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To Save State Residents: States' Use of Community Property for Federal Tax Reduction, 1939–1947

STEPHANIE HUNTER McMAHON

In 1939, at the end of almost two decades of statewide want and despair, Oklahoma adopted the community property system “to save state residents on their federal income tax.”¹ Between 1939 and 1947, Oklahoma and four other states openly and unabashedly exploited the Supreme Court’s creation of what amounted to a tax loophole for the nation’s wealthy; several more states seriously considered doing the same.² In 1930, the Court had ruled that the community marital property regime of eight western states permitted their married couples to split family income between spouses, so that each spouse reported half of that income for federal income tax purposes.³ As a result of the federal government’s progressive income tax bracket structure, in most cases this split meant that more of the family’s income would be taxed in lower tax brackets.⁴ Thus, a property regime

1. “Phillips in Favor of Tax Law Change,” *Daily Oklahoman*, April 6, 1939.

2. Oregon, Nebraska, Pennsylvania, Michigan, plus the territory of Hawaii. See note 125 below.

3. *Poe v. Seaborn*, 282 U.S. 101 (1930); *Goodwell v. Koch*, 282 U.S. 118 (1930); *Hopkins v. Bacon*, 282 U.S. 122 (1930); *Bender v. Pfaff*, 282 U.S. 127 (1930); Mim. 3853, X-1 *Cumulative Bulletin* (1931). Technically California was allowed to split income in 1931. *U.S. v. Robbins*, 269 U.S. 315 (1926); *U.S. v. Malcolm*, 282 U.S. 792 (1931).

4. Couples in which each spouse earned roughly equal incomes were neither benefited

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that was purely a creation of state law had the effect of reducing residents' federal tax obligations.

Over time, state politicians in the other forty states realized they could gain a significant tax advantage for their married constituents by changing their states' property laws. Reducing taxes became particularly advantageous after federal tax rates reached new heights during World War II. Rates rose, with top marginal rates exceeding 90 percent, and exemptions fell, to a wartime low of \$500 for singles and \$1,000 for couples, causing the income tax both to hit the middle class for the first time and to impose staggering new rates on the wealthy.⁵ In 1937, 3.4 million people, or only 2.6 percent of the nation's population, paid a little more than \$1 billion in federal individual income taxes, but by 1945, almost fifty million people, or approximately 35 percent of the total national population, owed over \$17 billion in taxes on their incomes.⁶ By 1948, income-splitting generated tax savings ranging from \$19 (3.3 percent) for couples with net incomes of \$4,000, up to \$2,622 (40.59 percent) for those with net incomes of \$25,000.⁷ With the cost of these tax savings largely hidden, state legislators could use state law to provide an immediate federal tax advantage to wealthy constituents.⁸

This paper examines state legislators' frank use of the federal system to the advantage of their own constituencies over those of other states.⁹ They changed their marital property regimes to secure these tax savings because they understood that state law could be manipulated to control the application of the federal income tax to families. In 1930, the Supreme Court had ruled in *Lucas v. Earl* that contractual divisions of earnings, although valid under state law, would not effectively divide income for federal income tax purposes, but in *Poe v. Seaborn*, decided eight months after *Earl*, the Court held that the community property division of wages and other income did, in fact, split income between spouses for tax purposes.¹⁰ That divi-

nor harmed, except in rare circumstances. For example, see discussion in *Willcox v. The Penn Mutual Life Ins. Co.*, 357 Pa. 581 (Pa. S.Ct., 1947), referenced below.

5. IRS, Statistics of Income Bulletin, Personal Exemptions and Individuals Income Tax Rates, Spring 2002, Publication 1136 (Revised 6-02).

6. U.S. Treasury Department, Bureau of Internal Revenue, *Statistics of Income 1939* (GPO, 1940), 6; U.S. Treasury Department, Bureau of Internal Revenue, *Statistics of Income 1945* (GPO, 1951), 5.

7. For \$1 million incomes, couples saved \$23,921, but this was only 2.93 percent. Senate, Finance Committee, *Revenue Act of 1948*, 80th Cong., 2d sess., 1948, S. Rep. 1013, 23.

8. Costs could come in the form of increased federal tax rates to make up the lost revenue (but that would be spread across the entire country) and local confusion in administration.

9. A later paper will look at the federal government's response in 1948.

10. *Lucas v. Earl*, 281 U.S. 111 (1930); note 3. For further discussion of the cases, see below at pages 591-92.

sion of income meant that community property couples could double-dip in lower tax brackets. Common law states then began switching regimes in the late 1930s and 1940s, not out of a sense that community property was substantively better, but in spite of any substantive change it wrought. Much like trusts or family partnerships, which could sometimes be used to shift income for tax purposes without necessarily reducing the power of the husband over family property, the community property regime was seen in many states as simply another means to reduce taxes.¹¹

Despite the tax savings, however, the advisability of adopting a community property regime was heavily debated. Not only did it potentially change rights vis-à-vis spouses, but the conversion was seen as likely to produce a “harvest for the accountants and lawyers.”¹² The new marital property regime was expected to upset property titles and raise serious concerns regarding established creditors’ rights. Bar associations of the states that adopted new community property laws were concerned with pragmatic issues in their legal practice: the difficulties of preserving real estate and other property titles, probating wills, and dividing property upon the dissolution of marriages.¹³ It was well understood that this tax savings came at a significant price, even if policymakers were unable to quantify what that price might be.

Thus, although a generation of feminist commentary has concluded that the fear of a “transfer of power from men to women” prevented the further expansion of community property systems in this period and that some states did not convert because of the “hostility toward a wife’s present interest in community earnings and property . . . ,” this does not tell the whole story.¹⁴

11. Unlike with community property, there was no a priori guarantee that the government would recognize any particular common law device and none could transfer salary.

12. William Coit Allee, “Community Property as Viewed by the Tax Practitioner,” *Michigan State Bar Journal* 26 (1947): 22. See also, Malcolm W. McKenzie, “Community Property as it Affects Titles,” *Oklahoma Bar Association Journal* 15 (1945): 973–80.

13. For example, between 1922 and 1932 there were over 100 community property cases in Washington. Frank L. Mechem, “Progress of Law in Washington Community property,” *Washington Law Review* 7 (1933): 367. See also, Resolution No. 1, *Nebraska Law Review* 27 (1947): 369; Frank L. Mechem, “Creditors’ Rights in Community Property,” *Washington Law Review* 11 (1936): 80–90; William H. Dodd, “Community Property in Pennsylvania,” *Dickinson Law Review* 52 (1947): 34–38; Lewis R. Ricketts, “The Nebraska Community Property Law,” *Nebraska Law Review* 27 (1947): 215; Perry W. Morton, “The Nebraska Community Property Law,” *Nebraska Law Review* 27 (1947): 229; Tom W. Garrett, “Conveyance Under the Community Property Law,” *Oklahoma Bar Association Journal* 18 (1947): 1292–97; A. W. Trice, “Community Property Law,” *Oklahoma Bar Association Journal* 16 (1945): 763–72.

14. Carolyn C. Jones, “Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s,” *Law and History Review* 6 (1988): 270, 274; Jennifer E. Sturiale, “The Passage of Community Property Laws, 1939–1947: Was ‘More than Money’ Involved?” *Michigan*

It can be taken as a given that a particular “gendered imagery became the measure of fairness,” but although traditional gender roles defined Middle America and limited legislators’ choices, they do not explain why some states changed their property regimes while others did not.¹⁵ In this debate, as states enacted these new laws, public discourse over marital property regimes never became a battleground for women’s rights.

Instead, by examining the issues as they developed in Oklahoma, we can see in detail what did motivate state actions. Oklahoma was not only the first common law state to make the conversion but, after the Supreme Court denied tax savings to its first community property statute, the state reenacted a revised law. It seems odd on its face that a relatively traditional state would adopt what is now popularly depicted as a pro-wife regime, particularly during a conservative period in 1939 and again at the end of World War II when the state hoped to lure returning GIs to establish a residence. This study of how and why a state changed regimes provides a look at what drove state decision making within the American federal system. While numerous scholars have investigated the delegation of power to government agencies, relatively little has been done on the delegation of the operation of federal law to the states.¹⁶ Looking at it from a historical perspective, this review forces us to question Justice Louis Brandeis’s praise for the states as laboratories when it is policymaking and the enforcement of federal laws that is being delegated. In the loss of control over federal receipts and the creation of a range of unintended consequences, this article shows that federal reliance upon state law comes at a price.

This article thus provides a complex description of federalism in action. While much of the literature on federalism, in particular fiscal federalism, tends to focus on competition between states and depicts their unilinear interaction with the federal government, this story of intergovernmental

Journal of Gender and Law 11 (2005): 213–52; Pamela B. Gann, “Abandoning Marital Status as a Factor in Allocating Income Tax Burdens,” *Texas Law Review* 59 (1980): 1–69; Grace Blumberg, “Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers,” *Buffalo Law Review* 21 (1972): 49–98.

15. Alice Kessler-Harris, *In Pursuit of Equity: Women, Men, and the Quest for Economic Citizenship in 20th Century America* (New York: Oxford University Press, 2001), 179. This discounts the simple truth that this model reflected reality for the majority of American families at the time and arguably reinforced the status quo by rewarding with the greatest tax savings the family with one wage earner. While McCaffery focuses on tax motivations, he also does not explain why some states changed and others did not. Edward J. McCaffery, *Taking Women* (Chicago: University of Chicago Press, 1997), 45–57. This begins to tell that story.

16. One recent exception is Robert Post, “Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era,” *William and Mary Law Review* 48 (2006): 1–183.

relations between the states and the federal government demonstrates a reciprocal power within the system as states worked within the federal system for tax reduction.¹⁷ Although it was not guaranteed that states' adoption of community property statutes would yield the same tax benefit as in *Poe v. Seaborn*, wealthy residents' ability to vote with their feet forced states to try as competition for taxpaying residents produced a race between states to lower federal income taxes.¹⁸ In this case study, some states felt particularly strong pressure to take advantage of the community property loophole. Issues of state importance were thus able to influence federal revenue collections. In doing so, federal tax law drove states to consider, and a number to adopt, a marital property regime that would otherwise have held little interest for them. This example of federal policies creating new state-level politics demonstrates the politics of federalism in the shaping of federal taxation. Not only did "state and local officials attempt to 'export' the cost of funding state and local public goods to nonresidents," but even more, they tried to minimize their share of federal expenditures.¹⁹

Those residing in states that changed marital property regimes were able to proclaim their intent to avoid federal income taxes through these enactments proudly. They did so at the end of the Great Depression and in the aftermath of World War II when to do so with respect to other federal laws, such as antitrust or securities regulation, would have been, if not legally, at least socially culpable offenses. In the case of the adoption of community property

17. See, for example, Sean Nicholson-Crotty, Nick A. Theobald, and B. Dan Wood, "Fiscal Federalism and Budgetary Tradeoffs in the American States," *Political Research Quarterly* 59 (2006): 313–21; Kirk J. Stark, "Fiscal Federalism and Tax Progressivity: Should the Federal Income Tax Encourage State and Local Redistribution?" *U.C.L.A. Law Review* 51 (2004): 1389–1435. But see Edward A. Purcell, Jr., "Evolving Understanding of American Federalism: Some Shifting Parameters," *New York Law School Law Review* 50 (2005): 635–98; Akhil Reed Amar, "Of Sovereignty and Federalism," *Yale Law Journal* 96 (1987): 1425–1520.

18. See note 96. The absolute amount of a taxpayer's state and federal tax obligations would not necessarily decline significantly. By reducing residents' federal income tax burdens, taxpayers would have smaller deductions for federal taxes paid when filing state income tax returns, making more income subject to taxation by the state. On the other hand, taxpayers gain vis-à-vis states that adopted federal rules governing taxation, including income-splitting.

19. Stark, "Fiscal Federalism," 1389. For more on the role of antitax public feeling as a fiscal constraint on the ability to build the federal state, see Julian E. Zelizer, "The Uneasy Relationship: Democracy, Taxation, and State Building Since the New Deal," in *The Democratic Experiment*, ed. Meg Jacobs and others, 276–300 (Princeton: Princeton University Press, 2003); Marjorie E. Kornhauser, "Legitimacy and the Right of Revolution: The Role of Tax Protests and Anti-Tax Rhetoric in America," *Buffalo Law Review* 50 (2002): 819–930; Charles Adams, *Those Dirty Rotten Taxes: The Tax Revolts that Built America* (New York: Freedom Press, 1998).

statutes, even though only the wealthy would actually benefit from a state adopting community property, this relatively small interest group captured policy formation by casting the issue as tax discrimination against residents of common law states. The perception of tax inequity was enough to drive changes even to other areas of substantive law. When the federal government finally conceded victory to the states by nationalizing income-splitting in 1948, states had proved their power to influence national tax policy. In this way, the American federal system unintentionally empowered and incentivized state policymakers to game the national income tax to benefit their state's residents.

How the Midwest Was Won Over

Citizens in the majority of the states had always lived under the common law principle of coverture. Coverture originally gave husbands rights in their wives' property and earnings and greatly limited wives' legal ability to acquire and manage property. During the nineteenth century, however, states began to enact married women's acts that curbed husbands' power.²⁰ Women were increasingly allowed to hold property separately, with each state legislature creating special rules governing the types of property allowed to be owned separately and how it was to be managed. Even with these new rights, wives' claims to *family* property were at most that they be "adequately" clothed, housed, and fed; and the courts' standards of what was adequate were often remarkably low.²¹ Thus, while by 1930 wives had achieved legal personalty by statute, the degree to which married women had gained economic independence from their husbands varied by their own circumstance and the state in which they lived.

On the other hand, married couples in eight western states had long lived under civil law community property regimes inherited from France and Spain, whereby property of the husband and wife belonged to each by halves.²² Although the systems in each of the states varied significantly,

20. Norma Basch, *In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York* (Ithaca: Cornell University Press, 1982); Peggy A. Rabkin, *Fathers to Daughters: The Legal Foundations of Female Emancipation* (Westport, CT: Greenwood Press, 1980); Reva B. Siegel, "The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860–1930," *Georgetown Law Journal* 82 (1994): 2127–57.

21. In *McGuire v. McGuire*, 175 Neb. 226 (1953), for example, Nebraska's supreme court refused to order a husband to supply indoor plumbing or clothing for his wife, although he was worth almost \$200,000. See, Hendrik Hartog, *Man and Wife in America: A History* (Cambridge: Harvard University Press, 2000), 2–6.

22. For a period discussion of the community property system, see William Q. DeFuniak, *Principles of Community Property* (Chicago: Callahan and Company, 1943), §§37–53;

couples governed by them argued that wives by law owned half of whatever the husband earned and vice-versa, without the need for any transfers, trusts, or other legal devices. In point of fact, community property systems differed from the common law more in form than in substance, not in the least because many of the community property states' lawyers had been trained in the East and brought a distinctly common law approach to drafting and later interpreting the community property provisions. Thus, while some argued that community property systems established a partnership between spouses, as a practical matter, equal partnerships were not created.²³ Even in states where wives were held to have vested interests in the community property, the regime did not require their joint control. Instead, as under the common law, statutes and judicial decisions generally held that control resided with the husband.²⁴ Legal practitioners and scholars of the period were divided about whether the spread of the community property regimes would even be good for women or the family.²⁵

In 1930 the Supreme Court faced attempts by couples residing in both common law and community property states to shift income between spouses for federal income tax purposes. As mentioned in the introduction, one taxpayer, Guy C. Earl, used a common law device, a contract, to shift one-

George McKay, *A Treatise on the Law of Community Property* (Indianapolis: Bobbs-Merrill, 1925); Alvin E. Evans, "Ownership of Community Property," *Harvard Law Review* 35 (1921): 47-67.

23. Even lawyers in traditional community property states disagreed over the value of the wife's interest. See, for example, Harriet S. Daggett, "The Modern Problem of the Nature of the Wife's Interest in Community Property—A Comparative Study," *California Law Review* 19 (1931): 567-601; J. Emmett Sebree, "Federal Taxation of Community Property," *Texas Law Review* 12 (1934): 273-302; DeFuniak, "Review in Brief," 63-74; Roswell Magill, "The Federal Income Tax on the Family," *Texas Law Review* 20 (1941): 150-64; George E. Ray, "Proposed Changes in Federal Taxation of Community Property: Income Tax," *California Law Review* 30 (1941): 404. The leading scholar of community property argued in 1925 that community property systems actually worked as a conservative influence by discouraging women from leaving the home and earning separate wages. McKay, *Treatise on the Law*, 65.

24. Only rather late did community property wives gain the right to control their separate property. Until 1972, no community property state allowed wives to manage community property equally with husbands. Anne K. Binaman, "The Impact of the Equal Rights Amendment on Married Women's Financial Individual Rights," *Pepperdine Law Review* 3 (1975): 26, 28.

25. For example, see Harriet Spiller Daggett, "Trends in Louisiana Law of the Family," *Tulane Law Review* 9 (1934): 89; Ben L. Moore, "The Community Property System and the Economic Reconstruction of the Family Unit: Insolvent and Bankrupt," *Washington Law Review* 11 (April 1936): 61-79; McKay, *Treatise on the Law*, 65; George T. Atman, "Community Property and Joint Returns," *Taxes* 19 (1941): 588-90, 612; Dodd, "Community Property in Pennsylvania," 24-5; Robert C. Brown, "Tax Problems Under the Pennsylvania Community Property Law," *University of Pittsburgh Law Review* 9 (1947): 8.

half of his wages to his wife.²⁶ Challenged by the Treasury Department in *Lucas v. Earl*,²⁷ the Earls argued that under state law each spouse “owned” half of Guy’s earnings.²⁸ A unanimous Court, however, strengthened the federal government’s position vis-à-vis taxpayers, ultimately enlarging the power of Congress relative to the states. Not questioning the validity of the contract under state law, the Court read into the Revenue Act a limitation on taxpayers’ ability to use state law devices to minimize their federal taxes.²⁹ Months later, four cases involving state community property laws were consolidated before the Court. These couples based their right to file separate returns, each reporting half of their community income, on their state’s property law and not on private agreements pursuant to state law, as had the Earls. The Court in the lead case, *Poe v. Seaborn*, accepted state-defined ownership of community income as controlling the application of the federal income tax.³⁰ Federalism was applied more stringently as the Court felt bound by this state determination of property ownership.

In the face of this disparate tax treatment, Oklahoma became the first common law state to adopt a community property regime. It had a pressing need to secure federal tax savings for its wealthy residents even though most of the state’s residents did not earn any income subject to federal income taxation. By 1930, when *Poe v. Seaborn* was decided, the people and government of Oklahoma were in considerable fiscal difficulty with the state’s per capita income only 59 percent of the national figure, and, as immortalized in John Steinbeck’s novel *The Grapes of Wrath*, the 1930s brought only further misery to the state.³¹ While the state’s government faced bankruptcy, one angry response to the Great Depression for many Oklahomans was to attempt to reduce or avoid their tax burdens.³² Most

26. Guy and Ella Earl entered an oral agreement in 1901, twelve years before the federal income tax took effect, likely as an estate-planning device. Patricia A. Cain, “The Story of Earl,” in *Tax Stories: An In-Depth Look at Ten Leading Federal Income Tax Cases*, ed. Paul L. Caron (New York: Foundation Press, 2003), 285. See also, Petition before Board of Tax Appeals, 3, *Lucas v. Earl*, 281 U.S. 111 (1930).

27. For a good discussion of *Lucas v. Earl*, see Cain, “Story of Earl,” 275–311; McCaffery, *Taxing Women*, 37–45; “Appeals Income Tax Case,” *N.Y. Times*, February 12, 1930; “Pooling Income Decision Given,” *L.A. Times*, March 18, 1930; “Tax Brief Filed by Government,” *Wall Street Journal*, June 17, 1929; “Review Granted in Tax Case,” *N.Y. Times*, October 15, 1929.

28. Brief for Respondent, 11, *Lucas v. Earl*, 281 U.S. 111 (1930).

29. 281 U.S. 111, at 114–15.

30. See note 3 above.

31. Interestingly, the *Grapes of Wrath* was published the same year Oklahoma adopted the community property regime. “‘No Ad Valorem Tax’—Then What,” *Tulsa Daily World*, April 21, 1930; “Real Study of Taxation Essential,” *Tulsa Daily World*, April 11, 1930; “State ‘In Red’ Half Million,” *Daily Oklahoman*, October 19, 1930.

32. “Taxation,” *Oklahoma State Bar Journal* 4 (1933): 43–44.

Oklahomans, however, did not need to evade federal income taxes—they earned too little money.³³ One Oklahoma woman recalled, “You know what our big wish was? That someday we would be making so much money we’d have to pay income tax. In those days that meant you’d really arrived.”³⁴

As Oklahoma’s economy worsened and incomes fell, politicians cast about for ways to increase the state’s tax revenues. The task was made more difficult because wealthy taxpayers were leaving the state, taking their tax revenue with them.³⁵ Every married man who made \$100,000 a year in Oklahoma could save \$13,000 a year if he moved to Texas.³⁶ In 1937, the governor began a study to see how many taxpayers were leaving Oklahoma, suggesting that he personally knew fifteen or twenty of the wealthiest who had left but expected the number to be around one hundred.³⁷ A report finished in 1940 concluded that the state did, in fact, lose many wealthy taxpayers, reinforcing the popular notion that there was something drawing wealthy residents out of the state.³⁸ The report suggested that the adoption of the community property system would eliminate one significant cause of the exodus. Regardless of whether the savings actually led many to relocate, rumors flew that millionaires made rich by oil money flowing from the Oklahoma fields were fleeing to Texas, a low-tax state for state taxes as well, and Oklahoma’s persistent fear of losing taxable citizens haunted the legislature.³⁹

Despite its dire economic situation, Oklahoma waited to adopt a community property statute. Although the state lies west of the Mississippi River,

33. During the 1930s, over one-third of the state’s families had incomes between \$500 and \$1,500 a year, and in 1935 the median family income was only \$1,160. However, only those families earning at least \$2,500 a year were subject to federal income taxation. Winifred D. Wandersee Bolin, “The Economics of Middle-Income Family Life: Working Women During the Great Depression,” *Journal of American History* 65 (June 1978): 62.

34. Quoted in Susan Ware, *Holding Their Own: American Women in the 1930s* (New York: Twayne Publishers, 1982), 3.

35. Sheila Manes, “Pioneers and Survivors: Oklahoma’s Landless Farmers,” in *Oklahoma: New Views of the Forty-Sixth State*, ed. Anne Hodges Morgan and H. Wayne Morgan (Norman: University of Oklahoma Press, 1982), 129.

36. House Ways and Means Committee, *Hearings on Revenue Revisions, 1947–48*, 80th Cong., 1st Sess., 1947, 893 (hereafter *Hearings on Revenue Revisions*).

37. “Tax Refugee Study is Set,” *Daily Oklahoman*, December 43, 1937.

38. “Analysis Shows State Loses Its Big Taxpayers,” *Daily Oklahoman*, February 4, 1940.

39. “Tax Burden Eased by Senate Action,” *Tulsa World*, April 28, 1939; Harriett Spiller Daggett, “The Oklahoma Community Property Act,” *Louisiana Law Review* 2 (1940): 575–96; Harry A. Campbell and L. Karlton Mosteller, “Development Relating to the Oklahoma Community Property Act,” *Oklahoma Bar Association Journal* 13 (1942): 49–51; I.M. Labovitz, “The Community Property System, Its Relation to Income, Estate, and Inheritance Taxation,” Part I, *Taxes* 9 (1931): 290.

Oklahoma did not have a history of western law, and the community property regime was foreign to Oklahoma's common law system.⁴⁰ However, by 1939, with the New Deal dead and the public facing a conservative backlash, Oklahoma's treasury was in desperate need of money, and its people were in desperate need of some sense that conditions were improving.⁴¹ Earlier in the year, there had been rumors that President Franklin D. Roosevelt would cut little, if any, federal government expenditures and might increase federal taxes, further draining available tax dollars from the state.⁴² This was unwelcome news to Oklahoma policymakers as newly inaugurated Governor Leon C. ("Red") Phillips pushed to balance the budget.⁴³ Convinced that new taxes would be necessary if the state's books were ever to be balanced, the governor demanded that the state legislature enact a series of tax increases. Reducing federal tax obligations would go a long way in making these state tax increases palatable to the state's taxpayers.

Changing the marital regime thus was not a long-term goal of the Phillips administration but became a rather impromptu means to ease the state's economic plight.⁴⁴ Around 1939, the Oklahoma Tax Commission compared various states' tax systems because of the "veritable rash of advertisements and articles by or concerning certain states in which the supposed tax advantages of the state as compared to other states have been widely heralded."⁴⁵ Texas, in fact, was bragging of taking Oklahoma's wealthier

40. Oklahoma was closely associated geographically, commercially, and culturally with Texas, Louisiana, and New Mexico, each of which had the community property system, as did some of the state's local Native American tribes. Douglas Hale, "The People of Oklahoma: Economics and Social Change," in *Oklahoma: New Views*, 41.

41. "State Income is Six Million Short of 1938," *Daily Oklahoman*, May 3, 1939; "Lack of Cash Darkens City," *Daily Oklahoman*, May 14, 1939; "Reduction is Preferred to 'No Pay' Era," *Daily Oklahoman*, April 28, 1930; "Audit Shows Fund For Pay Almost Gone," *Daily Oklahoman*, April 4, 1930.

42. "High Income Theory Basis for Spending," *Daily Oklahoman*, January 4, 1939; "U.S. Debt Due to Near Legal Limit in 1940," *Daily Oklahoman*, January 6, 1939; "Pencils Fly on New Guess of Revenues," *Daily Oklahoman*, January 28, 1939.

43. "Pencils Fly on New Guess of Revenues," *Daily Oklahoman*, January 28, 1939; George G. Humphries, *A Century to Remember: A Historical Perspective on the Oklahoma House of Representatives* (Oklahoma City: The House, 2000), 45.

44. A taxpayers' group to study the state's economic program was established in 1939. Of its six proposed reforms, none involved the marital regime. "Six Reforms Fixed as Goal of Tax Group," *Daily Oklahoman*, February 10, 1939. See also, Elmer Thomas to Fred Carr, 22 July 1937, Folder 13, Box 33, Legislative, Elmer Thomas Collection, Carl Albert Center, University of Oklahoma, OK (hereafter Thomas Collection); Elmer Thomas to C. T. Egerton, 24 July 1937, Folder 13, Box 33, Legislative, Thomas Collection; Campbell and Mosteller, "Oklahoma Community Property Act," 49.

45. "Know Your Government Series No. 3, Comparisons of State Tax Systems," Folder 20, Box 26, Gubernatorial Series, Robert S. Kerr Collection, Carl Albert Center Congressional Archives, University of Oklahoma, OK (hereafter Kerr Collection).

citizens.⁴⁶ As a result, members of the Oklahoma bar, primarily those representing members of the oil and banking industries, began researching and drafting a community property statute.⁴⁷

Oklahoma's proclaimed purpose behind its community property bill was "to save state residents on their federal income tax and prevent removals to Texas to escape income taxes."⁴⁸ As the business community led a propaganda campaign against Roosevelt's "soak the rich" tax policy following the mini-recession of 1937 and 1938, by casting the community property statute as a "tax law bill," leaders like Governor Phillips could focus on the millions in federal income taxes it would save state residents.⁴⁹ However, as the nation fought over maintaining its neutrality in Europe, state legislators proceeded with caution over this bill which would divert money from the federal coffer. The community property statute passed subject to a potential public challenge by referendum; the public did not take up that challenge.⁵⁰

Somewhat surprisingly, the Oklahoma statute, which could have been interpreted as invoking a major change in domestic relations, at first was uncontroversial. The state was relatively conservative in the 1930s with respect to women's rights; and, if the community property regime had been thought to effect a real change in domestic relations, it would not have been adopted.⁵¹ One reason Oklahomans were comfortable with their new law was that, unlike the original community property systems, the Oklahoma regime was elective.⁵² While everyone in the state could be

46. "Tax Burden Eased for Oklahomans," *Tulsa World*, April 28, 1939.

47. Roger S. Randolph, "The Oklahoma Community Property Act of 1939," *Oklahoma State Bar Journal* 10 (1940): 540–1. Throughout the period under review Oklahoma did not record the proceedings before the Oklahoma Tax Commission or the legislature.

48. See note 1 above. See also, Harriet Spiller Daggett, "The Oklahoma Community Property Act: A Comparative Study," *Louisiana Law Review* 2 (1939): 576; A.W. Trice, "Community Property in Oklahoma," *Southwestern Law Journal* 4 (1950): 38–45.

49. Randolph, "Oklahoma Community Property," 542.

50. The bill originally contained an emergency provision, meaning that the bill would automatically be effective once signed, but the provision was struck in conference. Under the state's constitution at the time, without an emergency clause bills did not become effective for ninety days after the legislature adjourned, and in the interim a referendum petition could be lodged to suspend the effectiveness of the law until voted upon by the people.

51. See, for example, "Womanhood is Indorsed, But After Battle," *Daily Oklahoman*, January 25, 1939; Edith Johnson, "Hard Times and Birth Control," *Daily Oklahoman*, October 3, 1930; Roger Babson, "Women Flood the Job Market," *Daily Oklahoman*, January 7, 1939. But see "Robert Kerr Recognizes Women's Economic Status," *Oklahoma Club Woman* 11 (1936): 5; "Women and the New Order," dated 1942, Folder 17, Box 1, Speeches, Kerr Collection.

52. Some original community property states allowed couples to elect out of community treatment as discussed below.

collaterally affected, as land titles became clouded or if creditors became wary of lending, the full effect of the system would only be felt by those who thought they would benefit, and only about eleven percent of Oklahoma taxpayers were expected to receive any tax saving by electing the community property regime.⁵³ Thus, while any Oklahoma couple could file a written election to be governed by the community property system, for husbands who feared that the community property regime would diminish their domestic power or reduce the value of their estates, the common law system would continue to apply.⁵⁴ Even for those electing, the system was presented as neither changing the law of descent or distribution nor altering creditors' rights.⁵⁵ Hence, this bill was able to fly through the legislature in a little over a month, and become effective July 29, 1939, because rights were changed only as much as necessary to secure the tax savings.⁵⁶ With so many urgent political and economic concerns gripping the state and nation, these seemingly minor changes to the marital property regime did not seem particularly important.

Even those seemingly most affected, leading women's groups in Oklahoma, made little of the proposed community property regime. The Oklahoma League of Women Voters, composed largely of well-educated, middle-class, and progressive women, studied state and federal taxation but left no record of connecting taxation and the property law or the community property regime.⁵⁷ This indifference was shared by women of the major

53. *Hearings on Revenue Revisions*, 893.

54. Once made, the election was dissolved only by the death of a spouse or by divorce.

55. Because wives were entitled to one-half of community estates upon the death of their husbands, while the law would not change the division of an intestate's property among heirs, it would reduce the amount of property subject to division. Until a husband's death, a wife without separate property had nothing but a barren, inchoate half-interest in the community which was in the absolute control of the husband to give, gamble, or gobble at his discretion and might be taken at divorce. "Tax Burden Eased for Oklahomans," *Tulsa World*, April 28, 1939; HB 565, 1939, 2-1-3, Oklahoma State Archives, Oklahoma Department of Libraries, Oklahoma City, OK (hereafter OK State Archives).

56. Okla. Sess. Laws. 1939, c. 62, Art. 2 §§ 1-15, Okla. Stat. Ann. (Supp. 1939) tit. 32, §§ 51-65. For a detailed description of the various provisions of the law, see Daggett, "Oklahoma Community Property Act," 575-96; E. Winterer, "Mysteries and Delusions of Community Property," *State Bar Journal of California* 12 (1937): 87-88; George T. Altman, "Community Property: Avoiding Avoidance by Adoption in the Revenue Act," *Taxes* 16 (March 1938): 140; George T. Altman, "The Oklahoma Community Property Law," *Taxes* 22 (June 1944): 261.

57. "Oklahoma League of Women Voters—Program of Work," Folder 4, 2006.16, Box 12[H], 1930s, John Dunning Political Collection, Oklahoma Historical Society, Oklahoma City, OK (hereafter OK Historical Society); Louise M. Young, *In the Public Interest: The League of Women Voters, 1920-1970* (Westport, CT: Greenwood Press, 1989), 113-17. There was no mention of this from the Oklahoma League of Women Voters or the national Women's Bureau report on the state. See, Mrs. William C. Carson to Miss Marguerite M. Wells, 5

political parties. The *Voice of the Democratic Women of Oklahoma* made no mention of the change in the marital property regime before or after its enactment in 1939. Edith Johnson, an outspoken Republican columnist, did not once reference the change in her weekly newspaper column. The Women Lawyer's Club of Oklahoma, uniquely situated to comment on this statute, was instead preoccupied with other women's political and social issues, such as seeking the right to serve on juries and to be eligible for top public office.⁵⁸ This blanket of silence from women's groups throughout the political and social spectrum both publicly and in their private records helped limit debate on the issue. While women's groups never focused on it, many did share the rest of Oklahoma's disgust with high taxes. Roberta Lawson, president of the Oklahoma Federation of Women's Clubs, argued that taxes increased the cost of living.⁵⁹ To the extent women accepted it as a "tax bill," as the community property statute was hailed, likely they would have eagerly endorsed it.

Business and legislative groups similarly gave the bill scant attention. *Harlow's Weekly*, Oklahoma's leading source of legislative news at the time, did not mention the community property law throughout the 1939 legislative session. Its editor even noted at the end of the session, "The scope of subjects touched is wide and marked by its freedom from freak legislation; taken as a whole the results will be found to be representative of a conservatively constructive attitude towards the problems confronting the State."⁶⁰ While the legislative press ignored the bill both before and after its passage, the Oklahoma City Chamber of Commerce looked favorably on the bill once it was passed. It recognized the law as offering residents of the state "certain advantages which have been highly valued by those of a limited number of other commonwealths."⁶¹ As the Chamber of

September 1940; Grace Arnold to Mrs. William J. Carson, 23 September 1940, Joint Income Tax, Box 449, Discrimination Against Women, Part II, Biennial Files, 1920–1946, League of Women Voters, Library of Congress (hereinafter LWV Papers); Box 388, Oklahoma, 1939–1940, Part II, Biennial Files, 1920–1946, LWV Papers; Box 475, Oklahoma, 1944–1945 and Box 199, Oklahoma, Part III, Records, 1918–1964, LWV Papers.

58. Orben J. Casey, *And Justice for All: The Legal Profession in Oklahoma, 1821–1989* (Oklahoma City: Oklahoma Heritage Society, 1989); Patsy Trotter, *Leading the Way: A Look at Oklahoma's Pioneering Women Lawyers* (Oklahoma City: Oklahoma Bar Association, 2003); Lou Etta Bellamy, "History of Women Lawyers' Club of Oklahoma," *Oklahoma State Bar Journal* 9 (1939): 182. From the surviving copies of the *Citator*, the group's monthly magazine, there is no indication that the group either supported or opposed the bill.

59. "Mrs. Roberta Lawson Discusses Taxation," *Oklahoma Club Woman* 12 (1937): 9.

60. Victor E. Harlow, "The End of Session," *Harlow's Weekly* 51 (May 13, 1939): 2; Victor E. Harlow, "Killing the Goose," *Harlow's Weekly* 51 (April 1, 1939): 3.

61. "New Community Property law Offers Chance to Cut Taxes," *Oklahoma: A Magazine of Business* 23 (August 3, 1939): 1.

Commerce saw it, the law aimed at “removing what has been considered a major difficulty in the path of attracting and holding monied interests in state industry, and high income individuals in state residence.”⁶²

Because the regime did not significantly alter rights between husbands and wives, it was rare for an Oklahoma author to claim that the new community system gave wives significantly more protection than they had received at common law. Instead, “it must be remembered that when Oklahoma adopted the community property system, it did so out of consideration for the husband and not out of regard for the position of the wife.”⁶³ Others noted that Oklahoma presented little evidence that the state was making a sincere attempt to create a genuine community property system.⁶⁴ Two lawyers, however, tried after the fact to create a more favorable statutory history to reinforce the state’s position in the legal challenge expected to be launched by the Bureau of Internal Revenue. The attorneys who had compiled and annotated Oklahoma’s laws drafted a guide to the community property statute in 1940. They wrote that “the Oklahoma law comes nearest to giving the wife an equal control over the community, yet it gives the husband a measure of control denied to the wife.”⁶⁵ Concluding that the changes wrought by the community property law were to the advantage of the wife, they nonetheless admitted that the law did not improve her existing rights until her husband’s death.⁶⁶ It was with this slim justification that the law, the “tax law,” went before the courts. It was the courts that would determine whether Oklahoma’s legislature really did have the power to determine the incidence of federal income taxation.

Not So Fast, Oklahoma

Federal and state governments sought drastic increases in tax revenue as the prospect of World War II loomed, so it should come as no surprise that the treasuries of both resisted Oklahoma’s new income-splitting at-

62. “Tax Cutting Property Law Now Operates in Oklahoma,” *Oklahoma: A Magazine of Business* 23 (August 17, 1939): 23.

63. Dwight A. Olds, “Bona Fide Purchaser Doctrine Should Be Applied to Community Property Dissolutions,” *Oklahoma Bar Association Journal* 16 (1945): 1845. See also, Randolph, “Oklahoma Community Property,” 850–53.

64. “Taxation—Income Tax,” *Columbia Law Review* 44 (1944): 572. See also Paul N. Buford, “Community or Jointly Acquired Property,” *Oklahoma State Bar Association Bar Journal* 10 (1940): 957–59; Alfred Harsch, “Control of Property Under the Oregon Community-Property Act,” *Oregon Law Review* 27 (1948): 247–73; Brown, “Tax Problems,” 8.

65. Frank Eagin and Charles Everett Eagin, *Community Property Law in Oklahoma* (Tulsa: Mid-West Printing Co., 1940), 3.

66. Eagin and Eagin, *Community Property Law*, 206.

tempt. In 1940, with the state and federal bureaus of revenue challenging Oklahoma's 1939 community property statute, an informed source told one newspaper that no more than three hundred Oklahoma taxpayers would benefit by splitting their family income between spouses. But those three hundred were the state's wealthiest.⁶⁷ In fact, 1,016 married couples, representing 15 percent of the income-tax-paying citizens of the state, soon elected community property treatment. These couples were among those who carried the heaviest load of income taxation. In 1940, 17 percent of Oklahoma's taxpayers paid 91 percent of all income taxes imposed on the state.⁶⁸ In defense of these heavy hitters (and heavy payers), the state began its legal battle, even against its own treasury, to secure federal recognition of its income-splitting regime for electing couples.⁶⁹

One couple taking advantage of the statute, C.C. and Pearl Harmon, had filed their written election on October 26, 1939, and submitted separate income tax returns, each reporting one-half of their November and December income, some \$27,000, as community property at a time when the median annual income for American families was only \$1,319.⁷⁰ While the Harmons' tax returns showed a combined tax due of \$22,986.10, which was paid, the amount they saved by dividing their income between themselves was \$9,300, not an insignificant sum in 1940, and it would have increased their tax burden by about 30 percent.

While Oklahoma women were fighting to gain the right to run for elected office and to sit on juries in the state, the debate over the community property statute wound its way unheralded through the Oklahoma courts. On May 9, 1940, the Oklahoma Tax Commission determined that C.C. Harmon was not entitled to divide his income with his wife for state income tax purposes, and on June 6 of that year, Harmon filed a protest. In *Harmon v. Oklahoma Tax Commission*,⁷¹ the Oklahoma Tax Commission, likely under pressure from the governor, backed down and did not challenge the constitutionality of the Oklahoma community property regime. Instead, it accepted that the 1939 Act vested property interests in both husband and wife. Therefore, compensation for personal services, dividends from separately owned corporate stocks, and interest on separately owned notes and bonds constituted community, rather than separate, property. All of this income could be split for state tax purposes. On the other hand, the

67. "U.S. Rules Out State Tax Law," *Daily Oklahoman*, April 2, 1941.

68. Campbell and Mosteller, "Oklahoma Community Property Act," 49-50.

69. See also note 18.

70. This was the median for families with both spouses present. U.S. Department of Commerce, Bureau of Census, *Historical Statistics of the United States, Colonial Times to 1970*, Series G353-371 (GPO, 1975), 353.

71. 189 Okla. 475 (October 14, 1941).

Commission concluded that income from separately owned oil royalties and leases and the profit from the sale of separately owned capital assets constituted separate property, and that such income could not be split.⁷² Thus, the Tax Commission went directly to practical application issues, such as whether leases qualified as separate or community property. The state was attempting to work out the very legal issues that commentators had forewarned.

As expected, the taxpayer took great effort to secure the broadest reading of the statute's income-splitting possibilities. To do so, the defense took liberal license with the statute's legislative history. Harmon's attorneys asserted, without documentation or any other proof, that the 1939 Act "changes drastically the property rights of those who elect to come under its provisions, and in doing so gives to the wife far more protection than she has received heretofore in Oklahoma."⁷³ Even with this new, and creative, interpretation of the statute's history and impact, its defenders could not help but reference their true concerns: "Many citizens who have considered seriously moving to Texas now have abandoned this plan, and have elected to come under the Oklahoma Act."⁷⁴ Attorneys on Harmon's behalf defended the tax-avoidance results created by the statute on the grounds that Oklahoma enacted its law "in self defense" against tax inequities created by the original community property states. Residents of other states were avoiding taxes, so it was appropriate for Oklahomans to do so as well. Harmon's attorneys pointed out that if the state court held the 1939 Act constitutional and that electing Oklahoma wives had vested interests in community property, it would help clarify the federal situation. At that time federal revenue agents were holding that the new law did not create or vest in the state's wives a property right, so that electing taxpayers could not split any family income for federal income tax purposes.

The state's supreme court in a unanimous opinion filed October 14, 1941, held, consistent with the claims of the Oklahoma Tax Commission, that certain types of income, but not all, constituted community property.⁷⁵ Holding the 1939 Act valid largely on the basis that the communities established under it were voluntary and contractual, the court both settled the rule regarding the sale of oil and gas leases, one of the pesky issues opponents to the law had bemoaned, and held the 1939 act constitutional.

72. Brief of Defendant in Error, filed Nov. 27, 1940, *Harmon v. OK Tax Commission*, No. 30016, OK State Archives (hereafter *Harmon*).

73. Brief of Plaintiff in Error, filed Oct. 23, 1940, 8, *Harmon*. This argument was included in Harmon's plea for a ruling on the Act's constitutionality. Request for ruling on supplemental brief, filed Jan. 22, 1941, *Harmon*.

74. Brief of Plaintiff in Error, filed Oct. 23, 1940, 30, *Harmon*.

75. *Harmon v. Oklahoma Tax Commission*, 189 Okla. 475 (1941).

Thereafter, electing couples could receive a reduction in state income taxes depending upon the nature of their property.

Oklahoma's community property statute then ran a gauntlet of federal courts as the Commissioner of Internal Revenue devoted significant resources to contesting the community property statute.⁷⁶ The Commissioner of Internal Revenue had initially ruled that Harmon was taxable on all the income received by him and was also liable for any income earned by his wife's separate property. The Tax Court⁷⁷ and the Tenth Circuit Court of Appeals⁷⁸ reversed this ruling, recognized the validity of the state's community property law, and decided that the spouses were right in each filing separate returns for one-half of the joint income. In his brief before the Supreme Court, the Commissioner limited the breadth of his challenge and argued that, notwithstanding the state's community property law, the taxpayer was subject to tax on all income from his salary and separate property.⁷⁹ The elective nature of the Oklahoma regime was particularly offensive to the federal treasury, and the Commissioner attacked it, arguing that it meant that the "character of the income is necessarily predicated on an exercise of power by the husband." Not only did the husband have to take action to initiate the regime, the Commissioner explained, but the "election works no alteration in the wife's interest."⁸⁰

On a day when news focused on Metz falling to the Nazis, Oklahoma quietly lost its tax battle as the Supreme Court ruled against its taxpayers.⁸¹ In a seven to two decision in *Commissioner of Internal Revenue v. Harmon*,⁸² the Court sided with the Commissioner, reinstating his ruling that the statute

76. Anita Wells, "Community Property," 24 July 1941, 12; Ellis E. Manning to Mr. Wenchel, "Re: Oklahoma Community Property Law of 1939," [n.d.]; Anita Wells to Roy Blough, "List of States Having Community Property Laws," 6 November 1939; "Data from 1936 Community Property Returns with Net Income of \$100,000 and Over," 1 August - 17 October 1939; "Suggestions for Study of Taxation of Community Property," 10 September 1939; Anita Wells to Roy Blough, "Community Property Law in Oklahoma," 29 August 1939, all in Box 54, Office of Tax Policy, RG 56, National Archives at College Park, MD. The Commissioner of Internal Revenue did not challenge the Act's constitutionality but did argue that this should not affect the taxability of the husband's income, arguing that it did not change the wife's interest. Brief for the Petitioner, *Commissioner v. Harmon*, *Supreme Court Briefs*, 4-5.

77. *Harmon v. Commissioner*, 1 T.C. 40 (1942). In a series of cases the Tax Court recognized the elective regime as effective for splitting income for federal income tax purposes. *Charles L. Yancey*, 1942 Tax Ct. Memo LEXIS 40 (1942); *L. W. Prunty*, 1942 Tax Ct. Memo LEXIS 41; *Armais Arutunoff v. Commissioner*, 1942 Tax Ct. Memo LEXIS 42; *Thomas A. Creekmore*, 1942 Tax Ct. Memo LEXIS 71.

78. *Commissioner v. Harmon*, 139 F.2d 211 (10th Cir., 1943).

79. This excluded income derived from Pearl Harmon's separate property.

80. Brief for the Petitioner, *Commissioner v. Harmon*, *Supreme Court Briefs*, 6, 8.

81. Bascom Timons, "State Loses Tax Battle," *Tulsa World*, November 21, 1944.

82. 323 U.S. 44 (1944) (Douglas dissenting).

was not effective for altering federal income taxation. Instead of viewing it as an incident of marriage as in *Seaborn*, the Court held that, because of its elective nature, the Oklahoma statute merely permitted contractual agreements such as those in *Earl*.⁸³ Narrowly circumscribing *Seaborn*, the Court reasoned that the Oklahoma statute caused electing couples to enter a consensual community, arising out of the written contract, rather than a legal community, arising out of the settled legal policy of the state. As such, the Court did not waiver in its support for state law determinations of property ownership or the validity of community property divisions for federal income tax purposes. The Court's distinction might well have been a judicial maneuver to stop the system's further expansion by increasing the cost of the regime to states' politicians.⁸⁴

Interestingly, although Oklahoma's public policy was the heart of the majority's opinion, there was little discussion of Oklahoma's policy objectives in enacting the statute other than the bald assertion that Oklahoma's aim was *not* to change the state's marital policy.⁸⁵ In the majority opinion the controversial nature of the wife's interest was discussed only in passing as a matter settled by the state. There was no mention, or condemnation, of the state's express purpose of avoiding taxes. This left open the judicial outcome if Oklahoma or any other state adopted community property as a mandatory legal system. Rather than foreclosing any option, the Court took a rather conservative position and all but pleaded for Congress to solve the problem by legislating uniformity and clearer guidelines for the states.⁸⁶ The Court saw this issue as a situation in which the states could

83. *Commissioner v. Harmon*, 323 U.S. at 47–8. This was in spite of the fact that original community property states, including California and Washington, allowed married couples to contract out of the community property system, discussed in detail in the Commissioner's brief. See Brief for the Petitioner, *Commissioner v. Harmon*, *Supreme Court Briefs*, 5–9.

84. *Malcolm* might also limit the use of *Seaborn* in same-sex marriage cases. The Internal Revenue Service concluded in an internal memorandum issued February 24, 2006, that *Poe v. Seaborn* does not apply to same-sex couples. CCA 200608038 at <www.natptax.com/2006caincomesplit.pdf> (accessed May 1, 2009). See, William P. Kratzke, "The Defense of Marriage Act (DOMA) is Bad Tax Policy," *University of Memphis Law Review* 36 (2005): 399–445; Patricia A. Cain, "Federal Tax Consequences of Civil Unions," *Capital University Law Review* 30 (2002): 387–408; Theodore P. Seto, "The Unintended Tax Advantages of Gay Marriage," *Washington and Lee Law Review* 65 (2008): 1529–92.

85. Brief for the Petitioner, *Commissioner v. Harmon*, *Supreme Court Briefs*, 22–6.

86. "The Treasury had consistently ruled that the Revenue Act applied to the property systems of those States as it found them and consequently husband and wife were entitled each to return one half the community income. The Congress was fully conversant of these rulings and the practice thereunder, was asked to alter the provisions of later revenue acts to change the incidence of the tax, and refused to do so." *Commissioner v. Harmon*, 323 U.S. at 46–47.

do as they wished, within certain bounds, but that Congress retained some power to create uniformity in the federal tax system.

The dissent likewise sought uniformity but wanted the Court to set the parameters on income-splitting. Justice William O. Douglas, with Justice Hugo Black concurring, took umbrage with the “unjustifiable discrimination against the residents of non-community property states.”⁸⁷ Disagreeing with the majority, Douglas contended that marriage itself or change of domicile were both consensual acts, and hence the distinction between the contractual and legal characteristics of marriage made by the majority was one without significance. If the Court was willing to allow one type of consensual act to reduce federal income taxes, Douglas argued that it should allow both. Douglas made clear, however, that his dissent was not in defense of the hollow vested interest distinction created in *Seaborn* but in the interest of national uniformity. Agreeing with the Commissioner that *Earl* and *Seaborn* were “competing theories of income tax liability,” Douglas wanted the conflict between them resolved. Unlike the majority, which shifted power from the judiciary to the legislature, Douglas did not want to leave to Congress the task of finding a new incident of taxation. Instead, Douglas sought power for the Court, wanting it to look after federal finance by overruling *Seaborn*.

Reaction to *Harmon* in Oklahoma was varied. Tellingly, women did not react with anger or perceive the Court’s decision as a violation of their rights. They should not have, as both state and federal courts made no changes in the law but only denied the tax savings the law might have produced. Although the Oklahoma press wrongly alleged that the Supreme Court had overruled the law, the community property regime continued to operate on spouses who had elected to be governed by its rules and permitted those couples to split some types of family income for state income tax purposes.⁸⁸ Some Oklahomans did not think this was enough. While the *Daily Oklahoman* saw the Supreme Court’s decision as just another change in the tax system, the editor of the *Tulsa World* concluded, “Overruling, by the United States Court, of the community property statute was a serious blow to Oklahoma. This law represented an effort to liberalize and stabilize our tax system.”⁸⁹ Recognizing the limits imposed by the Court’s opinion, *Harmon* and his supporters took up the gauntlet thrown by *Harmon*’s dis-

87. *Ibid.*, at 53; Brief for the Petitioner, *Commissioner v. Harmon*, *Supreme Court Briefs*, 12–14.

88. “Oklahoma Man and Wife Can’t Split Income Tax, Court Rules,” *Daily Oklahoman*, November 21, 1944; “Tax Decision A Severe Blow to Oklahoma,” *Tulsa World*, November 22, 1944; Bascom Timons, “State Loses Tax Battled,” *Tulsa World*, November 21, 1944. No one discussed the implications of its continuing to operate on previously electing couples.

89. “Oklahoma Man and Wife”; “Tax Decision A Severe Blow.”

sent and tried on rehearing to get the Court at least to overturn *Seaborn*.⁹⁰ They failed.

Oklahoma Fights Back

As wealthy Oklahoma residents faced higher tax bills, including back taxes following the invalidation of five years of community property-based federal income tax returns, Governor Robert S. Kerr responded quickly.⁹¹ Trying to fend off fears of domestic economic woes that had led to the enactment of the community property regime in 1939, Kerr boasted of the state's favorable tax situation despite the judicial setback Oklahoma had just suffered.⁹² Although the state's chief executive marketed the fiscal benefits of living in the state, others warned of the state's disadvantages. The Oklahoma State Chamber of Commerce argued that, considering only economic factors, Oklahomans should move to Texas.⁹³ As before 1939, many in the state felt as though they were being discriminated against for federal income tax purposes, and there was renewed pressure to enact an effective community property law to eliminate this inequity. When the Supreme Court denied rehearing of *Harmon* on December 18, 1944, Oklahoma paused to reevaluate its statute. Supporters of the community property system discussed the possibility of changing the law to make it acceptable to the federal courts but worried that the obstacles were too great. Not only did such a bill have to satisfy courts whose standards were not well-defined, but any proposal would have to pass the state legislature which was more factionalized than it had been in 1939. As representatives had begun to recognize the costs that came with the community property regime, there was concern that a mandatory plan would not get through the legislature.⁹⁴

Although Oklahoma considered changing its marital property regime at a time when the war effort was undermining traditional gender relationships, the state was not attempting to modernize these relationships but to stave

90. Petition of Respondent for rehearing, *Commissioner v. Harmon*, *Supreme Court Briefs*, 2.

91. "Little Hope for Tax Law," *Tulsa World*, November 22, 1944. People who made the 1939 election and split their income owed what they would have paid for the previous five years plus interest from March 15, 1940. The sum due was estimated at \$10 to \$12 million.

92. "Kerr Wants Any Tax Cut Equalized," *Daily Oklahoman*, November 22, 1944.

93. Ray Park, "State Tax Unit Raps Research Groups' Totals," *Daily Oklahoman*, January 28, 1945.

94. "Little Hope for Tax Law," *Tulsa World*, November 22, 1944. Even in this political environment, however, Governor Kerr considered calling a special session of the legislature.

off economic troubles. In the final year of the war, economic expectations for postwar Oklahoma were questionable at best, setting the stage for one of Oklahoma's Democratic party leaders, J.H. Arrington, to toy with a bill that preserved some opt-in or opt-out feature before proposing a bill in January, 1945, much like the statute upheld in *Seaborn*.⁹⁵ The main concern its proponents had was whether the bill could withstand scrutiny by the Court and effectively reduce Oklahomans' federal income taxes. Unable to address the potential problem presented in certain of the Court's dicta that no state statute passed after the enactment of the federal income tax could effectively alter federal income taxation, to address at least the express rationale of the *Harmon* decision, Arrington's bill established the community property system as an involuntary incident of marriage between residents of the state.⁹⁶ The 1945 Act contained a few other changes from its predecessor, but none that sparked debate.⁹⁷ Taking its cue from the Court, which had not emphasized the position of wives in *Harmon*, the Oklahoma legislature did not feel the need to empower them further.

Unlike in 1939, when the community property bill passed the legislature in legal obscurity, in 1945 the bill garnered significant attention from the bar. Lawyers noted that all couples in the state would be directly affected by the new system so "that property rights will be greatly disturbed" by the enactment of the "community property tax bill."⁹⁸ Though most lawyers would ultimately defer to the interests of their wealthy clients and support the bill, there was debate in the state's bar association journal as to what the statute meant in practice.⁹⁹ There was no such public debate with respect to

95. "Business Changes in Oklahoma," *Oklahoma Business Bulletin* 10 (1944): 6; "Tax Collections," *Oklahoma Business Bulletin* 11 (1945): 1; "Legislature Awaits Kerr's Suggestions on School Finance, Tax Cut Actions," *Daily Oklahoman*, January 5, 1945.

96. "On the other hand, in those states which, by inheritance of Spanish law, have always had a legal community property system, which vests in each spouse one half of the community income as it accrues, each is entitled to return one half of the income as the basis of federal income tax." *Commissioner v. Harmon*, 323 U.S. at 46 (emphasis added). "New Community Property Law for Oklahoma," 25 January 1945, Folder 7, Box 2, Printed Material, Kerr Collection.

97. Trice compared the two statutes and found differences. Trice, "Community Property Law," 763. It is the opinion of this author that the differences he identified were not terribly significant.

98. *Ibid.*

99. McKenzie, "Community Property"; Wm. S. Hamilton, "Oklahoma Community Property Law as it Affects Operation and Management of Savings and Loan Associations," *Oklahoma Bar Association Journal* 16 (1945): 1077; Oron S. Ellifrit, "Joint Tenancy and the Community Property Law," *Oklahoma Bar Association Journal* 16 (1945): 1101-4; "Necessary Showing of Facts in Conveyance of Real Estate Under Oklahoma Community Property Law," *Oklahoma Bar Association Journal* 16 (1945): 1263; A.W. Trice, "Conveyances Under the Community Property Act," *Oklahoma Bar Association Journal* 16 (1945):

the 1939 Act. One attorney referred to the statute “as a lawyer’s paradise” because it would provide new work in litigation and estate planning to sort out conveyances of property.¹⁰⁰ Walter Grany, attorney for the governor, claimed that a number of attorneys had protested against the effect the measure would have on property in the state.¹⁰¹ While the bill occasioned grumblings from those concerned with the statute’s actual operation, there was, however, no organized opposition.

While Arrington’s bill was winding its way through the legislature, another group of lawyers and their representatives were busy drafting a different community property bill. After the Senate Committee on Taxation had been in session for about an hour, this second group proposed its own version. Attempting to “avoid the tax purpose of the law altogether,” and proposing to orchestrate sham debates in the house and senate regarding the state’s public policy towards marriage, proponents of this second bill even sought to establish a historical background for community property based on Oklahoma’s original inclusion as part of the Louisiana Purchase.¹⁰² Although the second bill’s procedures were more formalized, both bills used the same rules regarding the management of separate and community property. Thus, the changes were aimed only at strengthening the state’s case vis-à-vis the federal tax collector. However, while the proponents of the new bill supported the idea of community property, their attacks merely aided community property opponents. L.D. Melton, of the Tulsa Chamber of Commerce and an avid supporter of community property legislation, sought to end the internal division with the derisive retort that “no amount of stage-management can disguise the purpose of such a law to reduce federal taxes payable by Oklahomans, and we ought not try to do so.” Melton implored Governor Kerr to help pass the original community property bill before it was killed by the second.¹⁰³ After bitter debates in conference, Arrington’s original proposal passed the legislature handily.¹⁰⁴

1435; R. Rhys Evans, “The Community Property Act of 1945 and its Effect on the Oil and Gas Industry,” *Oklahoma Bar Association Journal* 16 (1945): 1606–13; Olds, “Bona Fide Purchaser,” 1843–7; Rayburn L. Foster, “Probating a Community Property Estate,” *Oklahoma Bar Association Journal* 17 (1946): 664–71; Byrne A. Bowman, “Taxability of Capital Gains on Separate Property,” *Oklahoma Bar Association Journal* 1 (1946): 823–32.

100. See note 12.

101. “Kerr to Check New Tax Law,” *Daily Oklahoman*, April 20, 1945; “Kerr Approves 3 Major Bills,” *Daily Oklahoman*, April 29, 1945.

102. Folder 1945, H.B. 444, 2.1.3, OK State Archives.

103. L.D. Melton to Robert S. Kerr, 27 March 1945, Folder 27, Box 14, Gubernatorial Series, Kerr Collection.

104. H.B. 444 was amended in committee to address nontax matters. “Property Bill and Tax Law Stymie House,” *Daily Oklahoman*, April 24, 1945; Folder 1945, H.B. 444, 2.1.3, OK State Archives.

As with the 1939 Act, the reason for the revised statute in 1945 was to give wealthy taxpayers the benefit of splitting their family's income between spouses.¹⁰⁵ Governor Kerr backed the community property law, as had Governor Phillips, often referring to it as a "tax law," as a means of giving big taxpayers relief from federal taxation without creating obvious losers within the state.¹⁰⁶ Kerr, inaugurated in January 1943, had personal reasons for caring about the community property statute. By 1942 his personal wealth, earned in the oil industry, was estimated at \$10 million. Although he claimed that he had "never, personally, taken advantage of the community property law," in 1936 he had been elected to the presidency of Mid-Continent Oil and Gas Association—linking him closely with other powerful, wealthy citizens of Oklahoma who did make use of income-splitting.¹⁰⁷

Governor Kerr also saw the community property statute as a means of furthering his own fiscal agenda. Kerr came to office with the pledge that "no existing tax shall be increased nor any new tax levied, unless emergencies beyond our control should arise."¹⁰⁸ At the same time, however, Kerr sought to pay down the \$34 million in state debt then outstanding and to diversify the state's economy to help the state weather the transition to a peacetime economy.¹⁰⁹ "Holding the tax line," justified by the unquestioning certainty that a favorable tax climate would lure the industry necessary to revitalize the Sooner economy, forced Kerr to cast about for means to lessen the state's tax burdens. As Kerr pursued aggressive measures to better Oklahoma's fiscal situation, he argued that without a community property law all other forms of tax relief then being considered would still leave the state at a disadvantage compared to Texas and other states with such a law. However, like Arrington, Kerr first wanted to preserve some means to release Oklahomans from the community property system. Kerr contemplated a law which made the system mandatory unless people opted out of it, but Kerr gave up this idea to protect the system's ability to generate federal tax reductions.¹¹⁰

105. "U.S. Tax Collector Eyes State Laws," *Daily Oklahoman*, June 3, 1945. Oklahoma did not record debates and reports were not made for this bill.

106. For example, see "Kerr asks Community Property Law to Aid Large Taxpayers," *Daily Oklahoman*, January 11, 1945; "Tax Questions Now Hinge On Avoiding Boost," *Daily Oklahoman*, January 12, 1945; "Session Quiet as Legislators, Governor Spar," *Daily Oklahoman*, January 13, 1945.

107. "Little Hope for Tax Law," *Tulsa World*, November 22, 1944.

108. "State of the State," January 12, 1943, at <<http://www.odl.state.ok.us/oar/governors/addresses/kerr1943.pdf>> (accessed May 1, 2009).

109. "State of the State," January 2, 1945, at <<http://www.odl.state.ok.us/oar/governors/addresses/kerr1945.pdf>> (accessed May 1, 2009); Arrell Morgan Gibson, *Oklahoma: A History of Five Centuries*, 2nd ed. (Norman: University of Oklahoma Press, 1981), 231.

110. "Kerr Asks Community Property Law to Aid Large Taxpayers," *Daily Oklahoman*, January 11, 1945.

Despite the fact that the 1945 Act was framed as a tax bill and actually made few changes to the status quo, the bill faced some resistance. Before passing the community property statute, the Oklahoma senate passed a resolution, which the house adopted, asking Congress to amend the federal income tax laws to remove the discrimination against common law states.¹¹¹ The resolution did not specify the future of the community property bill in the state if federal action was taken, but the implication was clear. The senate also removed the emergency provision Arrington had included in the bill so that, as in 1939, the community property law had a ninety-day waiting period before becoming effective. The measure was not referred to a vote of the people however; the bill was too obscure for a referendum to have been a serious possibility.¹¹² Thus, with a similar purpose as it had in 1939, the Oklahoma legislature passed its second community property statute, which became effective July 26, 1945, before the end of the war.¹¹³

Public opinion, what there was of it, was divided on the advisability of this piece of 1945 legislation. Somewhat surprisingly, no one seemed to focus on its impact on federal revenue at a time when the war with Japan was far from settled, the final cost in dollars and blood still unknown. Late in the war much of the population had grown tired of the war and calls for equality of sacrifice were distant memories.¹¹⁴ Instead, those expressing opinions were all inward-looking to state, not national, results. Some constituents wrote to Kerr praising him for his efforts to get the community property regime passed. The Vice-President of Consolidated Gas Utilities Corporation wrote: "I should like to congratulate you for your efforts on

111. "State Senate Action Hits U.S. Income Tax Discriminations," *Daily Oklahoman*, March 7, 1945.

112. "Tax, Oil Laws Due to Escape Vote of People," *Daily Oklahoman*, June 13, 1945.

113. 32 Okla. Stat. Ann. §§66–82 (Supp. 1945). "Legislature Finished, Mass of Bills Up for Final Decision by Governor," *Daily Oklahoman*, April 28, 1945; "Kerr Approves 3 Major Bills," *Daily Oklahoman*, April 29, 1945. The 1945 statute repealed the 1939 Act, at least prospectively, and tried to extend retroactive tax benefits to previously electing couples. It is probable the repeal did not affect the agreement between electing spouses. A. W. Trice, "Some Constitutional Questions on Repeal of the Community Property Act," *Oklahoma Bar Association Journal* 20 (1949): 1815. Trice also argued that the 1949 repeal, discussed below, did not affect rights arising from an election under the 1939 Act.

114. See Carolyn C. Jones, "Mass-based Income Taxation: Creating a Taxpaying Culture, 1940–1952," in *Funding the Modern American State, 1941–1995: The Rise and Fall of the Era of Easy Finance*, ed. W. Elliot Brownlee, 107–47 (New York: Woodrow Wilson Center Press / Cambridge University Press, 1996); Mark Leff, "The Politics of Sacrifice on the American Homefront During World War II," *Journal of American History* 77 (1991): 1296–1318; David M. Kennedy, *Freedom from Fear* (New York: Oxford University Press, 1999), 275–6; David Brinkley, *Washington Goes to War* (New York: Alfred A. Knopf, 1988), 125–26, 202; Robert Higgs, *Crisis and Leviathan: Critical Episodes in the Growth of American Government* (New York: Oxford University Press, 1987), 198.

behalf of the community property Law. I sincerely believe that if it were not for your personal prestige in this matter the present bill might have received the same fate as the first one. It was a real achievement for our State."¹¹⁵ On the other hand, Kerr also received complaints about the community property statute. One attorney wrote several letters to Kerr about problems inherent in the community property regime. In one letter he asked Kerr, "Do you know that the 'Community Property' law passed by the last legislature is the most vicious and costly piece of legislation that has ever been perpetrated upon this state, since statehood. It has clouded the title to every piece of land in Oklahoma."¹¹⁶ In another letter the same attorney concluded, "We are all aware of the tax dodging features of the Law, but that is insignificant to the costs, trouble and confusion caused and to be caused by it."¹¹⁷

While there was significantly more debate in 1945 than the almost total silence surrounding the 1939 Act, several powerful business groups continued to pay little attention to the new law. Even the Oklahoma City Chamber of Commerce, which had commented favorably on the 1939 law, did not mention the revised community property statute in either 1944 or 1945. A sense of inevitability prevailed, and the wealthy few who would benefit from the law felt that the quieter the bill could be kept, the better chance they would have of ensuring its passage.

Like the business community, albeit for different reasons, the women of Oklahoma continued to take little interest in the community property regime as they focused on more pressing matters. During the war, organized Oklahoma women concentrated more on helping the nation than on advancing their own interests, although their attention was certainly piqued when the two coincided. For example, as national and international news dominated newspapers and minds in 1945, the mainstream League of Women Voters, the largest of Oklahoma's women's groups, focused heavily on increasing the efficiency of the war effort by encouraging the employment of qualified personnel without discrimination on the basis of sex, marital status, or place of residence.¹¹⁸ While female lawyers continued

115. Norman Hirschfield to Kerr, 3 January 1946, Folder 27, Box 14, Gubernatorial Series, Kerr Collection.

116. H.W. Wright to Kerr, 4 October 1945, Folder 27, Box 14, Gubernatorial Series, Kerr Collection.

117. H.W. Wright to Kerr, 11 October 1945, Folder 27, Box 14, Gubernatorial Series, Kerr Collection.

118. Young, *In the Public Interest*, 113–17; "The Record: Summary of Action taken under Active List," April 1944–April 1946, League of Women Voters Papers on film, II. B.1 0145–48. See also Resolutions Adopted at the Fiftieth Annual Meeting of the Oklahoma State Federation of Women's Clubs, 22 April 1948, Box 3, Oklahoma State Federation of Women's Club, OK Historical Society. The National Woman's Party studied the community

their silence on tax issues, the American Association of University Women had opposed since the mid-1940s the regressive nature of the nation's tax system; however, even they did not debate the community property regime within this framework.¹¹⁹ The major women's groups' lack of public attention to the community property system limited their role in the debate and allowed the regime to be adopted with minimal attention given to its impact on the family.

Ultimately, the community property bill was enacted for a single purpose—tax savings—and the public judged whether it was a success based on this limited aim. Even before the 1945 Act became effective, Governor Kerr began seeking federal recognition of the new law's income-splitting capabilities.¹²⁰ Kerr had estimated that once income-splitting was permitted, it would save wealthy Oklahomans \$25 million on their federal income tax returns. After some consideration, the Commissioner of Internal Revenue recognized Oklahoma's statute as prospectively effectuating the division of family income between spouses for federal income tax purposes without the need for a test case.¹²¹

With this benefit in hand, Oklahoma could begin the same sort of publicity campaign about its tax position as Texas had made against it, hoping to lure people and businesses away from common law marital property states. Governor Kerr could happily tout the glories of Oklahoma. After admitting Oklahoma's comparatively high corporate income tax rates, Kerr referred to the community property law and alleged that it allowed "Oklahoma citizens, as individuals [to] pay less *total* State and Federal income tax than paid in Federal income tax alone on similar incomes by the citizens of Colorado, Kansas, Missouri, Arkansas, or Nebraska."¹²² This tax savings did not come without some cost, however. The new law meant the filing of hundreds of thousands more state and federal income tax returns as wives

property system at the national level but did not formulate a coherent policy on the issue. Mrs. Harvey W. Wiley to Walter F. George, 26 August 1941, telegram, reprinted in *Hearings on Revenue Revisions*, 917; Burnita Shelton Matthews, "The Denial of Justice to Women—A Summary of Discriminations," House Ways and Means Committee, *Hearings on Revenue Revision of 1942*, 77th Cong., 2d Sess., 1942, 1475–76. There are no records for this period for the Oklahoma branch of the National Woman's Party.

119. For a discussion of the Oklahoma Association of Women Lawyers, see note 58 above. "Association Opposes Anti-Busing Proposal, Value Added Tax," *American Association of University Women Journal* (May 1972): 1.

120. Brief in Support of Application for Recognition of the Oklahoma Community Property Law of 1945," Folder 27, Box 14, Gubernatorial Series, Kerr Collection; "Kerr Asks U.S. Sanctions for New Tax Laws," *Daily Oklahoman*, June 6, 1945.

121. I.T. 3782, 1 *Cumulative Bulletin* (1946): 84.

122. (emphasis in original) "Report to the People," 23 February 1946, Folder 25, Box 2, Speech, Kerr Collection.

filed separately, and countless questions about the law's application.¹²³ Over time, questions also began to arise regarding its effects on land titles and creditors' claims.¹²⁴ But until the federal government made the community property system no longer attractive for federal income tax purposes, there was no significant movement for its repeal within the state.

Bandwagon States

Following the Bureau of Internal Revenue's favorable ruling on Oklahoma's community property statute, several other states enacted mandatory community property regimes with statutes substantially similar to Oklahoma's 1945 Act and for similar tax-motivated reasons.¹²⁵ Oregon had passed an elective law in 1943 but, after the Supreme Court's ruling in *Harmon*, repealed its law and enacted a new mandatory regime in 1947. While the territory of Hawaii enacted a mandatory community property statute in 1945, Michigan, Nebraska, and Pennsylvania, like Oregon, waited to enact statutes until 1947 when Chairman of the House Ways and Means Committee Harold Knutson (R-MN) proposed across-the-board federal tax cuts that did not address this discrimination between states. Even as Republicans urged tax reduction, many state politicians, faced with fears of inflation and the nation's mount-

123. "Annual Saving of \$25 Million is Due Citizens," *Daily Oklahoman*, December 21, 1945; "Community Property Decision Has Even Tax Men Guessing," *Daily Oklahoman*, December 23, 1945.

124. Not much evidence of the exact cost exists, particularly because everyone but wives had an economic incentive to minimize any actual change produced by the law. Nonetheless, cases slowly moved through the Oklahoma court system. See *Bagsby v. Bagsby*, 184 Okla. 627 (1939); *Greer v. Greer*, 194 Okla. 181 (1944); *Essex v. Washington*, 198 Okla. 145 (1946); *In re Bass Estate*, 200 Okla. 14 (1947); *Harris Trust and Savings Bank v. Burlingame*, 200 Okla. 29 (1948); *Draughton v. Wright*, 200 Okla. 198 (1948); *Bowman v. Bowman*, 201 Okla. 384 (1949); *In re Crane Estate*, 201 Okla. 354 (1949); *Swisher v. Clark*, 202 Okla. 25 (1949); *Mangum v. Mangum*, 202 Okla. 95 (1949); *Banta v. Banta*, 202 Okla. 86 (1949); *Champion v. Champion*, 203 Okla. 105 (1950); *Loverlady v. Loughridge*, 20 Okla. 186 (1951); *Crane v. Howard*, 206 Okla. 278 (1951); *Reding v. Reding*, 206 Okla. 565 (1952); *Davis Estate v. OK Tax Commission*, 206 Okla. 644 (1952); *Swanda v. Swanda*, 207 Okla. 186 (1952); *Hiskett v. Wells*, 351 P.2d 300 (1959); *Stinson v. Sherman*, 405 P.2d 172 (1965); *Catron v. First National Bank*, 434 P.2d 263 (1967).

125. See note 121; Or. Laws 1943, c. 440; Or. Laws 1945, c. 270; Or. Laws 1947, c. 525; Michigan Law 1947, Pub. Act 317; Nebraska 1947, chapter 156; Oregon, Laws of 1947, ch. 525; Pennsylvania, Act. No. 550, 1947 session; Hawaii Revised Laws, 1945, ch. 301A; "Oregon Tax Balm," *Newsweek*, June 21, 1943; William J. Moshofsky, "Repeal of the Community-Property Law," *Oregon Law Review* 28 (1948): 311. For a good comparison of the laws, see William Q. DeFuniak, "The New Community Property Jurisdictions," *Tulane Law Review* 22 (1947): 264-72.

ing foreign obligations, recognized that federal tax rates would never return to prewar levels.¹²⁶

Thus, while during World War II it might have seemed unpatriotic and also unnecessary to change regimes for what could have been a short-term high-tax season, this postwar awareness that high federal income taxes had become permanent caused states to consider changing their marital property regimes to secure tax reduction for their wealthy residents.¹²⁷ By 1948 community property statutes were pending in Alabama, New Hampshire, Wisconsin, and Illinois, and there was talk in other states as diverse as Colorado, Connecticut, Indiana, New York, North Dakota, and Massachusetts about adopting the regime if Congress did not act swiftly.¹²⁸ Even Strom Thurmond's South Carolina, normally arch-defender of states' rights, requested the federal government ignore state law distinctions on this matter.¹²⁹

Not only did adopting community property statutes make economic sense for common law states, but the fact that doing so produced the most savings for families with one breadwinner (the majority of families in the period) also reflected the era's understanding of marital unions—husbands should support their families financially and wives should remain in the home. Women, on the defensive and divided over the Equal Rights Amendment, were also divided about their proper role in postwar America, particularly in the paid labor force, and so offered little effective challenge to this view.¹³⁰

126. For example, see "Magill Urges Cut in Federal Budget," *N.Y. Times*, February 6, 1947; "A Special Summary and Forecast of Federal and State Tax Developments," *Wall Street Journal*, January 8, 1947; "The Federal Tax Cut," *Hartford Courant*, May 30, 1947; "Tax, Tax, and Spend," *L.A. Times*, August 22, 1947; "High Taxes Will Last Until '48," *Wall Street Journal*, August 5, 1946.

127. However, for the limited constraint that this patriotism might have actually imposed, see above at note 114.

128. Student Editorial Board, "The Community Property System," *Boston University Law Review* 27 (1947): 443–59; Edward N. Polisher, "The Pennsylvania Community Property Statute: Its Federal Income, Gift and Estate Tax Implications," *Dickinson Law Review* 52 (1947): 1–23; Roscoe Fleming, "Other States Seeking to Tap Oklahoma's Pipeline into Treasury," *N.Y. Times*, March 16, 1947; "Upper-Bracket Couples Can Hope for Tax Cuts in Split-Income Bill," *Wall Street Journal*, October 18, 1947; "Community Dilemma," *Newsweek*, October 13, 1947; "Community Law Opposed by Governor," *Hartford Courant*, November 22, 1947; Myron H. Bright, "Community Property," *Bar Brief* 24 (1948): 65. Some states, like Virginia, had already rejected a statute. "Va. Senate Eases Law on Ballots," *Washington Post*, February 3, 1948.

129. Concurrent Resolution introduced by Hugo S. Sims, Jr., to House of Representatives, 8 January 1948, Milbank Legislative Files (MSS-0085–001), Folder 69.11, Special Collections, College of Charleston, Charleston, SC.

130. Dorothy Sue Cobble, *Other Women's Movement* (Princeton: Princeton University Press, 2004), 60–66, 71–77; Kessler-Harris, *Pursuit of Equity*, 205; Landon R.Y. Storrs,

In such an environment, a regime that purportedly empowered wives, in the home if not in the workforce, and that changed the property rights of all families but economically benefited only a small number was accepted by four states in two years.

Despite the fact that businesses often “helped” women make the decision to exit the postwar workforce, by the time the larger pool of states began considering adopting the community property regime the long-term trend towards increased female employment outside the home had already begun to reassert itself.¹³¹ Most women reentering the paid labor markets, however, were being denied high-paying jobs as men left the military and resumed their positions in the workforce.¹³² While disadvantageous to many women, this change in women’s place in the job market made the community property system more economically attractive than it had been in the war years’ more woman-friendly labor environment when working women could report separately their higher wages. Income-splitting, while most advantageous to families with only one wage earner, yielded some benefit to couples with two earners if there existed income disparity between spouses because its gain was in the ability to move income from higher to lower tax brackets.¹³³

After the war, the first state on the East coast enacted a community property regime for its tax-saving benefits. Pennsylvania did not have Oklahoma’s problem of residents fleeing to community property states, but it did have serious economic concerns as it fell behind relative to the South and West.¹³⁴ A populous state with enormous industrial capacity, Pennsylvania saw production jump from \$5.0 billion in 1939 to \$15.1 billion in 1944;

Civilizing Capitalism: The National Consumers’ League, Women’s Activism, and Labor Standards in the New Deal Era (Chapel Hill: University of North Carolina Press, 2000), 229–46; Rosalind Rosenberg, *Divided Lives: American Women in the Twentieth Century* (New York: Hill and Wang, 1992), 138–58; Susan Hartmann, *The Home Front and Beyond: American Women in the 1940s* (Boston: Twayne Publishers, 1982), 20, 60–7.

131. While 3.25 million women either quit or were fired between September 1945 and November 1946, nearly 2.75 million women gained new jobs, making the net decline of female employment about 600,000 women. Hartmann, *Home Front*, 92–95, 108; Rosenberg, *Divided Lives*, 127–28, 134–36.

132. The median income for all women rose 38 percent during the war. Hartmann, *Home Front*, at 92–95, 108; Anderson, *Wartime Women*, 60, 161–64.

133. Income-splitting only benefited families with over \$3,300 in annual income when \$3,031 was the median family income. Most of its tax benefits went to 4 percent of taxpayers with incomes of more than \$5,000. Bureau of Census, *Historical Statistics*, Series G179–188, 296; “The Modern Income Tax,” *Fortune*, December 1948; “Community-Property Tangles,” *U.S. News and World Report*, October 17, 1947; “Spread of Proposed Tax Cut,” *U.S. News and World Report*, January 24, 1947.

134. For good descriptions of Pennsylvania’s economic and political development in this period, see Paul B. Beers, *Pennsylvania Politics Yesterday and Today: The Tolerable Accommodation* (University Park: Pennsylvania State University Press, 1980), 118–66;

but while the state was the second largest manufacturing state in the nation, it had placed seventh in the value of World War II government contracts awarded. In 1947 James H. Duff assumed Pennsylvania's governorship, determined to reestablish Pennsylvania's dominance. Duff was a relatively liberal Republican and supported government intervention in the economy, at times putting him at odds with his conservative Republican legislature, but not on the community property issue.

In conservative Pennsylvania, postwar state political battles seeking to improve the state's economy generally reduced the amount of protection women workers received from the state.¹³⁵ As shown in their legislative debates, these changes were less a response to feminists seeking entry into the market than to economic pressures as industrialists sought cheap labor. Unsurprisingly, when this legislature considered property rights within families, the results advantaged husbands over their wives. Nevertheless, Pennsylvania's legislature passed a community property bill in 1947.¹³⁶ Unlike in Oklahoma in 1939, Pennsylvania did not enact its community property regime in obscurity. Instead, the bill was one of the most heavily debated bills in the state legislature that year, and the governor received a substantial number of letters about it.¹³⁷ Letters, ranging from pithy one-liners to cool and meticulous discourses on property rights and equitable taxation, depict a public very divided in its views on the community property regime.¹³⁸

Before the public chimed in, however, state legislators had debated the value of the regime amongst themselves, always with a bit of political posturing because it was the year before a contentious state election.¹³⁹ Republicans especially felt pressure to cut taxes, and to appear to be doing so, even as Governor Duff sought to increase state spending.¹⁴⁰ Thus,

Philip S. Sklein and Ari Hoogenboon, *A History of Pennsylvania*, 2nd ed. (University Park: Pennsylvania State University Press, 1980), 472–73.

135. Act No. 159 (May 31, 1947); Act No. 160 (May 31, 1947); Act No. 543 (July 7, 1947); Act No. 544 (July 7, 1947).

136. Earlier community property bills, S.B. No. 287 and S.B. No. 377, died in committee. H.B. 615 was introduced on April 21, 1947. The Pennsylvania legislature met every two years and did not consider a community property statute in 1945.

137. Press Release, 9 July 1947, Folder 1, "Senate Bill 615," Box 11, Legislative Files, GM 1498, James H. Duff Papers, MG 190, Pennsylvania State Archives, Harrisburg, PA (hereafter Duff Papers).

138. There are four folders of letters both for and against the community property bill, most dated between June 25 and July 7, 1947. Box 11, Legislative Files, GM 1498, Duff Papers.

139. Commonwealth of Pennsylvania, *Legislative Journal*, vol. 30 (1947), 3224–29, 5561–71 (hereafter *Legislative Journal*).

140. Duff, and presumably other Republicans, received countless angry letters from

as in Oklahoma, many Pennsylvania legislators sought to reduce federal taxes for some of the state's wealthier inhabitants and, like their Sooner counterparts, were completely frank about this objective. Senator John W. Lord, Jr., a Republican from Philadelphia County and the author of the bill, questioned, "I do not see why any member of this Senate wants to discriminate in favor of the citizens of California, Arizona, Texas, Louisiana, New Mexico, Washington, Nevada, Idaho, Oklahoma, and, on July 6, 1947, Oregon."¹⁴¹ Even though it was the wealthy who would benefit, which Republicans admitted, they claimed that the wealthy man was "still a citizen of Pennsylvania" and so deserved a tax break which would keep money within the state to the benefit of all.¹⁴² The bill's timing—the vote in the state house came as the U.S. Congress failed to override President Harry S. Truman's veto of a federal tax cut—proved dispositive.¹⁴³ The house majority leader noted in his closing comments, "I read in the papers yesterday that a tax reduction measure for the people generally was vetoed. Here we have an opportunity to give at least married people among the people an opportunity to avail themselves of some assistance to accomplish that result."¹⁴⁴ Some Republicans, including the governor, saw Pennsylvania action as a necessary catalyst for congressional tax relief.¹⁴⁵

Opponents of the bill in the Pennsylvania state legislature took a two-pronged approach. First, legislators disputed the tax savings the bill was purported to produce—striking at its very heart. They argued that the federal tax savings, so crucial to proponents, would only force Congress to increase federal tax rates.¹⁴⁶ Reducing federal tax revenues, even temporarily, also cast the issue as a federalism concern, as legislators questioned whether the state legislature should consider only state, or also national, needs. On this issue the legislature split down party lines.¹⁴⁷ The house minority leader portrayed the bill's purpose as simple tax evasion, chas-

Republican constituents on the rising levels of state taxation. See Folder "Taxes—Correspondence, Dec. 1947–June 1948," Box 12, Legislative File, 1947–1949, GM 1499, Duff Papers.

141. *Legislative Journal*, 3227.

142. *Ibid.*

143. The Republican *Philadelphia Inquirer*, referring to the bill as a "tax bill," published as a headline "Truman Veto Upheld By 2 Votes; State Bill Cuts Taxes for Couples," June 18, 1947. The paper changed its description to the "community property law" once the Act was declared unconstitutional by the state supreme court. "Council Ready to Boost Wage Tax—Community Property Law Voided," *Philadelphia Inquirer*, November 27, 1947.

144. Herbert P. Sorg, *Legislative Journal*, 5571.

145. Press Release, Duffs Papers.

146. *Legislative Journal*, 3226, 5565. Moreover, this savings would benefit only a limited portion of Pennsylvania's married citizens. *Ibid.*, at 3227–28, 5565.

147. *Ibid.*, at 3227, 5565.

tising that “tax dodging, smuggling and other assaults upon constituted government are an old Spanish custom.”¹⁴⁸ Deferential to the federal government’s needs, he and his fellow Democrats did not want Pennsylvania to adopt such a custom and in doing so set such an example in the East. Democrats instead thought that Congress would soon take action to remove this discrimination between the states.¹⁴⁹

The second prong of the opposition’s argument invoked the impact the community property regime would have on Pennsylvania families. Much as Republican newspapers focused on the bill’s tax-saving features, Democratic papers always referred to it as a “community property bill” that fundamentally changed property laws.¹⁵⁰ Not only did many feel as though property of the husband was being given arbitrarily to his wife, but that the bill also benefited widows at the expense of their children.¹⁵¹ Thus, the focus was less on empowering women than portraying everyone else as victims. While limited to changing the rights of inheritance, the bill was thought to enrich women much more so than it had been recognized as doing in Oklahoma.¹⁵²

Even with vocal opposition, the bill flew through the heavily-Republican Pennsylvania legislature.¹⁵³ First read on April 21, 1947, it passed both houses by June 16. One Democratic member of the House Judiciary Committee pleaded that the bill had sailed through the committee too quickly and needed more consideration.¹⁵⁴ In their haste Republicans had copied the bill from Oklahoma’s statute and had proceeded so rapidly that it took until the second reading in the senate to replace “homestead,” an Oklaho-

148. Hiram G. Andrews, *ibid.*, at 5566. See also *ibid.*, at 3228, 5565.

149. *Ibid.*, at 3226–27. But see *ibid.*, at 3327.

150. For example, C. Edmund Fisher, “Community Property Bill Lists Some Exceptions,” *Pittsburgh Post Gazette*, June 19, 1947; “Community Property Veto is Urged,” *Pittsburgh Post Gazette*, May 27, 1947.

151. *Legislative Journal*, 5564–66, 5568–69. Earlier in 1947 the Pennsylvania legislature had completed a two-year project revising its intestacy laws, granting less property and fewer rights to widows than the community property statute would provide.

152. On the other hand, some worried that the bill might destroy residents’ ability to form tenancies by the entirety. *Legislative Journal*, 5563, 5565, 5568.

153. “Adjourn Assembly,” *Harrisburg Patriot*, June 18, 1947.

154. *Legislative Journal*, 5567. The general unease with the speed of its passage was shared by most of the legal associations of Pennsylvania, even if many lawyers supported the bill personally. See “Duff Hints He Will Sign Couples’ Split-Tax Bill,” *Philadelphia Inquirer*, June 28, 1947; Philadelphia Bar Association to Duff, 28 June 1947, Folder “Senate Bill 615,” Box 11, Legislative File, GM 1498, Duff Papers; Herbert F. Goodrich and William T. Coleman, Jr., “Pennsylvania Marital Communities and Common Law Neighbors,” *University of Pennsylvania Law Review* 96 (1947): 1–19; Cuthbert H. Latta and Kenneth W. Gemmill, “Observations of Some Pennsylvania Community Property Problems,” *University of Pennsylvania Law Review* 96 (1947): 20–47.

man concept that did not exist in Pennsylvania, with “all real estate.”¹⁵⁵ Nonetheless, facilitating a speedy enactment, debates in the legislature were almost strictly partisan, and the 1947 Act was decided along party lines, with most Republicans pushing for the bill as a tax cut, as they were pushing for rate reductions in Congress.¹⁵⁶

Governor Duff did not, at first, embrace the community property statute. In one press release, he said he would follow the majority of Pennsylvanians in their decision on the statute, which he read to be support notwithstanding the large number of letters he received to the contrary.¹⁵⁷ This posturing allowed Duff to appease wealthy constituents with tax cuts without alienating the masses who would not benefit from income-splitting.¹⁵⁸ In a statement issued as he signed the bill:

The purpose of the recent legislation is primarily to effect savings on Federal Income Tax. I have been advised that the minimum savings to taxpayers of Pennsylvania under this bill will be \$100,000,000 a year. This is a consideration that cannot possibly be overlooked. I am not unaware that such a radical change in the law of Pennsylvania will cause some confusion and will be the cause of considerable litigation. But the fact that \$100,000,000 will be saved to the taxpayers of the Commonwealth is such a vast amount of money, particularly at a time the taxes are generally so onerous, that I believe it is in the interest of the people of the Commonwealth to approve the bill and run the risk of the confusion that will be caused by the new legislation.¹⁵⁹

As it did for all states willing to follow Oklahoma’s footsteps and adopt a mandatory system, the Bureau of Internal Revenue permitted this regime, enacted solely for tax-saving purposes, to reduce Pennsylvania’s wealthy couples’ federal tax obligations.¹⁶⁰

Pennsylvania, however, had lurking within its judiciary greater resistance to changes in the state’s property regime than had Oklahoma. Within a

155. *Legislative Journal*, 3152.

156. Republicans who did not support the community property measure were either concerned about the bill’s impact on inheritance rights or did not feel that they understood the bill. *Ibid.*, at 5566, 5570.

157. “Duff Hints He Will Sigh Couples’ Split-Tax Bill,” *Philadelphia Inquirer*, June 28, 1947; “Duff Weighing Community Property Bill,” *Pittsburgh Post Gazette*, June 28, 1947.

158. On July 7, 1947, Duff signed S.B. 615, effective September 1, 1947. Pa. Laws 1947, Act. No. 550. For a discussion, see Edward N. Polisher, “The Pennsylvania Community Property Statute: Its Federal Income, Gift, and Estate Tax Implications,” *Dickinson Law Review* 52 (1947): 1–23; James H. Booser, “Half for the Better Half—The Pennsylvania Community Property Law,” *Dickinson Law Review* 52 (1947): 110–26.

159. Press Release, Duff Papers.

160. I.T. 3870, *Cumulative Bulletin* 2 (1947): 57; I.T. 3879, *Cumulative Bulletin* 2 (1947): 59. As a result of *Willcox*, discussed below, the rulings were revoked. I.T. 3884, *Cumulative Bulletin* 1 (1948): 52.

matter of months, the “exotic” civil law system was declared unconstitutional by the state’s supreme court in *Willcox v. Pennsylvania Mutual Life Insurance Co.*, a friendly suit instigated by two lawyers.¹⁶¹ Without any of the posturing that had occurred before the Oklahoma courts, the parties set about debating the constitutionality of Pennsylvania’s new law. Both wanted to have the law invalidated, so they made no effort to argue that the bill was anything more than an attempt to reduce federal income taxes.¹⁶² Oddly, the Attorney General of the Commonwealth of Pennsylvania also limited his defense of the statute: “If we have come to the point where there is to be a socialistic redistribution of wealth among the people of America, there is at least the last vestige of power left to the sovereign State to see to it that in this redistribution its citizens are treated on a parity with the citizens of other States.”¹⁶³ Since the purpose of the statute was well-agreed upon, the crux of the debate before the court was the degree to which the law actually changed marital property law in Pennsylvania.¹⁶⁴

Who says the wheels of justice do not turn quickly? Within a year of the statute’s enactment, the judges on the Pennsylvania Supreme Court held that the community property law violated Article I, Section 1 of the Declaration of Rights of the Pennsylvania constitution which provided that “. . . all men . . . have certain inherent and indefeasible rights, among which are those of acquiring, possessing and protecting property.”¹⁶⁵ According to the court, because the statute converted income from separate property into community property, the spouse who originally owned the property was deprived of half of its income without due process of law.¹⁶⁶ Without the provision the court held unconstitutional, in some rare cases where one spouse had substantial income from separate property, splitting the income from what remained community property might, in fact, increase a couple’s taxes. The court held that this remote prospect defeated the

161. 357 Pa. 581 (Pa. S.Ct., 1947).

162. See Brief for Plaintiff, 10; Brief of Amicus Curiae from Montgomery, McCracken, Walker & Rhoads, 15; Brief of Mary F. W. Lewis, 13, each in *Willcox v. Penn Mutual Life Ins. Co.*, Commonwealth of Pennsylvania, *Supreme Court Paper Books*, 357 Pa. 572–602 (1947) (hereafter *Supreme Court Paper Books*). But see, Brief of Amicus Curiae from Bernard V. Lentz, C. Laurence Cushmore, John W. Lord, Jr., Thomas Raeburn White, *Supreme Court Paper Books*, 4, 20–1. Its appendix listed tax minimization as the purpose. *Supreme Court Paper Books*, 3a–4a.

163. Brief for the Attorney General of the Commonwealth of Pennsylvania, 6, *Supreme Court Paper Books*.

164. Brief for Plaintiff, 21, *Supreme Court Paper Books*; Brief for the Attorney General of the Commonwealth of Pennsylvania, 3, *Supreme Court Paper Books*. The other briefs submitted to the court refrained from taking a stand on this issue.

165. *Willcox v. Pennsylvania Mutual*, 55 A.2d, at 526–27.

166. This would only necessarily affect retroactive changes. For property yet to be acquired by a married couple, the husband had no vested rights.

statute's legislative intent and rendered the entire 1947 Act inoperative. In reality, the number of couples for whom there would be a tax increase had to be quite small, and by giving this situation such weight, the court ignored the possibility that the legislature wanted to help the great bulk of wealthy citizens even if the new law would not help them all. And if that were not enough, the court concluded that even if the law was not struck, the wife was given by it no real interest in community property.¹⁶⁷

The 1947 Act, which was never meant to increase wives' power over family property, and the tax benefits that came with it were ultimately sacrificed because the court wanted to protect vested property rights, enjoyed primarily by the state's husbands. With this decision, and in the face of Representative Knutson's assurances that the tax disparity between states would be addressed in Congress in 1948, Lord and other Republican supporters of the regime admitted defeat.¹⁶⁸ Pennsylvania then joined the ranks of common law states hoping that some action would be taken by Congress in the coming year to ameliorate the tax discrimination between states. It will never be known if Congress had not acted whether the next Pennsylvania legislature would have revised its community property law to satisfy both the courts and the Treasury Department.¹⁶⁹

After *Willcox* was decided on November 26, 1947, New York Republican Governor and presidential hopeful Thomas E. Dewey had ample time to read it before his statement to the public on December 13th regarding New York's assessment of the community property issue. During this crucial period of tax uncertainty at the federal level, New York evaluated, but did not enact, a change in its marital property regime.¹⁷⁰ This was in spite of the fact that the state had a significant number of wealthy taxpayers who would have benefited, many greatly. When the president of the New York State Tax Commission reported to Dewey on the issue, he acknowledged

167. The court was swayed because the husband exercised complete control over the community property; his personal creditors could reach community property held in his name; and a wife was statutorily prevented from suing her husband for illegal use of the community except in a proceeding for divorce or to protect or recover her separate property. Sturiale argues that the court's concern about wives' interests dictated its decision, but although the court argued in terms of the rights wives possessed, it did not take any steps to enlarge those rights. See Sturiale, "Passage of Community Property Laws," 250-52.

168. By this time, it was publicly known that Representative Harold Knutson (R-MN) had guaranteed Senator Harry F. Byrd (D-VA) that Knutson would introduce an income-splitting bill in 1948 in return for support on tax reduction. "GOP Promises to back Split Income Plan to Win Tax Cut Support," *Philadelphia Inquirer*, July 7, 1947.

169. Also unknown is whether, if Congress had reduced taxes across-the-board as Knutson originally proposed, states would have still adopted community property regimes.

170. Democrats urged the adoption of a community property law. See, "Community Property," *Wall Street Journal*, September 25, 1947; "Community Property," *N.Y. Times*, October 6, 1947; "State Asks Easing of Couples' Taxes," *N.Y. Times*, December 14, 1947.

the discrimination in favor of community property states as an “indefensible defect in the Federal Income Tax Law,” but concluded that the adoption of a community property system by the state would “disrupt the whole foundation of our legal system” and “involve questions of constitutionality which might severely limit the adequacy of the statute.”¹⁷¹ Not yet knowing whether Congress would equalize treatment between the states, Dewey declared that even with the difficulties the commission foresaw, “if the Congress and the President fail to take action in the coming year, the State will be forced to modify its laws to protect its citizens as best it can from the present discriminatory situation.”¹⁷² That states on the East coast, with no tradition of civil law and facing constitutional difficulties presented by the *Willcox* decision, were contemplating the change put pressure on Congress to take some action.

Aftermath

While *Willcox* did not dissuade New York from considering adopting a community property system, it did make more difficult the adoption of the regime by common law states seeking merely to reduce their residents’ federal income taxes. Moreover, it forced states that had already enacted such statutes to consider potential legal challenges to their new laws.¹⁷³ That some states changed their marital property regimes and held on to those changes so tenaciously in the late 1930s and 1940s is surprising, particularly when the states’ objectives were so narrow and benefited so few. Equally intriguing is what drove some states to change regimes while others chose to wait impatiently for Congress to take action. The social attitudes that made the adoption of a community property law possible in these five states presumably existed in others, as neither the statutes nor the states that adopted them were particularly radical with respect to domestic relations.

Nonetheless, only five states changed regimes. Policymakers in the non-converting states likely decided based on the relative costs and benefits of

171. Alger B. Chapman, *A Report on the Advisability of Adopting a Community Property Law in New York State* (New York, 1947). The report contained no discussion of the impact the law would have on New York women or families.

172. “State Asks Easing of Couples’ Taxes,” *N.Y. Times*, December 14, 1947. See also “Democrats Speed Reply to Dewey,” *N.Y. Times*, December 16, 1947.

173. It proved difficult for opponents to bring cases quickly. A declaratory judgment seeking to declare Nebraska’s community property act unconstitutional was dismissed because of lack of proper parties and justiciable issues. *Miller v. Stolinski*, 149 Neb. 679 (1948). The Oklahoma state supreme court in *Swanda v. Swanda*, 207 Okla. 186 (1952), distinguished the Pennsylvania statute. See also *Bulgo v. Bulgo*, 41 Haw. 578 (1957).

the regime to wait for Congress. Adopting a community property regime was not without costs to common law legislators who increasingly recognized the impact the change in system would have on titles and creditors' rights within their states.¹⁷⁴ As seen in Oklahoma, only states with a great need to appease wealthy constituents would be willing to incur these costs. Moreover, many wealthy constituents had already found other means, albeit less secure ones, of achieving the same income-splitting objectives. Indeed, in 1947 the Treasury Department estimated that of the 24.7 million married taxpayers, 9 percent filed separate returns, of which more than half were from common law states.¹⁷⁵

However, once Oklahoma established a workable regime (except for the risks to be introduced in *Willcox*), common law states had the opportunity of giving wealthy residents a more secure method of splitting family income between spouses than could be achieved with most common law devices. Most state legislatures of the period, however, proved too weak to enact the provision either during or immediately following the war. By the time congressional inaction on tax reduction drove states to act in the face of local concerns about the regime, the war had ended and Congress had substantial room in the budget to address the problem of the disparate treatment of states' marital property regimes.¹⁷⁶ Then, as more and more states contemplated changing their property laws solely to secure federal income tax savings, the federal government took action. In 1948, in response to political pressure and flush with a \$6.8 billion surplus in government revenue occasioned by the end of the war, Congress enacted a bill allowing all couples to split family income between spouses regardless of its ownership attributes under state law.¹⁷⁷ This federal legislation terminated this opportunity for tax gamesmanship between states.

The Revenue Act of 1948 was not, however, an extension of the community property regime to all states as some argued at the time. It did not affect state-defined property rights in any way. It merely made the state-law determination of ownership as between spouses no longer relevant to this aspect of federal income taxation.¹⁷⁸ Consequently, married couples received the benefit of income-splitting without having to divide the own-

174. See notes 12, 13, 23, 99, and 124.

175. Treasury Department, "The Tax Treatment of Family Income," reprinted in *Hearings on Revenue Revisions*, 859-63.

176. Cullen B. Gosnell and Lynwood M. Holland, *State and Local Government in the United States* (New York: Prentice-Hall, 1951), 247-51.

177. Revenue Act of 1948, Pub. L. No. 471, 62 Stat. 110, 111-12 (1948); House Ways and Means Committee, *Individual Income Tax Reduction Act of 1947*, 80th Cong., 1st sess., 1947, H. Rep. 180, 7.

178. State property law continued to govern the determination of property ownership and many other questions of federal taxation.

ership of family property between spouses. As a warning to future policy-makers, this change in policy had been forced by tax avoidance and was accepted by Congress only in response to pressures created by Americans' antitax sentiment.

If Congress had not legislated to remove the tax advantage the community property states enjoyed, it is likely that all states eventually would have enacted community property statutes. Once the Supreme Court showed that it was not going to reverse *Seaborn*, and as more states made the switch to community property regimes, the remaining common law states would have felt increasing pressure to do so. Angry taxpayers could vote with their feet against what they perceived as unfair taxation at the hands of the federal government. In response, states, worried that the federal government was, in fact, taxing their citizens at higher effective rates than their neighbors, were frank about their tax-avoidance objectives. The push for uniformity was thus instigated at the state level as states competed to take advantage of the federal system. No state wanted to deprive its current and potential residents of a tax reduction.

Once the federal government extended income-splitting to all couples, those states with newly enacted community property statutes rapidly repealed the provisions, highlighting that the allure of the community property regime had been intimately linked to its tax savings.¹⁷⁹ Michigan led the way, repealing its statute within months of the enactment of the Revenue Act of 1948. The other newly converted states followed suit during their next legislative sessions. The statutes were repealed partly because the complications common law lawyers had predicted had come to fruition. In Oklahoma, even after eight years of experience with community property, the state's collector of revenue complained of the number of questions pouring in regarding the community property law's operation.¹⁸⁰ More importantly, however, the community property statutes could be repealed because the purpose of the statutes had been met. In Michigan, "upon the passage of the Revenue Act of 1948, it was felt almost universally that

179. Okla. H.B. 13, 1949; Neb. Laws 1949, c. 129, § 6; Mich. Public Act No. 39, May 10, 1948; Ore. Laws 1949, c. 349. The repeal of community property statutes did raise legal concerns for newly created community property. See Trice, "Community Property," 38-45; Trice, "Constitutional Questions," 1812-18; William B. Cudlip, "Repeal of Michigan Community Property Act," *Michigan State Bar Journal* 27 (1948): 14; W. Preston Woodruff, "The Effect of the Act Repealing the Community Property Law . . . and Suggested Procedure Thereunder," *Oklahoma Bar Association Journal* 21 (1950): 84-94; Note, "Epilogue to the Community Property Scramble: Problems of Repeal," *Columbia Law Review* 50 (1950): 332-51.

180. "Tax Questions Still Come In; Jones Replies," *Daily Oklahoman*, January 12, 1948; "If So, Let's Repeal It," *Daily Oklahoman*, December 7, 1947.

the local statute had accomplished its purposes . . . ,” and the legislature was therefore free to repeal the community property law and eliminate the complexities that came with the civil law regime.¹⁸¹

In Oklahoma, the common law state with the longest experience with the community property system, the legislature began the process of repealing its community property laws in early January 1949. As for any negative effects on wives that the repeal might engender, proponents of repeal argued disparagingly that “the wife can only lose what she gained accidentally under a statute passed for other purposes.”¹⁸² And so, three-and-a-half years after the mandatory regime was enacted, a bill was proposed in the house repealing all provisions in the state’s statutes relating to community property.¹⁸³ This bill, unlike the 1939 or 1945 Acts, managed to pass as emergency legislation, going into effect immediately when signed June 2, without the standard mechanism permitting a call for a referendum.

Not all shared the rush to repeal in Oklahoma. As with the enactment of the community property regime, the speediness of its repeal bothered some. A few businessmen, in fact, wanted to retain the measure—if only for a little while longer—because they were worried that Congress would repeal or otherwise eliminate the income-splitting provisions enacted only the year before.¹⁸⁴ If Congress changed its mind on nationalized income-splitting after Oklahoma had repealed its community property law, its residents would again be subject to increased taxes relative to couples in neighboring states. However, these views were not the dominant opinion of Oklahoma attorneys.¹⁸⁵ Those Oklahoma lawyers who had always disliked the confusion caused by the civil law system were finally gaining the upper hand.

Even as a general disdain for taxes dominated the repeal debates, the issue of the community property system’s impact on wives finally gained some, however marginal, attention. While there was no organized support

181. Cudlip, “Repeal of Michigan Community Property Act,” 14.

182. Joe B. Thompson, Early Q. Gray, and W.R. Wallace, Jr., “The Constitutionality and Effect of the Repeal of the Community Property Law,” *Oklahoma Bar Association Journal* 21 (1950): 80.

183. To appease attorneys who were concerned about the technicalities of repeal, the Judiciary Committee added a provision providing for the recording of then-existing community property and a statute of limitation after which all community property would be deemed owned by the person in whose name title rested. State Legislative Council, Quarterly Meeting, November 22–23, 1948, Folder 19–4, Box 19, Record Group 8–M-1, Governor’s Office Records, OK State Archives; Okla. Laws 1949, c. 229, § 2, renumbered from Title 32, § 83 [32–83] by Okla. Laws 1989, c. 333, § 2. eff. November 1, 1989.

184. “Don’t Be Hasty,” *Daily Oklahoman*, January 27, 1949.

185. L.D. Melton to Turner, 10 January 1948, Folder 2–10, Box 2, Record Group 8–M-2, Governor’s Office Records, OK State Archives.

by women for the retention of the law, James C. Nance, chairman of the powerful Senate Revenue and Taxation Committee, pushed to retain the community property regime. "The community property law makes husband and wife full partners after marriage. It is a step for womanhood and the women of Oklahoma want to retain the community property law. I have never talked to a woman who wants the law repealed."¹⁸⁶ This was, however, far from a popular view, and the majority of the state was not in favor of enlarging married women's rights. As progressive women focused on other feminist goals within the state, most people felt that the repeal would make little difference to the average married couple.¹⁸⁷ In this instance, marriage was an arena in which property ownership and the distribution of income and property within families and between families and the state was debated in ways that was not about marriage itself. Being cast as a tax law had prevented the community property system from ever gaining acceptance as a means to help equalize relations between the sexes.

In truth, the community property regime had never gained widespread acceptance and so its repeal aroused little attention. The public had not been the driving force behind the law's enactment or its repeal. Public inattention to the repeal was facilitated, as the Oklahoma Public Expenditures Council noted, because it was given so little publicity by the legislature.¹⁸⁸ The secretive process might well have secretly pleased Oklahoma's governor, Roy J. Turner. As Kerr's successor, Turner was devoted to continuing Kerr's program of recruiting industry to Oklahoma. His focus on building the state and diversifying its economy made him reluctant to deal with potentially sensitive issues. Turner told one reporter that he was ambivalent about the repeal measure, but he did eventually sign the bill.¹⁸⁹ Turner then not only failed to mention the repeal of the community property statute in his summary of the actions of the legislature in his biweekly radio address to the people, he failed to mention its repeal at any point that year.¹⁹⁰ Businesses, not the rights of the state's wives, held his interest.

186. "Repeal of Joint Property Law Up to Turner," *Daily Oklahoman*, May 27, 1949.

187. "Public Hearing on Community Tax Law Called," *Daily Oklahoman*, January 23, 1949.

188. Steve Stahl, 22 March 1949, Folder 53, Box 2, General, Carl Albert Collection, Carl Albert Center.

189. "State Taxpayers Turn in Record," *Daily Oklahoman*, March 17, 1949; "Repeal of Joint Property Law Up to Turner," *Daily Oklahoman*, May 27, 1949. In his inaugural address in 1947, he stated, "The community property law of 1945 is, in effect, a tax measure and a good one." Inaugural Address, 13 January 1947, Folder 4-2, Box 4, Record Group 8-M-6, Governor's Office Records, OK State Archives.

190. Report to the People, 6 June 1949, Box 1, Folder 1-3, Record Group 8-M-6, Governor's Office Records, OK State Archives. Turner mentioned the community property regime earlier in 1947 when he pointed out it enabled married couples to save federal income taxes.

Thus, through the repeal process states tried to undo the systems they had created over the previous decade while states with long histories of community property regimes continued as they had before their regimes generated tax savings. Those seeking repeal had never been truly comfortable with the system and had adopted it only as part of a larger process of tax gamesmanship between states. Indeed, most practitioners, scholars, and politicians had resisted the change as they worked to devise a coherent relationship between the constitutional requirement that federal law apply uniformly across the states and the Supreme Court's requirement that state law determine property ownership for federal tax law purposes. These groups failed in five states, and if Congress had delayed further, the count might have been much higher. In fact, for most states during this period, the fear of complications and the unknown meant that their married couples paid more in taxes than those residing in states that were less risk-averse. By adopting community property statutes, aggressive states used the federal system to benefit their citizens. Through this portrayal of the issue by the press and in Congress as one of federalism, people across the nation felt moved to end discrimination between states, even if that discrimination was felt by only a few—the wealthy few. And Congress proved only too happy to oblige.

Report to the People, 7 August 1947, Folder 2-7, Box 2, Record Group 8-M-6, Governor's Office Records, OK State Archives.

2

Legal History Dialogues

The following section focuses on the craft of history. An interview with Hendrik (Dirk) Hartog by Barbara Welke in June 2007 at the 4th Biennial Hurst Summer Institute in Legal History in Madison, Wisconsin starts the conversation. Several Hurst Fellows join Welke in posing questions, including ones about Hartog's classic 1985 article on "Pigs and Positivism." Just as reading J. Willard Hurst's *Law and the Conditions of Freedom* launched many careers in legal history, Hartog's article now serves as an introduction to the field for many graduate students.

The second dialogue—Kenneth W. Mack's and Nancy MacLean's conversation about writing the history of the civil rights movement—introduces the reader to a vibrant historiography. It complements nicely Hartog's thoughts on the relationship between law and the everyday, and moves the discussion from nineteenth-century subjects to the twentieth-century problem of the color line. Significantly, Mack and MacLean discuss how to bring law into this literature, while highlighting the importance of studying African American legal liberalism.

David S. Tanenhaus
Editor



Photo 1. 2007 Hurst Fellows with colleagues, Closing Banquet, 22 June 2007, Madison, WI. Left to right: Stanley Kutler, Pam Hollenhorst, Karl Shoemaker, Steven Porter, Stelios Tofaris, Diana Williams, Barbara Welke, Laura Weinrib, Dirk Hartog, Sophia Lee, Nandini Chatterjee, Honor Sachs, Joshua Barkan, Anne Kornhauser, Ray Solomon, Masako Nakamura, Roman Hoyos, and Lisong Liu.