

## CALIFORNIA WOMEN: USING FEDERAL TAXES TO PUT THE “COMMUNITY” IN COMMUNITY PROPERTY

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“Can the gentleman give us any good reason why eight States of the Union should pay a lesser income-tax rate on the same income than the other 40 States pay?”<sup>1</sup> The answer was that those eight states had community property marital property regimes.<sup>2</sup> From the beginning of the federal income tax in 1913 until the adoption of the income splitting joint return in 1948, wealthy couples used gifts, trusts, family partnerships, and other devices to shift income between spouses in order to ensure more income could be taxed in the “poor spouse’s” lower tax brackets.<sup>3</sup> Only married couples in community property states, however, could argue that their state civil law marital property regime *required* them to divide their family income between spouses because property of the husband and wife belonged to each by halves. What “belonged to each” meant in this context was open to debate, but, generally, wives were deemed to have a one-half interest in the income, including wages, their husbands earned during marriage.<sup>4</sup> Common law couples, even under Married Women’s Acts, could not make that argument.

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1. 78 CONG. REC. 2664 (1934) (statement of Rep. John Brown).

2. *See id.*

3. I put “poor spouse” in quotes because, if a married couple functions as an economic unit, one spouse would not be wealthier than the other.

4. Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington were community property states upon admittance to the Union. Only Louisiana operated the civil law *in toto*. Although their community property systems varied significantly, there were broad similarities. Everything acquired by either spouse before marriage remained separate property of the acquiring spouse. Similarly, property acquired by gift, will, or intestacy by one spouse was that spouse’s separate property even if the property

After some hesitant uncertainty, the Treasury Department sided with community property couples in Texas, and then with most of the other community property states.<sup>5</sup> As a result, couples could divide community income and double dip in the lowest tax brackets to reduce their collective federal income taxes. This boon to the married couples of most community property states was denied to couples in California because the state's judiciary had ruled that under state law wives lacked vested rights in their half of the community property.<sup>6</sup>

Progressive Era women, recognizing what amounted to a tax loophole as an opportunity, sought to use the federal tax law to leverage increases in their marital rights. While California had always been a community property state, the state's laws fell significantly short of giving wives control over that property or ownership rights as we think of them today. Women in the 1910s and 1920s began to argue that California couples would enjoy federal tax reduction if only the state's community property law was revised to give wives a greater practical interest in their half of marital community property. If these changes were made, the argument went, wives could report and pay tax on half of the family's income. California families would effectively shift half of their families' income between spouses for federal tax purposes without engaging in any additional tax planning. Burnita Shelton Mathews, at the time a lawyer for the National Woman's Party, summed up what women were hoping: "Now that the nature of the wife's interest is found to involve so many millions of dollars in taxes, perhaps the matter will receive greater consideration, and impetus be given to the cause of Equal Rights between men and women."<sup>7</sup> As long as women controlled framing the link between marriage and taxes, they stood to gain even as the federal government lost revenue.

California women would no longer countenance the idea of community property giving them rights they could not actually enjoy. The community property system seemed to provide all wives greater independence than was won by Married Women's Acts in common law states by creating an economic community during marriage. Unfortunately, owing to the influence of lawyers from the East trained in the common law in drafting, and, perhaps more importantly, interpreting the various statutory provisions in the eight states,

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was acquired during the marriage. On the other hand, all income and earnings of either spouse during the marriage belonged to both as community property. Income generated by separate property was generally separate property, but some jurisdictions treated it as community property. For a discussion from the period covered in this paper, see GEORGE MCKAY, *A TREATISE ON THE LAW OF COMMUNITY PROPERTY* (Bobbs-Merrill Co. 2d ed. 1925) (1910); Alvin E. Evans, *The Ownership of Community Property*, 35 HARV. L. REV. 47 (1921); J. Emmett Sebree, *Outlines of Community Property*, 6 N.Y.U. L. REV. 32 (1928).

5. 32 Op. Att'y Gen. 298 (1920); O.D. 426, 2 C.B. 198 (1920). See also William T. Hancock, *A Look at Community Property Law*, 34 VA. L. REV. 417, 419 (1948).

6. T.D. 3138, 4-5 C.B. 238, 249-50 (1921). The Treasury Department did recognize husband-wife partnerships under California law. I.T. 1744, II-2 C.B. 179-80 (1923).

7. Burnita Shelton Mathews, *Supreme Court Decision on California Community Property*, EQUAL RIGHTS, Jan. 23, 1925.

community property regimes in the United States differed more from the common law in theory than in practice.<sup>8</sup> Although some argued that community property systems established a partnership between spouses, equal partnerships were not being created. Even when wives held vested interests in the family's community property, they did not have joint control over that property. Instead, as under the common law, control was determined by statute and judicial decision to reside with husbands, even though certain statutory limitations for the protection of wives had been placed upon husbands' powers.<sup>9</sup>

California provides a clear example of the limits of rights presumed to be granted to wives under a community property regime. Almost immediately after the state's original 1849 constitution had been adopted, the legislature minimized the rights enjoyed by the state's wives. Within three decades of joining the Union, wives could not control, convey, or even devise their half of the community property.<sup>10</sup> By the turn of the twentieth century, however, women were on the offensive, working to make California's community property regime live up to its promise of greater rights for wives. Although California was at the forefront of social welfare legislation throughout the Progressive Era,<sup>11</sup> women quickly learned the limitations of arguing for married women's rights in terms of a progressive concern for equity and justice.<sup>12</sup> As a result of political constraints, they adopted the possibility of tax reduction as a political tool. This effectively linked women with tax reductionists within the state, increasing their numbers but diluting their original purpose.

Thus, while Progressive Era reformists might have been motivated by a "moral fervor," when women sought marital rights they adopted pragmatic, anti-tax rhetoric to further their ends.<sup>13</sup> Much as they had used taxes as a basis for demanding representation, taxes would now be the basis for claiming social rights.<sup>14</sup> Their goal as one of the era's "scores of aggressive, politically active pressure groups" was to take the issue of marital property out of the background by using tax reduction, a popular topic, to advance wives' issues.<sup>15</sup>

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8. For instance, in *George v. Ransom*, Judge Joseph Baldwin interpreted "separate property" as within its common law meaning because "the large majority of [the framers] were familiar with, and had lived under that system." 15 Cal. 322, 324 (1860). For similar arguments on a national level, see Sara L. Zeigler, *Uniformity and Conformity: Regionalism and the Adjudication of the Married Women's Property Acts*, 28 POLITY 467, 494 (1996).

9. John Paul Jackson, *Community Property and Federal Taxes*, 12 SW. L.J. 1, 4 (1958). Only rather late did community property wives gain the right to control even their separate property. See, e.g., Robert L. Gibson, Jr., Note, *Protection of the Widow: A Common Law View of Community Property*, 15 FL. L. REV. 143, 151-52 (1962).

10. See *infra* pp. 11-12.

11. Sherry Katz, *Socialist Women and Progressive Reform*, in CALIFORNIA PROGRESSIVISM REVISITED 117, 118 (William Deverell & Tom Sitton eds., 1994).

12. See *id.* at 119-20.

13. See Daniel T. Rodgers, *In Search of Progressivism*, 10 REV. AM. HIST. 113, 117 (1982).

14. LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND OBLIGATIONS OF CITIZENSHIP, 81-86 (1998).

15. Rodgers, *supra* note 12, at 114.

As women had done with respect to other women's goals, such as suffrage and Married Women's Acts, they used arguments that these changes would help the family to secure advances in their own rights.<sup>16</sup> This article thus furthers recent work showing that Progressive Era women were active players in the political process, and not always with an agenda focused on only helping others.<sup>17</sup>

Their argument was only possible because of the interaction of federal and state law. As the federal income tax imposed new economic burdens on California's wealthiest taxpayers, the state was willing to change its domestic laws in order to reduce that burden. Much of the existing literature on federalism, in particular fiscal federalism, focuses on competition between states and describes the story as one of states' unilinear interaction with the federal government.<sup>18</sup> In this particular debate, the relation was more complex: States worked within the federal system for tax reduction.<sup>19</sup> Thus, adding to the literature on federalism, this article shows how, in the process of making claims

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16. See, e.g., Gayle Gullett, *Constructing the Woman Citizen and Struggling for the Vote in California, 1896-1911*, 69 PAC. HIST. REV. 573 (2000); LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE, 1890-1935* (1994); Gwendolyn Mink, *The Lady and the Tramp: Gender, Race, and the Origins of the American Welfare State*, in *WOMEN, THE STATE, AND WELFARE* 92 (Linda Gordon ed., 1990); JAMES J. CONNOLLY, *THE TRIUMPH OF ETHNIC PROGRESSIVISM: URBAN POLITICAL CULTURE IN BOSTON, 1900-1925* at 10 (1998); PEGGY PASCOE, *RELATIONS OF RESCUE: THE SEARCH FOR FEMALE MORAL AUTHORITY IN THE AMERICAN WEST, 1874-1939* (1990); THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* (1992); Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359 (1983); Rick Geddes & Dean Lueck, *The Gains From Self-Ownership and the Expansion of Women's Rights*, 92 AM. ECON. REV. 1079 (2002). Framing issues is important for determining how a policy's costs and benefits are assessed and weighted. See Peter A. Hall, *Preference Formation as a Political Process: The Case of Monetary Union in Europe*, in *PREFERENCES AND SITUATIONS* 129, 132-34 (Ira Katznelson & Barry Weingast eds., 2005); Margaret Weir, *Ideas and the Politics of Bounded Innovation*, in *STRUCTURING POLITICS: HISTORICAL INSTITUTIONALISM IN COMPARATIVE ANALYSIS* 188 (Sven Steinmo et al. eds., 1992).

17. Elizabeth Israels Perry, *Men Are From the Gilded Age, Women Are from the Progressive Era*, 1 J. GILDED AGE & PROGRESSIVE ERA 25, 35 (2002) (urging a rethinking about how we view women of the Progressive Era, and demonstrating that women did have real political power). Arguing that women did not have political power from 1780-1920, see Paula Baker, *The Domestication of Politics: Women and American Political Society, 1780-1920*, in *WOMEN, THE STATE, AND WELFARE* 55 (Linda Gordon ed., 1990), and arguing they also did not have unity from 1917 and 1923, see CONNOLLY, *supra* note 16, at 178.

18. See, e.g., Sean Nicholson-Crotty, Nick A. Theobald & B. Dan Wood, *Fiscal Federalism and Budgetary Tradeoffs in the American States*, 59 POL. RES. Q. 313 (2006); Kirk J. Stark, *Fiscal Federalism and Tax Progressivity: Should the Federal Income Tax Encourage State and Local Redistribution?*, 51 UCLA L. REV. 1389 (2004); Wallace E. Oates, *An Essay on Fiscal Federalism*, 37 J. ECON. LITERATURE 1120 (1999). But see Edward A. Purcell, Jr., *Evolving Understandings of American Federalism: Some Shifting Parameters*, 50 N.Y. L. SCH. L. REV. 635 (2005-06); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987).

19. See Stephanie Hunter McMahon, *To Save State Residents: States' Use of Community Property for Federal Tax Reduction, 1939-1947*, 27 LAW & HIST. REV. 585 (2009).

for women, claims for federal tax reduction were used to change state law and, in turn, pushed the development of the federal tax regime as the federal government responded to states' efforts to minimize the taxes owed.

Moreover, because it was less inflammatory than the same period's debates over the Equal Rights Amendment and equal pay, this dialogue between women, the public, and the state legislature over community property demonstrates how interest groups can use issues palatable to the larger public to achieve gains that would otherwise have held little popular appeal.<sup>20</sup> However, while women of the period had a political power that was well-recognized,<sup>21</sup> women soon lost control of the dialogue and wealthy taxpayers began to dominate the tax issue.<sup>22</sup> The state's final legislative act<sup>23</sup> that actually won California its tax benefits did so without benefiting wives in the state. That women's tactics in the 1920s conflated issues of women's rights and tax reduction, and ultimately lost control relative to the latter, shows the danger of linking women's issues with aims not normally considered feminist.<sup>24</sup> Thereafter, no significant changes were made to California's community property regime for a quarter of a century.<sup>25</sup>

This article examines the process by which these legal changes to California's community property regime occurred and uses this process to highlight the costs and benefits of political alliances. To accomplish that objective, it does not seek to suggest that using arguments regarding tax reduction was the only, or even the most successful, tool women employed to advance their community property rights. Part I discusses the early establishment of the community property regime in California and the rapid process by which it lost its progressive ideals. Part II looks at developments in the system in the early twentieth century as well as the impact the regime had

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20. Similar policy networks of government actors, private analysts, and interest groups formed around other issues. See, e.g., Elisabeth S. Clemens, *Organizational Repertoires and Institutional Change: Women's Groups and the Transformation of U.S. Politics, 1890-1920*, 98 AM. J. SOC. 755 (1993); Hugh Hecllo, *Issue Networks and the Executive Establishment*, in THE NEW AMERICAN POLITICAL SYSTEM 87 (Anthony King ed., 1978); JULIAN E. ZELIZER, *TAXING AMERICA: WILBUR D. MILLS, CONGRESS, AND THE STATE, 1945-1975* (1998); BRIAN BALOGH, *CHAIN REACTION: EXPERT DEBATE AND PUBLIC PARTICIPATION IN AMERICAN COMMERCIAL NUCLEAR POWER, 1945-1975* (1991).

21. See LORRIANE GATES SCHUYLER, *THE WEIGHT OF THEIR VOTES: SOUTHERN WOMEN AND POLITICAL LEVERAGE IN THE 1920S* (2006); KRISTI ANDERSEN, *AFTER SUFFRAGE: WOMEN IN PARTISAN AND ELECTORAL POLITICS BEFORE THE NEW DEAL* 156-57 (1996); Wendy Sarvasy, *Beyond the Difference versus Equality Policy Debate: Postsuffrage Feminism, Citizenship, and the Quest for a Feminist Welfare State*, 17 SIGNS 329 (1992).

22. See *infra* Part III.

23. 1927 Cal. Stat. 484.

24. Similar difficulties developed when men and women's interests diverged in the labor movement. See DOROTHY SUE COBBLE, *THE OTHER WOMEN'S MOVEMENT: WORKPLACE JUSTICE AND SOCIAL RIGHTS IN MODERN AMERICA* (2004); Rebecca J. Mead, "Let the Women Get Their Wages as Men Do": *Trade Union Women and the Legislated Minimum Wage in California*, 67 PAC. HIST. REV. 317 (1998).

25. See *infra* note 195.

on the federal tax system. State policymakers were quick to recognize the possibility of using their state marital property law for federal tax reductions. Part III examines how women lost control of the link between federal taxation and the community property regime. As a final change secured the desired tax cut, women's rights were no longer considered. This article concludes by evaluating the efficacy of this alliance between disparate interests.

### I. EARLY EVOLUTION OF CALIFORNIA COMMUNITY PROPERTY

Although from the time California became one of the United States it had a community property regime,<sup>26</sup> what that regime meant for the state's wives changed over time. As views towards women and their place within marriage and society evolved, so did the law's treatment of them. From the beginning, the language of community property seemed favorable to wives, but it was only in the late nineteenth and early twentieth centuries that community property began to give wives substantive rights within marriage. Not everyone was pleased with these developments and they were not always predicated on a desire to further wifely independence. Instead, they were often part of a political give and take that developed in halting steps.

California's history dates back long before the state's entry into the Union. Its history was for a long period dominated by Spanish, and then Mexican, civil law rule, which was stretched over a thinly populated land.<sup>27</sup> For married couples who lived there, spouses shared community property. Then the United States acquired the territory of California from Mexico in 1848.<sup>28</sup> Article VIII of the Treaty of Guadalupe Hidalgo, ending the Mexican-American War, provided that property belonging to Mexicans should be "inviolably respected," which was interpreted to require the continuance of the community property system, at least for these couples.<sup>29</sup> One modern scholar has concluded that "[t]o avoid the confusion of a dual system of land holding, it was adopted generally as well."<sup>30</sup> On a broader scale, the military government administering the territory made serious efforts to retain the civil law system and it appears to have succeeded in the period before statehood.<sup>31</sup> The territory preserved much

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26. CAL. CONST. of 1849 art. XI, § 14.

27. For a good discussion of the role of women in these earlier times, see BARBARA O. REYES, *PRIVATE WOMEN, PUBLIC LIVES: GENDER AND THE MISSIONS OF THE CALIFORNIAS* (2009); MARIA RAQUEL CASAS, *MARRIED TO A DAUGHTER OF THE LAND: SPANISH-MEXICAN WOMEN AND INTERETHNIC MARRIAGE IN CALIFORNIA, 1820-1880* (2007); TESTIMONIOS: EARLY CALIFORNIA THROUGH THE EYES OF WOMEN, 1815-1848 (Rose Marie Beebe & Robert M. Senkewicz trans. 2006).

28. CASAS, *supra* note 27, at 3.

29. Treaty of Peace, Friendship, Limits and Settlement (Treaty of Guadalupe Hidalgo) art. VIII, U.S.-Mex., Feb. 2, 1848, 18 Stat. 492, 495.

30. BARBARA NACHTRIEB ARMSTRONG, *CALIFORNIA FAMILY LAW: PERSONS AND DOMESTIC RELATIONS, THE COMMUNITY PROPERTY SYSTEM* 431-32 (1953).

31. See Susan Westerberg Prager, *The Persistence of Separate Property Concepts in California's Community Property System, 1849-1975*, 24 UCLA L. REV. 1, 10-11 (1976).

of the property relationships and government structure that had existed under Mexican rule.

After a gold rush-induced population explosion,<sup>32</sup> largely from the eastern United States, California's initial 1849 state constitution ignored its civil law past and adopted the common law for all purposes but marriage.<sup>33</sup> The rejection of the civil law system should not be surprising because of the political dominance of those for whom the civil law was a foreign, and hence inferior, system. Of the forty-seven convention delegates, only seven were native Californians and five were from foreign countries.<sup>34</sup> Despite this skewed political power, the civil law marital property regime, the subject of a vigorous debate that lasted one lone evening, was adopted for the state's married couples.<sup>35</sup> The retention of any of its civil law past is more surprising than that so much was jettisoned.

Although some members of the constitutional convention saw the community property provision as radical, others merely hoped it would attract women to the male-dominated state. Future Civil War general H.W. Halleck, a bachelor at the time, claimed, "I do not think we can offer a greater inducement for women of fortune to come to California. It is the very best provision to get us wives that we can introduce into the Constitution."<sup>36</sup> Halleck's conclusions were particularly important because of the role he played in the framing of issues for the convention. He bragged, "The first draft of most of the articles of the constitution of California was made by me and submitted to a committee for revision before being reported to the Convention."<sup>37</sup> On the other hand, the views of the other delegates were diverse as to what the provision would mean in practice.<sup>38</sup> While some opposed the provision because it "goes to change entirely the nature of the married relations"<sup>39</sup> or that "[t]he only despotism on

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32. California's population increased from 26,000 on January 1, 1849 (only 8,000 of whom were Americans) to 107,069 (76,069 were Americans) on January 1, 1850. Orrin K. McMurray, *The Beginnings of the Community Property System in California and the Adoption of the Common Law*, 3 CAL. L. REV. 359, 359-60 (1915).

33. For a discussion of the territory's adoption of the community property regime, see generally *Id.*; J. ROSS BROWNE, REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA, ON THE FORMATION OF THE STATE CONSTITUTION, IN SEPTEMBER AND OCTOBER, 1949 (1850); M.R. Kirkwood, *Historical Background and Objectives of the Law of Community Property in the Pacific Coast States*, 11 WASH. L. REV. 1 (1936); Prager, *supra* note 31.

34. Prager, *supra* note 31, at 11.

35. Kirkwood, *supra* note 33, at 9. Some delegates dismissed the provision's importance until they were told during a break in the session that this provision was meant to open a door to introducing civil law more broadly. Donna C. Schuele, *Community Property Law and the Politics of Married Women's Rights in Nineteenth-Century California*, 7 W. LEGAL HIST. 245, 252-53 (1994) [hereinafter Schuele, *Community Property Law*].

36. BROWNE, *supra* note 33, at 259.

37. Prager, *supra* note 31, at 9 n.41 (quoting Letter from H.W. Halleck to Dr. Francis Lieber (July 5, 1867)).

38. BROWNE, *supra* note 33, at 259.

39. *Id.* at 257.

earth that I would advocate, is the despotism of the husband,”<sup>40</sup> others felt it was the “due to every wife”<sup>41</sup> and that it protected a wife from an “idle, dissipated, visionary, or impractical man.”<sup>42</sup> The first chief justice of California, K.H. Dimmick, worried that the alternative would take away women’s established rights.<sup>43</sup>

As with the adoption of Married Women’s Acts in common law states, concern for the family and the protection of family wealth ultimately prevailed. One framer worried that “no man can tell how long he can stand upon the pinnacle of wealth that he has reared for himself.”<sup>44</sup> In reconciling the issues of wealth protection and husbands’ control, policymakers took a wife-centered focus but one that did not necessarily give wives all that they would have hoped for from a community property system. The 1849 Constitution provided:

All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise, or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property as to that held in common with her husband. Laws shall also be passed providing for the registration of the wife’s separate property.<sup>45</sup>

While it is odd to frame a community property regime with reference to a wife’s separate property, from their debates it is evident that the framers saw this provision as empowering women and changing the family relation. They thought that California’s law of marriage was somehow different from the common law. That view, however, proved short-lived.

Less than three months after the adoption of the state’s constitution, California’s legislature met and enacted a law interpreting the constitution’s community property provision.<sup>46</sup> The Act of April 17, 1850 gave husbands management and control of even their wives’ separate property with the only qualification that wives must join in the sale of, or in establishing a lien on, her own property.<sup>47</sup> With so little regard for a wife’s separate property rights, in 1860, Justice Stephen Field, as a California Supreme Court Justice, characterized the wife’s interest in community property as a “mere expectancy.”<sup>48</sup> This label would haunt the state in future tax debates even

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40. *Id.* at 260.

41. *Id.* at 258.

42. *Id.* at 259.

43. *Id.* at 262-63.

44. BROWNE, *supra* note 33, at 266.

45. CAL. CONST. of 1849 art. XI, § 14.

46. The adoption attracted little journalistic attention. Kirkwood, *supra* note 33, at 9; Prager, *supra* note 31, at 32.

47. “An Act defining the rights of Husband and Wife,” Act of Apr. 17, 1850, ch. 103, 1850 Cal. Stat. 254.

48. *Van Maren v. Johnson*, 15 Cal. 308, 311 (1860).

though some argued there was a second strain of judicial opinions from this period that insisted wives did, in fact, have a real right to half of the community property.<sup>49</sup> One could argue that early California state courts saw wives' ownership rights on a sliding scale, whereas, for tax purposes, ownership was binary: Either wives had ownership or they did not. Forced into a binary mold, wives lost out.

Furthering this trend, in 1861 the state legislature enacted an amendment so that, on the death of a wife, all community property went without administration to her surviving husband.<sup>50</sup> However, if a husband died first, his children still received one-half of his estate.<sup>51</sup> Thereafter, wives had no control over community property and no right to leave it to anyone upon their deaths. Community property scholar Susan Prager argues that over the first forty years of statehood the legislature substantially undid the progressive gains of the 1849 Constitution and that California wives were given even less protection than enjoyed under most Married Women's Property Acts.<sup>52</sup> Full management power over even their own separate property only came with the adoption of the Field Code which was more an administrative revision than a result of feminist reform efforts.<sup>53</sup> In this early period of California history, community property was not the reformist objective it later would be.<sup>54</sup>

Even though by 1890 husbands had complete dominion over community property, beginning in 1891 the legislature began to protect wives' community property interests by enacting a series of statutes that restricted husbands' *inter vivos* control. This was begun at a time when many of the female immigrants to California, most from common law communities, would have had little knowledge of community property principles, especially with so few women in the state trained as lawyers.<sup>55</sup> The process of revising the community property law was gradual. The government first granted wives negative rights, such as

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49. For cases in which the court found the wife's interest substantial, see *Kashaw v. Kashaw*, 3 Cal. 312 (1853); *Beard v. Knox*, 5 Cal. 252 (1855); *Smith v. Smith*, 12 Cal. 216 (1859); *Meyer v. Kinzer*, 12 Cal. 247 (1859).

50. Act of May 8, 1861, ch. 323, § 1, 1861 Cal. Stat. 310-11.

51. *Id.*

52. Prager, *supra* note 31, at 25. See also Act of Apr. 4, 1864, ch. 333, § 11, 1863-64 Cal. Stat. 363.

53. See Prager, *supra* note 31, at 41; Act of Apr. 17, 1850, ch. 103, § 6, 1850 Cal. Stat. 254; Schuele, *supra* note 35, at 263-67. Wives were given right to write wills without needing the consent of their husbands in 1866. Act of Mar. 20, 1866, ch. 285, § 1, 1865-66 Cal. Stat. 316, 316-17.

54. This is not to suggest that women were not advocating reform in this pre-1890 period. For example, in 1872 the California Woman Suffrage Association presented the legislature with a petition calling for a constitutional amendment granting women suffrage and generally requesting changes in the community property statutes to equalize marital property rights. It was officially presented by Leland Stanford, former governor, and bore more than 5,000 signatures. Schuele, *supra* note 35, at 260, 268-69.

55. There was only one practicing female attorney in Los Angeles at the time. JOAN M. JENSEN & GLORIA RICCI LOTHROP, CALIFORNIA WOMEN: A HISTORY 33 (1987).

requiring their consent for the disposition of community property,<sup>56</sup> and then provided them positive ones, such as the right to dispose of their half of community property by will.<sup>57</sup> These expansions, however, remained limited. Not only did the state supreme court prevent these amendments from applying retroactively, the few rights granted were interpreted narrowly.<sup>58</sup> Legal commentators noted in 1930 that, “[i]n short, what between ill-conceived legislation and judicial construction..., the wife’s legal power to control the community property against wrongful conveyances by the husband, much less against the improvidence and vicious expenditures of the husband, remain[ed] practically ineffective.”<sup>59</sup>

Women’s voices cried loudly for these, and further, changes. From an early date, wives were dissatisfied with a mere expectancy in one-half of community property. For example, the wife of a local judge in Santa Clara county, Mrs. Sarah Wallis, bought a 250-acre parcel of land for the family home in her own name.<sup>60</sup> When the civil system prevented her, as a married woman, from managing that land, she concluded that the laws needed to be changed.<sup>61</sup> Thereafter, she lobbied until she won an amendment enabling married women to make contracts.<sup>62</sup> Another woman, Marietta Stow, complained, “Expectancy is intangible. It is like the sparkling bubbles upon the beach, which the next wave laps up, and they are seen no more.”<sup>63</sup> Even though she had ample separate property, based on her own experience in probate court, Stow began a crusade to protect wives.<sup>64</sup> She even sought to give wives half-ownership of their husbands’ separate property but not vice-versa.<sup>65</sup> In this period of progressive change, while middle-class women were still strictly bound by custom, some proved willing and able to contest their legal lot in marriage. For some brave women, in the changing social and economic world of the turn of the century California, they could demand greater equality within marriage.

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56. Act of Mar. 31, 1891, ch. 220, § 1, 1891 Cal. Stats. 425.

57. Act of Mar. 23, 1901, ch. 190, § 1, 1901 Cal. Stats. 598.

58. *See, e.g.*, Spreckels v. Spreckels, 48 P. 228, 231 (Cal. 1897). The court so held even when it imposed a monetary cost on wives. *See infra* notes 71-78.

59. Orrin K. McMurray & Jackson W. Chance, *Community Property: Effect of Gift of Community Property Without Wife’s Consent*, 18 CAL. L. REV. 400, 409 (1930).

60. 3 HISTORY OF WOMAN SUFFRAGE 765 (Elizabeth Cady Stanton et al. eds., Charles Mann Printing Co. 1986) (1886); Mary Lou Lyon, *Sarah Armstrong Montgomery Green Wallis*, 50 CAL. HISTORIAN (2003) available at <http://www.californiahistorian.com/articles/sarah-armstrong.html>.

61. 3 HISTORY OF WOMAN SUFFRAGE, *supra* note 60, at 765.

62. *Id.*

63. MRS. J. W. STOW, PROBATE CONFISCATION: UNJUST LAWS WHICH GOVERN WOMEN (1876). For a discussion of Stow’s efforts, *see* Donna C. Schuele, *In Her Own Way: Marietta Stow’s Crusade for Probate Law Reform Within the Nineteenth-Century Women’s Rights Movement*, 7 YALE J.L. & FEMINISM 279 (1995) [hereinafter Schuele, *In Her Own Way*]; Schuele, *Community Property Law*, *supra* note 35, at 277-80.

64. Schuele, *In Her Own Way*, *supra* note 63, at 279, 282, 285 n.64.

65. *Id.* at 287.

Many of these women were already organized for other reasons. As the numbers of men and women neared parity (except for the Asian population which remained disproportionately male), women had begun to reproduce East Coast culture, including the female-dominated reform organizations prevalent throughout the Progressive Era.<sup>66</sup> These were particularly important because, by 1900, a growing majority of California women were living in cities and confronting urban and industrialization problems with a plethora of political, economic, and moral reforms.<sup>67</sup> Their reach, however, was limited. Not only did they not have the right to vote, but many were relegated to low-paying jobs.<sup>68</sup> Unlike Clara Foltz, a twenty-seven year old divorced mother with five small children, who became the first woman admitted to the California bar,<sup>69</sup> economic reality led many women to seek marriage rather than wages in order to obtain financial security.<sup>70</sup> Seeking security within marriage, they wanted all of the benefits marriage could provide, but few women at this early time had strong ideas as how best to secure those advances in the context of the community property regime.

Forces stronger than feminism were pushing the development of family law, namely a conservative court overseeing intra-family and male-dominated quarrels. One fight highlighting the pressures driving early changes to the state's marital law involved Claus Spreckels.<sup>71</sup> Spreckels was an industrialist who came to dominate the Hawaiian sugar trade and sire a very wealthy family.<sup>72</sup> That family also endured a very public split. In one family argument, Claus became angry that a son, Gus, signed a Sugar Trust agreement for the family's Philadelphia refinery.<sup>73</sup> After much public noise, including a claim by Claus that Gus had embezzled \$250,000, in 1895 Gus sued Claus for slander.<sup>74</sup> In the continuing saga, Gus had previously received a gift from Claus that

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66. JENSEN & LOTHROP, *supra* note 55, at 22-30, 36-37.

67. *Id.*

68. *Id.*

69. Mortimer D. Schwartz, Susan L. Brandt, & Patience Milrod, *Clara Shortridge Foltz: Pioneer in the Law*, 27 HASTINGS L.J. 545, 545-46 (1976). Similarly, women like Phoebe Hearst, who became the manager of her husband's estate (he left her the estate because he feared that his son would spend the money on newspapers), began to see that women needed political power both for management of their estates and for their social reforms. Alexandra M. Nickliss, *Phoebe Apperson Hearst's "Gospel of Wealth," 1883-1901*, 71 PAC. HIST. REV. 575, 589 (2002). Many female reformers, however, chose not to marry, so it is possible that community property was not an issue of significant concern for this group in this early period.

70. JENSEN & LOTHROP, *supra* note 55, at 41.

71. *Spreckels v. Spreckels*, 48 P. 228 (Cal. 1897); Charlotte K. Goldberg, *A Cauldron of Anger: The Spreckels Family and Reform of California Property Law*, 12 W. LEGAL HIST. 241 (1999).

72. Goldberg, *supra* note 71, at 242.

73. *Id.* at 246, 250.

74. *Id.* at 254.

Claus, angered by the slander suit, then sought to rescind.<sup>75</sup> Claus wanted to use the legislature's 1891 requirement, that husbands not make gifts of community property without their wives' consent, to accomplish his objective. Because Claus had not bothered to get his wife's permission for the original gift, Claus claimed the gift was invalid.<sup>76</sup> His wife was curiously silent.

Despite the opportunity to help a powerful California husband, the California State Supreme Court refused to do so. That interpretation would have required a wife-friendly reading of the community property revision. After noting that the state's constitution did not mention community property, only wives' separate property, the state supreme court ruled that the governing statute "gives to the husband complete legal ownership of community property..., and confers upon the wife no element of ownership whatever."<sup>77</sup> The court rejected Claus' argument on the grounds that the 1891 amendment could not retroactively give his wife a power over property because to do so would thereby divest husbands of a property right.<sup>78</sup> This protection of husbands' prerogative would be something that, under most other circumstances, Claus would have supported.

The *Spreckels* opinion was published despite the fact that by the late nineteenth century issues of community property were recognized to have important tax implications that could mean substantial tax reduction for wealthy married couples. Then, in 1905, California adopted its basic inheritance tax statute, so that "[a]ll property which shall pass by will or by the intestate laws of this state, from any person who may die seized or possessed of the same...shall be and is subject to a tax hereinafter provided for."<sup>79</sup> In *In re Estate of Moffitt*, the state supreme court interpreted the tax to apply to a wife when she received her half of the community property at her husband's death.<sup>80</sup> In the case before the court, the princely sum of \$26,684.50 was at stake.<sup>81</sup> The court held, "Thus the legislature is presumed to have enacted [the inheritance tax act] with full knowledge that this court in Bank, not once but repeatedly, had declared that the wife did take her share of the community property... as his heir."<sup>82</sup> Moreover, if it "never entered the minds of the men constituting the

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75. *Id.* at 246; *Spreckels*, 48 P. at 228. By the time this case was resolved, the previously favored children were being excluded from the estate on the grounds that they had already received their share. *Spreckels v. Spreckels*, 158 P. 537, 537-38 (1916).

76. *Spreckels*, 48 P. at 228-29.

77. *Id.* at 229.

78. *Id.* at 231. Even the validity of a prospective change enacted through the statute, however, was questionable to the court. "It is clear, I think, that the operation of the amendment must be confined, *at least*, to community property acquired after its passage." *Id.* (emphasis in original).

79. Act of March 20, 1905, ch. 314, § 1, 1905 Cal. Stat. 341 (repealed 1911, 1913). The statute repealed California's "collateral" inheritance tax of 1893 that taxed only inheritances, bequests, or devices to non-relatives. *Id.* at 341.

80. *See In re Estate of Moffitt*, 95 P. 653 (1908).

81. *Id.* at 653.

82. *Id.* at 654.

legislative body that they were imposing this tax,” then it was their duty, and not the court’s, to change the law.<sup>83</sup>

While women were struggling to gain rights under California’s community property law, throughout the Progressive Era there was an increase in other women’s rights in the state as well as in the nation as a whole. Even though few legislatures had the goal of securing wives’ independence, each legislative step improved the separate citizenship of American wives. To accomplish these goals, women often used arguments based on societal goods unrelated to women’s rights. In 1911, for example, the women of California won suffrage for reasons similar to those prevalent in the rest of the country, primarily to further a reformist agenda.<sup>84</sup> Charlotte Perkins Gilman persuaded women that they “cannot belong to the human race till you do *human work*.”<sup>85</sup> There was a hope that “women citizens would establish a moral, and thus stable, social order.”<sup>86</sup> Women won suffrage in California,<sup>87</sup> but there remained substantial public opposition to women having the right to vote which augured that attempts to expand women’s rights within the family would not be well-received. If the public worried about divided political loyalties within the family unit, they would be no less worried about divided economic objectives.

Many women, in fact, shared these concerns. Before World War I a large number of California women regarded gaining the right to vote as victory enough and were unwilling to actively campaign for additional rights.<sup>88</sup> Progressive women in the state were focused on Americanizing recent immigrants and, in the process, embraced their domestic roles as wives and mothers as the epitome of womanhood. For these women, community property was recognized as “a foreign element” in the state’s law.<sup>89</sup> As occurred throughout much of the country, California women’s groups shifted their focus from feminist political activities, to the extent that the suffrage movement could be seen as such, to less adversarial work bettering their communities.<sup>90</sup> Even Clara Foltz, the first female lawyer on the West coast, “maintained that

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83. *Id.*

84. Gullett, *supra* note 16, at 573. This was the second referendum on the subject. The first referendum had failed in 1896. *Id.*; Ronald Schaffer, *The Problem of Consciousness in the Woman Suffrage Movement: A California Perspective*, 45 PAC. HIST. REV. 469 (1976).

85. Gullett, *supra* note 16, at 579 (emphasis in original).

86. *Id.* at 580.

87. FRANK C. JORDAN, STATEMENT OF THE VOTE OF CALIFORNIA AT THE SPECIAL ELECTION OF OCTOBER 10, 1911, ON CONSTITUTIONAL AMENDMENTS 10 (1911).

88. JENSEN & LOTHROP, *supra* note 55, at 65-66; Gayle Gullett, *Women Progressives and the Politics of Americanization in California, 1915-1920*, 64 PAC. HIST. REV. 71, 72-73 (1995).

89. Walter Loewy, *The Spanish Community of Acquests and Gains and its Adoption and Modification by the State of California*, 1 CAL. L. REV. 32, 32 (1912).

90. See, e.g., LEE M. A. SIMPSON, *SELLING THE CITY: GENDER, CLASS, AND THE CALIFORNIA GROWTH MACHINE, 1880-1940* at 41-43, 51 (2004). “When socialist women emphasized society’s obligation to further ‘industrial justice’ for the male breadwinner and his family, they inherently, and probably unintentionally, advocated an indirect relationship between women and the state mediated by male workers.” Katz, *supra* note 11, at 124.

women's chief concerns were home, husband, and children."<sup>91</sup> It was only as a renewed effort for helping women within marriage collided with the federal income tax that new community property legislation could win popular approval.

## II. WOMEN USE THE FEDERAL INCOME TAX

America's involvement in World War I produced new calls in California for advancing wives' rights. By 1914, the state was home to a large number of female lawyers who understood the community property system and then, as the nation fought to make the world safe for democracy, these women led groups who sought to increase their own rights within marriage.<sup>92</sup> In the beginning, women used the rhetoric of justice and fairness to build their arguments. As World War I promoted much of California's female labor force into better paying jobs, women complained of the inequity of a community property regime that gave husbands control over all of a family's community property, including wives' wages.<sup>93</sup> However, after this political rhetoric lost its persuasive appeal, women adopted the rhetoric of federal tax reduction to achieve the same ends. They used the political ammunition available to them as they sought immediate returns for their lobbying efforts.

Women's appeals to Progressive Era ideals initially succeeded, even as the state focused on rising tax rates.<sup>94</sup> These women successfully initiated a flood of bills reforming the state's marital property laws into a legislature otherwise focused on the state's finances. Largely as a result of women's efforts, during 1917 two significant reforms to the community property regime were passed.<sup>95</sup> First, the legislature required husbands to obtain their wives' signatures on transfers or long-term leases of community real property.<sup>96</sup> Unfortunately, this was better for women in theory than in practice; the short one-year statute of limitations on wives' claims for breaches materially diminished the protection given to wives. The original proposal would have given husbands and wives equal control over community real property, but this

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91. Schaffer, *supra* note 84, at 478; *See also* NOTABLE AMERICAN WOMEN 1607-1950: A BIOGRAPHICAL DICTIONARY 641-43 (Edward T. James ed., 1971). However, this is different than the life of Charlotte Perkins Gilman. *See, e.g.*, MARY A. HILL, CHARLOTTE PERKINS GILLMAN: THE MAKING OF A RADICAL FEMINIST, 1860-1896 at 122-23 (1980); CHARLOTTE PERKINS GILLMAN: A NONFICTION READER 182-85, 208, 295-97 (Larry Ceplair ed., 1991).

92. In 1914, the state had its first woman assistant attorney general for the Northern District of California and, in 1918, the country had its first female U.S. Attorney who was also from the state. JENSEN & LOTHROP, *supra* note 55, at 67-68.

93. *See* Mead, *supra* note 24, at 333.

94. For example, the headline of The Sacramento Bee was: *Increased Federal Taxes in Incomes and Corporations Becomes Effective To-Day*, SACRAMENTO BEE, Jan. 1, 1917, at 1.

95. *The Lady Lobbyists*, L.A. TIMES, Mar. 31, 1917, at I21.

96. Act of May 23, 1917, ch. 583, § 1, 1916 Cal. Stat. 829, 829-30. Another change that expanded the definition of community property, 1916 Cal. Stats. at 827, was declared unconstitutional in *In re Estate of Thornton*, 33 P.2d 1 (Cal. 1934).

was too extreme for 1917 sensibilities.<sup>97</sup> Second, the state legislature also changed the state's inheritance rules, minimizing wives' share of the state's inheritance tax burden.<sup>98</sup> At the time, state inheritance tax rates were at a maximum of 30% - the highest in the country.<sup>99</sup> State Controller John S. Chambers sought to have them lowered because "they discourage[d] eastern capitalists from making their residence in this State."<sup>100</sup> The revision to the community property law minimized the tax burden for married couples, at least where the husband died first. The revised law provided that on the death of a husband the wife took one-half of the community property, not as heir but as a purchaser for valuable consideration.<sup>101</sup> As a result, a wife would not owe tax on her half of the family's community property when her husband died.

Women urged these early changes on the same grounds that they urged the adoption of other progressive legislation – equity and reform. At the same time, however, the bills were presented as increasing women's power and, to that end, women were no longer content with "watchful waiting, while being ladylike."<sup>102</sup> "The women want the community property disposal in all events of life and death to be co-equal and impartially identical."<sup>103</sup> When portrayed in this way, there developed strong opposition to both of these measures.<sup>104</sup> Some even claimed to worry that increasing wives' rights would discourage marriage, when marriage rates had already been falling for three years.<sup>105</sup> As a result, one editorialist complained, it "is the men who make the melodramatic speeches of beseeching sentimentality," while women presented themselves well.<sup>106</sup> In the face of this opposition, women fought hard to secure the bills' passage and the state, in turn, wanted to be seen as empowering this new group of voters.<sup>107</sup> So,

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97. For a discussion, see R.E.S., *Community Property: The Effect of the 1917 Amendment to Civil Code Section 172a*, 12 CAL. L. REV. 124 (1924).

98. Inheritance Tax Act of 1917, ch. 58, § 1, 1917 Cal. Stat. 880, 881.

99. *Inheritance Tax Rates*, L.A. TIMES, Apr. 1, 1917, at II4.

100. *Id.*

101. Inheritance Tax Act of 1917, § 1, 1917 Cal. Stat. at 881. A wife remained an heir to her husband's half of the property. *Id.*

102. Alma Whitaker, *Lady Lobbyists' Drive Makes Men Send S.O.S.*, L.A. TIMES, Mar. 14, 1917, at I2, I4 [hereinafter *Lady Lobbyists'*]; Alma Whitaker, *Steamy Remarks*, L.A. TIMES, Mar. 27, 1917, at II4 [hereinafter *Steamy Remarks'*]; *Women's Work and Women's Clubs*, L.A. TIMES, May 27, 1917, at III3; *Happenings on the Pacific Slope*, L.A. TIMES, Jan. 23, 1917, at I4 [hereinafter *Happenings'*]. The L.A. Times was against women's suffrage and these community property bills.

103. Alma Whitaker, *Three Ls on Duty*, L.A. TIMES, Mar. 13, 1917, at II [hereinafter *Three Ls'*].

104. Gale Laughlin, feminist and activist, anticipating their attack, argued that these groups had claimed that suffrage would destroy credit, and yet credit remained in tact. *Lady Lobbyists'*, *supra* note 102, at I4.

105. *Happenings*, *supra* note 102, at I4.

106. Alma Whitaker, *Eloquence Let Loose*, L.A. TIMES, Mar. 16, 1917, at II4.

107. *Women May Go to Washington to Carry Votes*, SACRAMENTO UNION, Jan. 5, 1917, at 1; *Women Will Watch Legislative Action*, SACRAMENTAL UNION, Jan. 17, 1917, at 2; *Women Insist Upon Laws to Protect Wives*, SAN FRANCISCO CHRONICLE, Jan. 18, 1917, at 3; *Happenings*, *supra* note 103, at I4; Editorial, *Laws the Women Want*, SACRAMENTO UNION,

despite the fact that the bills' fate was initially decided by a judiciary committee composed of eighteen men,<sup>108</sup> women won changes in the law "of the greatest importance to the women of California insofar as they provide a more just method of the determination of community property and disposition thereof."<sup>109</sup>

Even as community property reform won with pleas for equity and justice, other bills favoring women, such as the right for women to sit on juries, had a harder time.<sup>110</sup> But advances to community property legislation soon hit a wall that feminist support alone could not overcome. In 1919 a spate of bills further advancing wives' property interests were introduced in the California legislature as a direct result of "the growth of the feminist movement."<sup>111</sup> "There was general agreement in the legislature to place the wife on an equal footing with her husband, but much dispute developed among the lawyers as to how to work this out."<sup>112</sup> After the bills were introduced into both houses of the legislature, 50,000 women in the Women's Legislative Council (WLC) met to discuss the bills.<sup>113</sup> Each branch of the California state legislature did not want to pass the other branch's bill, and the WLC worried that if neither passed, the blame would fall on women.<sup>114</sup> The legislature finally passed a bill permitting wives to devise their half of the community property.<sup>115</sup> Nonetheless, women were not completely happy with the final product as "the bills before Governor Stephens...are not ideal, they do not provide perfect equality between husband and wife."<sup>116</sup>

Although the governor did not feel that this new intestacy provision diminished husbands' power, many of the state's citizens did, and a group

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Jan. 24, 1917, at 4; *Women Seek Equal Rights Under Laws*, SACRAMENTO UNION, Mar. 13, 1917, at 4; *Women's Rights Urged on Senate Committee*, SACRAMENTO UNION, Mar. 13, 1917, at 3; *Three Ls*, *supra* note 104, at 11; *Lady Lobbyists'*, *supra* note 102, at 121; *Steamy Remarks*, *supra* note 102, at 114; *Women's Work and Women's Clubs*, *supra* note 102, at 113.

108. Alma Whitaker, *Senators Want to be Coaxed*, L.A. TIMES, Mar. 16, 1917, at 16; *Women Will Invade Governor's Office*, SACRAMENTO UNION, Mar. 27, 1917, at 2.

109. *Important Acts Written into the State's Laws*, SACRAMENTO UNION, June 6, 1917, at 10.

110. *Solons Favors Women Jurors*, SACRAMENTO UNION, Apr. 19, 1917, at 9.

111. A. M. Kidd, *The Proposed Community Property Bills*, 7 CAL. L. REV. 166, 166 (1919). See also Prager, *supra* note 31, at 57; *Bills Make Wives Equal to Husbands*, L.A. TIMES, Apr. 9, 1919, at 13; *Houses Deadlock Over Community Property Rights*, SACRAMENTO UNION, Apr. 21, 1919, at 2; *Community Bill is Compromised*, L.A. TIMES, Apr. 23, 1919, at 13; *Confusion Worse Confounded*, L.A. TIMES, May 16, 1919, at 114. Previously, on a wife's death all of the community property belonged to her husband, without administration. Act of May 27, 1919, ch. 611, § 1, 1919 Cal. Stats. 1274-75.

112. *Wrong Community Property Bill on Governor's Table*, SACRAMENTO UNION, May 6, 1919, at 3.

113. *Houses Deadlock over Community Property Rights*, *supra* note 111, at 2.

114. *Id.*

115. Act of May 27, 1919, ch. 611, § 1, 1919 Cal. Stats. 1274-75.

116. *Women Plead for Justice in Community Property Laws*, SACRAMENTO UNION, May 17, 1919, at 3.

calling itself the California Protective League was organized to defeat the measure.<sup>117</sup> Supported by the California Bar Association, the group organized a petition of voters that stayed the bill's effective date until a referendum could be called.<sup>118</sup> Portrayed as a reform measure, something conservative Californians increasingly opposed, the bill was then defeated by a margin of nearly two to one.<sup>119</sup> Women failed to materialize an effective lobby as they had two years earlier.<sup>120</sup> Clara Foltz, for example, who had supported the 1917 community property reforms, thought women did not need additional property rights. She wrote in a letter to Alice Park that "after all is said and done, it is efficiency in a superlative degree that can or will ever bring about equality between men and women. The law cannot do it... We [already] have a whole lot more rights than we can exercise."<sup>121</sup>

At this point, federal taxes entered explicitly into debates over changes to the state's community property statutes. Soon after the federal income tax was enacted in 1913 and the federal estate tax in 1916, state community property laws were recognized to reduce these taxes. In 1917, the Treasury Department held that a Texas wife's share of community property did not pass by inheritance, so only half of the community property should be taxable as part of a decedent husband's estate.<sup>122</sup> Then the Bureau of Internal Revenue, precursor to the Internal Revenue Service, issued an opinion authorizing spouses in Texas and Washington, two of the eight original community property states, to file separate federal income tax returns with each spouse reporting one-half of community income.<sup>123</sup> Community property couples thus had a federal income and estate tax advantage over their common law neighbors.

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117. *Wife Can Will Her Interests*, L.A. TIMES, May 28, 1919, at 19; *Referendum to Down Menace*, L.A. TIMES, July 2, 1919, at II1-II2; *Only Host of Signers Can Avert Dire Peril*, L.A. TIMES, Jul. 6, 1919, at III; Myra Nye, *Shall We Have a Sex War?* L.A. TIMES, June 3, 1920, at II4; M.C.L., *Editorial Notes*, 8 CAL. L. REV. 41 (1920); O.K.M., *Meeting of the California Bar Association*, 9 CAL. L. REV. 56 (1921); *Community Property Measure is Opposed*, L.A. TIMES, May 13, 1919, at I8; *Stephens Awaits O.K. by Webb before Signing Bill*, SACRAMENTO UNION, May 13, 1919, at 2; *Women's Pet Measures Opposed*, SACRAMENTO UNION, May 14, 1919, at 1; *Women Plead for Justice in Community Property Laws*, *supra* note 116, at 3.

118. *Community Property Measure is Opposed*, *supra* note 117, at I8.

119. *Fears Children are Neglected*, L.A. TIMES, Apr. 10, 1919, at I3; *Community Property: Two Very Dangerous Measures*, L.A. TIMES, Apr. 12, 1919, at I4; *Community Property Law is Vicious Act*, L.A. TIMES, Nov. 1, 1920, at II8.

120. Women's political power was beginning to ebb. By 1928 no women sat in the state assembly. Two Republican women were elected in 1930 and one Democrat in 1936. JENSEN & LOTHROP, *supra* note 55, at 90.

121. *Id.* at 89.

122. T.D. 2450, 19 Treas. Dec. Int. Rev. 38 (1917).

123. O.D. 426, 2 C.B. 198 (1920); 32 Op. Att'y Gen. 298 (1922); *Id.* at 435. For a good discussion, see Harrop A. Freeman & Virginia Schwartz Mueller, *Federal Taxation of Community Property*, 34 CAL. L. REV. 398 (1946). For public opinion, see *To Rule on Wife's Income*, N.Y. TIMES, Feb. 23, 1921, at 5; *Income Taxes on Community Property*, CHRISTIAN SCI. MONITOR, Mar. 4, 1921, at 1; William T. Hancock, *A Look at Community Property Law*, 34 VA. L. REV. 417, 419 (1948).

While the federal government recognized a community property advantage in general, only months after the failure of California's electorate to advance women's interests through community property reform, the United States Attorney General ruled that, unlike wives in other community property states, California's wives did not possess a vested interest in their half of the community property.<sup>124</sup> As a result, California wives could not separately claim half of the community's income and report it on their individual federal income tax returns.<sup>125</sup> Also, because husbands managed and controlled their family's community property, which included wives' separate wages, the Commissioner argued that husbands should be taxed on that income as well.<sup>126</sup>

This negative treatment existed despite a District Court ruling two months prior, in *Blum v. Wardell*, that only one-half of community property was to be included in a decedent husband's estate. The court reasoned that under California law wives did, in fact, have a sufficiently vested interest in their half of the community, at least for federal estate tax purposes.<sup>127</sup> Attorney General Harry M. Daugherty listened to Mabel Walker Willebrandt, the first female Assistant Attorney General, that California should be treated the same as the other community property states.<sup>128</sup> Before entering government work, Willebrandt had practiced law in California where she advocated for women to have more control over community property.<sup>129</sup> Willebrandt wrote to her mother:

The A.G. has today just shown me his concurring opinion upholding my Com. Prop. opinion. Isn't that a vindication of all those years of work that I spent on the Community Property Question in

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124. T.D. 3138, 4 C.B. 238 (1921).

125. *Id.*

126. O.D. 1128, 5 C.B. 199 (1921); T.D. 4152, VII-1 C.B. 215 (1928); G.C.M. 4797, VII-2 C.B. 121 (1928). *But see* I.T. 2352, VI-1 C.B. 32 (1927). Later, the Board of Tax Appeals began to tax a wife's earnings to her rather than to her husband whenever spouses had agreed that a wife's earnings should be her separate property. *Harris v. Comm'r*, 10 B.T.A. 1374 (1928); *Gassner v. Comm'r*, 4 B.T.A. 1071 (1926).

127. *Blum v. Wardell*, 270 F. 309 (N.D. Cal. 1920). The *Blum* case was decided by Frank H. Rudkin (of Washington) who later heard *Earl v. Commissioner*, 30 F.2d 898 (9th Cir. 1929). The dissent argued that the 1917 change specifically exempted the wife's interest for state inheritance tax purposes and for no other purpose. *Talcott v. U.S.*, 23 F.2d 897 (9th Cir. 1928), overruled *Wardell v. Blum*, relying on *Stewart and Robbins*. For a discussion of *Blum v. Wardell*, see *Means Much to Taxpayer*, L.A. TIMES, Nov. 1, 1921, at 19.

128. See generally DOROTHY M. BROWN, MABEL WALKER WILLEBRANDT: A STUDY OF POWER, LOYALTY, AND LAW (1984). Willebrandt had been appointed by President Harding in 1921 as the first female Assistant Attorney General and was the highest ranking woman while she held office until 1929, heading the Justice Department division responsible for taxation. *Id.* at 46-47. Willebrandt persuaded Daugherty to accept *Blum v. Wardell*. See *id.* at 141. Interestingly, Willebrandt was on the government's team in *Talcott v. United States*, cert. denied, 277 U.S. 604 (1928).

129. BROWN, *supra* note 128, at 46-47.

California....His opinion, constantly refers to mine of March 8th and ends by reaffirming and reissuing it.<sup>130</sup>

Thus, in a frustrating result, the federal government took contradictory positions on the effect of California's community property regime for the federal estate and income taxes. Whereas the federal judiciary saw the wife's interest in the community as vested and real, and so extended estate tax benefits, the executive saw her interest as inchoate and withheld such benefits for income tax purposes.

As this division was developing in the federal tax treatment of California community property, the executive branch began to challenge the tax advantages it had previously extended to the other community property regimes. In 1921, Secretary Andrew Mellon's Treasury Department proposed that Congress tax all husbands on all community income on the basis that they had control over it.<sup>131</sup> However, while the House Committee on Ways and Means denounced community property states' "marked advantage," it took no further action.<sup>132</sup> Similarly, the Senate sought to tax husbands on community income but the Senators struggled as they conflated legal ownership and control.<sup>133</sup> The Senate proposal ultimately failed because Congress was not willing to devote resources to ending a tax advantage that cost the government relatively little revenue and was not important to voters. At a time when the income tax was imposed on only the wealthiest Americans, Boise Penrose (R-PA) concluded, "I recognize that some 8 or 10 States are interested in this amendment. It is really not of sufficient general importance, in my opinion, to take up much of the time of the Senate."<sup>134</sup>

Admitting defeat, the Treasury Department recognized in Treasury Regulations issued in 1921 the right of married couples in all community property states, except those in California, to divide income on the basis of their marital property regimes.<sup>135</sup> Then, since the national legislature had taken no contrary action, the Ninth Circuit affirmed the District Court decision granting California favorable estate tax treatment.<sup>136</sup> When the Supreme Court denied a petition to hear the California estate tax case,<sup>137</sup> it seemed settled that community property provided a secure means to shift income within families for all community property states but California, and even California's couples enjoyed some limited benefits with respect to federal estate taxation.

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130. *Id.* at 141.

131. 61 CONG. REC. 6,595 (1921). This was not the same as mandatory joint returns or nationalized income splitting because, under the proposal, if the wife had control over income she would have had the obligation to report it separately.

132. H.R. REP. NO. 67-350, at 11 (1921); H.R. REP. NO. 67-486, at 1-2 (1921).

133. *See, e.g.*, 61 CONG. REC. 6,585-95 & 8,037-38 (1921); S. REP. NO. 67-275, at 14 (1921); 61 CONG. REC. 5,917-21 & 6,589 (1921).

134. 61 CONG. REC. 7,229 (1921). The House yielded the issue in conference.

135. TREAS. REG. § 213 (1921).

136. *Wardell v. Blum*, 276 F. 226 (9th Cir. 1921).

137. *Wardell v. Blum*, 258 U.S. 617 (1922).

With these tax challenges lurking in the California legislature's mind, women secured another advance in their community property rights the next year, reinforcing their claims to ownership.<sup>138</sup> In 1923, one of the few female legislators in the California assembly, Miss Esto Broughton, re-introduced with some minor changes the community property measure allowing wives to devise their half of the community property that had been voted down in the 1920 referendum.<sup>139</sup> Women's groups and liberal newspapers supported the measure, lamenting that "[w]omanhood of California is crying out for a revision of the antiquated and barbaric laws."<sup>140</sup> Even those women who worried that the bill provided little in the way of advancement for women, and so wasted women's resources for little gain, supported the measure. For example, the National League of Women Voters resolved to support joint ownership of family property, and this issue was the only resolution debated in the League's assembly.<sup>141</sup> Opponents within the League argued that many industrious women married lazy husbands.<sup>142</sup> Similarly, the National Woman's Party recognized that the proposed law regarding devising property at death would not be entirely satisfactory but supported it as an advance over the existing statute.<sup>143</sup>

Women argued in 1923, unlike in 1919, not only in terms of equity considerations but also in terms of tax reduction. They saw as an opportunity

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138. See Act of Apr. 16, 1923, ch. 18, § 1, 1923 Cal. Stats. 29, 29-30; CAL. PROB. CODE § 201 (West 2002). Oddly, this was not discussed in *Recent Legislation*, 12 CAL. L. REV. 65-68 (1923).

139. *With State Legislators*, SACRAMENTO UNION, Jan. 8, 1923, at 2; *California Legislators*, SACRAMENTO UNION, Jan. 23, 1923, at 4. This bill won the strong support of the California Bar Association. *Community Property Bill Crops Up in Assembly Hall*, SACRAMENTO UNION, Jan. 19, 1923, at 2; *Community Property Bill to be Amended*, SACRAMENTO UNION, Mar. 15, 1923, at 14; *Wives Win Fight on Property Bill*, SACRAMENTO UNION, Apr. 7, 1923, at 1; *Change in Property Measure is Favored*, L.A. TIMES, Feb. 28, 1923, at II22.

140. Editorial, *Progressive Laws Never Did and Never Can 'Hurt Business'*, SACRAMENTO UNION, Apr. 7, 1923, at 4. The League of Women Voters pushed for the 1923 testamentary law change. *In California Community Property is a Name but not a Reality*, Box 126 Status of Women, Part III, Records, 1918-1964, League of Women Voters, Library of Congress, Washington, DC (photocopy on file with author) [hereinafter LVW Papers]. Similarly, California's Federation of Women's Clubs and the Congress of Mothers supported the bill. *Senate Acts on Bills*, L.A. TIMES, Mar. 20, 1923, at I2; *Mothers' Congress Convention is Ended*, L.A. TIMES, Apr. 15, 1923, at II2; *Property Bill Fight Revived*, L.A. TIMES, Apr. 15, 1923, at II3; *Voters to Pass on Property Measure*, L.A. TIMES, Apr. 18, 1923, at I4; *Daily Trade Talk*, L.A. TIMES, June 21, 1923, at II0; *Community Property Measure is Opposed*, L.A. TIMES, May 12, 1919, at I8; *Community Property Measure is Sent to Assembly for Action*, SACRAMENTO UNION, Mar. 28, 1923, at 10; Editorial, *Progressive Laws Never Did and Never Can "Hurt Business,"* SACRAMENTO UNION, Apr. 7, 1923, at 4; Editorial, *Justice to Women – That is What the Community Property Bill Is*, SACRAMENTO UNION, Mar. 30, 1923, at 4.

141. *Women's Confab Urges Laws Upon Joint Properties*, SACRAMENTO UNION, Apr. 13, 1923, at 3.

142. *Id.*

143. *The Nation-Wide Legislative Campaign*, EQUAL RIGHTS, Feb. 24, 1923.

that the “federal income tax legislation...should be used to further our efforts in this direction.”<sup>144</sup> When presented in this light, although some conservative interests continued to oppose this form of community property reform, the 1923 bill could now gain the support it lacked in 1919.<sup>145</sup> Its link to the federal income tax won the bill that support.<sup>146</sup> Governor Friend Richardson held a hearing the day before he signed the bill, and in the hearing he did not listen to any feminist arguments for the measure.<sup>147</sup> Although a sworn enemy of progressivism, Richardson had already made up his mind in the law’s favor.<sup>148</sup> Once the bill was signed, California attorneys immediately sought clarification of the state’s federal tax treatment. Dashing their hopes, the Treasury Department denied that the 1923 Act would affect how the federal income tax applied to couples residing in the state.<sup>149</sup>

Attempts to persuade the Treasury Department of the value of wives’ interests were made more difficult by opinions of the California Supreme Court. Unwilling to be swayed by wives’ hopes or taxpayers’ desires, while the state legislature was expanding wives’ rights, its judiciary continued to construe such statutes narrowly.<sup>150</sup> In one case, a married couple had acquired significant community property before the 1917 Acts became effective.<sup>151</sup> Then, in 1920, the wife filed for divorce on the grounds of extreme cruelty, but the night before she filed her husband executed a deed transferring their community property to a neighbor who was aware of the impending divorce.<sup>152</sup> The husband received, as compensation from the neighbor, a promissory note and promptly left the state.<sup>153</sup> The wife took action to declare the deed null and void because she had not joined in the deed, and the lower court agreed with her.<sup>154</sup> The state supreme court, however, held that the joinder requirement added in 1917 did not apply to realty acquired before 1917.<sup>155</sup> Very protective of husbands’ vested rights, the court fought long and hard to deny wives an interest in community property prior to the dissolution of marriage.

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144. Alma Myers, *Statement on Community Property Law of California*, Box 126, Status of Women, Part III, Records, 1918-1964, LWV Papers (photocopies on file with author).

145. Roy G. Blair, *The Income Tax Law*, SACRAMENTO UNION, Feb. 2, 1923, at 4.

146. Opposition groups did try to force a second referendum but they failed, in part, because the secretary of state questioned the collected signatures. *Petition Faces Failure Unless Signers Hurry*, L.A. TIMES, July 25, 1923, at III10.

147. Headline, *Property Measure Signed*, SACRAMENTO UNION, Apr. 17, 1923, at 1.

148. *Id.*; Jackson K. Putnam, *The Progressive Legacy in California: Fifty Years of Politics, 1917-1967*, in CALIFORNIA PROGRESSIVISM REVISITED 247, 252 (William Deverell & Tom Sitton eds., 1994).

149. *New Law Not to Cut Taxes*, L.A. TIMES, Oct. 9, 1923, at III1-II2; *Property Measure Signed*, *supra* note 147. Putnam, *supra* note 148, at 252.

150. R.E.S., *supra* note 97. See also *Roberts v. Wehmeyer*, 218 P. 22 (Cal. 1923).

151. *Roberts*, 218 P. at 22.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 27.

Many women thought the 1917 and 1923 legislative advances were a step in the right direction, but that the regime was still far from perfect.<sup>156</sup> Partly as a result of the court's ruling, many stressed that the community property system of marital property, especially as it operated in California, did not give women equal property rights.<sup>157</sup> Some hoped the pressure to secure income splitting under the federal income tax would push state legislators to make the law more equitable to wives. Some women wanted to use the incentive created by the income tax to increase wives' control over family property.

At the same time, however, the community property income tax advantage enjoyed in the other community property states again came under attack. Secretary of the Treasury Department, Andrew Mellon, targeted community property income splitting in 1924, as he had in 1921, even though the nation enjoyed a projected \$309 million budget surplus.<sup>158</sup> Mellon had set his sights on eliminating this tax reduction despite the fact that he tried to secure national tax rate reductions several times during his decade-long tenure in office.<sup>159</sup> Mellon included in his "Mellon Plan" a provision taxing community property to the spouse with control of the property to prevent some couples in some states, but not all, from enjoying federal tax reductions.<sup>160</sup> As in 1921, this attack failed. Most public and congressional attention was instead on the fact that Mellon urged reduction of the top marginal rates with little to no tax reduction for

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156. Catherine Waugh McCulloch, *The Economic Status of Wife Working at Home*, in LWV PAPERS, Box 125 Status of Women, Part III, Records, 1918-1964, at 13(1924) (photocopy on file with author); Dorothy Kenyon, *Memorandum on Community Property*, in LWV PAPERS, Box 125 Status of Women, Part III, Records, 1918-1964, at 8 (1924) (photocopy on file with author).

157. *California Laws Affecting Women: Community Property Laws*, in NATIONAL WOMAN'S PARTY PAPERS, Box II 201, Legal Digest, Library of Congress, Washington, D.C. 1921-1949 (1925) [hereinafter NPW Papers] (photocopies on file with author); *How The Community Property System of California Discriminates Against Women*, in NWP PAPERS, Box II 201, Legal Digest, 1921-1949 (1926) (photocopy on file with author). *Rept. No. 15, In Re: Certain of the Bills Supported by Woman's Party*, in NPW PAPERS, Legal Reports, 1919-1969, Nos. 1-37, Box II 206 (focusing primarily on Texas) (photocopy on file with author). *But see* Burnita Shelton Mathews, *Rept. No. 26, Legal Discriminations Against Women*, in NWP PAPERS, Legal Reports, 1919-[1969], Nos. 1-37, Box II 206 (photocopy on file with author).

158. 65 CONG. REC. 1,144 (1924). As in 1921, this was not a mandatory joint return or income splitting proposal. *See supra* note 131. Oddly, the Annual Report of the Secretary of Treasury in 1924 made no mention of community property or joint returns. S. REP. NO. 68-398 (1924). It was also strange that the issue had so prominent a place in Mellon's proposals when it involved relatively little revenue. One questions whether Mellon raised it for its rhetorical value. *See* ANDREW W. MELLON, *TAXATION: THE PEOPLE'S BUSINESS* 60-61 (1924).

159. Ronald Frederick King, *From Redistributive to Hegemonic Logic*, 12 POL. & SOC'Y 1, 22-24 (1983); Gene Smiley & Richard H. Keehn, *Federal Personal Income Policy in the 1920s*, 55 J. ECON. HIST. 285, 287-88 (1995).

160. Reprinted in part in H.R. REP. NO. 68-179, at 3 (1924). *See also* MELLON, *supra* note 158, app. A at 184-85. Mellon used the low number of returns and the low amounts of income reported by the wealthy to argue that the government should cut rates because the rich were not paying taxes at high rates anyway. *Id.* at 79-80.

lower-income Americans.<sup>161</sup> Because of the regressive impact of the larger Mellon Plan, the Secretary's attack on community property was doomed from the start.

Moreover, the community property states had perfected their own publicity campaign. Their representatives highlighted the differences between the common law and community property regimes, in rhetoric if not in fact.<sup>162</sup> James O'Connor (D-LA) complained that "community property law [is] not fiction as popularly thought, but creates practical burdens upon property rights of husbands which do not exist in common-law States."<sup>163</sup> John F. Miller (R-WA) compared community property to a transfer of title to a wife in common law states.<sup>164</sup> Groups of taxpayers were also formed in support of the community property tax advantage. Charles E. Dunbar, Jr., of the Citizens Committee and New Orleans Association of Commerce, argued that community property "creates a substantial practical partnership."<sup>165</sup> George Donworth, a lawyer who later argued for the taxpayer in *Poe v. Seaborn*,<sup>166</sup> complained that while Mellon urged a decrease in collective taxes, his proposal would increase those for community property couples.<sup>167</sup> The House Ways and Means Committee, after public hearings on the matter, rejected Mellon's second proposal.<sup>168</sup>

With Congress content to let the issue of the community property tax advantage slide, the Attorney General revisited his conclusions regarding California state law in light of the revisions that had been enacted. As the House abstained from legislative action, the Attorney General ratified federal court rulings by modifying the department's 1921 opinion.<sup>169</sup> He explicitly held that California wives were not required to pay federal *estate* tax on their portion of community property.<sup>170</sup> Notwithstanding state judicial opinions suggesting the contrary, the executive department's new position was that, with respect to California community property, "the wife has a greater interest than the mere possibility of an expectant heir."<sup>171</sup> Although the contrary position would have maximized federal revenues, the federal government interpreted state law more

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161. *Hearings on Revenue Revision, 1924: Before H. Comm. of Ways and Means*, 68th Cong., 364 (1924).

162. *Id.* at 194-66, 478-82.

163. *Id.* at 195 (statement of James O'Connor, Rep. in Congress from Louisiana).

164. *Id.* at 478-82 (statement of John F. Miller, Rep. in Congress from Washington).

165. *Id.* at 375 (statement of Charles E. Dunbar, Citizens Committee and New Orleans Associate of Commerce).

166. 282 U.S. 101, 106 (1930).

167. *Hearings on Revenue Revision, 1924, supra* note 161, at 364 (statement of George Donworth, Taxpayers Committee in the State of Washington).

168. *Id.* at 364-65.

169. 34 Op. Att'y Gen. 376 (1926).

170. *Id.*

171. T.D. 3569, III-1 C.B. 91, 92-93, 101 (1924). *See also* I.T. 2003, III-1 C.B. 229 (1924).

favorably to wives than the state's own supreme court.<sup>172</sup> Taking the Attorney General's position one step further, the Treasury Department for the first time issued regulations allowing all community property couples, including those in California, each to report half of the community property on their separate income tax returns.<sup>173</sup>

Within the year, however, questions regarding tax reduction and California's community property regime arose again. Newly appointed Harlan Fiske Stone, in his short tenure as Attorney General before being bumped upstairs to the Supreme Court, recalled the California community property opinions for further consideration.<sup>174</sup> Stone had grave doubts about the legality of regulations that permitted income splitting between California spouses "since the husband has complete control of the community income and may dispose of it as he sees fit during his lifetime without the consent of his wife."<sup>175</sup> Because the Supreme Court had refused to hear the Treasury Department's appeal in *Blum v. Wardell*, Stone was unable to overturn the Ninth Circuit's ruling that California spouses each owned half of their community property for federal estate tax purposes.<sup>176</sup> Stone would not give up, however, on the income tax. He made a final plea, arguing that community property income splitting produced inequities between the states.<sup>177</sup> Refunds, he pointed out, estimated at approximately \$77 million to California alone, could only be made out of taxes collected from the citizens of the common law states.<sup>178</sup> "In fairness to the country as a whole, . . . the taxpayers of other States should have their day in court."<sup>179</sup> As a result, Stone advised the Treasury Department that it was free to litigate test cases on the appropriate income tax treatment of community property.<sup>180</sup> It did so in *United States v. Robbins*.<sup>181</sup>

*Robbins* was pending before the Supreme Court, where Stone was then sitting, at the end of 1925, which stayed Secretary Mellon from again targeting the community property advantage in his proposals for that year's Revenue Act.<sup>182</sup> Not content to await the Court's decision, Mellon sought to reduce the inequity between states by lowering income tax rates, which, he argued, would

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172. T.D. 3569, III-1 C.B. at 97, 101.

173. T.D. 3568, III-1 C.B. 84 (1924). See also I.T. 2003, III-1 C.B. 229 (1924).

174. T.D. 3596, III-1 C.B. 101-02 (1924).

175. T.D. 3670, III-1 C.B. 19 (1924); 34 Op. Att'y Gen. 395 (1924).

176. T.D. 3670, IV-1 C.B. at 19, 21 ("[I]t is the duty of the Government, as well as a private individual, to bow to the decision of the court in that case, unless it appears that reasonable grounds exist fairly justifying relitigation of this question *de novo*."). Stone expressly limited his holding to estate taxation in a separate letter dated January 27, 1925. *Id.* at 25-26.

177. *Id.* at 20.

178. *Id.*

179. *Id.*

180. *Id.*

181. 269 U.S. 315 (1926), *rev'g*, 5 F.2d 690 (N.D. Cal. 1925).

182. WAYS AND MEANS COMMITTEE, 69TH CONG., GENERAL STATEMENTS ON REVENUE REVISION, 1925 at 2 (Comm. Print 1925).

minimize the advantages to be had from moving income between tax brackets.<sup>183</sup> Frustration over the lack of national uniformity was also beginning to spread beyond the Treasury Department. Edwin R. A. Seligman, a pioneer of American public finance, implored Congress that the community property advantage was creating significant financial injustice.<sup>184</sup> Seligman wanted Congress to legislate a national solution. “Perhaps it is not worth while [from a revenue perspective], but as a matter of equal justice I think it should be done.”<sup>185</sup> Congress, however, refused to rise to the challenge. As a result of congressional inaction, California women hoped to capitalize on the federal tax system.

### III. WOMEN LOSE CONTROL OF THE DEBATE

Many of the nation’s leading policymakers understood that the community property regime offered wealthy married couples an opportunity to reduce their federal taxes. While some leaders wanted to close the loophole, those enjoying its benefits had an advantage – they were defending the status quo. The married women of California were also willing to support the tax savings because, in doing so, they could use the tax benefits offered to community property residents to their own advantage. In 1923, they were able to leverage state legislators’ desire to reduce taxes for wealthy residents into increased marital property rights. That alliance with wealthy taxpayers did not last indefinitely. Eventually, those who sought tax reduction alone found ways to reduce their taxes with little improvement in the economic rights of the state’s wives.

The beginning of the end of the de facto alliance between wealthy taxpayers and California wives was when the Commissioner of Internal Revenue began his challenge of wealthy California couples’ federal income tax benefits in 1925 in *United States v. Robbins*.<sup>186</sup> The National Woman’s Party followed the case closely as it wound its way through the judicial system.<sup>187</sup> The case was recognized as “one of the most important in its bearing upon the woman movement of all the cases which have ever come before the Supreme

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183. *Id.* at 9. This is not to say that Mellon would not have urged tax rate cuts regardless of their impact on income shifting.

184. *Id.* at 146.

185. *Id.*

186. 269 U.S. 315.

187. *Feminist Notes*, EQUAL RIGHTS, May 9, 1925, at 98; *What Marriage Does to Women’s Rights in California*, EQUAL RIGHTS, Nov. 7, 1925, at 309-10; Burnita Shelton Matthews, *The Wife’s Interest in Community Property in California*, EQUAL RIGHTS, Dec. 19, 1925, at 358 [hereinafter *The Wife’s Interest*]; Burnita Shelton Matthews, *Community Property in California a “Barren Ideality,”* EQUAL RIGHTS, Sep. 11, 1926, at 243; Burnita Shelton Matthews, *Another California Community Property Decision*, EQUAL RIGHTS, Oct. 2, 1926. The Women’s Bureau, on the other hand, did not include property laws in its description of special legislation for women or mention *Robbins* in 1926. WOMEN’S BUREAU, U.S. DEP’T OF LABOR, REP. NO. 9, WOMEN’S INDUSTRIAL CONFERENCE SUMMARIZED, Reel 1, Part I: Reports of the Director, Women’s Bureau, microfilm (1926).

Court.”<sup>188</sup> Women who complained about the limited interest California wives received in community property hoped that the incentives created under the federal income tax would induce opponents of spousal equality to revise the state’s laws for completely selfish reasons. Hence, they worried if California taxpayers prevailed in *Robbins*, it would eliminate incentives for future advancement for wives. On the other hand, if the federal government prevailed, there was hope that the state legislature would amend the community property law to make wives real partners with their husbands.<sup>189</sup>

In the context of evolving attitudes towards property ownership and taxation, Reuel Drinkwater Robbins and his wife, Saditha, prominent Solano County ranchers, attempted to file separate income tax returns in 1918 with each reporting half of their community income.<sup>190</sup> The revenue collector refused their request.<sup>191</sup> When Reuel died in 1919, Saditha and her son (who was also the litigating attorney) sued to recover approximately \$7,000 in income taxes paid for the year 1918.<sup>192</sup> Thus, the question before the court was whether all of a family’s community income could be assessed against a California husband, in effect whether the entire amount was his taxable income.

Before the lower court, the government argued that under California law, because her interest was not vested, Saditha had a mere expectancy in her half of the community property and, consequently, she could not be considered the true property owner.<sup>193</sup> District Court Judge John S. Partridge disagreed.<sup>194</sup> Not persuaded by the government’s claim that recognition of income splitting would cost the government \$77 million in refunds to California taxpayers,<sup>195</sup> Partridge compared the California system favorably to the other community property states, assuming that those regimes should be permitted to divide community income for income tax purposes.<sup>196</sup> He then concluded, in an elaborate opinion, that Saditha did hold a vested interest in the family’s community property and, as a result, Reuel could only be required to file a return and pay taxes on one-half of the community income.<sup>197</sup> Partridge did not

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188. *The Wife’s Interest*, *supra* note 187.

189. *Rept. 78, The Wife’s Interest in Community Property in California*, in NVP PAPERS, Box II 206, Legal Reports, Legal Reports, 1919-[1969], Nos. 65-79, at 6 (photocopy on file with author).

190. *Robbins*, 269 U.S. 315, 326 (1926).

191. *Id.* By the time the case was heard, top federal income tax rates had fallen dramatically to twenty-five percent, although well above the original seven percent. See IRS.gov, *SOI Tax Stats – Historical Table 23*, <http://www.irs.gov/taxstats/article/0,,id=175910,00.html> (last visited Apr. 23, 2010).

192. *Id.*; See also The Robbins Collection, [http://www.law.berkeley.edu/robbins/history\\_collection.html](http://www.law.berkeley.edu/robbins/history_collection.html) (last visited Mar. 19, 2010).

193. *Robbins v. United States*, 5 F.2d 690, 700 (N.D. Cal. 1925).

194. *Id.*

195. *Id.* at 690.

196. *Id.* at 694-96.

197. *Id.* at 690. Looking at the economic substance of wives’ interests, rather than the labels the states gave them, the court found that in some cases California wives had greater interests than wives in the other community property states. *Id.*

bother to compare California's system with those of common law states with Married Women's Acts or to question whether any community property couple should ever be given the right to divide income between spouses for tax purposes.

The federal government appealed the lower court's decision but not its basis in state law. The framework for the issue was thus preserved as one that could be used by California women. This pleased the Robbins family who followed the lower court's lead when it went before the Supreme Court. They sought to equate California with the other community property states and then demanded uniform application of the federal income tax by using state property law to determine ownership.<sup>198</sup> While the Attorney General accepted that state law was binding on federal courts for determining the nature of the wife's interest in community income in California, the government argued that California courts had determined that the husband had absolute ownership and power of disposition over community property with only minor limitations.<sup>199</sup> The government built a persuasive case of the limited nature of the wife's interest.

Accepting that state law should control, the government tried to shift the comparison from other community property states to common law states, finding substantial similarities between applicable California and Minnesota law.<sup>200</sup> As a result, to grant California this special privilege would permit "the most direct discrimination against husbands and wives in some forty States of the Union, where, in order to split their incomes between husbands and wives to avoid high surtaxes, husbands must convey part of their property outright to their wives, paying a gift tax in the process."<sup>201</sup> The Treasury Department seemingly accepted income shifting, just not pursuant to California's community property law.

In view of the conflict in the California state judiciary over the nature of the wife's interest in community property, the federal courts could have taken it upon themselves to determine the real nature of the wife's interest. In *Warburton v. White*<sup>202</sup> and *Arnett v. Reade*,<sup>203</sup> cases decided previously with

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198. Brief of Allen G. Wright, Amicus Curiae, *United States v. Robbins*, 269 U.S. 315 (1926) (No. 1249) (comparing California's community property regime to common law states but only to non-family partnerships). Apparently fearing their state's judicial indecision, all briefs for the taxpayer pleaded with the Supreme Court to make a determination of state law. *See* Brief for Defendants in Error, *United States v. Robbins*, 269 U.S. 315 (1926) (No. 493); Brief of John C. Altman & Richard S. Goldman, Amici Curiae, *United States v. Robbins*, 269 U.S. 315 (1926) (No. 1249); Brief of Allen G. Wright, Amicus Curiae, *U.S. v. Robbins*, 269 U.S. 316 (1926) (No. 1249).

199. Brief for the United States, at 19, *United States v. Robbins*, 269 U.S. 315 (1926) (No. 493).

200. *Id.* at 82-86. The "notion that there is any community property system common to the States carved from the former Spanish dominions must be discarded at the outset." *Id.* at 11.

201. *Id.* at 87.

202. 176 U.S. 484 (1900).

203. 220 U.S. 311 (1911).

respect to other community property states' laws, the Court had treated wives as having vested interests in community property where their rights and privileges were hardly greater than those in California. Justice Oliver Wendell Holmes, Jr., however, when upholding the wife's interest in the latter case, held that it was "not necessary to go very deeply into the precise nature of the wife's interest during marriage. The discussion has fed the flame of judicial controversy for many years."<sup>204</sup> Similarly, in *Robbins*, the Court would not rise to that challenge and shied away from the murky depths of community property law.

Finally, in the *Robbins* appeal on January 4, 1926, in a decision that gave California women the result they sought, the Supreme Court sided with the Treasury Department.<sup>205</sup> The Supreme Court for the first time spoke directly on the question of income splitting effected by community property statutes while continuing, as in *Arnett*, to avoid evaluating state-created interests.<sup>206</sup> The Court ruled that the California community property statute, as in effect in 1919, did not give wives vested property interests in their community property, and so husbands had to report all of their family income for federal income tax purposes.<sup>207</sup> Justice Holmes, writing for all but Justice Sutherland, concluded, "We can see no sufficient reason to doubt that the settled opinion of the Supreme Court of California, at least with reference to the time before the later statutes, is that the wife had a mere expectancy while living with her husband."<sup>208</sup> Making only fleeting reference to California law, Holmes made no reference to distinctions between California and either other community property or common law states and ignored the lower court's copious opinion. The import of the decision for wives was clear: The nation's highest court had held that the community property regime, if only in California with the rights that it vested in wives before 1920, did not create a true partnership between spouses. But the income tax-savings possibilities remained because the decision also upheld the use of state law, rather than a federal standard, as the basis for determining who owned income for federal income tax purposes.

Following *Robbins*, the Department of Justice turned, yet again, to the contradictions that existed between the treatment of California community

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204. *Id.* at 319. The Court relied heavily on the distinction between the definition of ownership for the purpose of parsing individual property rights and the definition of that same term for tax purposes. *Id.* at 320. In *Arnett*, Holmes would not "put an end to her interest without compensation," but he would disregard as irrelevant whatever interest she had for tax purposes in *Robbins*. *Id.* at 320. Similarly, Justice Edward Douglass White, who had decided *Warburton*, upheld, in *Moffitt v. Kelly*, California's state inheritance tax on all of the husband's estate including the wife's share of the community property because it was "merely a law imposing a tax." 218 U.S. 400, 403 (1910).

205. *United States v. Robbins*, 269 U.S. 315 (1926).

206. *Id.* *Robbins* was appealed to the Supreme Court on a "writ of error" shortly before the Judiciary Act of 1925 went into effect eliminating such direct appeals. The case involved property acquired before California's legislature revised the treatment of wives' interests in 1917, so the holding was not necessarily applicable to post-1917 community property.

207. *Id.* at 326-27.

208. *Id.*

property for federal estate and income tax purposes. The new Attorney General, Calvin Coolidge appointee John Sargent, withdrew Stone's 1924 opinion and undertook a reevaluation of the wife's interest in community property under state law.<sup>209</sup> Wives' interests were again found wanting:

[W]hatever adjectives or descriptive terms may be used in an attempt to define the nature of the wife's interest, when it came to the ordinary rights of ownership they were completely wanting, and the alleged ownership of the wife in a share of the community estate in California was properly described as a "barren ideality."<sup>210</sup>

After taking into account the recent changes made by the California legislature to the state's marital property regime, Sargent concluded that even with the 1923 change "the California Legislature seems to have taken a step toward giving the wife one, at least, of the rights usually pertaining to ownership of property, and yet the step was half-hearted."<sup>211</sup> Unless more substantive changes were made to give California wives greater interests in their half of the community property, the legislature was unlikely to sway the head of the Justice Department.

A major concern for the Attorney General was if California wives did not have a real ownership interest in community property it would violate the uniformity clause because it would allow the label of community property to reduce some couples' federal tax obligations below that imposed on their common law neighbors. Acknowledging the question was one of state, and not federal, law, only if community property wives truly had a more substantive right to property than their common law sisters would it be fair to give them the right to report their community income for federal tax purposes.<sup>212</sup> Thus, the Attorney General was concerned not just about federal revenue but also about preserving fairness in the federal tax system. He was not seeking to use the federal income tax to expand or contract the rights of the nation's wives but to create a workable system of determining property ownership. Nonetheless, to achieve his version of fairness, the Attorney General would have helped women toward their goal of equality within marriage. The government's intention was to have the confusion about community property resolved on a state-by-state basis and by state courts, and not on a national basis by congressional action.<sup>213</sup> This would increase the relevance of California women's pleas to improve their interest in community property. The ability to reduce taxes appeared to be in the state's hands.

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209. See 35 Op. Att'y Gen. 265 (1929) (discussing the income tax); 35 Op. Att'y Gen. 89 (1929) (discussing the estate tax).

210. T.D. 3891, V-2 C.B. 232, 234 (1926).

211. *Id.* at 236.

212. *Id.* at 236-37.

213. *Id.* at 237. The Attorney General never interpreted *Robbins* as asserting any power or intent to tax community property husbands on couples' joint income.

On the other hand, showing divisions in the executive branch, the Treasury Department prepared an administrative ruling that would have denied all husbands and wives the right to split income in all cases, both through the use of common law income-shifting devices and the community property regime.<sup>214</sup> This would have overruled the Attorney General's state law-based approach. Community property state representatives fiercely attacked the proposal and persuaded the Treasury Department to withhold its ruling until test cases in other community property states completed their judicial gauntlet.<sup>215</sup> All administrative rulings on the issue of community property were withdrawn so the Treasury Department could bring these test cases; cases litigated before the Supreme Court in 1930.<sup>216</sup> The representatives from the eight community property states also persuaded Congress to close the books for periods before January 1, 1925 in order to give closure for tax returns filed before *Robbins* had been handed down.<sup>217</sup>

As the federal government pursued cases in other community property states, the meaning of California's statutory revisions were reviewed in its own state courts. Despite the clear federal tax implications of California state supreme court decisions, the court continued to hold that wives did not have a vested interest in community property under state law.<sup>218</sup> In what was recognized at the time as a friendly suit,<sup>219</sup> a husband, Ernest A. Stewart, who was also the president of the California's Income Taxpayers' Association, a group that sought reduced taxation, challenged the statutory revisions.<sup>220</sup> Ida May Adams, the association's attorney, represented his wife, Frances Lee

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214. Memorandum from Tarleau to Sullivan, Legislative History of the Treasury's Position with Respect to Compulsory Joint Returns and Community Property Income (June 10, 1941) (on file with the Office of the Secretary of the Treasury, Box 54, Office of Tax Policy, Central Files, National Archives and Records Administration II, College Park, MD, 1933-56); George Donworth, *Federal Taxation of Community Incomes – The Recent History of Pending Questions*, 4 WASH. L. REV. 145, 161 (1929).

215. Donworth, *supra* note 214, at 165.

216. H.R.J. Res. 340, 71st Cong. (1930) (extending the statute of limitations for returns involving community income for fiscal years 1927 and 1928.).

217. Revenue Act of 1926, ch. 27, 44 Stat. 9 (1926); 67 CONG. REC. 4,422 (1926); H.R. REP. NO. 69-356, at 60 (1926) (Conf. Rep.). The Revenue Act of 1926 had passed the House without any reference to community income but by time the bill reached the Senate the Court had rendered its decision in *Robbins*. The provision would have also helped couples in the other community property states if they lost the other community property cases. Its effect was to validate and make final returns that had been based on government-issued guidelines supporting community property divisions of income.

218. See, e.g., *Stewart v. Stewart*, 249 P. 197, 208 (Cal. 1926), *reh'g denied* 269 P. 439 (Cal. 1928). This appeared to resolve the dual line of California cases that had troubled each branch of the federal government – putting to bed the line of cases which had claimed that the wife did have a vested interest in community property. See *supra* notes 49-50 and accompanying text.

219. *Tax Test Case Goes Forward*, L.A. TIMES, Feb. 25, 1927, at A1.

220. *Stewart*, 249 P. at 199.

Stewart, in a suit to quiet title to her half of the couple's community property.<sup>221</sup> Frances and Ernest had married in 1907 and their only property was community property purchased with funds acquired after the effective date of the 1917 Acts.<sup>222</sup> Ernest claimed all of the community property in fee simple and that his wife had a mere expectancy.<sup>223</sup> While Frances won before the lower court, her attorney faced a hostile audience in the California Supreme Court.<sup>224</sup> As women's groups pushed for, and won, greater protections from the state legislature, the court continued its conservative record when interpreting their rights. In *Stewart v. Stewart*, the court held that previous legislative changes had not fundamentally changed the nature of a wife's interest.<sup>225</sup> "The legislature...did not state...in plain language'... 'that the purpose of these amendments was to vest in the wife during the marriage a present interest or estate in the community property.'"<sup>226</sup>

By the time *Stewart* was decided, control of the community property/income tax debate had been wrestled from women's groups.<sup>227</sup> In the year following *Robbins* and *Stewart*, the California legislature added yet another section to its Civil Code, this one sponsored by none other than the California's Income Taxpayers' Association.<sup>228</sup> In fact, "three bills designed to clear up the community property income tax muddle... and pave the way for the refund of about \$120,000,000 in Federal income taxes paid by California husbands and wives" were introduced in the legislature.<sup>229</sup> Unlike the earlier changes to the regime that had been initiated by the state's women's groups seeking to improve the position of wives, tax-savings was the objective of the 1927 amendment.<sup>230</sup> At the nadir of women's political power in the state, the proposed provision gave both husband and wife "present, existing and equal

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221. *Id.* at 197. In 1932, the Women Lawyer's Journal (Los Angeles) gave a tribute to Ida May Adams who had become an elected judge. It is interesting how her contribution to community property was phrased: "RESPONSIBLE for amending in 1927 the California Community Property Law securing to women equal interest with that the husband in community property. Upon this amendment is based a ruling of U.S. Treasury Department according to California income taxpayers the privilege of filing separate income tax returns, resulting in saving to the people of California \$13,000,000 per year." *Judge Ida May Adams*, 19 WOMEN LAW. J. 6, 6 (1932).

222. *Stewart*, 249 P. at 198.

223. *Id.*

224. *Id.* at 208.

225. *Id.* at 205-06.

226. *Id.* at 206 (emphasis in original).

227. See *Talcott v. United States*, 21 F.2d 493 (N.D. Cal. 1927). *Talcott* reversed *Wardell v. Blum*. The court found for the government relying on *Stewart* and *Robbins* in a two sentence opinion listing these sources. *Id.* at 494.

228. *Governor Signs Property Bill*, L.A. TIMES, Apr. 29, 1927, at 4; See also O. J. Wilkinson, Jr., *Quasi-Community Property—California's New Property Concept*, 6 ARIZ. L. REV. 121 (1964).

229. *Bills Clear up State Tax Law*, L.A. TIMES, Jan. 21, 1927, at 3.

230. Edward H. Mitchell, *Federal Taxation in Recent Contact with California Community Property*, 14 S. CAL. L. REV. 390, 390 (1940).

interests” in the couple’s community property during marriage but also explicitly provided that the husband maintained management and control of all community property.<sup>231</sup> This wording did not incorporate the more common term “vested” as was included in the bill sponsored by the California League of Women Voters.<sup>232</sup> No longer was the state using real expansions of women’s rights in the hope of reducing residents’ federal tax obligations; it was now attempting to use no more than a legislative gloss to accomplish the same objective.

Public attention to the 1927 legislative change mirrored the shift in focus to one only of taxation. The National Woman’s Party, which had been following California developments closely, made no effort to support, but also none to alter, the 1927 proposal.<sup>233</sup> When it mentioned California’s laws in 1928, the group complained that husbands had exclusive rights of control over community property whether or not spouses lived together but made no further evaluation of the 1927 legislative change.<sup>234</sup> Similarly, the *L.A. Times* did not oppose the 1927 change to the community property regime as it had opposed the changes in 1917, 1919, and 1923 because it recognized this proposal as a tax-cutting bill;<sup>235</sup> and the *Sacramento Union*, a longtime supporter of women’s advancement, all but ignored the provision.<sup>236</sup> Nonetheless, even though the bill would save California couples federal taxes, some conservative interests still fought to prevent it from being made retroactive, and the Judiciary Committee debated the bill numerous times.<sup>237</sup> When it was finally passed, Ida May Adams, the attorney who had represented Frances Stewart the year before, rejoiced: “The only effect of the new law...will be to clarify the Federal income taxing situation.”<sup>238</sup>

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231. Act of Apr. 16, 1923, ch. 18, 1923 Cal. Stats. 29, 30. Because the Act was declaratory, some argued that the legislature only intended to codify existing law, so it might provide retroactive tax benefits, but this reading was denied by the state supreme court. See *McKay v. Lauriston*, 269 P. 519, 523 (Cal. 1928). Oddly, while the court worried about husbands’ loss of property rights, it also held that wives did not gain a vested right. *Id.* at 524. It seems that one stick of the bundle of property rights could be lost.

232. *Legislation Chief Topic for Council*, L.A. TIMES, Feb. 27, 1927, at C31.

233. Other women recognized that after the 1927 legislation husbands would take steps, such as creating trusts or family corporations, to ensure that their wives did not gain control over what they considered their province. *The Bulletin of the California League of Women Voters*, vol. 6, June 1930, Box 126 Status of Women, Part III, Records, 1918-1964, LWV Papers (photocopies on file with author).

234. Mab Copeland Lineman, *California Community Property as Affected by Recent Statutes*, EQUAL RIGHTS, June 16, 1928, at 151.

235. *Bills Clear Up State Tax Law*, *supra* note 230, at 3; *Governor Signs Property Bill*, *supra* note 228, at 4; *Senator Seeks Tax Law Relief*, L.A. TIMES, Nov. 27, 1927, at 15.

236. *Governor Signs Property Bill*, SACRAMENTO UNION, Apr. 29, 1927, at 4; *Tax Relief Seen in New Measure*, SACRAMENTO UNION, Apr. 30, 1927.

237. *New Property Law Drafted*, L.A. TIMES, Mar. 13, 1927, at 6.

238. *Governor Signs Property Bill*, *supra* note 228, at 4. Some thought that the provision would bring about radical change. See, e.g., Henry E. Monroe, *Procedural Changes Affecting Real Property*, CAL. ST. B.J. 36, 36-38 (1927); Charles H. Brock, *The Community Property Problem*, 3 B. ASS’N BULL. 5, 5-10, 26-28 (1927).

In 1930, the Supreme Court finally decided the other community property cases. Arising out of the uncertainty created by *Robbins*, four cases invoking the community property statutes of Washington,<sup>239</sup> Arizona,<sup>240</sup> Texas,<sup>241</sup> and Louisiana<sup>242</sup> were consolidated before the Court, each involving the right of state law to govern property ownership for federal income tax purposes. Justice Owen Roberts had joined the bench on June 2, 1930, and arguments in these cases were heard in late October of that same year.<sup>243</sup> While not a tax lawyer, Roberts's meticulous mind made him particularly well-suited for these types of cases. Analyzing the cases as someone who had ample experience applying statutory language and not as one judging the statute's underlying value, Roberts was more concerned with legal doctrine than with economic realities. In *Poe v. Seaborn*, which was Roberts's first opinion for the Court,<sup>244</sup> the Court adopted a conservative interpretation of the Court's role in interpreting federal tax legislation, deciding to defer to state law.<sup>245</sup>

Rendering the decision promptly, a month and three days after it was argued, a unanimous Court, soundly disagreed with the government. In *Seaborn*, Roberts concluded that when Congress levied a tax on the "net income of every individual," the "of" denoted ownership as defined by state law.<sup>246</sup> According to Roberts, under these state community property regimes, the rights of the husband and wife were so complete that neither ever became separately vested in ownership of the property but rather ownership became vested in the community at the moment of its acquisition.<sup>247</sup> The Court held that married couples living in these community property states could divide community income between spouses and thereby gain the reduction in federal taxes denied to the Robbinses.

Although people would continue to debate the wisdom of the *Seaborn* decision, the Court had settled the issue for most of the community property states, at least for the time being. The Treasury Department extended recognition of income splitting to the remaining community property states: Idaho, Nevada, and New Mexico.<sup>248</sup> The decision did not, however, overturn *Robbins*, and so California couples remained uncertain of their own proper tax

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239. *Poe v. Seaborn*, 282 U.S. 101 (1930).

240. *Goodell v. Koch*, 282 U.S. 118 (1930).

241. *Hopkins v. Bacon*, 282 U.S. 122 (1930).

242. *Bender v. Pfaff*, 282 U.S. 127 (1930).

243. The joint motion for certiorari in *Seaborn* was granted May 26, 1930, a week before Roberts joined the Court. 281 U.S. 704 (1930).

244. Erwin N. Griswold, *Owen J. Roberts as a Judge*, 104 U. PA. L. REV. 332, 337 (1955).

245. *Seaborn*, 282 U.S. at 117. Erwin Griswold noted a rumor that Justices Hughes and Stone, and potentially one other Justice, wished to dissent and so simply "took no part." Griswold, *supra* note 244, at 338 n.5. Hughes was also known for his dislike of dissents. Paul A. Freund, *Charles Evans Hughes as Chief Justice*, 81 HARV. L. REV. 4, 37 (1967).

246. 282 U.S. at 109.

247. *Id.* at 113.

248. Mimeo. 3853, X-I C.B. 139, 139 (1931).

treatment. Less than two months later, the Court again visited the issue of California's community property, this time considering the 1927 changes to California's Civil Code that gave wives "present, existing and equal interests."<sup>249</sup> In *United States v. Malcolm*, the Court undertook its review before the provision had a chance to be litigated in the state's courts. It did so after the Commissioner had already accepted the legislative revision as sufficient to permit couples to split their income for tax purposes; the Commissioner simply sought judicial blessing for this decision.<sup>250</sup> Having already adopted this approach, the government could not have been expected to launch a vigorous attack on what was now its own position.<sup>251</sup> In fact, the government's brief worked seamlessly with that of the taxpayer to ensure that *Robbins* no longer controlled.

Robert and Esther Malcolm brought the test case in which the positions of wealthy taxpayers and the government finally merged. Of all the couples who tested the limits of income splitting before the Supreme Court, the Malcolms benefited from it the least. In 1928 Robert had received a salary of \$3,600 for personal services and, in 1929, the couple filed separate returns, each reporting one-half of that amount.<sup>252</sup> They reported no other income.<sup>253</sup> As a result of their moderate financial position, as a couple they would benefit only marginally from the play between income tax brackets, unlike the other litigants in the community property cases. Their assessed deficiency was only \$18.39.<sup>254</sup> While this might have aided them in their fight for public support, it does not explain how they afforded their battery of high-powered attorneys.<sup>255</sup> Most likely funded by those who would benefit more than the Malcolms, the Malcolm's attorneys sought to have the case heard in conjunction with *Seaborn* and its companion cases.<sup>256</sup> Although they failed in that endeavor, they did manage to have the Court consider the changes in California law since *Robbins* in light of Congress's response, or lack thereof, to the Treasury Department's

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249. *United States v. Malcolm*, 282 U.S. 792 (1931).

250. Brief for Robert K. Malcolm at 2, *United States v. Malcolm*, 282 U.S. 792 (1931); I.T. 2457, VIII-1 C.B. 89 (1929).

251. I.T. 2457, VIII-1 C.B. at 89.

252. *Malcolm*, 282 U.S. at 793.

253. *Id.*

254. *Id.* *The Saturday Evening Post* incorrectly fixed the amount at \$1.12. Robert M. Yoder, *How Nine States Beat the Income Tax*, SATURDAY EVENING POST, May 24, 1947, at 23.

255. Several of Malcolm's attorneys authored treatises on taxation. See, e.g., KINGMAN BREWSTER, JAMES STERLING YARD IRVINS & PERCY WILSON PHILLIPS, *THE FEDERAL GIFT TAX* (1933); KINGMAN BREWSTER, *THE FEDERAL EXCESS PROFITS TAX* (1941); KINGMAN BREWSTER, *DISTRAINT UNDER FEDERAL REVENUE LAWS* (1937); KINGMAN BREWSTER, JAMES S. Y. IVINS & PERCY WILSON PHILLIPS, *TAXATION UNDER THE A.A.A. (AGRICULTURE ADJUSTMENT ADMINISTRATION)* (1934); KINGMAN BREWSTER, JAMES S. Y. IVINS & GEORGE E. HOLMES, *HOLMES AND BREWSTER'S FEDERAL TAX APPEALS* (1927); Allen G. Wright, *The California State Tax on Corporate Franchises*, 1 CAL. L. REV. 91 (1913).

256. Motion to Advance and to Have Brief Considered in Other Cases at 2, *United States v. Malcolm*, 282 U.S. 792 (1931) (No. 512).

treatment of the other community property regimes.<sup>257</sup> By presenting the case in this way, the taxpayer made the new California law look as much like those discussed in *Seaborn* as possible.

In defense of California's community property system, the taxpayers' dream team of attorneys painted a picture of the traditional family that the Malcolms embodied. As a result of their union, counsel explained, "the husband and wife pool their interests and work for the common good of the community."<sup>258</sup> Attorneys for the Malcolms argued that the husband should not be taxed on the assumption that he would violate the trust the state had placed in him to do his job as a spouse.<sup>259</sup> The Malcolms' legal team suggested that "[i]f New York or Massachusetts feel that the residents of California or Washington have, under the Revenue Acts, an unfair advantage over their own citizens, they can conform their statutes to those of the community property states."<sup>260</sup> With this, the community property states moved from defensive posturing to an offensive position in support of states' power to determine property ownership.

After a brief review of these facts, the Ninth Circuit Court of Appeals certified the pertinent questions to the Supreme Court.<sup>261</sup> In a *per curiam* opinion, the Supreme Court accepted that the wife's interest had been sufficiently vested for the couple to enjoy the economic benefit of splitting the family's income for federal income tax purposes.<sup>262</sup>

While the changed tax position might or might not have reflected any change in the economic reality of California's spouses, it definitely had an economic impact on the state and the nation.<sup>263</sup> After California qualified for income splitting tax treatment, the property regime's tax savings was attributed with attracting "a considerable number of motion picture stars and other high-salaried talents."<sup>264</sup> Moreover, its federal tax advantage was thought to permit the state to impose higher rates of *state* income tax than could non-community property states, and thus raise revenue for purely local concerns even as it siphoned money from the federal treasury.<sup>265</sup> Regardless of the amount of government revenue actually affected, the perception that the amount was substantial pervaded both the federal and state tax systems and affected their decision-making processes.<sup>266</sup> These perceptions, however, revolved around the

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257. Brief for Robert K. Malcolm, *supra* note 250, at 5, 16-26.

258. *Id.* at 27.

259. *Id.*

260. *Id.* at 37.

261. *United States v. Malcolm*, 282 U.S. 792 (1931).

262. *Id.* at 794.

263. R.M.L.B., *Community Property-Taxation-Income Taxes on Wife's Share of Community Property-Effect of California Code Amendments of 1917, 1923 and 1927*, 4 S. CAL. L. REV. 395, 400 (1931) (arguing the change reflected economic reality).

264. Harry J. Rudick, *The Problem of Personal Income Tax Avoidance*, 7 LAW & CONTEMP. PROBS. 243, 252 n.64 (1940).

265. *Id.* at 252-53.

266. *See, e.g., McMahon, supra* note 19.

tax consequences of the 1927 amendments and not any change bettering the state's wives.

#### CONCLUSION

California's 1927 statutory revisions, giving both spouses present, existing, and equal interests in a family's community property in name only, secured the tax savings that the state's wealthy couples had long coveted. This new provision, however, produced no legislative or judicial reexamination of the community property law, and no further significant changes were made until 1951.<sup>267</sup> Nonetheless, immediately after the California legislature acted, feminist Clara Foltz's brother, one of California's United States Senators, lobbied the Treasury Department, won the favorable tax treatment, and ended the doubt a couple's income splitting tax returns might be denied.<sup>268</sup> After this benefit was won, California couples were allowed to split community income between spouses for both federal income and estate tax purposes.<sup>269</sup> However, California's victory was not certain to last forever. Another new Attorney General announced that he would hold public hearings on the appropriate income tax treatment of community property in all of the community property states.<sup>270</sup>

Thus, by the end of the 1920s, the Treasury Department had reconciled itself to the idea that the federal income tax was in many ways limited by state marital property regimes, but the department refused to accept the interests state law created without deeper investigation into what those interests meant in practice. In reaching this conclusion, the Department had grown weary of indecisive negotiations with Congress to define the appropriate relations between state law and federal taxes. Reliance on state law had effectively handicapped the federal government. In the face of a potentially never-ending cycle of state and federal disputes as to the appropriate method of taxing community property regimes, the federal executive branch, as well as Congress, washed its hands of the problem and ceded the decision to the federal courts. The courts then failed as the last hope for a national federal income tax.

Although the Supreme Court in 1926 had denied California favorable tax results in the short term, by reinforcing the use of state law, rather than a federal standard, as the basis for determining who owned income for federal income tax purposes, *Robbins* required the federal government to be limited by state law and the rights it created. This also empowered the state's women to push for greater rights within the community property regime. Shortly

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267. Married women were then given the right to manage and control their earnings and any damages collected for personal injustices against them as long as the income was not mingled with that of their husband. Act of June 16, 1951, ch. 1102, [1951] Cal. Stat. 2860, 2860-61.

268. *Senator Seeks Tax Law Relief*, *supra* note 235, at 15.

269. I.T. 2457, VIII-1 C.B. 89, 89 (1929). *But see* Mimeo. 3723, VIII-1 C.B. 89, 90 (1929).

270. Donworth, *supra* note 214, at 164.

thereafter, the California state legislature set a dangerous precedent by proving that even though the income tax only applied to a small percentage of the state's residents, the legislature was not above manipulating its marital property regime to minimize those residents' federal tax obligations. As a result of the Court's ruling, women in other community property states also sought additional rights under their regimes, in part to support their claims for income tax reduction.<sup>271</sup> For example, worried that its position was weak, Louisiana's courts determined in 1926 that the wife's interest was a "vested" one.<sup>272</sup> Over the next two decades, some states completely altered their property regimes, by adopting community property when they had traditionally been common law states, solely for the purpose of reducing their residents' tax burdens.<sup>273</sup>

It is not surprising that state law was manipulated to reduce federal income taxes. As a response to similar tax-cutting desires, states have adopted Limited Liability Company statutes and drafted rules for mergers and acquisitions to win tax advantages.<sup>274</sup> What is more unusual is that in this instance the income tax was used by some as an excuse to further other, unrelated social objectives. Women played the game of tax reduction in order to further their own ends of equity within marriage. They attempted to use the state's "gendered imagery" to their own benefit.<sup>275</sup> In doing so, this article shows the strength of these Progressive Era women in the early 1920s and their recognition of the rhetoric required to achieve their goals. They could not always win with appeals to equity but by framing their issues for male self-interest they might just succeed.

At the time, people recognized this for what it was: "For twenty years the 'equal (identical) rights for women' movement has been effectively reinforced, in California, by this unsolicited though powerful tax-saving ally."<sup>276</sup> However, these arguments had limitations. In 1932 an unsuccessful attempt was made in *Hannah v. Swift* to procure construction of the 1927 language that would confer upon married women equal possession and control of community property.<sup>277</sup> The Ninth Circuit referred to the "novelty" of such convention, rejected it, and held these provisions did not change the rule "vesting in the husband the entire management and control of the community property."<sup>278</sup>

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271. *Washington Women Want Separate Tax Returns*, EQUAL RIGHTS, June 12, 1926, at 138.

272. *Phillips v. Phillips*, 107 So. 584, 588 (La. 1926).

273. See McMahon, *supra* note 19.

274. See, e.g., Susan Pace Hamill, *The Story of LLCs: Combining the Best Features of a Flawed Business Tax Structure*, in BUSINESS TAX STORIES 295 (Steven A. Bank & Kirk J. Stark eds., 2005); Ajay K. Mehrotra, *The Story of the Corporate Reorganization Provisions*, in BUSINESS TAX STORIES 27 (Steven A. Bank & Kirk J. Stark eds., 2005).

275. ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20<sup>TH</sup>-CENTURY AMERICA 172 (2001).

276. Edward H. Mitchell, *Federal Taxation in Recent Contact with California Community Property*, 14 S. CAL. L. REV. 390, 390 (1940).

277. 61 F.2d 307, 310 (9th Cir. 1932).

278. *Id.*

Community property had been adopted in California with heated debate but with no meeting of the minds as to what it would really mean in practice. One delegate wanted wives for the state's bachelors; others wanted wholesale adoption of the civil law. Only a few of the delegates actually saw it as significantly altering women's rights. Once the state legislature eviscerated much of the power that community property gave to wives, it was hard to reverse that trend. In the early decades of the twentieth century, wives thought they had found a useful tool in the federal income tax. They were able to use arguments for its reduction to advance their own interests and make the community property system operate more as a community and less as a patriarchy. Unfortunately, women lost control of this argument. By 1927, when marital property and federal taxation were effectively intertwined, the state legislature acted to minimize its state residents' tax obligations but without expanding the rights afforded to the state's wives. Thereafter the power of the tax rhetoric for this issue would reside with the wealthy alone.