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POLITICAL HOT POTATO: HOW CLOSING LOOPHOLES CAN GET POLICYMAKERS COOKED

*Stephanie Hunter McMahon**

ABSTRACT

Loopholes in the law are weaknesses that allow the law to be circumvented. Once created, they prove hard to eliminate. A case study of the evolving tax unit used in the federal income tax explores policymakers' response to loopholes. The 1913 income tax created an opportunity for wealthy married couples to shift ownership of family income between spouses, then to file separately, and, as a result, to reduce their collective taxes. In 1948, Congress closed this loophole by extending the income-splitting benefit to all married taxpayers filing jointly. Congress acted only after the federal judiciary and Treasury Department pleaded for congressional reform and, receiving none, reduced their roles policing wealthy couples' tax abuse. The other branches would no longer accept the delegated power to regulate the tax unit. By examining these developments, this article explores the impact of the separation of powers on the closing of loopholes and adds to our understanding of how the government operates. It concludes that when statutes contain loopholes that are not politically salient, there is a limit as to how long policymakers will accept a delegation of responsibility to police the loopholes.

I. INTRODUCTION

"The great problem to be solved" by the Founding Fathers was to design governance institutions that would afford "practical security" against the excessive concentration of political power.[1] Their product, our Constitution, envisions a system in which each branch of the federal government has its own duties and powers and the states retain much of the obligations and powers of governing.[2] The Constitution does not specify how the division of power is to be enforced; and

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1. THE FEDERALIST NO. 48 (James Madison).
2. U.S. CONST. art. I, §8; art. II, §1; art. III; amend. X.

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founders, such as James Madison, understood that this separation of government functions would not be strictly maintained and that the resulting checks and balances would often achieve beneficial ends.[3] This system was to preserve the American public's liberty, even at the price of raising the cost of governance.[4] For Madison, and for many scholars today, the goal was to design institutions so that policymakers' self-serving desires could be channeled to public ends.[5]

A question of governance that has yet to be answered is how to prevent the creation of loopholes in statutory regimes and, secondarily, how to structure the government to encourage closing loopholes once they have been created. Judge Frank Easterbrook described legislation as compromises, "and the cornerstone of many a compromise is the decision, usually unexpressed, to leave certain issues unresolved."[6] Once a compromise is exploited as a loophole, the public might rationally demand that their political leaders change the law. However, as discussed below, the separation of powers can provide political insulation that discourages the different branches of government from taking action to close them. Little scholarly attention has been given to these instances when no one wants political power because the potential blame for closing someone's loophole outweighs the political benefits that might be derived from improving the law.[7]

Public choice models predict that when the cost of legislation is concentrated but its benefits are dispersed the minority will be able to thwart congressional action.[8] It requires a political entrepreneur to impose the majority's will on the

3. THE FEDERALIST NO. 47 (James Madison). *Compare* the language of U.S. CONST. art. II, §1 ("The executive Power shall be vested in a President. . .") *and* art. III, §1 ("The judicial Power of the United States, shall be vested in one supreme Court. . .") *with* art. I, §8 ("The Congress shall have the Power. . .To make all Laws which shall be necessary and proper. . .").

4. Bruce G. Peabody & John D. Nugent, *Toward a Unifying Theory of the Separation of Powers*, 53 AM. U. L. REV. 1, 32-33 (2003); Thomas O. Sargentich, *The Limits of the Parliamentary Critique of the Separation of Powers*, 34 WM. & MARY L. REV. 679, 732-8 (1993); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 577-78 (1984).

5. THE FEDERALIST NO. 51 (James Madison). *See, e.g.*, DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY (Ira Katznelson, Matin Shefter & Theda Skopol eds., 2001); JACOB S. HACKER, THE DIVIDED WELFARE STATE (Cambridge Univ. Press 2002); Daniel R. Ernst, *Law and American Political Development, 1877-1938*, 26 REV. AM. HIST. 205 (1998); Jonathan R. Macey, *Positive Political Theory and Federal Usurpation of the Regulation of Corporate Governance: The Coming Preemption of the Martin Act*, 80 NOTRE DAME L. REV. 951 (2005); Terry M. Moe, *Political Control and the Power of the Agent*, 22 J. L., ECON. & ORG. 1 (2005); Reuel Schiller, *"Saint George and the Dragon": Courts and the Development of the Administrative State in Twentieth-Century America*, 17 J. POL'Y HIST. 110 (2005); Mathew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035 (2006). *But see* Daniel A, Farber, *Politics and Procedure in Environmental Law*, 8 J.L. ECON. & ORG. 59 (1992); Mark Kelman, *On Democracy-Bashing: A Skeptical Look at The Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199, 217-23 (1988); Jeffrey J. Rachlinsky & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549 (2002).

6. Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 540 (1983).

7. Congressional delegation is predicted when pleasing some constituents harms others. *See* MICHAEL HAYES, LOBBYISTS AND LEGISLATORS 198 (1981); NEIL K. KOMESAR, IMPERFECT ALTERNATIVES 5 (Univ. of Chi. Press 1994); Maxwell L. Stearns, *The Public Choice Case Against the Line Item Veto*, 49 WASH. & LEE L. REV. 385, 405-6 (1992). More has been written on the creation of loopholes in the tax code than on their closure. For an interesting study, see JOHN WITTE, THE POLITICS AND DEVELOPMENT OF THE FEDERAL INCOME TAX 269-335 (Univ. of Wis. Press 1985).

8. HAYES, *supra* note 7, at 99-126; JAMES Q. WILSON, POLITICAL ORGANIZATIONS 332-37 (Princeton

minority.[9] One difficulty in closing loopholes is that the benefit of the loophole is concentrated while the benefit of an equitable regime is diffuse. Those benefiting from the loophole not only face the psychological cost of losing a benefit, often a stronger motivator than the hope of a just system, but also have fewer transaction costs when uniting to block corrective legislation.[10] As a result, in most cases one would expect loopholes to persist; the question is through what means is the loophole protected.

This case study examines whether those predictions are accurate in a deep history of one important issue for the U.S. federal income tax. In what was seen as a loophole of the early tax, political entrepreneurs did not step forward even though those burdened were few, dispersed, and not well-organized on the issue. The particular issue being examined – the tax unit which dictates who is required to file a single tax return – was recognized to provide opportunities for abuse.[11] Nonetheless, as shown in the congressional record and legislative debates, legislators received little sustained pressure from their constituents regarding how the tax unit should be defined.[12] In the face of relative public apathy, what motivated and constrained policymakers' decisions remains unexplored. As with many issues in the day-to-day operation of government, that the issue had little political salience except among those directly affected, and even then relatively little, meant that policymakers could act without fear of direct political reprisal.[13]

Although this new theory has yet to be broadly tested, this study shows that when a policy change is recognized to create identifiable winners and losers, elected officials will not act aggressively even to privilege their constituents.[14] Instead, they act reluctantly and only when forced. On the other hand, for a period the Treasury Department and the courts interpreted the law in ways that they believed would accomplish the greater good. For a time the system operated in a way that would have made Madison proud. Moreover, when these branches stopped policing the exploitation of the loophole, they did so not because they were not captured by those who stood to gain but in order to abdicate the power to the

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Univ. Press 1973).

9. MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 34-36, 175-78 (Oxford Univ. Press 1971).

10. *See* Edward J. McCaffery and Jonathan Baron, *Framing and Taxation: Evaluation of Tax Policies Involving Household Composition*, 25 J. ECON. PSYCHOL. 679 (2004). Moreover, those seeking to maintain a loophole merely need to thwart legislation whereas those seeking to close it need legislative action. *Id.*

11. While scholars today might not view this as avoidance, it was seen as avoidance at the time. *See, e.g.*, Randolph E. Paul and Valentine B. Havens, *Husband and Wife Under the Income Tax*, 5 BROOK. L. REV. 241, 255 (1936); Robert M. Yoder, *She's Dear, But Is She Deductible?*, SATURDAY EVENING POST, Oct. 12, 1946, at 17; For similar results in environmental law, *see also* John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 ECOLOGY L.Q. 233 (1990).

12. Legislators did receive pressure in 1941 and 1942, *infra* notes 94 and 97.

13. Regarding the salience of taxes, *see* Marcus Berliant & Hideo Konishi, *Salience: Agenda Choices by Competing Candidates*, 125 PUBLIC CHOICE 129 (2005); Raj Chetty et al., *Salience and Taxation: Theory and Evidence*, 99 AM. ECON. REV. 1145, 1165 (2009); Amy Finkelstein, *E-Z Tax: Tax Salience and Tax Rates*, 124 Q.J. ECON. 969 (2009); Deborah H. Schenk, *Exploiting the Salience Bias in Designing Taxes*, 28 YALE J. REG. 1 (2011).

14. This is unlike the distribution of tax benefits that benefits a few and has no identifiable losers. *See* Edward J. McCaffery & Linda R. Cohen, *Shakedown at Gucci Gulch: The New Logic of Collective Action*, 84 N.C. L. REV. 1159 (2006).

legislature.

After the executive agency and the judiciary stopped policing behavior, Congress was a reluctant entrepreneur and adopted the income-splitting joint return in 1948 to replace the original individual-based tax system.[15] It did so trying to reconcile competing objectives. The income tax system has historically had several objectives when choosing who should file a single tax return: individuals, married couples, or families. In their choice of tax unit, the government sought to treat all taxpayers in the same economic position the same way regardless of their marital status as well as to tax everyone according to their ability to pay.[16] Boris Bittker once proved it is impossible to attain each of these goals at the same time.[17] As long as a progressive rate structure is maintained, a system that is neutral to marriage will tax couples with the same amount of income different amounts.

For an example that highlights the zero sum nature of this political choice, assume that there are five taxpayers: Anne, Ben, Carrie, Dan, and Ed. Anne and Ben are married as are Carrie and Dan. Ed is single. Anne and Ben each earn $10,000 this year, Carrie earns $0, and Dan and Ed each earn $20,000. Each "household" has the same income, but Anne-Ben is an equal-earning couple while Carrie-Dan has one income earner. The tax system is progressive: the rate is 10% on all income above $10,000 but income $10,000 and below is exempt from tax. Under an individually assessed system, Anne, Ben, and Carrie would pay $0 while Dan and Ed would pay $1,000 each. Anne-Ben pays less as a couple than Carrie-Dan even though both couples have equal income.

	Income	Tax Liability
Anne	$10,000	$-0-
Ben	$10,000	$-0-
Carrie	$-0-	$-0-
Dan	$20,000	$1,000
Ed	$20,000	$1,000

Under the joint taxation system adopted by Congress in 1948, married couples are taxed as a unit but with tax brackets twice as wide as those for single taxpayers, therefore married couples' income up to $20,000 is exempt from tax.[18] As a result, neither couple owes federal income tax; Ed, on the other hand, is taxed $1,000.

15. *See infra* pp. 174-75.

16. Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1396-97 (1975).

17. *Id.*

18. Technically, a couple filing jointly in 1948 would owe federal income tax equal to twice the amount that would have been due on half its income. Revenue Act of 1948, Pub. L. No. 80-471, §§ 301-303, 62 Stat. 110, 114-16 (1948). The method of calculating joint tax obligations has since been changed to a separate bracket schedule. I.R.C. § 1 (2010).

	Income	Tax Liability
Anne-Ben	$20,000	$-0-
Carrie-Dan	$20,000	$-0-
Ed	$20,000	$1,000

In order to raise the same amount of government revenue as under the individual regime, the government might double the tax rate to 20%, in which case Ed would bear the entire increased tax burden. Thus, under a progressive system, the choice of tax unit matters as to the allocation of tax liabilities and, after they perform this calculation, the different constituencies can see who is winning and who is losing by either choice of tax unit.

The issue was made more difficult for Congress because, from the income tax's enactment in 1913, policymakers recognized that with the original individual-filing system wealthy spouses could shift income to their lower-income mates and minimize their collective taxes.[19] In other words, Dan could (and often did) shift $10,000 of income to Carrie, Carrie would then be taxed on the $10,000, and together they would owe less in tax ($0 as opposed to $1,000).[20] But this tax reduction only worked for wealthy taxpayers who were married and had income that the Supreme Court would allow to be shifted. Some taxpayers, but not all, could reduce their collective taxes through tax planning. This threat to the integrity of the progressive tax system proved more dangerous when rates were made very progressive and top marginal tax rates reached 77 percent in World War I.[21]

The zero-sum nature of the tax unit was especially apparent in the era before deficit financing. The choice to spend on one government project necessarily means there is less money available for another, but the way the public and policymakers interpret these issues differ.[22] Although in a given year one group might receive a tax reduction without increasing the tax rates applied to other groups, those not benefiting suffer under relatively more in taxes and, over time, as revenue needs increase and with it tax rates, the zero-sum nature becomes more direct. Regardless of whether choices with respect to the tax unit were zero sum in a given year, the policy developed as a result of the abdication of responsibility because policymakers understood the issue as zero sum. Left unanswered in this article is the interesting question of how issues are framed and why some are recognized as

19. Couples could file joint returns before 1948 but the Treasury Department did not always calculate their liability as a unit. *See infra* note 78 and accompanying text. Before 1948, there might be economic benefits to filing jointly if one spouse had losses or deductions to offset the other's income. *Id.*

20. Dan's ability to shift income would depend on the source of his income. *See* Lucas v. Earl, 281 U.S. 111 (1930).

21. Data Release, Personal Exemptions and Individual Income Tax Rates, 1913-2002, http://www.irs.gov/pub/irs-soi/02inpetr.pdf.

22. DANIEL SHAVIRO, DO DEFICITS MATTER? 308-09 (Univ. of Chi. Press 1997); Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q. J. ECON. 371, 376 (1983).

zero sum and others are not.[23]

Because of the difficulty policymakers had framing a solution to income-shifting tax avoidance, the issue of the appropriate tax unit presents an opportunity to question the wisdom of Madison's grand design. This article argues that Congress reversed course in 1948 only in reaction to the recognition that it could no longer delegate responsibility.[24] That realization was coupled with an opportunistic ability to frame the change as a tax reduction and not as the imposition of a tax increase. In this instance of a zero sum game, favorable laws that would benefit the public by clarifying the law and preventing its avoidance were slow to pass.[25] No branch was required to act. Not deciding the law led to a stalemate that benefited some taxpayers over others.[26]

Recent scholarship, particularly by those authors studying positive political theory, examines the interrelationship of institutional players, such as legislators, agency personnel, and the courts, as creators of policy.[27] Policymaking is depicted as dynamic; those making policy respond to each other sequentially in real time. In this case study, after a period during which an executive agency and the judiciary worked to solve problems created by an omission in the original tax statute, those political actors stopped taking responsibility for policing the loophole. When Congress refused to act, eventually the other branches tossed the hot potato, and the minority group of taxpayers won.

Based on this study, it is incorrect for scholars to assume that the various branches of government will always accept a delegation of power from Congress.[28] Consistent with classic game theory, the branches understood that the outcome of this policy depended on the actions of others.[29] Knowing that each branch must

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23. When closing loopholes in the law, those who previously benefited will always experience a loss. The question remains why others sometimes feel they directly benefit. This is a more direct sense than the nebulous joy of "soaking the rich." Because of space constraints, I minimize discussion of interest groups in this article. Few members of the public showed interest in this element of tax policy with the notable exception of 1941 and 1942. For a full discussion of interest groups, see Stephanie Hunter McMahon, Money, Sex, and Tax Policy: Developments in Tax Avoidance and Marital Returns, 1913-1948 (January 2009) (unpublished Ph.D. dissertation, University of Virgina) (on file with UMI Microform, ProQuest LLC).

24. This is not the only time Congress has avoided power. Scholars have critiqued congressional inaction in the war on terror and more generally in foreign affairs. *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2352 (2006). Not everyone thinks it is worth the resources to close loopholes. *See* Mark J. Ramseyer & Minoru Nakazato, *Tax Transitions and the Protection Racket: A Reply to Professors Graetz and Kaplow*, 85 VA. L. REV. 1155, 1157 (1989).

25. Change must overcome procedural hurdles. ELIZABETH GERBER, POPULIST PARADOX 7-8, 37-58 (Princeton Univ. Press 1999).

26. Of course, the alternative situation in which Congress did act might have produced a less equitable result.

27. *See supra* note 5; Davis S. Law, *Introduction: Positive Political Theory and the Law*, 15 J. CONTEMP. LEGAL ISSUES 1 (2006); Max M. Schanzenbach & Emerson H. Tiller, *Strategic Judging Under the U.S. Sentencing Guidelines: Positive Political Theory and Evidence*, 23 J.L. ECON. & ORG. 24 (2007); Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and its Interpretation*, 151 U. PA. L. REV. 1474-87 (2003).

28. *See* Marilyn F. Drees, *Do State Legislatures in Resolving the "Just Compensation" Dilemma? Some Lessons from Public Choice and Positive Political Theory*, 66 FORDHAM L. REV. 787, 809 (1997).

29. Stephen W. Salant & Theodore S. Sims, *Game Theory and the Law: Ready for Prime Time?*, 94 MICH. L. REV. 1839, 1846-47 (1996).

compromise in order to forge a political deal, this allowed them to abdicate responsibility for making policy. This history demonstrates that policymakers are not always seeking to create a deal in the first place. By not compromising, each branch hoped to remain clear of blame for the loophole. Understanding this helps better predict policymakers' action (or inaction) in the face of statutory weaknesses.

Moreover, understanding this history should influence how we interpret statutes and the value we give to legislative intent. Scholars theorize that the choice of a judge's interpretative tool favors a particular allocation of power between the branches of government, and it is this allocation that we must evaluate for its ability to achieve justice.[30] However, in situations where no branch is taking the lead on a policy issue, this theory of statutory interpretation merely exacerbates existing political dynamics of what is, in effect, a political vacuum. Accepting Congress's signaling function is difficult if not impossible when, as in the case of the tax unit between 1913 and 1948, Congress abdicates that function.[31]

This article thus provides a description of intergovernmental relations in which the fragmentation of power prevented the concentration of policy development in one center and allowed a loophole to flourish. Part II examines the Treasury Department's efforts to respond to taxpayer abuse, first by attempting to define rules and then by lobbying for legislative change. Part III assesses the Supreme Court's attempt to persuade congressional action in several of its opinions. Part IV evaluates Congress's actions and final resolution. Finally, the article concludes that the delay in action exemplifies a dangerous policy model of inaction.

II. THE POWER OF THE EXECUTIVE: PRESSED INTO INACTION

Scholars fear that an executive agency will be captured by the interests that it regulates even as it "seize[s] opportunities to expand its jurisdiction and its lawmaking authority."[32] These twin concerns leave scholars struggling to devise

30. *See* Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593 (1995); Nancy Staudt et al., *Judging Statutes: Interpretive Regimes*, 38 LOY. L.A. L. REV. 1909, 1910 (2004).

31. *See* Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027 (2002); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987); Earl M. Maltz, *Statutory Interpretation and Legislative Power: The Case for a Modified Internationalist Approach*, 63 TUL. L. REV. 1 (1988); John F. Manning, *Putting Legislative History to a Vote: A Response to Professor Siegel*, 53 VAND. L. REV. 1529 (2000); McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP PROBS. 3 (1994); McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705 (1992); Daniel B. Rodriguez & Barry R. Weingast, *The Paradox of Expansionary Statutory Interpretation*, 101 NW. U. L. REV. 1207 (2007); Lawrence M. Solan, *Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation*, 93 GEO. L.J. 427 (2005); Peter L. Strauss, *Statutes Are Not Static: The Case of the APA*, 14 J. CONTEMP. LEGAL ISSUES 767, 770 (2005); *But see* William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171 (2000); Kenneth A. Shepsle, *Congress is a "They," Not an It: Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

32. Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 62 (1982). *See also* Jonathan R. Macey, *Separated Power and Positive Political Theory: The Tug of War Over Administrative Agencies*, 80 GEO. L.J. 671, 675-92 (1992); William T. Mayton, *The Possibilities of Collective Choice: Arrow's Theorem, Article I, and the Delegation of Legislative Power to Administrative Agencies*,

means to control agencies and ensure that they follow Congress's dictates.[33] This case study shows that these fears are not always realized. Although the nature of the tax unit question forced the Treasury Department to draft rules in order for the tax to operate, this executive agency acted with little desire for the responsibility as its rulings attempted to narrow the loophole permitting income shifting. At a time when few Americans paid the income tax, the Treasury Department initially pursued a policy that put the concerns of the larger number of citizens over a small group of wealthy couples.

One scholar suggests that "a moderate degree of bureaucratic insulation" reduces rather than exacerbates counter-majoritarian problems in agency rulemaking.[34] In this case, the executive agency pulled policy from the extremes of unfettered taxpayer discretion to family taxation as it struggled to develop a fair tax. However, the Department also lobbied Congress for more explicit laws that would relieve the agency of the burden of policing individuals' activities.[35] When Congress failed to respond, the Treasury Department stepped down from its decision-making position, leaving the power with the interest group of wealthy, married taxpayers. Interested taxpayers thus did not have to capture the agency, they simply had to keep Congress from acting. Agency inaction was enough.

The Treasury Department, when presented with Congress's 1913 income tax, did not start with a blank slate. The United States had two previous national experiences to draw on, both incorporating the individual as the tax unit.[36] On the other hand, progressive policymakers often used the British income tax as a model, and its regime treated married couples as the tax unit.[37] Then-Congressman Cordell Hull (D-TN), who wrote the first (that was really the last) draft of the income tax statute, contemplated following the British lead and requiring spouses to file jointly, but he believed that married women's property acts would make such a law unconstitutional.[38] The larger congressional body did not debate the issue; marital

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1986 DUKE L.J. 948, 960 (1986); Matthew D. MCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989); Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1050-52 (1997). *But see* Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON & ORG. 81 (1985).

33. Macey, *supra* note 5, at 951; Eric A. Posner, *Controlling Agencies with Cost-Benefit Analysis*, 68 U. CHI. L. REV. 1137 (2001).

34. *See* Matthew Stephenson, *Optimal Political Tax Control of the Bureaucracy*, 107 MICH. L. REV. 53, 53 (2008).

35. The process was political. "[The regulatory process] involves negotiation and compromise as well as evolving strategies to achieve certain ends." Dwyer, *supra* note 11, at 315.

36. *See generally* Act of August 5, 1861, 12 Stat. 292 (1861); Tariff of 1894, 28 Stat. 509 (1894). Civil War politicians were aware of this potential tax avoidance. *See* Henry Wilson (R-MA), CONG. GLOBE, 38TH Cong., 1ST SESS., 2515-16 (daily ed. May 28, 1864) (statement of Sen. Henry Wilson).

37. *See, e.g.*, H.R. REP. NO. 77-1040, at 64-68 (1941); *Revenue Revision of 1942: Hearings Before the House Committee on Ways and Means*, 77th Cong., vol. 2, at 1254-55 (1942) (statement of William Greenough, Attorney at Law); 87 CONG. REC. 6480, 6600, 6715 (1941); 88 CONG. REC. 6332 (1942).

38. *See* CORDELL HULL, THE MEMOIRS OF CORDELL HULL 70-71 (Macmillan 1948); ROBERT H. MONTGOMERY, FEDERAL TAX HANDBOOK SUPPLEMENT 1941-1942, at 1016 (1941). Hull likely meant to have husbands file the family's return, as they did in Wisconsin, although this is not certain. If that was the case, joint filing would require the husband to pay tax on income that not he but his wife owned.

status only entered congressional debates regarding exemption levels and then issues of gender equality mixed together with concerns about the progressivity of the tax.[39]

The income tax section of the Tariff Act of 1913, only ten pages long, imposed a new tax "upon the entire net income arising or accruing. . .to every citizen of the United States."[40] Throughout the statute "citizen," "individual," and "person" were used interchangeably.[41] Congress's answer to the tax unit question had simply been to replicate its past language with little debate. This was consistent with Congress's approach to many other issues of the practical administration of the tax.[42] Devising answers to questions of the tax's operation was politically dangerous because the choices carried the risk of raising someone's taxes.[43] The statute's speedy passage, although minimizing opposition in Congress, merely postponed problems to its implementation phase.[44]

The postponement of congressional clarification continued until the 1948 adoption of the married couple as the tax unit. In each enacted statute, Congress taxed the "net income of every individual."[45] Seemingly clear, this language could have been interpreted in multiple ways: Income of a person could be defined based on legal title to, benefit from, or control over income.[46] Each of these tests could, in turn, be based on a national standard or be interpreted as requiring deference to state law. Because Congress had not specified what the indicia of ownership to be taxed precisely were, first the Treasury Department and then the courts were required to determine who was the appropriate owner of taxable property in a myriad of legal and factual situations.[47]

Thus, what at first glance might appear to be clear language in reality allowed Congress to defer issues of the tax's application as the legislature failed to develop a coherent method to determine what specific property was owned by a particular

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39. *See, e.g.*, TREASURY DEP'T, INCOME TAX: EXTRACT, S. DOC. NO. 63-4 1 (1913); 50 CONG. REC. 1,254-57, 3,850-52 (1913). The Senate's Finance Committee tried to permit each spouse to take a full individual exemption, but it agreed to a lower marital exemption but one that more than covered the $587 mean adult male income. 50 CONG. REC. 3,771, 3850-51 (1913); BUREAU OF THE CENSUS, HISTORICAL STATISTICS, Series D 722-727, at 164.

40. *See* Tariff Act of 1913, sec. 2, 38 Stat. 114, at 166 (1913).

41. *See generally id.* The surtax was levied on "every individual" and "every person" subject to the tax had to file a return.

42. *See generally* Stephanie Hunter McMahon, *A Law with a Life of Its Own*, 7 PITT. TAX REV. 1 (2009).

43. *See* W. ELLIOTT BROWNLEE, FEDERAL TAXATION IN AMERICA 54 n.6 (2004).

44. For a similar experience, *see* Michael Selmi, *Interpreting the Americans with Disabilities Act*, 76 GEO. WASH. L. REV. 522, 539 (2008).

45. *See, e.g.*, Act of 1913, *supra* note 40; Revenue Act of 1916, 39 Stat. 756 (1916); Revenue Act of 1917, 39 Stat. 1000 (1917); Revenue Act of 1918, 40 Stat. 1057 (1919); Revenue Act of 1921, 42 Stat. 227 (1921); Revenue Act of 1924, 43 Stat. 253 (1924); Revenue Act of 1926, 44 Stat. 9 (1926); Revenue Act of 1932, 47 Stat. 169 (1932); Revenue Act of 1934, 48 Stat. 680 (1934); Revenue Act of 1938, 52 Stat. 447 (1938); Revenue Act of 1942, 56 Stat. 798 (1942).

46. These possibilities became more important as the meaning of property changed in the Progressive Era. *See infra* note 110.

47. The Sixteenth Amendment and the income tax statutes also did not define "income" or "taxpayer." *See* U.S. CONST. amend. XVI.

individual, especially within the close relationship of the family.[48] This ambiguity in the statute soon became a loophole for wealthy married couples; but while some wealthy couples would soon benefit significantly from this inadvertently made policy, few couples actually did so. An average of only 2% of the labor force paid federal income tax each year from 1913 to 1915.[49] Because few families had income above family exemption levels, the loophole went unused by most Americans.

After the tax's enactment, the Treasury Department was given only twenty-eight days to prepare regulations governing the tax's practical operation before withholding was to begin on November 1, 1913.[50] This necessity forced the Treasury Department to recognize some system for applying the tax to families. The choice to be made was whether to take the statute at its word and devise rules for dividing family income or to apply the statute to couples as a single unit. Despite the wording of the statute, the Department first took the position that the 1913 income tax treated the couple as a unit.[51] "The husband, as the head and legal representative of the household and general custodian of its income, should make and render the return of the aggregate income of himself and wife."[52] The Treasury Department understood that such a treatment would impose a relatively higher tax burden on some marriages, those of wealthy couples.[53]

This early structure of relative burdens was short-lived. The next year the Treasury Department reversed course, ruling that husbands and wives must file separately if they had separate income.[54] This change benefited wealthy couples because it allowed them to reduce their collective taxes if they shifted income between spouses because more income would be taxed in lower tax brackets. Spouses gave each other gifts and established joint tenancies, trusts, and family partnerships in order to shift income.[55] Other couples relied on their state

48. *See* Tariff Act of 1913, *supra* note 40, at 166. Some members of Congress complained that the delegation created a "third House of Congress by depositing in departmental officers discretion as to whether or no[t] laws shall actually have vital operation or not." *See, e.g.*, CONG. GLOBE, 41st Cong., 2d. Sess. 631 (1870) (statement of Sen. Thomas Bayard). *See also* CONG. GLOBE, 37th Cong., 1st Sess. 315, 1531 (1861).

49. W. Elliot Brownlee, *Historical Perspective on U.S. Tax Policy Toward the Rich, in* DOES ATLAS SHRUG? THE ECONOMIC CONSEQUENCES OF TAXING THE RICH 29, 41-42 (Joel B. Slemrod ed., 2000); WITTE, *supra* note 7, at 79.

50. TREASURY DEP'T, ANNUAL REPORT OF THE SECRETARY OF THE TREASURY, H.R. DOC. NO. 358, at 5 (1913).

51. The Treasury Department might have relied on the language regarding exemptions that allowed "only one deduction of $1,000 shall be made from the aggregate income of both husband and wife when living together." *See* Tariff Act of 1913, *supra* note 40, at 168.

52. T.D. 1923, 15 Treas. Dec. Int. Rev. 298, 298 (1913).

53. *See id.*

54. *See* T.D. 2090, 16 Treas. Dec. Int. Rev. 259, 268 (1914); T.D. 2137, 17 Treas. Dec. Int. Rev. 48, 49 (1915).

55. *See* C. W. Leaphart, *The Use of the Trust to Escape the Imposition of Federal Income and Estate Taxes*, 15 CORNELL L. Q. 587, 588 (1929); ROSWELL MAGILL, TAXABLE INCOME 274-76 (3rd ed. 1939). *See generally* Bennett L. Smith, *Common and Joint Tenancies, Partnerships and Federal Taxes*, 9 TEX. B. J. 387 (1946). Assignments of future earnings, however, raised significant issues for tax purposes. *See, e.g.*, Lucas v. Earl, 281 U.S. 111 (1930). Although from the tax's inception in 1913 a sale between spouses would trigger the taxation of gain on the property, originally there were no tax consequences to giving the property as a gift to a spouse, or to anyone else for that matter, because there was no transfer tax on gifts. *See* S.M. 3763, 3-2

community property laws and then argued that these marital laws mandated that each spouse report one-half of the family's income.[56] The government's objectives in making this change that led to the adoption of these devices are unclear. The Treasury Department later admitted that its policy governing the taxation of families in this early period "did not seem to derive from any clear conception. . .; it seemed merely to be more convenient in some instances to assess it in this manner."[57]

Despite the lack of a clear sense of the right way to tax couples, the Treasury Department quickly demonstrated that it was not under the control of wealthy couples by denying taxpayers favorable results where they shifted income unless substantive changes were made to property ownership.[58] The Department would not uncritically accept all such arrangements but sought to determine whether the lower-income spouse truly owned, under state property laws, the property generating the income being reported.[59] The government evaluated these various devices on a case-by-case basis to determine whether the recipient spouse was actually given recognizable property rights and, therefore, entitled to report the income.[60] Thus the Treasury Department took Congress's language seriously and worked to make the regime function in an equitable manner.

Because the Treasury Department reviewed the rights created by couples' devices under state law, not all devices were given the same beneficial treatment of reducing a couple's taxes. If under state law wives' rights to property were significantly limited, the federal government did not recognize income as shifted for tax purposes.[61] This invocation of federalism in the application of the federal income tax gave states the opportunity to influence the amount of federal tax receipts. It also ensured that couples would seek recognition of their individual devices and a regulatory environment in which these devices could flourish. As a result, those couples that had found means to reduce their taxes, and yet maintain the appearance of high progressive tax rates, had every incentive to capture the Department.

Nevertheless, as it sought to craft a nationally applicable federal income tax

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C.B. 53 (1924).

56. Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington had community property regimes. For descriptions of community property from the period, *see* WILLIAM QUINBY DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY §§ 37-53, 70 (1943); GEORGE MCKAY, A TREATISE ON THE LAW OF COMMUNITY PROPERTY (1925); CHESTER G. VERNIER, AMERICAN FAMILY LAWS § 178, 207-08 (1935); Alvin E. Evans, *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).

57. "Tax Revision 1937: Project No. 3," 19 November 1936, Staff Memo, pp. 4-5, Box 54, Records of the Office of Tax Policy/Division of Tax Research, General Records of the Department of the Treasury, Record Group 56, National Archives, College Park, MD (hereinafter Office of Tax Policy).

58. *See, e.g.*, Champlin v. Comm'r, 71 F.2d 23 (10th Cir., 1934); Northampton Brewery Corp. v. Lande, 138 Pa. Super. 235 (1939); Oakley v. Comm'r, 24 B.T.A. 1082 (1931); Wilson v. Comm'r, 11 B.T.A. 963 (1928).

59. *See, e.g.*, A.R.R. 636, 5 C.B. 257 (1921); I.T. 1151, I-1 C.B. 1 (1922); I.T. 1186, I-1 C.B. 3 (1922); I.T. 2022, III-1 C.B. 9 (1924).

60. *See, e.g.*, I.T. 1574, II-1 C.B. 143 (1923).

61. *See, e.g.*, T.D. 2529, 19 C.B. 164 (1917); A.R.R. 636, 5 C.B. 257 (1921); I.T. 1186, I-1 C.B. 3 (1922); I.T. 1574, II-1 C.B. 143 (1923); I.T. 1670, II-1 C.B. 146 (1923).

within the constraints of the statute, the Treasury Department troubleshot problems of tax avoidance as it lobbied Congress to legislate a change to alleviate this burden.[62] The Department was acting within narrow constraints because Congress had not expressly delegated to it the authority to define national rules of ownership for federal tax purposes. As a result, the Treasury Department was forced to devote substantial time and resources to disputes with taxpayers who devised plans to avoid the federal income tax.[63] In order to create a national tax, the executive agency had to act as though legislation were in place that had not even been debated in Congress.

But as the Treasury Department recognized faults in the statute, Congress was adding new complications to the tax unit issue.[64] Under President Woodrow Wilson, the federal government actively sought to promote social justice and, in 1916, Congress extended the marital exemption to the undefined category of "head of family" in order to reduce the tax burdens of widows and widowers with children.[65] When challenged to define the term "head of family," one Senator retorted, "it seems to me that the Treasury Department or the internal-revenue collectors and the attorneys there could very well place the proper interpretation of the term 'head of family.' It is a term of common acceptance."[66] Those seeking this revision delegated the task of making the statute operational to the executive agency. Unsurprisingly, the public had questions regarding this term's meaning.[67] Only over time, and under the guidance of the Treasury Department, was the definition of the head of family worked out.[68]

This exemption, along with other changes following World War I, reduced the number of taxpayers subject to the federal income tax from a wartime high.[69] With the return to normalcy, neither the Republican government nor most taxpayers had a stomach for a pervasive income tax. At this early date, a little over 5% of the population filed an income tax return, the vast majority of whom were married and with a dominant income earner.[70] As a result, this early system favored the largest group of taxpayers, although the cost of the favor was the shifting of income between spouses.

In the face of taxpayer activity, the Treasury Department changed course

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62. *See infra* Part III.

63. It was estimated to cost $1.56 per return for which a tax was paid and $.50 if a tax was not paid. Roy Blough, *Problems of Federal Tax Administration*, 214 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL & SOCIAL SCIENCE 157, 159 (Thorstein Sellin ed., 1941).

64. Chairman of the Ways and Means Committee, Claude Kitchen (D-NC), proposed a bill that would have clarified the family unit (including children) for the normal tax, but it failed. *See* H.R. 16763, 64th Cong., 53 CONG. REC. 10,664 (1916).

65. *See* Revenue Act, 1916, sec. 7, 39 Stat. 756, 761 (1916). *See also* 53 CONG. REC. 13,268-75 (1916); T.D. 2427, 18 Treas. Dec. Int. Rev. 278 (1916); T.D. 2692, 20 Treas. Dec. Int. Rev. 291 (1918).

66. 53 CONG. REC. 13,274 (1916) (statement of Sen. James Wadsworth (R-NY)).

67. *See, e.g.*, *Who is Head of Family Defined*, CHIC. DAILY TRIB., Jan. 20, 1920; *Income Tax Act of 1920*, L.A. TIMES, Jan. 12, 1920.

68. *See, e.g.*, I.T. 1618, II-1 C.B. 123-24 (1923); I.T. 1619, II-1 C.B. 124 (1923); TREASURY DEP'T, REGULATIONS 45, H. DOC. NO. 1826, at 75 (1919).

69. *See* STEVEN A. BANK, KIRK J. STARK, & JOSEPH J. THORNDIKE, WAR AND TAXES 81 (2008).

70. *See id.* at 79.

several times with respect to specific devices.[71] For example, in 1918 and 1919 the Secretary of the Treasury required the filing of a joint return by community property couples.[72] Two years later, in response to public pressure from taxpayers in these states and from their representatives, the Department asked the Attorney General to determine the appropriate way to tax community property couples.[73] The Attorney General succumbed to community property states' pressure in 1920, allowing spouses to divide all their community income and made community property the most effective family tax reduction device.[74] The Treasury Department followed suit.[75] In this case, it does appear that the government was captured by wealthy couples in eight states.

However, the early Treasury Department policies were not built on an abstract notion of the "best" tax unit as much as a need to make the system operational and, to that end, they often floundered for the best method to tax married couples. In its Income Tax Primer published in 1918, the Department established a policy of convenience rather than establishing some underlying basis in equity.[76] It required couples file joint returns if their combined incomes, with that of their dependent children, equaled or exceeded $2,000. However, if, and only if, a husband and wife each received an independent income of $1,000 or more, they could file separately.[77] In regulations published the next year, the Department permitted "a husband and wife living together [to file] a single joint return," however the means the couple used to file did not necessarily correspond to how they would be taxed.[78]

This debate, as long as it presumed that couples had the option of separate filing, did not resolve the Treasury Department's problem of couples who shifted income to avoid taxes and then filed separately. In an attempt to limit this type of tax avoidance, the executive branch focused its congressional challenge on the tax advantage perceived to be enjoyed by couples of the community property states. Andrew Mellon's Treasury Department led a charge, more rhetorical than effective, against the community property advantage in 1921 and again in 1924.[79] Many in

71. *See, e.g.*, 32 Op. Att'y Gen. 298 (1920); also published as T.D. 3071, 3 C.B. 221 (1920); Sol. Op. 90, 4 C.B. 236 (1921); O.D. 960, 4 C.B. 255 (1921); I.T. 1997, III-1 C.B. 149 (1924).

72. *See* O.D. 285, 1 C.B. 189 (1919).

73. *See* 61 CONG. REC. 6,917 (1921) (statement of Sen. Robert Broussard); 61 CONG. REC. 6,973-4 (1921) (letter of Jesse Andrews to William E. Borah, 14 September 1921).

74. *See* Op. Att'y Gen., *supra* note 71; (1920): O.D. No. 426, 2 C.B. 198 (1920); William T. Hancock, *A Look at Community Property Law*, 34 VA. L. REV. 417, 419 (1948). This beneficial treatment did not apply to California. *See generally* Stephanie Hunter McMahon, *California Women*, 25 WISC. J.L. GENDER & SOC'Y 35 (2010).

75. *See* TREASURY DEP'T, REGULATIONS 62, art. 31, at 32 (1921); T.D. 3568, III-1 C.B. 84 (1924) (including California).

76. *See generally* TREASURY DEP'T, U.S. INT. REV., INCOME TAX PRIMER, H.R. DOC. NO. 841 (1918).

77. Thus, if one spouse earned $999 and the other either $1,001 or $1 million, the spouses could file separately. Likewise continuing the Department's earlier policy, if the couple combined earned more than $2,000 the normal tax would be assessed against the aggregate amount of their incomes regardless of how they filed, and the surtax would be assessed only against the separate income of each. *See id.*

78. *See* H.R. DOC. NO. 1826, at 98 (1919) (also presuming joint return of family income by husbands unless families took affirmative steps to file separately).

79. 65 CONG. REC. 1,144 (1924); 61 CONG. REC. 6,595 (1921). *See also* Covey T. Oliver, *Community Property and the Taxation of Family Income*, 20 TEX. L. REV. 545 (1942).

the executive branch were unhappy when Congress refused to take action, believing these early community property laws were simply another taxpayer device.[80] This Mellon attack also indicated a continued commitment to the case-by-case approach, looking at particular devices and the state law upon which they were based, rather than confronting the larger issue of whether the couple, as opposed to the individual, should be the basis for income taxation.

By making these case-by-case determinations, the Treasury Department did more to narrow this loophole in the period before 1948 than Congress, not because the Department desired to take the lead, but because doing so was necessary for the operation of the tax. This meant, however, that the application of the income tax to the family was developed on an ad hoc basis. The Attorney General wanted the confusion about the appropriate tax treatment of families' income to be resolved on a state-by-state basis and by state courts, and not on a national basis by the IRS or congressional action.[81] On the other hand, showing divisions in the executive branch, the Treasury Department prepared, but withheld as a result of political pressure, an administrative ruling that would have overruled the application of state property laws as well as the Attorney General's state law-based approach.[82]

Throughout the Great Depression, the executive branch recognized that these forms of tax avoidance pervaded the system and eliminating them increasingly became an administrative objective. While the Roosevelt administration targeted many other avenues of tax avoidance, either for political reasons or to maximize federal revenue to pay for its New Deal relief programs, attacking income shifting did not serve either of these objectives particularly well.[83] Much of the public was barely aware of this particular tax abuse and the revenue loss was not substantial from a national perspective.[84] Instead, President Franklin D. Roosevelt and his Treasury Department targeted income shifting because he found it morally

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80. 34 Op. Att'y Gen. 395 (1924), also published as T.D. 3670, 4-1 C.B. 19 (1925); 35 Op. Att'y Gen. 265 (1926) (income tax); 35 Op. Att'y Gen. 89 (1926) (estate tax), also published as T.D. 3891, 5-2 C.B. 323 (1926); George Donworth, *Federal Taxation of Community Incomes – The Recent History of Pending Questions*, 4 WASH. L. REV. 145, 161 (1929).

81. The Attorney General never interpreted *Robbins* as asserting any power or intent on the part of Congress to tax community property husbands on couples' joint income. T.D. 3891, *supra* note 80, at 237-38.

82. Letter from Tarleau to Sullivan, Legislative History of the Treasury's Position With Respect to Compulsory Joint Returns and Community-Property Income, June 10, 1941, OTA/DTR Files, Box 54, *available at* http://taxhistory.tax.org/Civilization/Documents/marriage/hst28693/28693-1.htm (last visited Feb. 21, 2012). All administrative rulings on the issue of community property were withdrawn so that the Treasury Department could bring additional test cases; cases litigated in 1930.

83. For Roosevelt's views on tax avoidance generally, see *A Message to Congress on Tax Revision*, Jun. 19, 1935; *Two-Hundred and Twenty-Fifth Press Conference* (Excerpts), Jul. 31, 1935; *A Supplemental Budget Message to the Congress*, Mar. 3, 1936; *In 1776 the Fight Was for Democracy in Taxation. In 1936 That is Still the Fight*, Oct. 21, 1936; *The President Urges Legislation to Prevent Tax Evasion*, Jun. 1, 1937, all in FRANKLIN D. ROOSEVELT, PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT (1938-); Press Conference No. 370, 28 May 1937, COMPLETE PRESIDENTIAL PRESS CONFERENCES OF FRANKLIN D. ROOSEVELT 9:396-405 (1972); ROBERT H. JACKSON, THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT 119-20 (John Q. Barrett ed., 2003); 1 JOHN MORTON BLUM, FROM THE MORGENTHAU DIARIES 323-37 (1959). *But see* ARTHUR SCHLESINGER, POLITICS OF UPHEAVAL 325-27 (1960); DAVID M. KENNEDY, FREEDOM FROM FEAR 275-76 (1999); MARK LEFF, LIMITS OF SYMBOLIC REFORM 91-96 (1984).

84. *See* pp. 156-7, 170, 172 for projected revenue amounts.

offensive.[85] It troubled him that wealthy couples and their lawyers and accountants used these devices to avoid their financial responsibilities to the federal government, particularly at a time of national emergency.

However, Roosevelt's Treasury Department had little luck changing the tax unit. In mid-1933, the Department was at a low-point in its influence on tax policy.[86] Nevertheless, as Secretary of the Treasury Department, Roosevelt's close friend, Henry Morgenthau, Jr., asked Congress to consider taxing husband and wife as a single unit. Morgenthau argued that such a provision would put all married taxpayers on equal footing by eliminating these income-shifting means of tax avoidance.[87] In his view, continuing to permit separate tax returns threatened to "defeat the progressive rate schedule, particularly in the case of the larger taxpayers."[88] Morgenthau's moralistic attacks focused on comparisons between taxpaying groups, but its results would have increased tax burdens on many wealthy married couples across the nation. In December, Treasury Department officials were disappointed that Congress rejected their solution.[89] Morgenthau tried a similar approach in 1937 and, again, failed.[90]

Because of its relatively limited power, the Treasury Department used debate and investigation as a substitute for policymaking in the 1930s. The Department undertook two comprehensive examinations of the federal income tax system and included the issue of the tax unit each time.[91] When these reviews failed to produce a viable solution to the income-shifting problem, the Treasury Department abandoned the position it had claimed since 1913. In new regulations, the Department required husbands and wives to be taxed separately.[92] After failing to

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85. *See infra* note 88.

86. BLUM, *supra* note 83, at 1:297-98; *Mr. Roosevelt's Men*, FORTUNE, Apr. 1934.

87. Tarleau to Sullivan, *supra* note 82; Treasury Department, Statement of Acting Secretary of Treasury Regarding the Preliminary Report of the Committee on Ways and Means Relative to Methods of Preventing the Avoidance and Evasion of the Internal Revenue LawsFalse, 73d Cong. 15 (Comm. Print 1933).

88. *Hearing on Revenue Revision, 1934 Before the H. Comm. on Ways and Means*, 73d Cong. 113 (1933).

89. H.R REP. NO. 73-704, at 2, 44 (1934); Tarleau to Sullivan, *supra* note 82. *Hearing on H.R. 8396, Community Property Income, Before H. Comm. on Ways and Means*, 77d Cong. 6 (1934) (statement of Allen T. Treadway (R-MA)). Lovell H. Parker, the first chief of staff of the Joint Committee on Internal Revenue Taxation, suggested a management and control proposal in a memorandum dated September 26, 1933, to the Ways and Means Committee. Reprinted as L.H. Parker to E. Barrett Prettyman in *Hearings on H.R. 8396*, 16-22. This proposal was rejected in the House, but by a bare majority vote, due largely to opposition from community property representatives. Tarleau to Sullivan, *supra* note 82. There was no discussion of the issue in the Senate. *Revenue Act of 1934: Hearing on H.R. 7385 Before S. Comm. on Finance*, 73d Cong. (1934); S. REP. NO. 73-558 (1934).

90. *Hearing on Tax Evasion and Avoidance Before Joint Committee on Tax Evasion and Avoidance*, 75th Cong. 309 (1937); Joint Committee on Taxation, *Tax Evasion and Avoidance*, H.R. DOC. NO. 337, at 7 (1937). *See* Randolph Paul, *The Background of the Revenue Act of 1937*, 5 U. CHI. L. REV. 41, 84-85 (1937).

91. *See* Carl Shoup, *Forward and Summary of Recommendations*, The Federal Income Tax System, A Report to the Secretary of the Treasury, 20 September 1934, Box 62, Office of Tax Policy, *available at* http://taxhistory.tax.org/Civilization/Documents/Surveys/hst23735/23735-1.htm (last visited Feb. 21, 2012)); Blakey, *Federal Income Tax, Section VII: Joint versus Separate Returns*, in Roy G. Blakey, The Federal Income Tax System, 20 September 1934, Box 62, Office of Tax Policy, *available at* http://www.taxhistory.org/Civilization/Documents/Surveys/hst23737/23737-5.htm (last visited Feb. 21, 2012)); *Hearings on Revenue Revision, supra* note 88 at112-6; MAGILL, *supra* note 55, at 392–99.

92. Treasury Department, *Regulations 86 Under the Revenue Act of 1934*, art. 51-1, 117-5 (1935): 129,

win support from Congress, as far as the executive branch was concerned married couples were no longer a taxable unit even if they elected to file jointly.

That remained the executive's position until new revenue pressures were applied during World War II, but even then it deferred action to Congress. Economic need forced (or perhaps permitted) Morgenthau to renew in 1941 and again in 1942 his proposal of taxing the marital unit.[93] The Roosevelt administration proposed this approach after it determined that taxing the family as a unit would yield an additional $300 million in taxes from a small group of wealthy taxpayers.[94] As a rhetorical matter, the Treasury Department justified this battered proposal on the grounds that aggregating family income best reflected the family's ability to pay, in its view the most fair basis of taxation.[95] Although the executive branch stood firmly behind its proposal, with widespread public opposition to tax increases, the proposal received a lukewarm reception in Congress.[96] Thereafter, until Congress took action in 1948, the Treasury Department continued to impose separate taxation and abstained from further debate.

Thus, in the period before 1948, far from being captured by wealthy taxpayers, the Treasury Department felt constrained by the governing statute to regulate tax avoidance on a case-by-case basis, which it did. Moreover, it proposed specific rule changes in 1921, 1924, 1933, 1934, 1937, 1941, and 1942, that would have created a national solution for tax governance. Each time it failed. If we take the Department at its word, it was attempting to stop the exploitation of a loophole by a narrow segment of society. On the other hand, this approach permitted the executive branch to attack avoidance rhetorically while the issue was also being debated by the legislature and the judiciary, and so the Treasury Department was liberated from responsibility. Once it was clear that the other branches were not going to accept responsibility and dictate a response, the Treasury Department gave up its calls for reform; it eventually forfeited its policies in the face of continued congressional apathy.

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218. *See also* G.C.M. 15438, 14-2 C.B. 156-8 (1935).

93. H.R. REP. NO. 77-1203, at 10 (1941) (Conf. Rep.); *Hearings on Revenue Revision of 1942*, *supra* note 36, at 9 (statement of Henry Morgenthau); *Hearing on H.R. 7378 Before S. Comm. on Finance*, 77th Cong. 2-7 (1942); 88 CONG. REC. 6,319-20 (1942).

94. Robert H. Montgomery, founder of Lybrand, Rose & Bros and Montgomery, later to become PricewaterhouseCoopers, feared that a mandatory joint return provision would be declared unconstitutional, necessitating refunds. MONTGOMERY, *supra* note 38, at 1016. Administrative convenience also made the proposal attractive: It required numerous resources for administrators to determine which of the devices were "real." *See* Blough, *supra* note 63, at 159.

95. Blough to Sullivan, "Compulsory Joint Returns," 10 June 1941, p. 1, Box 54, Office of Tax Policy. The administration offset employment disincentives for wives with an earned income credit for couples with two earners that would have sheltered from tax most wives' income. *Hearing on H.R. 5417 Before S. Comm. on Finance*, 77th Cong. 7-8 (1941). Mandatory joint returns would raise $297 million in taxes, but the credit would cost $39 million. *Id.* at 8-9.

96. *See* 87 CONG. REC. 3,446-7, A3,546, 6,478-81, 6,617-18 (1941); 88 CONG. REC. A2,473, 6,319-25 (1942).

III. THE SUPREME COURT DECIDES: SETTING THE FRAMEWORK

In the early decades of the income tax, the federal judiciary struggled along with the Treasury Department from the lack of congressional guidance: The courts were left deciding the cases of income shifting brought by the I.R.S.[97] Although scholars often question the motives of the Justices, in the case of this loophole, the Supreme Court sought to read into the income tax rules that did not require delegation, either to the states or the executive branch, to eliminate this means of avoidance.[98] As discussed below, the Court supplemented statutes in a manner consistent with what the Court presumed was the legislative intent in order to fashion a nationally-applicable federal income tax. In doing so the Court often acted contrary to wealthy couples' interests. However, the Justices were unable to stray far or for long from Congress's dictates, even when those dictates were expressed through inaction.[99] With new appointments to the bench, the Court stopped inferring congressional intent and deferred future decisions to Congress.

Many of the cases involving income shifting came to the Supreme Court in the late 1920s and early 1930s, but the litigation began in the early and mid-1920s, an era when much of the nation experienced a backlash against the progressivism of turn-of-the-century reformers.[100] Republicans regained control of Washington and slashed marginal tax rates.[101] This removed taxpayers from the rolls, so that by 1929 only 2.5 million taxable returns were filed.[102] Nonetheless, the tax raised over $1 billion in revenue, or over one-quarter of the federal government's total

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97. For a survey of modern literature on judicial behavior, see Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 270-329 (2005). *See also* Selmi, *supra* note 44, at 525; Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1751 (2007).

98. The Court took a similar approach in other areas of law. *See* U.S. v. Grimaud, 220 U.S. 506, 517 (1911); J.W. Hampton, Jr. v. U.S., 276 U.S. 394 (1928); Union Bridge Co. v. U.S., 204 U.S. 364 (1910). Issues of delegation of power were often raised in the Court's first 150 years but the Court never struck a statute on that basis until the New Deal. *See* Panama Refining v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. U.S., 295 U.S. 495 (1935); Carter v. Carter Coal, 298 U.S. 238 (1936). For recent studies of the Court's power, see Michael Abramowicz & Emerson Tiller, *Citation to Legislative History*, 38 J. LEGAL STUD. 419 (2009); Joseph Smith, *Presidents, Justices and Deference to Administrative Action*, 23 J. L. ECON. & ORG. 346 (2007); Nancy Staudt et al., *Judicial Decisions as Legislation*, 82 N.Y.U.L REV. 1340 (2007); Chris Guthrie et al., *Blinking on the Bench*, 93 CORNELL L. REV. 1 (2007); Tonja Jacobi, *Positive Political Theory and the Law*, 15 J. CONTEMP. LEGAL ISSUES 219 (2006); Staudt *Judging Statutes*, *supra* note 30, at 1911; Richard L. Revesz, *Congressional Influence on Judicial Behavior*, 76 N.Y.U. L. Rev. 1100 (2001); Daniel Schneider, *Empirical Research on Judicial Reasoning*, 31 N.M. L. REV. 325 (2001).

99. For similar conclusions regarding the Court, see MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS (2004); Barry Friedman & Anna Harvey, *Electing the Supreme Court*, 78 IND. L.J. 123 (2003); John A. Ferejohn & Larry Kramer, *Independent Judges, Dependent Judiciary*, 77 N.Y.U. L. REV. 962 (2002); Robert Dahl, *Decision-Making in a Democracy*, 6 J. PUB. L. 279, 282-86 (1957). For an interpretation that gives the Court more power in changing the public's views, see BARRY FRIEDMAN, THE WILL OF THE PEOPLE (2009).

100. For a discussion of progressivism in the law, see GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END 29-31 (1995); GRANT GILMORE, THE AGES OF AMERICAN LAW 90-91 (1977); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, at 145-67 (1992).

101. There is evidence the anti-tax post-war response was bi-partisan. *See* Lawrence Murray, *Bureaucracy and Bi-Partisanship in Taxation*, 52 BUS. HIST. REV. 200 (1978).

102. BUREAU OF INTERNAL REVENUE, STATISTICS OF INCOME FOR 1929, at 4 (1931); BUREAU OF CENSUS, HISTORICAL STATISTICS, Y339-342, at 1105; Y358-373, at 1107.

receipts.[103] Such an important source of government funds, drawn from such a small number of individuals, was certain to generate controversies and, ultimately, litigation. The Treasury Department jealously protected its source of revenue and the small group that had to pay felt increasingly persecuted and dispossessed. Even though these wealthy couples repeatedly sought support by the Court, the Court was not captured by those interests.[104]

Already in the center of a storm over Prohibition enforcement, the Court found a surprising unity on tax issues that continued into the early 1930s, despite being divided on other New Deal policies.[105] Over the course of the two decades following the income tax's enactment, the Supreme Court generally agreed that, as the income tax was written, the determination of who owned what for federal income tax purposes had to be determined by state law, but it closely examined the rights created under state law.[106] In doing so, the Court favored its own interpretation over the Treasury Department's in the face of congressional inaction. This behavior with respect to the tax unit issue was consistent with the Court's activism on other tax issues. Before 1960, the Justices generally prioritized their own viewpoints when deciding tax cases.[107] They might have privileged their own precedent in the early years of the tax because there were so few other sources of the law.

The Court's examination of state-law rights was more difficult that it might appear, enlarging the loophole wealthy couples exploited.[108] Rapid changes in the economy brought about by industrialization prompted changes in the conception of property that complicated the determination of ownership for tax purposes. Realist legal thinkers' conception of property changed from being a single thing over which one person had both ownership and control to a more complex idea of a bundle of rights.[109] As ownership grew more and more finely divided, the difference between title versus control versus beneficial enjoyment became more central to the question of federal income taxation but more difficult to parse under local law. The simple ownership tests crafted by earlier generations of state and federal courts proved less

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103. *Id.*

104. For more on repeat litigation, see Marc Galanter, *Why The "Haves" Come Out Ahead*, 9 LAW & SOC'Y REV. 95, 97-104 (1974); Frank Cross, *The Judiciary and Public Choice*, 50 HASTINGS L.J. 335, 355 (1999); Merrill, *supra* note 32.

105. Robert Post, *Federalism, Positive Law, and the Emergence of the America Administrative State*, 48 WM. & MARY L. REV. 1 (2006).

106. *See* Edmund N. Cahn, *Federal Taxation and Private Law*, 44 COLUM. L. REV. 669 (1944); Edward N. Cahn, *Local Law in Federal Taxation*, 52 YALE L.J. 799 (1943). This trend was consistent with the Court's use of the Tenth Amendment to restrict the federal government's power. ALTON LEE, A HISTORY OF REGULATORY TAXATION 1-11 (1973).

107. Staudt, *supra* note 30, at 1911.

108. *But see* Dennis Ventry, *Saving Seaborn*, 86 IND. L.J. 1459 (2011).

109. *See* Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913). This view was not new but only gradually was there a broader awareness of the complexities of property rights. Thomas C. Grey, *The Disintegration of Property*, *in* PROPERTY 69-85 (J. Roland Pennock & John W. Chapman eds., 1980); HOWARD GILLMAN, THE CONSTITUTION BESIEGED 248-58 (1993). The state was no longer a neutral enforcer of contracts and property rights but a wielder of a collective force that could be harnessed for the good of society. GREGORY S. ALEXANDER, COMMODITY AND PROPRIETY 2 (1997).

persuasive. Moreover, taxpayers generally relied on exceptions or peculiarities of local law to support arguments for favorable tax treatment, while the Treasury Department took the position that these peculiarities and exceptions were meaningless for federal income tax purposes.[110]

Not only was state law hard to apply, but federalism had become a contentious political issue both in national politics and for the Court. Progressives thought localism was important for functional reasons, with states serving as laboratories of reform and, therefore, capable of being overridden when reform required.[111] Conservatives invested federalism with its own independent normative value.[112] These pressures and biases percolated up to the Court. At the same time, the Court faced a countervailing value of national uniformity in the application of federal law.[113] The Court tried to ensure that the progressive national income tax would, in fact, be nationally applied.

To reconcile the objectives of federalism and uniformity, the Court frequently ruled that the administration of federal tax statutes had to be governed by the economic reality of state-created interests until Congress explicitly took jurisdiction.[114] Thus, even before Congress acted the Court would not blindly follow states' rules but, instead, it tried to determine what rights were actually created under state law. By considering state law with a critical eye and disregarding what it felt were hollow distinctions, the Court set the stage for a strong federal taxing power, one that could be made stronger if Congress (but not the executive branch) took its challenge to more clearly define ownership for federal tax purposes. Thus, although the judiciary created guidelines for the other branches of government, it remained reluctant to define clear limits on the taxing power.

When the Supreme Court first ruled on income shifting between spouses, it took a tough stand on this tax avoidance and, in dicta, recognized Congress's power to legislate a national standard of ownership. Its earliest case involved California's community property law.[115] In *United States v. Robbins*, the executive branch argued that to grant California the special privilege of splitting couples' income between spouses would permit "the most direct discrimination against husbands and wives in some forty States of the Union. . . .[116] The Treasury Department accepted income shifting in principle, just not pursuant to California's community property law because the state's law did not grant wives sufficient indicia of ownership.

110. In the process, local policies that did not conform to accepted tax theories tended to be engulfed by tax concepts expanded to fit them. Cahn, *supra* note 106, at 802, 817.

111. Post, *supra* note 105, at 44.

112. *Id.*

113. *See* Lyeth v. Hoey, 305 U.S. 188, 194 (1938).

114. *See, e.g.*, Hecht v. Malley, 265 U.S. 144 (1924); Burk-Waggoner Oil Asso. v. Hopkins, 269 U.S. 110 (1925); Tyler v. U.S., 281 U.S. 497 (1930); Burnet v. Harmel, 287 U.S. 103 (1932); Helvering v. Hallock, 309 U.S. 106 (1940); Morgan v. Comm'r, 309 U.S. 79 (1940). *But see*, Blair v. Comm'r, 300 U.S. 5 (1937).

115. U.S. v. Robbins, 269 U.S. 315 (1926).

116. Brief for the United States at 87, U.S. v. Robbins, 269 U.S. 315 (1926) (No. 493).

Justice Oliver Wendell Holmes, Jr., agreed with the government in a scanty, four paragraph majority opinion. Relying on state judicial opinions, Holmes concluded that a California wife had in community property a "mere expectancy while living with her husband."[117] The proto-realist Holmes went further, however, arguing that, even assuming California wives' interests to be vested, Congress could still tax husbands on the whole of the family's income:

> Even if we are wrong as to the law of California and assume that the wife had an interest in the community income that Congress could tax if it so minded, it does not follow that Congress could not tax the husband for the whole. . . .he who has all the power should bear the burden. . . .[118]

Unlike earlier Court precedent, Holmes's controversial final paragraph discounted the authority to be given to state law.

This expansive view of income taxation was not the result of a love of taxation by Justice Holmes. Holmes had sided with Republicans' call to cut taxes in the 1920s.[119] Holmes once dismissively complained that "[i]f all the world saw that a tax, however levied, ultimately means a diversion of part of that stream to government employees with so much less for those outside, they would see that in each case it was a question of the relative value of the government return. . . ."[120] Nevertheless, especially when it came to wealthy couples' income shifting, Holmes pushed for a national interpretation of ownership, increasing the taxes of many couples.[121]

After *Robbins*, serious doubts developed about the potential success of schemes to exploit the individual as the tax unit, even if the devices were based on laws that had legitimate state purposes and long traditions. The Treasury Department challenged many such schemes, one of which, inter-spousal contracts, it took to the highest court in *Lucas v. Earl*.[122] To allow taxpayers to minimize their collective

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117. *Robbins*, 269 U.S. at 326-27. Holmes disregarded state legislative intent and used only state judicial opinion to determine property interests. *Id.* Justice George Sutherland was the sole dissenter.

118. *Id.* at 327. Some interpret this entire line of reasoning as predicated upon the provisions of California law. *See* Donworth, *supra* note 80, at 158.

119. Letter from Oliver Wendell Holmes to Frederick Pollock (May 11, 1924), *in* 2 HOLMES-POLLOCK LETTERS 136-37 (Mark DeWolfe Howe ed., 1946). One can see in Holmes's letters an undeniable defense of capitalism and a strong antipathy to the redistribution of wealth. DAVID H. BURTON, POLITICAL IDEAS OF JUSTICE HOLMES 86-89 (1992).

120. Letter from Oliver Wendell Holmes to Felix Frankfurter (Mar. 24, 1914), *in* HOLMES AND FRANKFURTER: THEIR CORRESPONDENCE, 1912-1934, at 19-20 (Robert M. Mennel & Christine L. Compston eds., 1996).

121. Holmes almost always sided with the government in tax cases. Patricia A. Cain, *The Story of Earl*, *in* TAX STORIES 275, 279 (Paul Caron ed., 2003).

122. 281 U.S. 111 (1930), *rev'g* 30 F.2d 898 (1929), *rev'g* 10 B.T.A. 723 (1928). *Appeals Income Tax Case*, N.Y. TIMES, Feb. 12, 1930; *Pooling Income Decision Given*, L.A. TIMES, Mar. 18, 1930; *Tax Brief Filed by Government*, WALL ST. J., Jun. 17, 1929; *Review Granted in Tax Case*, N.Y. TIMES, Oct. 15, 1929. For good discussion of *Lucas v. Earl*, see Cain, *Story of Earl*, *supra* note 121; EDWARD MCCAFFERY, TAXING WOMEN 37-45 (1997).

taxes by contract would authorize individuals – because of state action permitting such contracts – to trump the will of Congress.[123] In essence, the executive branch was pleading for the same sort of realist interpretation of the law that Holmes had made in *Robbins*. In another pithy, this time three-paragraph, opinion echoing the tone of his *Robbins* decision, Holmes for a unanimous Court again strengthened the federal government's position vis-à-vis taxpayers. Not questioning the validity of the contract, much as he had not questioned the status of the wife's interest four years earlier, Holmes read into the Revenue Act a limitation on taxpayers' ability to minimize their federal taxes.[124]

The Court continued its campaign of protecting the income tax in its rulings on family trusts. In *Corliss v. Bowers*, Holmes continued his efforts in *Robbins* and *Earl* to minimize the role of the Court in tax cases and to allow Congress to make the determination of the appropriate incident of ownership for federal income tax purposes.[125] Decided a little over a month after *Earl*, the Court held that taxation was "not so much concerned with the refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid."[126] In this case, a unanimous Court continued to craft a national approach to income taxation.[127] Holmes endorsed Congress's power to set the appropriate incident of ownership to be taxed. Mere title or trust form would not be enough to thwart that congressional purpose.

At the end of the trio of Holmes cases (*Robbins*, *Earl*, and *Corliss*), although the federal government had won in each, Holmes had not established a hard and fast rule of property ownership for federal income tax purposes. Instead, Holmes deferred to Congress, with the caveat that the Court would infer congressional intent from time to time when necessary to decide a case with particularly egregious facts. This standard was untenable, however, because Congress proved unwilling to clarify its rules to govern ambiguous situations, putting pressure on the Holmes approach. The pressure erupted eight months after *Earl* was decided and seven months after *Corliss*. Arising out of the uncertainty created by *Robbins*, four cases invoking the community property statutes of Washington, Arizona, Texas, and Louisiana were consolidated before the Court, each involving the right of state law to govern property ownership for federal income tax purposes.[128]

The Treasury Department expected to prevail over the married couples in *Poe v. Seaborn* based on its recent experiences before the Court on the grounds that income should be taxed to "the person who controls and enjoys [income], rather

123. MCCAFFERY, *supra* note 122, at 16-17.

124. *Lucas*, 281 U.S. at 114-15.

125. A similar decision was rendered by Judge Schoonmaker in the Western District of Pennsylvania. Clapp v. Heiner, 34 F.2d 506 (W.D. Penn. 1929).

126. Corliss v. Bowers, 281 U.S. 376, 378 (1930).

127. Holmes concluded, "We consider the case too clear to need help from the local law of New York." *Id.*

128. Poe v. Seaborn, 282 U.S. 101 (1930); Goodell v. Koch, 282 U.S. 118 (1930); Hopkins v. Bacon, 282 U.S. 122 (1930); Bender v. Pfaff, 282 U.S. 127 (1930).

than to the person who holds title to the property from which it is derived."[129] However, *Seaborn* was not decided by Holmes; it was Justice Owen Roberts's first decision for the Court and it signaled a new, less activist Court in tax matters.[130] In *Seaborn*, Roberts concluded that when Congress levied a tax on the "net income of every individual," the "of" denoted ownership under state law, however that was defined.[131] Thus, married couples living in these community property states could divide community income between spouses and gain the reduction in federal taxes denied the Robbinses, Earls, and Corlisses. Instead of using Holmes's precedents that read state law with an eye to giving Congress the power to determine taxation, Roberts applied the concept of federalism more stringently and read the Court's earlier holdings narrowly, as requiring the Court to be much more deferential to the states.[132] In the process, state property rules regained a portion of their pre-Holmesian dominance and the loophole in the federal income tax won judicial sanction.[133]

Holmes joined Roberts in this opinion that proved favorable to wealthy couples even though he had authored each of the earlier decisions. Beyond the tradition of allowing a Justice's first opinion to be unanimous, a more thoughtful explanation is available, although Holmes never revealed the reasons for his change of mind.[134] It is likely that in *Robbins* Holmes had been unaware of, or felt he could ignore, the fact that Congress had twice failed to act when confronted by the Treasury Department with the tax advantage community property couples enjoyed.[135] Then, in *Seaborn*, attorneys for the taxpayers made it a major part of their argument that the Court could no longer assume an intent Congress had failed to express.[136] In effect, in *Seaborn* Holmes and the Court deferred to a congressional decision not to

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129. Brief for Collector at 5-6, Poe v. Seaborn, 282 U.S. 101 (1930) (No 15). The Treasury Department made this charge as a theoretical matter and because of practical difficulties. Under Washington state law, for example, a wife could not create debts for the community, so that a wife would be unable to pay the tax assessed against her out of the very income taxable to her. Brief for Collector at 42, Poe v. Seaborn, 282 U.S. 101 (1930) (No. 15).

130. The joint motion for certiorari in Seaborn was granted May 25, 1930, a week before Roberts joined the Court. 281 U.S. 704 (1930).

131. *Poe*, 282 U.S. at 109.

132. Roberts interpreted *Robbins* as applying only to California; narrowly distinguished *Earl* as involving assignments of property by contract as opposed to divisions of property based on state policy; and interpreted *Corliss* as based on a power that Congress actually exercised. *Poe*, 282 U.S. at 116-17.

133. That married couples in different states would be treated differently withstood challenge under the uniformity clause. *Poe*, 282 U.S. at 117-18. The Court held to this position even as it recognized that conflicts would be created between the states. While the Court might have desired to induce Congress to change the statute to be more explicit as to which incident of ownership it intended to tax, it is also possible that the Justices were willing to accept community property income splitting because they expected that its use would be limited to the original community property states. The Court held in *Commissioner v. Harmon* that "[t]he legal community system of the States in question long antedated the Sixteenth Amendment and the first Revenue Act adopted thereunder." Comm'r v. Harmon, 323 U.S. 44, 46 (1944).

134. Erwin Griswold noted a rumor that Justices Hughes and Stone, and potentially one other Justice, wished to dissent and so simply "took no part." Erwin Griswold, *Owen J. Roberts as a Judge*, 104 U. PA. L. REV. 332, 338 n.5 (1955). Hughes was also known for his dislike of dissents. Paul Freund, *Charles Evan Hughes as Chief Justice*, 81 HARV. L. REV. 4, 37 (1967).

135. *See supra* note 79.

136. *See* Brief of H.G. Seaborn at 71-73, 145-56, Poe v. Seaborn, 282 U.S. 101 (1930) (No. 15).

change an earlier executive interpretation of its statute despite prior judicial precedent.[137]

As cases involving state community property regimes won the support of the newest Justice, common law measures to permit husbands and wives to shift family income for federal income tax purposes continued to percolate through the courts.[138] These cases would find their way to the highest tribunal soon to be rent with faction. Once Holmes retired, the Court began to experience greater division in tax cases.[139] Illustrating that the Court is not a cohesive body, it split as some Justices grew increasingly conservative regarding taxation, and thus tolerant of loopholes, in the face of congressional inaction.

Scholars have since discovered that a concern with revenue impacts the Court's willingness to decide tax cases,[140] but the Court's increasing resistance to inferring congressional intent might have been more the result of a concern for the judicial docket. Tax cases had become the largest single item on the Court's docket.[141] Moreover, one digest of 295 income tax cases in 1946 revealed that one-third involved questions of the family group, with at least forty percent of those clearly involving tax avoidance devices.[142] One might expect the Court to react with hostility to the increase in its docket.[143] As the Treasury Department had before it, the Court was left constructing rules to fill the vacuum left by the legislature and this took time and resources. But, for all of its attempts to choose among various alternative resolutions, the Court was unsuccessful at developing simple judicial rules governing the ownership of taxable income and property within families, in large part because it lacked the power to define the appropriate tax unit for the federal income tax.

Regardless of the Court's underlying motivation, a growing division over the appropriateness of creating rules to prevent tax avoidance made it difficult for that branch to formulate effective guidance for the other federal branches. While continuing to allow Congress to choose the incidents of ownership to be taxed, the Court increasingly required an explicit expression of congressional intent to tax a

137. The Treasury Department then extended recognition of income splitting to the remaining community property states. Mim. 3853, 10-1 C.B 139-40 (1931); U.S. v. Malcolm, 282 U.S. 792, 793-94 (1931).

138. *Compare, e.g.,* Smith v. Comm'r, 3 T.C. 894 (1944), *and* Johnston v. Comm'r, 3 T.C. 799 (1944), *with* Lowry v. Comm'r, 3 T.C. 730 (1944), *and* Tower v. Comm'r, 3 T.C. 396 (1944), *rev'd* 148 F.2d 388 (6th Cir. 1945), *rev'd* 327 U.S. 280 (1946). The Board of Tax Appeals became the Tax Court in 1942.

139. Justice Sutherland, in a series of family trust cases decided in 1935, ruled for the taxpayers even though their stated motives for establishing the trusts included "to avoid high surtaxes on . . . income." Helvering v. St. Louis Union Trust Co., 296 U.S. 39 (1935); Becker v. St. Louis Union Trust Co., 296 U.S. 48 (1935). Chief Justice Hughes and Justices Brandeis, Stone, and Cardozo dissented in those cases, arguing that a formal arrangement used by the taxpayer should not prevent the Court from recognizing the purpose of the revenue statute and effectuating the objectives of Congress. *Helvering*, 296 U.S. at 47 (Stone, J., dissenting).

140. Nancy Staudt, *Agenda Setting In Supreme Court Tax Cases*, 52 BUFF. L. REV. 889, 894 (2004).

141. Felix Frankfurter & Henry M. Hart, Jr., *The Business of the Supreme Court at October Term, 1934*, 49 HARV. L. REV. 68, 88-89 tbl. IX (1935); Felix Frankfurter & James M. Landis, *The Business of the Supreme Court at October Term, 1930*, 45 HARV. L. REV. 271, 297 (1931).

142. John Ervin, *Federal Taxes and the Family*, 20 S. CAL. L. REV. 243, 249 (1947).

143. William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Forward, Law as Equilibrium*, 108 HARV. L. REV. 26, 70 (1994).

particular property interest or to plug a particular loophole, rather than assuming, as Holmes had done, that Congress intended to maximize government revenues by creating a tax system that applied uniformly across the nation.[144] Only if Congress stated its intent with sufficient clarity would the Court dismiss refinements of title.[145] Thus, Congress was given broad powers to determine the incidents of ownership it wished to tax but, after Seaborn, it was Congress's duty to make the law clear.

The Court would not, however, write itself completely out of the role Holmes had created when it appeared that taxpayers were taking too much license with the tax statutes. For example, in *Helvering v. Clifford*, the Court held that the technicalities of the law of trusts could not be used to avoid the federal income tax and, in *Burnet v. Leininger*, it tightly circumscribed valid family partnerships.[146] Not all of the Justices agreed that the Court should retain even this limited power of determining and applying congressional intent. Justice Roberts dissented in these cases on the grounds that "Courts ought not to stop loopholes in an act at the behest of the Government, nor relieve from what they deem a harsh provision plainly stated, at the behest of the taxpayer. Relief in either case should be sought in another quarter."[147] That quarter being Congress. Roberts's position gained dominance in the late 1930s and 1940s, endangering Holmes's common law approach to federal income taxation.[148]

Nonetheless, the Court's response to this tax avoidance behavior created through tentative steps what was in effect a common law of taxation but one that stopped short of answering the question of who was to be taxed on what income.[149] The Court's jurisprudence failed to define a clear test for determining ownership for tax purposes or even a rule prescribing when Congress was required to defer to the states for that determination. This created difficulties because, absent perfect statutory language or a clear indication of congressional intent, the power and scope of revenue laws remained subject to substantial judicial discretion. Furthermore, this indecision, both as to the degree of deference to be given to states' determination of property rights and as to the applicability of the various common law theories of ownership, left the Court's decisions open to attack and taxpayers uncertain as to the consequences of their tax-planning choices.

Thus in the early decades of the modern income tax's operation, the Supreme Court left its mark on the law's course of development, even onto such a seemingly small issue as the tax unit. In contrast to the Court's approach in many other fields

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144. Burnet v. Wells, 289 U.S. 670, 678 (1933); DuPont v. Comm'r, 289 U.S. 685 (1933); Reinecke v. Smith, 289 U.S. 172 (1933).

145. *Wells*, 289 U.S. at 678.

146. Helvering v. Clifford, 309 U.S. 331, 334 (1940); Burnet v. Leininger, 285 U.S. 136, 139-41 (1932).

147. *Clifford*, 309 U.S. at 342.

148. *See* Comm'r v. Culbertson, 337 U.S. 733, 746 & n.15 (1949) (noting that, unless Congress attaches tax consequences to a defined status, no such consequences exist); Helvering v. Wood, 309 U.S. 344 (1940).

149. According to Chief Justice Hughes, Congress always had the power to prevent the loss of federal revenue by prohibiting evasions of its law. Cooper v. U.S., 280 U.S. 409, 482-83 (1930); Taft v. Bowers, 278 U.S. 470 (1929).

of law, it quickly accepted congressional supremacy: that Congress intended to maximize federal revenues by crafting a universally-applicable tax regime. When Congress proved unwilling to ratify its intent to create such a regime, the Court pulled back, but fell short of a complete re-evaluation of its early common law-based support for the federal income tax. In its refereeing between taxpayers and the Treasury Department, the Court exercised essentially political functions in deciding whether to constrain Congress by state law or to develop a federal common law to govern federal income taxation.[150]

By 1948, the Court had handed down several decisions regarding family income shifting that took the power to define ownership for federal income tax purposes from the Treasury Department, which had exercised it reluctantly, and tried to give it to an equally reluctant Congress. One can question the value of this early policymaking by the Court.[151] It initially acted because of perceived ambiguities in the governing statute but then pulled back when there was a demonstrated inability by the political branches to resolve the issue. The legislature and executive branches were complicit in the Court's early usurpation of power because they transferred responsibility to a branch not directly answerable to the people. Only the relinquishing of the Court's power forced Congress to act.

IV. CONGRESSIONAL SUPREMACY: ONLY IF WE MUST

By enacting an income tax without evaluating and conclusively deciding upon a tax unit, Congress initiated thirty-five years of debate between the branches of government. Not making that decision allowed Congress to isolate itself from the political repercussions of imposing relatively higher burdens on an identifiable group.[152] At the same time, it allowed a preferred group, wealthy married couples, to enjoy the benefit of a loophole. Finally, Congress could demand new contributions every time the loophole was challenged by another branch.[153] Thus, this policy delegation by omission provided Congress significant benefits.

This approach to delegation is not unusual but, nonetheless, most scholarship on the delegation of legislative power focuses on overt delegation.[154] The same

150. *See* Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1244 (1999).

151. For example, Epstein finds problematic judicial independence when used to subvert the political branches. Richard A. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 BYU L. REV. 827, 847 (1990).

152. No-win issues are particularly likely to be delegated because some important constituency will be angered. Dwyer, *supra* note 11, at 245-46.

153. For other discussions of legislative rent-taking in tax policy, see Richard L. Doernberg & Fred S. McChesney, *On the Accelerating Rate and Decreasing Durability of Tax Reform*, 71 MINN. L. REV. 913 (1987); Richard L. Doernberg & Fred S. McChesney, *Doing Good or Doing Well?* 62 N.Y.U. L. Rev. 891 (1997); J. Mark Ramseyer & Minoru Nakazato, *Tax Transitions and the Protection Racket: A Reply to Professors Graetz and Kaplow*, 85 VA. L. REV. 1155, 1172-73, 1175 (1989).

154. Scholars question why Congress chooses to delegate decision-making and to which branch it is best to delegate. Jonathan Bendor & Adam Meirowitz, *Spatial Models of Delegation*, 98 AM. POL. SCI. REV. 293 (2004); Morris Fiorina, *Legislative Choice of Regulatory Forms*, 39 PUB. CHOICE 33 (1982); Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title*

motivations that make Congress expressly delegate its power also applies when it does so without taking action. For example, Congress might be unable to anticipate all relevant issues,[155] or to form a congressional consensus,[156] or congresspeople might desire to avoid blame for unpopular choices.[157] Although the motivations might be the same, the consequences of delegation "seem most bleak when, in delegating the legislature abdicates."[158]

When the tax unit was debated in Congress before 1948, congresspeople protected wealthy constituents' interests by not closing the loophole. For example, representatives from community property states worked to thwart Treasury Department attempts to remove the community property advantage.[159] Whether legislators were captured by interest groups in a sinister sense or represented constituents more benignly, those in Congress often put the narrow interests of wealthy couples ahead of the desire to create a nationally-applied income tax. Defaulting to this position was relatively easy because it only required congresspeople to refrain from acting. No one had to go on the record raising anyone's taxes.

These political constraints were made stronger because wealthy constituents benefiting from the loophole felt the retention of the tax benefit of income shifting as more valuable than rate reductions, particularly as the reductions might come at some undefined point in the future.[160] This was not only an issue of timing but psychologists have demonstrated that people treat foregone gains, here the gain of rate reduction, as less important than losses, the loss of income shifting.[161] Those who stood to lose the tax benefit tried harder to prevent reform than those who hoped to gain by an improved tax system. The benefit of being able to shift income created a sense of entitlement, an endowment effect, that legislators could only overcome when they were able to preserve the gain and thereby frame the issue as a broader tax cut.[162]

Revenue needs alone were not enough to overcome this resistance. As the

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VII, 63 VAND. L. REV. 363 (2010); Mashaw, *supra* note 32, at 91-95; David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L. J. 97, 106-12 (2000) Stephenson, *supra* note 5.

155. Richard A. Posner, *Statutory Interpretation*, 50 U. CHI. L. REV. 800, 811 (1983).

156. Daniel Rodriguez, *Statutory Language and Political Advantage*, 12 INT'L REV. L. & ECON. 217, 218-19 (1992); Shepsle, *supra* note 31; David B. Spence, *A Public Choice Progressivism, Continued*, 87 CORNELL L. REV. 397, 432 (2002).

157. Peter Aranson, *supra* note 32, at 56-62. *Contra* DANIEL FARBER & PHILIP FRICKNEY, LAW AND PUBLIC CHOICE 81 (Univ. of Chi. Press 1991) (arguing against the "pass the buck" rationale).

158. Arthur Lupia & Mathew McCubbins, *Designing Bureaucratic Accountability*, 57 LAW & CONTEMP. PROBS. 91, 96 (1994).

159. *See supra* note 74.

160. *New Support for Tax Splitting*, U.S. NEWS & WORLD REP., Jun. 27, 1947, at 45; *Tax Bill Improved*, NEW REPUBLIC, Aug. 11, 1941, at 171; *Taxes*, BUS. WEEK, Nov. 15, 1947, at 26; *Taxpayers Rise Up*, BUS. WEEK, Jan. 18, 1941, at 17-18; *The Ingenious Taxpayer*, FORTUNE, Feb. 1947, at 108.

161. Rachlinski & Farina, *supra* note 5, at 604-05; Cass R. Sunstein, *Behavioral Analysis of Law*, 64 U. CHI. L. REV. 1175, 1179 (1997). Fiorina claims congresspeople expect constituents to blame them for votes against interest more than praise them for votes in their interest. *See* MORRIS FIORINA, REPRESENTATIVES, ROLL CALLS, AND CONSTITUENCIES 38-39 (Lexington Books 1974).

162. *See, e.g.*, Cass R. Sunstein, *Endogenous Preferences, Environmental Law*, 22 J. LEGAL STUD. 217, 227-30 (1993).

nation entered World War I, the concern for revenue forced Congress to recognize the problem of the tax unit even though it would not take decisive action for two more decades.[163] Seeking to increase federal revenue, one Senator proposed an amendment that, "for income-tax purposes. . .a husband and wife shall be regarded as 'one person,' and their 'combined' income shall be reported on one income-tax return, and that the []tax shall be collected on the combined income of both."[164] Requiring mandatory joint filing and taxing the combined incomes of both spouses at the same rates applied to single taxpayers would push more income into higher tax brackets and raise more revenue. Unsurprisingly, this proposal raised the objections of wealthy couples, and Congress sided with those interests.[165] This action (or inaction) was repeated when the Treasury Department attempted to target the community property states' "marked advantage" in the 1920s.[166]

Similarly, the Supreme Court's decisions in the late 1920s and early 1930s could have prompted Congress to resolve the question of the appropriate tax unit. The Court had taken the power to set national standards for applying the income tax from the executive branch and unambiguously given it to Congress.[167] Congress, however, proved reluctant to act upon the Court's mandate. Part of Congress's reluctance came from a predictable source: Any policy dictating who would be taxed on income within the family would increase the taxes of at least some wealthy, powerful constituents (whether married or single). Any choice was certain to anger someone. Therefore, though the Treasury Department and the Court asked for resolution, Congress deferred taking a stance until it was forced to act.

When confronted with proposals from the Treasury Department in the 1930s, Congress talked more than it acted. It took some amount of tax avoidance, which included use of the income-shifting loophole, as a fact of life that it would not seriously challenge.[168] Economist Henry Simons denounced this, arguing, "One senses here a grand scheme of deception, whereby enormous surtaxes are voted in exchange for promises that they will not be made effective. Thus, politicians may point with pride to the rates, while quietly reminding their wealthy constituents of the loopholes."[169] This prevailing sense that tax avoidance was inevitable colored

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163. Wilson proposed doubling tax rates in 1918 which allowed anti-tax opponents to regain control of Congress. *See* Elliott Brownlee, *Tax Regimes, National Crisis, and State-Building in America*, *in* FUNDING THE MODERN AMERICAN STATE, 1941-1995 at 37, 60-67 (Elliott Brownlee ed., Cambridge Univ. Press 1996).

164. 61 CONG. REC. 11,312 (1918) (statement of Atlee Pomerene (D-OH)).

165. 61 CONG. REC. 10,419-22, 11,312 (1918); *Husband and Wife Returns*, WALL ST. J., Oct. 23, 1918. Congress's confirmation of the executive policy of allowing a choice of filing options garnered little public attention. *Tax Law Carries Ruling to Keep Peace in Family*, CHI. TRIB., Feb. 23, 1919.

166. *Hearing on Revenue Revision, 1924 Before H. Comm. on Ways and Means*, 68th Cong., vol. 3, at 194-6; vol. 5 at 263-80, 319, 350-2; vol. 6 at 478-82 (1924); H.R. REP. NO. 67-350, at 11 (1921); H.R. REP. NO. 67-486 (1921) (Conf. Rep.); *see also* S. REP. NO. 67-275, at 14 (1921); 61 CONG. REC. 5,917-21, 6,584-95, 8,037-38 (1921).

167. *See supra* Part III.

168. *See, e.g., Joint Committee on Tax Evasion and Avoidance*, *supra* note 90, at 9-16; 78 CONG. REC. 2656-57 (1934); 67 CONG. REC. 3876 (1926); 65 CONG. REC. 916 (1924); Statement of Acting Secretary of Treasury on Preliminary Report of a Subcommittee on Committee on Ways and Means 1 (Comm. Print 1933).

169. HENRY C. SIMONS, PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY 219 (Univ. of Chi. Press 1938).

congressional debates over the best tax unit.

This is not to suggest that Congress did not recognize the benefit of attacking this tax avoidance in a strong, but purely rhetorical, way. In the early 1930s Congress investigated perceived abuses by Wall Street, abuses many blamed for the stock market crash of 1929.[170] The larger purpose behind this investigation was to build a case for the regulation of the finance industry and calling attention to tax avoidance was an effective way of demonstrating bankers' immorality. Some of the most outrageous tax avoidance behavior identified involved income shifting between spouses to avoid tax.[171]

In the end, Congress's response was largely rhetorical. While narrow provisions to target specific abuses were passed, the final legislation did not address the larger issue of the tax unit.[172] Moreover, when it acted, Congress often benefited narrow groups of taxpayers. For example, in 1928, Congress enacted a provision that permitted the Treasury Department not to seek back taxes if the Supreme Court invalidated community property income splitting that had been allowed by regulation but was then being challenged in *Poe v. Seaborn*.[173] This protected taxpayers from retroactive change even if the government won the test cases.[174] Despite the fact Congress recognized that wealthy taxpayers were avoiding taxes with methods that "almost no fair-minded man would defend," including inter-family sales, gifts, and revocable trusts, Congress also did not seek prospective change because it worried that "such a controversial item might delay the passage of the revenue bill."[175] As a result, Congress made little attempt to stop the use of these devices. Similarly, the community property question was debated in separate hearings, but they too amounted to nothing.[176]

By not nationalizing a system of property ownership and waiting to make ownership between spouses irrelevant for the federal income tax, the American system empowered and incentivized states to game the tax to the benefit of narrow

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170. For a good discussion of the Pecora Commission, see Joseph Thorndike, "The Price of Civilization," 188-97 (unpublished dissertation, 2005); RON CHERNOW, THE HOUSE OF MORGAN: AN AMERICAN BANKING DYNASTY AND THE RISE OF MODERN FINANCE 355-60 (Atlantic Monthly Press 1990); FERDINAND PECORA, WALL STREET UNDER OATH: THE STORY OF OUR MODERN MONEY CHANGERS (A.M. Kelley 1939); JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE (1982).

171. PECORA, *supra* note 170, at 196-97; SCHLESINGER, *supra* note 83, at 253.

172. Congress plugged one loophole that Pecora had identified by enacting a provision that disallowed deductions for losses on sales of property between family members. Revenue Act of 1934, ch. 277, § 24(a)(6), 48 Stat. 680 at 691.

173. Revenue Act of 1928, ch. 277, § 1108, 48 Stat. 680.

174. As reported by counsel to H.G. Seaborn, assurances were given that prior years would not be reopened if the cases were promptly begun and prosecuted with diligence. Mim. 3723, 8-1 C.B. 89-92 (1929); Donworth, *supra* note 80, at 168-69.

175. Roy Blakey & Gladys Blakey, *The Revenue Act of 1934*, 24 AM. ECON. REV. 450, 452 (1934).

176. *Hearing on H.R. 8396*, at 6 (statement of Allen T. Treadway (R-MA)). In the hot summer of 1934, the House held ten forlorn days of hearings on community property income splitting. There were only five members on the subcommittee, one of whom, Charles West (D-OH), never spoke. The hearings did receive some public attention, but not much, in community property states. *Community Property Tax Revision Urged*, L.A. TIMES, May 2, 1934; *Property Tax Plan Assailed*, L.A. TIMES, May 22, 1934. There was no mention in the N.Y. Times, Washington Post, or Wall Street Journal.

local interests.[177] Five states succumbed to pressure to change their marital property regimes from common law to community property to give their residents certainty that their division of family income between spouses would be effective for federal income tax purposes.[178] Five states changed regimes, including socially conservative Oklahoma and Nebraska, who would not have otherwise changed regimes; more states seriously considered doing so but waited for congressional action in 1948.[179]

As states changed their marital property regime to insulate local constituents from federal taxes, issues of state importance were able to influence federal revenue collections. Likewise, federal tax law drove states to alter their own domestic property regimes. The fear that states would take such an action troubled congresspeople for reasons as far ranging as that this would empower wives to that it would disrupt local property law.[180] As these fears became politically salient during World War II, few recognized who would lose the most from closing the loophole. Of the revenue raised by mandating the couple as the tax unit, only $65 million would have come from eliminating community property's favorable treatment—$288 million would have been derived from eliminating common law income-shifting.[181]

During World War II, the pressure to define the appropriate tax unit became more pressing as the tax raised more revenue from larger numbers of taxpayers. The federal income tax reached new heights, exceeding 90%, and became a mass tax, applying to middle class taxpayers for the first time.[182] For some couples, income shifting could generate tax savings of over 40% and so retained a powerful group of supporters.[183]

At the same time that income shifting benefited more Americans, both the government's economic understanding and the nation's economic realities changed, forcing policymakers to rethink tax policies. The tax unit became part of larger economic debates because changing tax rates was recognized as one tool Congress

177. *See* Stephanie Hunter McMahon, *To Save States' Residents*, 27 LAW & HIST. REV. 585 (2009).

178. *Id.* at 612, 619-21.

179. *Id.*

180. Carolyn Jones, *Split Income and Separate Spheres*, 6 LAW & HIST. REV. 259, 267, 294-96 (1988).

181. Memorandum from Miss Coyle, Joint Returns of Income of Husbands and Wives (Apr. 15, 1941), *available at* http://www.taxhistory.org/Civilization/Documents/marriage/hst28695/28695-1.htm (last visited Feb. 21, 2012). Thirty-five percent of the increase in number of returns would come from community property states. Joint Committee on Internal Revenue Taxation, *Mandatory Joint Returns* 11 (Comm. Print 1941).

182. *See* Carolyn C. Jones, *Mass-based Income Taxation: Creating a Taxpaying Culture, 1940-1952*, *in* FUNDING THE MODERN AMERICAN STATE, 1941-1995, at 104-47 (Elliot Brownlee ed., Cambridge Univ. Press 1996). Although family tax-planning became more valuable in the face of higher wartime tax rates, fewer families needed artificial income shifting as more wives entered the workforce, and at higher wages, and could report those wages on separate returns. Nevertheless, the percentage of separate filing as a percentage of total returns and of married returns fell from 1940 to 1945, even though the absolute number of separate filings increased over threefold. In 1937, only 2.6% of the nation's population paid federal individual income taxes, but by 1945 approximately 35% owed taxes on their incomes. BUREAU OF INTERNAL REVENUE, STATISTICS FOR INCOME FOR 1945 5, 13 (1951); BUREAU OF INTERNAL REVENUE, STATISTICS FOR INCOME FOR 1940 39 (1943); BUREAU OF INTERNAL REVENUE, STATISTICS OF INCOME FOR 1939 6 (1940).

183. *Hearing on Revenue Revisions, 1947-1948, Before H. Comm. on Ways and Means*, 80th Cong. 907 (1947).

could use to curb inflation or to spark economic growth.[184] Each choice of a tax unit increased or decreased the taxes owed by various groups within society. This new activist approach to the economy coincided with a realist reaction to earlier progressive reforms as many lawyers and legal scholars sought a pragmatic reform of the law.[185] In the field of taxation, this shift manifested itself in a desire to reduce the complexity of the Internal Revenue Code and the potential for taxpayer abuse.[186] A simple Code was thought more likely to produce the economic results that Congress sought, and eliminating income shifting would allow Congress to simplify the Code.

Nevertheless, taking a position against the individual tax unit, especially after the Roosevelt administration's failed proposal for mandatory joint taxation, proved difficult for those in Congress because opponents to the perceived tax increase were quick to mobilize. Even if most members of Congress had wanted to adopt the administration's policy during the war, of which there is no evidence, representatives of community property states threatened a filibuster of the revenue bill to protect individual filing.[187] The Secretary of the Treasury Department sacrificed mandatory joint filing, and an increased tax burden on wealthy married couples, to get a revenue bill passed quickly.[188]

Opponents of the World War II mandatory joint return proposals, mainly those who benefited from income shifting and their representatives, succeeded in portraying the issue as a social issue rather than a revenue one.[189] Thus, they painted the mandatory joint return as a threat to marriage and the family. Congress, who in previous years had argued that allowing wives and mothers to enter the workforce would destroy the family, now reversed course and argued that a tax provision that gave wives an incentive to leave the workforce was a threat to domestic peace.[190] Business leaders, who certainly had an economic motivation for their views, warned that the proposal would decrease the rate of marriage by ten

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184. For a good description of the evolution of fiscal policy following World War II, see Herbert Stein, *The Development of Consensus, 1945 to 1949*, *in* THE FISCAL REVOLUTION IN AMERICA 197-240 (AEI Press 1990); *Hearing on Tax Changes for Shortrun Stabilization Before Joint Economic Comm. Subcomm. on Fiscal Policy*, 89th Cong. (1966).

185. "Efficacy replaced virtue as the ideal." ALEXANDER, *supra* note 109, at 309.

186. Fearing a backlash by the wealthy when rates were raised, Congress's preferred method to raise revenue was to reduce, or even close, some of the complicated loopholes opened during the 1920s. WITTE, *supra* note 7, at 103-04.

187. *Hearings on H.R. 5417*, at 1571. Discussing the 1941 proposal, Walter George (D-GA) noted the fear of "an incipient filibuster. It was not fully developed, but it had all the earmarks of developing into a full-sized filibuster." 93 CONG. REC. 5921 (1947); *see also The Congress*, TIME, Sept. 15, 1941.

188. *Hearings on H.R. 5417*, at 1.

189. *See* Dorothy D. Crook, *Not Guilty! (Legal Status of the Married Woman Worker)*, 20 INDEPENDENT WOMAN 179 (1941); Henry Dorriss, *Women Warn of More Divorces with Enforcing of Joint Returns*, N.Y. TIMES, Mar. 26, 1942; Stuart Piebes, *Joint Tax Returns Opposed*, N.Y. TIMES, Jul. 23, 1941; *Tax Bill Improved*, NEW REPUBLIC, Aug. 11, 1941; Mary Anderson, *Dismissal of Married Women an Attack on Democracy*, May 17, 1939, Reel 22, Record of the Women's Bureau of the U.S. Dept. of Labor, 1918-1965 [hereinafter Women's Bureau, microfilm]; Mary Anderson, *Effect of So-Called Married Women Bill on Business in General*, Feb. 10, 1940, Reel 9, Women's Bureau, microfilm.

190. H.R. REP. NO. 77-1040, at 12, 69 (1941); 87 CONG. REC. 6,617, 6,714 (1941); 87 CONG. REC. A3,524, A3,688 (1941).

percent and increase the rate of divorce by as much as twenty percent.[191] Whether proponents of the measure believed it or not, the argument that joint returns would hurt women's rights became the "iron petticoat" that the measure's opponents hid behind.[192] Bertrand Gearhart (R-CA) and other community property congresspeople made women's rights the decisive issue in their efforts to protect their constituents' tax advantage.[193]

Women's groups also joined the debate and were divided along socio-economic lines. The National Woman's Party, speaking largely for middle- and upper-class women, despite recognizing that the Treasury Department's proposal would have decreased most wives' portion of families' tax liability, opposed the plan.[194] On the other hand, Eleanor Roosevelt on behalf of lower income groups "pooh-pooed. . .the idea that the proposal requiring married couples to file a joint income tax return would undermine a working wife's independence."[195] Some women's groups actively supported the mandatory joint return proposal because they perceived it more as class legislation than as gender-based legislation.[196]

For most women's groups, and most of the nation, this loophole was not significant enough to produce a policy entrepreneur willing to take on the issue.[197] More than 80% of the population, the vast majority of American voters, did not benefit economically from income shifting, but they did not have the political will to push through a provision that would reduce wealthy couples' tax benefits.[198] When billions of dollars needed to be raised, as it was during World War II, alienating sixteen Senators from community property states (fourteen of whom were Democrats) to raise $300 million seemed unwise.[199] Moreover, while Congress worked with the president in support of his foreign policy, the two

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191. Letter from Leonard E. Read to Chambers of Commerce and Trade Associations, Memorandum (Jun. 28, 1941), Reel 71, National Woman's Party Papers, 1913-1974 (1981) (hereinafter NWP microfilm); *see also Hearings on Revenue Revision of 1942*, at 276, 295.

192. ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH CENTURY AMERICA 191 (Oxford Univ. Press 2001). Kessler-Harris alludes to the fact that the National Woman's Party might have taken its position in order to win Gearhart and others' support for the Equal Rights Amendment. *Id.* at 190, 196.

193. 88 CONG. REC. A2,476 (1942); *see also* 88 CONG. REC. A2,473, 6,367 (1942).

194. Wives' proportion of families' taxes would be lowered because liability was to be apportioned rather than joint and several. *Compulsory Joint Income Tax Returns*, EQUAL RIGHTS, Sept. 1941; *Joint Income Tax Return*, EQUAL RIGHTS, Aug. 1941; *Joint Income Tax Returns*, EQUAL RIGHTS, Jul. 1941.

195. *Mrs. Roosevelt Backs Joint Income Return*, N.Y. TIMES, Jun. 9, 1942, at 18.

196. *See Hearings on H.R. 5417*, *supra* note 95, at 328, 1413; *see also Hearings on Revenue Revision of 1942*, *supra* note 36, at 1946 (statement of Washington League of Women Shoppers); *Labor Party Asks Tax Bill Revision*, N.Y. TIMES, Jul. 6, 1942, at 11; National Consumers League, Minutes, 6 May 6 1942, p. 4, Reel 2: Minutes to Meeting 1932-1949, National Consumers' League Records, 1899-1972, microfilm (Washington, DC: Library of Congress) [hereinafter NCL microfilm].

197. Consider, for example, the Women's Bureau and the League of Women Voters. Rept. No. 12, June 1-30, 1941, Reel 1, Women's Bureau, microfilm.

198. *See* WILLIAM GREEN, THE THEORY AND PRACTICE OF MODERN TAXATION 51 (Commerce Clearing House, Inc. 1933); ERWIN N. GRISWOLD, CASES AND MATERIALS ON FEDERAL TAXATION 427 (The Foundation Press, Inc. 1940); Ervin, *supra* note 142, at 251.

199. *See* H.R. REP. NO. 77-1203, at 10 (1941) (Conf. Rep.). Morgenthau estimated $400 million could be raised by eliminating separate returns. *Hearing on H.R. 7378*, *supra* note 93, at 8.

branches of the federal government feuded over domestic policy.[200] Enacting, and retaining, special privileges in revenue bills was one way for congresspeople to lash out at the president with relatively little political cost.[201]

America's relief at the end of World War II was tinged with worry about the American economy.[202] Although the nation would enjoy tremendous economic growth in the decades following the war, neither the public nor policymakers could predict this. With demobilization came the prospect of high unemployment, declining wages, and labor unrest; while wartime labor shortages had accustomed workers to job security and high wages.[203] Memories of the post-World War I recession loomed large in the public memory.[204] Demands were made for cuts in heavy wartime taxes to stimulate investment and encourage consumer demand, even in the face of rising inflation and the heavy drain on federal finances imposed by international obligations.[205]

However, the separation of powers stymied tax policy development as a Democratic President engaged in a two-year struggle with the Republican Congress. Republicans condemned the then-current level of taxation as the "crushing of initiative," "destroying. . . of free enterprise," and possibly resulting in a "socialistic and communistic" system.[206] President Harry S. Truman, on the other hand, saw the postwar revenue surplus as fleeting because of the government's heightened international obligations and the increased social spending that would accompany the nation's transition to a peace-time economy. With these concerns in mind, Truman vetoed three tax-cutting revenue bills over the course of 1947 and 1948.[207]

As Congress and the president struggled over tax cuts, the issue of the appropriate tax unit (either individuals or married couples) again became part of the debate over federal revenue needs. Chairman of the Ways and Means Committee Harold Knutson (R-MN) first proposed an across-the-board twenty percent tax cut in 1947.[208] Knutson's proposal was only marginally modified when it was

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200. The Ways and Means Committee was particularly hostile to the Treasury Department in 1942. J.M. BLUM, YEARS OF WAR, 1941-1945 at 39-42 (Houghton Miflin Co. 1967).

201. *Id.*

202. *See Ruml Forecasts 6 Million Jobless at End of 1947*, WALL ST. J., Mar. 10, 1947, at 2; *see also Recession Late in '47 Forecast by U.S. Agency*, CHI. DAILY TRIB., Mar. 7, 1947, at 45.

203. *Id.*

204. *Id.*

205. As early as the 1944 election, Democrats claimed to want the "[a]daptation of tax law to an expanding peacetime economy, with simplified structure and wartime taxes reduced or repealed as soon as possible," and Republicans similarly wanted rates reduced and expressly "reject[ed] the theory of restoring prosperity through government spending and deficit financing." NATIONAL PARTY PLATFORMS, 1840-1972, at 403-4, 411 (Donald Johnson & Kirk Porter eds., 5th ed. University of Illinois Press 1975)

206. Quoted, with commentary, in RANDOLPH PAUL, TAXATION IN THE UNITED STATES 490 (Little, Brown and Company 1954).

207. *Message from the President of the Unites States*, H.R. DOC. 322, 80th Cong. (1947) (veto of H.R. 1); *Message from the President of the Unites States*, H.R. DOC. 407, 80th Cong. (1947) (veto of H.R. 3950); *Message from the President of the Unites States*, H.R. DOC. 589, 80th Cong. (1948) (veto of H.R. 4790).

208. H.R. 1, 80th Cong. (1947); Robert C. Albright, *Both Parties Pick Leaders for Congress*, WASH. POST, Jan. 3, 1947, at 1; *Income Tax Cut to Get Green Light*, L.A. TIMES, Jan. 3, 1947; *Tax Cut Promised if GOP Gets House*, N.Y. TIMES, Aug. 12, 1946, at 10; *Washington Bulletin*, BUS. WEEK, Oct. 6, 1945.

resubmitted after a presidential veto.[209] The goal of these two bills was to cut rates, not to reform the income tax system. Truman's vetoes partially changed this. By overriding the legislature, Truman prevented Congress from implementing a simple plan for tax reduction, a plan that might have made substantive tax reform impossible, or at least unlikely, as politicians who had already won the political benefits of a tax cut would have had little appetite for discussing tax reforms that themselves contained little popular appeal and with little revenue to fund them.[210]

Forcing Congress to build a larger coalition to override the veto inadvertently forced it to consider broader tax reform measures that ultimately led to the adoption of nationalized income splitting.[211] Although the tax savings that would be generated by nationalized income splitting would accrue only to the upper-middle-class and above, it enjoyed broad Democratic support in part because many hoped it would reduce tax avoidance. Exploitation by the wealthy had long been a significant concern of the Democratic party but not until 1948 was targeting tax inequities, and in 1952 tax loopholes specifically, introduced into the party platform.[212]

After thirty-five years of self-inflicted gridlock over the tax unit, which had worked to the advantage of taxpayers who had the desire and sophistication to engage in tax planning, when Congress finally roused itself, its action cemented those same taxpayers' gains.[213] In doing so, the Revenue Act of 1948 eliminated one opportunity for tax gamesmanship between states and effectively eliminated the gains to be had from inter-spousal income-shifting devices. The Finance Committee Chair admitted after the fact that it "was deliberately contrived in order to attract the votes, because we wanted to reduce taxes. . . ."[214] The Act did this by creating a federal law that superseded state law for this tax purpose, but it did not extend the community property regime to all states, as some claimed at the time.[215] It did not

209. H.R. 3950 only changed the effective date of H.R. 1. In the face of the first veto, the Ways and Means Committee began its scheduled comprehensive hearings on the revenue system. *Revenue Revision, 1947-1948: Hearing on Proposed Revisions of the Internal Revenue Code Before the H. Comm. on Ways and Means*, 80th Cong. (1947) [hereinafter *Revenue Revision, 1947-1948*].

210. Some attempts were made to insert measures into the second bill that fundamentally changed the tax unit but these failed. The Finance Committee Chairman hoped that by refusing to accept these changes he could ensure that the bill would be passed in time for Congress to re-visit it before Congress adjourned and after Truman had the full ten days to study and veto the bill. *See* Jack Bell, *Tax Cut Bill May Be Passed During Week*, WASH. POST, Jul. 7, 1947; John D. Morriss, *Senate Tax Pact*, N.Y. TIMES, Jul. 13, 1947, at 1.

211. *See* 93 CONG. REC. 8,807-13, 8,831-3 (1947); *Knutson Favors Letting Couple Split Income*, CHI. DAILY TRIB., Mar. 26, 1947, at 3. But see Robert C. Albright, *GOP Leaders in House Agree on 'Split Income' Tax Benefits*, WASH. POST, Oct. 21, 1947, at 9, for a later date for agreement. Despite debates over this policy since at least 1921, Knutson urged delay because it would be "most unfortunate" if Congress acted "hastily on this matter before we found an adequate solution." *Knutson Favors Letting Couple Split Income*, *supra* note 11.

212. NATIONAL PARTY PLATFORMS, *supra* note 205, at 433, 478.

213. *See* Revenue Act of 1948, 62 Stat 110.

214. 98 CONG. REC. 11,731 (1951). For a good description of the process, see A.E. HOLMANS, UNITED STATES FISCAL POLICY 1945-1949, at 85-101 (Oxford University Press 1961). The timing of the cut was early enough to be noticed in taxpayers' paychecks before the November election but late enough not to noticeably affect that year's federal budget.

215. *E.g.*, George Altman, *The Nationalization of Community Property*, 26 TAXES 14 (1948); William S. Hay, Letter to the Editor, *Community Property Laws*, CHRISTIAN SCI. MONITOR, Jan. 5, 1948, at 18; *How*

affect state-defined property rights in any way. By enacting nationalized income splitting, Congress merely prevented state law-defined ownership as between spouses from determining a couple's federal income tax liability.[216]

One of the more puzzling aspects of the enactment of nationalized income splitting in 1948 was the relative silence of those arguably most affected: women. Women's groups that had opposed mandatory joint returns in 1941 and 1942 kept quiet in 1947 and 1948.[217] With the only real pressure on this issue coming from those seeking to protect tax reduction, Congress was not likely to take steps other than to preserve the status quo. In this case, the legal actions of those avoiding taxes did not energize a social movement.[218]

This interpretation of nationalized income splitting as a political tool to accomplish a broader goal of cutting taxes helps explain why Congress was able to settle on a policy so quickly in 1948 after it had taken so long to act. Married couples who were living in substantially similar circumstances but with different incomes and appetites for tax planning had long experienced disparate tax treatment. While a crisis might provide an opportunity for entrepreneurial politicians and regulators to break the political logjams and pass rules that are difficult to develop during ordinary politics, so too might crises provide opportunities to pass on legislative favors.[219] The framing of the issue as a tax cut was crucial to Congress's ability to act.[220] Policymakers understood that "[t]ax-wise married citizens in the middle and upper brackets suddenly perceived the application to tax reduction of Shakespeare's aphorism respecting the rose. Split income would not only give them even more. . .but could also be respectably defended as tax reform."[221]

The political imperative of distributing a federal revenue surplus forced Congress to act on this tax issue. Following wealthy couples' lead, Congress passed

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Income Splitting Works, U.S. NEWS & WORLD REP., Jan. 9, 1948.

216. State property law continued to govern property ownership and many other questions of federal taxation. There remained limited advantages to filing separately, particularly with continued community-property income splitting. *See generally* John A. Miller, *Federal Income Taxation and Community Property Law: The Case For Divorce*, 44 SW. L.J. 1087 (1990).

217. *See Tax Reform Act of 1969: Hearing on H.R. 13270 Before S. Comm. on Finance*, 91st Cong. (1969); *Reduction of Individual Income Tax: Hearing on H.R. 4790 Before S. Comm. on Finance*, 80th Cong. (1948); *Individual Income Tax Reduction: Hearing on H.R. 1 Before S. Comm. on Finance*. 80th Cong. (1947) [hereinafter *Hearings on H.R. 1*]; *Revenue Revision, 1947-1948, supra* note 209.

218. For discussion of the social movement literature, see generally NICK CROSSLEY, MAKING SENSE OF SOCIAL MOVEMENTS (2002);Tomiko Brown-Nagin, *Elites, Social Movements, and the Law*, 105 COLUM. L. REV. 1436 (2005); William Eskridge, *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2406-07 (2002); Robert Post, *Fashioning the Legal Constitution*, 117 HARV. L. REV. 4 (2003); Edward Rubin, *Passing Through the Door*, 150 U. PA. L. REV. 1 (2001).

219. Macey, *supra* note 5, at 959.

220. Framing was particularly important for determining how the policy's costs and benefits were assessed and weighted. Peter A. Hall, *Preference Formation as a Political Process*, *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., Cambridge University Press 1992).

221. STANLEY S. SURREY & WILLIAM C. WARREN, FEDERAL INCOME TAXATION: CASES AND MATERIALS 721 (1950).

a targeted tax savings without clear debate on the underlying issues or a full understanding of the potential costs that such tax savings might later entail.[222] The Revenue Act of 1948 used a significant portion of the post-war federal revenue surplus, between $800 million and $1 billion, to accomplish that goal, even though the savings reached only a limited number of families, roughly ten percent of all married taxpayers.[223] This result meant that some wealthy taxpayers had leveraged the Supreme Court's opinions handed down in the 1930s into significant, long-term gains.

PART V. CONCLUSION

Whether married couples must file their federal tax returns jointly or as individuals generated problems for the government and taxpayers alike, in part because in 1913 Congress did not dictate a decisive rule. Instead, Congress designed a broad policy objective for the income tax and let others fill in the blanks as to the specific rules of its implementation. As a result, members of Congress did not have to take responsibility for those individual decisions even when they resulted in a loophole that allowed some taxpayers, but not all, to reduce their tax obligations. While the consequences were inequitable, for most of the history of the tax unit debate, Congress was content with this fragmentation of policymaking power. Consequently, the 1948 change to the law resulted less from a well-thought out governmental policy than from congressional reactions to the unintended consequences of earlier policies.[224]

Not only was Congress content with the fragmentation of power, but after a period of attempting to resolve the issue of the appropriate tax unit, the other branches of the federal government likewise conceded ground to the winning interest group. Because closing the loophole of income shifting requires that one branch decide which group(s) of taxpayers should bear a disproportionate burden of taxation, policymakers proved reluctant to take decisive action and tried to shift responsibility for these difficult, inevitably unpopular decisions to other branches or levels of government.[225] Neither the Treasury Department nor the Supreme Court would indefinitely take the responsibility delegated by Congress. The federal government's reluctance gave individual taxpayers and state policymakers the opportunity to capture tax savings. Nevertheless, as the reach of the tax grew, details of the tax's operation had to be re-evaluated and the Revenue Act of 1948 eliminated one source of inter-state and inter-couple disparities that had developed.

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222. There was discussion of the trade-offs of increasing the relative burdens of single taxpayers and dual-earning couples, but many policymakers might not have heard the tax advisors' cry of warning of new inequities being created. *Hearings on H.R. 1*, *supra* note 217, at 527 (statement of Randolph Paul).

223. MCCAFFERY, *supra* note 122, at 54.

224. For a discussion of the inherent limits to the ability to change policy except incrementally, see MICHAEL HAYES, THE LIMITS OF POLICY CHANGE 5, 42-43, 150-54 (Georgetown University Press 2001).

225. For a similar argument in other circumstances, see Morris P. Fiorina, *Group Concentration and the Delegation of Legislative Authority*, *in* REGULATORY POLICY AND THE SOCIAL SCIENCES 175, 183-87, 196 (Roger G. Noll ed., University of California Press 1985).

The loophole was closed.

During the Korean War, individual income tax rates returned to 1945 levels, and the high levels of taxation made clear who had benefited and who had not from the postwar tax cuts.[226] Although the 1948 rate reduction was wiped out, income splitting remained, illustrating one policymaker and professor's argument that "a tax decrease difficult to obtain in direct reduction terms may be secured more easily through complex structural alterations."[227] Cuts that find their way into the structure of the Internal Revenue Code are more likely to live on even when the circumstances that beget them, here the norm of the one-earner household and a federal budget surplus, no longer apply.

That the issue of the tax unit is a zero sum game, at least over time or when viewed as some winning a reduction that others cannot enjoy, ensured that different constituencies would lobby for advantage. The first salvo by single taxpayers was made on behalf of a sympathetic group of singles, widows and widowers with children, who complained of this relative tax advantage.[228] In 1951, a partial income-splitting bracket schedule was introduced for heads of households who were defined as single taxpayers with dependents.[229] However, that change alone was not enough to resolve the zero sum game. In 1969, Congress acted to reduce the benefits that married couples enjoyed relative to all single taxpayers but, in the process, created a marriage penalty whereby two relatively equal earning spouses will owe more tax after marriage than if they had remained single.[230] More changes have since been made as representatives seek to placate taxpayers who realize the earlier policies disadvantage them.[231] Thus the debate continues today as couples complain about this marriage penalty but, since 1948, it is clear that the power resides with Congress to redress constituents' concerns.[232]

The process through which congressional supremacy developed poses a threat to democratic policymaking. The separation of powers, and the incentives these structural forces create in the different branches of government, exert tremendous

226. *See* Revenue Act of 1950, ch. 994, § 101, 64 Stat. 910-14 (1950).

227. Stanley Surrey, *Federal Taxation of the Family—The Revenue Act of 1948*, 61 HARV. L. REV. 1097, 1154 (1948). *Business Week* assured its readers in 1948 that even if rates increased, they would not lose income splitting. *Your Postwar Tax Cut. . .How It Works*, BUS. WEEK, Apr. 3, 1948.

228. *See, e.g.*, *Hearing on Revenue Revision of 1951 Before H. Comm. on Ways and Means*, 82nd Cong. 11 (1951) (statement of John Snyder Secretary of the Treasury); STAFF OF J. COMM. ON INTERNAL REVENUE TAXATION, 82D CONG., STAFF DATA ON H.R. 4473(THE REVENUE ACT OF 1951) PART 6 HEAD OF HOUSEHOLD 3 (Comm. Print 1951); H.R. REP. NO. 82-586, at 11 (1951); 95 CONG. REC. 293 (1949). For the need to provide relief to a single person who is a head of family or for two-earner couples, see 95 CONG. REC. A6, 550 (1949) (statement of Rep. Douglas). *But see Revenue Act of 1951: Hearing on H.R. 4473 Before S. Comm. on Finance*, 82d Cong. 743, 926, 2339-340, 2593, 2611 (1951); 97 CONG. REC. 11,08, 11,732 (1951);.

229. *See* Revenue Act of 1951, Pub. L. No. 82-183 § 301, 65 Stat. 452, 480-83.

230. *See* Tax Reform Act of 1969, Pub. L. No. 91-171, § 803, 89 Stat. 487, 678-82.

231. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (codified as amended in scattered sections of 26 U.S.C.); Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, 117 Stat. 752.

232. For a discussion of the legislation targeting the marriage penalty in the Bush era, see, for example, Ann F. Thomas, *Marriage and the Income Tax Yesterday, Today and Tomorrow*, 16 N.Y.L. SCH. J. HUM. RTS 1 (2000); *see also* Dennis Ventry, The Treatment of Marriage Under the U.S. Federal Income Tax 279-516 (Sept. 2001) (unpublished dissertation, University of California, Santa Barbara).

power outside of the political process on the law's course of development and direct it in ways that are not necessarily consistent with any larger policy agenda. Policy is often forged over time as a result of each of the different branches fulfilling its own role in the face of exploitation of a loophole.[233] An important question remains whether this political reality is, nevertheless, the best possible result for these types of political issues. This iterative process kept an otherwise unsalient issue under consideration. When Congress did not step up, the other branches did – at least for a time. Before the Treasury Department and the courts stopped making policy, they had defined the issue. They would not, however, indefinitely accept this delegated responsibility.

Regardless of its relative merits, for issues that are perceived by the public as zero sum, political development is unlikely to be one of a single branch affirmatively wielding the power to set the national agenda or of cooperation between the branches or between interest groups and policymakers to do so. Rather, it is a story of how all three branches of government abdicate their policy-making power and, in doing so, create a vacuum that is only reluctantly filled. Without policy leadership, some groups gain a significant first-mover advantage in that once their preferred policy has been adopted, their representatives have little choice but to defend that policy. The system thereby inadvertently strengthens the status quo as the branches of government toss about the hot potato.

233. Peabody and Nugent, *supra* note 4, at 25-27.