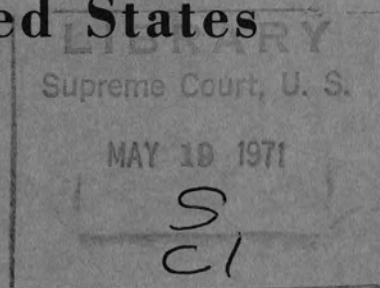


Supreme Court of the United States

OCTOBER TERM 1971



In the Matter of:

THE UNITED STATES OF AMERICA, et al.,

Docket No. 798

Petitioners

vs.

ANNE BOYNE MITCHELL, ET AL.,

Respondents.

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE
MAY 19 11 12 AM '71

Duplication or copying of this transcript
by photographic, electrostatic or other
facsimile means is prohibited under the
order form agreement.

Place Washington, D. C.

Date Tuesday, April 20, 1971

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

ARGUMENT OF:

PAGE

William Terry Bray, Esq., on behalf of
the Petitioners

3

Paul K. Kirkpatrick, Jr., Esq., on behalf
of the Respondent , Mitchell

29

Patrick M. Schott, Esq., on behalf of the
Respondent, Angello

51

REBUTTAL ARGUMENT OF:

PAGE

William Terry Bray, Esq., on behalf of
the Petitioners

60

- - -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1971

THE UNITED STATES OF AMERICA,
ET AL.,

Petitioners

vs

No. 798

ANNE BOYNE MITCHELL, ET AL.,

Respondents

The above-entitled matter came on for argument at
1:17 o'clock p.m. on Tuesday, April 20, 1971.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

WILLIAM TERRY BRAY, ESQ.
Office of the Solicitor General
Department of Justice
Washington, D. C. 20530
On behalf of Petitioners

PAUL K. KIRKPATRICK, JR., ESQ.
1000 Ouachita Bank Building
Monroe, Louisiana 71201
On behalf of Respondent Mitchell

1 APPEARANCES (CONT'D)

2 PATRICK M. SCHOTT, ESQ.
3 1607 National Bank of Commerce Building
4 New Orleans, Louisiana 70112
5 On behalf of Respondent Angello
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments now in Number 798, United States against Mitchell and others.

Mr. Bray.

ORAL ARGUMENT BY WILLIAM TERRY BRAY, ESQ.

ON BEHALF OF PETITIONERS

MR. BRAY: Mr. Chief Justice and if it may please the Court:

These combined income tax cases are here on certiorari from the Fifth Circuit. They involve the Louisiana community property system. In each case a husband and wife living in Louisiana realize community income from which each own one-half under the Louisiana law. No Federal income tax returns were filed by either spouse, either separately or jointly. The marriages were subsequently dissolved and the Government separately assessed each wife for the income taxes on her share of the realized unreported community income.

The cases present a single question: whether, when no returns have been filed, a Louisiana wife must report and pay the Federal income taxes on the one-half share of community income which under the laws of that state, she owns.

In each of these cases the Fifth Circuit held that she need not do so where she neither accepts liability for those taxes nor receives any benefits from the community property before the dissolution of the community.

1 We believe that in doing so that Court failed
2 to perceive an important distinction, one which we feel under-
3 lies the decision in this case; that is the distinction of
4 imposition of the tax on the one hand and collection of the
5 tax from the individual owing it on the other.

6 Q Mr. Bray, could you tell me one detail:
7 is the income of the community on which the deficiency was
8 determined due to the wife's earnings or income from her
9 property at all?

10 A In the Mitchell case it was partially
11 due to her earnings. In the Angello case the record indicates
12 that all of her community income was due to the husband's
13 earnings. In neither case was there any significant income
14 due to the wife's individual separate efforts. This, however,
15 we do not believe, since regardless of who generates the
16 income, under Louisiana law, each spouse owns an undivided one-
17 half interest of it from the very moment it comes into being.

18 Q This has to be your position necessarily.
19 It is rather reminiscent of the old embezzlement cases; isn't
20 it?

21 A Yes, sir and even before that the split
22 income taxes in the 1930 time of this Court. We think those
23 cases decide this case and compel the result for which we
24 here contend.

25 Our position is that this case involves only the

1 imposition of the tax and that because the wife owns her share
2 of community income she is taxed on it. While we recognize
3 that our position may result in hardships in certain instances
4 to wives residing in community property states, yet we think
5 the law is clear and compels the position that we take, at
6 least as the statutory law presently exists.

7 In sum, we argue that it is now and for many
8 years prior to this, well-established that the Federal statutes
9 impose the tax against the owner of the income; that under the
10 Louisiana law the wife owns outright her one-half interest in
11 community income as of the very moment that it comes into
12 existence, and that it follows that she must report and pay
13 taxes on her half.

14 On the other hand, as regards the collection of these
15 taxes, we think there is no real dispute on our position here.
16 The state laws exempting Louisiana wife from community obliga-
17 tions and we would here acknowledge that Federal income taxes
18 or community income are indeed, a community obligation but
19 these state laws exonerating the wife from community obliga-
20 tion simply are ineffective to the United States in its efforts
21 to collect the tax from the individual owing it.

22 The dispute here really is whether the wife's
23 ownership of her community income, her share of community in-
24 come, is sufficient under the Federal statutes, for that statute
25 to impose the tax against her and compel her to pay tax on it.

1 Q Mr. Bray, is that renunciation in the
2 Louisiana statute common to all community property states?

3 A It was not; it was common under the
4 Spanish law. It arose under the Spanish law. As far as we
5 can tell Louisiana is the only state which has carried this
6 over from the Spanish law. I might point out in that regard
7 that even under the Spanish law it was very clear that during
8 the existence of the marriage the wife owned outright her half
9 of community income. The renunciation provision was merely
10 one designed to protect her from community creditors again,
11 a creditor right proposition which gave her the right upon the
12 termination of the marriage to forego her otherwise vested
13 interest in the community income and for that matter, all
14 community property, and severally to be relieved of any obliga-
15 tions or community debts.

16 Q Well, by termination of the marriage this
17 would include death of her spouse.

18 A That's correct. In fact, in these cases,
19 one dissolution occurred because of death.

20 Q Does the husband have the same right?

21 A No; the husband does not and this is
22 because, again originating from the Spanish law, the husband
23 has the management, generally speaking of the community pro-
24 perty. It was therefore thought that because he manages the
25 property he ought to be responsible for the community debts

1 regardless and indeed, historically not only was he responsible
2 in the sense that community property was responsible for the
3 debts, but he personally was responsible for those community
4 debts.

5 In other words, if the community was not suf-
6 ficient to take care of the community debts, he had to come
7 out of his own separate property to pay those debts.

8 Q -- was there no way for the "master" to
9 pay?

10 A No.

11 Q Isn't that part of the provision?

12 A Yes, sir, but I would point out that there
13 are conditions for the wife, while she can't compel her hus-
14 band to pay her taxes as such, yet she does have protections
15 under state law which are very clearly spelled out, not only
16 to the state law cases, but for that matter in the two cases
17 in which this Court has dealt with Louisiana community property:
18 Bender versus Pfaff, the split income case and Fernandez
19 versus Wiener -- I beg your pardon, a state tax case, and in
20 both instances, while the husband had management rights over
21 her half of the community property, nevertheless, she had some
22 rather special provisions of state law which protected her
23 interest in that state property, including the right to
24 separate her property from her husband's without terminating
25 the marriage and from that point forward to have complete

1 control over her property.

2 Q As a practical matter how could she
3 possibly file a return?

4 A AS a practical matter, if indeed the
5 husband is unavailable --

6 Q He's plenty available; he just knows it's
7 none of her business.

8 You do contend that she's obligated to
9 file the return for both of them; don't you?

10 A No, sir.

11 Q Well, just for her how much -- on her
12 income or her share of the community income.

13 A She must report her share of the community
14 income.

15 Q How does she -- where does she know how
16 to find that out?

17 A This is, of course, the practical diffi-
18 culty with which we are faced in this case Court.

19 Q Well, you are not faced with any practical
20 difficulty; she is.

21 A I beg your pardon; the practical difficulty
22 of the wife, which we must answer in this Court.

23 Q Well, where does she get the information
24 to file a return?

25 A Under state law there is the possibility

1 that she could compel her husband to give her this information.

2 Frankly, I know of no case under Louisiana law,
3 or for that matter, under any other community property state
4 law which would give her this right, but on the other hand --

5 Q How could she protect herself from
6 penalty? She can file a return and say: "My husband refuses
7 to tell me what the community income is, but I can tell you
8 what my contribution is; other than this I am awfully sorry."
9 Would that be a compliance?

10 A No; it would not be a complete compliance.
11 Now, with regard to your specific question certainly she could,
12 I think, protect herself from penalties in that situation.
13 For filing a separate return and reporting all that she knew
14 about she would not be subject to any penalties. On the other
15 hand, I think it follows from the existing state of the law
16 that she would still be liable for the tax with statutory
17 interest, on --

18 Q Even though it was practically impossible
19 for her to acquire it?

20 A Even though it was practically impossible;
21 yes, Your Honor. Now, again this special situation -- indeed if
22 it is a problem and we would recognize it is, can be handled
23 in one of two fashions. One would be amending the present
24 Internal Revenue Code. This, of course, has been done quite
25 recently in a situation where joint returns have been filed.

1 In that situation the recent amendments that came into being
2 in January of this year relieves the wife of the liability if
3 she, in fact is completely innocent and has done everything
4 she can to comply with the requirements of law.

5 Q If fraud -- they would release her from
6 it?

7 A Well, not only fraud, but also tax
8 liability. Yes, sir; it does.

9 But, let me emphasize this: that statute presently
10 applies only where a joint return has been filed and thus
11 both spouses are jointly and severally liable for the entire
12 tax. Now, this highlights the problem we're faced with here.
13 Under existing law as we interpret it, the husband is not
14 liable for the taxes on the wife's share of the community
15 income; thus only the wife -- thus we may presently only go
16 after the wife. If, indeed similar legislation is presented to
17 relieve an innocent spouse in a community property state from
18 liability on his or her one-half share of community income, of
19 which he or she knows nothing, then we would hope that
20 Congress would impose liability on the guilty spouse, with
21 respect to those taxes. Otherwise, half an income will escape
22 taxation under the present state law.

23 Now --

24 Q Mr. Bray, going back to Justice White's
25 question: isn't the same kind of dilemma presented to the

1 -- to a member of a husband-wife team in a non-community
2 property state is there is an advantage in filing a joint
3 return and she can't find out what income he has?

4 A Absolutely.

5 Q It isn't the same because she could file
6 a separate return and avoid penalties directly.

7 A That's right, and let me say in that
8 regard: while the present legislation has relieved the wife of
9 liability in certain very limited circumstances, there are two
10 very important features of that: first of all, the legislation,
11 we feel was absolutely necessary, notwithstanding some cases to
12 the contrary, to bring about the change in the law; that is:
13 of relieving the wife of liability.

14 Secondly, I would point that again, historically
15 under Spanish law, the wife has not been deemed the one-half
16 owner of fraudulently obtained funds.

17 So that the situation to which the amending
18 statute is specifically directed; that is where the husband
19 has fraudulently obtained funds and the wife has not been
20 deemed the one-half owner of fraudulently-obtained funds. So
21 that the situation to which the amending statute is specifically
22 directed, that is where the husband has fraudulently obtained
23 funds and the wife knows nothing about them, would not, under
24 the historical approach of the community property law, be a
25 problem in community property states, because the wife doesn't

1 own any part of that fraudulently-obtained income.

2 But, to answer your question as directly as I
3 can: yes; the situation would be identical in the common-law
4 states.

5 Q In a common-law state where a joint
6 return is made and let's say there is another statement of
7 income that is negative or fraudulent or criminal, there are
8 more taxes owing, and that's discovered. Now, can each spouse
9 be held liable for the entire --

10 A In the community property state?

11 Q No, no; in the common-law states.

12 A If a joint return has been filed and
13 signed; yes, until the amendments of the statute in January
14 of this year.

15 Q Each spouse can be held liable --

16 A That's right; jointly and severally
17 liable for all taxes, both those reported and those found to
18 be due upon subsequent --

19 Q And, unlike, as I understand it, you told
20 us that community property state the spouse is only liable for
21 half the taxes?

22 A Absolutely. Now, I think again this
23 serves to highlight the problem here. The problem is not one
24 of our making, but rather one of the community property laws.
25 Historically the community property laws had provided "

1 community property husbands and wives with some rather sig-
2 nificant advantages. Before in the day of the joint return,
3 and I might add that the joint return came into being essen-
4 tially because of the advantages, before the day of the joint
5 return the spouses could split their income, file it separately
6 and thus avoid, or, at least lessen the impact of the graduating
7 income tax.

8 When this Court held in the 1930 term, upheld the
9 right of the spouses to do this, in the series of cases founded
10 on Poe versus Seabron, advantages were very clear-cut and the
11 Court established at that time that taxation follows owner-
12 ship insofar as the individual taxpayer is concerned. We
13 think that that compels the position that we take here: that
14 the wife owns her share and she must pay taxes on it.

15 And I might add, that since 1930 that has been the
16 whole basis of the taxation of individuals in the Federal
17 Income Tax Code. That is, it has taxes the income of two
18 individuals, and this has been repeatedly recognized and the
19 Congress has acted on this understanding of the law. Indeed,
20 the recent amendments serve to emphasize this once more. In
21 those amendments, or rather the legislative history of it, the
22 Congressional Reports indicate that except for the amendment
23 Congress recognized that in the community property states the
24 wife would be deemed to be owner of one-half of all community
25 income and would have to report and pay tax on it. And because

1 of that, the Congress inserted in these amending statutes, a
2 provision relieving the wife of liability in the joint return
3 situation where she otherwise would have that liability, not
4 just because she signed the joint return, but because she
5 owned the income.

6 Q Mr. Bray, Judge Ainsworth(?) was a member
7 of the panel in the First Circuit, was he not?

8 A Yes, sir; he was, and dissented from the
9 decision in both of these cases.

10 Q Did he?

11 A Well, I'm sorry --

12 Q This is what bothers me. Judge Ainsworth
13 is a Louisianan, and --

14 A Yes, sir; you are correct; I am sorry.

15 Q And the majority, I wondered if you had
16 any comment on that?

17 A No; no specific comment on it, other than
18 the fact that we view the decision as wrongly grounded and one
19 which is in complete conflict with this Court's decisions.

20 Q The other two are -- and they split?

21 A That's correct and they continue to do so,
22 I might add.

23 Q I still have great difficulty, Mr. Bray,
24 with the master not telling the wife anything and doling out
25 a weekly amount and you are charging her with --

1 A Mr. Justice Marshall, I -- if I could say
2 that we don't charge her with possessing something. The state
3 law says that she owns that income regardless. Under our view
4 the Federal law is quite clear: it taxes income to the owner.
5 We don't have any control as to who is the owner and it is a
6 matter determined under state law.

7 Q Yes, but how is she the owner if the owner
8 has the right to dispose?

9 A Well, this Court, again in Poe versus
10 Seaborn, distinguishes the management on the one hand, which we
11 acknowledge the husband has --

12 Q And fair ownership --

13 A And fair ownership on the other. And I
14 might add that in a subsequent dissent Mr. Justice Douglas
15 pointed out that this was the technical distinction made and
16 that now ownership determines who is liable for the taxes.

17 As I have indicated, both state and Federal law
18 is important in the question before this Court. State law
19 creates the legal interest involved, while the Federal law
20 taxes those interests, and it is clear that the Federal
21 statute taxes those interests. In our view it is clear that
22 the Federal statute taxes income to the individual who owns it.
23 This was decided in the 1930 series of cases and has been bed-
24 rock with respect to subsequent revenue legislation. We don't
25 see any way around this at this point in time.

1 Now, with respect to the state law we think it's
2 equally clear that the wife owns her undivided one-half share
3 of the community income and we don't think there is any real
4 dispute either with respect to the Respondents, or for that
5 matter, with respect to the Fifth Circuit on this particular
6 topic. Indeed, the Fifth Circuit said that in its opinion
7 that under Louisiana law the wife has a ^{present} vested ownership in-
8 terest in one-half of the community property, including its
9 income. The Court could only say this following not only the
10 many decisions of the Louisiana Supreme Court so stating, but
11 also the decisions of this Court in Bender versus Pfaff and in
12 Fernandez versus Wiener, so holding.

13 But the Court went on to say that it has rejected
14 what we say must follow. That is, that the wife must report
15 and pay taxes on her half, by saying that under Louisiana law
16 the wife's interest in the community is of such a character
17 that she is not personally liable out of her separate property
18 for the tax on her share.

19 We think in this regard the Court confused collec-
20 tion of the taxes which state law does provide protections that
21 would ordinarily protect the wife from community creditors and
22 imposition of the tax which we think is truly the issue here
23 involved. And the Fifth Circuit rested its decision that the
24 wife's ownership interest was qualified sufficiently that she
25 could not be held responsible for the taxes on her share,

1 essentially on two grounds. On the ground that the husband
2 had management rights over the wife's community
3 property; not only over his, but also over the wife's.

4 And secondly, that the wife's property was --
5 beg your pardon -- that the wife's separate property was
6 generally protected from community creditors.

7 However, under the state law, again as that law
8 has been recognized in this Court, these two features of state
9 law simply are ineffective insofar as protecting the wife from
10 the taxation that is vested upon her because she owns the
11 income. They do not alter the fact that she owns outright her
12 share of the income. And we think that she must report and
13 pay the tax on her share of the income, based on this Court's
14 decision in the 1930 split income tax cases.

15 Admittedly, these cases did not bring before the
16 Court the question of whether the wife is required to report
17 it or whether she was entitled to do so. But we think a case
18 decided along with these cases in that same session of the
19 Court made clear that it not only may she do so, but she
20 must do so where the spouses have not otherwise reported their
21 income on a joint return. This is the decision in the United
22 States versus Malcolm. *Malcolm*

23 Malcolm was decided some five years after an
24 earlier Supreme Court decision in United States versus Robbins,
25 In Robbins this Court decided that in California, at any rate,

1 that the husband must report and pay taxes on all community
2 income. In Robbins the Court based its decision on two grounds:
3 primarily on the holdings of the Supreme Court of California
4 that the wife's interest in community property during the
5 existence of the community was merely an expectancy. She had
6 no present vested interest in the community income.

7 Alternatively, the Court founded its decision on
8 the fact that the husband had such broad management powers
9 that this would entitle Congress to tax all of the income to
10 him. In recognition of this decision California subsequently
11 amended its laws and stated unequivocally that the wife's in-
12 terest in the community during the existence of the community,
13 was a present existing interest equal to that of the husband's.

14 Following this amendment and the statutes were
15 not amended significantly with respect to the husband's manage-
16 ment powers -- he still managed his wife's share of the com-
17 munity, but following the amendment with respect to the vested
18 interest versus expectancy interests, Malcom versus the United
19 States came before this Court, and in the per curiam opinion
20 based upon the Court's split income decisions in Poe versus
21 Seaborn and the other cases the Court held that under the
22 Federal statutes the husband need no longer -- the California
23 husband, need no longer report and pay taxes on all of the
24 community income in California.

25 They further held that the wife's interest under

1 state law was such that she should -- and I use the word
2 "should," because that was the question posed to the Court,
3 that she should report and pay the taxes on her share.

4 We think that this makes clear the position that
5 we are here taking and indeed, every Court up until the Fifth
6 Circuit's decision here, who has considered this question,
7 has so held.

8 Now, in doing so we would suggest the Court
9 abandon the management grounds on which Robbins had alter-
10 natively based the decision to tax the husband on all of the
11 community income. The Court, instead, opted in favor of owner-
12 ship, bare legal ownership, and made clear that management is
13 not the touchstone under the code, rather: ownership is the
14 key and whoever is the owner must pay the taxes.

15 I might point out that this is not unlike the
16 situation in several others -- concerning several other areas
17 of the tax law; specifically the partnership area. The wife's
18 interest has been compared by the Louisiana courts to that of
19 a limited partner in a limited partnership; just as a limited
20 partner must pay taxes on his partnership income, so the wife
21 must. And, this, mind you, whether or not the partner is
22 around at the time the partnership return and the individual
23 return should be filed, and whether or not the partner has ever
24 made distributions of the partnership income.

25 Thus, if the partner absconds with all of the

1 partnership funds this does not relieve the limited partner
2 in any respect from his obligation to pay Federal income tax
3 on his share of the partnership income.

4 Similarly, in the situation where the grantor
5 creates a trust and because he also the beneficiary of the
6 trust he is taxed on its income. If the trustee absconds with
7 all of the trust's income the grantor beneficiary would not be
8 relieved of his obligation to pay taxes on the trust's income.

9 Thus we can see no reason to suggest that taxing
10 the wife on the share of her income is unconstitutional as a
11 violation of the Fifth or 14th Amendments, and yet there is
12 just no basis for this as far as we can tell. We have been
13 able to find no cases suggesting that this would be such an
14 unfair invidious tax -- system of taxation as to render it
15 unconstitutional and we note that while our opponents suggest
16 that it would be unconstitutional, they do not either cite any
17 authority for this proposition.

18 Q Mr. Bray, does Texas have community
19 property?

20 A Yes; it does.

21 Q You are a Texan?

22 A Yes, sir; I am.

23 Q I am still bothered by this renunciation
24 provision -- I think it's 2410.

25 A Yes, sir; that's correct.

1 Q -- of the Louisiana statutes. Is this
2 one that can be exercised only after the community is dis-
3 solve? Could it be exercised prenuptially, for example?

4 A Not under that provision, but prenup-
5 tially the parties may determine not to be bound by the
6 community property laws, under Article 2399, which provides
7 that absent an agreement the marriage superinduces a partner-
8 ship of right between the spouses, "unless they otherwise
9 agree." And it's clear, I think, under Louisiana law that
10 they can't otherwise agree.

11 But the renunciation under 2410, if I'm not
12 mistaken, does not go specifically to prenuptial arrangements,
13 rather only to dissolution.

14 Q They do not have it in Texas?

15 A No, we don't, but I might add that the
16 Fifth Circuit didn't base its decision on renunciation per se.
17 The Angello case makes this quite clear, as does the subsequent
18 Ramos case, which comes out of Texas. There was no formal
19 renunciation. There the husband died and the wife merely --
20 there is no evidence that she got anything from the community
21 that previously existed between the spouses. She did not for-
22 merly renounce her interest in the community under Article
23 2410. Ramos, as I say, comes out of Texas and there is no
24 renunciation. However, in both Angello and Ramos the Fifth
25 Circuit based on its Mitchell holding, found that because the

1 spouse, the wife, had not received any benefits from the
2 community and had not expressly agreed to be bound by all of
3 her share of the taxes, she could not be made to pay that
4 share of the taxes.

5 If the Court accepts what we think is the clear
6 law; one: that the wife is the owner of the tax and two: that
7 as the owner she must report and pay the taxes on it -- I beg
8 your pardon. One: that the wife is the owner of her share of
9 the income and two: as the owner she must report and pay the
10 taxes on it, then we think it follows that the Government is
11 entitled to collect those taxes from any property she has,
12 including after-acquired separate property such as involved in
13 these cases.

14 I don't understand Respondents to seriously object
15 to our propositions in this regard, which we have set out fully
16 in our brief, whether their objection, just as the Fifth
17 Circuit's opinion is to -- whether the wife's ownership is
18 sufficient to impose the tax against her in the first instance;
19 if, indeed the tax is imposed against her and she owes it then
20 it is clear that the Federal collection statutes prevail over
21 state exemption laws and entitles us to collect the tax from
22 any property that she owes.

23 Q You are speaking of hard cases factually,
24 aren't you? One is an insurance proceeds case and the other
25 one is a husband who apparently isn't around any more.

1 A Unfortunately, Mr. Justice Blackmun we
2 can't claim the equities in this case, and we recognize that
3 only too well, but we come here because we think the law is
4 clear. It has been for some 40 years now, ever since the
5 splitting temptations, and that law is that in the individual
6 tax area the individual who owes the income must report to pay
7 the ataxes on it.

8 Further, if we had a means of going after the
9 husband this might not be quite so much a concern to us, but
10 under the existing state of the law, as I have explained, we
11 can't go after the husband. Again, we think the Malcolm case
12 and the cases that have come along since it, make that very
13 clear.

14 Q Is it very likely that you would ever get
15 a case in this area that was not a hardship case?

16 A Not on this subject; I don't believe it
17 would. But, I might point out that of course the wife, as I
18 mentioned earlier, realizes some rather significant benefits
19 under the community property laws which she doesn't have under
20 the common law states. Those benefits were before the Court in
21 the split income cases.

22 And this is merely the other side of the coin from
23 state law. Now, of course the state can change its laws, just
24 as Congress could amend the revenue statutes with respect to
25 these specific hardship areas. Indeed, my understanding of

1 California law is that if the husband abandons the wife the
2 income which he subsequently owes which is his separate income,
3 and the wife has no interest, no ownership interest in that,
4 then thus would not be obligated to report and pay taxes on it.
5 There is nothing to preclude, I presume, Louisiana from doing
6 the same, and that's truly the hardship case, I think, more so
7 than ours, where the wife was residing with her husband and
8 indeed in all probability, sharing with him whatever earnings
9 he had. In today's world the wife does, indeed, spend quite
10 a bit of the income which I think even her husband makes, and
11 I think it's realistic to recognize that.

12 But, in the area where Mr. Justice White posited,
13 where she has no knowledge of what is going on and can't because
14 her husband has abandoned her, for instance, then there is
15 nothing to suggest why Louisiana couldn't modify its laws to
16 say in that circumstance the husband owns outright his income
17 and the wife has no interest in it.

18 Q You have read the hypothetical case on
19 page 11 of the Angello brief?

20 A Yes, sir; I did.

21 Q In which you have a true hardship case.

22 A Yes, sir; it is.

23 Q And you agree that that would be the
24 result in the hypothetical case if your argument is accepted;
25 do you?

1 A Presuming that the funds there were
2 legally obtained and I presume that they were --

3 Q However, it's changed by the hypothesis
4 at the gambling tables in Las Vegas --

5 A I understand --

6 Q \$100,000 some-odd dollars.

7 A Then indeed, it would follow what we
8 consider to be what we contend to be the established law that
9 she must report and pay the taxes on her one-half share of that
10 \$100,000 if a joint return or her husband's separate return has
11 not included that in it.

12 Q Well, in my hypothesis he went to Mexico
13 with a paramour then died soon thereafter and she was left
14 penniless. He squandered all the money and she was left penni-
15 less and then later inherited a little money from her father
16 which she was using to support her children and yet on your
17 argument the Government gets all of this?

18 A As you can see, there is no way I can
19 get around that; yes.

20 Q Can the same thing be said of the embezzle-
21 ment cases in, I think, Jones, under the holding of this Court?

22 A Except, as I tried to say, in the embezzle-
23 ment area, historically at any rate, the community property
24 law has not recognized the wife as the one-half owner of monies
25 illegally obtained by her husband. Thus, we would not be faced

1 with, I don't think, in the community property, quite the same
2 problem in the embezzlement cases.

3 Now, I might add that it is for this very reason
4 that Congress saw fit to amend the provisions of the Internal
5 Revenue Code this January to relieve the wife of this liability
6 in this hardship case.

7 Q Not in this one?

8 A Not in this one. In the hardship case
9 where the husband has illegally obtained money or otherwise
10 fraudulently misled the wife in accepting into accepting joint
11 and several liability on a joint return. And the Congress
12 there again confirmed its understanding that income is taxes
13 to its owner and that in the community property states the wife
14 is the owner and thus is the taxpayer for her share. And we,
15 of course, would have no objection whatsoever to the Congress
16 doing the same for hardship cases in community property states
17 where no return was filed if they also devise, if Congress can
18 also devise a means for imposing liability against the husband
19 in that circumstance.

20 I would like, if I may --

21 Q To refer further to page 11, is there any
22 instance you know of under the tax law where somebody is taxed
23 on something he never knew he had?

24 A He never knew he had?

25 Q Yes.

1 A Again, I would presume that a limited
2 partner might not know what he had. I would also presume that
3 a beneficiary of a trust might not know what a trustee is
4 doing. Again, in the second instance, presuming a rather
5 significant appreciation there is no reason why the trustee
6 couldn't sell the property and leave with the appreciation
7 being recognized but with the taxes not --

8 Q If the partner who later picks up a
9 little money -- he's got to pay it --

10 A Exactly. That is the whole basis of the
11 individual taxation portions of the code.

12 Q Yes, but the limited partner has remedies
13 under local law.

14 A Well, certainly --

15 Q But to make out --

16 A But, Mr. Justice White, if I may add --
17 this would, of course, be after the fact. Just like it is in
18 our cases, or in a hypothetical, at any rate, could be. The
19 wife in our case has after-the-fact remedies.

20 Q That doesn't mean that everybody does --

21 A But, she has after-the-fact remedies.
22 She would certainly find out at the time that the government
23 found out and make a suit against her. Just as the wives found
24 out -- she can sue the husband for -- now, I'm not as clear on
25 Louisiana law as I am on California law because of the recent

1 cases --

2 Q What about Louisiana law?

3 A Okay; it would be my understanding that
4 Louisiana law is identical to California law on this subject,
5 and that is the wife has a right over and against her husband
6 for his failure to pay community debts when he should have.
7 That is exactly what Kimes says and that is what, I believe,
8 the Messersmith Louisiana Supreme Court decision suggests;
9 that the husband is primarily liable on community obligations.
10 If he does not pay those obligations the wife would have a
11 claim over and against him.

12 Q So this woman would then have a remedy
13 against her husband?

14 A Yes; yes. would be my understanding.
15 Now, under Louisiana law now, again presuming its limitations
16 or something else doesn't bar her from going after it. Of
17 course in Angello the husband is dead and the record would
18 indicate that the estate is insolvent. But, under state law
19 she does have a remedy against her husband if he fails to pay
20 the community obligation; that is the taxes on the community
21 income.

22 But, let me emphasize, that unlike the suggestion
23 in the Fifth Circuit below, that the community is not a tax-
24 paying entity, just as the partnership of the trust is not;
25 rather it's merely a _____ device. The individual spouses

1 under local law, it's very clear own individual their interests
2 on community property and income and thus required to pay
3 the taxes on it.

4 If I may I would like to reserve whatever time I
5 have left for rebuttal.

6 MR. CHIEF JUSTICE BURGER: Very well, Mr. Bray.
7 Mr. Kirkpatrick.

8 ORAL ARGUMENT BY PAUL K. KIRKPATRICK, JR., ESQ.

9 ON BEHALF OF RESPONDENT MITCHELL

10 MR. KIRKPATRICK: Mr. Chief Justice and may it
11 please the Court:

12 This Court has said that individuals who have
13 command over income may be taxed on that income even though
14 they do not have title to it. We ask this Court to hold that
15 the Respondent, Mrs. Ann Goyne Mitchell, cannot be taxed on
16 income, community income which it has said she owns, but over
17 which she has no command. We ask

18 We ask this, because to interpret Section 1 of the
19 Code, which taxes income of individuals as imposing a tax on
20 her would make it unconstitutional as applied to her. And

21 And secondly, irrespective of the constitutional
22 argument and the issue in Section 1, Section 1 should not be
23 interpreted as imposing a tax on her because her vested interest
24 in the community is insufficient to cause her to be required
25 to treat the income of that community as her own income.

1 Under Louisiana --

2 Q Does Louisiana have an income tax?

3 A It does, Your Honor.

4 Q Are there problems akin to this or does
5 the precise problem ever arise under state law -- income tax?

6 A I have never been able to find any record
7 of it having occurred. I have been making inquiries with the
8 state revenue people but I find no instance. It does not mean
9 that there are none.

10 Under the community property regime of Louisiana
11 the wife has no present rights to deal with the community.
12 During the existence of the community she cannot sell the
13 property; she cannot mortgage property; she cannot obligate the
14 community in her own right; she cannot compel an accounting
15 from her husband or she cannot require him to furnish any in-
16 formation to her. He has complete control of the property.

17 Q How long has that been the law of
18 Louisiana?

19 A It has been the law of Louisiana, Your
20 Honor, at least since it became a state and then prior thereto,
21 under the Spanish and French.

22 Q And I take it you disagree with Mr. Bray's
23 inference to the contrary, that she could compel him to dis-
24 gorge her share of the income.

25 A I do disagree. Now, there is one

1 instance in which she can ask for a separation of property.
2 The only time during the existence of the community that the
3 community can terminate by death, divorce or separation or if
4 at one point she may ask for a termination of the community.
5 That is when his mismanagement of the community is endangering
6 her separate property.

7 Q Well, that is this situation; isn't it?

8 A In this particular situation, Your Honor,
9 she had no separate property at the point at which she might
10 have asked for a termination of the community.

11 But --

12 Q If she can't terminate it even if --

13 A Our courts have held that if the result
14 of his squandering of community funds is to make her support
15 put in jeopardy and that she is working she might get a termina-
16 tion of the community so that her future earnings would be her
17 separate property.

18 That is not this situation, Your Honor. She could
19 not show that she was not being supported during the continua-
20 tion of this community. It was after this community --

21 Q Support -- you could hardly --

22 A Our courts have not at this point inter-
23 preted support that broadly. I can't say what they would inter-
24 pret as a court, but it tends to be what it takes to subsist:
25 clothing, shelter, et cetera.

1 Our courts would treat the wife as the agent of
2 the husband if she would buy food, but if you get much past
3 that you get into a great controversy as to what -- as to
4 whether that is support or not in our state.

5 The husband has complete control of the community.
6 He may sell the property. He may spend the money virtually as
7 he pleases, but he may spend the money as he pleases. He is,
8 subject to certain restrictions, he can make gifts of the
9 community property to others. He is not a fiduciary and he is
10 not required to account to his wife during the course of the
11 community or thereafter for his administration.

12 The restrictions upon him are that he cannot
13 donate the immovables or quotas, such as one-fourth or one-
14 half, to anyone other than the children of the marriage. If he
15 -- he may give a sum of money which is not described as one-
16 fourth of all personal property to anyone he chooses. He may
17 not sell property which has been designated as the family home-
18 stead, without the wife joining in the deed. He cannot take
19 the community property and steal it, so to speak, and make it
20 his separate property.

21 Q What about other real estate that is non-
22 homestead --

23 A He can sell it as he chooses. He can
24 sell it --

25 Q Without the wife's signature?

1 A He does not need her signature at all.

2 Q Well, assuming that the community is in
3 existence, how does he have any personal property of his own?

4 A He could have property which he owned
5 before marriage. He could have property as a result of having
6 sold that property and reinvested it, gifts and inheritances.

7 Q Are you attacking the constitutionality
8 of the entire system?

9 A I'm attacking an interpretation of Section
10 1 of the Code as imposing a tax on the wives in the community
11 when she has not assumed that liability by filing a return
12 or accepting the community. The husband may not fraudulently
13 dispose of the community with the intent to deprive a wife of
14 it.

15 We contend --

16 Q On the other hand he can squander it;
17 can't he?

18 A Without any control whatsoever.

19 Q This is the content of your hypothetical?

20 A That is correct. We contend that to /
21 Section 1 of the Code as imposing a tax on the wife, violates
22 the Due Process Clause of the Fifth Amendment because it is
23 arbitrary and unreasonable in that she has no control and has
24 no -- and the husband at the same time has power to deny her
25 the property.

1 If she is required to report it is legally im-
2 possible for her to do so unless her husband -- she can only
3 do if her husband gives her the information. If she does not
4 have separate property and he will not advance her the funds
5 it is not possible for her to pay. Whether or not she pays
6 or reports, depends on his whim. And we contend that to
7 require her to pay community taxes with her separate funds is
8 to confiscate her separate property.

9 Section 1 does not require --

10 Q Let me interrupt you. Wouldn't that same
11 comment, hwoever apply to the fraudulent income embezzlement
12 cases if it went the other way?

13 A Your Honor, if you are comparing a wife
14 in a separate property statement who has signed a joint return
15 and made herself liable by signing -- by signing a joint return
16 she had made it possible for the family to split the family
17 income, the Congress makes her liable, makes her agree to be
18 liable for all the taxes, by virtue of signing a return.

19 Now, the question of whether fraudulent money is
20 income or not, this Court has decided twice and at this moment
21 it is income. I doubt seriously if we could avoid taxation to
22 the wives in Louisiana because our state law says that em-
23 bezzled money was not the property of the community.

24 Q Well, you are distinguishing those cases,
25 I take it, on some kind of theory of waiver. Certainly in the

1 criminal field we would look pretty sharp to any such waiver
2 these days and I think they are precedent against you, is all.

3 A I don't understand you, Your Honor.

4 Q Well, I think the cases that you have just
5 attempted to distinguish by saying that a wife when wshe signs
6 a joint return, ineffect, consents to being liable for income
7 of which she has no knowledge; embezzled income from her hus-
8 band --

9 A She would not be liable at all if she had
10 not filed a return. She would -- she was not required to file
11 a return and she would not be liable under any circumstances
12 had she not filed a return.

13 Q Well, all I'm saying is: she is in as
14 hard a position as your client is here.

15 A Yes, she is, Mr. Justice, but the Govern-
16 ment says here: You must file a return. You don't have a
17 choice of whether to file a return and be liable or not file a
18 return and not be liable. Here you must file a return and be
19 liable. I think that this is the greater problem.

20 Q Well, they say that because of their theory
21 of whose income it is.

22 A That is correct. And it is our contention
23 that it is not her income. That Section 1 of the Code when it
24 imposes a tax on the income of individuals, does not impose a
25 tax on the wife.

1 Now, the argument goes that since she has a
2 vested interest in the community she owns the community's
3 income, but this ignores a basic fundamental concept of the
4 community property laws. The community is an entity. Com-
5 munity is not a form of co-ownership -- co-tenancy. Community
6 property is the property of the community; it is not owned one-
7 half by one and one-half by the other. Community property is
8 -- the community is separate from the husband and the wife.
9 The tax problem arises from the fact that the community is not
10 a taxpaying entity and in order to find an individual or indi-
11 viduals who will pay its tax the community then must be
12 attributable to some person.

13 The question then is really and truly is not whose
14 income is it, but to whom should it be attributed? Now, the
15 Poe v. Seaborn did not -- which held that the husband and wife
16 would split income was not based on the concept that the hus-
17 band and the wife own the income. It was based upon the
18 rationale that neither owned it and since -- the opinion said
19 that it could not be said that one owned it any more than the
20 other. And as a result they were permitted to split the in-
21 come, but that is not the same thing as saying that one owns
22 the income or the other, but both own it.

23 Mitchell said that Seaborn permitted both to file
24 returns and split the income. This is the whole rationale of
25 Seaborn. If they did not -- and if Mitchell said that if the

1 husband and wife do not split the income and file returns;
2 they say that if they do the wife has assumed the liability by
3 virtue of filing a return. Why? Because Seaborn said she
4 could file a return -- split the income and file returns --
5 that the Court then should look to see to whom should the in-
6 come be attributed.

7 The Fifth Circuit said the income should be
8 attributed to the husband because he had control of the
9 property and because to treat it any other way was to rip up the
10 community property laws unnecessarily by the use of the tax
11 laws. It said the husband was liable for the debts of the
12 community; that this was by its nature a community debt and
13 the husband was the logical person to pay the tax.

14 Mitchell does not conflict with Seaborn unless the
15 import of Seaborn was that the husband could only be required
16 to pay on one-half or that the wife was liable for one-half of
17 the tax on her separate property without regard to anything
18 else.

19 If that is what Seaborn meant, although it did not
20 say that, we suggest that this Court should overrule Seaborn
21 because that is an illogical interpretation of Section 1. It
22 creates an unnecessary problem with state law and it causes
23 collection problems that the Government complains of here.

24 It is unnecessary for this Court to overrule
25 Seaborn to affirm Mitchell. But --

1 Q What did Seaborn hold?

2 A Seaborn held that the husband and wife
3 in the community property states could file separate returns
4 and return one-half of the income in each.

5 Q On a constitutional basis?

6 A No, Your Honor, that the rationale of
7 Seaborn as I read it, it was based upon two rationales: one
8 that the Revenue Service had permitted it in its regulations
9 and that the income tax laws had been reenacted in the interim
10 and therefore that they would accept administrative construc-
11 tion.

12 Q At any rate it was a ruling on Louisiana
13 law?

14 A Seaborn was a ruling on Washington law,
15 but after that case it was quickly followed by California,
16 Arizona, Louisiana and Texas cases, all basically relying on
17 Seaborn.

18 Q Well, if we were wrong in that case on
19 state law, should we again go wrong and overrule?

20 A Well, I do not think that the Court was
21 wrong in its characterization of the Washington community
22 property laws. The Court acknowledged that the community wasn't
23 in it.

24 Q But it was on state law?

25 A Beg your pardon?

1 Q This ruling was on state law entirely?

2 A The ruling was on the state law. The
3 Court found that the wives had a vested interest in the com-
4 munity; that is the entity, and that as such she was entitled
5 to report one-half of the community that -- the entity's
6 income as her own.

7 Q Well, suppose Congress has passed a law
8 and said that can't be the law in the State of Washington.

9 A Whether or not the Congress has ~~has~~ has
10 the power to require states to adopt other than the community
11 property system I don't know. But I do contend that Congress--
12 I do not think that if Congress could -- in fact if Congress
13 could tax the income of the community to one or the other of
14 the husband or wife, we would acknowledge that Congress can
15 tax the husband. United States v. Robbins said that it could,
16 but we would contend that they cannot tax the wives.

17 Q And you still say that Congress then
18 couldn't pass a law? This Court could pass a law which might
19 change the effect --

20 A No, Your Honor. I say that if this Court
21 does say that Seaborn which says that they could split the
22 income, that they might could split the income. If this Court
23 would say that as a natural result of that decision that the
24 wife must split the income and report one-half and pay tax on
25 it, then we say that that violates the Fifth Amendment.

1 That interpretation of Section 1 of the Code was made --

2 Q You hold that they can't do it and you
3 say Congress couldn't do it; it violates the Fifth Amendment?

4 A Yes, Your Honor. We say that it is uncon-
5 stitutional to tax wives on one-half of the community income
6 and we do not think that it compares at all with a partnership
7 or a trust. If a partner absconds with the partnership money
8 presumably there is a theft deduction --

9 Q Well, on what principle do you --

10 A Because, first of all this Court has said
11 that you can tax the husband, but this Court has said over and
12 over again --

13 Q What if the husband --

14 A It does not say that; Malcolm does not say
15 that, Your Honor.

16 Q Yes, but what about the husband --

17 A It did not say that. It did not say
18 that, Your Honor.

19 Q What about --

20 A Because he has control. He has the
21 possession of this -- the state law gives him the power to
22 take her income.

23 Q I know, but she can --

24 A We can get into what can he do as a prac-
25 tical matter as a legal matter. As a matter of right he could

1 require her employer -- we're talking about practical powers
2 as against legal powers. He has the legal power. The State
3 of Louisiana gives him -- it invests in him, from the moment
4 of marriage -- it vests in him the power to take control of
5 that money and take it from her.

6 Q Mr. Kirkpatrick, if -- were on the --
7 of Louisiana law, do you mean there is a law --

8 A This Court has said that, in the case of
9 Oklahoma that you cannot achieve these results, because it
10 wouldbe an assignment.

11 If I may sum up for just a moment, the essence of
12 our argument is that the only reason that anyone has suggested
13 taxing the husband and the wives is that the community is an
14 entity which is not a taxpaying entity. No one has suggested
15 and Poe v. Seaborn does not say or none of the cases have ever
16 considered this problem except some of the tax court cases have
17 said. None has said that the wife owns the cash in the bank.
18 What they have said is she has a vested interested in this
19 partnership which means when this community terminates she
20 gets one-half of what is left. Nobody has suggested that she
21 owns the furniture or the car or anything else.

22 Q They use the word "title" in the Messer-
23 smith case --

24 A Beg your pardon, Your Honor?

25 Q They use the word "title" in the

1 Messersmith case. They said the community is a partnership
2 in which the husband and his wife own equal shares, their
3 title thereto commencing the very instant that such property
4 is acquired.

5 A Right.

6 Q That doesn't mean ownership?

7 A Yes, but we are not talking about the
8 title to this property. This property has now fallen into the
9 community and the community owns it and as long as it is in the
10 community it is our property. Community property could have
11 been titled in the wife's name but that would not make her the
12 owner of it. It would not -- her husband could require that
13 it be transferred from her to someone else.

14 Q What do you suppose the Supreme Court
15 is talking about when it is talking about "title at the very
16 instant the property is acquired"?

17 A Lawyers of our state are so used to
18 dealing with the community we do not mean to reiterate the
19 instant theory as we discuss it.

20 Q Well, she could sell it, too?

21 A No; she could not sell it.

22 Q And a part of title is the right to sell
23 it, so I have some -- I'm really confused.

24 A Well, as one writer said: "It is almost
25 necessary to be born and bred in the community system to feel

1 nuances. Be that as it may, it is a fundamental principle of
2 community property, I say, in every community property state
3 that community is an entity.

4 Q Well, what about the Government's
5 argument that the states have not given the power or authority
6 to -- by any set up of community property or anything else, to
7 arrange that somebody who owns something not to --

8 A We agree. We contend that she does not
9 owe it. There is no contention on the part of the Respondent
10 that if she became liable for taxes or anything else, that the
11 state requires her to, could cause her to escape liability
12 from it. We say she was not liable.

13 Q Well, under Louisiana law if the husband
14 takes off with everything and then she has nothing; correct?

15 A She ends up with nothing.

16 Q And there is nothing she can do about it?

17 A There is nothing she can do about it.

18 If a trustee took her property she might sue that trustee. If
19 she placed the property in trust she might sue the trustee.
20 And if he stole it and she couldn't recover it she could
21 probably get an offset on an income tax against that for theft
22 loss.

23 The same is probably true of the partnership but
24 it is not true of the community.

25 Q But she can -- the

1 A If she renounces the community then the
2 community gives as to her under state law as if it had never
3 existed.

4 Q So, once the debts have been incurred she
5 can escape them if they were terminated?

6 A That's correct. And --

7 Q And similarly you suggest the --

8 A No. If this Court meant in *Poe v. Seaborn*
9 that this was a separate debt of hers, that one-half of the
10 community's income were her separate debt, if that's what this
11 Court meant beyond that holding, being we say an unconstitutional
12 interpretation of Section 1, she could not escape under our
13 law. We don't say that our law relieves her of any liability--

14 Q According to your position, though, by
15 renouncing she can escape liability for a community debt that
16 otherwise she would be liable for?

17 A No, Your Honor, she would never become
18 liable for any community debt unless she had accepted the com-
19 munity. She is not liable at the point of inception of the
20 debt. The renunciation is the point which puts it out of
21 question whether she will or will not assume liability.

22 Q Well, all right; let's assume that the
23 community terminates and she does nothing about her --

24 A Well, let me say that prior to the 20s
25 she had 30 days. If she did not announce in 30 days it was

1 presumed she had renounced. Under today's law she is not
2 required to come in now and renounce. If she takes hold of the
3 community and takes any of its properties and uses it, then
4 she is presumed to have accepted the community and then she
5 becomes liable for its debts.

6 But, if she renounces at that point it is put
7 out of the question that -- that is the statement that she
8 will not become liable for its debts. But if she has a separate
9 debt, which is what the Government is arguing -- if she has a
10 debt, which is what the Government is arguing -- you under-
11 stand it, during the existence of the community she can
12 or her own separate debts which cannot be paid out of the
13 community, cannot go to the husband and ask him to pay it --
14 those --

15 Q Can she have income that's hers?

16 A Yes; she can have income from her separate
17 and fair _____ property provided that she has reserved that
18 income to herself.

19 Q What happens if the -- all of the com-
20 munity property is in a joint bank account? That would be
21 ownership; wouldn't it?

22 A If the wife has been the -- the result of
23 -- well, let me say first of all, Your Honor --

24 Q But this is all community property money.

25 A Under our conception under our law it is

1 the husband's money, but the banking laws are managed so that
2 if the bank honors a check that the wife has drawn then she
3 will be treated as if the husband had authorized her to draw
4 that check, but conceptually that is not a joint bank account.
5 If her husband were to die she would find out that she would
6 not be able to take any income from it or anything that would
7 terminate the community like that, she would not be able to
8 draw from the account.

9 Q Just out of curiosity, how do you pro-
10 nounce the word a-c-q-u-e-t?

11 A Acquet.

12 Q Acquets and that means or acquisitions?

13 A Yes, sir; correct.

14 You see, Your Honor, under our law there is never
15 any reason to ask who owns the community. There are bundles of
16 rights and we don't find it necessary to characterize some-
17 thing as ownership. It is this Court that found it necessary
18 to characterize something as ownership. They had to find the
19 ownership and the ownership is not the property but it is the
20 community; it is the interest in the community. They found her
21 interest as being "vested," meaning present, meaning that if she dies it will
22 go to her heirs. If she dies she can leave a will and it will
23 pass by that will; nothing more.

24 Q Well, your own court has talked a little
25 bit about ownership, though, in Messersmith.

1 A We learned to talk about ownership,
2 Your Honor, when the split income became a possibility.

3 Q Well, you were responsible for the split
4 income possibility.

5 A But not Mrs. Mitchell.

6 Q By "you," I mean the community property
7 states.

8 A Yes, sir.

9 Q Let me ask of you the question I asked of
10 Mr. Bray, perhaps unfairly, because he's not a Louisianan.

11 Do you have any comment about the renunciation
12 statute as to when it is effective and may be exercised pre-
13 nuptially and may a wife renounce only when a community has
14 been disrupted?

15 A That's correct; that's correct. The
16 husband and wife -- before marriage it is not necessary that
17 they elect to come under the community property system. They
18 may require a marriage contract in the public records which
19 eliminates the community property system as to them, but once
20 they come under that system if the wife's right of renunciation
21 comes about only at the termination of the community.
22 That's the death, separation from bed and board, divorce and
23 actions of separation of property.

24 At this point she has three choices: she says I
25 will take the community with the benefit of inventory. That

1 means that the husband will clean it up and pay the debts.
2 If there is anything left over I will take half of it.

3 Or, she can take the community unconditionally.

4 Q You mean just write a check and get it
5 all?

6 A Yes. Her half, you mean?

7 Q What?

8 A In other words she can take it in rem --
9 everything is in rem with regard to her if she takes it with
10 benefit of inventory. If she takes the community with benefit
11 of inventory the property of the community must be first used
12 to satisfy the debts and if there be anything left she gets
13 one-half of that. That's --

14 Q You mean the wife has, theoretically the
15 power to use her hands and write a check on every bit of it
16 and yet -- she doesn't have any at all?

17 A No, Your Honor. At the termination of
18 the community, at the death of her husband, at this point a
19 community no longer exists, the wife --

20 Q Suppose he is still living?

21 A At a divorce. It has to be at the point
22 at which the community terminates under our law but if we
23 reach a point where the community terminates under our law the
24 wife has the choice --

25 Q Suppose she draws it all out; does that

1 terminate it?

2 A You are talking about the joint bank
3 account? The husband may invest her with the power to
4 act with the property. He may make her the agent of the com-
5 munity, in which case she may have the powers when she has the
6 agency it is agent for the community alone. She is not
7 acting under her own right, nor is she acting as agent for her
8 husband; she is acting as agent for the community.

9 Q Can he draw it out?

10 A Yes, Your Honor; without any question.

11 Q Would you say Petitioner could be taxed
12 at least to the extent at which she has income of her own,
13 which way it would be handled?

14 A I would, because the law of our state
15 makes that property under the control of her husband.

16 Q Well, there she would at least know what
17 she had.

18 A That is correct.

19 Q She would know what went into the
20 community.

21 A The hardship would not be as great, but
22 as far as her legal rights, her legal rights are just as great
23 -- I mean her legal disabilities are just as great under that
24 situation as under any other.

25 What if she was teaching school in the tenth grade

1 and she --

2 A To whatever step it takes he can take it
3 away from her. She is not permitted to keep that money as her
4 own.

5 Q I suppose about that time the community
6 would terminate.

7 A It would terminate.

8 Q She is a part community owner but she is
9 not permitted to have any of it in her possession?

10 A This Court -- not this Court, the Revenue
11 Department says she is the owner and our courts have attempted
12 to characterize her as such. The statute of California which
13 it took to turn her interest from an expectancy into invested
14 ownership was no more than an adjunct. It said: "From this
15 day forward her interest will be vested, present invested.
16 whatever that meant. It is a bill of _____ which this
17 Court decided in Malcolm.

18 Q Doesn't expectancy affect ownership?

19 A Prior to that statute this Court had found
20 and it used the characterization of the Supreme Court of
21 California, that the wife's interest was a mere expectancy
22 because she had no rights of control. Following the amendment
23 of the California statute to say that her right was vested
24 this Court said that she could file a return and and pay one-
25 half on it.

1 Thank you.

2 MR. CHIEF JUSTICE BURGER: Thank you, Mr.
3 Kirkpatrick.

4 Mr. Schott.

5 ORAL ARGUMENT BY PATRICK M. SCHOTT, ESQ.

6 ON BEHALF OF RESPONDENT ANGELLO

7 MR. SCHOTT: Mr. Chief Justice and may it please
8 the Court:

9 I am here on behalf of the other Respondent,
10 Frances Angello, and Your Honors, if you would indulge me for
11 just one moment. I cannot stand here and launch on my
12 argument without noting that after almost 20 years before the
13 bar this has to be one of the greatest moments of a professional
14 career to argue a case before this high Court, and I do thank
15 the Court for allowing us a few additional minutes.

16 Your Honors, the fallacy that we have submitted
17 in the Government's position in this case is if, in all the
18 simplifications of an issue and a failure to consider that
19 which this Court has held must be considered in order to make
20 a determination such as this.

21 For instance, my opponent made the statement a
22 moment ago that state law creates legal interest while Federal
23 law taxes those interests so created. That statement is in-
24 complete. That is not what this Court has held and if that
25 were a complete statement of the law the logic of the

1 Government's position may very well follow.

2 But, what this Court has held and what this Court
3 has said, I think is more accurately put in the Government's
4 brief on page 14 and 15 where it is said that -- excuse me,
5 Your Honors. The Government has cited the case of Morgan
6 versus Commissioner on page 14 of its brief and in that case
7 the Supreme Court held that state law creates legal interests
8 and rights. The Federal Revenue Act designates what inter-
9 ests so created shall be taxed.

10 Now, in Seaborn and in Bender versus Pfaff --

11 Q What did you say, Mr. Schott. I missed
12 it, but it was my fault -- I remember your saying that a cer-
13 tain statement was incomplete. Now what was that statement?

14 A That statement is: that as the Federal
15 Government taxes interests that are created by the state but
16 state law determines what those interests are. Now, what I
17 have said is that if that, standing alone were under consider-
18 ation, then the logic of the Government's argument might
19 follow that therefore such things as the exemption, if you
20 will, of the wife's separate property from vulnerability of
21 seizure by a community creditor or mere exemption statutes,
22 but that is not what the law is.

23 What I say the law is that -- is that Federal
24 law indeed does designate the interests to be taxed, but also
25 the rights that the state law creates. Federal law designates

1 the rights that ought to be taxes also.

2 And I say that in that omission by the Government
3 of a look at what is the right of the wife to renounce the
4 community, in that omission is the crux of the Government's
5 error in this case.

6 Under Louisiana community property law it is true
7 that the wife has a present vested interest in the property.
8 However, that law says that she has a right to renounce the
9 community and under our holdings of our Supreme Court it is as
10 though the community never existed as far as she was concerned.

11 Now, the reasons for these, of course, have al-
12 ready been touched upon by my colleague, Mr. Kirkpatrick in
13 talking about the almost unlimited control that the husband
14 has over the community property. For instance, in answer to
15 a question by the Chief Justice -- the question was: "Can the
16 husband alienate the homestead?" The answer to that question
17 is "yes."

18 Now, there is a provision in the state law which
19 gives the right to the wife to file a declaration of homestead
20 and prevent the husband from doing so. This is not usually
21 exercised and if the ownership or title of the property is
22 taken in the name of the husband alone even though it is the
23 homestead and the wife and children live in the home the hus-
24 band is free to alienate that property and he cannot be for-
25 bidden by the wife from doing so or he cannot be called upon to

1 account to the wife after he has done it.

2 So, I say to the Court that because of this great
3 power of control and because of the very effects that would
4 flow from the hypothetical which we have inserted in our brief
5 which I think is a good analysis and a sound analysis or an
6 analogy -- excuse me -- I think the Government has admitted
7 that the effect of their position would be that where the hus-
8 band earns this money, squanders it they can come back to the
9 wife to pay on half the income that she never saw, never con-
10 trolled, never enjoyed and could not do anything about it.

11 Q Would you say that the Government could
12 collect the entire bill for the entire tax bill for the entire
13 community from the husband?

14 A I think that the logical extension of the
15 Louisiana community property law if it is left undisturbed in
16 this case is that the husband owes all of the community income
17 tax because a husband under Louisiana law does not have that
18 same right as the wife has.

19 Q Does this require any modification of prior
20 cases?

21 A No, I do not believe it would, sir. Mr.
22 Justice White, I think the only prior cases that the Government
23 relies upon, being Seaborn and Bender, are cases that stand
24 only for the proposition that if the wife chooses to file
25 a joint return or separate return -- split income in other

1 words she has enough, a sufficient vested interest in the
2 community to do so.

3 The Government would have you extend that to mean
4 that because she has that sufficient vested interest she
5 therefore -- we just overlook her rights. That is: the right
6 to renounce in the event that she chooses to do so under our
7 law.

8 Now, the other point that I would like to make to
9 the Court --

10 Q But there is no case or innovation in our
11 cases that the Government may not collect the entire tax bill
12 from the husband?

13 A I find none, Your Honor.

14 Q How about the Malcolm case?

15 A Well, Your Honor, Malcolm is a case --

16 Q It's number one --

17 A That is a percuriam decision --

18 Q Certified questions.

19 A That case was a case in which the husband
20 and wife had filed a joint return. And I think that does make
21 all the difference in the world because, in effect, the wife
22 in signing the joint return makes herself automatically liable
23 under the tax laws.

24 And I might add to Your Honors, that even on
25 under the Louisiana community property law, for instance, if

1 the husband borrows money and he signs his name on a note,
2 under the law he obligates the community but he does not make
3 the wife individually liable so that her separate property can
4 be seized to satisfy that debt --

5 Q Well, now wait. Does the end result then
6 of your position that -- is that the husband is responsible for
7 the entire tax bill for the community --

8 A That is correct, Your Honor, right there.

9 Q The wife has really no substantial
10 present interest in it and therefore there should be no
11 division of income for purposes of the tax rates?

12 A She has -- if she has a sufficient inter-
13 est under Poe and Bender in order to split the income for tax
14 purposes, but to say to the wife now that even though you--

15 Q Do you think that Louisiana law still
16 gives her enough of an interest so that the husband doesn't
17 need to pay as though he were a single taxpayer?

18 A I think that it does. In fact, Your Honor
19 I was going to add that the Malcolm situation and the thought
20 that I was trying to make here in answer to Mr. Justice
21 Stewart's question was this: that under Louisiana law if a
22 husband and wife both sign that same note in a finance company
23 -- in other words, the wife has now joined in signing that
24 note.

25 Under Louisiana law she has voluntarily then

1 obligated herself personally to pay the debt so that then her
2 separate property can be reached. But the point is that the
3 husband can actually endanger the community, all of the wife's
4 interest in the community when he signs that note and it's
5 under that condition that we say that the law has provided for
6 the wife to renounce.

7 And Your Honors, the only other point I wanted to
8 make to the Court is that the Government's characterization of
9 what I have called the wife's separate property's immunity, if
10 you will, from vulnerability to seizure by the Government for
11 tax purposes -- that has been characterized by the Government
12 as a state exemption statute the way you would exempt, for
13 instance, insurance proceeds under law or the way you might
14 exempt the tools of trade from seizure; that type of thing.

15 Your Honors, I think that that is almost a crass
16 characterization. This is an integral part of our community
17 property system which flows logically from the others that since
18 the wife can renounce and since she doesn't have control,
19 therefore her separate property cannot be seized by a community
20 creditor.

21 And I say to the Court that that is not merely an
22 exemption statute that the Federal law preempts; more than
23 that it is an integral part of our community property system
24 which I believe would have to be respected in determining what
25 her rights are for the imposition of Federal income tax.

1 Q Well, why shouldn't the Federal Govern-
2 ment take seriously -- and say to the husband when the tax
3 collector, when he says he can handle all of the taxes --
4 why shouldn't the tax collector say: "Well, you tell me this
5 doesn't belong to the wife; she has no interest in it; how do
6 you --

7 A Your Honor, certainly the Federal income
8 tax laws could be amended so as to require the husband to pay
9 all the taxes. As Mr. Bray pointed out in his address to the
10 Court, there is no doubt that they could amend a tax law if
11 that needs to be done to make the state law consistent in this
12 case, but what I am saying is that an analysis of Louisiana
13 state community property law does lead to the conclusion, one:
14 that the wife may renounce and avoid the payment of that tax
15 and two: that the husband himself should be the one who would
16 owe the tax with the Seaborn decision's objection --

17 Q At the full rate --

18 A At the full rate unless under the --

19 Q Under one single individual rate.

20 A That is correct, except for the Federal
21 regulations which permit her to sign that joint return as she
22 did in Malcolm and make herself wide open for half of it and
23 of course the decision in Seaborn which says merely that she
24 has sufficient vested interest in the community to go ahead and
25 declare half of the taxes and retain half of the income.

1 Q Mr. Schott, help me a little bit with
2 your renouncement argument. Has it not always been the case
3 that the renunciation of income doesn't necessarily lead to
4 nonliability for tax on that income?

5 A Your Honor, in Louisiana a renunciation
6 of the community by the wife is a peculiar aspect of our com-
7 munity property law which gives the right to the wife, the
8 right to renounce not only the benefits of the community, but
9 also the obligations of the community to the extent that the
10 community as far as she was concerned, never existed. She can
11 disassociate herself from all of the assets as well as all of
12 the liabilities on a renunciation or a refusal, if you will,
13 to accept that community.

14 Now, I don't think that that is the same as a
15 renunciation of income in a state, which for instance, would
16 not have this peculiar concept which gives the wife the right
17 to this.

18 Q What's the difference.

19 A Well, I think, Your Honor, as my colleague
20 pointed out -- I think that you are looking at a bundle of
21 rights here and to say that she has a sufficient interest in the
22 community to go ahead and return half of the income and then to
23 ignore her rights to that renunciation under our law which our
24 court has held would place our disposition as though the com-
25 munity never existed, is to simply ignore one part of our

1 property rights system and to put undue emphasis on the other.

2 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Schott.

3 MR. SCHOTT: Thank you very much.

4 MR. CHIEF JUSTICE BURGER: Mr. Bray, you have
5 about eight minutes left.

6 REBUTTAL ARGUMENT BY WILLIAM TERRY BRAY, ESQ.

7 ON BEHALF OF PETITIONERS

8 MR. BRAY: Thank you, Your Honor. I would like
9 to respond to four or five items brought out in the argument.

10 First, it's our position that the Federal statute
11 at this point in time is very clear that it taxes income to
12 the owner, and that this has been the law since this Court
13 handed down its decision in the 1930 term in the split income
14 cases.

15 Thus, the inquiry under state law is: who is the
16 owner, and we think the law of Louisiana is equally clear,
17 that the wife owns her one-half share of the income and thus
18 it follows that she must report and pay the taxes on it.

19 The taxpayers' arguments essentially are that the
20 various state law rights to which they refer so qualify a
21 wife's ownership that she can't be obligated to pay the tax,
22 but the ownership does not rise to the level which the Federal
23 statutes tax. Listening to that argument it duplicates almost
24 verbatim the Government's brief in the Poe versus Seaborn cases.
25 All of these arguments were made by the Government in the 1930

1 cases in support of their position that the husband must report
2 and pay taxes on all of the community income. We argued there
3 that he was the in fact, owner of all the income because of
4 his practical powers, management powers, albeit, over that
5 income.

6 And, of course, not only did we argue his manage-
7 ment powers, but we also accorded to the wife's protections
8 under state law, specifically her renunciation power and we
9 argued in our brief that this renunciation power was incon-
10 sistent with the wife being a "sufficient owner" to entitle her
11 separately to report and pay taxes.

12 Notwithstanding our arguments the Court very
13 clearly held, and this contrary to assertions of Respondents,
14 that the income is taxed to the owner. It did not tax it to
15 the community, but rather to the owner and found that the indi-
16 vidual spouses, each of them owned their respective shares of
17 the community income.

18 This was the very holding, not only in Poe versus
19 Seaborn, the Washington case, but also in the Louisiana case
20 where the Court said: "If the test be as we have held it is:
21 ownership, then the Louisiana case is probably the strongest of
22 those presented to us in favor of the wife's ownership of one-
23 half of that income."

24 It went on, of course, to hold that because she
25 was the owner she was entitled separately to report and pay

1 taxes on it.

2 The wife, indeed, has protection under state law
3 but these protections do not affect her basic ownership rights.
4 They are outlined in the Wiener opinion to which we refer on
5 page 10 of our brief, in support of the Court's decision there,
6 the Louisiana Supreme Court's decision there, showing that the
7 husband's management powers are not so extensive as to destroy
8 the wife's ownership. These protections, indeed, limit the
9 husband's powers. The husband not only has these rights with
10 respect to management, but has the duty to manage the community
11 property to the benefit of the community.

12 So that these go along with the rights.

13 I might add that the provision of Louisiana law
14 dealing with separation of property without dissolving the
15 marriage provide not only for the separation of property where
16 the wife's -- beg your pardon, where the husband's activities
17 endanger the wife's separate property, but go on to say: "al-
18 though this order of his affairs induces her to believe that
19 his estate may not be sufficient to meet her rights and claims."

20 And of course it's our position that one of her
21 rights and claims would be to -- the right to receive her share
22 of community property upon dissolution of the community and
23 thus if the husband was frittering away the community income
24 obviously this would entitle her to a separation of property
25 under Louisiana Civil Code.

1 With respect to the right of renunciation, let me
2 say that this, of course occurs only after the community is
3 dissolved and as in the cases here, long after the tax years
4 in which income is realized and this is the clear law of
5 Louisiana: the wife owns her share of that income.

6 It would certainly be unusual and unique in the
7 tax laws if, many years later, because of some taken with
8 respect to the state's definition of creditor's rights she
9 could remove the liability which otherwise is imposed on her
10 by the Federal taxing statutes for her tax on her share of the
11 income.

12 Now, let me emphasize, too, that the decision
13 below, opens up many nonhardship cases, or at least it poses
14 a problem in such cases. Under that decision there is nothing
15 to keep wives now from just not reporting their share from
16 income. And their husband, filing a separate return and paying
17 the tax on his half of the community income.

18 Under the decisions of this Court, and we think
19 Malcolm in contrast with respondents, is quite clear that we
20 cannot collect the wife's taxes from her husband, thus the
21 taxes on her share would escape taxation under the decision
22 below.

23 Let me mention that perhaps Judge --

24 Q Why couldn't the Government here --

25 A Because the wife has no obligation on the

1 taxes on the husband's share of the income. To answer that
2 directly: yes; it's not her taxes and just as it's not his
3 taxes and thus we can't collect her taxes from the husband.

4 Q I suppose if a joint return is made in
5 a community property state, just as a matter of Federal law
6 is each spouse --

7 A Each spouse is enjoined jointly and
8 severally liable and we can then go after --

9 Q For the whole bill.

10 A We can go after either or both of them
11 for all of the taxes and for any property they may own, com-
12 munity or separate --

13 Q It is just a matter of Federal law --

14 A That's a matter of Federal collection law.

15 Q If a joint return is made it is no
16 different from a common law state?

17 A That is correct and I think that this case
18 makes it very clear that in that situation we are not bound
19 by any state exemption laws.

20 The characterization of the wife's ownership is
21 something less than sufficient for Federal tax purposes. It is
22 simply not what this Court has recognized, or what the
23 Louisiana courts have held time and again. And this may
24 explain Judge Ainsworth(?) joining in the majority opinion
25 here. Perhaps he was too influenced by the parochial views of

1 Louisiana law. He had been a Louisiana lawyer for many, many
2 years and he failed to see that the Federal law taxes the
3 owner and the state law in Louisiana makes the wife the owner.

4 The other peculiarities of that law do not
5 diminish in any way her ownership --

6 Q Well, can she sell it?

7 A She has no right to convey the property
8 during the existence of the community. No reason why she
9 couldn't assign whatever rights she may have at such time as
10 those rights --

11 Q But she does have ownership the way I
12 understand ownership; does she?

13 A No, sir; not in terms of conveyances.
14 Now, I might answer that by saying that the husband's rights of
15 conveyance are restricted wherever the wife's name is on com-
16 munity property. He can't convey without her consent, so in
17 that regard his rights of conveyance are restricted, too.

18 MR. CHIEF JUSTICE BURGER: Thank you Mr. Bray.

19 MR. BRAY: Thank you.

20 MR. CHIEF JUSTICE BURGER: Thank you gentlemen.
21 The case is submitted.

22 (Whereupon, at 2:50 o'clock p.m. the argument in
23 the above-entitled matter was concluded)
24
25