Loyola University Chicago Law Journal

Volume 34
Issue 1 *Fall 2002*

Article 10

2002

Lien on Me: After *Craft*, a Federal Tax Lien Can Attach to Tenancy-by-the-Entirety Property

Colleen M. Feeney

Note

Lien on Me: After *Craft*, a Federal Tax Lien Can Attach to Tenancy-by-the-Entirety Property

Colleen M. Feeney[*]

I. INTRODUCTION

Americans expect the federal government to shoulder many responsibilities and provide them with many opportunities.[1] In order to accomplish these tasks, the government needs money, most of which comes from taxes.[2] Because of the government's responsibilities, it has incurred a large federal debt, the effect of which has increasingly burdened the United States.[3] The Internal Revenue Service ("IRS") collects upon debts owed to the federal government in an effort to reduce the national debt.[4] One method the IRS employs to collect debts

---

* J.D. expected May 2003. I would like to thank my family and friends for their love, support, and patience, without which this Note could not have been written. I would also like to thank the editorial staff of the *Loyola University Chicago Law Journal* for their comments and suggestions.

1. U.S. DEP'T OF THE TREAS., *Taxes and Society*, *in* FAQS: TAXES, *at* http://www.treas.gov/education/faq/taxes/taxes-society.html (last visited Oct. 18, 2002).

2. *Id.* The government collects taxes to provide many services. *Id.* Other methods for paying for governmental functions are "the issuance of public debt and the issuance of money." *Id.*

3. *Id.* The current projection for the federal debt for the end of the fiscal year 2002 is $5,854,990 million. U.S. DEP'T OF THE TREAS., *Gross Federal Debt History*, *in* FACT SHEETS: TAXES, *at* http://www.treas.gov/education/fact-sheets/taxes/fed-debt.html (last visited Oct. 18, 2002).

4. *See* Seth S. Katz, Comment, *Federal Debt Collection Under the Federal Debt Collection Procedures Act: The Preemption of State Real Estate Laws*, 46 EMORY L.J. 1697, 1698 (1997). In the 1980s, President Reagan realized the problem of outstanding federal debt and instructed the government agencies to "institute more effective debt collection practices." H.R. REP. NO. 101-825 (1990), 1990 WL 200549, at *1–2, *quoted in* Katz, *supra*, at 1698. "Allowing uncollected debt to grow increases the cost of government and adds to the inflation that hurts every one of us." Statement by the President, "Federal Credit Management," Administration of Ronald Reagan, Apr. 23, 1981, *quoted in* Katz, *supra*, at 1698 n.2 (citing H.R. REP. NO. 101-825 (1990), 1990 WL 200549, at *1–2).

owed to the government is through the attachment and enforcement of federal liens on real property.[5]

The general federal tax lien is the most wide-reaching federal lien, attaching to a delinquent taxpayer's real and personal property and to any right to property to which the taxpayer is entitled.[6] Difficult issues arise when the IRS is allowed to satisfy tax debts through jointly owned property.[7] Although the federal government must protect its fiscal integrity, the owners of joint property who do not owe past-due taxes should not have their interests unduly impeded by a delinquent owner's debts.[8] An example of these competing interests arises when determining whether a federal tax lien should attach to tenancy-by-the-entirety property.[9]

Over fifty years ago, a United States Court of Appeals compared the tenancy-by-the-entirety interest to "'the morning fog rising from the valley,'" holding that when only one of the co-tenants owed taxes, a federal tax lien would not attach.[10] Even with the evolution of the tax

---

5. *Id.* at 1698. A "lien" is a legal interest that a creditor has in someone else's property. BLACK'S LAW DICTIONARY 933 (7th ed. 1999). A "judgment lien" is "a lien imposed on a judgment debtor's nonexempt property; such a lien gives the judgment creditor the right to attach the judgment debtor's property." *Id.* at 935. For a list of property exempt from a federal tax lien, see *infra* note 46.

6. I.R.C. § 6321 (2000) (reaching "all property and rights to property, whether real or personal").

7. Steve R. Johnson, *Fog, Fairness, and the Federal Fisc: Tenancy-by-the-Entireties Interests and the Federal Tax Lien*, 60 MO. L. REV. 839, 839 (1995) [hereinafter Johnson, *Fog, Fairness, and the Federal Fisc*]. In two Supreme Court decisions, the Court held for the IRS, reversing lower court decisions. *Id.* at 839 n.1; *see* United States v. Nat'l Bank of Commerce, 472 U.S. 713 (1985) (holding that the IRS could levy on a joint bank account when only one of the depositors owed taxes); United States v. Rodgers, 461 U.S. 677 (1983) (holding that the IRS could force the sale of homestead property when only one of the spouses owed taxes). However, the Court split 5-4 both times, and the majority and dissenting blocks did not fit any particular pattern. Johnson, *Fog, Fairness, and the Federal Fisc*, *supra*, at 839 n.1. For example, Justice Stevens was the only Justice to dissent in both cases, while Justice Blackmun wrote the majority opinion in *National Bank of Commerce* and the dissent in *Rodgers*. *Id.*

8. Johnson, *Fog, Fairness, and the Federal Fisc*, *supra* note 7, at 839. Johnson further notes that uncollected shortfalls would inevitably be passed on to the rest of the country's taxpayers. *Id.*

9. *Id.* The definition for "tenancy-by-the-entirety" is: "A joint tenancy that arises between husband and wife when a single instrument conveys realty to both of them but nothing is said in the deed or will about the character of their ownership." BLACK'S LAW DICTIONARY 1477 (7th ed. 1999). This type of tenancy exists in only a few common-law states. *Id.*

10. Johnson, *Fog, Fairness, and the Federal Fisc*, *supra* note 7, at 839 (quoting United States v. Hutcherson, 188 F.2d 326, 331 (8th Cir. 1951)). The court in *United States v. Hutcherson* based its reasoning about the state law limits on the rights of creditors to reach tenancy-by-the-entirety property. *Hutcherson*, 188 F.2d at 331; Johnson, *Fog, Fairness, and the Federal Fisc*, *supra* note 7, at 839–40; *see also infra* notes 130–34 and accompanying text (discussing the holding and analysis of *Hutcherson*).

laws, this was the view of an overwhelming majority of courts with respect to federal tax liens attaching to tenancy-by-the-entirety property,[11] until the Supreme Court's decision in *United States v. Craft*.[12]

Part II of this Note traces the legislative history of § 6321[13] of the Internal Revenue Code ("the Code") and how the statute affects tax collection procedures by the IRS.[14] Part II then traces the development of tenancy-by-the-entirety property in the United States.[15] Part II also considers the approaches taken by the Michigan courts that have examined tenancy-by-the-entirety property in conjunction with the attachment of a federal tax lien.[16] Part II then reviews the decisions of the courts of appeals relating to the issue of whether a federal tax lien could attach to property held in tenancy-by-the-entirety.[17] Part II concludes with an examination of the Supreme Court's analysis of the role of state law in federal tax analysis before and after *United States v. Drye*.[18] Part III of this Note reviews the state court decision, the appellate decision, and the majority and dissenting opinions of the United States Supreme Court's decision in *United States v. Craft*.[19] Part IV discusses why the majority was correct in its analysis.[20] Finally, Part V concludes with a discussion about the impact this decision will

11. Johnson, *Fog, Fairness, and the Federal Fisc*, *supra* note 7, at 840.

12. United States v. Craft, 122 S. Ct. 1414, 1426 (2002); *see also infra* Part III.A (discussing the facts of *United States v. Craft*); *infra* Part III.B (discussing the district court's decision); *infra* Part III.C (discussing the Sixth Circuit's decision); *infra* Part III.D (discussing the Supreme Court's analysis).

13. I.R.C. § 6321 (2000).

14. *See infra* Parts II.A–B (discussing the legislative history of § 6321 of the Code and the tax collection procedures of the IRS).

15. *See infra* Part II.C (discussing the development of tenancy-by-the-entirety property from its origins within English feudalism to its present form within the United States).

16. *See infra* Part II.D.1 (analyzing the Sixth Circuit opinions in *Fischre v. United States*, 852 F. Supp. 628 (W.D. Mich. 1994), *United States v. 2525 Leroy Lane*, 910 F.2d 343 (6th Cir. 1990), and *Cole v. Cardoza*, 441 F.2d 1337 (6th Cir. 1971)). This Note focuses on Sixth Circuit opinions because the Sixth Circuit decided *Craft v. United States*.

17. *See infra* Part II.D.2 (analyzing how the appellate courts approached the issue of whether a federal tax lien would attach to property held in tenancy-by-the-entirety before *United States v. Craft*).

18. *See infra* Parts II.D.3–4 (discussing the Supreme Court's analysis in *Drye v. United States*, 528 U.S. 49 (1999), *United States v. Irvine*, 511 U.S. 224 (1994), *United States v. National Bank of Commerce*, 472 U.S. 713 (1985), *United States v. Rodgers*, 461 U.S. 677 (1983), *Aquilino v. United States*, 363 U.S. 509 (1960), and *United States v. Bess*, 357 U.S. 51 (1958)).

19. *See infra* Part III.A (discussing the facts of *United States v. Craft*); *infra* Part III.B (discussing the district court's decision); *infra* Part III.C (discussing the Sixth Circuit's decision); *infra* Part III.D (discussing the Supreme Court's analysis).

20. *See infra* Part IV (analyzing the Court's decision in *Craft*).

have on the creation of tenancy-by-the-entirety property across the United States.[21]

II. BACKGROUND

It is important to explore the history of § 6321 of the Internal Revenue Code and tenancy-by-the-entirety property in the United States to understand the *United States v. Craft* decision because Congress failed to explicitly answer the question of whether a federal tax lien would attach to property held in tenancy-by-the-entirety.[22] First, this Part examines the legislative history of § 6321 of the Code[23] and explains how the IRS collects delinquent taxes.[24] It then describes the development of tenancy-by-the-entirety as a form of property ownership in the United States.[25] This Part concludes with an examination of case law interpreting the Supreme Court's analysis regarding tenancy-by-the-entirety property and federal tax liens leading up to *United States v. Craft*.[26]

A. Legislative History of § 6321

Congress rewrote the revenue code in 1954, replacing the Internal Revenue Code of 1939.[27] Consequently, many sections of the Code were revised.[28] As part of this overhaul, the House of Representatives passed a measure that expressly stated that a federal tax lien would attach to property held in tenancy-by-the-entirety.[29] The measure did not pass in the Senate.[30]

---

21. *See infra* Part V (discussing the positive implications resulting from the Court's decision).

22. *See infra* Parts II.A–D (examining the history and background of § 6321 of the Code and tenancy-by-the-entirety property).

23. *See infra* Part II.A (setting forth the legislative history of § 6321 of the Code).

24. *See infra* Part II.B (discussing the procedure used by the IRS to collect taxes from delinquent taxpayers).

25. *See infra* Part II.C (discussing the origins of the tenancy-by-the-entirety form of property ownership and its status before *United States v. Craft*).

26. *See infra* Part II.D (analyzing lower court decisions regarding whether a federal tax lien can attach to property held in tenancy-by-the-entirety).

27. *See, e.g.*, Steve R. Johnson, *After* Drye*: The Likely Attachment of the Federal Tax Lien to Tenancy-by-the-Entireties Interests*, 75 IND. L.J. 1163, 1185 (2000) [hereinafter Johnson, *After* Drye] (discussing the legislative history of § 6321).

28. Johnson, *After* Drye, *supra* note 27, at 1185.

29. H.R. REP. NO. 83-1377, at 4132 (1954), *reprinted in* 1954 U.S.C.C.A.N. 4017, 4554 ("This section clarifies the term 'property and rights to property' by expressly including therein the interest of the delinquent taxpayer in an estate by the entirety."); *see also* Johnson, *After* Drye, *supra* note 27, at 1185 (discussing the legislative history of § 6321).

30. S. REP. NO. 83-1622, at 4776 (1954), *reprinted in* 1954 U.S.C.C.A.N. 4621, 5224. The Senate responded by stating:

B. Tax Collection: A Summary

Since the government can only attach a lien on property to the extent of the debtor's interest in the property, it is critical to determine the debtor's interest in the property to ascertain the entire reach of the federal tax lien.[31] The United States Constitution gives the federal government the power to collect taxes.[32] In fact, the federal government primarily derives its revenue from the collection of taxes, which ultimately depends on the successful collection efforts of the IRS.[33] In general, the IRS can only enforce collection against properties to which a federal tax lien can attach.[34] Thus, it is important to determine the debtor's interest in the property.[35]

When the government wants to collect delinquent taxes, the claim upon the delinquent taxpayer is similar to the claim of a creditor seeking payment of a debt.[36] In contrast to a private creditor, however, the IRS is given statutory power to generate a lien.[37] First, the IRS must properly assess the taxpayer's liability.[38] Then, the IRS must send a notice of demand to the delinquent taxpayer.[39] After the issuance of the demand notice and the later non-payment of the taxes, the federal tax

---

> This section corresponds to that of the House bill, except that the parenthetical phrase "(including the interest of such person as tenant by the entirety)", which phrase is not included in existing law, has been deleted. It is not clear what change in existing law would be made by the parenthetical phrase. The deletion of the phrase is intended to continue the existing law.

Id.; *see also* Johnson, *After* Drye, *supra* note 27, at 1185 (discussing the legislative history of § 6321).

31. *See* United States v. Rodgers, 461 U.S. 677, 690–91 (1983) (noting that § 6321 can only reach property interests held by the debtor taxpayer); *see also* Katz, *supra* note 4, at 1711–12 ("[T]he federal government's interest in the debtor's property is only as great as the taxpayer's interest . . . ."); Johnson, *Fog, Fairness, and the Federal Fisc*, *supra* note 7, at 840–41 (proposing that a federal tax lien under § 6321 should attach to tenancy-by-the-entirety-property).

32. U.S. CONST. art. I, § 8, cl. 1. Furthermore, the Sixteenth Amendment gives the power to collect income taxes. U.S. CONST. amend. XVI.

33. Johnson, *After* Drye, *supra* note 27, at 1170. "Taxes are the lifeblood of the government, and their prompt and certain availability an imperious need." Bull v. United States, 295 U.S. 247, 259 (1935).

34. *Id.*

35. Katz, *supra* note 4, at 1712.

36. Johnson, *After* Drye, *supra* note 27, at 1170–71.

37. I.R.C. § 6321 (2000). Section 6321 of the Code states that "if any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States . . . ." *Id.*

38. *See id.* §§ 6203, 6303.

39. *Id.* § 6303. An assessment without a demand will not give rise to a lien. *See id.* § 6303; I.R.C. § 6201 (2000 & West Supp. 2002).

lien arises.[40] Thereafter, the amount of tax liability assessed results in the creation of a lien attaching to "all property and rights to property"[41] belonging to the delinquent taxpayer.[42] The phrase "all property and rights to property" has been construed broadly, reaching almost anything of value belonging to the delinquent taxpayer.[43]

There are two principal ways in which a federal tax lien can be enforced: the administrative levy[44] and the judicial foreclosure.[45] These collection techniques can only be applied to property to which a federal tax lien has attached.[46] When identifying the property to which a lien

---

40. I.R.C. §§ 6321–6322 (2000). The lien will still be attached until the tax is paid or until the statute of limitations has run. *Id.* § 6322.

41. The term "property" is defined as "the right to possess, use, and enjoy a determinate thing . . . ." BLACK'S LAW DICTIONARY 1232 (7th ed. 1999).

42. I.R.C. § 6321. Section 6321 of the Code is a general tax lien; it is considered the only "comprehensive" lien in the Internal Revenue Code. Johnson, *After* Drye, *supra* note 27, at 1170.

43. United States v. Nat'l Bank of Commerce, 472 U.S. 713, 719–20 (1985) (noting that the language of § 6321 "is broad and reveals on its face that Congress meant to reach every interest in property that a taxpayer might have"); *see also* Glass City Bank v. United States, 326 U.S. 265, 267 (1945) ("Stronger language could hardly have been selected to reveal a purpose to assure the collection of taxes."). Thus, even though state law serves as the basis for determining the rights given to a property interest, the description has been interpreted to be nearly all encompassing. Johnson, *After* Drye, *supra* note 27, at 1167.

44. I.R.C. § 6331(b). Section 6331(b) of the Code defines "levy" as including "the power of distraint and seizure by any means." *Id.* The IRS sells the seized property. *Id.* While there are exemptions provided, the items excluded are enumerated and thus limited. *See infra* note 46 (listing the exemptions provided by the Code).

45. I.R.C. § 7403. If the government wishes to sell the property to enforce its lien, the court may deny foreclosure. United States v. Rodgers, 461 U.S. 677, 706 (1983). The court exercises the standard of "reasoned discretion." *Id.* If the court authorizes a sale, the government must compensate the non-liable spouse for her interest "according to the findings of the court in respect to the interests of the parties and of the United States." *Id.* at 697–98 (quoting I.R.C. § 7403).

46. *See Rodgers*, 461 U.S. at 690–91 (noting that § 6321 can only reach property interests held by the debtor taxpayer); *see also* Katz, *supra* note 4, at 1711 (discussing the requirements for a valid enforceable lien). The Code lists several specific categories of property that are exempt from an administrative levy. Section 6334(a) of the Code provides exemptions for:

(1) Wearing apparel and school books

. . . .

(2) Fuel, provisions, furniture, and personal effects

. . . .

(3) Books and tools of a trade, business, or profession

. . . .

(4) Unemployment benefits

. . . .

(5) Undelivered mail

. . . .

(6) Certain annuity and pension payments

. . . .

(7) Workmen's compensation

will attach, the IRS will first target property in which the delinquent taxpayer is the fee simple owner.[47] Often, however, these assets have been used up or are not available.[48] Thus, the IRS may go after property that is held in less than fee simple ownership.[49] Because the government can only attach a lien on property to the extent of the debtor's interest, it is necessary to ascertain the debtor's interest in the property to determine the reach of the federal tax lien.[50]

C. Tenancy-by-the-Entirety

To understand how property held in tenancy-by-the-entirety could be attached by a federal tax lien, it is important to understand how this property right developed in the United States and what rights tenancy-by-the-entirety owners have in the property.[51] Furthermore, the impact *Craft* will have on tenancy-by-the-entirety property can be seen through an examination of the different approaches that the states have taken with respect to tenancy-by-the-entirety property.[52]

. . . .

(8) Judgments for support of minor children

. . . .

(9) Minimum exemption for wages, salary, and other income

. . . .

(10) Certain service-connected disability payments

. . . .

(11) Certain public assistance payments

. . . .

(12) Assistance under Job Training Partnership Act [and]

. . . .

(13) Residences exempt in small deficiency cases and principle residences and certain business assets exempt in absence of certain approval or jeopardy[.]

I.R.C. § 6334(a).

47. Steve R. Johnson, *The Good, the Bad, and the Ugly in the Post-*Drye *Tax Lien Analysis*, 5 FLA. TAX REV. 415, 417 (2002) [hereinafter Johnson, *The Good, the Bad, and the Ugly*]. A federal tax lien will attach to fee simple ownership first because it is "obviously" the property of the tax delinquent and because this property is "relatively easy to convert into cash to pay the liability." *Id.*

48. *Id.*

49. *Id.* "Fee simple" ownership is "an interest in land that, being the broadest property interest allowed by law, endures until the current holder dies without heirs; esp., a fee simple absolute." BLACK'S LAW DICTIONARY 630 (7th ed. 1999).

50. Johnson, *Fog, Fairness, and the Federal Fisc*, *supra* note 7, at 842.

51. *See infra* Part II.C.1 (discussing the origins of tenancy-by-the-entirety).

52. *See infra* Part II.C.2 (discussing the varied approaches taken by the jurisdictions toward tenancy-by-the-entirety estates).

1. Origins of Tenancy-by-the-Entirety

There are various forms of concurrent ownership[53] in American property law, many of which are almost six hundred years old.[54] Although the origin of tenancy-by-the-entirety is not known, Littleton and Blackstone recognized it as far back as the fifteenth century.[55]

Tenancy-by-the-entirety is thought to have originated in England's feudal society.[56] At common-law, a married couple could hold property in tenancy-by-the-entirety[57] because they were treated as a single person.[58] Unlike other forms of concurrent ownership, there was an additional unity[59] required for the concurrent ownership of tenancy-by-

---

53. There are multiple forms of concurrent ownership, "including community property, tenancies in common, joint tenancies, and tenancies by the entireties." Johnson, *After* Drye, *supra* note 27, at 1169. Concurrent ownership occurs when two or more people own or possess property at the same time. BLACK'S LAW DICTIONARY 286, 1131 (7th ed. 1999).

54. Peter M. Carrozzo, *Tenancies in Antiquity: A Transformation of Concurrent Ownership for Modern Relationships*, 85 MARQ. L. REV. 423, 423 (2001).

55. 7 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 52.01[2], at 52-3 (Michael Allan Wolf ed., Mathew Bender & Co. 2001) (1949). See POWELL for a comprehensive list of case names and statutes for each state's treatment of tenancy-by-the-entirety. 7 *id.*

56. Janet D. Ritsko, Comment, *Lien Times in Massachusetts: Tenancy by the Entirety After* Coraccio v. Lowell Five Cents Sav. Bank, 30 NEW ENG. L. REV. 85, 91 (1995). At the time, land equaled power and status, and the king owned every piece of land in England. *Id.* at 90. The king would award tracts of land to his loyal servants, who then became known as lords. *Id.* In fact, King William of Normandy distributed about seventy-five percent of his land in England to his supporters. *Id.* at 90 & n.39. The king would maintain ownership, while allowing the lords to work the land. *Id.* at 90. The lords then acquired their own tenants. *Id.* This system trickled down and included even the lowest members of society. *Id.* The tenants would compensate their overlords through services. *Id.* at 91. This system continued until 1290 when the Statute *Quia Emptores* was passed. *Id.* at 90 n.44. This statute did not allow a tenant to grant smaller estates from estates held by the lord in fee simple. *Id.* Later, free substitution was allowed, where the tenant had the right to put another tenant in his place. *Id.* As feudalism waned, tenants would pay fixed amounts of money, like rent, instead of the personal services that were once required of them. *Id.* at 91.

57. The first modern pronouncement of a tenancy-by-the-entirety is in William Blackstone's *Commentaries*. Carrozzo, *supra* note 54, at 437. Blackstone describes the tenancy-by-the-entirety as a separate and distinct form of ownership in his *Commentaries*:

> And therefore, if an estate in fee be given to a man and his wife, they are neither properly joint-tenants, nor tenants in common: for husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seised of the entirety, per tout et non per my; the consequence of which is that neither the husband nor wife can dispose of any part without the assent of the other, but the whole must remain to the survivor.

2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 182 (9th ed. 1783), *quoted in* Carrozzo, *supra* note 54, at 437.

58. Carrozzo, *supra* note 54, at 429. Upon marriage, both the husband and the wife were deemed to lose their individual identities and became a single entity. Johnson, *After* Drye, *supra* note 27, at 1169.

59. At common-law, it was necessary to have four "unities" to create a joint tenancy. BLACK'S LAW DICTIONARY 1535 (7th ed. 1999). The four "unities" are interest, possession,

the-entirety property: the unity of the person.[60] This form of property ownership was not thought of as a concurrent estate because both husband and wife were considered to be one person by the law.[61]

The common-law established the notion, which still exists, that neither spouse could unilaterally alienate or encumber the property because the property was indivisible and neither spouse had an individual share.[62] Thus, creditors could not attach property held in tenancy-by-the-entirety to satisfy the individual debts of a spouse.[63] Additionally, owners of property held in tenancy-by-the-entirety received a right of survivorship: "'the whole must remain to the survivor.'"[64] Under common-law, however, the courts only recognized present property rights in the husband, such as the right to use, the right to rent, and the right to profits.[65]

The American colonies and, later, many states adopted tenancy-by-the-entirety as a form of concurrent ownership of property.[66] The inequities created[67] through holding land in tenancy-by-the-entirety, however, would only last so long.[68] In 1925, England abolished tenancy-by-the-entirety.[69] Then, in the middle of the nineteenth century, the enactment of married women's property reform legislation, beginning with the Married Women's Property Acts, further undermined this already unstable form of property ownership.[70] These

---

time, and title. *Id.* The "unity of interest" required that all of the joint tenants' interests be "identical in nature, extent, and duration." *Id.* The "unity of possession" required that each joint tenant be entitled to possess the whole property. *Id.* The "unity of time" required each of the joint tenants' interests "vest at the same time." *Id.* The "unity of title" required that each joint tenant "acquire[d] their interests under the same instrument." *Id.*

60. Carrozzo, *supra* note 54, at 429. "This oneness of person made true concurrent ownership by husband and wife a legal, albeit fictitious, impossibility." *Id.* at 436.

61. John V. Orth, *Tenancy by the Entirety: The Strange Career of the Common-Law Marital Estate*, 1997 BYU L. REV. 35, 38–39; *see also supra* note 53 (discussing alternate forms of concurrent ownership).

62. Johnson, *Fog, Fairness, and the Federal Fisc*, *supra* note 7, at 842.

63. *Id.*

64. Orth, *supra* note 61, at 39 (quoting 2 BLACKSTONE, *supra* note 57, at 179, 182).

65. *Id.* at 40. "'[A]t common law, husband and wife were one, and that one was the husband.'" Johnson, *After* Drye, *supra* note 27, at 1169 n. 36 (citing Oval A. Phipps, *Tenancy by Entireties*, 25 TEMP. L.Q. 24, 24 (1951)).

66. Johnson, *Fog, Fairness, and the Federal Fisc*, *supra* note 7, at 843.

67. The husband had the exclusive rights to occupy the principle, use the income produced by the estate, manage, control, possess the estate, and use the estate as collateral for debt. *See* Johnson, *After* Drye, *supra* note 27, at 1169. In contrast, the wife's sole interest was a contingent right of survivorship to the whole estate if she were to outlive her husband. *Id.*

68. Orth, *supra* note 61, at 41.

69. *Id.* (citing Law of Property Act, 1925, 15 & 16 Geo. 5, c. 20, § 37 (Eng.)).

70. Johnson, *Fog, Fairness, and the Federal Fisc*, *supra* note 7, at 843. The Married Women's Property Acts "caused some western states never to adopt the tenancy-by-the-entireties

reforms caused the tenancy-by-the-entirety form of property ownership to be abolished in some American jurisdictions as well.[71] The courts that abolished the interest took the position that since married women could have rights to property, the husband and wife were no longer one person.[72] Thus, there could be no tenancy-by-the-entirety.[73]

2. Status of Tenancy-by-the-Entirety Property Before *Craft*

Despite the trend to abolish tenancy-by-the-entirety property, it remained in many jurisdictions.[74] However, courts have taken varied approaches toward tenancy-by-the-entirety estates.[75] Currently, thirty states and the District of Columbia allow tenancy-by-the-entirety as a legitimate form of ownership.[76] Four states have statutes that mention tenancy-by-the-entirety in their codes, but their statutes do not govern or restrict the ability to hold property as tenants-by-the-entirety.[77] Sixteen

---

form and caused some other states to abolish or restrict it." *Id.* The Married Women's Property Acts were statutes enacted by many states by the 1840s. Reva B. Seigel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850–1880*, 103 YALE L.J. 1073, 1082 (1994). The Married Women's Property Acts were spurred by the argument that women should be able to separately own the property that they brought to their marriages or acquired during their marriages. *Id.* at 1115. Some of the states enacted statutes that exempted a wife's property from her husband's debts. *Id.* at 1082. These statutes served to protect family interests, keeping family property from the husband's creditors. *Id.* at 1083. "At the same time, the reform legislation opened vistas beyond the ancient status doctrines of the common law, suggesting that the traditional consolidation of property interests in the husband might be supplanted by a regime of separate property ownership in marriage." *Id.* at 1083.

71. Johnson, *Fog, Fairness, and the Federal Fisc*, *supra* note 7, at 843; *see also infra* note 78 (discussing the jurisdictions that never recognized a tenancy-by-the-entirety interest or abolished it).

72. Orth, *supra* note 61, at 41.

73. *Id.*

74. *See* 7 POWELL, *supra* note 55, § 52.01[3], at 52-4.

75. 7 *id.*

76. 7 *id.* § 52.01[3], at 52-12. References to tenancy-by-the-entirety specifically appear in the statutes of Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Missouri, Nebraska, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, and Wyoming. 7 *id.* § 52.01[3], at 52-4 to 52-11. In the following states, courts have recognized tenancy-by-the-entirety: Mississippi, Vermont, and Virginia. 7 *id.* § 52.01[3], at 52-9 to 52-11.

77. 7 *id.* § 52.01[3], at 52-12. These states are Idaho, Kansas, Texas, and Utah. 7 *id.* § 52.01[3], at 52-12 n.99. The only statutory or case-law authority is based upon uniform acts that have accepted the legitimacy of the tenancy-by-the-entirety form. 7 *id.* § 52.01[3], at 52-12. There are a number of code provisions in Idaho that recognize the existence of tenancy-by-the-entirety property. 7 *id.* § 52.01[3], at 52-6. Even though in 1902, the Kansas Supreme Court abolished tenancy-by-the-entirety in *Stewart v. Thomas*, a number of current statutes in Kansas mention tenancy-by-the-entirety property. 7 *id.* § 52.01[3], at 52-7 (referencing Stewart v. Thomas, 68 P. 70 (Kan. 1902)). In Texas, some statutes dealing with fraudulent transfers, non-profit corporations, and partnerships mention tenancy-by-the-entirety property, but no statutes or

states either never recognized tenancy-by-the-entirety or have abolished it.[78] The jurisdictions that did keep the tenancy-by-the-entirety form of ownership can be divided into at least two groups based on their treatment of the rights of creditors to attach liens to the property.[79] For

---

court opinions expressly create tenancy-by-the-entirety property. 7 *id.* Similarly, Utah has statutes mentioning tenancy-by-the-entirety when determining interests upon death, partnerships, and fraud. 7 *id.*

78. 7 *id.* § 52.01[3], at 52-11 to 52-12. The following are the states where tenancy-by-the-entirety has been abolished or never existed: California, Connecticut, Louisiana, Maine, Minnesota, Montana, Nevada, New Hampshire, New Mexico, North Dakota, Ohio, South Carolina, South Dakota, Washington, West Virginia, and Wisconsin. 7 *id.* § 52.01[3], at 52-5 to 52-11. In California, there are no statutes that mention tenancy-by-the-entirety, and it has been judicially abolished. 7 *id.* § 52.01[3], at 52-5. In Connecticut, tenancy-by-the-entirety is deemed to be joint tenancy—with a right of survivorship. 7 *id.* In Louisiana, there are no state statutes or cases referencing tenancy-by-the-entirety. 7 *id.* § 52.01[3], at 52-7. Tenancy-by-the-entirety is not recognized in Maine courts. 7 *id.* Minnesota courts have held that a statute on concurrent estates, which omits reference to tenancy-by-the-entirety, has abolished the tenancy. 7 *id.* § 52.01[3], at 52-8. Montana's concurrent ownership statute does not reference tenancy-by-the-entirety and the Supreme Court of Montana has held that tenancy-by-the-entirety is "'not a permissible mode of ownership of property in Montana.'" 7 *id.* (quoting Clark v. Clark, 387 P.2d 907 (Mont. 1963)). The Nevada Supreme Court has never addressed the issue, but Nevada has a statute that states that a husband and a wife may only hold property as joint tenants, tenants in common, or as community property. 7 *id.* The New Hampshire courts have held that the state's married women's property rights act has abolished tenancy-by-the-entirety property created after the act was passed. 7 *id.* In New Mexico, there is a statute that authorizes a husband and a wife to hold property jointly, but it does not mention tenancy-by-the-entirety. 7 *id.* § 52.01[3], at 52-8 to 52-9. Furthermore, the New Mexico Supreme Court has held that when New Mexico became a community property state, tenancy-by-the-entirety property was abrogated. 7 *id.* § 52.01[3], at 52-8 to 52-9. In North Dakota, there is no mention of tenancy-by-the-entirety in its statutory definition of concurrent ownership of property. 7 *id.* § 52.01[3], at 52-9. In addition, one court in North Dakota has declared that tenancy-by-the-entirety is not recognized. 7 *id.* In Ohio, before 1972, property held in tenancy-by-the-entirety was not recognized. 7 *id.* However, the code was amended in 1972 to specifically recognize it. 7 *id.* However, when the code was amended again in 1985, tenancy-by-the-entirety was replaced by a generic survivorship tenancy. 7 *id.* Any tenancy-by-the-entirety created under the previous statute would still remain valid. 7 *id.* The South Carolina Supreme Court abolished tenancy-by-the-entirety in 1953. 7 *id.* § 52.01[3], at 52-10. Additionally, the South Carolina Senate, when it recently addressed the issue of joint tenancy, specifically stated that it was not creating tenancy-by-the-entirety, implying that the tenancy-by-the-entirety did not exist in South Carolina. 7 *id.* In South Dakota, a 1973 case declared that tenancy-by-the-entirety was not a form of property under South Dakota law, and there is no mention of tenancy-by-the-entirety property in the statute authorizing forms of concurrent ownership. 7 *id.* The Washington Supreme Court noted that "[T]enancy by the entireties is superseded by the community property system." Holophan v. Melville, 249 P.2d 777 (Wash. 1959), *quoted in* 7 POWELL, *supra* note 55, § 52.01[3], at 52-11. Furthermore, there is no mention of tenancy-by-the-entirety property under the statute authorizing joint tenancies. 7 POWELL, *supra* note 55, § 52.01[3], at 52-11. The Wisconsin Supreme Court abolished tenancy-by-the-entirety in 1938. 7 *id.* However, Wisconsin statutes regarding partnerships and fraudulent transfers, mention tenancy-by-the-entirety. 7 *id.*

79. Johnson, *After* Drye, *supra* note 27, at 1169. Johnson divides the jurisdictions that recognize tenancy-by-the-entirety interests into two separate groups: (1) the jurisdictions that do not allow creditors to attach a lien to property held in tenancy-by-the-entirety for the debts of one

instance, the advent of the modern tenancy-by-the-entirety interest and of mutual control of the property prompted protection of both spouses' interests; some states denied creditors access to either spouse's interest.[80] In other states, however, a creditor was allowed to attach a levy and sale to a spouse's individual interest, but there was no right to force a partition of the land.[81] A minority of states allowed creditors of either spouse to satisfy debts from tenancy-by-the-entirety property.[82] Finally, in some states, a valid lien could not attach to tenancy-by-the-entirety property to satisfy the individual debts of one of the spouses.[83]

D. Case Law Before Craft

This Part analyzes the case law regarding the scope of federal tax liens and tenancy-by-the-entirety property. First, this Part will examine Michigan decisions interpreting the Supreme Court's analysis of tenancy-by-the-entirety ownership and federal tax liens in order to understand the Sixth Circuit's analysis in *Craft*.[84] Next, this Part will analyze the decisions of the United States Courts of Appeals to show the basis for the argument that a federal tax lien should not attach to tenancy-by-the-entirety property.[85] This Part will then examine the Supreme Court's analysis of the role of state law in federal tax analysis, showing why there was confusion among the lower courts.[86] Finally, this Part will present the current state of the law regarding the role of state law in federal tax analysis through an examination of the Supreme Court's decision in *Drye v. United States*.[87]

---

spouse; and (2) the jurisdictions that allow creditors to attach tenancy-by-the-entirety property with a lien for the debts of one spouse, but only subject to the rights of the non-debtor spouse. *Id.*

80. 7 POWELL, *supra* note 55, § 52.03[3], at 52-22. The following states deny creditor access to the property when only one spouse owes the debt: Delaware, Florida, Hawaii, Maryland, Missouri, Ohio, North Carolina, Oregon, and Virginia. 7 *id.* § 52.03[3], at 52-22 & n.7, 52-23.

81. 7 *id.* § 52.03[3], at 52-23. These states are Alaska, Arkansas, Hawaii, Maryland, New Jersey, New York, Oregon, Pennsylvania, and West Virginia. 7 *id.* § 52.03[3], at 52-23 & n.8.

82. 7 *id.* In Oklahoma and Tennessee, creditors can satisfy the debts of one spouse with the tenancy-by-the-entirety property. 7 *id.* § 52.03[3], at 52-23 & n.10.

83. 7 *id.* § 52.03[3], at 52-24.

84. *See infra* Part II.D.1 (analyzing the Michigan decisions interpreting the Supreme Court's analysis regarding the scope of a federal tax lien).

85. *See infra* Part II.D.2 (analyzing how the appellate courts approached the issue of whether a federal tax lien would attach to property held in tenancy-by-the-entirety before *United States v. Craft*).

86. *See infra* Part II.D.3 (discussing the Supreme Court's analyses in *United States v. Bess*, *United States v. Rodgers*, *Aquilino v. United States*, *United States v. National Bank of Commerce*, and *United States v. Irvine*).

87. *See infra* Part II.D.4 (discussing the Supreme Court's analysis in *Drye v. United States*).

1. Michigan Decisions Interpreting the Supreme Court's Analysis Regarding Tenancy-by-the-Entirety and Federal Tax Liens

The Sixth Circuit Court of Appeals in *Cole v. Cardoza*[88] held that a federal tax lien against only one spouse does not attach to property owned by a husband and wife in tenancy-by-the-entirety property because it constituted a cloud on their title.[89] In *Cole*, excise taxes were assessed against the husband, Eugene Cole, in connection with gambling debts.[90] The government placed a lien on the home owned by Eugene Cole and his wife as tenants-by-the-entirety.[91] The Sixth Circuit applied Michigan law to determine that tenants-by-the-entirety hold property under a single title.[92] Therefore, neither spouse alone could alienate their property, and neither the land nor any rents or profits from the land could be subject to a levy or an execution by creditors to satisfy the debts of only the husband or the wife.[93] The court reasoned that the lien constituted a cloud on their title to the property.[94] Thus, the Sixth Circuit held the lien null and void because the lien was only against one spouse.[95]

The protection for property in Michigan held in tenancy-by-the-entirety applied to all creditors until the decision in *United States v. 2525 Leroy Lane*[96] by the Sixth Circuit.[97] In *2525 Leroy Lane*, the Sixth Circuit allowed the government to take half of the innocent owner's proceeds from a sale of the tenancy-by-the-entirety property because once the tenancy-by-the-entirety estate was terminated, the wife

88. Cole v. Cardoza, 441 F.2d 1337 (6th Cir. 1971).

89. *Id.* at 1343–44.

90. *Id.* at 1338. The government assessed an excise tax in the amount of $14,693.08 on the amount Mr. Cole gambled during the period of August 1, 1965 to November 20, 1965. *Id.* Furthermore, in August 1969, tax assessments for the interest were recorded at $2086.19. *Id.* at 1339. The taxes were assessed pursuant to § 4401 and § 4411 of the Code. *Id.* at 1338.

91. *Id.* at 1343. Interestingly, the court noted that under Michigan law, the Government had no valid claim against the property. *Id.*

92. *Id.*

93. *Id.* (citing Farrell v. Paulus, 15 N.W.2d 700, 702 (Mich. 1944)).

94. *Id.* "[I]f it 'has a tendency, even in the slightest degree, to cast doubt upon the owner's title, and to stand in the way of a full and free exercise of ownership,' it should be removed." *Id.* (quoting Whitney v. Port Huron, 50 N.W. 316, 317–18 (Mich. 1891)). The court reasoned that the lien on the Coles' home would make the "average prospective purchaser or mortgagee hesitant to purchase or mortgage the property until [the] matter [was] cleared up . . . ." *Id.*

95. *Id.* "[I]n the present situation, the federal tax lien does not attach to the subject property owned by Eugene and Mary Cole by the entirety, because the Government's tax lien is against Eugeen Cole only." *Id.*

96. United States v. 2525 Leroy Lane, 910 F.2d 343 (6th Cir. 1990).

97. Eric T. Weiss, *Tax Liens, Entireties Property,* Cole v. Cardoza *Revisited*, 74 MICH. B.J. 1040, 1041 (1995).

was only entitled to half of the proceeds.[98] The wife owned a house with her husband, a convicted drug dealer, as tenants-by-the-entirety.[99] The United States seized the house under a criminal-forfeiture statute because of her husband's conviction.[100] In order to determine the wife's interest, the court applied Michigan law governing tenancy-by-the-entirety property.[101] The court noted that, in ascertaining whether a federal tax lien could attach to a particular property, federal courts typically apply state law to determine the property interest of the owners.[102] The court applied this analysis because, like the forfeiture statutes, the tax lien statute does not define property rights.[103] The court therefore looked to Michigan property law and determined that tenants-by-the-entirety hold property under a single title of ownership with the right of survivorship.[104] Neither spouse had the power to unilaterally alienate any interest in the estate, nor could creditors of only one spouse levy against the property.[105]

Applying Michigan law in *2525 Leroy Lane*, the Sixth Circuit noted that the wife, the non-debtor spouse, would have only realized her survivorship interest if she survived her husband.[106] The court reasoned that if the marriage terminated in divorce, the tenancy-by-the-entirety property would be converted into a tenancy-in-common property by operation of statute, with each spouse holding half of the property interest.[107] Thus, the property could then be attached to satisfy the personal tax liability of a single spouse.[108] Additionally, the court noted

98. *2525 Leroy Lane*, 910 F.2d at 352; *cf.* United States v. 15621 S.W. 209th Ave., 894 F.2d 1511, 1516 n.6 (11th Cir. 1990) (stating that no lien could presently attach but the government could file *lis pendens*) and United States v. 1500 Lincoln Ave., 949 F.2d 73, 78 (3d Cir. 1991) (remanding under instructions similar to those found in the *2525 Leroy Lane* court's decision).

99. *2525 Leroy Lane*, 910 F.2d at 344–45.

100. *Id.*

101. *Id.* at 347–48 (noting Cole v. Cardoza, 441 F.2d 1337 (6th Cir. 1971)). "[T]he application of state law is the most appropriate method of determining the interest of an innocent owner under 21 U.S.C. § 881(a)(7)." *Id.* at 347.

102. *Id.* at 347–48. "[S]tate laws governing tenancies by the entirety have been applied by federal courts in determining the interests available for the satisfaction of a federal tax lien, where the tax lien statute, like the forfeiture statutes, contained no definition of property rights." *Id.*

103. *Id.*

104. *Id.* at 346. The "right of survivorship" is a right held by a joint tenant "to succeed to the whole estate upon the death of the other joint tenant." BLACK'S LAW DICTIONARY 1326 (7th ed. 1999). In other words, the surviving tenant has the right to take the entire piece of property. *Id.*

105. *2525 Leroy Lane*, 910 F.2d at 346.

106. *Id.* at 351.

107. *Id.*

108. *Id.*

that the tenancy-by-the-entirety estate could also be destroyed through a joint conveyance of the property by the husband and wife.[109]

The Sixth Circuit vacated the lower court's holding, which awarded all of the proceeds from the forced sale of the property to the wife, as the innocent owner, on the grounds that she would only be entitled to all of the proceeds on the sale of the property after the death of her husband.[110] Conversely, she would be entitled to only half of the proceeds upon the termination of the tenancy-by-the-entirety estate.[111]

In *Fischre v. United States*,[112] the District Court of Western Michigan held that the government's lien attached to a spouse's individual interest in tenancy-by-the-entirety property and could remain on their title with the Register of Deeds.[113] This case relied on the Sixth Circuit's decisions in *2525 Leroy Lane* and *Cole v. Cardoza*, involving tenancy-by-the-entirety properties, and was later followed by the district court decision in *Craft v. United States*.[114]

In *Fischre*, Dr. and Mrs. Fischre brought an action to quiet title on their property held in tenancy-by-the-entirety, on which there was a judgment lien against only Dr. Fischre.[115] The court held that the lien could attach to the husband's survivorship interest in the tenancy-by-the-entirety property, but determined that the lien could not attach to the present interest in the tenancy-by-the-entirety property for the debts of only Dr. Fischre because it would encumber the property.[116] The court in *Fischre* found that the government's lien clearly showed Dr. Fischre as the sole judgment debtor and gave no evidence of joint liability.[117] Furthermore, the court, relying on *2525 Leroy Lane*, noted that the judgment lien might still attach to Dr. Fischre's individual interest, even though the lien was a nullity as to the present interest the Fischres had in the property.[118]

---

109. *Id.* In this case, the wife would not agree to a joint conveyance. *Id.*

110. *Id.* at 352.

111. *Id.*

112. Fischre v. United States, 852 F. Supp. 628 (W.D. Mich. 1994).

113. *Id.* at 630.

114. *Id.* at 629–30; *see also* Craft v. United States, No. 1:93-CV-306, 1994 WL 669680 (W.D. Mich., Sept. 12, 1994), *rev'd*, 140 F.3d 638 (6th Cir. 1998), *rev'd*, 122 S. Ct. 1414 (2002) [hereinafter *Craft I*]; *supra* notes 98–111 and accompanying text (discussing the Sixth Circuit's decision in *2525 Leroy Lane*); *infra* Part III (discussing *Craft v. United States*).

115. *Fischre*, 852 F. Supp. at 628–29.

116. *Id.* at 630.

117. *Id.* at 629 ("[T]he United States' judgment lien is not ambiguous; it clearly identifies Dr. Fischre only as the judgment debtor and gives no indication of joint liability.").

118. *Id.* at 630. The court noted that each spouse owned the individual interest of a life estate with a right of survivorship. *Id.* (citing United States v. 2525 Leroy Lane, 910 F.2d 343, 350–51

The Sixth Circuit had previously decided this issue in *Cole v. Cardoza*.[119] Based on a factual situation similar to that in *Fischre*, the Sixth Circuit in *Cole* held that a tax lien could not attach to the husband's interest in property held as tenants-by-the-entirety.[120] The court recognized that a federal tax lien on the public land records pertaining to Cole's property constituted a cloud on the title, making a prospective purchaser or mortgagee reluctant to commit himself or herself until the tax lien was removed.[121]

Even though the *Fischre* court found that there were individual interests in the property, the *Fischre* court followed the decision in *Cole* holding that the judgment lien was a nullity because it constituted a "cloud on the title."[122] It is important to note, however, that the *Fischre* court found an "individual interest" in tenancy-by-the-entirety property.[123] This decision opposes the most basic element of tenancy-by-the-entirety property: that spouses hold the property together, as one, with a right of survivorship, and that neither of them can unilaterally alienate any interest in the property.[124]

2. Federal Tax Lien and Tenancy-by-the-Entirety: Courts of Appeals Analyses

Before the Supreme Court decided *United States v. Craft*, a federal tax lien could only attach to tenancy-by-the-entirety property if the state

---

(6th Cir. 1990)). This individual right is not realized until the tenancy-by-the-entirety is broken by the joint conveyance or the death of one spouse. *Id.* However, the survivorship interest is a right to property to which a federal tax lien can attach. *Id.*

119. *Id.* at 629; *see supra* notes 89–95 and accompanying text (discussing the facts and analysis of *Cole v. Cardoza*).

120. *Fischre*, 852 F. Supp. at 629 (discussing Cole v. Cardoza, 441 F.2d 1337 (6th Cir. 1971)); *see supra* notes 89–95 and accompanying text (discussing the facts and analysis of *Cole*).

121. *Fischre*, 852 F. Supp. at 629. The Sixth Circuit stated:

> Michigan law recognizes that a cloud upon a title can be merely an apparent defect and that if it "has a tendency, even in the slightest degree, to cast doubt upon the owner's title, and to stand in the way of a full and free exercise of his ownership," it should be removed.

Cole, 441 F.2d at 1343 (quoting Whitney v. Port Huron, 50 N.W. 316, 317–18 (Mich. 1891)). Furthermore, the Sixth Circuit noted:

> A title examination would not disclose whether an assessment was for a deficiency with regard to a joint income tax return filed by husband and wife or was levied because both were engaged in the activity being taxed. Such doubt would affect the title of the property and cause reasonable prudent purchasers to refuse to accept it until they were certain the title was clear.

Id. at 1343–44.

122. *Fischre*, 852 F. Supp. at 630.

123. Weiss, *supra* note 97, at 1041.

124. *Id.*

in which the property was held allowed creditors of a single spouse to reach the property.[125] The view in the states that prevented the IRS from attaching a federal tax lien to property held in tenancy-by-the-entirety when only one of the spouses owed federal taxes was based on three federal appellate court cases decided in the 1950s:[126] *United States v. Hutcherson*,[127] *Raffaele v. Granger*,[128] and *United States v. American National Bank of Jacksonville*.[129]

a. *United States v. Hutcherson*

In 1951, the Eighth Circuit, in *Hutcherson*, held that a federal tax lien did not attach to property held by both spouses as tenants-by-the-entirety when only one spouse owed a debt.[130] The court recognized that the property rights were to be determined in accordance with state law, and then federal law would determine the application of the federal tax lien to whatever "property" or "rights to property" a delinquent taxpayer might have under state law.[131] The court noted that, in a tenancy-by-the-entirety estate, the husband and the wife each own the whole interest, not a part, of the property.[132] The court reasoned that the state law prevented the creditors of one debtor spouse from attaching a lien on tenancy-by-the-entirety property to satisfy the individual debt of one spouse.[133] The court concluded, however, by stating that a spouse who holds property in tenancy-by-the-entirety does not have a "right to property" or "property" at all.[134]

---

125. Johnson, *Fog, Fairness, and the Federal Fisc*, *supra* note 7, at 844 (commenting that a federal tax lien was "hostage to whatever entireties regime exist[ed] in the taxpayer's state"); *see also supra* notes 75–83 and accompanying text (discussing whether individual states allow creditors to reach tenancy-by-the-entirety property for the individual debts of one spouse).

126. Johnson, *Fog, Fairness, and the Federal Fisc*, *supra* note 7, at 844.

127. United States v. Hutcherson, 188 F.2d 326 (8th Cir. 1951).

128. Raffaele v. Granger, 196 F.2d 620 (3d Cir. 1952).

129. United States v. Am. Nat'l Bank of Jacksonville, 255 F.2d 504 (5th Cir. 1958).

130. *Hutcherson*, 188 F.2d at 331.

131. *Id.* at 328 (citing Glass City Bank v. United States, 326 U.S. 265 (1945); Detroit Bank v. United States, 317 U.S. 329 (1943); and Michigan v. United States, 317 U.S. 338 (1943)).

132. *Id.* at 329.

133. *Id.* at 330. The court noted that Missouri law "is applied by the state courts [to determine] whether liens arising under state law may attach to the individual interest of either spouse." *Id.* at 331.

134. *Id.*

> Under Missouri law the individual interest of the husband or wife in an estate by the entirety is, like the rainbow in the sky or the morning fog rising from the valley, not such an estate as may be subjected to the grasp of an attaching creditor or which will permit the adherence thereto of a tax lien.

Id. The court then concluded that "[u]niformly it is held that such liens may not. Not because State or Federal liens are withheld from this particular 'right to property', but because the interest

b. *Raffaele v. Granger*

The very next year, in *Raffaele*, the Third Circuit held that the IRS could not issue a warrant of distraint[135] against bank accounts held by a husband and wife as tenants-by-the-entirety.[136] Even though each spouse had independent authority to withdraw funds from the account, the court denied the warrant of distraint, stating that the United States had no power to take property from an innocent spouse to satisfy the obligations of the other.[137]

c. *United States v. American National Bank of Jacksonville*

In 1958, the Fifth Circuit Court of Appeals, in *American National Bank of Jacksonville*, held that a federal tax lien could not attach to tenancy-by-the-entirety property for the debts of only one spouse.[138] The court concluded that there was no separate interest in the tenancy-by-the-entirety property to which a lien for federal taxes owed by only one spouse could attach.[139] The court accepted that federal tax liens are matters of federal law.[140] However, it noted that the federal courts would respect that state law determined the ownership of property.[141]

After this line of cases, the prevailing view of the courts in the states where laws prohibited the attachment of federal tax liens to tenancy-by-the-entirety property was that such property was immune from the attachment of federal tax liens where only one of the spouses was delinquent.[142] Subsequent decisions did not change the analysis of whether a federal tax lien could attach to tenancy-by-the-entirety property,[143] until *Craft*.

---

of one spouse in the estate by the entirety in Missouri is not a right to property or property in any sense." *Id.*

135. A warrant of distraint permits seizure of property in order to secure the payment of unpaid debt. BLACK'S LAW DICTIONARY 487 (7th ed. 1999).

136. Raffaele v. Granger, 196 F.2d 620, 622–23 (3d Cir. 1952).

137. *Id.* at 623. The court noted that any attempt to dispose the interest of one of the spouses would impair the other spouse's interest of the entire piece of property. *Id.* at 622. Thus it would be worthless. *Id.* The court further noted that "it does not matter that a claim against one spouse is being asserted under a federal statute for taxes owed the United States." *Id.* at 623.

138. United States v. Am. Nat'l Bank of Jacksonville, 255 F.2d 504, 507 (5th Cir. 1958) (concurring with the Eighth Circuit's decision in *United States v. Hutcherson*, 188 F.2d 326 (8th Cir. 1951)).

139. *Id.*

140. *Id.* at 506.

141. *Id.* at 506–07.

142. Johnson, *Fog, Fairness, and the Federal Fisc*, *supra* note 7, at 846.

143. *Id.*

3. The Role of State Law in Federal Tax Analysis Before *Drye v. United States*: Supreme Court Analysis

Prior to *Drye v. United States*,[144] the Supreme Court's analysis of the role of state law in federal tax analysis had been less than crystal clear, showing why there was confusion among the lower courts as to how to analyze the issue.[145] Even though the Court had decided this issue similarly in several cases, the language the Court used did not provide a definitive test.[146]

In *United States v. Bess*,[147] the Supreme Court held that while state law determined the interests that a taxpayer had in the property, the courts were to look to federal law to determine whether those interests were indeed property.[148] In *Bess*, the Court held that the cash surrender value of an insurance policy was a right to property that was attachable by the IRS.[149]

In *United States v. Rodgers*,[150] the Court held that exemptions created by state law against the forced sale of jointly owned property were ineffective against a federal lien.[151] Although Texas law protected homestead property from a forced sale for the payment of debts, the Court held that the federal lien could attach to the homestead property for the unpaid taxes of one spouse.[152] The Court emphasized, though,

---

144. Drye v. United States, 528 U.S. 49 (1999).

145. *See* Johnson, *The Good, the Bad, and the Ugly*, *supra* note 47, at 427–29 (analyzing the language used by the Supreme Court when deciding the role of state law in federal tax analysis); *see also infra* notes 148–66 (discussing the Supreme Court's analysis of the role of state law in federal tax analysis).

146. *See* Johnson, *The Good, the Bad, and the Ugly*, *supra* note 47, at 427–29 (examining the Supreme Court's analysis of the issue of the role of state law in federal tax analysis).

147. United States v. Bess, 357 U.S. 51 (1958).

148. *Id.* at 56–57. "[O]nce it has been determined that state law creates sufficient interest in the insured [taxpayer] to satisfy the requirements of [what is now § 6321 of the Code], state law is inoperative to prevent the attachment of liens created by federal statutes in favor of the United States." *Id.*

149. *Id.* "Cash surrender value" is "money a policyowner is entitled to receive from an insurance company upon surrendering a life insurance policy with cash value." BARRON'S DICTIONARY OF BUSINESS TERMS 93 (3d ed. 2000).

150. United States v. Rodgers, 461 U.S. 677 (1983).

151. *Id.* at 701. The Court noted that the court of appeals in this case had examined whether Texas law provided an exemption from a federal tax lien for homestead property. *Id.* at 700–01. The court of appeals held that, without any vested property rights, the exemption under Texas law for a homestead interest would not keep a federal lien from attaching. *Id.* at 701. The court of appeals, however, barred the government from forcing a sale of the property because it was homestead property under state law. *Id.*

152. *Id.* at 690–91. In its analysis, the Court divided the substance of the Texas law into two categories: (1) Texas law establishing a homestead estate, which, by the Texas Constitution, is beyond the reach of most creditors; and (2) Texas law giving individual family members' rights in the homestead property. *Id.* at 684. The Texas Constitution provides:

that the tax lien could only reach the property interest of the debtor spouse.[153] The Court reasoned that the Supremacy Clause of the Constitution allows the federal government to disregard state law exemptions.[154]

Alternatively, in *Aquilino v. United States*,[155] the Court expressly stated that state law defines property.[156] The Court concluded that courts were to apply state law to determine the taxpayer's interest in the property.[157] The *Aquilino* Court held that state law should be used to determine if there is property, and that federal law then determines whether a federal lien can attach.[158] The Court reasoned that this approach would balance the traditional state interest of defining property and the federal interest of uniform administration of the revenue statutes.[159]

> The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for [certain exceptions not relevant here] . . . . No mortgage, trust deed, or other lien on the homestead shall ever be valid, except for [certain exceptions not relevant here].

Id. (quoting TEX. CONST. art. XVI, § 50) (alteration in original). In a separate clause, the Texas Constitution further provides that each spouse owning homestead property must receive the consent of the other spouse before selling or abandoning the property. *Id.* at 684–85 (quoting TEX. CONST. art. XVI, § 50). The Court further noted that, in Texas, the homestead right is not just a right given by statute, but also a vested property right. *Id.* at 686 ("[T]he Texas homestead right is not a mere statutory entitlement, but a vested property right.").

153. *Id.* at 690–91.

154. *Id.* at 701.

155. Aquilino v. United States, 363 U.S. 509 (1960).

156. *Id.* at 512–13.

> The threshold question in this case, as in all cases where the Federal Government asserts its tax lien, is whether and to what extent the taxpayer had "property" or "rights to property" to which the tax lien could attach. In answering that question, both federal and state courts must look to state law, for it has long been the rule that "in the application of a federal revenue act, state law controls in determining the nature of the legal interest which the taxpayer had in the property . . . ."

Id. (quoting Morgan v. Comm'r, 309 U.S. 78, 82 (1940)) (alteration in original).

157. *Id.*

158. *Id.* at 514.

159. *Id.* ("This approach strikes a proper balance between the legitimate and traditional interest which the State has in creating and defining the property interest of its citizens, and the necessity for a uniform administration of the federal revenue statutes."). The Court's holding in *Aquilino* did not overrule *Bess*, however. *See* Johnson, *The Good, the Bad, and the Ugly*, *supra* note 47, at 428–29 (noting that the language of *Aquilino*, as to the role of state law in federal tax analysis, is distinguishable from prior cases). Furthermore, *Aquilino* was not overruled by the Court's holding in *United States v. Drye*. *Id.* Johnson noted:

> [E]ven [*Aquilino*] can be reconcilable. To say that state law must be looked to in making the property status determination is not to say that state law is the only thing to be considered. Tunnel vision is not required. *Drye* too requires that state law be looked to, but only up to a certain point and not exclusively. *Aquilino* is not terminally incompatible with that approach.

Id. at 429.

The more recent Court decisions regarding the treatment of the role of state law in federal tax analysis followed the same steps, all of them noting that the rule has never changed.[160] For example, in 1971 the Court held that the federal statutes determined when and how the property should be taxed *after* state law created the legal interests with respect to the property.[161] The Court noted that these principles were not new in the law of taxation.[162] In addition, the Court in *United States v. National Bank of Commerce*[163] stated that the issue of whether a state law right constitutes "property" or "rights to property" was a matter of federal law.[164] In 1994, the Court in *United States v. Irvine*[165] illustrated the rule that even though state law determined the legal interest and the rights one had in property, the federal law would determine how those interests would be taxed.[166]

4. Current State of the Law: *Drye v. United States*

Finally, in 1999, the Court examined the issue again and clarified the roles of state law and federal law in defining property and property rights.[167] In *Drye v. United States*, the Court unanimously upheld a lien attached to a spendthrift trust, reasoning that the state law only determined whether an interest is created, and then federal law determined whether the interest is property or a property right.[168]

---

160. Johnson, *The Good, the Bad, and the Ugly*, *supra* note 47, at 429–30.

161. United States v. Mitchell, 403 U.S. 190, 197 (1971); *see also* Johnson, *The Good, the Bad, and the Ugly*, *supra* note 47, at 429 (noting that the Court clearly stated the role of state law in federal tax analysis).

162. *Mitchell*, 403 U.S. at 197 ("[T]hese principles are long established in the law of taxation.").

163. United States v. Nat'l Bank of Commerce, 472 U.S. 713 (1985)

164. *Id.* at 727 (citing United States v. Bess, 357 U.S. 51, 56–57 (1958)).

165. United States v. Irvine, 511 U.S. 224 (1994).

166. *Id.* at 238. The Court noted that this was a "general and longstanding rule in federal tax cases." *Id.* In *Irvine*, the Court held that a state law allowing an individual to disclaim a gift would not force the federal gift tax to be "struck blind" to the fact that the transfer of "property" or "property rights" for which the gift tax was due had already occurred. *See id.* at 239–40 ("[S]tate property transfer rules do not transfer into federal taxation rules."); *see also* Johnson, *The Good, the Bad, and the Ugly*, *supra* note 47, at 429–30 (discussing the *Irvine* decision).

167. *See* Johnson, *The Good, the Bad, and the Ugly*, *supra* note 47, at 429–30 (discussing whether *Drye* changed or clarified the role of state law in federal tax analysis). The Court in *Drye* recognized that there was confusion as to whether federal or state law controlled whether a taxpayer had sufficient interest in property to be subject to a federal tax lien for unpaid taxes. Drye v. United States, 528 U.S. 49, 57 (1999) (stating that the Court's "decisions in point have not been phrased so meticulously").

168. *Drye*, 528 U.S. at 52 ("The Internal Revenue Code's prescriptions are most sensibly read to look to state law for delineation of the taxpayer's rights or interests, but to leave to federal law the determination whether those rights or interests constitute 'property' or 'rights to property' within the meaning of § 6321.").

Rohn Drye owed the federal government $325,000 for taxes he did not pay.[169] The federal government had already filed notices of federal tax liens when Mr. Drye's mother died intestate.[170] Under Arkansas law, Mr. Drye was the sole heir to her estate worth about $233,000.[171] If Mr. Drye had accepted his inheritance, the IRS would have seized the property and taken it pursuant to the lien they had already placed upon it.[172] Thus, Mr. Drye disclaimed his inheritance,[173] allowing it to pass by operation of law to his daughter.[174] Under Arkansas law, when a disclaimer is properly filed, the state treats the disclaimant as if he had predeceased the decedent.[175] Thus, the disclaimant's creditors cannot reach the property because the disclaiming heir is considered to have never owned or controlled the property.[176] Upon receiving the inheritance, Mr. Drye's daughter placed the inherited property in a spendthrift trust, listing herself and her parents as beneficiaries.[177] The IRS filed a lien against the trust and a notice of levy on its accounts; the trust filed a wrongful levy suit in response.[178]

The Court relied on the Internal Revenue Code and case law to determine that federal law defines property after the state law has recognized an interest.[179] While the Code does not create "property" or "rights to property," it determines when a lien can attach once the rights have been recognized.[180] Furthermore, the Court noted that the language used by Congress in § 6321 of the Code "is broad and reveals

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* The Court applied the law of the state in which the property was located—Arkansas. *Id.* Under the law of Arkansas, like that of many states, an heir may file a disclaimer up to nine months after the death of the decedent to disclaim an inheritance. *Id.* at 53 (citing ARK. CODE ANN. §§ 28-2-101, 28-2-107 (Michie 1987)).

174. *Id.* at 52.

175. ARK. CODE ANN. § 28-2-108 (Michie 1987).

176. *Id.*

177. *Drye*, 528 U.S. at 54. A spendthrift trust is a trust that prohibits the beneficiary from assigning his or her equitable interest and also prevents a creditor from attaching that interest. BLACK'S LAW DICTIONARY 1518 (7th ed. 1999).

178. *Drye*, 528 U.S. at 54.

179. *Id.* at 57–58. Interestingly, the Court did not distinguish the difference between "property" and "rights to property," nor did the Court define "property" and "rights to property." *See id.* However, the Court did refer to prior definitions of "property" and "rights to property." *Id.* at 55–60. The Court held that "'[t]he important consideration is the breadth of the control the [taxpayer] could exercise over the property.'" *Id.* at 61 (quoting Morgan v. Comm'r, 309 U.S. 78, 83–84 (1940)).

180. *Id.* at 57 & n.4 (quoting United States v. Nat'l Bank of Commerce, 472 U.S. 713, 722 (1985)).

on its face that Congress meant to reach every interest in property that a taxpayer might have."[181] The Court also reasoned that the list of property exempt from a tax levy created in § 6334(a) of the Code is exclusive.[182]

The Court rejected the gift analogy given by Mr. Drye.[183] Mr. Drye compared his action of rejecting the inheritance to that of a person rejecting a gift.[184] The Court noted a critical distinction between a gift rejected while the giver is alive and a gift rejected when the giver is deceased.[185] When a gift is rejected while the giver is alive, the giver is restored to his or her pre-gift status.[186] This is not true when the gift is inherited because the giver cannot be returned to the status quo when an inheritance is rejected.[187] The Court concluded that Mr. Drye did not just reject the gift, but also determined who would get the gift.[188] The Court held that a disclaimer is a right to property to which a federal tax lien can attach because the person disclaiming the property exercises sufficient dominion over the decision to accept the property or to direct it to a known other.[189]

After the Supreme Court's decision in *Drye*, it is clear that federal law determines whether an interest given by state law is "property" or "rights to property." However, the next question becomes: how does federal law define "property" or "rights to property"? Because neither the Code nor its related IRS regulations define "property" or "rights to

181. *Id.* at 56 (quoting United States v. Nat'l Bank of Commerce, 472 U.S. 713, 719–20 (1985)). Section 6321 states that a federal tax lien can attach to "all property and rights to property" that a taxpayer may have. I.R.C. § 6321 (2000). It seems, then, "[f]or § 6321 purposes, 'all' means 'all.' Thus, 'all property and rights to property' encompasses all undivided property interests as surely as it does all separate property interests." Johnson, *Fog, Fairness, and the Federal Fisc*, *supra* note 7, at 866 (footnote omitted).

182. *Drye*, 528 U.S. at 56; *see supra* note 46 (identifying property exempt from the attachment of federal tax liens). "The fact that . . . Congress provided specific exemptions from distraint is evidence that Congress did not intend to recognize further exemptions which would prevent attachment of [federal tax] liens." *Drye*, 528 U.S. at 56 (citing United States v. Bess, 357 U.S. 51, 57 (1958)); *see also supra* notes 147–49 and accompanying text (discussing the Supreme Court decision in *United States v. Bess*).

183. *Drye*, 528 U.S. at 60–61.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 61.

189. *Id. Drye* did not change the existing law created by *United States v. Bess*, *United States v. Rodgers*, and *Aquilino v. United States*; it just clarified it. Johnson, *The Good, the Bad, and the Ugly*, *supra* note 47, at 429–32; *see also supra* Part II.D.3 (discussing the Supreme Court analysis prior to *Drye*).

property," looking to case law is the only way to answer the question.[190] In *Drye*, the Court noted possible criteria for property, which it had distinguished in previous cases:

> -"'every species of right or interest protected by law and having an exchangeable value,'"
> -a right to gain possession of an item, even if such possession does not amount to ownership,
> -items available to the taxpayer, " 'within her reach to enjoy,' "
> -"any beneficial interest, as opposed to 'bare legal title,' in the [asset] at issue,"
> -"a valuable, transferable, legally protected right to the property at issue,"
> -"rights or interests that have pecuniary value and are transferable," and
> -more than a mere expectancy, even if valuable and transferable.[191]

While the Court did consider these formulations for a general understanding of the reach of § 6321, it did not take any or all of them as the final definition.[192]

III. DISCUSSION

The Supreme Court's decision in *United States v. Craft* expanded the reach of a federal tax lien to property held in tenancy-by-the-entirety. The United States District Court for the Western District of Michigan determined that a federal tax lien could attach to the tenancy-by-the-entirety property once the property was conveyed to a single owner, Mrs. Craft.[193] The Sixth Circuit Court of Appeals reversed the district court decision, holding that the Crafts had no separate interest in the property to which a lien could attach.[194] The Supreme Court granted certiorari, and in a 6-3 decision, allowed the IRS to attach a federal tax

190. Johnson, *The Good, the Bad, and the Ugly*, *supra* note 47, at 421.

191. *Id.* at 422 (quoting *Drye*, 528 U.S. at 56, 58–60) (footnotes omitted).

192. *Id.* However, these prior definitions combine to form five elements, none of which is dispositive to finding "property" or "rights to property." Johnson, *After* Drye, *supra* note 27, at 1179. The five elements provide that (1) a debtor should possess or have the ability to enjoy the property; and that a debtor's interest should be (2) protected by law; (3) exchangeable and transferable; (4) valuable; and (5) more than just bare title or a mere expectancy. *Id.*

193. *Craft I*, No. 1:93-CV-306, 1994 WL 669680 at *2–3 (W.D. Mich., Sept. 12, 1994), *rev'd*, 140 F.3d 638 (6th Cir. 1998), *rev'd*, 122 S. Ct. 1414 (2002); *see infra* Part III.B (discussing the district court's opinion).

194. Craft v. United States, 140 F.3d 638, 644 (6th Cir. 1998), *rev'd*, 122 S. Ct. 1414 (2002) [hereinafter *Craft II*]; *see infra* Part III.C (discussing the Sixth Circuit's decision).

lien to the property.[195] The majority opinion was accompanied by critical dissents by Justice Scalia and Justice Thomas.[196]

A. *Facts of* Craft

In 1972, Mr. and Mrs. Craft purchased a home in Michigan as tenants-by-the-entirety.[197] Mr. Craft failed to file his federal income tax returns from 1979 through 1986.[198] By 1988, the IRS determined that Mr. Craft owed more than $480,000 in unpaid income tax liabilities.[199] The IRS made an assessment against him, and he did not pay.[200] The following year, the IRS attached a federal tax lien to all property and rights to property belonging to him.[201] In late August, about five months after the lien was filed, the couple conveyed the property to Mrs. Craft by a quitclaim deed for only one dollar.[202] The IRS, however, asserted that the lien attached to Mr. Craft's interest in the property held in tenancy-by-the-entirety.[203]

Subsequently, Mrs. Craft tried to sell the piece of land; however, a title search showed that the IRS had a lien on the property, which prevented the sale.[204] Mrs. Craft requested that the IRS release the lien on the property, and the IRS refused.[205] The IRS finally agreed to release the lien on the property to allow her to sell the land, under the condition that she establish a non-interest bearing escrow account to contain half of the proceeds from the sale of the land, which would be subject to the same title, right, and interest that the federal tax lien had on the property.[206] Mrs. Craft sold the property for almost $120,000 and placed half of the proceeds in the escrow account.[207]

Mrs. Craft then brought an action to quiet title to the proceeds in the escrow account.[208] The government argued that the federal tax lien

195. United States v. Craft, 122 S. Ct. 1414, 1425–26 (2002) [hereinafter *Craft III*].

196. *Id.* at 1426; *see infra* Part III.D (discussing the majority and dissenting opinions).

197. *Craft II*, 140 F.3d at 639.

198. *Id.*

199. *Id.* The IRS assessed his unpaid tax liabilities at $482,446.73. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* A quitclaim deed is a deed that conveys the grantor's entire interest in real property to another. BLACK'S LAW DICTIONARY 424 (7th ed. 1999). However, a quitclaim deed does not guarantee that the title is valid. *Id.*

203. *Craft II*, 140 F.3d at 640.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

attached to the husband's interest in the property held in tenancy-by-the-entirety when the conveyance of the deed to Mrs. Craft effectively terminated the tenancy-by-the-entirety.[209] Thus, the government argued that the federal tax lien attached when Mr. Craft possessed a separate, one-half interest in the property.[210] The government also claimed that Mr. Craft had fraudulently conveyed his interest in the property to Mrs. Craft.[211]

B. The District Court's Decision

The district court, ruling in the government's favor, held that the federal tax lien could attach to the property at the moment Mr. Craft conveyed his interest to his wife, severing the tenancy-by-the-entirety.[212] The district court noted the Sixth Circuit's decision in *Cole v. Cardoza*, which reasoned that under Michigan law tenants-by-the-entirety hold property under a single title.[213] Because the property was held under a single title, a tax lien against only one spouse could not attach to the property.[214] The district court determined that the conveyance effectively terminated the tenancy-by-the-entirety estate.[215] Consequently, the federal tax lien could attach at the moment of conveyance because Mr. Craft had a separate one-half interest.[216]

---

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* at 640–41.

213. *Craft I*, No.1: 93-CV-306, 1994 WL 669680, at *2 (W.D. Mich. Sept. 12, 1994), *rev'd*, 140 F.3d 638 (6th Cir. 1998), *rev'd*, 122 S. Ct. 1414 (2002); *see also supra* notes 119–21 (discussing the holding in *Cole v. Cardoza*).

214. *Id.* at *3. This decision hinged on the court's reliance of the *Fischre* decision, which reasoned:

> [E]ven though each spouse has an indivisible interest in the entireties property and owns it as a whole, each also holds an individual interest . . . . This individual interest is not realized and remains inchoate until the entireties estate is terminated by the death of one spouse, divorce or joint conveyance. . . . As long as the entireties estate is intact, the property is not subject to levy and execution by the creditors of one spouse. Yet, each spouse's survivorship interest is distinct, cognizable, and sufficient to support attachment of a creditor's lien.

Id. (quoting Fischre v. United States, 852 F. Supp. 628, 630 (W.D. Mich. 1994)) (alteration in original); *see also* Cole v. Cardoza, 441 F.2d 1337, 1343 (6th Cir. 1971) (holding that a federal tax lien could not attach to tenancy-by-the-entirety property for the debt of one spouse); *supra* notes 89–124 and accompanying text (discussing the court's reasoning and analysis in *Cole* and *Fischre*).

215. *Craft II*, 140 F.3d at 640 (discussing the district court's findings).

216. *Id.*

C. *The Sixth Circuit's Decision*

On appeal, however, the Sixth Circuit reversed and held that no lien attached because Mr. Craft had no separate interest in the land as it was held in tenancy-by-the-entirety.[217] The court cited *Bess*, *Aquilino*, and *National Bank of Commerce* in its analysis, determining that once state law has created a sufficient interest, the federal law dictates the tax consequences.[218] The court recognized that the government's tax liens could attach to every interest in property a taxpayer might have, even if the interest is not full ownership or is an interest among several claims of ownership against the property.[219] Even so, the court determined that more recent cases would not allow a state's definition of a property interest to be overridden by federal law.[220]

The court analyzed Michigan law and determined that one spouse did not possess a separate interest in tenancy-by-the-entirety property.[221] The majority relied on the common-law fiction that property held in tenancy-by-the-entirety is not owned by either of the spouses, but owned instead by the marital unit.[222] As a result, the court held that, because the property was held in tenancy-by-the-entirety and the debt was only that of Mr. Craft, a federal lien could not attach.[223] Because, under Michigan law, creditors for the debts of only one spouse could not attach property held in tenancy-by-the-entirety, the court concluded

---

217. *See id.* at 644.

218. *Id.* at 641; *see also supra* Part II.D.3 (discussing *Bess*, *Aquilino*, and *National Bank of Commerce*). Because the federal tax law "'creates no property rights but merely attaches consequences, federally defined, to rights created under state law,'" the court must first look at state law to determine whether there is a property interest. *Craft II*, 140 F.3d at 641 (quoting United States v. Bess, 357 U.S. 51, 55 (1958)). Therefore, "'state law controls in determining the nature of the legal interest which the taxpayer had in the property.'" *Id.* (quoting Aquilino v. United States, 363 U.S. 509, 513 (1960) (quoting Morgan v. Comm'r, 309 U.S. 78, 82 (1940))). "'[O]nce it has been determined that state law creates sufficient interest in the [taxpayer] to satisfy the requirements of [the statute], state law is inoperative,' and the tax consequences thenceforth are dictated by federal law." *Id.* (quoting United States v. Nat'l Bank of Commerce, 472 U.S. 713, 722 (1985) (quoting *Bess*, 357 U.S. at 56–57)).

219. *Craft II*, 140 F.3d at 641 (citing United States v. Safeco Ins. Co. of Am., 870 F.2d 338, 341 (6th Cir. 1989); *Nat'l Bank of Commerce*, 472 U.S. at 725, 730)).

220. *Id.* at 643. The court noted that the cases "do not support the proposition that federal law can be used to trump a state's definition of a property interest." *Id.*

221. *Id.*

222. *Id.*; *see supra* notes 56–73 and accompanying text (discussing the rights given to spouses holding property in tenancy-by-the-entirety); *supra* note 76 and accompanying text (discussing the state of the law in Michigan regarding tenancy-by-the-entirety property before *Craft I*).

223. *Craft II*, 140 F.3d at 643 ("[A] federal tax lien against one spouse cannot attach to property held by that spouse as an entireties estate.").

that the federal tax lien could not be attached to this property for the separate debts of one spouse.[224]

D. The Supreme Court's Decision

In an opinion written by Justice O'Connor, the Supreme Court decided, by a 6-3 margin, to reverse the Sixth Circuit's decision.[225] The majority held that Mr. Craft's interests in the tenancy-by-the-entirety property constituted "property" or "rights to property" to which a federal lien could attach.[226] Justice Scalia's critical dissent, however, argued that this decision would remove the protection for non-debtor spouses.[227] Moreover, Justice Thomas's critical dissent argued that the longstanding consensus in the lower courts, combined with the fact that the federal government had not defined "property," should have indicated that a federal tax lien could not attach to tenancy-by-the-entirety property.[228]

1. Majority Opinion

The majority held that Mr. Craft's interest in the tenancy-by-the-entirety property constituted "property" or "rights to property" to which a federal tax lien could attach.[229] The majority looked first to state law to determine what rights Mr. Craft had in the property because federal tax law did not create property rights, but merely attached federally defined consequences to state law created rights.[230] The Court used the common idiom "a bundle of sticks" to describe the individual rights of property, noting that state law established which sticks were in one's bundle.[231] The majority then looked at federal law to determine whether the "bundle of sticks" given to Mr. and Mrs. Craft in their property held in tenancy-by-the-entirety would qualify as "property" or "rights to property" under the federal tax lien statute.[232]

---

224. *Id.*

225. Although the Court followed the analysis of *Drye*, which was unanimously decided by the same members of the Court just three years prior, the Court split 6-3 in *Craft III*. *Craft III*, 122 S. Ct. 1414 (2002); Drye v. United States, 528 U.S. 49 (1999).

226. *Craft III*, 122 S. Ct. at 1425.

227. *Id.* at 1426 (Scalia, J., dissenting); *see also infra* Part III.D.2 (discussing Justice Scalia's dissent, with whom Justice Thomas joined).

228. *Craft III*, 122 S. Ct. at 1428–29 (Thomas, J., dissenting); *see also infra* Part III.D.3 (discussing Justice Thomas's dissent, with whom Justices Stevens and Scalia joined).

229. *Craft III*, 122 S. Ct. at 1420.

230. *Id.* Most recently, in *Drye*, the Court clarified this analysis. *Drye*, 528 U.S. at 58.

231. *Craft III*, 122 S. Ct. at 1420.

232. *Id.* at 1420, 1422.

The Court looked at the substance of the rights given by Michigan law and determined what rights Mr. Craft had in the property.[233] According to Michigan law, Mr. Craft had the following rights associated with the property:

> The right to use the property, the right to exclude third parties from it, the right to a share of income produced from it, the right of survivorship, the right to become a tenant in common with equal shares upon divorce, the right to sell the property with the respondent's consent and to receive half the proceeds from such a sale, the right to place an encumbrance on the property with the respondent's consent, and the right to block respondent from selling or encumbering the property unilaterally.[234]

Then the Court analyzed the "bundle of sticks" granted to Mr. Craft by Michigan law and determined whether the bundle qualified as "property" or "rights to property" under § 6321 of the Code.[235] To ensure the collection of taxes, the Court reasoned that Congress used the broadest terminology so every interest a taxpayer might have could be reached by the federal tax lien.[236] In fact, the Court noted, Congress could not have used more powerful language to guarantee the collection of taxes.[237]

The majority determined that because Michigan law granted a tenant-by-the-entirety "some of the most essential property rights," Mr. Craft's rights in the property held in tenancy-by-the-entirety would fall within the broad language of § 6321 of the Code.[238] The Court reasoned that the right to use, the right to exclude others, and the right to receive income were essential rights, which alone might have constituted a sufficient interest to consider it "property" or "rights to property" within the broad statutory language of § 6321.[239]

Furthermore, the Court reasoned that Mr. Craft was granted more than just the right to use, exclude others, and receive income.[240] Even though Mr. Craft's property interest did not contain a common stick in the "bundle of sticks"—it was not unilaterally alienable—the Court reasoned that unilateral alienation was not essential to property

---

233. *Id.* at 1422.

234. *Id.*

235. *Id.* at 1422–23.

236. *Id.* at 1422 (quoting United States v. Nat'l Bank of Commerce, 472 U.S. 713, 720 (1985)).

237. *Id.* at 1423 (quoting Glass City Bank v. United States, 328 U.S. 265, 267 (1945)).

238. *Id.* at 1423–24.

239. *Id.* at 1423 (citing Drye v. United States, 528 U.S. 49, 61 (1999)).

240. *Id.*

ownership.[241] The Court further reasoned that to exclude property that is not unilaterally alienable from the property to which federal tax liens could attach would create an exemption for a large amount of what is generally thought of as property.[242]

In addition, as part of his bundle of sticks, Mr. Craft possessed a future right of survivorship.[243] The Court determined that if it held that there were no "property" or "rights to property," then tenancy-by-the-entirety property would belong to no one because neither spouse had a greater interest than the other.[244] The Court reasoned that such a result would create an opportunity for taxpayer manipulation and abuse.[245] Accordingly, the Court held that Mr. Craft had sufficient rights in the property to qualify his interest as "property" or "rights to property" such that the federal tax lien could attach.[246]

The Court dismissed the dissenting Justices' argument that the majority's holding—that there was an interest in the tenancy-by-the-entirety property to which a federal tax lien could attach—created a conflict with the rules for tax liens relating to partnership property.[247] The majority reasoned that a federal tax lien does attach to the fair market value of an individual partner's share of the partnership assets.[248] Furthermore, the majority argued that to hold otherwise would depart from partnership law because the federal tax lien could not attach to Mr. Craft's interest when it could attach to an individual partner's interest in partnership property.[249]

The Court addressed the argument that Congress did not intend for federal tax liens to reach property held in tenancy-by-the-entirety because a proposed amendment,[250] which would have included tenancy-

241. *Id.*

242. *Id.* at 1422–23.

243. *Id.* at 1424. The Court did not address the issue of whether this interest was merely an expectancy, since there were already a number of sticks present in Mr. Craft's bundle of rights in the property. *Id.*

244. *Id.*

245. *Id.* The Court reasoned that the result "not only seems absurd, but would also allow spouses to shield their property from federal taxation by classifying it as entireties property, facilitating abuse of the federal tax system." *Id.*

246. *Id.*

247. *Id.* (citing B. BITTKER & M. MCMAHON, FEDERAL INCOME TAXATION OF INDIVIDUALS ¶ 44.5[4][a] (2d ed. 1995 & 2000 Cum. Supp.)).

248. *Id.*

249. *Id.*

250. *Id.* at 1425. The amendment would "clarif[y] the term 'property and rights to property' by expressly including therein the interest of the delinquent taxpayer in an estate by the entirety." H.R. REP. NO. 83-1337, at 4132 (1954), *reprinted in* 1954 U.S.C.C.A.N. 4017, 4554; *see also supra* notes 27–30 and accompanying text (discussing the legislative history of § 6321).

by-the-entirety property in the list of "property" and "rights to property" covered under the federal tax lien statute, failed.[251] The Court reasoned, however, that several plausible inferences could be made from the inaction of Congress to change the wording of the statute, concluding that the proposed amendment in 1954 was just a "clarification" of existing law.[252] Alternatively, it may have been rejected because the suggested amending language[253] was excessive.[254]

The Court recognized that Michigan law exempted property held in tenancy-by-the-entirety from the reach of state law creditors when the debt was from one of the spouses alone.[255] Still, the Court reasoned that state law in no way binds the federal courts when answering whether a federal tax lien can attach to property held in tenancy-by-the-entirety.[256] Therefore, the majority concluded that Mr. Craft's interest constituted "property" or "rights to property" under § 6321 of the Code.[257]

2. Justice Scalia's Dissent

Justice Scalia, who joined in Justice Thomas's dissent, wrote separately to point out that, in his opinion, the Court had abolished a form of property ownership with respect to federal taxes.[258] He argued that treating the marital partnership as a legal entity, which was protected from the individual debts of a sole spouse, was no different than the decision to treat commercial partnerships as a legal entity.[259]

---

251. *Craft III*, 122 S. Ct. at 1425. The majority noted that the Court has held that "failed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'" *Id.* (quoting Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990)).

252. *Id.*; *see also* Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 187 (1994) ("Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.").

253. *See supra* notes 27–30 and accompanying text (discussing the legislative history of § 6321 of the Code).

254. *See supra* note 30 and accompanying text (discussing the Senate's remarks to the proposal, noting the legislative history of § 6321 of the Code).

255. *Craft III*, 122 S. Ct. at 1425.

256. *Id.* at 1425–26.

257. *Id.* at 1426.

258. *Id.* (Scalia, J., dissenting); *see also infra* Part III.D.3 (discussing the dissent by Justice Thomas). Scalia writes, "[T]he Court nullifies (insofar as federal taxes are concerned, at least) a form of property ownership that was of particular benefit to the stay-at-home spouse or mother." *Craft III*, 122 S. Ct. at 1426 (Scalia, J., dissenting).

259. *Craft III*, 122 S. Ct. at 1426 (Scalia, J., dissenting). Scalia argues that a state's decision to protect tenancy-by-the-entirety property "is no more novel and no more 'artificial' than a

He further argued that the majority's holding eliminated the protection that was once afforded to stay-at-home mothers by many of the states.[260]

3. Justice Thomas's Dissent

Justice Thomas wrote a dissenting opinion, in which Justice Stevens and Justice Scalia joined.[261] The dissent argued that the Court allowed a federal tax lien to reach property that did not actually belong to the debtor taxpayer.[262] The dissent further argued that the majority opinion conflicted with a consensus of the lower courts and the IRS.[263] The dissent agreed that the real property held by the Crafts when the federal tax lien attached was held in tenancy-by-the-entirety.[264] However, the dissent reasoned that the conveyance to Mrs. Craft terminated the tenancy-by-the-entirety.[265] Because a federal tax lien could not extend beyond the property interests held by the delinquent taxpayer, the IRS was only entitled to half the proceeds from the conveyance, in this case fifty cents.[266]

The dissent analyzed whether, at the time of the conveyance, Mr. Craft had an interest that constituted property or rights to property.[267] The dissent reasoned that under English common-law, property held in tenancy-by-the-entirety was held in a "sole tenancy," giving neither spouse a separate interest.[268] Thus, the property held by Mr. and Mrs. Craft did not "belong" to either one of them individually when the IRS

State's decision to treat the commercial partnership as a separate legal entity, whose property cannot be encumbered by the debts of its individual members." *Id.* (Scalia, J., dissenting).

260. *Id.* (Scalia, J., dissenting).

> [The stay-at-home mother] is overwhelmingly likely to be the survivor that obtains title to the unencumbered property; and she (as opposed to her businessworld husband) is overwhelmingly unlikely to be the source of the individual indebtedness against which a tenancy by the entirety protects. It is regrettable that the Court has eliminated a large part of this traditional protection retained by many States.

Id. (Scalia, J., dissenting).

261. *Id.* (Thomas, J., dissenting).

262. *Id.* (Thomas, J., dissenting).

263. *Id.* at 1427 (Thomas, J., dissenting) ("[The holding] eviscerates the statutory distinction between 'property' and 'rights to property' drawn by § 6321, and conflicts with an unbroken line of authority from this Court, the lower courts, and the IRS.").

264. *Id.* at 1427 n.1 (Thomas, J., dissenting); *see also supra* notes 229–57 and accompanying text (discussing the majority's analysis of the rights to property held in tenancy-by-the-entirety).

265. *Craft III*, 122 S. Ct. at 1427 (Thomas, J., dissenting); *see also* notes 97–111 and accompanying text (discussing *United States v. 2525 Leroy Lane*, 910 F.2d 343 (6th Cir. 1990), and analyzing the ways in which tenancy-by-the-entirety can be terminated under Michigan law).

266. *Craft III*, 122 S. Ct. at 1427 & n.1 (Thomas, J., dissenting).

267. *Id.* at 1427 (Thomas, J., dissenting).

268. *Id.* (Thomas, J., dissenting).

placed a lien on the property.[269] Therefore, the dissent concluded that Mr. Craft did not have an interest that constituted property to which a federal tax lien could attach.[270]

Next, the dissent looked to *Drye*.[271] The dissent asserted that *Drye* stood for the proposition that state laws could exempt a type of property from federal tax liability after the interest in the property had been created.[272] In *Drye*, the Court held that a disclaimer was a right to property to which a federal tax lien could attach because the person disclaiming the property already had a vested right in it, which the disclaimant could not undo.[273]

Further, the dissent argued that the majority created a new, federal common-law definition of property, believing that the Court's holding disregarded the rule that the states define and control the scope of property.[274] The dissent also noted that a taxpayer's property rights under federal law were uncertain.[275]

Agreeing with the majority that Michigan law created property rights to property held as tenants-by-the-entirety, the dissent noted that Michigan law was unsettled as to whether these rights were individual rights "belonging to" each tenant.[276] Additionally, the dissent noted that the majority did not suggest *which* of the rights given to Mr. Craft was sufficient for the tax lien to attach.[277]

Furthermore, the dissent attacked the Court's reasoning because it did not address the difference between "property" and "rights to property."[278] First, the dissent analyzed whether Mr. Craft had any "rights to property" to which the federal tax lien could attach.[279] The

269. *Id.* at 1428 (Thomas, J., dissenting) ("Because Michigan does not recognize a separate spousal interest in the Grand Rapids property, it did not 'belong' to either . . . individually when the IRS asserted its lien . . . .").

270. *Id.* (Thomas, J., dissenting).

271. *Id.* (Thomas, J., dissenting).

272. *Id.* (Thomas, J., dissenting); *see also supra* notes 167–92 and accompanying text (discussing the analysis and holding of *Drye*).

273. *Craft III*, 122 S. Ct. at 1428 (Thomas, J., dissenting).

274. *Id.* (Thomas, J., dissenting).

275. *Id.* (Thomas, J., dissenting) (quoting Aquilino v. United States, 363 U.S. 509, 513 (1960)).

276. *Id.* at 1429 n.2 (Thomas, J., dissenting).

277. *Id.* at 1429 (Thomas, J., dissenting).

278. *Id.* (Thomas, J., dissenting). Section 6321 states that a federal tax lien can attach to "all property and rights to property." I.R.C. § 6321 (2001); *see also* notes 179–82 and accompanying text (discussing the Supreme Court's analysis of § 6321 in *Drye*).

279. *Craft III*, 122 S. Ct. at 1429 (Thomas, J., dissenting).

dissent concluded that he did not have any rights to the property.[280] The dissent reasoned that any rights Mr. Craft might have had did not resemble rights to which a federal tax lien had ever attached.[281] "Rights to property" that have been subject to a federal tax lien are valuable and can be measured.[282] However, the dissent reasoned that a tenant holding property in tenancy-by-the-entirety has no present divisible interest in the property: he or she could not sell, encumber, or transfer the property without spousal consent.[283] Additionally, Mr. Craft did not possess the ability to devise the property.[284] The dissent agreed that a federal tax lien could attach to a tenant's right in property held in tenancy-by-the-entirety and to rents, products, incomes, or profits created from the property.[285] Here, however, as the dissent pointed out, the property did not create any rents, income, or profits to which the lien could attach.[286]

Furthermore, the dissent reasoned that the rights given through tenancy-by-the-entirety are dependent on the taxpayer's status as a spouse and, therefore, had a lack of exchangeable value or were mere expectancies.[287] The dissent reasoned that all of the "rights to property" to which the federal tax lien attached were destroyed when Mr. and Mrs. Craft severed the tenancy by the quitclaim deed.[288] The dissent reasoned that because the federal government steps into the "taxpayer's shoes" when attaching a lien, if the rights in the property have been destroyed, so has the government's interest.[289] Therefore, the dissent concluded, Mr. Craft had neither "property" nor "rights to property" sufficient for the federal tax lien to attach.[290]

Additionally, the dissent noted the enormous precedent supporting its position among the lower courts.[291] The dissent argued that while

---

280. *Id.* (Thomas, J., dissenting). The dissent simply stated: "He did not." *Id.* (Thomas, J., dissenting).

281. *Id.* at 1429 n.5 (Thomas, J., dissenting).

282. *Id.* (Thomas, J., dissenting) (citing WILLIAM D. ELLIOT, FED. TAX COLLECTION, LIENS, AND LEVIES ¶¶ 909 [3][a]–[f] (1995 & 2000 Cum. Supp.)).

283. *Id.* at 1430 (Thomas, J., dissenting).

284. *Id.* (Thomas, J., dissenting).

285. *Id.* at 1431 (Thomas, J., dissenting).

286. *Id.* (Thomas, J., dissenting).

287. *Id.* at 1430 (Thomas, J., dissenting).

288. *Id.* at 1431 (Thomas, J., dissenting).

289. *Id.* (Thomas, J., dissenting).

290. *Id.* at 1432 (Thomas, J., dissenting).

291. *Id.* at 1431–32 (Thomas, J., dissenting). Thomas cited cases from across the country, which all concluded that a federal tax lien cannot attach to tenancy-by-the-entirety property to satisfy the debts of one spouse:

precedent does not bind the Court, it should have at least been addressed, pointing out that the majority failed to mention the precedent in its reasoning.[292]

The dissent admitted that ownership by "the marriage" is a state law fiction.[293] However, it determined that this fiction should not change the result in this case, reasoning that the state law definition should have been followed because federal law does not define property.[294] It noted further that if the tax liability was that of both tenants, then the property held in tenancy-by-the-entirety would be subject to a federal tax lien.[295]

Finally, the dissent disagreed with the majority's assumption that without holding that the lien attaches to property held in tenancy-by-the-entirety, the Court would be facilitating tax fraud by married individuals.[296] The government never appealed the lower court's decision that the transfer by quitclaim deed was fraudulent.[297] Furthermore, the dissent noted that there was no factual evidence presented that showed that if the Court had reached a different result, there would be "wholesale tax fraud."[298]

IRS v. Gaster, 42 F.3d 787, 791 (C.A.3 1994) (concluding that the IRS is not entitled to a lien on property owned as a tenancy by the entirety to satisfy the tax obligations of one spouse); Pitts v. United States, 946 F.2d 1569, 1571–1572 (C.A.4 1991) (same); United States v. American Nat. Bank of Jacksonville, 255 F.2d 504, 507 (C.A.5), *cert. denied*, 358 U.S. 835, 79 S.Ct. 58, 3 L.Ed.2d 72 (1958) (same); Raffaele v. Granger, 196 F.2d 620, 622–623 (C.A.3 1952) (same); United States v. Hutcherson, 188 F.2d 326, 331 (C.A.8 1951) (explaining that the interest of one spouse in tenancy by the entirety property "is not a right to property or property in any sense"); United States v. Nathanson, 60 F.Supp. 193, 194 (E.D.Mich.1945) (finding no designation in the Federal Revenue Act for imposing tax upon property held by the entirety for taxes due from one person alone); Shaw v. United States, 94 F.Supp. 245, 246 (W.D.Mich.1939) (recognizing that the nature of the estate under Michigan law precludes the tax lien from attaching to tenancy by the entirety property for the tax liability of one spouse). See also Benson v. United States, 442 F.2d 1221, 1223 (C.A.D.C.1971) (recognizing the Government's concession that property owned by the parties as tenants by the entirety cannot be subjected to a tax lien for the debt of one tenant); Cole v. Cardoza, 441 F.2d 1337, 1343 (C.A.6 1971) (noting Government concession that, under Michigan law, it had no valid claim against real property held by tenancy by the entirety).

Id. at 1431 n.8 (Thomas, J., dissenting).

292. *Id.* at 1432 (Thomas, J., dissenting). "[O]ne would be hard pressed to explain why the combined weight of these judicial and administrative sources—including the IRS' instructions to its own employees—do not constitute relevant authority." *Id.* (Thomas, J., dissenting).

293. *Id.* (Thomas, J., dissenting).

294. *Id.* (Thomas, J., dissenting).

295. *Id.* (Thomas, J., dissenting).

296. *Id.* (Thomas, J., dissenting).

297. *Id.* (Thomas, J., dissenting).

298. *Id.* at 1431 (Thomas, J., dissenting).

IV. ANALYSIS

The majority correctly held that a federal tax lien should attach to property held in tenancy-by-the-entirety. This Part first demonstrates why the lower court precedent prohibiting creditors from reaching property held in tenancy-by-the-entirety was not upheld.[299] This Part then turns to the state law analysis of tenancy-by-the-entirety property.[300] Next, this Part discusses how the state law rights given to Mr. Craft are "property" or "rights to property" such that a federal tax lien should attach.[301] Finally, this Part addresses the dissent's mistaken argument that there are no protections for non-debtor spouses.[302]

A. Lower Courts' Precedent

Even though a considerable amount of precedent among the lower courts has led citizens and lawyers to rely on the tenancy-by-the-entirety protections from creditors,[303] the majority decision was correct. Courts have followed the rule barring creditors from reaching property held in tenancy-by-the-entirety for decades.[304] But, this rule is derived solely from lower court decisions.[305] Furthermore, since the Supreme Court decided *United States v. Rodgers*[306] and *United States v. National*

299. *See infra* Part IV.A (discussing how the prior rule barring creditors from attaching tenancy-by-the-entirety property was only developed by lower court decisions).

300. *See infra* Part IV.B (discussing the opportunities and controls that Mr. Craft had in the property, given Michigan state law).

301. *See infra* Part IV.C (discussing the broad power of the IRS to reach every interest in property).

302. *See infra* Part IV.D (discussing the protections for non-debtor spouses).

303. Johnson, *After* Drye, *supra* note 27, at 1188; *see Craft III*, 122 S. Ct. at 1431 n.8 (Thomas, J., dissenting) (listing lower court decisions that held that a federal tax lien could not attach to tenancy-by-the-entirety property to satisfy the debts of one spouse); *see also* Raffaele v. Granger, 196 F.2d 620, 622–23 (3d Cir. 1952) (concluding that the IRS is not entitled to attach a lien on tenancy-by-the-entirety property to satisfy the tax obligations of one spouse); United States v. Hutcherson, 188 F.2d 326, 331 (8th Cir. 1951) (explaining the interest of one spouse in tenancy-by-the-entirety property "is not a right to property or property in any sense"); *supra* Parts II.D.2.a–b (discussing *Hutcherson* and *Raffaele*).

304. *See supra* Part II.D (discussing the case law before *Craft*); *cf.* Cox v. Comm'r, 121 F.3d 390, 392 (8th Cir. 1997) (noting that the reasoning behind the protection from creditors for property held in tenancy-by-the-entirety was flawed). In *Cox*, the Eighth Circuit determined that recent case law had been eroding the protection from creditors for tenancy-by-the-entirety property. Johnson, *After* Drye, *supra* note 27, at 1175 n.72. "[I]t now is clear that the whole entirety estate is vested and held in each spouse . . . . [T]he ownership interest is in the spouses, and not in a separate entity." *Cox*, 121 F.3d at 392.

305. Johnson, *After* Drye, *supra* note 27, at 1188.

306. Even when the Supreme Court decided *Rodgers*, it signaled doubt that the lower court decisions relating to the tenancy-by-the-entirety bar were correct. Johnson, *After* Drye, *supra* note 27, at 1188; *see also* United States v. Rodgers, 461 U.S. 677, 703 n.31 (1983) ("*if* the tenancy by the entirety cases are correct" (emphasis in original)).

Bank of Commerce,[307] many commentators have cast doubt on the strength of the lower courts' rulings.[308] Under *Rodgers*, the government forced a sale of homestead property, despite the fact that the debtor could not unilaterally alienate the property.[309] Homestead property interests are similar to tenancy-by-the-entirety interests, in that neither spouse acting alone can alienate the property.[310]

In addition, the lower court decisions rest on a misapprehension of the role of state law in the analysis of whether a federal tax lien can attach to property.[311] These courts have looked to state law to characterize the opportunity or benefit that the state law has given the owner of the property.[312] That approach takes state law too far.[313] Under the analysis of *Drye*, the decision of whether the opportunities or benefits given to an owner of property by state law is property or a right to property is a decision of federal law, not state law.[314]

Furthermore, the concept on which the lower court decisions were based—that the property was held by neither of the spouses—has eroded away.[315] Ever since states began adopting the Married Women's Property Acts, the idea that the "marital union" holds tenancy-by-the-entirety property has not been followed.[316] Courts acknowledge that either both spouses or each spouse owns the tenancy-by-the-entirety property, even in states where creditors are barred from

---

307. *See supra* Part II.D.3 (analyzing *Rodgers* and *National Bank of Commerce*).

308. Johnson, *After* Drye, *supra* note 27, at 1190 n.165. "Perhaps it is only a matter of time before a spouse's tenancy by entirety interest will be subject to federal tax lien attachment by creeping federal supremacy." WILLIAM D. ELLIOTT, FEDERAL TAX COLLECTIONS, LIENS & LEVIES 9-92 at 9.09[4][d] (2d ed. Cum. Supp. No. 2 2002). Before the decisions by the Court in *Rodgers* and *National Bank of Commerce*, a tax lien could not attach to jointly held property until the debtor taxpayer survived the spouse and became the outright owner of the property. Joanne Phillips, Comment, United States v. Nat'l Bank of Commerce*: Co-Owners Suffer the "Federal Law Consequences*," 11 DEL. J. CORP. L. 561, 583 (1987).

309. John F. Hernandez, *The Federal Tax Lien: Beyond* United States v. Rodgers, 36 U. FLA. L. REV. 1081, 1098 (1984). "Clearly, a literal reading of section 7403 would invade the tenancy by the entirety sanctuary." *Id.*

310. Terrence C. Brown-Steiner, Comment, *Federal Tax Liens and Homestead Exceptions: The Aftermath of* United States v. Rodgers, 34 BUFF. L. REV. 279, 323 (1985). "A strong argument can be made that *Rodgers* applies to tenancy-by-the-entirety interests." *Id.*

311. Johnson, *After* Drye, *supra* note 27, at 1174.

312. *Id.*

313. *Id.*

314. *Id.*; *see supra* Part II.D.4 (discussing the current state of the law regarding the role of state law and federal law in defining "property" and "property rights").

315. Johnson, *Fog, Fairness, and the Federal Fisc*, *supra* note 7, at 858.

316. *Id.*; *see supra* notes 70–73 (discussing the Married Women's Property Acts and their impact on tenancy-by-the-entirety property).

reaching tenancy-by-the-entirety property.[317] Thus, it is difficult to argue that neither spouse has a property interest in tenancy-by-the-entirety property.[318]

B. The First Prong: State Law Analysis

Under the analysis set forth in *Drye*, to ascertain the amount of control Mr. Craft had over his property a court must look first at state law.[319] A court must then look to federal law to determine if the right given to the taxpayer constitutes a property right to which a tax lien could attach.[320] According to Michigan law, Mr. Craft had many rights associated with the property.[321]

Thus, Michigan law afforded Mr. Craft with many "sticks" in the "bundle of rights" for this property.[322] He had numerous opportunities and controls with respect to the property held in tenancy-by-the-entirety.[323] He had both a present interest and a future interest.[324] The present interest gave him the right, among others, to use the property, to exclude others from it, and to receive rents or other profits from it.[325] Mr. Craft had the absolute right to occupy and use the property, and not even his wife could oust him from possession.[326] Additionally, Mr.

317. Johnson, *Fog, Fairness, and the Federal Fisc*, *supra* note 7, at 858.

318. *Id.*

319. *See supra* notes 168–89 and accompanying text (discussing the analysis and holding of *Drye*); *see also supra* note 179 (noting the important consideration in determining whether a right is sufficient to constitute "property" or "right to property"); *supra* Part II.D.4 (discussing the Supreme Court case, *Drye*, which clarified the test for determining if a federal tax lien could attach to real property).

320. *See supra* Part II.D.4 (discussing the *Drye* test for determining if a federal tax lien could attach to real property).

321. *See supra* text accompanying note 234 (listing the rights Mr. Craft had in the tenancy-by-the-entirety property under Michigan law); *see also* MICH. COMP. LAWS ANN. § 557.71 (West 1988) ("A husband and wife shall be equally entitled to the rents, products, income, or profits, and to the control and management of real or personal property held by them as tenants by the entirety.").

322. *See* Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)); *see also supra* text accompanying note 234 (listing the rights Mr. Craft had in the tenancy-by-the-entirety property under Michigan law); *see also* MICH. COMP. LAWS ANN. § 557.71 (West 1988) (listing the rights given to spouses owning tenancy-by-the-entirety property in Michigan).

323. *See supra* note 234 and accompanying text (listing the rights Mr. Craft had in the tenancy-by-the-entirety property under Michigan law).

324. *See* MICH. COMP. LAWS ANN. § 700.2901(g), (i) (West 2002) (stating that joint property, including tenancy-by-the-entirety, has both a present interest and a future interest).

325. *See supra* note 234 and accompanying text (listing the rights given to Mr. Craft by Michigan law).

326. *See supra* note 234 and accompanying text (listing the rights given to Mr. Craft by Michigan law).

Craft had the future interest of survivorship, which is a significant contingent right.[327]

Under *Drye*, a court must then analyze the federal law to ascertain whether the opportunities and controls rise to the level of being "property" or "rights to property."[328] Michigan has given each spouse the right to use the property and has prevented one spouse from alienating the property.[329] Under a federal interpretation of the rights given to Mr. Craft, the right to use the property is a property interest.[330] Additionally, the right to exclude others has been held by the Court to be an essential stick in the bundle of rights that is commonly characterized as property.[331] Mr. Craft can exclude everyone in the world from the property, except for his wife.[332]

Even though Michigan does not authorize the seizure of tenancy-by-the-entirety property for the debts of only one spouse, the Court has held that state law restrictions do not prevent the attachment and enforcement of a federal tax lien.[333] Pursuant to Michigan state law, Mr. Craft has the ability to use, receive income from, transfer with the consent of his wife, and exclude others from his tenancy-by-the-entirety property.[334]

---

327. *Craft III*, 122 S. Ct. at 1424; *see also* MICH. COMP. LAWS ANN. § 700.2901(g) (stating that the right of survivorship is the right to receive the property in fee simple absolute upon the death of the other spouse).

328. *See supra* Part II.D.4 (analyzing the Supreme Court case, *Drye*, which clarified the test for determining if a federal tax lien could attach to real property).

329. *See supra* notes 233–34 and accompanying text (discussing the rights given to tenants-by-the-entirety under Michigan law).

330. Dickmann v. Comm'r, 465 U.S. 330, 336 (1984). As the Supreme Court has said, "[T]he use of valuable property . . . is itself a protectible property interest." *Id.*; *see also* Johnson, *The Good, the Bad, and the Ugly*, *supra* note 47, at 451 (discussing the powers given to Mr. Craft with respect to the property and how those powers are property rights under federal law).

331. Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).

332. Johnson, *After* Drye, *supra* note 27, at 1178.

333. *See* Drye v. United States, 528 U.S. 49, 59 (1999) (quoting United States v. Mitchell, 403 U.S. 190, 204 (1971) (stating that "exempt status under state law does not bind the federal collector")); *see also* United States v. Nat'l Bank of Commerce, 472 U.S. 713, 727 (1985) (noting that the fact that, under state law, a taxpayer's creditors could not seize or attach a lien to the property was irrelevant).

334. *See supra* text accompanying note 234 (listing the rights given to a tenant-by-the-entirety under Michigan law); *see also* Johnson, *After* Drye, *supra* note 27, at 1178 (listing the powers or rights given to spouses holding property in tenancy-by-the-entirety).

C. *Second Prong: "Congress meant to reach every interest in property that a taxpayer might have"*[335]

After determining that Mr. Craft has rights and powers over the tenancy-by-the-entirety property, a court must next analyze whether these rights and powers are sufficient to constitute "property" or a "right to property" to which a federal tax lien can attach.[336] When a taxpayer does not pay his or her taxes after a notice and a demand for payment have been issued, a lien arises by operation of law.[337] To ensure the collection of taxes, Congress used the broadest possible terminology[338] "to reach every interest in property that a taxpayer might have."[339] Additionally, the Supreme Court has held that this broad federal tax lien reaches every right or interest having value.[340] Thus, "property" and "rights to property" to which a federal tax lien can attach include many assorted interests.[341] The valuable, legally protected rights of a tenant-by-the-entirety are within the scope of this broad and clear statutory reach.[342] Lower courts, however, held that there was an exception to this very broad and clear language from the legislature.[343] To keep the tenancy-by-the-entirety bar to federal creditors on the basis of precedent would allow the courts to change the plain meaning of a statute enacted by Congress.[344]

The statutory language states that the federal lien attaches to "all" of a taxpayer's "property" and "rights to property," not that it attaches to a taxpayer's "separate" "property" and "rights to property."[345] The Court has held that the federal tax lien attaches to undivided rights, such as

---

335. *Nat'l Bank of Commerce*, 472 U.S. at 720.

336. *See supra* Part II.D.4 (analyzing the Supreme Court case, *Drye*, which clarified the test for determining if a federal tax lien could attach to real property).

337. I.R.C. § 6321 (2000) (permitting a lien "in favor of the United States upon all property and rights to property" of that taxpayer).

338. *Nat'l Bank of Commerce*, 472 U.S. at 720 (quoting Glass City Bank v. United States, 326 U.S. 265, 267 (1945)).

339. *Id.* at 719–20.

340. Drye v. United States, 528 U.S. 49, 56 (1999) (quoting Jewett v. Comm'r, 455 U.S. 305, 309 (1982)) (The federal tax lien "reach[es] every species of right or interest protected by law and having an exchangeable value."); *see Nat'l Bank of Commerce*, 472 U.S. at 719–20.

341. *See, e.g.*, *Drye*, 528 U.S. at 56 (holding that an heir's right to inherit property is "property" to which a federal tax lien can attach under § 6321); *Nat'l Bank of Commerce*, 472 U.S. at 727 (holding that a depositor's right to withdraw the entire contents of a joint bank account qualifies as "property" to which a federal tax lien can attach under § 6321).

342. *See supra* notes 27–50 and accompanying text (discussing the language and background of § 6321 of the Code).

343. Johnson, *After* Drye, *supra* note 27, at 1188.

344. *Id.*

345. Johnson, *The Good, the Bad, and the Ugly*, *supra* note 47, at 449.

homestead interests, community property interests, and trusts, not just separate individual rights.[346] Additionally, the interests to which a federal administrative levy cannot attach are enumerated in § 6334(a) of the Code.[347] Property held in tenancy-by-the-entirety is not listed as exempt from the reach of § 6321.[348] Furthermore, as viewed by the House, the 1954 House bill was an attempt to "clarify" the existing law, not to alter it.[349] If amending § 6321 to explicitly list tenancy-by-the-entirety property as property that could be attached by a federal tax lien would have been excessive, then it can be argued that a federal tax lien can already attach to such interests.[350]

Additionally, the Constitution gives the United States government the power to collect taxes, whereas state law governs private creditors.[351] Furthermore, the Court has noted that the power of the IRS to collect taxes does not flow from being an ordinary creditor but from the express language of the Code.[352] It is the "exercise of a sovereign prerogative."[353]

---

346. *Id.*; *see supra* notes 179–82 and accompanying text (discussing the Court's analysis of the expansive reach of § 6321); *see also supra* notes 151–54 (discussing *United States v. Rodgers*, where the Court held that a federal tax lien could attach to homestead property to satisfy the debts of one spouse even though that spouse only had an undivided interest in the property).

347. *See supra* note 46 and accompanying text (listing the property which is exempt from a federal tax lien). Section 6334(c) is "specific and . . . clear." United States v. Mitchell, 403 U.S. 190, 204–05 (1971). "[T]here is no room in it for automatic exemption of property that happens to be exempt from state levy under state laws." *Id.* at 205.

348. *See supra* note 46 (listing the property that is exempt from a federal tax lien). Additionally, the Court has emphasized that the language of § 6334 is specific and clear, intending not to recognize further exemptions. Drye v. United States, 528 U.S. 49, 56 (1999); *Mitchell*, 403 U.S. at 205; United States v. Bess, 357 U.S. 51, 57 (1958).

349. *See supra* Part II.A (discussing the legislative history of § 6321).

350. Johnson, *After* Drye, *supra* note 27, at 1185.

351. *Id.* at 1172–73; *see* U.S. CONST. art. 1, § 8, cl. 1 ("lay and collect taxes"); *see also supra* note 32 and accompanying text (discussing the power to collect income taxes given to Congress by the United States Constitution).

352. United States v. Rodgers, 461 U.S. 677, 697 (1983).

> [T]he Government's right to seek a forced sale of the entire property in which a delinquent taxpayer had an interest does not arise out of its privileges as an ordinary creditor, but out of the express terms of § 7403. Moreover, the use of the power granted by § 7403 is not the act of an ordinary creditor, but the exercise of a sovereign prerogative, incident to the power to enforce the obligations of the delinquent taxpayer himself, and ultimately grounded in the constitutional mandate to "lay and collect taxes."

Id. "The IRS is an involuntary creditor," who cannot choose the people with whom it does business, "so it cannot be seen as having assumed the risk of nonpayment by dealing with them." Johnson, *After* Drye, *supra* note 27, at 1172.

353. *Rodgers*, 461 U.S. at 697.

Therefore, the second prong of the test is satisfied.[354] Under federal law, a tax lien attaches to all property interests a debtor taxpayer may have.[355] Federal law lists all the property exempt from a federal tax lien, and tenancy-by-the-entirety property is not on this list.[356] Furthermore, the Supreme Court has held that state law exemptions cannot shield property from a federal tax lien.[357]

D. Protection for the Non-Debtor Spouse

The dissent was incorrect when it argued that the majority's ruling would not adequately protect the non-debtor spouse[358] because there are statutory protections in place that safeguard the non-debtor spouse's interests.[359] For example, in order to enforce a lien, the federal government generally must levy the property or have a judicial sale.[360] Often, judicial review and administrative hearings are required before a levy is made.[361] Additionally, Congress has made certain types of property exempt from administrative levy.[362] The IRS can also return property and release levies, if they were wrongfully applied.[363] Finally, a taxpayer who has been affected by a wrongful levy can obtain damages or seek to undo the levy through a civil action.[364]

However, the most practical way that the IRS could proceed to recover unpaid taxes would be through a judicial sale of the property.[365] Section 7403 of the Code allows a federal court to sell the entire piece of property and distribute the proceeds to the various owners of the

---

354. Johnson, *Fog, Fairness, and the Federal Fisc*, *supra* note 7, at 857.

355. *Id.*

356. *Id.*

357. *Id.* at 857 n.78.

358. *See supra* Parts III.D.2–3 (analyzing the dissenting arguments in *Craft III*); *see also Craft III*, 122 S. Ct. 1414, 1426 (2002) (Scalia, J., dissenting) (arguing that the majority's ruling will inadequately protect non-debtor spouses).

359. Johnson, *Fog, Fairness, and the Federal Fisc*, *supra* note 7, at 851. Johnson believes that the real impact on non-debtor spouses is not when the lien attaches, but rather when the sale of the property occurs. *Id.*

360. *See supra* Part II.B (discussing the means of enforcing a federal tax lien).

361. Johnson, *After* Drye, *supra* note 27, at 1183 (discussing protections for non-debtor spouses); *see* I.R.C. § 6330 (2000 & West Supp. 2002).

362. Johnson, *After* Drye, *supra* note 27, at 1183 (discussing protections for non-debtor spouses); *see* I.R.C. § 6334(a)(13), (e) (2000). These provisions have reduced the IRS levies on residences and businesses. Johnson, *After* Drye, *supra* note 27, at 1163 n.132. For three months in 1998, the IRS made about 586,000 levies. *Id.* For the same period in 1999, the number dropped by 570,000, to about 16,000 levies. *Id.*

363. Johnson, *After* Drye, *supra* note 27, at 1183.

364. *Id.*

365. *Id.*

property.[366] Thus, a non-debtor spouse would receive half of the proceeds, and the IRS would receive the other half, as in *Craft*.[367] Furthermore, there are safeguards in place that allow a court to deny an IRS petition to sell a piece of land.[368] The courts are given discretion to weigh the individual interests of the IRS and the hardship to the non-debtor spouse.[369]

In addition, in states where tenancy-by-the-entirety is not recognized, property can still be held jointly.[370] The federal tax lien has been allowed to attach to jointly owned property, to the extent of the debtor spouse's interest.[371] Thus, the new policy created by *Craft* does not add a new type of hardship to non-debtor spouses; it only places all non-debtor spouses in the same position, no matter where the property is owned.[372]

V. IMPACT

Ultimately, *Craft* will reduce the manipulation and abuse of the tax system as a whole and create more equity in the tax system.[373] This decision will help create uniformity in the application of federal tax liens to property held in tenancy-by-the-entirety.[374] Furthermore, the

366. *Id.*; *see also supra* note 45 and accompanying text (discussing § 7403 and the judicial sale of property).

367. Johnson, *After* Drye, *supra* note 27, at 1183. If the debtor spouse pre-deceases the non-debtor spouse, the non-debtor spouse would inherit the entire interest in the property. *See supra* notes 106–11 (discussing the court's analysis of the survivorship interest in *United States v. 2525 Leroy Lane*).

368. United States v. Rodgers, 461 U.S. 677, 697–99 (1983); Johnson, *After* Drye, *supra* note 27, at 1183.

369. Johnson, *After* Drye, *supra* note 27, at 1183. The statutory language of § 7403 of the Code states that the court "may," after application from the IRS, direct the sale of the property. *Id.*; I.R.C. § 7403. The use of the word "may" indicates that Congress wanted the courts to weigh all of the interests involved before forcing a sale of the property. Johnson, *After* Drye, *supra* note 27, at 1183. If, for example, the hardship to the non-debtor spouse outweighs the revenue interest of the IRS, the courts would deny the sale. *Id.*; *see also* Johnson, *Fog, Fairness, and the Federal Fisc*, *supra* note 7, at 850–51 (explaining how the rule allowing a federal tax lien to attach to tenancy-by-the-entirety property is fair to non-debtor spouses).

370. Johnson, *After* Drye, *supra* note 27, at 1172.

371. *Id.*

372. Johnson, *Fog, Fairness, and the Federal Fisc*, *supra* note 7, at 850–51. Johnson notes that it would only place non-debtor spouses who were protected by the tenancy-by-the-entirety bar in the exact same position as the non-delinquent spouses living in states where there is no such protection from the IRS. *Id.* "Parity with the rest of the nation cannot be considered undue hardship." *Id.*

373. *See infra* Parts V.A–B (discussing an example of how the tax system could have been manipulated and abused by married taxpayers).

374. *See infra* Part V.B (showing how the *Craft* decision will create uniformity in the states' treatment of federal tax liens with respect to tenancy-by-the-entirety property).

decision in *Craft* will reduce the uncertainty as to whether a federal tax lien will attach to a particular form of property.[375]

A. *Possible Manipulation and Abuse of the System*

If the court did not attach the federal tax lien to the property held in tenancy-by-the-entirety, taxpayers would be able to manipulate and abuse the system.[376] For example, spouses, like the Crafts in Michigan, could transfer everything they owned into property held as tenants-by-the-entirety and then file their tax returns separately.[377] The spouse with the higher income, thus in the higher tax bracket, could then take more aggressive positions on his or her return, like not reporting cash income or taking questionable deductions, which would reduce his or her taxes paid.[378] Then, the spouse who was in a lower tax bracket could accurately report his or her income and pay the amount of taxes owed.[379] Under the pre-*Craft* rule, it would not be worth the effort for the IRS to bring suit against the higher-income spouse for the taxes owed because the IRS could not collect against an individual spouse from property held in tenancy-by-the-entirety.[380]

B. *Equity in the Tax System*

Craft shows that state law barriers to federal tax collection have essentially been dissolved.[381] This result is correct because previously state-recognized property interests like tenancy-by-the-entirety interests made it impossible to enforce a tax lien in some jurisdictions, while in

375. *See infra* Part V.B (showing how the *Craft* decision will create equity in the tax system).

376. Johnson, *After* Drye, *supra* note 27, at 1171; Johnson, *Fog, Fairness, and the Federal Fisc*, *supra* note 7, at 848 ("The entireties bar compromises the government's ability to 'lay and collect taxes.' . . . This revenue concern is heightened by the fact that motivated taxpayers can deliberately structure their affairs and manipulate the entireties bar to avoid paying tax."); *see also Craft II*, 140 F.3d 638, 649 (1998) (Ryan, J., concurring) (The entireties bar "not only contravenes established recent precedent, but provides an avenue for easy avoidance of federal income-tax laws."), *rev'd*, 122 S. Ct. 1414 (2002).

377. Johnson, *After* Drye, *supra* note 27, at 1171. Johnson gives this example as a way taxpayers could abuse the tax system. *Id.* He further discusses how the protection given to property held in tenancy-by-the-entirety has created "audit insurance" for couples who want to manipulate the tax system. Johnson, *Fog, Fairness, and the Federal Fisc*, *supra* note 7, at 848–50.

378. Johnson, *After* Drye, *supra* note 27, at 1171.

379. *Id.*

380. *Id.*

381. Phillips, *supra* note 308, at 583. "[S]tate law characterization has been effectively reduced to a somewhat moot consideration. While the courts may pay lip-service to the notion of state law, that law will not be upheld in the collection of taxes if one of the incidents of that property definition is non-severability." *Id.* at 584.

other jurisdictions the lien attached to essentially the same property.[382] Furthermore, our tax system is designed so that taxpayers who have the same amount of income and deductions pay the same amount of taxes.[383] Under the previous rule, that a federal tax lien could not attach to property held in tenancy-by-the-entirety, two people with the same tax deficiency would have been treated differently depending on the state in which they lived.[384] If one person lived in a state that protected property held in tenancy-by-the-entirety, the property would not be subject to a federal tax lien, whereas the other who lived in a state that did not recognize tenancy-by-the-entirety would be subject to a tax lien.[385] *Craft* creates a rule whereby federal tax liens can attach to property of all taxpayers who default against the government, not just the property of debtors living in states that do not recognize tenancy-by-the-entirety.[386]

The holding in *Craft* significantly reduces the uncertainty regarding how the Supreme Court will treat jointly owned property. The trend in federal tax analysis in the recent decisions by the Court is evidence of a disregard for state law definitions of property.[387] Such disregard was necessary so that state laws, which define property rights, could not block the uniform collection of taxes.[388]

VI. CONCLUSION

The majority correctly decided that a federal tax lien should attach to property held in tenancy-by-the-entirety. The majority opinion correctly applied the analysis in *Drye* to determine that there are rights to property created in the state law definition of tenancy-by-the-entirety. While this decision only affects the law in some states because not all states allow tenancy-by-the-entirety property, it will nonetheless affect how the federal tax lien will be applied in the future. Furthermore, this

382. Johnson, *After* Drye, *supra* note 27, at 1172.

383. *Id.* at 1171–72. "Our tax system is 'designed to ensure as far as possible that similarly situated taxpayers pay the same amount of tax.' This principle of horizontal equity is important aspirationally and, despite various departures, often operationally in our tax system." *Id.* (quoting Thor Power Tool Co. v. Comm'r, 439 U.S. 522, 544 (1979)). "Each taxpayer should bear his own tax responsibility." Phillips, *supra* note 308, at 590.

384. Johnson, *After* Drye, *supra* note 27, at 1172; *see also supra* Part II.C.2 (analyzing the different treatment of tenancy-by-the-entirety property across the United States).

385. Johnson, *After* Drye, *supra* note 27, at 1172.

386. *Id.*

387. Phillips, *supra* note 308, at 579.

388. *Id.* at 590.

decision will create a more uniform application of the federal tax lien.[389]

389. *Craft*, however, does not completely solve the problem. There still should be a uniform property definition so that property owners and lawyers can anticipate whether a tax lien will attach. Phillips, *supra* note 308, at 590. That issue, however, is beyond the scope of this Note.