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Fog, Fairness, and the Federal Fisc: Tenancy-by-the-Entireties Interests and the Federal Tax Lien

Steve R. Johnson[*]

Important values often clash when the Internal Revenue Service proceeds against jointly owned property to satisfy tax debts.[1] On the one hand, the federal government has a legitimate revenue interest: In a time of acute budgetary stress, effective collection of taxes is imperative. Moreover, fairness to other taxpayers bears on the matter. Were some of the delinquent owner's tax liabilities to go uncollected for failure to act against her interest in joint property, that shortfall would—one way or another—have to be made up by the rest of the country's taxpayers. On the other hand, the co-owners who do not owe taxes should not have their interests in joint property unduly compromised by tax collection against the delinquent owner. In addition, since the form of joint ownership will have been established under state law, concerns of federalism come into play.

An instance of these clashing interests is the extent to which the federal tax lien attaches to tenancy-by-the-entireties property. Forty-five years ago, a federal appellate court likened entireties interests to "the morning fog rising from the valley" and held that the federal tax lien does not attach to such interests when only one of the cotenants owes taxes.[2] This decision and others reaching the same result were premised on state law limits on the rights of

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1. The difficulty of the area is illustrated by two leading Supreme Court decisions: United States v. National Bank of Commerce, 472 U.S. 713 (1985) (IRS levy on joint bank account when only one of the depositors owed taxes), and United States v. Rodgers, 461 U.S. 677 (1983) (sale of homestead property when only one of the spouses owed taxes). In both cases, the Supreme Court held for the IRS, reversing circuit court decisions. Both decisions were 5-4, however, and the majority and dissenting blocks fitted no apparent pattern. For example, Justice Blackmun authored the dissent in *Rodgers* and wrote the majority opinion in *National Bank of Commerce*; Justice Brennan wrote the majority opinion in *Rodgers* and dissented in *National Bank of Commerce*; and only one Justice (Justice Stevens) joined in the dissents in both cases.

2. United States v. Hutcherson, 188 F.2d 326, 331 (8th Cir. 1951).

creditors to proceed against entireties property,[3] limits existing in about one-third of American jurisdictions. Despite substantial evolution of federal tax lien law in the years since, the old cases were followed without exception until quite recently and remain, even today, overwhelmingly the majority position of the courts.

This rule—the tenancy-by-the-entiretiesbar to tax collection—is unsound. It inadequately reconciles the interests at stake, and it is inconsistent with the modern understanding of the nature and reach of the federal tax lien.

This article recommends that the bar be abrogated. In place of the old rule, the article proposes that the federal tax lien should attach to entireties property, but only to the extent of the lesser of (1) the debtor tenant's tax liabilities or (2) the value of the debtor tenant's interest in the property.

The article has five parts. Part I describes the origins of the entireties bar and the principal rationales on which it is based.

Parts II, III, and IV criticize the bar. They suggest that the key bar cases likely were wrong when decided—both as a matter of policy and doctrinally—and that subsequent developments have revealed the errors of these cases more glaringly.

Specifically, Part II maintains that the bar cases undervalue the national interest in prompt and effective revenue collection. The bar cases relegate the federal government to the collection remedies available under state law to ordinary, private creditors. This approach is at odds with Congress' constitutional prerogative to make rules governing the laying and collection of taxes, and it frustrates the federal government's ability to collect assessed taxes. Indeed, the bar creates the opportunity for tax abuse: The bar can be used as "audit insurance" to shield underreporting of tax liability. Such revenue reduction and tax abuse are particularly undesirable in light of the severely strained condition of the federal budget.

Part III suggests that the bar cases improperly balance considerations of fairness to and among taxpayers. Those cases are explained in part by a fairness concern: fear that allowing attachment of the federal tax lien to entireties interests would unduly prejudice the nondebtor spouse. However, the legitimate interests of nondebtor spouses can be protected without the bar. Moreover, the bar creates its own kind of unfairness: For tax collection purposes, it puts entireties taxpayers in a privileged position relative to all other taxpayers in the country. Thus, the bar undercuts the important policy that taxpayers be treated equally by our tax system.

Part IV argues that the bar cases misconstrue the established rule as to the role of state law in federal tax lien analysis. Under that rule, one first looks to state law to ascertain what powers over property the taxpayer possesses; then, one looks to federal law to determine what tax consequences attach to

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3. *Id.*

those powers, including whether the federal tax lien attaches. The bar cases misapply both aspects of the rule: They inappropriately apply formalities of title over realities of control when ascertaining what powers over property exist and they superimpose state debtor-creditor rules onto federal rules, inappropriately limiting the broad rule of lien attachment under federal tax law. These erroneous applications of the established rule by the bar cases are inconsistent with the teaching of the Supreme Court in two major tax collection decisions.

The desirability of ending the entireties bar having been established, Part V considers how best to achieve this result. It notes that a number of recent decisions provide a basis from which general judicial repudiation of the entireties bar could eventuate. Nonetheless, Part V concludes that, although continued judicial erosion of the entireties bar would be desirable, legislation holds more promise as the means by which to finally abolish the bar. Part V also addresses important "second generation" issues that overthrowing the entireties bar would raise.

I. ORIGINS OF THE ENTIRETIES BAR

A. The Tax Collection Process

Federal tax collection proceeds through several phases. First, the tax liability must be properly assessed, and the IRS must make notice and demand upon the taxpayer for payment.[4] Thereupon, the amount assessed "shall be a lien in favor of the United States upon all property and rights to property" belonging to the tax delinquent.[5]

If the liability is not otherwise satisfied, the IRS will proceed to enforce collection. As to jointly owned property, two principal collection options are: (1) administrative seizure and sale of only the delinquent co-owner's interest in the property[6] and (2) judicial sale of the entire property with pro rata division of the proceeds among all the co-owners, the IRS standing in the shoes of the delinquent co-owner to the extent of his unpaid tax liabilities.[7]

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4. I.R.C. §§ 6201(a), 6203 & 6303(a) (1994).

5. I.R.C. § 6321 & § 6322 (1994). The § 6321 lien is known as the general tax lien since it applies to all assessed taxes. In addition, the Internal Revenue Code provides for a variety of special liens limited to particular contexts. *See, e.g.*, I.R.C. § 6324(a) (1994) (special lien for estate taxes) and § 6324(b) (1994) (special lien for gift taxes).

6. I.R.C. § 6331 (1994).

7. I.R.C. § 7403 (1994).

These and other collection techniques can be applied only to property to which the federal tax lien has attached. The reach of that lien, therefore, is of crucial significance.

B. Tenancies by the Entireties

Tenancies by the entireties developed as part of the English feudal system to serve military organization and male supremacy.

> The exigencies of feudalism demanded that the functions of ownership be vested in males, presumably capable of bearing arms in war. Women were lightly regarded legally, and especially married women—whose very identities, in most respects, were considered merged and lost in the personalities of their husbands. . . . Man and wife were one and the one was male.[8]

These exigencies explain an important attribute of entireties estates. Originally, and largely still today, neither entireties spouse could partition, alienate, or encumber the property without the other spouse's consent.[9] As a consequence, entireties property was not answerable to creditors for the separate debts of one of the spouses.[10] This attribute flowed naturally from the common law's distaste for dividing tenures. Such division broke up feudal services among the various tenants, rendering more tenuous the connection between the lord and his vassals.[11]

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8. Oval A. Phipps, *Tenancy by Entireties*, 25 TEMP. L.Q. 24, 24 (1951). In addition to these exigencies, there was a religious aspect. After describing the creation of Eve, the Bible ordains that man and wife "shall be one flesh." *Genesis* 2:24. Tenancies by the entireties developed from this Biblical declaration. United States v. Gurley, 415 F.2d 144, 149 (5th Cir. 1969).

The anti-wife character of entireties estates is not purely ancient history. For example, Massachusetts entireties estates created before 1980 (but still in legal force and effect) have been described thusly: "The wife, in short, has no functioning rights in the property during her husband's lifetime." Geiselman v. United States, 961 F.2d 1, 7 (1st Cir. 1992).

9. *See, e.g.*, 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 183-84 (5th ed. 1773); 4 JAMES KENT, COMMENTARIES ON AMERICAN LAW 359-60 (2d ed. 1832).

10. *See, e.g.*, Proceedings of Real Property, Probate & Trust Law Section, ABA 82-84 (1944) (adding: "The most objectionable aspect of the tenancy is the opportunity it affords for frustrating the rights of creditors of one spouse.").

11. *See, e.g.*, Fernande R.V. Duffly, *The Effect of the State Equal Rights Amendment on Tenancy by the Entirety*, 64 MASS. L. REV. 205, 206 (1979). Although feudalism was principally a system of land tenures, most American jurisdictions recognizing tenancies by the entireties permit both personal and real property to be

Tenancies by the entireties were received into the law of the American colonies, later the states, although their popularity subsequently suffered some erosion. England abolished entireties tenancies in 1925.[12] In the United States, the progressive recognition of women's property rights, beginning with the nineteenth century Married Women's Property Acts, caused some western states never to adopt the tenancy-by-the-entireties form and caused some other states to abolish or restrict it.[13] Numerous judges[14] and commentators[15] have called for ending tenancies by the entireties where they continue to exist.

Nonetheless, every American lawyer knows the facility of our legal system for discovering new rationales for familiar forms whose original purposes have passed, or for retaining such forms out of little but inertia. So, a substantial number of American jurisdictions have retained tenancies by the entireties.

For purposes of this article, these jurisdictions divide into two groups. Sixteen American jurisdictions (the "bar states" or "full bar states") provide that the liens of separate creditors cannot attach to entireties property or interests. Another ten jurisdictions (the "modified bar states") provide that the liens of separate creditors can attach but subject to the rights of the nondebtor spouse, *i.e.*, that the underlying property held by the entireties estate cannot be levied on until the nondebtor spouse's rights cease to be absolute, such as upon the termination of the entireties estate by death or divorce.[16]

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held by such tenancies. *See* ROGER A. CUNNINGHAM, WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY 207 (2d ed. 1993).

12. Law of Property Act, 15 & 16 Geo. 5, ch. 2, § 37 (1925) (Eng.).

13. *See, e.g.*, RICHARD R. POWELL, 4A POWELL ON REAL PROPERTY ¶ 620[3] (Patrick J. Rohan rev. ed. 1993).

14. "The estate by the entireties is a remnant of other times. . . . To me the conception is quite incomprehensible." King v. Greene, 153 A.2d 49, 60 (N.J. 1959) (Weintraub, C.J., dissenting); Kerner v. McDonald, 84 N.W. 92, 92 (Neb. 1900) ("It would seem clear that, taking the modern view of the marriage relation, there is no reason for the doctrine of estates in entirety. . . ."); *see also* CORNELIUS J. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 219 (2d ed. 1988) (Tenancy by the entireties' "underlying concept of an artificial unity of husband and wife is repugnant to modern views of the status of married women.").

15. *See, e.g.*, Duffly, *supra* note 11, at 205; Phipps, *supra* note 8, at 26 (referring to the "absurd theory of unity between spouses"); C. J. Messerschmidt, Comment, *Beall v. Beall—The Effect of One Spouse's Death on an Offer To Sell Property Held as Tenants by the Entireties*, 42 MD. L. REV. 508, 515 (1983); Note, *Effect of the Married Women's Property Acts upon Estates by the Entirety*, 37 HARV. L. REV. 616 (1924); Proceedings of Real Property, *supra* note 10, at 82-84.

16. The sixteen full bar jurisdictions are Delaware, the District of Columbia, Florida, Hawaii, Indiana, Maryland, Michigan, Mississippi, Missouri, North Carolina, Ohio (for entireties estates created before 1985 only), Pennsylvania, the Virgin Islands,

C. Entireties Bar to Tax Collection

Under the currently prevailing view, the federal tax lien is hostage to whatever entireties regime exists in the taxpayer's state. The IRS as a tax creditor is held to the same limitations that bind private creditors. So, in the ten modified bar states, the tax lien attaches to entireties property but subject to the nondebtor spouse's rights in the property,[17] and, in the sixteen full bar states, the tax lien does not attach at all to entireties property and entireties interests. Because of their greater number, greater population, and greater limitation on the tax lien, the full bar states present the greater problem and are the principal focus of this article.

Although there were a few earlier trial court decisions to the same effect,[18] the view that, in the bar states, the federal tax lien does not extend to entireties property when only one of the spouses owes taxes rests on a triad of 1950s federal appellate court cases: *United States v. Hutcherson*,[19] *Raffaele v. Granger*,[20] and *United States v. American National Bank*.[21]

In the 1951 *Hutcherson* case, the court framed the issue as whether one spouse's interest in entireties property "is such an interest to which any lien can attach," a matter to be ascertained "by the application of the law of Missouri determining and defining the law of property rights in that state."[22] Three related strands of thought appear in the somewhat discursive and occasionally lyrical opinion:

Virginia, Vermont, and Wyoming. The ten modified bar jurisdictions are Alaska, Arkansas, Kentucky, Massachusetts, Montana, New Jersey, New York, Oregon, Rhode Island, and Tennessee. *See, e.g.*, POWELL, *supra* note 13, ¶ 620[4]; J.H. Cooper, Annotation, *Interest of Spouse in Estate by Entireties as Subject to Satisfaction of His or Her Individual Debt*, 75 A.L.R. 2D 1172 (1961). The Virgin Islands is omitted by the above sources but is a full bar jurisdiction. *E.g.*, Masonry Prods., Inc. v. Tees, 280 F. Supp. 654 (D.V.I. 1968).

17. Geiselman v. United States, 961 F.2d 1, 6-7 (1st Cir. 1992); United States v. Jones, 877 F. Supp. 907, 916-17 (D.N.J. 1995); United States v. Brynes, 848 F. Supp. 1096, 1099 (D.R.I. 1994); United States v. Ragsdale, 206 F. Supp. 613 (W.D. Tenn. 1962); Pilip v. United States, 186 F. Supp. 397 (D. Alaska 1960); United States v. Kaplan, 54-2 U.S. Tax Cas. (CCH) ¶ 9532 (S.D.N.Y. 1953).

18. *See* United States v. Nathanson, 60 F. Supp. 193 (E.D. Mich. 1945); Shaw v. United States, 94 F. Supp. 245 (W.D. Mich. 1939); Smith v. Commissioner, 24 B.T.A. 807, 811-13 (1931).

19. 188 F.2d 326 (8th Cir. 1951) (Missouri law).

20. 196 F.2d 620 (3d Cir. 1952) (Pennsylvania law).

21. 255 F.2d 504 (5th Cir. 1958) (Florida law), *cert. denied as to another issue*, 358 U.S. 835 (1959).

22. *Hutcherson*, 188 F.2d at 328.

(1) Near the end of the opinion, the court declared: "[T]he interest of one spouse in the estate by the entirety in Missouri is not a right to property or property in any sense."[23]

(2) That declaration, however, is in tension with a prior portion of the opinion. There, the court quoted extensively from Missouri cases holding that each spouse is "vested with the entire estate," that "each owns, not a part . . . but the whole" of the property.[24] In this light, the court's argument is not that there is no property interest at all, but only that that property interest is an undivided interest, not a separate interest.

(3) At yet other places, the court intimated that, whatever the nature of the property right at issue, it was not a right "to which a lien may attach."[25] The reason was that, under Missouri law, the entireties estate "has retained the characteristic of immunity," *i.e.*, that state law prevented creditors of one spouse from attaching or levying on entirety property to satisfy the separate debts of one of the spouses.[26] Thus, the *Hutcherson* court rhapsodized:

> 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.[27]

In the following year, 1952, the issue was addressed in *Raffaele*. The court reached the same result although with only passing reference to *Hutcherson* and on different grounds. The *Raffaele* court reasoned that one person's property may not be taken to satisfy a different person's tax liability and that allowing the Service to proceed against entireties property would permit just that, "whether [the Service's] attack be viewed as an invasion of property of the wife or of title vested in 'a distinct legal entity, consisting of the unified personalities of the husband and wife'."[28]

Completing the triad was the 1958 decision in *American National Bank*, which noted *Raffaele* in passing but relied more heavily on *Hutcherson*.[29] The *American National Bank* court conceded that federal tax liens and their enforcement are matters of federal law, but it added: "[T]he rules of property

23. *Id.* at 331.
24. *Id.* at 329.
25. *Id.*
26. *Id.* at 330.
27. *Id.* at 331.
28. *Raffaele*, 196 F.2d at 623 (citation omitted).
29. *American National Bank*, 255 F.2d at 507.

and [the] fixing of the incidents [of] property ownership are rules of state law which the Federal courts will respect."[30]

The court, "[w]hile refraining from concurrence in dicta regarding rainbows and fogs," agreed with *Hutcherson*'s result, on the conclusory ground that the delinquent spouse "did not have any interest in the subject property during [the other spouse's] lifetime to which a lien for Federal taxes, owed by him but not by her, could attach."[31]

Nearly all subsequent decisions have followed the 1950s triad.[32] Accordingly, the currently prevailing view is that, in the bar states, the federal tax lien does not attach to entireties property when only one spouse owes taxes.[33] None of the post-1950s cases, however, has added to the analysis, and none has reviewed the triad in light of the evolution of tax lien law since the 1950s.

II. UNDERVALUING THE NATIONAL INTEREST IN REVENUE COLLECTION

Our country is now engaged in the latest round of the perennial debate about the proper role and size of the federal government. Whatever will result, it is safe to say that Americans have expected, and for the foreseeable future likely will expect, the federal government to shoulder an imposing array of responsibilities, both here and abroad. To do so, the government needs money, most of which comes from taxes. Thus, as the Supreme Court has

30. *Id.* at 506-07.

31. *Id.* at 507.

32. *See, e.g.*, Cole v. Cardoza, 441 F.2d 1337, 1343-44 (6th Cir. 1971) (Michigan); Benson v. United States, 442 F.2d 1221, 1223 (D.C. Cir. 1971) (dictum; District of Columbia); Batrus, Foldenauer & Madigan, Inc. v. United States, 29 A.F.T.R.2d (P-H) ¶ 72-629 (E.D. Va. 1972) (Virginia); Pettengill v. United States, 205 F.Supp. 10, 13 (D. Vt. 1962) (Vermont). But *see* Part V.A below.

33. Despite the bar, there are at least two situations in which the IRS can pursue entireties property. First, if both spouses owe taxes, the tax lien will attach to entireties property up to the amount of whichever spouse's liability is the less. *E.g.*, Tony Thornton Auction Service, Inc. v. United States, 791 F.2d 635, 637-38 (8th Cir. 1986); United States v. Eglinton, 90-1 U.S. Tax Cas. (CCH) ¶ 50,322 (E.D. Pa. 1990); Whittaker v. Kavanagh, 100 F. Supp. 918, 920 (E.D. Mich. 1951).

Second, if one spouse, while already owing taxes, transfers his formerly separate property into entirety status, the government can pursue the property (or its monetary equivalent) through fraudulent conveyance or transferee liability theories. *E.g.*, Alonzo v. Commissioner, 78 T.C. 577 (1982); United States v. Ream, 67-2 U.S. Tax Cas. (CCH) ¶ 9703 (M.D. 1967).

repeatedly recognized, "taxes are the life-blood of government, and their prompt and certain availability an imperious need."[34]

Of course, this fact does not mean that the IRS should win every case. When Congress has chosen not to impose tax or has chosen to forgo collection in particular circumstances, the courts must honor that choice. The other side of the coin, however, is that courts should not, through their decisions, create rules of exemption without carefully considering their impact on the government's legitimate revenue collection interests.

The bar cases are wanting in this respect. Fundamental to them is imposing on the federal government as a tax creditor the same restrictions state law imposes on ordinary creditors. But the IRS and ordinary creditors are not the same. They derive their collection rights from different sources, and the effects on society when they are unable to collect amounts owed to them are different.

United States v. Rodgers[35] is instructive in this regard. Texas law restricted the ability of private creditors to reach homestead property, and the lower courts would have applied these limits against the IRS as well.[36] The Supreme Court held to the contrary, rejecting the notion that the IRS "should not have any right, superior to that of other creditors, to disturb the settled expectations of innocent third parties."[37] It observed:

> In fact, however, the Government's right [to proceed against] 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 [the Internal Revenue Code]. Moreover, the use of the power granted by [the Code] 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."[38]

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34. Bull v. United States, 295 U.S. 247, 259 (1935); *see e.g.*, United States v. Dalm, 494 U.S. 596, 604 (1990); United States v. National Bank of Commerce, 472 U.S. 713, 733 (1985). "That collection of taxes is vital to the functioning, indeed existence, of government cannot be denied." United States v. Kimbell Foods, Inc., 440 U.S. 715, 734 (1979).

35. 461 U.S. 677 (1983). For fuller discussion of *Rodgers*, *see infra* notes 137-159 and accompanying text.

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

37. *Id.*

38. *Id.* (citing U.S. CONST. art. I, § 8, cl. 1; amend. XVI); *see also* United States v. Whiting Pools, Inc., 462 U.S. 198, 209-10 (1983) ("The enforcement provisions of the Internal Revenue Code . . . do grant to the Service powers to enforce its tax liens that are greater than those possessed by private secured creditors under state law.").

The entireties bar compromises the government's ability to "lay and collect taxes." In all cases in which the delinquent spouse's assessed liabilities exceed the sum of his separate assets, the bar—by putting that spouse's interest in entireties property off-limits to the Service—will prevent collection of assessed taxes. Although the government has not published statistics on such revenue loss, the number of the jurisdictions featuring the bar and the populous nature of some of them suggest that such loss is appreciable.[39]

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. The Supreme Court already has recognized the possibility of tax abuse in the joint ownership context. In *United States v. National Bank of Commerce*,[40] the Court upheld the Service's ability to levy on joint bank accounts even though only one of the three codepositors owed taxes and it was unclear what percentage of the sums in the accounts he owned. The Court supported its holding in part by noting that, were joint accounts beyond the Service's reach, "it would be easy for a delinquent taxpayer to evade, or at least defer, his obligation by placing his funds in joint bank accounts."[41]

The entireties bar creates a similar highway for abuse. Take an illustration involving the income tax. The spouses transfer all their assets—including formerly separately owned assets—into entireties ownership. Then, in subsequent years, they file separate income tax returns. The higher-income spouse takes aggressive return positions greatly reducing her reported tax due, and the lower-income spouse reports and pays his correct tax liability. The money saved by the higher-income spouse is used to finance personal consumption, not to acquire any assets capable of sale. Any costs of or improvements to entireties property (such as home mortgage expenses) are met out of income from entireties property (such as interest on entireties bank accounts or dividends on entireties stock)[42] or out of any separate resources of the lower-income spouse.

Through such an arrangement, the spouses would have, in effect, used the entireties bar as audit insurance. If the Service audits the higher-income spouse and challenges the aggressive positions, the Service would do itself

39. *See supra* note 17 and accompanying text. Even in the 1950s, the issue was significant. *See* I.R.S. Action on Dec. CC-1957-406 (June 19, 1957) ("the question of tenancy by the entireties versus the Federal tax lien is one of frequent occurrence and considerable importance [in the bar states]"). If anything, the issue is of greater importance today.

40. 472 U.S. 713 (1985).

41. *Id.* at 733. For fuller discussion of *National Bank of Commerce*, *see infra* notes 159-178 and accompanying text.

42. In most entireties jurisdictions, personal property as well as real property can be held by the entireties. *See supra* note 11.

little good—deficiency assessments against that spouse would be uncollectible. That spouse has no separate assets of her own against which collection could be effected, and the Service—having an assessment against one spouse only—could not proceed against the entireties property. At the cost of perhaps slightly higher tax paid by the lower-income spouse,[43] the couple would have rendered the aggressive, higher-income spouse audit-proof.[44]

Thus, the entireties bar improperly equates the IRS to private creditors; it decreases the government's ability to collect assessed but unpaid taxes; and it creates an avenue for tax abuse, a scheme by which to obtain "audit insurance" for tax underreporting.

These concerns may have been somewhat less pressing when the key bar cases were decided in the 1950s than they are now. For example, in 1956 (the first year for which the federal government used unified budget concepts) the federal budget had a surplus of more than $4 billion, while in 1993 the federal budget had a deficit of more than $254 billion.[45] The IRS's inability to collect assessed taxes is part of the problem.[46] Thus, the fact that the

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43. Married-filing-separately rates are higher than married-filing-jointly rates. *Compare* I.R.C. § 1(a) (1994) *with* I.R.C. § 1(d) (1994). This would be largely irrelevant to the higher-income spouse if she can sufficiently slash her taxes through aggressive positions, and it would matter little to the other spouse if his taxable income is low.

44. The Service might attempt to assert that the lower-income spouse is liable as a transferee for the higher-income spouse's deficiencies. *See* I.R.C. § 6901 (1994). Were the Service successful, it would have assessments against both the spouses, enabling it to proceed against the entireties property. *See supra* note 33.

However, it is far from certain that the Service would be successful. Transfers prior to the tax year of the deficiency commonly cannot give rise to transferee liability. *See, e.g.*, Papineau v. Commissioner, 28 T.C. 54, 58 (1957). Moreover, if the other spouse also transferred separate assets into entireties form, there might be consideration for the higher-income spouse's transfers, obviating transferee liability. *See, e.g.*, Gumm v. Commissioner, 93 T.C. 475, 480 (1989), *aff'd without opinion*, 933 F.2d 1014 (9th Cir. 1991) (absence or inadequacy of consideration is an element of transferee liability).

45. U.S. DEPT. OF TREASURY, FINANCIAL MANAGEMENT SERV., 1995 INFORMATION PLEASE ALMANAC 73.

46. According to the General Accounting Office, between 1990 and 1994, the gross inventory of tax debt grew from $87 billion to $156 billion (nearly an 80% increase) while annual collections of delinquent taxes dropped from $25.5 billion to $23.5 billion (an 8% decrease). The GAO concluded: "IRS' poor performance in resolving tens of billions of dollars in outstanding tax delinquencies has not only lessened the revenues immediately available to support government operations but could also jeopardize future taxpayer compliance by leaving the impression that IRS is neither fair nor serious about collecting overdue taxes." GAO/HR 95-6 (Feb. 23, 1995), 1995 WL 234941, at *7 (F.D.C.H.).

entireties bar compromises the revenue interest of the federal government may have been tolerable when the original bar cases were decided, but it is hard to defend retaining the bar in our current period of budgetary stress.[47]

III. IMPROPER BALANCING OF FAIRNESS CONSIDERATIONS

Tax cases are principally occasions of statutory construction, and considerations of fairness should not override the intent of Congress.[48] Nonetheless, equity often matters, whether as a stated aid in the construction process or as a tacit element in the judge's thinking.

A fairness concern helps to explain the bar cases. The thought that allowing the tax lien to attach to entireties property would unduly harm the nondelinquent spouse was seen as a possible due process concern or, at least, as a policy reason to construe the statute as not requiring lien attachment.[49]

This line of thought, while understandable, is misguided: (1) the entireties bar is not necessary to achieve fairness for non-delinquent spouses and (2) the bar creates its own kind of unfairness by its unequal treatment of taxpayers.

A. Fairness to Nondelinquent Spouses

For three reasons, no severe harm to nondelinquent spouses would obtain upon the overthrow of the entireties bar. First, the majority of married couples in this country do not hold their property in entireties bar form—either because their states do not recognize entireties estates at all or because the spouses choose to use some other form of property ownership. In those situations, even when only one spouse owes taxes, the federal tax lien

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To improve the IRS's ability to collect assessed but unpaid taxes, in 1990 Congress extended the statute of limitations on collection from six years to ten years. Pub. L. No. 101-508, § 11317(a), 104 Stat. 1388-458 (amending I.R.C. § 6502(a)). Of course, that change will not materially increase collection in entireties situations as long as the bar remains in effect.

47. While it is too early to know what will emerge from the tax-reform fever currently sweeping Capitol Hill, one leading proposal, Representative Armey's, would abolish federal income tax withholding on wages. H.R. 4585, § 103, 103d Cong., 2d Sess. (1994). Were such a change ultimately enacted, even greater fiscal importance would attach to the IRS's being able to effectively collect taxes due and to such collection not being hindered by limitations like the entireties bar.

48. *See, e.g.*, United States v. Williams, 115 S. Ct. 1611, 1623-24 (1995) (Rehnquist, C.J., dissenting); Estate of Dupree v. United States 391 F.2d 753, 758 (5th Cir. 1968); Carlton v. United States, 385 F.2d 238, 243 (5th Cir. 1967).

49. *See, e.g.*, Raffaele v. Granger, 196 F.2d 620, 623 (3d Cir. 1952).

does attach to the jointly owned property, at least to the extent of the delinquent spouse's interest therein.[50]

Thus, abolishing the entireties bar would create no new disability and no unique hardship on nondelinquent spouses. It only would put nondelinquent spouses once protected by the bar in the same position that nondelinquent spouses not under bar protection always have been in. Parity with the rest of the nation cannot be considered undue hardship.

Second, allowing the tax lien to attach to entireties interests would not, by itself, severely prejudice nondebtor spouses. The real impact on such spouses would come, not from mere attachment of the lien, but from sale of the property. Typically, such sale would be pursuant to § 7403. Yet, two aspects of § 7403 protect nondelinquent spouses from serious harm:[51]

(1) Section 7403 provides that a district court, on application from the Service, "may" direct sale of the property, not that it must do so.[52] This language permits the district court to exercise a degree of equitable discretion to deny sale when the government's revenue interest is clearly outweighed by hardship to the nondebtor co-owner.[53]

(2) If sale is ordered by the district court, it will be followed by division of the net proceeds among the co-owners in proportion to their respective interests in the property. Through this mechanism, the nondebtor owner would obtain the cash equivalent of his interest in the property. While less than complete salvation,[54] such compensation defeats any due process objections.[55]

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50. *See infra* note 60 and accompanying text.

51. *See* United States v. Rodgers, 461 U.S. 677, 699 (1983) ("§ 7403 is punctilious in protecting the vested rights of third parties caught in the Government's collection effort, and in ensuring that the Government not receive out of the proceeds of the sale any more than that to which it is properly entitled").

52. I.R.C. § 7403(c) (1994).

53. *Rodgers*, 461 U.S. at 705-11. In practice, some courts have chosen to exercise this discretion adversely to the IRS. *See, e.g.*, Harris v. United States, 764 F.2d 1126, 1129 (5th Cir. 1985); United States v. Pilla, 711 F.2d 94, 95-96 (8th Cir. 1983); United States v. Jones, 877 F. Supp. 907, 917-20 (D.N.J. 1995); United States v. Jensen, 785 F. Supp. 922, 924-25 (D. Utah 1992).

54. The non-delinquent owner may prefer to hold his or her interest in a form other than its equivalent in cash. *See Rodgers*, 461 U.S. at 704 ("we are not blind to the fact that in practical terms financial compensation may not always be a completely adequate substitute for a roof over one's head"). This concern, of course, is at its strongest when the property at stake is a residence. Most entireties jurisdictions, however, permit personalty to be held by the entireties too. *See supra* note 11. Spousal and family protection concerns are much weaker as to, say, shares of IBM stock held in an entireties estate.

55. *E.g.*, *Rodgers*, 461 U.S. at 697-99; United States v. Overman, 424 F.2d 1142, 1146 (9th Cir. 1970). There is a similar mechanism in bankruptcy. The

Third, if the protections of § 7403 are deemed insufficient, additional safeguards can be crafted. As discussed in Part V.B.1, one of the virtues of legislative abolition of the entireties bar would be flexibility.[56] If it wishes, Congress could provide that, although the tax lien attaches to entireties interests, the Service could not seek § 7403 sale while the property remains in entireties form. Such a moratorium could be applied to residences held by the entireties, or, at the extreme, to all types of entireties property. Such an approach, though not recommended by this article, would, at least, be an improvement over the status quo and yet would be highly solicitous toward nondebtor spouses.[57]

B. Fairness to Other Taxpayers

An important objective of the Internal Revenue Code is that similarly situated taxpayers be treated similarly. Our tax system is "designed to ensure as far as possible that similarly situated taxpayers pay the same tax."[58] Inequalities in administering the tax laws and discriminatory distinctions should be avoided.[59]

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bankruptcy estate includes entireties interests of the debtor unless specifically excluded. *See infra* notes 107-09 and accompanying text. The trustee may, under stated conditions, sell the underlying property held by the entireties estate, paying over to the nondebtor spouse the value of his or her interest in the property and retaining the remainder in the bankruptcy estate. *See* 11 U.S.C. § 363(f), (h) (1994). This procedure—generally comparable to § 7403 sale and distribution—is viewed as adequately protecting the interest of the nondebtor spouse. *See, e.g., In re* Koehler, 6 B.R. 203, 204-05 (Bankr. M.D. Fla. 1980); H.R. REP. NO. 595, 95th Cong., 2d Sess. 177 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6137-38.

56. *See infra* notes 206-216 and accompanying text.

57. *See infra* notes 208-211 and accompanying text.

58. Thor Power Tool Co. v. Commissioner, 439 U.S. 522, 544 (1979).

59. *See, e.g.,* Commissioner v. Sunnen, 333 U.S. 591, 599 (1948); Burnet v. Harmel, 287 U.S. 103, 110 (1932); Ogiony v. Commissioner, 617 F.2d 14, 18 (2d Cir. 1980) (Oakes, J., concurring); Bauman v. United States, 106 F. Supp. 384, 388 (E.D. Mo. 1952).

Admittedly, our tax system is not unswerving in its adherence to uniformity or, in the language of economics, horizontal equity. For instance, the Supreme Court rejected uniformity arguments in permitting taxpayers in community property states to split their incomes when taxpayers in separate property states could not, Poe v. Seaborn, 282 U.S. 101, 117-18 (1930), and, even today, married taxpayers may experience a "marriage penalty" or a "marriage bonus" compared to single taxpayers, *compare* I.R.C. § 1(a) (1994) (married-filing-jointly income tax rates) *with* I.R.C. § 1(c) (1994) (income tax rates for unmarried individuals).

However, pressures for uniform treatment are strong. Responding to such pressures, Congress largely reversed the effects of Poe v. Seaborn in legislation in

The entireties bar disserves the goal of uniform application of the revenue laws. Taxpayers who happen to be entireties cotenants in bar states are given a privileged position relative to all other taxpayers in the country. Entireties interests in bar states are the only type of joint ownership or joint property interest exempt from the federal tax lien. The lien attaches to a tax delinquent's interest in all other types of joint property.[60]

Thus, at least two types of inequalities result from the entireties bar. First, most states either do not recognize entireties estates at all or permit creditors to proceed against entireties property to satisfy separate debts. The tax law treats entireties cotenants in bar states preferentially compared to all joint tenants in non-bar states. Second, even in bar states, entireties ownership typically is optional with spouses, not mandatory. Within the bar jurisdictions, the tax law treats spouses who choose entireties estates preferentially compared to other spouses who choose to hold their property in other forms of ownership.

Consider an illustration. Bob and Ray both have outstanding federal tax assessments against them of $100,000; there are no outstanding assessments against their wives. Bob resides in Georgia, a non-bar state, in a modest home, which he and his wife own as joint tenants with right of survivorship. Bob has no other assets. Ray lives in Florida, a bar state. In addition to their home, Ray and his wife own a $2,000,000 ocean-front vacation house. Ray and his wife own both properties by the entireties.

Because of the bar, Bob and Ray will be treated very differently by our tax system. The tax lien will attach to Bob's interest in his home, and the IRS may take enforced collection action against it, through either § 6331 levy and sale of Bob's interest or § 7403 sale of the entire home with consequent division of proceeds.

1948 and 1969. *See* WILLIAM D. ANDREWS, BASIC FEDERAL INCOME TAXATION 892-93 (4th ed. 1991). Proposals to address the rate disparities based on marital status are regularly made. For example, a credit to partially alleviate the "marriage penalty" is included in the tax proposals in the House Republicans' "Contract with America." *See* JOINT COMMITTEE ON TAXATION, 104TH CONG., 1ST SESS., DESCRIPTION OF THE "CONTRACT WITH AMERICA TAX RELIEF ACT OF 1995" (JCX-9-95) (Mar. 9, 1995).

Thus, despite deviations, the policy of horizontal equity is one of the driving principles of our tax system. *See, e.g.*, *Interview with C. Eugene Steuerle*, ABA SEC. OF TAX. NEWSLETTER, Summer 1995 at 12.

60. *See, e.g.*, Tillery v. Parks, 630 F.2d 775, 776-77 (10th Cir. 1980) (homestead property); United States v. Kocher, 468 F.2d 503, 507 (2d Cir. 1972) (tenancy in common); United States v. Overman, 424 F.2d 1142, 1145 (9th Cir. 1970) (community property); Washington v. United States, 402 F.2d 3, 7 (4th Cir. 1968) (property subject to dower interest); United States v. Trilling, 328 F.2d 699, 702-03 (7th Cir. 1964) (joint tenancy). *See generally* MICHAEL SALTZMAN, IRS PRACTICE & PROCEDURE 14-43 to 14-46 (2d ed. 1991).

In contrast, as long as the bar exists, the lien will not attach to, and the IRS could not act against, either Ray's house or Ray's vacation home. Ray may continue to lie on the beach, fish in the surf, tan in the solarium, sip mint juleps on the veranda, throw parties downstairs, and slumber upstairs on his vacation property as much as he likes and as long as he likes without ever paying his tax bill.

Bob loses his home, the taxpayers of the United States have to find another $100,000 to make up for what Ray did not pay, and Ray lives and vacations in luxury because he is protected by the entireties bar. The entireties bar fosters untoward differences in how citizens are treated by our tax system.

A defender of the entireties bar would argue that entireties ownership is different from other types of co-ownership, that the disparities of treatment are not discriminatory but merely recognition of the difference. That asserted difference would be that, unlike tenancies in common for instance, tenancies by the entireties can be partitioned only by the mutual consent of both cotenants.

That defense is inadequate. A cotenant's unilateral ability to partition the property is not a prerequisite to attachment of the tax lien. The federal tax lien attaches to all other types of undivided property interests despite the interest-holder's inability unilaterally to partition the property.[61]

Thus, what purportedly makes entireties estates different should not matter for federal tax lien purposes. There being no *relevant* difference in the ownership forms, there is no warrant for the preferential treatment accorded some taxpayers by virtue of the entireties bar.

In summary, the entireties bar, though partly motivated by considerations of fairness, actually renders our tax system less fair. The bar is not necessary to protect the legitimate interests of nondelinquent spouses, and it results in taxpayers being treated differently for no compelling reason.

Again, as seen with respect to revenue considerations, the failure of the early bar cases to properly balance the fairness considerations is perhaps more understandable than the comparable failure of subsequent bar cases. Although the main elements of § 7403—including the language that the district court "may" decree sale, not must decree sale—have been in the law since 1868,[62] it was not until 1983 that it was settled that district courts have at least some equitable discretion to deny sale of co-owned property when the resultant harm to the nondebtor co-owner would exceed the resultant benefit to the government and that the § 7403 compensation mechanism overcomes any due process concerns.[63] Thus, a fairness argument in favor of the entireties bar,

61. *See infra* notes 111-115 and accompanying text.

62. *See* Act of July 20, 1868, ch. 186, § 106, 15 Stat. 167.

63. *See supra* notes 51-55 and accompanying text.

while somewhat plausible when the foundational bar cases were decided, is misplaced today.

IV. MISUNDERSTANDING OF THE PROPER ROLE OF STATE LAW IN FEDERAL TAX LIEN ANALYSIS

The revenue and fairness considerations discussed in Parts II and III are, of course, policy arguments against the entireties bar. The bar fails on doctrinal grounds as well: It is irreconcilable with the basic rule governing federal tax collection issues.

The collection provisions of the Internal Revenue Code do not create property rights, but they do attach consequences to the rights created under state law. Those consequences are matters of federal law.[64]

This relationship has led to a two-part formulation governing federal tax collection issues: First, state law is consulted to ascertain what interests the taxpayer has; second, "'once it has been determined that state law creates sufficient interests in the [taxpayer] to satisfy the requirements of [the statute], state law is inoperative,' and the tax consequences thenceforth are dictated by federal law."[65]

In varying language, the Supreme Court has invoked this rule for generations.[66] By describing the proper relation between federal law and state law, this formulation defines the requirements of federalism in the tax collection area.

Typically, the bar decisions have painted with broad brush and have not attempted to delineate precisely how the bar relates to the two-part formulation. In fact, as shown below, the bar cannot be justified under either part. Thus, the bar conflicts with the fundamental rule governing federal tax collection.

A. Second Part of the Formulation

This section begins with the second portion of the controlling rule because it requires no extended discussion. As noted above, once the

64. *E.g.*, United States v. Rodgers, 461 U.S. 677, 683 (1983); United States v. Bess, 357 U.S. 51, 55 (1958).

65. United States v. National Bank of Commerce, 472 U.S. 713, 722 (1985) (quoting United States v. Bess, 357 U.S. at 56-57).

66. *See, e.g.*, United States v. Mitchell, 403 U.S. 190, 197 (1971) (calling this rule "long established"); United States v. Union Central Life Ins. Co., 368 U.S. 291, 293-95 (1961); Aquilino v. United States, 363 U.S. 509, 513 (1960); Helvering v. Stuart, 317 U.S. 154, 162 (1942); Morgan v. Commissioner, 309 U.S. 78, 82 (1940); Burnet v. Harmel, 287 U.S. 103, 110 (1932).

delinquent is found to have a property interest, the tax collection consequences that apply to that interest are matters of federal law. As to lien attachment, federal law is clear. Under § 6321, the federal tax lien attaches to all of the delinquent's property rights.[67]

State laws preventing separate creditors from reaching entireties property cannot modify this rule of attachment. Consistent with the Supremacy Clause,[68] it is settled that state debt collection rules do not limit the federal tax lien[69] and that state exemptions and immunities do not shield taxpayers from the federal tax lien.[70] Examples abound. For instance, benefits under a city retirement fund and disability payments under an insurance contract, both exempt under state law from process of creditors, can be reached by the IRS to satisfy the beneficiary's unpaid taxes.[71]

Moreover, although some federal laws expressly or impliedly incorporate state debtor-creditor rules,[72] the Internal Revenue Code does not. Section 6321 provides that the federal tax lien attaches to "all property or rights to property" of the tax debtor.[73] Certain enumerated assets are made exempt from levy—though not from lien[74]—by § 6334(a).[75] However, entireties

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67. I.R.C. § 6321 (1994).

68. U.S. CONST. art. VI, cl. 2. The Supremacy Clause invalidates state rules inconsistent with federal law whether those rules protect third parties or protect the debtor. "[T]he Supremacy Clause—which provides the underpinning for the Federal Government's right to sweep aside state-created exemptions in the first place—is as potent in its application to innocent by-standers as in its application to delinquent debtors." United States v. Rodgers, 461 U.S. 677, 701 (1983) (footnote omitted).

69. *E.g.*, United States v. Union Central Life Ins. Co., 368 U.S. 291, 293-95 (1961) (federal tax lien is not subject, even as against good-faith purchaser, to state filing requirements); United States v. Acri, 348 U.S. 211, 213 (1955) (state priority rules do not apply to federal tax collection); United States v. City of New Britian, 347 U.S. 81, 86 (1954) (same); United States v. Security Trust & Savings Bank, 340 U.S. 47, 50-51 (1950) (whether liens competing with the federal tax lien are choate is determined under federal, not state, law).

70. *E.g.*, United States v. National Bank of Commerce, 472 U.S. 713, 722-23 (1985); United States v. Mitchell, 403 U.S. 190, 204-05 (1971); Treas. Reg. § 301.6334-1(c).

71. Fried v. New York Life Ins. Co., 241 F.2d 504, 505-07 (2d Cir. 1957), *cert. denied*, 354 U.S. 922 (1957) (disability payments); United States v. Wagner, 235 F. Supp. 854, 855 (S.D.N.Y. 1964) (retirement benefits).

72. *See, e.g.*, 11 U.S.C. § 522(b)(2)(A), (B) (1994) (expressly incorporating such rules into the Bankruptcy Code upon election of state); United States v. 15621 S.W. 2d Ave., 894 F.2d 1511, 1517 (11th Cir. 1990) (such rules are impliedly incorporated into federal forfeiture law).

73. I.R.C. § 6321 (1994).

74. *See In re* Voelker, 42 F.3d 1050, 1051 (7th Cir. 1994); WILLIAM T. PLUMB, JR., FEDERAL TAX LIENS 20-21 (3d ed. 1972).

interests are not within this enumeration, and § 6334(c) provides: "Notwithstanding any other law of the United States . . . , no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a)."[76] Section 6334(c) "is specific and it is clear and there is no room in it for automatic exemption of property that happens to be exempt from state levy under state laws."[77]

So, the second portion of the rule controlling federal tax collection issues adverts exclusively to federal law. Federal law provides for attachment of the tax lien to all property interests; it establishes an exclusive enumeration of exempt property; and entireties interests are not within this enumeration. State exemptions and immunities shielding entireties property neither override the federal rules nor are incorporated into them.[78] The entireties bar is not justified under the second portion of the controlling rule.

B. *First Part of the Formulation*

In light of the foregoing, the entireties bar can be defended, if at all, only if it fits within the first part of the controlling formulation, *i.e.*, only if tax-delinquent spouses do not have property interests as to assets held by the entireties.[79] However, that case cannot be made.

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75. I.R.C. § 6334(a) (1994).

76. I.R.C. § 6334(c) (1994).

77. United States v. Mitchell, 403 U.S. 190, 205 (1971); *see also* United States v. Rodgers, 461 U.S. 677, 700 (1983) (it is "clearly implicit" in § 6334(c) that state law cannot create an exemption not found in the Code); Treas. Reg. § 301.6334-1(c).

78. An early case argued that the bar is not an exemption for tax lien purposes. Shaw v. United States, 94 F. Supp. 245, 246 (W.D. Mich. 1939) ("This immunity is not an exemption but arises from the peculiar nature of the [entireties] estate.") *Shaw*'s discussion of this point is lamentably terse, and subsequent decisions have not expanded on it. In any event, the Supreme Court rejected what appears to be a similar argument in the context of homestead interests. United States v. Rodgers, 461 U.S. 677, 700-02 (1983) (rejecting the circuit court's view that state law limitations on the ability of creditors to reach homestead property should be applied against the IRS because the nature of homestead interests is not merely an exemption but also a property right).

79. The first part of the controlling formulation actually involves two inquiries. Initially, it is to necessary to ascertain what powers or "sticks" as to property the taxpayer has; this inquiry is a matter of state law. Thereafter, determining whether such powers or sticks rise to the level of being a property right is a matter of *federal* law. *E.g.*, Glass City Bank v. United States, 326 U.S. 265, 268 (1945) (dictum); United States v. Citizens & Southern Nat'l Bank, 538 F.2d 1101, 1105 (5th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977); Fidelity & Deposit Co. of Maryland v. New York City Hous. Auth., 241 F.2d 142, 144-45 (2d Cir. 1957); Edmond N. Cahn, *Local Law*

In its original, medieval conception, formal legal title to entireties property was thought to repose in neither the wife nor the husband, but instead in a fictive, metaphysical entity: the marital union.[80] Were this view taken seriously now, the federal tax lien arguably could not attach to entireties property as the debtor spouse would have no interest in it.

However, the dead hand of historical formalism should not be allowed to throttle modern tax lien law. Even at the purely formal level, the medieval notion that the spouses, in their personal capacities, do not own entireties property has eroded. "No interest" language occasionally still appears. However, especially since passage of the Married Women's Property Acts,[81] it is far more common for courts today—even in bar states—to acknowledge that ownership of entireties property is personal with the spouses, not vested in some fictive entity apart from them. Thus, the cases now usually refer to "both" spouses or "each" spouse owning entireties property.[82] Even at the purely formal level, therefore, it is too late in the day to assert that neither spouse has an interest in property held by the entireties.

But there is a far more fundamental point. Whether entireties interests are property interests should depend on substance—the actual burdens, benefits, and command each spouse has as to property held in entireties form—not on the mere formality of who is designated by local law as the legal "owner" of the property. Once the inquiry is lodged, as it must be, at the level of substance, it is clear that both spouses have property interests.

1. Substance over formality

It is long settled that federal tax law adverts to substance, not form. "'Taxation should move in an atmosphere of practical realities rather than amid the intricate and wooden concepts of local property law.'"[83] This

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in Federal Taxation, 52 YALE L.J. 799, 816 (1943).

80. *E.g.*, 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 182 (5th ed. 1773).

81. *See* text accompanying *supra* note 13.

82. *See, e.g.*, Lapp v. United States, 316 F. Supp. 386, 389 (S.D. Fla. 1970) ("Each [spouse] owned an undivided half interest in the whole."); Wife (L.R.) v. Husband (N.G.), 406 A.2d 34, 35 (Del. 1979) ("the wife had legal and equitable title to an undivided interest in each [tenancy-by-the-entireties] asset"); Quick v. Leatherman, 96 So. 2d 136, 138 (Fla. 1957) ("Each [spouse] owns and controls the whole."); *cf.* Mesa Petroleum Co. v. Coniglio, 787 F.2d 1484, 1488-89 (11th Cir. 1986) (when referring to a wife's interest in an entireties estate, repeatedly speaking of "her property interests" and "her entirety interests"), *cert. denied*, 479 U.S. 1031 (1987).

83. Kohn v. Commissioner, 197 F.2d 480, 482 (2d Cir. 1952) (quoting Randolph E. Paul, *The Effect on Federal Taxation of Local Rules of Property*, SELECTED

principle has been repeatedly emphasized by the Supreme Court and lower federal courts.[84] Thus, ownership for federal tax purposes depends on "command over property or enjoyment of its economic benefit," rather than on formalities of title under local law.[85]

The predominance of substance over state-created labels and formalities is demonstrated by the fact that the federal tax lien attaches to economic rights and interests even if the applicable state law does not classify them as property interests. For example, in *United States v. National Bank of Commerce*,[86] the right to withdraw money from a bank account was not called a property right by Arkansas law but nonetheless was held to be a sufficient property interest for federal tax collection purposes.[87]

Also, in several contexts, states grant persons licenses to operate certain kinds of businesses but state law expressly provides that these licenses are not "property," but only "privileges." Because federal tax law looks through state-created labels and adverts to the actualities of the economic benefit conferred, however, such "privileges" are considered "property or rights to property" for § 6321 purposes and the federal tax lien attaches to them.[88]

In emphasizing not labels but rights to direct or prevent particular uses of assets, the substance-based approach of the tax law fits well with our modern understanding of property. Property law has long since moved past the simplistic identification of "property" as some tangible, physical thing. Now, the familiar metaphor is that "property" is a "bundle of sticks," each stick constituting a right to do something or to prevent something from being done. In a leading gift tax case, the Supreme Court instructed: "'Property'

STUDIES IN FEDERAL TAXATION 1, 21 (2d Ser. 1938)).

84. *E.g.*, Commissioner v. Sunnen, 333 U.S. 591, 604-05 (1948); Corliss v. Bowers, 281 U.S. 376, 378 (1930) (Holmes, J., writing for a unanimous Court); *In re* Terwilliger's Catering Plus, Inc., 911 F.2d 1168, 1172 (6th Cir. 1990) (A state "cannot thwart the operation of the Tax Code by classifying the interests it has created as something other than property rights."), *cert. denied sub nom.*, Ohio Dep't of Revenue v. IRS, 501 U.S. 1212 (1991); Danenberg v. Commissioner, 73 T.C. 370, 390 (1979).

85. Speca v. Commissioner, 630 F.2d 554, 557 (7th Cir. 1980); *see, e.g.*, Cates v. Commissioner, 716 F.2d 1387, 1388-90 (11th Cir. 1983); Boykin v. Commissioner, 344 F.2d 889, 891 (5th Cir. 1965); Commissioner v. Segall, 114 F.2d 706, 709-10 (6th Cir. 1940), *cert. denied*, 313 U.S. 562 (1941).

86. 472 U.S. 713 (1985).

87. *See infra* notes 162-63 and accompanying text.

88. *E.g.*, United States v. Battley, 969 F.2d 806, 811 (9th Cir. 1992); *In re* Terwillinger's Catering Plus, Inc., 911 F.2d 1168 (6th Cir. 1990), *cert. denied sub nom.*, Ohio Dep't of Taxation v. IRS, 501 U.S. 1212 (1991); 21 West Lancaster Corp. v. Main Line Restaurant, Inc., 790 F.2d 354 (3d Cir. 1986); JFWIRS, Ltd. v. United States, 607 F. Supp. 566, 568-70 (M.D. Pa. 1985); Note, *Property Subject to the Federal Tax Lien*, 77 HARV. L. REV. 1485, 1487 (1964).

is more than just the physical thing—the land, the bricks, the mortar—it is also the sum of all the rights and powers incident to ownership of the physical thing. It is the tangible and the intangible. Property is composed of constituent elements."[89]

Thus, the tax law and modern conceptions of property dance to the same beat: Whether an interest constitutes "property" depends, not on labels, but on the actual benefits, burdens, and powers which the interest-holder possesses.[90]

2. Substantive analysis of entireties interests

When the discussion is moved from the plane of legal fictions to the plane of substance, it cannot seriously be denied that each spouse's entireties interest constitutes "property or rights to property." Each spouse has significant affirmative rights, veto rights, and contingent rights as to the use to which the underlying physical property is put. For instance, in various bar states:

(1) Each spouse has the absolute right to occupy and use all the property held by the entireties estate.[91] This present right of occupancy and use, by itself, suffices to establish entireties interests as property rights.[92]

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89. Dickman v. Commissioner, 465 U.S. 330, 336 (1984) (quoting Passailaigue v. United States, 224 F. Supp. 682, 686 (M.D. Ga. 1963)); *see also* Randall v. H. Nakashima & Co., 542 F.2d 270, 271, 277-78 (5th Cir. 1976) (in holding that the federal tax lien attached to rights under an executory contract, criticizing viewing property "as though it were a metaphysical problem, as though 'legal title' were some noumenal quality" and stating: "we recognize that property is an expanding concept .... 'Property' is not to be confined in a juridical straitjacket.").

90. The Supreme Court already has applied such a substance-based approach to taxation of entireties interests in another context. The gross estate on which the federal estate tax is imposed has long included the decedent's interest in any property owned by the entireties. *See* I.R.C. § 2040(b) (1994). In the course of challenging a predecessor of § 2040, a taxpayer relied on another fiction associated with the entireties form. The taxpayer argued that, since each entireties spouse is deemed to own all of the property from the beginning of the entireties estate, nothing passed to the surviving spouse as a result of the decedent's death. The Court rejected this argument, stating: "The power of taxation is . . . not to be restricted by mere legal fictions. Whether that power has been properly exercised in the present instance must be determined by the actual results brought about by the death, rather than by a consideration of the artificial rules which delimit the title, rights, and powers of tenants by the entirety at common law." Tyler v. United States, 281 U.S. 497, 503 (1930).

91. *E.g.*, Yarde v. Yarde, 71 N.E.2d 625, 625 (Ind. App. 1947).

92. *See Dickman*, 465 U.S. at 336 ("We have little difficulty accepting the theory that the use of valuable property . . . is itself a protectible property interest.").

(2) Each spouse has the right to share equally in any income produced by the entireties property and, if the property is sold, to share equally in the proceeds of sale.[93] If the other spouse withholds a spouse's share of such income or proceeds, the aggrieved spouse has the right to sue the other spouse for an accounting.[94]

(3) If entireties property is insured and has been wrongfully destroyed by the other spouse, the nonculpable spouse has the right to recover one-half of the insurance proceeds.[95]

(4) Each spouse has the right to improve the property held by the entireties estate.[96]

(5) Each spouse has the right to bring suit against others for torts committed with respect to the property.[97]

(6) Each spouse has the right to accept payment from and to discharge obligees with respect to the property.[98]

(7) Each spouse has the right to prevent the disposition of the property, whether by sale, gift, or devise.[99]

(8) Each spouse has the right to terminate the entireties estate by agreement with her cotenant and to divide the underlying property.[100]

(9) Divorce converts a tenancy by the entireties into a tenancy in common by operation of law.[101] Thus, each spouse has the right to become a tenant in common contingent on divorce.

(10) Each spouse has a right of survivorship, the right to become fee simple owner of the property contingent on the death of the other spouse.[102]

These are many and substantial sticks in the bundle of ownership. As the courts have emphasized, "it is the substance of the state law that is relevant

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93. *E.g.*, Perry v. Perry, 341 S.E.2d 53, 58 (N.C. Ct. App. 1986), *appeal dismissed*, 357 S.E.2d 925 (N.C. 1987).

94. *E.g.*, Lacker v. Zuern, 109 So. 2d 180, 182-83 (Fla. Dist. Ct. App. 1959); Pieretti v. Seigling, 34 A.2d 286, 288 (N.J. Ch. 1943).

95. *E.g.*, Lewis v. Homeowners Ins. Co., 432 N.W.2d 334, 336 (Mich. Ct. App. 1988).

96. *E.g.*, FLA. STAT. ANN. § 713.12 (West 1994).

97. *E.g.*, Sheldon v. Waters, 168 F.2d 483, 483-84 (5th Cir. 1948).

98. *E.g.*, Gerson v. Broward County Title Co., 116 So. 2d 455, 457 (Fla. Dist. Ct. App. 1959).

99. *E.g.*, Lewis v. United States, 485 F.2d 606, 612-13 (Ct. Cl. 1973); *In re* Jeffers, 3 B.R. 49, 52-53 (N.D. Ind. 1980).

100. *E.g.*, Runco v. Ostroski, 65 A.2d 399, 400 (Pa. 1949).

101. *E.g.*, Sebold v. Sebold, 444 F.2d 864, 871 (D.C. Cir. 1971); Smith v. Smith, 107 S.E.2d 530, 534 (N.C. 1959); MICH. COMP. LAWS ANN. § 552.102 (West 1988).

102. *E.g.*, United States v. 2525 Leroy Lane, 910 F.2d 343, 350-51 (6th Cir. 1990), *cert. denied*, 499 U.S. 947 (1991).

[for lien attachment purposes] and not any labels that a state or the parties might attach to that substance."[103] Thus, it is highly germane to § 6321 that state law confers on the tax-delinquent entireties spouse the substantial "sticks" described above, but it is not germane whether state law confers the term "owner" on that spouse.

3. Analogies

Whether entireties interests are, judged by their substance, "property or rights to property" need not be considered in a vacuum. The treatment of entireties interests in several contexts outside of tax collection confirms that such interests are legally cognizable property rights. For instance:

(1) Consider the treatment for income tax purposes of income generated by entireties property. If one took seriously the idea that the property is owned by neither spouse but only by some legal entity (their marital union), the law would require that entity to file a tax return reporting that income (as trusts and corporations do)[104] or to file an information return (as partnerships do).[105] At a minimum, it would require the spouses to report the income on a joint return.

The law does not, however. Instead, it is well established that income from entireties property may be reported by the spouses on *separate* returns. If the spouses file separate returns, each of them must report one-half of the income from the entireties property.[106] It would be anomalous to say that each spouse is sufficiently connected to property to have to pay tax on income from it but is not sufficiently connected to it to have a property interest.

(2) Under the Bankruptcy Code, the bankruptcy estate includes "all legal or equitable interests of the debtor in property."[107] When only one spouse is in bankruptcy, the majority view is that this rule sweeps that spouse's interest in an entireties estate into the bankruptcy estate.[108]

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103. Keeter v. United States, 461 F.2d 714, 717 (5th Cir. 1972).

104. I.R.C. § 6012(a)(2), (4) (1994).

105. I.R.C. § 6031(a) (1994).

106. *E.g.*, Morgan v. Finnegan, 87 F. Supp. 274 (E.D. Mo. 1949), *aff'd*, 182 F.2d 649 (8th Cir. 1950); Cox v. Commissioner, T.C. Memo. 1993-326, 66 T.C.M. (CCH) 192, 194-95.

107. 11 U.S.C. § 541(a)(1) (1994).

108. *See, e.g.*, *In re* Grosslight, 757 F.2d 773, 775-76 (6th Cir. 1985); Chippenham Hosp. v. Bondurant, 716 F.2d 1057, 1058 (4th Cir. 1983); Napotnik v. Equibank & Parkvale Savings Ass'n, 679 F.2d 316, 318 (3d Cir. 1982); Greenblatt v. Ford, 638 F.2d 14 (4th Cir. 1981) (per curiam), *aff'g In re* Ford, 3 B.R. 559 (Bankr. D. Md. 1980).

Other provisions of the Bankruptcy Code may permit the debtor to subsequently exclude the entireties interest from the bankruptcy estate.[109] However, for present purposes—for ascertaining whether entirety interests should be deemed "property or rights to property"—the instructive fact is that such interests are within "legal and equitable interests . . . in property" as defined under the Bankruptcy Code.

(3) To further deter and punish illegal conduct, Congress has, in a number of statutes, supplemented traditional fines and imprisonment with property forfeitures.[110] However, Congress did not wish the fight against crime to go so far as to harm innocent co-owners of otherwise forfeitable property. One of the most frequently litigated forfeiture provisions reflects these conflicting purposes:

> The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> * * * *
>
> All real property, including any right, title, and interest . . . , which is used . . . to facilitate the commission of, a violation of this subchapter . . . except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.[111]

Considerable judicial attention has been paid in recent years to the operation of this provision when one spouse uses property held by the entireties to facilitate an illegal purpose but the other spouse is uninvolved in and ignorant of that conduct.[112] The cases in that area further suggest that entireties spouses have property interests.

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109. *See* 11 U.S.C. §§ 522(b)(2)(A), (B) (1994). These other provisions exist because Congress chose to allow elective incorporation of state exemptions into the Bankruptcy Code, an incorporation not made in the Internal Revenue Code. *See supra* notes 72-74 and accompanying text.

110. *See, e.g.*, 18 U.S.C. § 2254 (1994); 21 U.S.C. § 853, § 881 (1994).

111. 21 U.S.C. § 881(a)(7) (1994).

112. *See, e.g.*, United States v. 18755 North Bay Road, 13 F.3d 1493, 1495 (11th Cir. 1994); United States v. 2525 Leroy Lane, 972 F.2d 136, 137-38 (6th Cir. 1992) [*Leroy Lane II*]; United States v. 1500 Lincoln Ave., 949 F.2d 73, 74-78 (3d Cir. 1991). *See generally* Barbara W. Sharp, Comment, *Losing Sticks from the Bundle: Incompatibility of Tenancy by the Entireties & Drug Forfeiture Laws*, 8 B.Y.U.J. PUB. L. 197 (1993).

Were the fiction that neither spouse owns the entireties property to be applied, entireties spouses could not be considered "owners" for forfeiture purposes. Yet, none of the forfeiture cases has taken this view. Indeed, it has been held both that the spouse involved in the illegality has an interest which she forfeits to the government[113] and that the other spouse has "the requisite ownership interest" to have standing to assert the innocent-owner defense against forfeiture.[114]

For purposes of 21 U.S.C. § 881, "owner" encompasses any person with a recognizable legal or equitable interest in the property seized.[115] Thus, to hold that each spouse is an owner for forfeiture purposes is to hold that each spouse has a recognizable legal or equitable interest in entireties property.

In summary, it cannot reasonably be argued that an entireties spouse has no property interest as to entireties property. That notion has broken down as a matter of form. More importantly, both federal taxation and contemporary concepts of property advert to substantive powers, not to formalities of title, and entireties spouses have many and substantial powers over entireties property. Also, analogies from several contexts reinforce that entireties interests are property rights.

4. Nature of property interest

In light of the hopelessness of a contention that entireties cotenants have no rights in the property at all, cases as early as *Hutcherson* have maintained alternatively that the property rights possessed by entireties spouses are only undivided rights, not separate rights.[116] There are three problems with this position.

First, the characterization appears not to be true as to all bar states. It is appropriate to distinguish between the underlying asset and the entirety estate which holds the asset. Each spouse, while having only an undivided interest in the underlying asset, has a separate interest in the entirety estate.[117]

113. *E.g.*, United States v. Jimerson, 5 F.3d 1453, 1454 (11th Cir. 1993) (per curiam).

114. United States v. 717 South Woodard St., 804 F. Supp. 716, 723 (E.D. Pa. 1982).

115. Joint Explanatory Statement of Titles II & III, 124 CONG. REC. S 17647, *reprinted in* 1978 U.S.C.C.A.N. 9518, 9522.

116. *See supra* note 24 and accompanying text.

117. For example, in Florida, "[a]n estate by the entireties is held by the husband and wife as one estate, therefore such estate is not the separate property of a married woman; nor is it the property of the husband; but the interest or property rights which a married woman has in an estate by the entireties held by her and her husband during his life is *her separate property* . . . and the interest the husband has

Second, in another way, the "only an undivided interest" characterization is wrong as to all states. As to the underlying property, each spouse has two interests. Each spouse has a present right to use the property. Also, each spouse has a future, contingent right: the right to become the fee simple owner of the whole property should the other spouse die first. The present right is undivided, but the future, contingent right is separate.

Thus, each tax delinquent who is an entireties cotenant *does* have at least some separate property right: the future, contingent right.[118] It is well established that the federal tax lien attaches to contingent property interests.[119] On this ground alone, the tax lien should attach to entireties property.

Third, there is an even more fundamental point. Assume, contrary to the foregoing, that in all states entireties interests are, in all respects, undivided interests only. That fact would be irrelevant for tax lien attachment purposes under the plain language of the statute.[120]

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in such an estate is *his property*." Newman v. Equitable Life Assurance Society, 160 So. 745, 747 (Fla. 1935) (emphasis added); *see, e.g.*, DePuis v. 79th Street Hotel, Inc., 231 So. 2d 532, 535 (Fla. Dist. Ct. App.) ("a married woman's interest or property right in an estate by the entireties is *her separate property*") (emphasis added), *cert. denied*, 238 So. 2d 105 (Fla. 1970).

In Michigan, a spouse's interest in the underlying property is inchoate during the existence of the entireties estate but "each spouse's survivorship interest is distinct, cognizable, and sufficient to support attachment of a creditor's lien." Fischre v. United States, 852 F. Supp. 628, 630 (W.D. Mich. 1994).

In Pennsylvania, a tenancy by the entireties has been analogized to a corporate entity. *See* C.I.T. Corp. v. Flint, 5 A.2d 126, 128 (Pa. 1939); *see also* William Plumb, *Federal Liens & Priorities—Agenda for the Next Decade II*, 77 YALE L.J. 605, 636 & n.206 (1968). A stockholder in a corporation, of course, has no separate right in the assets owned by the corporation, but her interest in the corporation (*i.e.*, her stock) *is* her separate property.

118. Indeed, depending on the relative life expectancies of the spouses, the separate contingent right may be economically more valuable than the undivided present right. For instance, for the younger spouse of an aged person or for the healthy spouse of a terminally ill person, the foreseeable prospect of becoming sole owner of the whole property may be worth more than the present right to use the property.

119. *E.g.*, United States v. Solheim, 91-1 U.S. Tax Cas. (CCH) ¶ 50,108 (D. Neb. 1991); Bigheart Pipeline Co. v. United States, 600 F. Supp. 50, 53 (N.D. Okla. 1984), *aff'd*, 835 F.2d 776 (10th Cir. 1987); *see also* United States v. Trigg, 465 F.2d 1264, 1268-69 (8th Cir. 1972); Seaboard Surety Co. v. United States, 306 F.2d 855, 859 (9th Cir. 1962); Nevada Rock & Sand Co. v. United States, 376 F. Supp. 161 (D. Nev. 1974).

120. Although the precise role of literal language in statutory interpretation is debated, *see, e.g.*, William D. Popkin, *An 'Internal' Critique of Justice Scalia's Theory*

Section 6321 says that the tax lien attaches to "*all* property and rights to property" of the tax delinquent.[121] The statute does not say "all separate rights to property," and it does not say "all rights to property except undivided rights."

The Supreme Court has taught that § 6321 should be taken at face value. For § 6321 purposes, "all" means "all."[122] Thus, "all property and rights to property" encompasses all undivided property interests as surely as it does all separate property interests. Indeed, when addressing undivided property interests outside the entireties context, courts have held the federal tax lien to attach.[123]

The character of a property interest—separate versus undivided—certainly is germane for valuation purposes. Other things being equal, a separate interest has a higher value than an undivided interest. As to whether the tax lien attaches in the first place, however, the character of the property interest is not pertinent. What matters is whether the tax delinquent spouse has a property interest, not what the nature of that property interest is.[124]

Thus, (1) in at least some bar states, entireties cotenants have separate, present property interests; (2) in all entireties states, such cotenants have

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of Statutory Interpretation, 76 MINN. L. REV. 1133 (1992), the Supreme Court has several times observed that "[t]he plain meaning of legislation should be conclusive except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters." United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 242 (1989) (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)).

121. I.R.C. § 6321 (1994) (emphasis added).

122. *E.g.*, United States v. National Bank of Commerce, 472 U.S. 713, 720 (1985) (the language of § 6321 "reveals on its face that Congress meant to reach every interest in property that a taxpayer might have"); 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 tax."); *see also In re* Voelker, 42 F.3d 1050, 1051 (7th Cir. 1994) ("The language of [§ 6321] unambiguously shows that the federal tax lien attaches to all of the debtor's property, without exception."); Medaris v. United States, 884 F.2d 832, 833 (5th Cir. 1989).

123. *See, e.g.*, United States v. Rodgers, 461 U.S. 677, 685 (1983) (federal tax lien attaches to Texas homestead rights and Texas homestead property may be sold to satisfy the separate tax debts of one spouse despite the fact that that spouse had only an undivided interest in the homestead property); Broday v. United States, 455 F.2d 1097, 1100 (5th Cir. 1972) (IRS may levy on Texas community property to satisfy antenuptial federal tax debt of one spouse); United States v. Overman, 424 F.2d 1142, 1146-47 (9th Cir. 1970) (federal tax lien attaches to undivided Washington State community property interests).

124. *Cf.* Dickman v. Commissioner, 465 U.S. 330, 337 (1984) (for gift tax purposes, the "uncertain tenure [of a demand loan] may reduce its value, but it does not undermine its status as property").

separate, contingent property interests sufficient for tax lien attachment; and (3) in any event, the "separate versus undivided" characterization is irrelevant for § 6321 purposes.

There is a variant on the "only an undivided interest" rationale. It has sometimes been argued that the inability of either spouse unilaterally to alienate the entireties property is an attribute inherent in each spouse's property interest. In this view, the inability of the tax-delinquent spouse to convey the property to anyone but his spouse (including his inability to convey it to the IRS) is part and parcel of the property interest he possesses.[125]

But such an argument is mere logomachy. An exemption remains an exemption even when dressed up as an "attribute inherent in the property interest."

In *United States v. Rodgers*,[126] the Supreme Court held that the IRS could subject to enforced collection the homestead interest of a spouse even though the local law protections and limitations as to homestead property were comparable to such protections and limitations as to entireties property in the bar states. The Supreme Court did not hold that these protections defined the homestead spouse's rights, or that the property interests intrinsically contained and were limited by these protections.[127] The argument should have no greater play for entireties interests than for homestead interests.

Similar examples could be multiplied. For example, state law provisions restricting what beneficiaries can demand or receive from spendthrift trusts and restricting the ability of the beneficiaries' creditors to reach trust assets could, with equal facility to bar restrictions, be considered attributes inherent in the beneficiaries' interests in the trusts. Yet, the federal tax lien attaches to beneficial interests in spendthrift trusts.[128]

In summary, as a matter of substance, state law gives each spouse important powers and controls as to entireties property. Tax-delinquent entireties spouses have "property or rights to property," and the separate or

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125. *See, e.g.*, John F. Hernandez, *The Federal Tax Lien: Beyond United States v. Rodgers*, 36 FLA. L. REV. 1081, 1086 (1984) ("when state law either prohibits the tax debtor, acting alone, from selling the property, or when it prohibits a third party's interest from being affected by debts incurred solely by the tax debtor [, t]hese protections, rather than acting as mere state-created exemptions, are inherent in the state-defined property interest").

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

127. *See infra* notes 143-46 and accompanying text. To similar effect, *see* United States v. Weitzner, 61-2 U.S. Tax Cas. (CCH) ¶ 9527 (S.D. Fla. 1961), *aff'd*, 309 F.2d 45 (5th Cir. 1962), *cert. denied*, 372 U.S. 913 (1963) (Florida homestead property).

128. *E.g.*, United States v. Dallas Nat'l Bank, 152 F.2d 582, 584-85 (5th Cir. 1945); LaSalle Nat'l Bank v. United States, 636 F. Supp. 874, 877 (N.D. Ill. 1986).

undivided character of such rights is irrelevant for lien attachment purposes. Thus, the entireties bar cannot be supported under the first portion of the two-part formulation governing federal tax collection issues. Because it cannot be supported under the second portion either, the entireties bar is inconsistent with the established rule governing federal tax collection.

C. Recent Supreme Court Teaching

As suggested by the foregoing, the bar cases (1) emphasize formalities of title over realities of control and (2) misconstrue the rule relating state law to federal tax lien analysis.[129] As to the second of these errors, at least, the early bar decisions—while wrong—once again are easier to excuse than the more recent bar decisions.

Although the Supreme Court has invoked the two-part rule since the 1930s,[130] it has done so through different, and occasionally sloppy, language.[131] Moreover, in one federal tax collection decision, the Supreme Court inexplicably neglected to employ the established two-part rule at all and instead expressed concern about "the severe dislocation to local property relationships which would result from our disregarding state procedures."[132] With the Supreme Court sending ambiguous signals, it is not extraordinary that bar cases of the 1950s and 1960s were decided as they were.[133]

However, tax lien law has not been in hibernation since then. The key decisions shaping our contemporary understanding of the federal tax lien are

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129. United States v. Gurley, 415 F.2d 145 (5th Cir. 1969), illustrates both tendencies. First, the court observed that "[a]n estate by the entireties is an almost metaphysical concept," *id.* at 149, yet it analyzed the case within the framework of entireties fictions rather than with reference to actual powers and controls over the property. Second, the court stated: "in matters involving the creation and enforcement of federal tax liens the Federal Courts respect those laws of a state which establish and regulate property rights within the state," *id.* at 150, a rendition far more deferential to state law than the two-part governing formulation is.

130. *See supra* note 66.

131. For example, in one case, the Court stated: "state law controls the determination of what is included within . . . 'property or rights to property.'" Meyer v. United States, 375 U.S. 233, 236 (1963). This language could give the impression that state law does more than merely create the powers or controls over property, that it also defines whether those powers and controls should be characterized as property rights, an impression that would be mistaken. *See supra* note 69.

132. United States v. Brosnan, 363 U.S. 237, 242 (1960).

133. *See* Randall v. H. Nakashima & Co., Ltd., 542 F.2d 270, 272-73 (5th Cir. 1976) (correctly applying the two-part rule but tracing the Supreme Court's occasionally imprecise statements of it).

the Supreme Court's 1980s decisions in *United States v. Rodgers*[134] and *United States v. National Bank of Commerce.*[135] The application of the two-part formulation in *Rodgers* and *National Bank of Commerce* renders the entireties bar hard to defend.

1. *Rodgers*

Rodgers involved two consolidated cases: *United States v. Rogers* and *Ingram v. Dallas Dep't of Housing & Urban Rehabilitation.*[136] In the first case, Lucille Mitzi Bosco Rodgers and her then husband acquired a residence, which they occupied as their homestead. In 1971 and 1972, the IRS assessed more than $927,000 of wagering taxes (plus interest and penalties) against the husband, which remained unpaid as of his death in 1974. Lucille owed no taxes.[137]

After the husband's death, Lucille continued to occupy the property as her homestead, with a new husband. In 1977, the government instituted suit under § 7403 to enforce the tax lien against the homestead property.[138]

In the second case, Joerene and Donald Ingram, during their marriage, acquired a residence, which they claimed as their homestead. In 1972 and 1973, the IRS, under § 6672, assessed employment taxes against Donald only as a responsible person of a business. More than $9,000 of the assessments (plus interest) remained unpaid. In 1973, the IRS assessed $283.33 of unpaid income tax (plus interest) against Donald and Joerene jointly.[139]

In 1975, while the Ingrams were in the process of divorcing, the house on their homestead property was destroyed by fire. The insurance proceeds were deposited with the local domestic relations court. Under their property settlement agreement, the Ingrams agreed to divide the proceeds equally. Also, Donald agreed to convey his interest in the homestead property to Joerene for $1,500, to be paid from amounts realized from selling the property. Perhaps because of the federal tax liens on the property,[140] Joerene was unable to sell the property. Joerene then sued to remove the tax

134. 461 U.S. 677 (1983).

135. 472 U.S. 713 (1985).

136. United States v. Rogers [sic], 649 F.2d 1117 (5th Cir. 1981), *rev'd,* 461 U.S. 677 (1983); Ingram v. Dallas Dep't of Hous. & Urban Rehabilitation, 649 F.2d 1128 (5th Cir. 1981), *vacated,* 461 U.S. 677 (1983). The taxpayer's surname was misspelled in the caption of the first of these cases.

137. *Rodgers,* 641 U.S. at 687.

138. *Id.*

139. *Id.* at 688.

140. *Id.*

liens from the property. During the litigation and pursuant to stipulation of the parties, the property was sold and the sale proceeds put into escrow.[141]

The principal holding of the Supreme Court was that § 7403 applied, *i.e.*, that the Rodgers property could be sold under, and the Ingram escrow could be divided under, § 7403 despite the homestead status and protections afforded by local law.[142] Necessarily, this holding means that the federal tax lien attaches to homestead interests because § 7403 operates only when the tax lien is in place as to at least one of the co-owners' interests in the property.[143]

Rodgers erodes the foundations on which the bar cases rest. As described by the Supreme Court, Texas law contains a formidable set of protections for homestead property:

—With certain exceptions not here relevant, Texas homestead property is "protected from forced sale, for the payment of all debts . . . . No mortgage, trust deed, or other lien on the homestead shall ever be valid."[144]

—"[T]he owner or claimant of the property [may not], if married, sell or abandon the homestead without the consent of the other spouse."[145]

—On the death of either spouse, the homestead property "shall not be partitioned among the heirs of the deceased during the lifetime of the surviving husband or wife, or so long as the survivor may elect to use or occupy the same as a homestead."[146]

The Court concluded:

> The effect of these provisions of the Texas Constitution is to give each spouse in a marriage a separate and undivided possessory interest in the homestead, which is only lost by death or abandonment, and which may not be compromised either by the other spouse or by his or her heirs.[147]

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141. *Id.* at 689.

142. *Id.* at 690-703. Secondarily, the Court held that district courts have limited equitable discretion to refuse § 7403 sale and division, *id.* at 703-13, although it emphasized that such discretion "should be exercised rigorously and sparingly, keeping in mind the Government's paramount interest in prompt and certain collection of delinquent taxes." *Id.* at 711.

143. Section 7403(a) authorizes a civil action "to enforce the [tax] lien of the United States." I.R.C. § 7403(a) (1994). The Court noted: "As a general matter, the 'lien of the United States' referred to in § 7403(a) is that created by [I.R.C.] § 6321." *Id.* at 681.

144. *Id.* at 682 (quoting TEX. CONST. art. 16, § 50).

145. *Id.* at 684-85 (quoting TEX. CONST. art. 16, § 50).

146. *Id.* at 685 (quoting TEX. CONST. art. 16, § 52).

147. *Id.* There are two intertwined aspects here: "One [of these] is that these laws confer a mere privilege of exemption, which operates to prevent the use of the process of the court to sell certain property for the payment of debts. The other is that the homestead right is considered an estate in land vested in the person designated by

There is no meaningful difference between Texas homestead interests as described by the Supreme Court and entireties interests as described by the bar cases. Tax-delinquent Texas spouses have no greater ability to alienate homestead property than tax-delinquent entireties spouses have to alienate entireties property.

Rodgers applied the two-part rule[148] and taught that, under it, the federal tax lien attaches to homestead interests even when only one spouse owes taxes and even when local law prevents separate creditors of one spouse from reaching the property. Given the comparable protections of homestead property under the Texas Constitution and of entireties property in the bar states, the inference from *Rodgers* is that the federal tax lien should attach to entireties interests also, even in the bar states.

This inference is fortified by dicta in *Rodgers* addressing the entireties bar directly. The dissent—correctly describing an entireties interest as "a spousal property interest similar to the Texas homestead"[149]—argued that commentators[150] as well as the bar cases had taken the view that entireties property "could not be sold to enforce the tax liability of one spouse."[151] The dissent also noted that in 1954 a measure had passed the House of Representatives that would have expressly provided that the § 6321 tax lien embraces "the taxpayer's interest as tenant by the entirety" but that the Senate had not agreed to the measure.[152]

The *Rodgers* majority addressed these points in a footnote. Although these remarks were dicta, three facets of the footnote undermine the leading bar cases:

(1) In the course of its discussion, the majority said: "*if* the tenancy by the entirety cases are correct . . . . "[153] By italicizing "if," the *Rodgers* majority suggested it was not convinced that the key bar cases were correctly decided.

law." Woods v. Alvarado State Bank, 19 S.W.2d 35, 35 (Tex. 1929), *quoted by Rogers* [sic], 649 F.2d at 1126-27; *see Rodgers*, 461 U.S. at 686.

148. *Rodgers*, 461 U.S. at 683. The circuit court had acknowledged this rule as well, but incorrectly concluded that, under federal law, the tax lien does not attach to homestead interests. *See also Rogers* [sic], 649 F.2d at 1120-28.

149. *Rodgers*, 461 U.S. at 719 (Blackmun, J., dissenting).

150. Paul E. Anderson, *Federal Tax Liens—Nature & Priority*, 41 CAL. L. REV. 241, 254 (1953); Samuel O. Clark, Jr., *Federal Tax Liens & Their Enforcement*, 33 VA. L. REV. 13, 17 (1947); *see also* Plumb, *supra* note 117, at 634-41.

151. *Rodgers*, 461 U.S. at 719.

152. *Id.* at 720; *see* H.R. 8300, 83d Cong., 2d Sess. (1954).

153. *Rodgers*, 461 U.S. at 703 n.31 (emphasis in original).

(2) As noted in Part I.C, the seminal bar cases could be read as resting on any or all of several different rationales.[154] In its "*if*" discussion, the majority interpreted the bar cases as being based on the notion that an entireties spouse does not possess an independent property interest.[155] As shown above, such a rationale cannot be defended.[156] Thus, to the extent that *Rodgers* reads the bar cases as depending on that rationale and not others, *Rodgers* puts the bar cases on thin ice.

(3) The reading given by the *Rodgers* majority to the legislative events of 1954 suggests that the federal tax lien *already* attaches to entireties interests. The House bill was not an attempt to change § 6321 to extend the tax lien to interests not previously within its ambit. Instead, the bill sought merely to "*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."[157] In the Court's view, the Senate rejected the House's clarification "not necessarily because it disagreed with it, but more likely because it found it superfluous."[158]

If amending § 6321 to state that the federal tax lien attaches to tenancy-by-the-entireties interests would be "superfluous," then § 6321 already encompasses such interests. Thus, the *Rodgers* majority's reading of the legislative history suggests that the entireties bar is inconsistent with the intent of Congress.

In summary, *Rodgers* confirms that, under the controlling two-part rule, the federal tax lien reaches property interests not meaningfully distinguishable

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154. *See supra* text accompanying notes 17-33.

155. The basic holding of the [bar cases] was, not merely that interests in a tenancy by the entirety could not be sold to satisfy a tax debt of one spouse, but that, as a result of the peculiar legal fiction governing tenancies by the entirety in some States, no tax lien could attach in the first place because neither spouse possessed an independent interest in the property. . . . Thus, *if* the tenancy by the entirety cases are correct, they do no more than illustrate the proposition that, in the tax enforcement context, federal law governs the consequences that attach to property interests, but state law governs whether any property interests exist in the first place.

Rodgers, 461 U.S. at 703 n.31 (emphasis in original).

156. *See also infra* notes 161-169 and accompanying text (showing that this rationale is inconsistent with the Supreme Court's teaching in *National Bank of Commerce*).

157. *Rodgers*, 461 U.S. at 703 n.31 (quoting H.R. REP. NO. 1337, 83d Cong., 2d Sess. A406 (1954), *reprinted in* 1954 U.S.C.C.A.N. 4017, 4554) (emphasis added by the Court).

158. *Id.*; *see* S. REP. NO. 1622, 83d Cong., 2d Sess. 575 (1954) ("It is not clear what change in existing law would be made by the [House's provision]. The deletion of the phrase is intended to continue the existing law.").

from entireties interests. Moreover, its discussion of the foundational bar cases and the legislative history further suggests that the tax lien does attach to entireties interests.

2. *National Bank of Commerce*

Two years after it decided *Rodgers*, the Supreme Court handed down its decision in *United States v. National Bank of Commerce*.[159] The IRS had assessed additional income taxes (plus interest and penalties) against Roy Reeves, and part of the assessments remained unpaid.

Roy, his wife (Neva), and his mother (Ruby) were codepositors in two bank accounts.[160] The record did not disclose which of them owned the funds in the accounts, or in what proportions. Indeed, the court did not know that *any* of the funds in the accounts belonged to Roy.[161] Nonetheless, under then effective local (Arkansas) law, each of the codepositors had the right to withdraw the full amounts in the accounts without notice to, or consent by, the other codepositors.[162]

The IRS sought to obtain the funds in the accounts up to the amount of the unpaid assessments through administrative levy under § 6331. To this end, it served a notice of levy on the bank. The bank, maintaining that it did not know how much of the money in the accounts belonged to Roy (as opposed to Ruby and Neva), refused to honor the levy.[163]

The government brought suit against the bank, contending that the IRS stood in Roy's shoes under § 6331 and so could exercise Roy's right to withdraw the amounts from the accounts. The district court and the appellate court held that the Service could not levy on the accounts without establishing how much of them each codepositor owned.[164] Although rejecting the availability of a § 6331 levy, both lower courts would have permitted the IRS to bring suit under § 7403 to foreclose the tax lien against the accounts.[165]

The Supreme Court reversed, upholding the § 6331 levy. The majority stressed that administrative levy, unlike § 7403 lien foreclosure, is a

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159. 472 U.S. 713 (1985).

160. *Id.* at 715-16.

161. *Id.* at 717 (majority opinion) & 735 (dissenting opinion).

162. *Id.* at 723 (citing former ARK. CODE ANN. §§ 67-521 & 67-552 (Michie 1980)).

163. *Id.* at 716.

164. United States v. National Bank of Commerce, 554 F. Supp. 110 (E.D. Ark. 1982), *aff'd,* 726 F.2d 1292 (8th Cir. 1984), *rev'd,* 472 U.S. 713 (1985).

165. *National Bank of Commerce*, 554 F. Supp. at 116; 726 F.2d at 1300. Roy's wife and mother would have been joined in such a § 7403 suit. I.R.C. § 7403(b) (1994).

provisional remedy only: the IRS gains temporary possession of the money or property, retaining or selling it only if other interested parties are unable to establish (administratively or through the courts) their ownership of the property.[166] The dissent maintained that § 6331 was inappropriate but apparently, like the courts below, would have permitted the government to bring suit under § 7403 to foreclose the tax lien on the bank accounts.[167]

National Bank of Commerce implicated both aspects of the two-part formulation. First, the Court spoke to what constitutes "property or property rights" for tax lien purposes. It was not established that Roy had any right under state law beyond a right to withdraw the money from the bank. That right was a right against the bank and did not establish Roy's legal right to retain the funds as against his codepositors.[168] Yet, in the view of the majority, that right to withdraw, without any ensuing legal possessory interest, is a sufficient "string" on the property or "stick" from the bundle of rights to authorize attachment of the tax lien.[169]

Spouses clearly have thicker strings or heavier sticks as to entireties property than Roy had as to the bank accounts.[170] For instance, entireties spouses *do* have a legal possessory interest: They have an absolute right to occupy and use the property held by the entireties estate.[171]

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166. *National Bank of Commerce*, 472 U.S. at 721.

167. *See id.* at 735-38 (Powell, J., dissenting).

168. *E.g.*, Black v. Black, 135 S.W.2d 837, 841 (Ark. 1940). Thus, had Roy withdrawn the funds and kept them but the true owner of the funds was his wife, his mother, or a combination of them, these codepositors could have sued Roy for conversion. *See National Bank of Commerce*, 726 F.2d at 1295.

169. *National Bank of Commerce*, 472 U.S. at 724. It is not entirely clear that the dissent disagreed with this view. The dissent did argue that the mere right of withdrawal should not be viewed as property for § 6331 levy purposes, *id.* at 741-47 (Powell, J., dissenting), but it was silent as to the anterior question of whether it constitutes property or rights to property for § 6321 lien attachment purposes.

Moreover, § 7403 suit is available only "to enforce the [tax] lien of the United States . . . or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax." I.R.C. § 7403(a) (1994). In agreeing that § 7403 was available to the IRS, therefore, the dissent (as well as the district and circuit courts) could be read as agreeing that the tax lien did attach or, at least, that Roy had a property right (for § 6321 purposes though not for § 6331 purposes) as to the accounts.

170. *See supra* notes 103-05 and accompanying text.

171. *E.g.*, POWELL, *supra* note 13, at ¶ 622[4] (citing cases). This difference might have satisfied the *National Bank of Commerce* dissenters as well. *See National Bank of Commerce*, 472 U.S. at 747 (reading prior cases as required that a tax delinquent have a "right of possession" before she can be deemed to have "property or rights to property" for levy purposes).

Because entireties spouses have greater powers over property than the power that was held to be "property or rights to property" in *National Bank of Commerce*, the Supreme Court's teaching in that case suggests that the entireties bar cannot be justified under the first portion of the two-part rule.

As to the second portion of the rule, *National Bank of Commerce* rejected the proposition that state debtor-creditor rules can limit the federal tax lien. Although Roy had an unqualified right to withdraw the amounts in the accounts, local garnishment law would not have subrogated Roy's creditors to that right. Instead, Roy's creditors would have been forced to bring suit for the amounts, joining Roy's wife and his mother in the suit and having to prove how much of the accounts belonged to each.[172] The Eighth Circuit would have limited the IRS to rights like those of the creditors.[173]

The *National Bank of Commerce* majority criticized this approach for two reasons. First, the Eighth Circuit's approach would have relegated the federal government to the status (and so the remedies) of a private creditor, a status to which the national "sovereign" is superior.[174]

Second, the Eighth Circuit's approach would have applied state law beyond the point at which recourse to state law should end. State law should be used only to ascertain what powers as to property the tax debtor has. Once that question is answered, recourse to state law ends and further questions are matters of federal law.[175]

Thus, having ascertained that Roy had a right as to property (the right to withdraw the funds), the Eighth Circuit should have looked to federal law (§ 6321) to determine whether the tax lien attached to that right and looked to federal law (§ 6331) to determine whether the Service could administratively levy on the accounts. It should not have looked to state garnishment law to determine whether and how the IRS could proceed.[176]

The parallel is clear. In the entireties context, one looks to local law to ascertain whether the tax delinquent spouse has strings and powers with respect to the property. Once it has been established that she does, attachment of the federal tax lien depends solely on § 6321. It does not depend on what remedies state law affords or denies to private creditors.

In addition to clarifying the controlling two-part formulation adversely to the entireties bar, *National Bank of Commerce* erodes the notion that attachment of the tax lien to entireties interests would be fundamentally unfair to nondelinquent spouses. The Court noted the Eighth Circuit's "understandable concern for Ruby's and Neva's property interests" but

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172. *E.g.*, Hayden v. Gardner, 381 S.W.2d 752 (Ark. 1964).

173. *National Bank of Commerce*, 726 F.2d at 1295-96.

174. *National Bank of Commerce*, 472 U.S. at 727.

175. *Id.* at 722-23.

176. *Id.* at 726-27.

observed that Congress had crafted mechanisms by which they could vindicate their interests after levy.[177] The Court instructed that the lower tribunals should have respected the balance struck by Congress between the government's need for prompt revenue collection and the interests of nondebtor persons.[178]

In summary, federal tax collection cases are governed by a well established two-part rule. The first part of that rule asks whether the taxpayer has "property or rights to property." This inquiry turns on substance, not formalities, and state law confers many significant powers over entireties property to each of the spouses. The second part of the rule looks to federal law exclusively, rendering irrelevant state principles preventing ordinary separate creditors from proceeding against entireties property. Especially as clarified by the Supreme Court in *Rodgers* and *National Bank of Commerce*, the two-part formulation leaves no room for the entireties bar.

V. ENDING THE ENTIRETIES BAR

As shown above, while the entireties bar was ill conceived from its inception, its drawbacks—revenue erosion, unfairness, and doctrinal confusion—have become even more glaring in light of developments since the 1950s and 1960s. The bar should be overthrown. The question now becomes which mechanism—continued litigation or legislation—is the more promising route by which to effect such overthrow.

In my view, Supreme Court decisions in the 1980s and lower court decisions in the 1990s provide a sufficient basis on which courts could repudiate the entireties bar in future cases. Thus, the desired result may come from case law evolution. Nonetheless, for reasons of speed and flexibility, legislation is more likely to provide the ultimate answer.

A. Judicial Overthrow of the Bar

As we saw in Part IV.C, the Supreme Court's teaching in *Rodgers* and *National Bank of Commerce* largely pulls the doctrinal rug out from under the entireties bar. Indeed, one commentator—who also was the taxpayer's counsel in *Rodgers*—remarked that, in view of that decision, "perhaps it is only a matter of time" before a spouse's entireties interest is held subject to attachment by the IRS as a result of his individual tax liabilities.[179]

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177. *Id.* at 728; *see* I.R.C. § 6343(b) (1994) (administrative authority to return property wrongfully levied on) and I.R.C. § 7426(a)(1) (1994) (wrongful levy suits by persons other than the tax delinquent).

178. *National Bank of Commerce*, 472 U.S. at 729.

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Of course, the digestive process of the law is not remarkable for its alacrity. That being the case, it is perhaps not surprising that most lower court cases after *Rodgers* and *National Bank of Commerce* have followed the old bar decisions and have failed to discuss the Supreme Court decisions in any careful or detailed manner.[180] However, two recent cases—the Tax Court's 1991 decision *Philips v. Commissioner*[181] and the Western District of Michigan's 1994 decision *Craft v. United States*[182]—are encouraging.

1. *Philips*

As detailed in Part II, tenancies by the entireties can be used as a planned mechanism for tax avoidance.[183] The taxpayers' actions in *Philips* strikingly resembled the program described in Part II.

Benjamin Philips, Jr., was a physician; his wife, Carolyn, was not employed outside the home. They resided in Florida, a bar state, and had their property there. The Philipses filed income tax returns on a "married filing separately" basis. Carolyn filed correct returns. Benjamin had high income from his medical practice, but, for nearly the entire decade of the 1970s, he offset much of that income by improper deductions from numerous tax shelters.[184]

(2d ed. 1995); *see also* 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."); Terrence C. Brown-Steiner, Comment, *Federal Tax Liens & State Homestead Exemptions: The Aftermath of United States v. Rodgers*, 34 BUFF. L. REV. 297, 323 (1985) ("A strong argument can be made that *Rodgers* does apply to tenancy-by-the-entirety situations.").

180. *See, e.g.*, United States v. Schneider, 91-1 U.S. Tax Cas. (CCH) ¶ 50,112, at 87,454 (8th Cir. 1991) (discussing neither Supreme Court decision); Tony Thornton Auction Service, Inc. v. United States, 791 F.2d 635, 637-38 (8th Cir. 1986) (dicta) (discussing neither Supreme Court decision); Talbot v. United States, 850 F. Supp. 969, 972-75 (D. Wyo. 1994) (discussing *Rodgers* incompletely and *National Bank of Commerce* not at all); Carlson v. United States, 1989 U.S. Dist LEXIS 15842 (S.D. Fla. 1989) (discussing neither Supreme Court case).

181. T.C. Memo. 1991-56, 61 T.C.M. (CCH) 1883, *aff'd without opinion*, 978 F.2d 719 (11th Cir. 1992). The author was trial counsel for the government in this case. The description here of the facts of *Philips* is drawn from the pleadings and decisions in this case and the transferor's prior Tax Court case: Docket No. 9158-79 (decision entered Feb. 19, 1986).

182. 94-2 U.S. Tax Cas. (CCH) ¶ 50,493, *supplemental opinion*, 1995 WL 549317 (W.D. Mich. 1995).

183. *See supra* notes 39-41 and accompanying text.

184. *Philips*, 61 T.C.M. at 1883.

The Service audited Benjamin's returns for 1973 through 1979 and determined large deficiencies. Benjamin contested these determinations, but the cases were eventually settled. Pursuant to the settlements, Benjamin agreed that he owed additional income taxes of more than $387,000 for these years.[185]

The case concerned four assets: a $100,000 purchase money note, some parcels of commercial real estate, some vacant land, and the Philips' residence. Benjamin had owned the first three of these assets in his individual capacity, but, after the IRS began its investigation of his 1973-1979 tax returns, he first conveyed them into tenancies by the entireties between himself and Carolyn, then released his entireties interests to her, making her the sole owner of the three assets.[186]

The residence had been acquired by the Philipses and held by them as tenants by the entireties before 1973. However, again after the start of the IRS audit, Benjamin conveyed his interest in it to Carolyn, making her sole owner of the residence—although Benjamin continued to live there with her.[187]

As he had divested himself of his assets, the Service could not collect Benjamin's large tax liabilities from him. Accordingly, the Service asserted that Carolyn was liable as a transferee from Benjamin to the extent of the full value of the formerly separately owned assets and one-half of the value of the residence.[188]

The Tax Court held that the transfer of Benjamin's entireties interest in the residence did not give rise to transferee liability because, under Florida entireties law, he had no independent interest in the property at any time when he owed taxes.[189] However, the court held that the transfer of the three other assets into entireties form *did* render Carolyn liable as a transferee.[190]

The latter holding represents a deep fissure in the once solid entireties wall. As to the three assets, Carolyn argued that she could not be held liable as a transferee because she had received nothing. Relying on Florida entireties

185. *Id.* This amount includes penalties but does not include interest, which, considering the vintage of the case, would have multiplied the liability several fold.

186. *Id.*

187. *Id.* at 1884.

188. *Id.*

189. *Id.* at 1886. In so holding, the Tax Court gave encouragement to taxpayers using the scheme of abuse described in Part II. As long as the entireties bar can be used as "audit insurance" for aggressive tax reporting, married taxpayers in bar states will have a standing invitation to underpay their taxes.

190. *Id.* at 1885.

law, she argued that the marital union, not she, was the transferee.[191] The Tax Court rejected her argument, holding that

> [Carolyn] received an interest in property when the entireties estates were created. . . . The fact that one spouse's interest is not wholly independent of the other's does not render that interest a nullity. We therefore dismiss as overly formalistic [Carolyn's] argument that only the entireties estate, as a separate entity, received a property interest. A tenancy by the entireties is not a juridical person, separate from the identities of the tenants themselves.[192]

This holding was the first express recognition in any tax collection case that an entireties interest in a bar state *is* a property interest.[193]

2. *Craft*

The origins of *Craft*—a tax lien decision—lie in the cases testing when entireties interests can be forfeited as a result of criminal activity,[194] particularly the Sixth Circuit's decision in *United States v. 2525 Leroy Lane*.[195] *Leroy Lane I* involved entireties property in Michigan, a bar state. The husband had used the property in drug trafficking; the wife was an innocent co-owner. The Sixth Circuit held, under the forfeiture provisions, that "the Government would have a lien on the property to the extent of the value of [the husband's] interest," that the wife could continue to use the property while the entireties estates existed, and that proceeds upon sale of the property would be divided between the United States and the wife.[196] In the course of its opinion, the court remarked: "Under Michigan law, the individual interest of a tenant by the entirety is the functional equivalent of a

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191. *Id.* at 1885.

192. *Id.*

193. Furthermore, any additional support the case offers for the "no independent interest" rationale is murky. Although that rationale was the basis of the court's holding as to the residence, the above quoted language from the other holding included the sentence: "The fact that one spouse's interest is not wholly independent of the other's does not render that interest a nullity." Since the court conceded that even an undivided interest is a property interest and since, under § 6321, the federal tax lien attaches to all property interests, the "no independent interest" rationale for the bar is shaky.

194. *See supra* notes 111-16 and accompanying text.

195. 910 F.2d 343 (6th Cir. 1990) [*Leroy Lane I*], *cert. denied*, 499 U.S. 947 (1991).

196. *Leroy Lane I*, 910 F.2d at 351.

life estate with a right of survivorship,"[197] a clear statement that a spouse *does* have a property interest as to entireties property.

In the spring of 1994, in *Fischre v. United States,* a district court applied *Leroy Lane I* to a judgment lien obtained by the United States against one spouse.[198] The court discussed *Cole v. Cardoza,* an earlier Sixth Circuit decision holding that the federal tax lien does not attach to Michigan entireties property when only one spouse owes taxes,[199] and it concluded that *Leroy Lane I* modified *Cole.*[200] In the court's view, although the underlying property cannot be reached while the entireties estate remains intact,

> each spouse's survivorship interest is distinct, cognizable, and sufficient to support attachment of a creditor's lien . . . . Thus, under Michigan law, it appears that a judgment lien based on the sole obligation of one spouse may legitimately attach to that spouse's individual survivorship interest in entireties property without illegitimately burdening the entireties estate or the other spouse's interest therein.[201]

In *Craft,* decided in the fall of 1994, Sandra and Don Craft purchased Michigan real property as tenants by the entireties in 1972. Subsequently, Don (but not Sandra) incurred income tax assessments exceeding $482,000 for 1979 through 1987. In March 1989 the IRS filed a notice of tax lien. In August 1989 the property was transferred into Sandra's sole ownership. Sandra later sold the property. Sandra claimed she was entitled to all of the sale proceeds; the IRS claimed a portion of the proceeds based on Don's interest in the property.[202]

The court followed *Leroy Lane I* and *Fischre.* Concluding that the tax lien attached to Don's interest, the court held that the IRS was entitled to a portion of the sale proceeds corresponding to Don's one-half interest in the property.[203] So, *Leroy Lane I, Fischre,* and *Craft* not only recognize that entireties spouses have property interests but also hold that government liens, including the federal tax lien, can attach to those interests.

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197. *Id.* at 350. This is broadly similar to the way the Supreme Court described Texas homestead interests. *See* United States v. Rodgers, 461 U.S. 677, 686 (1983).

198. 852 F. Supp. 628 (W.D. Mich. 1994). The case does not make clear what kind of liability gave rise to the judgment lien.

199. 441 F.2d 1337, 1343 (6th Cir. 1971).

200. *Id.*

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

202. *Craft,* 94-2 U.S. Tax Cas. at 85,816.

203. *Id.* at 85,817-18. *Craft* was decided by the same court that rendered one of the earliest bar opinions, Shaw v. United States, 94 F. Supp. 245 (W.D. Mich. 1939). *Craft* does not discuss *Shaw* though it effectively overrules it.

In summary, in the 1980s, in *Rodgers* and *National Bank of Commerce*, the Supreme Court construed the federal tax lien in ways which, when applied to the entireties area, fundamentally undermine the bar decisions. In 1991, in *Philips*, the Tax Court recognized that entireties interests are property interests. In 1994, in *Craft*, a district court held that the federal tax lien can attach to entireties interests even when only one spouse owes taxes. The case law may be evolving toward rejection of the entireties bar. Courts deciding future cases should confirm and advance that evolution.

B. Legislative Overthrow of the Bar

Despite this promising judicial evolution, legislation has some advantages over continued litigation as the principal means by which to effect abrogation of the bar. Many states, scattered among all the federal judicial circuits, have the entireties bar.[204] A decision by the Supreme Court would, of course, have national effect, but the certiorari process is unpredictable.[205] Absent Supreme Court resolution, attacking the entireties bar would entail multiple cases in multiple courts, consuming years of time and multiplying expense.

A compounding factor in this regard is the doctrine of *stare decisis*. Even though wisdom does not walk with the bar decisions, there are many of them and they extend over two generations. In my view, the area already has been destabilized by *Rodgers*, *National Bank of Commerce*, *Philips*, and *Craft*. Yet, some judges might feel that adherence to what remains the overwhelming bulk of the precedents requires following the old rule regardless of its analytical unsoundness. Such a view would add to the difficulty of rooting out the entireties bar through litigation.

In short, Congress—which can act once for the whole nation and which is not bound by judicial precedents construing statutes—is the superior body for completing the overthrow of the old rule. The wall should be toppled in one stroke rather then dismantled brick-by-brick.

An additional consideration points in the same direction. Ending the bar will bring to the fore "second generation" issues. Congress could resolve these issues anticipatorily as part of the statutory amendment eliminating the bar. Additional rounds of litigation would be needed to deal with the "second generation" issues were the bar removed through the courts.

Two "second generation" issues are of principal importance: First, what post-attachment options would the Service have in enforcing its lien against

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204. *See supra* note 16 and accompanying text.

205. In recent years, the Supreme Court has been hearing and deciding fewer cases. *See, e.g.*, William Banks, *Supreme Court Report: At the Halfway Point*, 81 A.B.A. J. 50, 50 (Apr. 1995).

the entireties property? Second, how would entireties interests be valued? These issues are addressed below.

1. Post-Attachment Options

The mere existence of the tax lien on the entireties property sometimes would lead to payment of the outstanding liabilities of the delinquent spouse. For example, the spouses sometimes would want to pay the liability to remove the lien's cloud on the property's title in order to more readily sell the property. But, in other cases, such payment would not be forthcoming. In those cases, the Service would want to be able to take enforced collection action.

The two main enforced collection options available to the Service are: (1) effecting administrative sale of the *delinquent's* property interest under § 6331(b) and (2) requesting a federal district court, under § 7403, to sell the *entire* property in which the delinquent has an interest and divide the net proceeds among the various owners, the IRS receiving the delinquent's share up to the total of her outstanding liabilities.

As a practical matter, the first of these options would little avail the IRS in most entireties cases. After sale of the other spouse's interest, the nondelinquent spouse would retain all of her rights, both present and future. The resultant divided ownership under, at best, tense circumstances would be unattractive to most potential buyers. The IRS usually would receive no or very low bids were it to try to sell the debtor spouse's interest only.

Thus, the core post-attachment question is this: Should the IRS be allowed to proceed under § 7403 with respect to entireties property as it can with respect to other types of jointly held property? Or, should solicitude for the nondebtor spouse lead to the crafting of a special rule for entireties cases?

The likeliest candidate for such a special rule would be a "wait and see" approach like the regime already in place in the modified bar states. That is, the Service could be prohibited from attempting to partition or sell the property during the existence of the marriage. What would happen thereafter would depend on whether the marriage ended because of divorce or because of death.

—By operation of law, divorce converts a tenancy by the entireties into a tenancy in common.[206] When husband and wife are tenants in common, the interests of either spouse can be reached by their separate creditors and are subject to levy and sale on execution.[207]

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206. *See supra* note 101 and accompanying text.

207. *E.g.*, United States v. Estes, 654 F. Supp. 49 (S.D. Ohio 1986); Michigan State Bank v. Kern, 155 N.W. 502 (Mich. 1915). Ending an entireties estate by agreement or by sale of the property would lead to a similar result. *See* Craft v.

—The right of survivorship is an attribute of tenancies by the entireties.[208] Thus, under the "wait and see" approach, were the tax-delinquent spouse to die first, his interest in the property would be extinguished and the Service would realize nothing. If, instead, the nondelinquent spouse were to die first, the extinguishment of her interest would leave the delinquent spouse the sole, fee simple owner of the property. Then, the Service could proceed against the property as it can against any separate property.

The forfeiture cases testing the innocent owner defense in the entireties context[209] have not gone further than a "wait and see" approach: the forfeiture of the guilty spouse's interest without erosion of the innocent spouse's continued use of the property and right of survivorship.[210] The tax lien case following the forfeiture cases took the same approach.[211]

Although even the "wait and see" approach would be an improvement over the status quo, this article recommends that the normal § 7403 regime—the regime that applies to all other types of jointly owned property—apply to entireties property after the lifting of the bar. Four reasons support this recommendation:

(1) The normal regime typically will yield far more rapid closure than would the "wait and see" approach. The prospect of uncertainty over years, perhaps decades, before death or divorce occurs is uninviting.

(2) The "wait and see" approach would underserve the nation's revenue interest. In cases in which the tax delinquent dies first, the Service's ability to proceed against the property will be extinguished. The tax-delinquent spouse would have had a valuable right—the right to occupy and use the entireties property, perhaps for years—yet no tax will have been collected with respect to that right.

(3) The "wait and see" approach also would underserve the objective of equal treatment of taxpayers. Though reduced compared to the present situation, preferential treatment—possible long use of the property and

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United States, 94-2 U.S. Tax Cas. ¶ 50,493, *supplemental opinion*, 1995 WL 549317 (W.D. Mich. 1995).

208. *See supra* note 102 and accompanying text.

209. *See supra* note 111-16 and accompanying text.

210. *Compare Leroy Lane I*, 910 F.2d at 351-52 (6th Cir. 1990) (government has lien on the property to extent of culpable spouse's interest but innocent spouse may use property as an entireties tenant), *with* United States v. 15621 S.W. 209th Ave., 894 F.2d 1511, 1516 n.6 (11th Cir. 1990) (no lien but government can file lis pendens) *and* United States v. 1500 Lincoln Ave., 949 F.2d 73, 78 (3d Cir. 1991) (remand under instructions similar to *Leroy Lane* approach).

211. Craft v. United States, 94-2 U.S. Tax Cas. ¶ 50,493, *supplemental opinion*, 1995 WL 549317 (W.D. Mich. 1995); *cf.* Fischre v. United States, 852 F. Supp. 628 (W.D. Mich. 1994) (same approach with respect to judgment lien).

possible ultimate avoidance of tax collection—still would be accorded citizens holding entireties property over all other citizens.

(4) The analogy to the forfeiture cases is imperfect. The national interest as to prompt and effective revenue collection exceeds that as to drug forfeiture.[212] More importantly, the existence of § 7403 distinguishes the two contexts:

—While 21 U.S.C. § 881(a)(7) directs that "no property [of an innocent owner] shall be forfeited," § 7403 specifically authorizes the sale of property in which both the tax delinquent and others have interests.[213]

—Section 7403 is carefully crafted to protect the interests of nondebtor owners: all persons interested in the property must be joined in the action, sale is effected "by a proper officer of the court," and sale proceeds are distributed by the court among the various interest-holders in proportion to their interests.[214] No parallel protections exist in the forfeiture arena.

—One concern expressed by courts in the forfeiture context is that, were forfeiture of the culpable spouse's interest to convert the estate into a partitionable tenancy in common, the government would possess greater power than the culpable spouse had while the property was in entireties form.[215] In contrast, by virtue of § 7403, the IRS may legally exert greater power over property than the delinquent taxpayer had in it.[216]

Thus, on balance, additional protection for nondelinquent spouses, beyond that afforded by § 7403, is not necessary. Once the federal tax lien has attached, the Service should be allowed to use the same tax collection options in the entireties context as it is allowed to use in all other contexts.

2. Valuation

After overthrow of the entireties bar, valuing entireties interests will matter for two reasons. First, when entireties property is sold pursuant to § 7403, valuation will be necessary to ensure that the nondelinquent spouse receives the proper amount in the ensuing distribution of sale proceeds. Second, taxpayers often attempt to "beat" the tax collector by transferring their assets to related individuals. One of the IRS's options in such cases is to seek

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212. Although "there is a strong governmental interest in obtaining full recovery of all forfeitable assets," Caplin & Drysdale Chartered v. United States, 491 U.S. 617, 631 (1989), "taxes are the life-blood of government" and their collection is "an imperious need," Bull v. United States, 295 U.S. 247, 259 (1935).

213. I.R.C. § 7403 (1994).

214. I.R.C. § 7403(b) & (c) (1994).

215. *See, e.g.*, United States v. 15621 S.W. 209th Ave., 894 F.2d 1511, 1516 (11th Cir. 1990).

216. *See, e.g.*, United States v. Rodgers, 461 U.S. 677, 696-97 (1983).

a money judgment from the transferee.[217] The amount of such judgment cannot exceed the fair market value of the transferred property (plus interest).[218] Thus, when a delinquent spouse, in order to defeat collection of her tax liabilities, transfers her entireties interest to her nondelinquent spouse, making him the fee simple owner of the property, measuring the extent of his transferee liability requires valuing the interest his wife transferred to him.

Three main options exist for valuing entireties interests. In ascending order of desirability, they are: (1) judicial resolution on a facts-and-circumstances basis, (2) judicial resolution based on the life expectancies of the spouses, and (3) legislative resolution. For the reasons below, the statutory amendment abrogating the entireties bar should provide that each spouse's interest in an entireties estate be valued at fifty percent of the value of the underlying property held by that estate.

Facts-and-circumstances valuation: Valuation is no stranger to tax litigation. Thousands of cases and rulings have dealt with the value of diverse types of property interests,[219] and tens of thousands of valuation controversies have been settled short of trial. While many situationally apposite guidelines have developed, the general rule is that "[a]ll relevant facts and elements of value as of the applicable valuation date shall be considered in every case."[220]

Ragnarok would not be precipitated were we simply to add entireties valuation issues to the judicial process without further guidance. Neither, however, would that be the wisest course. Doing so would expend precious judicial resources; it would multiply costs (attorneys fees and expert witness fees) for both taxpayers and the government; and it often would occasion years of delay in concluding tax controversies. Furthermore, at the end of that long and painful road, participants often would feel less than confident that an

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217. *See* I.R.C. § 6901 (1994).

218. *E.g.*, Yagoda v. Commissioner, 39 T.C. 170, 185 (1962), *aff'd*, 331 F.2d 485 (2d Cir. 1964).

219. For example, valuation is necessary to determine (i) the amount included in gross income when payment is received in the form of property, not cash, *see* Treas. Reg. § 1.61-2(d)(1) (1960 as amended in 1989); (ii) the extent of deductions for charitable contributions of property, *see* I.R.C. §§ 170, 2055 & 2522 (1994); (iii) the amount by which property owned by the decedent increases the gross estate for estate tax purposes, *see* I.R.C. § 2031(a) (1994); (iv) the amount of gifts (when made in property) subject to the gift tax, *see* I.R.C. § 2512(a) (1994); and (v) the base for imposition of certain penalties, *see* I.R.C. § 6662(e), (g) & (h) (1994).

220. Treas. Reg. § 20.2031-1(b) (1958 as amended in 1965).

accurate result had been reached. Valuation is a notoriously imprecise exercise,[221] and the courts possess no special expertise in performing it.[222]

The inadequacies of judicial valuation under the general facts-and-circumstances approach have engendered efforts to move tax valuation out of the courts.[223] It would run counter to those initiatives to throw entireties valuation into the judicial mill.

Moreover, valuing entireties interests would be even more problematic than many other valuation exercises. The touchstone of standard valuation analysis is the price at which assets like those at issue commonly are sold in their customary marketplace.[224] There is no established market for entireties interests; except for rare interspousal sales, such interests are not bought and sold. The restrictions and contingencies to which each entireties spouse's use of and expectancies as to the property are subject, coupled with the absence of an established market, would make facts-and-circumstances judicial valuation of entireties interests frustrating for all concerned.

Life expectancies valuation: One important feature of tenancies by the entireties is the right of survivorship. This feature suggests a possible valuation approach: By comparing the respective life expectancies of the spouses on the valuation date, one could allocate the value of the property between the spouses. For estate tax and other purposes, the Service has developed a variety of mortality and actuarial tables that could be adapted for this purpose,[225] and similar commercial tables exist.

This approach gains some force from dicta in *Rodgers*. The Court "assume[d], *only for the sake of illustration*, that a homestead estate is the exact economic equivalent of a life estate, and that the use of a standard

221. *See, e.g.*, Commissioner v. Marshall, 125 F.2d 943, 946 (2d Cir. 1942) ("almost always, 'value' involves a conjecture, a guess, a prediction, a prophecy"); Messing v. Commissioner, 48 T.C. 502, 512 (1967) (it is futile to attempt "to infuse a talismanic precision into [valuation] . . . which should frankly be recognized as inherently imprecise").

222. *E.g.*, Buffalo Tool & Die Mfg. Co., Inc. v. Commissioner, 74 T.C. 441, 452 (1980) (judicial resolution of valuation issues expends the time, effort, and money of the parties and of the court and is "not likely to produce a better result").

223. *See, e.g.*, TAX CT. R. 124 (voluntary binding arbitration for valuation and other factual issues); Rev. Proc. 91-22, 1991-1 C.B. 526, *proposed modifications*, IRS Announcement 95-49, 1995-24 I.R.B. 13 (advance pricing agreements for § 482); IRS Notice 95-1, 1995-2 I.R.B. 15 (proposed revenue procedure for advance valuation of certain contributions of art).

224. *E.g.*, Treas. Reg. § 20.2031-1(b) (1958 as amended in 1965).

225. *See, e.g.*, I.R.C. § 7520 (1994); Treas. Reg. § 20.2031-7; IRS Notice 89-60, 1989-1 C.B. 700; IRS Notice 89-24, 1989-1 C.B. 660.

statutory or commercial table . . . . is appropriate in calculating the value of that estate."[226]

A life expectancies approach to valuing entireties interests would entail less cost, delay, and uncertainty than a facts-and-circumstances approach. Still, it would have at least two shortcomings. First, the exclusive emphasis of a life expectancies approach would be distorting. The right of survivorship is *one* important aspect of entireties ownership, but it is not the only one.

Second, even as to right of survivorship, significant uncertainties would exist.[227] For example, the Service's tables and commercial tables assume hypothetical, average individuals. But, in each case, the spouses will be real people who may diverge, sometimes greatly, from the averages. For instance, assume John is 53 and in perfect health and Mary is 45 but in an advanced stage of a terminal disease. Use of established tables would greatly overvalue Mary's entireties interest.[228]

Statutory valuation: The height of certainty and simplicity would be a fixed statutory valuation rule. I recommend that, in the amendment to § 6321 overthrowing the entireties bar, Congress prescribe that each cotenant's interest in an entireties estate shall be valued at one-half of the value of the underlying property held by that estate.

For state law purposes, fifty percent per spouse is already the "default" valuation of entireties interests. Generally, spouses are allowed to end their entireties estate by agreement and to divide the property between themselves in any proportion they choose. If their agreement fails to state the proportion, a fifty-fifty division will be made by the courts.[229]

More importantly, a fifty percent-fifty percent rule already is used for several federal tax purposes. For example,

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226. United States v. Rodgers, 461 U.S. 677, 698 (1983) (emphasis in original).

227. *See, e.g.*, United States v. Jones, 877 F. Supp. 907, 918 n.8 (D.N.J. 1995) ("unlike a life estate, the value of which can be predicted with the use of life expectancy tables, the imprecise nature of an interest such as a right of survivorship makes it less susceptible of valuation").

228. *See, e.g.*, *Rodgers*, 461 U.S. at 704. This problem with standardized tables has been recognized, but not fully satisfactorily resolved. *See, e.g.*, Bank of California v. United States, 672 F.2d 758, 759-60 (9th Cir. 1982); Rev. Rul. 80-80, 1980-1 C.B. 194.

229. *E.g.*, Sheldon v. Waters, 168 F.2d 483, 486 (5th Cir. 1948); *see also* N.C. GEN. STAT. § 75D-8 (1990) (50%-50% rule for state forfeiture purposes); Eric G. Zajac, *Tenancies by the Entirety & Federal Civil Forfeiture Under the Crime Abuse Prevention & Control Act: A Clash of Titans*, 54 U. PITT. L. REV. 553 (1993) (urging adoption of the North Carolina approach for federal forfeiture purposes).

—For federal estate tax purposes, the Internal Revenue Code directs that, when one spouse dies, one-half of any property owned by the decedent and her spouse as tenants by the entireties be included in her gross estate.[230]

—For income tax purposes, any rents, interest, or other income produced by entireties property is taxed one-half to each spouse if they file separate returns.[231] A similar rule applies as to deductions with respect to entireties property.[232]

Of course, the principal objection to a fifty-fifty statutory valuation is its lack of calibration. However, this is hardly unique: often, a court can resolve a valuation dispute "only by a Solomon-like pronouncement."[233] As noted above, the approach recommended here simply applies to tax collection a valuation convention as to entireties interests already used for estate and income tax purposes. It is a sensible balance between convenience and precision.

CONCLUSION

The entireties bar is a testament to the tendency of our legal system to perpetuate antiquated rules long after their intellectual and practical foundations have crumbled. Emanating from cases almost a half century old, the bar survives despite the fact that the conceptions of property and of the relation of federal to state law on which those cases were based have been repudiated by more recent teaching.

The uncritical reaffirmation of the old bar cases by subsequent decisions has left us with a rule which compromises the revenue, creates a ready pathway for tax avoidance, defeats equal treatment of taxpayers, and lacks any defensible doctrinal underpinning. The entireties bar should be abrogated.

MacBeth lamented: "Life's but a walking shadow, a poor player that struts and frets his hour upon the stage and then is heard no more."[234] The entireties bar is a walking shadow that has overstayed its hour in federal tax lien analysis. It should be ushered off the stage.

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230. I.R.C. § 2040(b)(1), (2)(A) (1994).

231. *E.g.*, Morgan v. Finnegan, 87 F. Supp. 274, 278 (E.D. Mo. 1949), *aff'd*, 182 F.2d 649 (8th Cir. 1950).

232. *E.g.*, Cox v. Commissioner, T.C. Memo. 1993-326, 66 T.C.M. (CCH) 192.

233. Messing v. Commissioner, 48 T.C. 502, 512 (1967).

234. WILLIAM SHAKESPEARE, MACBETH act V, § v.