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WHY *CRAFT* ISN'T SCARY

Steve R. Johnson*

Editors' Synopsis: The Supreme Court recently decided Craft, *in which it held that the federal tax lien attaches to a tax-debtor spouse's interest in property held in tenancy by the entirety. Responding to concerns that were voiced most frequently about* Craft, *this Article argues that* Craft *does not impermissibly impinge on the traditional state role in establishing property and debtor-creditor rules. The Article concludes by describing how rights and legitimate interests of nontax-debtor spouses can be safeguarded in light of* Craft.

I. INTRODUCTION 440
II. FOUNDATIONS 441
  A. *Drye* 441
  B. *Craft* 445
III. *CRAFT* AND FEDERALISM 452
  A. *Rodgers* 452
  B. *Craft* 454
    1. *Not Groundbreaking* 454
    2. *Federal Definition for Federal Purposes* 458
IV. *CRAFT* AND PROTECTION OF NONDEBTOR SPOUSES 460
  A. *NBC* 460
    1. *Reinforcement of Prior Positions* 462
    2. *Protection of Other Owners or Interest-Holders* 463
  B. Craft 465
    1. *Uniqueness* 466
    2. *Mere Lien Attachment Not Threatening* 468
    3. *Enforced Collection Not Threatening* 473
V. CONCLUSION 477

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* E.L. Wiegand Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas. I invite questions or comments. My email address is steve.johnson@ccmail.nevada.edu. I thank my friend and former colleague, Professor Jeffrey Stake, whose sometimes different views of the issues discussed herein sharpened my own thoughts. I also thank the audience and participants at the May 2002 session of the American Bar Association Section of Taxation, Individual Income Tax Committee, where I spoke on these issues and received many useful questions.

I. INTRODUCTION

In April 2002, the Supreme Court of the United States decided *United States v. Craft*.[1] The Court held that the federal tax lien attaches to a tax-debtor spouse's interest in property held in tenancy by the entirety even when the other spouse does not owe tax and state law provides that entireties property and interests cannot be reached by separate creditors of only one spouse.

Craft was correctly decided. The older, contrary view that *Craft* displaced was fundamentally at odds with federal tax collection analysis as laid out by the Court. In addition, the old view invited tax abuse and created unfairness.[2]

Despite the wisdom of *Craft*, the decision has troubled some commentators. This is not surprising. As those involved in law reform efforts will readily attest, human beings, especially legal professionals, tend to eye change with suspicion. Though unsurprising, the concern about *Craft* is unnecessary. The message of this Article is that *Craft* is neither radical nor dangerous. Some of the concerns are misplaced. Other, more legitimate concerns can be assuaged by sensible answers to the implementation issues that arise as a result of *Craft*.

Part II of this Article describes the issue addressed in *Craft* and the Court's resolution of that issue. Parts III and IV address the two concerns most frequently voiced about *Craft*. Part III maintains that *Craft* does not impermissibly impinge on the traditional role of the states in establishing property and debtor-creditor rules. Part IV describes how the rights and legitimate interests of the spouses not owing tax can be safeguarded in light of *Craft*.

A theme underlying this Article is that the *Craft* decision is not, and should not be viewed as, a bolt from out of the blue. The decision was foreshadowed by earlier Court cases and represents the application of well-established rules and principles to the entirety area. We have lived with those rules and principles successfully; likewise, we can adapt to *Craft* without undue disruption or inconvenience.

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[1] 122 S. Ct. 1414 (2002).

[2] *See* Steve R. Johnson, *Fog Fairness, and the Federal Fisc: Tenancy-by-the-Entireties Interests and the Federal Tax Lien*, 60 MO. L. REV. 839, 846-76 (1995) [hereinafter "Johnson I"], and Steve R. Johnson, *After Drye: The Likely Attachment of the Federal Tax Lien to Tenancy-by-the-Entireties Interests*, 75 IND. L.J. 1163, 1171-74 (2000) [hereinafter "Johnson II"] (discussing the deficiencies in detail). The Court cited Johnson II in *Craft; see* 122 S. Ct. at 1424.

II. FOUNDATIONS

Understanding *Craft* requires an appreciation of the Court's decision in December 1999 in *Drye v. United States.*[3] Thus, this part of the Article begins with *Drye* and then advances to *Craft.*

A. *Drye*

Drye is a landmark case delineating the respective roles of federal and state law in federal tax lien analysis. Although a number of special liens also exist,[4] the general federal tax lien is by far the most important. The general lien comes into existence when the Internal Revenue Service ("Service") has assessed the tax and the taxpayer has failed to pay it after the Service has made notice and demand for payment.[5] Once it arises, the lien relates back to the date on which the assessment was made and continues until the liability has been paid or "becomes unenforceable by reason of lapse of time."[6] The statute of limitations on collection typically expires ten years after the assessment was made,[7] although many circumstances suspend the running of this limitations period.[8]

The scope of the general tax lien matters most for present purposes. The general tax lien is governed by Internal Revenue Code ("Code") section 6321, which provides that the lien attaches to "all property and rights to property, whether real or personal" of the tax delinquent.[9] The word "all" makes the statutory language sound sweeping, and that is how the Court consistently has read it. For example, in 1945, the Court remarked: "Stronger language could hardly have been selected to reveal a purpose to assure the collection of taxes."[10] In 1985, the Court reemphasized that the language of section 6321 "is broad and reveals on its face that Congress meant to reach every interest in property that a taxpayer might have."[11]

This broad reading of section 6321 reflects an underlying purpose of

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[3] 528 U.S. 49 (1999).

[4] *See* I.R.C. §§ 6324(a), 6324A, 6324B (estate tax), 6324(b) (gift tax), 5004 (taxes on distilled spirits) (2000).

[5] *See id.* §§ 6201(a), 6203, 6303(a), 6321.

[6] *Id.* § 6322.

[7] *See id.* § 6502(a)(1).

[8] *See, e.g., id.* §§ 6502(a), 6503.

[9] *Id.* § 6321.

[10] Glass City Bank v. United States, 326 U.S. 265, 267 (1945).

[11] United States v. Nat'l Bank of Commerce, 472 U.S. 713, 719-20 (1985).

fundamental importance. Long ago, the Court noted that "taxes are the life-blood of government, and their prompt and certain availability an imperious need."[12] The Court has repeated this recognition several times since,[13] and contemporary national and international events surely reinforce it.

But precisely what are "property and rights to property"? The Code does not define the terms, and nor do the Treasury Regulations promulgated thereunder. That being so, one naturally thinks of the rich body of state property law and wonders what role it may play in the enterprise. State law does at least the following three things: (1) it creates estates, interests, and rights in property; (2) less frequently, it categorizes the powers created—that is, it labels them as property or nonproperty; and (3) it establishes debtor-creditor rules, that is, it declares how and when creditors may proceed against property to satisfy unpaid debts and identifies property that is immune or exempt from creditors.[14] Which, if any, of such rules apply to or are incorporated into federal tax collection analysis?

The role of the first and third of the above categories has been relatively clear for a long time. One does look to state law to ascertain what powers the tax debtor has as to the property out of which the Service seeks to effect collection.[15] And, one does not look to state debtor-creditor rules or procedures[16] or to state-created immunities and exemptions.[17] For example, the federal tax lien attaches to, and the Service may collect unpaid

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[12] Bull v. United States, 295 U.S. 247, 259 (1935).

[13] *See, e.g.*, United States v. Dalm, 494 U.S. 596, 604 (1990); *Nat'l Bank of Commerce*, 472 U.S. at 733.

[14] Federal law may do some of the same, of course. Sometimes federal law creates property rights. *See, e.g.*, First Victoria Nat'l Bank v. United States, 620 F.2d 1096 (5th Cir. 1980) (holding that rice growing acreage history under federal agriculture statute was property for federal estate tax purposes). Also, the federal Bankruptcy Code, 11 U.S.C., is a major body of debtor-creditor rules. Still, taken as a whole, state property rules are considerably more numerous than federal property rules.

[15] This is not intended to exclude resorting to federal law if federal law creates rights. The reference to state law is simply short-hand for the fact that, far more frequently, state law is the source of creation or authorization.

[16] "[T]he consequences that attach [after determination that the interest involved is property or a right to property] is a matter left to federal law." United States v. Rodgers, 461 U.S. 677, 683 (1983); *see also Nat'l Bank of Commerce*, 472 U.S. at 722-23; United States v. Bess, 357 U.S. 51, 56-57 (1958).

[17] *See, e.g.*, United States v. Mitchell, 403 U.S. 190, 204-05 (1971); Treas. Reg. § 301.6334-1(c) (2002).

taxes from disability payments[18] and retirement benefits[19] even though state law expressly places them beyond the reach of the creditors of recipients.

Considerable confusion, however, surrounds the second element. The better view always has been that state labels and categorizations are not controlling, or even relevant[20] to whether a particular item rises to the level of being property or a property right for section 6321 purposes.[21] Many holdings support this view.[22] Many Court utterances also give effect to this. But other opinions contain loose language that could be interpreted—and sometimes has been interpreted—to mean that state law could control the definitional question.[23]

Thus the matter stood when the Court took up *Drye*. Narrowly put, the issue in *Drye* was whether the general tax lien attaches to disclaimed interests. Rohn F. Drye, Jr. had unpaid tax assessments of nearly a third of a million dollars. He was the sole heir of his mother's estate of $230,000. However, he disclaimed his interest in the estate, causing it to pass to his daughter. She used the proceeds to establish a spendthrift trust. She and her parents were the beneficiaries; their attorney was the trustee. The Service asserted that its liens against Mr. Drye attached to the disclaimed interest.[24]

As is the rule in most states,[25] the law of Arkansas (where Drye lived) provides that a disclaimer "relates back for all purposes to the date of death of the decedent,"[26] creating the legal fiction that the disclaimant prede-

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[18] *See* Fried v. New York Life Ins. Co., 241 F.2d 504, 505-07 (2d Cir. 1957).

[19] *See* United States v. Wagner, 235 F. Supp. 854, 855 (S.D.N.Y. 1964).

[20] For an early statement of this position by a renowned commentator, see Edmond N. Cahn, *Local Law in Federal Taxation*, 52 YALE L.J. 799, 816 (1943).

[21] A state "cannot thwart the operation of the Tax Code by classifying the interests it has created as something other than property rights." *In re* Terwilliger's Catering Plus, Inc., 911 F.2d 1168, 1172 (6th Cir. 1990).

[22] In many cases, licenses, expressly labeled as "privileges" and not as "property" by state law, were held to be section 6321 property or property rights. *See, e.g.*, United States v. Battley, 969 F.2d 806, 811 (9th Cir. 1992); 21 West Lancaster Corp. v. Main Line Rest., Inc., 790 F.2d 354, 358 (3d Cir. 1986); JFWIRS, Ltd. v. United States, 607 F. Supp. 566, 568-70 (M.D. Pa. 1985).

[23] *See* Steve R. Johnson, *The Good, the Bad and the Ugly in Post-Drye Tax Lien Analysis*, 5 FLA. TAX REV. 415, 426-32 (2002) [hereinafter Johnson III] (discussing the pre-*Drye* cases).

[24] *See Drye*, 528 U.S. at 52.

[25] *See, e.g.*, UNIF. PROBATE CODE § 2-801(c) (amended 1993), 8 U.L.A. 207 (Supp. 1998).

[26] ARK. CODE ANN. § 28-2-108(a)(3) (Michie 1998).

ceased the decedent. Accordingly, Mr. Drye maintained that, by virtue of the relating-back disclaimer, he never had a property interest in his mother's estate. Thus, there was nothing to which the tax liens against him could attach.

The Court held unanimously for the Service. For present purposes, the key part of the Court's opinion was its clarification of the role of state law in federal tax lien analysis. The Court held: "The Internal Revenue Code's prescriptions are most sensibly read to look to state law for delineation of the taxpayer's rights or interests, but to leave to federal law the determination whether those rights or interests constitute 'property' or 'rights to property' within the meaning of § 6321."[27]

Accordingly, *Drye* makes clear that recourse to state law is appropriate for only one purpose, to identify which strings, powers, or controls the tax delinquent has as to the assets out of which the Service seeks to effect collection. Once that has been done, recourse to state law ends and all further matters are governed exclusively by federal law. Thus, whether the identified strings, powers, or controls rise to the level of being property or rights to property under section 6321 is purely a question of federal law.[28] Similarly, what steps the Service can take against the property after attachment of the tax lien and what defenses or protections the taxpayer or third parties may have against those steps are purely questions of federal law.

Another aspect of *Drye* is its reaffirmation that state-created fictions do not control or limit the federal tax lien. It is fundamental that, in general, substance controls over form in federal taxation.[29] Thus, fictions —labels that diverge from underlying substance or reality—are not controlling or even relevant.[30] *Drye* adhered to that approach. The Court disregarded the state law fiction that Mr. Drye predeceased his mother.[31] Instead, the Court focused on the reality of Mr. Drye's control over the property. If he did not

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[27] *Drye*, 528 U.S. at 52.

[28] *See id.* at 56 (confirming previous case law that these statutory terms have an expansive meaning); *see also supra* text accompanying notes 10-11. *Drye* also distilled prior cases to develop an illustrative, but not comprehensive list of factors or criteria useful in deciding whether the powers possessed constitute section 6321 property or property rights. *Drye*, 528 U.S. at 56-61; *see* Johnson III, *supra* note 23, at 422-24.

[29] *See, e.g.*, Comm'r v. Sunnen, 333 U.S. 591, 604-05 (1948); Gregory v. Helvering, 293 U.S. 465, 470 (1935); Speca v. Comm'r, 630 F.2d 554, 557 (7th Cir. 1980).

[30] *See, e.g.*, United States v. Irvine, 511 U.S. 224, 239-40 (1994); United States v. Jacobs, 306 U.S. 363, 369 (1939).

[31] *See Drye*, 528 U.S. at 59.

disclaim, he would get the property; if he did disclaim, his act would channel the property to his daughter. He had the power to direct where the property would go. That was enough to give him a property right for section 6321 purposes.[32]

B. *Craft*

Craft is the first case after *Drye* in which the Court tested the role of state law in federal tax lien analysis. In fact, much of the drama in *Craft* involved whether the Court would adhere to its salutary clarification in *Drye* or would undercut it, returning us to the pre-*Drye* muddle. Fortunately, the Court took the first course.

Despite the expansive reading generally given to section 6321, for a long time an anomaly existed with respect to a tax delinquent's interests in tenancy-by-the-entirety property. In its original conception, this tenancy was based on a fiction: the notion that, by virtue of marriage, the husband and especially, the wife had lost their separate identities and became one person in law.[33] The fiction reflected "a particularly difficult form of doublethink,"[34] and many states abolished tenancy by the entirety as a form of ownership.[35]

Many American jurisdictions still recognize the form of tenancy by the entirety, although significant differences in detail exist. The important difference, for present purposes, involves the extent to which creditors can

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[32] *See id.* at 60-61.

[33] *See* United States v. Jacobs, 306 U.S. 363, 370 (1939) ("A tenancy by the entirety 'is essentially a joint tenancy, modified by the common law theory that husband and wife are one person.' Only a fiction stands between the two.") (internal citations omitted); 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 182 (1766).

[34] John V. Orth, *Tenancy by the Entirety: The Strange Career of the Common-Law Marital Estate*, 1997 BYU L. REV. 35, 40 (1997). Specifically,

> [a]lthough Blackstone elsewhere categorically declared that during marriage "the very being and existence of the woman is suspended," he could not consistently maintain that legal fiction, as he himself candidly admitted. "[N]either the husband nor the wife can dispose of any part without the assent of the other," he said of the tenancy by the entirety. She may have been a nonperson in some sense, but for a sale her separate assent was required.

Id. (internal citations omitted).

[35] Even England, where it originated, abolished that form of ownership in 1925. Law of Property Act, 1925, 15 & 16 Geo. 5, ch. 20, § 37 (1925) (Eng.). *See* RICHARD R. POWELL, 4A POWELL ON REAL PROPERTY ¶ 620 [3] (Patrick J. Rohan rev. ed. 1993) (noting that a number of American jurisdictions never adopted it or, especially under the influence of the Married Women's Property Acts, abolished or restricted it).

proceed against entireties property to collect separate debts of one of the spouses. The following discussion focuses on two patterns of state law, which I call, respectively, the "partial bar" and the "full bar" jurisdictions.[36]

There are approximately ten partial bar jurisdictions. In these jurisdictions, the liens of separate creditors can attach, but are subject to the rights of the other spouse.[37] This means that the underlying property cannot be levied on until the entireties estate ends. For example, divorce converts an entireties estate into a tenancy in common,[38] which would allow the separate creditor to proceed against the debtor's now separate interest. Or, death of one spouse leaves the survivor as the sole, fee simple owner of the property.[39] Therefore, if the debtor spouse is the survivor, the creditor may act against the whole property; however, if the nondebtor spouse is the survivor, the creditor is left without recourse.

There are approximately sixteen full bar jurisdictions. In these jurisdictions, separate creditors have even less recourse. Their liens do not attach at all to, and they may not levy on, entireties property or interests.[40]

The extent to which the federal tax lien attaches to entireties property or interests first was litigated generations ago,[41] before *Drye*'s clarification of the limited role of state law in federal tax lien analysis. The early cases followed the state rules, importing them into the tax lien area. Subsequent cases typically followed suit. There were numerous such decisions,[42] and only a few discordant notes.[43]

Thus, before *Craft*, the view of the lower courts was that the attach-

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[36] For a listing of jurisdictions in these categories and for a fuller description, see Johnson I, *supra* note 2, at 843-44; Johnson II, *supra* note 2, at 1169-70.

[37] *See, e.g.*, *In re* Pletz, 225 B.R. 206, 208 (Bankr. D. Or. 1997) ("The interest of a judgment debtor, as tenant by the entirety with his wife, may be sold on execution. . . . The execution purchaser only obtains the debtor spouse's interest, which ceases to exist should the debtor spouse predecease the nondebtor spouse.") (citations and internal quotation marks omitted), *aff'd*, 234 B.R. 800 (D. Or. 1998), *aff'd*, 221 F.3d 1114 (9th Cir. 2000).

[38] *See, e.g.*, Sebold v. Sebold, 444 F.2d 864, 871 (D.C. Cir. 1971).

[39] *See, e.g.*, United States v. 2525 Leroy Lane, 910 F.2d 343, 350-51 (6th Cir. 1990).

[40] *See, e.g.*, Sanford v. Bertrau, 169 N.W. 2d 880, 881 (Mich. 1918).

[41] *See, e.g.*, United States v. Hutcherson, 188 F.2d 326 (8th Cir. 1951); Shaw v. United States, 94 F. Supp. 245 (W.D. Mich. 1939); Smith v. Comm'r, 24 B.T.A. 807, 811-13 (1931).

[42] *See, e.g.*, Benson v. United States, 442 F.2d 1221, 1223 (D.C. Cir. 1971); Batrus, Foldenauer & Madigan, Inc. v. United States, 29 A.F.T.R. 2d (P-H) ¶ 72-629 (E.D. Va. 1972); Pettingill v. United States, 205 F. Supp. 10, 13 (D. Vt. 1962).

[43] *See* Johnson I, *supra* note 2, at 877-81 (discussing pre-*Craft* cases disagreeing or in tension with the old view).

ment of the federal tax lien to entireties interests and property depended on the content of state law. Under the pre-*Craft* view: (1) if the spouses were jointly liable for the unpaid tax,[44] the tax lien attached because under state law, entireties property is answerable for joint debts;[45] (2) if only one spouse was liable in a partial bar state, the tax lien attached to that spouse's interest subject to the other spouse's interest;[46] (3) if only one spouse was liable in a full bar state, the tax lien attached to nothing.[47]

However, the Court never embraced the pre-*Craft* view. Although the Court did not directly address the issue of the attachment of the federal tax lien to entireties property until *Craft*, dicta in a 1983 decision cast doubt on the pre-*Craft* view,[48] and the pre-*Craft* view seemed hard to reconcile with several decisions of the Court.[49]

The Court's chance to address the issue squarely came in *Craft*.[50] Don and Sandra Craft lived in Michigan, a full bar state, and owned a parcel of land there as tenants by the entireties. Don, an attorney, failed to file income tax returns for 1979 through 1986, causing unpaid assessments of

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[44] The main situation of joint liability involves the spouses filing a joint income tax return for the year. *See* I.R.C. § 6013(d)(3) (1994). Even then, liability would not be joint to the extent the spousal relief rules applied. *See id.* § 6015 (2000); *id.* § 6013(e) (1997) (repealed 1998). Joint liability could exist in other situations too. For example, the Service might have made "responsible person" assessments against both spouses for unpaid trust fund employment taxes if both met the criteria of section 6672.

[45] *See, e.g.*, Tony Thornton Auction Serv., Inc. v. United States, 791 F.2d 635, 637-38 (8th Cir. 1986); Whitaker v. Kavanagh, 100 F. Supp. 918, 920 (E.D. Mich. 1951); United States v. Eglinton, 90-1 U.S.T.C. (CCH) ¶ 50,322 (E.D. Pa. 1990).

[46] *See, e.g.*, 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).

[47] *See, e.g.*, Cole v. Cardoza, 441 F.2d 1337, 1343-44 (6th Cir. 1971); United States v. Am. Nat'l Bank, 255 F.2d 504, 508-09 (5th Cir. 1958), *cert. denied as to another issue*, 358 U.S. 835 (1959); Masonry Prods., Inc. v. Tees, 280 F. Supp. 654, 657 (D.V.I. 1968).

[48] United States v. Rodgers, 461 U.S. 677, 703 n.31 (1983). Counsel for taxpayers in *Rodgers* and a leading commentator remarked that in view of *Rodgers*, "perhaps it is only a matter of time" before the overthrow of the pre-*Craft* view. WILLIAM D. ELLIOTT, FEDERAL TAX COLLECTIONS, LIENS & LEVIES ¶ 9.09[4][d] (2d ed. 1995); Terrence C. Brown-Steiner, Comment, *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."); *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.").

[49] *See* Johnson I, *supra* note 2, at 868-76 (discussing *Rodgers* and *National Bank of Commerce*, among other cases).

[50] The facts recited herein are drawn from *Craft*, 122 S. Ct. at 1419-20.

nearly a half million dollars against him, but not Sandra, for those years. When the Service filed notices of tax lien against Don, the Crafts quitclaimed the parcel into Sandra's sole ownership. The Service asserted that the conveyance was fraudulent.

Later, Sandra wished to sell the parcel. The Service agreed to discharge the parcel from the liens against Don,[51] subject to the sale proceeds being held in escrow pending determination of whether the tax lien attached to part of the proceeds.

Several rounds of litigation ensued. Despite some support for the Service's position,[52] the Sixth Circuit ultimately followed the pre-*Craft* view, holding that the tax lien did not attach to any part of the sale proceeds.[53] By a six-to-three vote, the Court reversed, overthrowing the pre-*Craft* view.[54]

The main thrust of the Court's decision is the inconsistency of the pre-*Craft* view with *Drye*. The Court followed its holding in *Drye* that state law is consulted only to identify which powers, strings, or controls the tax delinquent has as to the asset in question and thereafter, state law is irrelevant.[55]

Thus, state law performs two functions: identification and characteriza-

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[51] *See* I.R.C. § 6325(b)(3) (1994).

[52] The original decision of the district court granted summary judgment to the Service, awarding the Service half of the sale proceeds. *See* Craft v. United States, 94-2 U.S.T.C. (CCH) ¶ 50,493 (W.D. Mich. 1994), *supplemental opinion* 1995 WL 549317 (W.D. Mich. 1995). A three-judge panel of the Sixth Circuit reversed and remanded, *see* 140 F.3d 638 (6th Cir. 1998). One of the judges, though, concurred only on the ground that because material issues of fact existed, summary judgment was not appropriate. He expressed his belief that the pre-*Craft* rule was inconsistent with Court and other precedents. *Id.* at 645-49 (Ryan, J., concurring). The final opinion of the Sixth Circuit was by another three-judge panel, *see* 233 F.3d 358 (6th Cir. 2000), *rev'd*, 122 S. Ct. 1414. Again, one judge concurred on law-of-the-case grounds, but expressed his belief that the pre-*Craft* rule no longer was good law. *Id.* at 376-77 (Gilman, J., concurring).

[53] For a critique of the Sixth Circuit's decision, see Johnson III, *supra* note 23, at 445-52.

[54] Justice O'Connor wrote for the majority. Justice Scalia wrote a short dissent, which is discussed in subpart IV.B. *infra*. Justice Thomas, joined by Justices Stevens and Scalia, wrote a longer dissent, which is discussed in subpart III.B., *infra*.

[55] "Whether the interests of [Don] in the property he held as a tenant by the entirety constitutes [sic] 'property and rights to property' for the purposes of . . . 6321, is ultimately a question of federal law." *Craft*, 122 S. Ct. at 1420. Strangely, and without support, the three dissenters thought that under *Drye*, characterization—whether the powers do or do not rise to the level of being section 6321 property rights—is a matter of state law. *See id.* at 1428, 1432.

tion.

(1) Identification: The Court looked to Michigan law to ascertain what powers Don had as to the parcel.

> According to Michigan law, [Don] had, among other rights, the following rights with respect to the entireties property: the right to use the property, the right to exclude third parties from it, the right to a share of income produced from it, the right of survivorship, the right to become a tenant in common with equal shares upon divorce, the right to sell the property with [Sandra's] consent and to receive half the proceeds from such a sale, the right to place an encumbrance on the property with [Sandra's] consent, and the right to block [Sandra] from selling or encumbering the property unilaterally.[56]

(2) Characterization: Under the characterization made by state law, Don had no interest in the parcel. "Following Blackstone, Michigan characterizes its tenancy by the entirety as creating no individual rights whatsoever."[57] But that characterization under state law clearly is a fiction, as the above enumeration of Don's powers reveals. Following *Drye*, *Craft* rejected the relevance of state law fictions.[58]

Indeed, the fiction under state law is hard to swallow. As the Court noted, Sandra "had no more interest in the property than [Don]; if neither of them had a property interest in the entireties property, who did?"[59] The Court properly labeled this result absurd and noted its potential to facilitate abuse of the tax system.[60]

Fortunately, we are not compelled to endure either logical contortion or tax abuse. Whatever their nature, state law characterizations are not germane to the section 6321 characterization. As the Court observed, following *Drye:*

> In looking to state law, we must be careful to consider the substance of the rights state law provides, not merely the labels the

[56] *Id.* at 1422.
[57] *Id.*
[58] *See id.* at 1421.
[59] *Id.* at 1424.
[60] *See id.* For a description of how entireties ownership could be used, before *Craft*, as a key component of a scheme of tax avoidance, *see* Steve R. Johnson, *After Craft: Implementation Issues*, 96 TAX NOTES 553, 556 (2002) [hereinafter Johnson IV]. *See also Craft*, 140 F.3d at 649 (Ryan, J., concurring).

> State gives these rights or the conclusions it draws from them. Such state law labels are irrelevant to the federal question of which bundles of rights constitute property that may be attached by a federal tax lien.[61]

So, irrespective of Michigan's characterization, did the bundle of powers Don had as a tenant by the entireties constitute property or property rights for section 6321 purposes? The Court said "yes." Its reasoning proceeded as follows:

First, the Court noted approvingly the previous case law[62] reading the language of section 6321 as sweeping.[63]

Second, the Court focused on Don's present powers regarding the parcel. The Court noted his right to use the parcel, to receive income produced by it, and to exclude third parties from it, calling these rights "some of the most essential property rights,"[64] a conclusion amply supported by the Court's previous decisions.[65] The Court stated: "These rights alone may be sufficient to subject [Don's] interest in the entireties property to the federal tax lien. They gave him a substantial degree of control over the entireties property."[66] That is significant because "as [the Court] noted in *Drye*, in determining whether a federal taxpayer's state-law rights constitute property or rights to property, the important consideration is the breadth of the control the taxpayer could exercise over the property."[67]

Third, the Court noted that Don also had the right to alienate or encumber the property with Sandra's consent. The fact that he could not

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[61] *Craft*, 122 S. Ct. at 1420.

[62] *See supra* text accompanying notes 10-11.

[63] *Craft*, 122 S. Ct. at 1422-23.

[64] *Id.* at 1423.

[65] The Court cited Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) ("[T]he right to exclude others [is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property'"), Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979), and Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982).

The Court also could have cited Dickman v. Commissioner, 465 U.S. 330, 336 (1984), a leading gift tax decision. ("We have little difficulty accepting the theory that the use of valuable property . . . is itself a legally protectible property interest."). *See also* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 890 (2000) (examining cases considering the meaning of "property" under the Due Process Clause and the Takings Clause).

[66] *Craft*, 122 S. Ct. at 1423.

[67] *Id.* (quoting *Drye*, 528 U.S. at 61) (internal quotation marks and brackets omitted).

unilaterally alienate the property was relevant to the characterization, but not sufficient to remove Don's bundle of powers from the category of property rights described in section 6321.[68] That conclusion[69] was supported by the fact that cases already had established that the tax lien attaches to other types of interests that are not unilaterally alienable, such as interests in homesteads,[70] community property,[71] and spendthrift trusts.[72] *Drye* had been to the same effect,[73] and other bodies of law could be enlisted in support of the same conclusion.[74]

The Court seems to have found the characterization question an easy call. Once characterization is understood as a federal question, as *Drye* teaches it must be, the powers, strings, and controls that each entireties tenant possesses, when taken in the aggregate, easily rise to the level of property or property rights for section 6321 purposes.[75]

Fourth, the Court rejected the relevance of state law restrictions on creditors of entireties spouses. The Court noted that the fact that Michigan law does not permit separate creditors to proceed against entireties property or interests

> by no means dictates [the Court's] choice. The interpretation of 26 U.S.C. § 6321 is a federal question, and in answering that question [the Court is] in no way bound by state courts' answers to similar questions involving state law. As [the Court] elsewhere has held,

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[68] *See id.* at 1423 (stating "[t]here is no reason to believe . . . that this one stick . . . is essential.").

[69] *See id.* at 1423-24.

[70] *See, e.g.*, United States v. Rodgers, 461 U.S. 677, 684 (1983).

[71] *See, e.g.*, United States v. Overman, 424 F.2d 1142, 1145 (9th Cir. 1970).

[72] *See, e.g.*, Bank One Ohio Trust Co., N.A. v. United States, 80 F.3d 173, 176 (6th Cir. 1996).

[73] *Drye*, 528 U.S. at 60 n.7 (stating that transferability may not be essential to the existence of property rights under section 6321).

[74] For example, "[r]ights which are not ordinarily exchanged or exchangeable are included in the [bankruptcy] estate." Robert B. Chapman, *Coverture and Cooperation: The Firm, the Market, and the Substantive Consolidation of Married Debtors*, 17 BANKR. DEV. J. 105, 127 (2000).

[75] The fact that each tenant's present rights sufficed to answer the characterization question in the affirmative meant that the Court did not have to decide how much the future rights, such as the right of survivorship, added to the mix. *See Craft*, 122 S. Ct. at 1424. Whether such rights, standing on their own, constitute section 6321 property rights may depend on whether they are seen as contingent rights (which probably are within section 6321) or merely as expectancies (which may not be). *See* Johnson III, *supra* note 23, at 422-23.

exempt status under state law does not bind the federal collector.[76]

Doctrinally, the Court's decision in *Craft* clearly is correct. A contrary holding could not have been squared with *Drye*; indeed, it would have remuddied the waters *Drye* clarified. When disquiet is expressed about *Craft*, it usually is not on doctrinal grounds. Rather, the concerns relate more to policy, principally the effect of the decision on federalism and on nondebtor spouses. As described in Parts III and IV respectively, these concerns can be answered.

III. *CRAFT* AND FEDERALISM

As *Drye* was foundational in Part II, another Court precedent is foundational in Part III: the 1983 decision in *United States v. Rodgers*.[77] Below, we consider *Rodgers* first, then explore the federalism implications, if any, of *Craft*.

A. *Rodgers*

Rodgers involved two consolidated cases presenting the same legal issue.[78] For simplicity, we will note the facts of only one of the cases.[79] Lucille Mitzi Bosco Rodgers and her then-husband acquired a residence in Texas, which they occupied as a homestead. In 1971 and 1972, the Service assessed nearly a million dollars of wagering taxes, interest, and penalties against the husband. The husband's debts remained unpaid as of his death in 1974. Lucille owed no tax.

After her husband's death, Lucille continued to occupy the residence as her homestead, with a new husband. In 1977, the Government brought suit under section 7403 to enforce the tax lien against the homestead property.[80]

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[76] 122 S. Ct. at 1425-26 (quoting *Drye*, 528 U.S. at 51, and citing *Rodgers*, 461 U.S. at 701) (internal quotation marks omitted).

[77] 461 U.S. 677 (1983).

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

[79] The recited facts are from 461 U.S. at 687-88.

[80] Section 7403 was crafted to deal with situations in which both the tax delinquent and one or more third parties hold interests in property. It permits the Service to petition a federal district court to sell the whole of the property, then to distribute the net proceeds of the sale among the various interestholders, with the Service standing in the delinquent's shoes to the extent of the unpaid taxes. *See* I.R.C. § 7403(a), (b). This device is discussed further in subpart IV.B. *infra*.

The Court held that the property could be sold under section 7403.[81] Because section 7403 operates only when the tax lien is in place, this holding means that the federal tax lien attached to Lucille's deceased husband's interest in the homestead property.[82]

For our purposes, it is particularly striking that Texas law—indeed the state constitution—established a formidable set of protections for homestead property. Specifically:

(1) With exceptions not here relevant, Texas homesteads were "protected from forced sale, for the payment of all debts . . . . No mortgage, trust deed, or other lien on the homestead shall ever be valid."[83]

(2) "[T]he owner or claimant of the property . . . [may not], if married, sell or abandon the homestead without the consent of the other spouse. . . ."[84]

(3) Upon the death of the first 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."[85]

For state law purposes, these provisions operated in two directions.

> One 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 law.[86]

The Court summarized it as follows:

> The effect of these provisions in 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

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[81] *See Rodgers*, 461 U.S. at 690-703.

[82] Section 7403(a) authorizes a civil action "to enforce the lien of the United States." The Court noted: "As a general matter, the 'lien of the United States' referred to in § 7403(a) is that created by [Code] § 6321." 461 U.S. at 681.

[83] *Id.* at 684 (quoting TEX. CONST. art. 16, § 50).

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

[85] *Id.* at 685 (quoting TEX. CONST. art. 16, § 52).

[86] *Rogers*, 649 F.2d at 1126-27 (quoting Woods v. Alvarado State Bank, 19 S.W.2d 35, 35 (Tex. 1929)); *see also Rodgers*, 461 U.S. at 686 (stating that the "homestead right is not a mere statutory entitlement, but a vested property right.").

spouse or by his or her heirs.[87]

Although there are differences in detail,[88] Texas homestead interests at issue in *Rodgers* are, for our purpose, comparable in essential nature to the full-bar entireties interests at issue in *Craft*. As the full bar states did, the state of Texas created a type of interest in property and imbued it with certain characteristics, including strong protections against creditors' claims or the actions of the other spouse. We shall return to this similarity in evaluating the federalism implications of *Craft*.

B. *Craft*

A principal complaint of the dissenters in *Craft* was that the decision "ignores the primacy of state law in defining property interests"[89] and "works a sea change in the role States have traditionally played in 'creating and defining' property interests."[90] The dissenters also warned that *Craft* "creates a new federal common law of property."[91]

I believe that concern is misplaced. First, *Craft* does not break new ground in terms of federal/state relations. The case travels paths well-trodden by prior decisions. Second, *Craft* merely involves a federal definition of terms in a federal statute for federal purposes. Defining terms in a federal statute for federal purposes is legitimately within the realm of the federal government's powers. *Craft* does not displace the ability of the states to define the same terms however they wish for their own nonfederal purposes.

1. Not Groundbreaking

From the standpoint of federalism, there is no compelling difference between *Rodgers* and *Craft*. The homestead interests in the former were comparable in dignity, authority, purpose, and strength of protection to the entireties interests in the latter. And, of course, *Rodgers* was only one of many cases decided before *Craft* in which the Court and lower courts[92] refused to give effect to state law restrictions and rules for federal tax purposes, whether liability or collection-related. Consider the cases

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[87] *Rodgers*, 461 U.S. at 685.

[88] *See* United States v. Jones, 877 F. Supp. 907, 919 (D.N.J. 1995), *aff'd without opinion*, 74 F.3d 1228 (3d Cir. 1995).

[89] *Craft*, 122 S. Ct. at 1427 (Thomas, J., dissenting).

[90] *Id.* at 1428 (Thomas, J., dissenting).

[91] *Id.*

[92] *See supra* text accompanying notes 18-19.

discussed below.

Mitchell v. United States[93] was a consolidated case involving two sets of Louisiana taxpayers, the Mitchells and the Sparacios. In the first case,[94] Mr. Mitchell earned a salary, half of which was his and half was his wife's under Louisiana community property law. Neither spouse filed federal income tax returns, and tax was not paid on the earnings. In 1961, some years after the income was earned, Mrs. Mitchell formally renounced the community property as part of the Mitchells' divorce. As a result, Mrs. Mitchell received neither a distribution of community property nor a property settlement on dissolution of the marriage, and instead, she was exonerated of "debts contracted during marriage."[95]

The Service determined deficiencies against Mrs. Mitchell based on her half of the community income, and it sought to collect the deficiencies out of property she had owned and gratuitously transferred. The Fifth Circuit held that, by virtue of her state law renunciation, Mrs. Mitchell avoided tax liability on the community income.[96] The Court unanimously reversed, noting that "with respect to community income, as with respect to other income, federal income tax liability follows ownership."[97] The Court noted that, in determining ownership, "state law creates legal interests but the federal statute determines when and how they shall be taxed."[98]

Mrs. Mitchell argued in part that "her right to renounce the community and to place herself in the same position as if it has never existed is substantive [and that] . . . it is really the community as an entity, not the husband or the wife, that owns the property."[99] Based on section 6321 and related Code sections,[100] though, the Court rejected these arguments, noting:

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[93] 403 U.S. 190 (1971).

[94] These facts are drawn from *id.* at 191-93.

[95] *Id.* at 191 (quoting LA. CIV. CODE art. 2410 (1972) (repealed 1980)).

[96] *See* Mitchell v. Comm'r, 430 F.2d 1 (5th Cir. 1970).

[97] *Mitchell*, 403 U.S. at 197 (citations omitted).

[98] *Id.* (quoting Burnet v. Harmel, 287 U.S. 103, 110 (1932)) (internal quotation marks omitted).

[99] *Id.* at 203.

[100] *See id.* at 204-05. The related sections were I.R.C. § 6331(a) (1954) (authorizing the Service to levy "upon all property and rights to property" of the tax delinquent) and I.R.C. § 6334(c) (1954) ("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 [the Code]."). The Court remarked: "This language is specific and it is clear [that] there is no room in it for automatic exemption of property that happens to be exempt from state levy under state law." *Id.* at 205.

> The results urged by the [taxpayers] might follow, of course, in connection with a tax or other obligation the collection of which is controlled by state law. But an exempt status under state law does not bind the federal collector. Federal law governs what is exempt from federal levy.
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> . . . .
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> . . . [S]tate law which exempts a husband's interest in community property from his premarital debts does not defeat collection of his federal income tax liability for premarital tax years from his interest in the community. The result as to [the taxpayers in the instant case] is no different.[101]

United States v. Irvine[102] considered whether a transfer subject to the federal gift tax resulted from disclaimer of a remainder interest in a trust. The taxpayer argued that a Treasury Regulation governing disclaimers was inapplicable and, thus, that state law applied. "Under state property rules, an effective disclaimer of a testamentary gift is generally treated as relating back to the moment of the original transfer of the interest being disclaimed. . . ."[103]

The Court, in a unanimous decision, rejected that argument. It referred, as had the *Mitchell* court, to "the general and longstanding rule in federal tax cases that although state law creates legal interests and rights in property, federal law determines whether and to what extent those interests will be taxed."[104] The Court concluded that "Congress had not meant to incorporate state-law fictions as touchstones of taxability when it enacted the [statute]. Absent such a legal fiction, the federal gift tax is not struck blind by a disclaimer."[105]

While *Irvine* involved fictions arising under state disclaimer rules in the tax liability context, *Drye* involved fictions in the tax collection context. The result, though, was the same: a clear and unanimous holding that state law rules do not control federal taxation.[106]

Thus, *Craft* is not radical. Long before that decision, the Court repeatedly had held that the federal tax statutes are not controlled by state

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[101] *Id.* at 204-05 (internal citations omitted).

[102] 511 U.S. 224 (1994).

[103] *Id.* at 239 (citations omitted).

[104] *Id.* at 238.

[105] *Id.* at 240. *See also id.* at 239 (noting that "state property transfer rules do not translate into federal taxation rules").

[106] For detailed discussion of *Drye*, see subpart II.A. *supra*.

property or debtor-creditor rules. As a result, federalism complaints about *Craft* are reminiscent of similar complaints about the prior decisions. For instance, just as the dissenters in *Craft* said that *Craft* "ignores the primacy of state law in defining property interests,"[107] a commentator said that *Drye* "reversed the long held belief that state law defines property."[108]

The dissenters in *Craft*, though, found *Craft* unique and, with respect to the history discussed above, noted that: "*Drye*, like *Irvine* and *Mitchell* before it, was concerned not with whether state law recognized 'property' as belonging to the taxpayer in the first place, but rather with whether state laws could disclaim or exempt such property from federal tax liability after the property interest was created."[109] They read the prior cases as establishing a "careful line between state laws that purport to disclaim or exempt property interests after the fact, which the federal tax lien does not respect, and state laws' definition of property and property rights, which the federal tax lien does respect."[110]

This distinction is not viable, however. The dissenters read the prior cases selectively and invented the distinction, rather than finding it in the precedents. The "careful line" of distinction to which the dissenters refer is drawn infrequently or not at all in the prior cases. The only cases that possibly support the dissenters' position are the 1940 *Morgan v. Commissioner*[111] and the 1960 *Aquilino v. United States*[112] decisions. But *Morgan* is internally inconsistent, and the language in both cases is best regarded as an imprecise statement of a view compatible with *Drye* and *Craft* rather than as the statement of a different view.[113]

In addition, the proffered distinction explains the facts of *Mitchell*, *Irvine*, and *Drye*, but does not explain the statements of the rule set out in those cases. While *Mitchell*, *Irvine*, and *Drye* did involve rights conferred by state law, which the taxpayers later renounced or disclaimed, the statements in these cases rejecting importation of state limitations and legal fictions are sweeping. These statements are not limited solely to "back

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[107] *Craft*, 122 S. Ct. at 1427 (Thomas, J., dissenting).

[108] Comment, *Cases, Statutes, and Recent Developments*, 33 URB. LAW. 221, 221 (2001). For another commentator arguing that *Drye* traduces federalism, see Note, *Drye v. United States: Limiting the Traditional State Right To Define Property*, 69 UMKC L. REV. 909 (2001).

[109] *Craft*, 122 S. Ct. at 1428 (Thomas, J., dissenting).

[110] *Id.*

[111] *See* 309 U.S. 78, 80-82 (1940).

[112] *See* 363 U.S. 509, 512-14 (1960).

[113] *See* Johnson III, *supra* note 23, at 427-30 (discussing these points in detail).

end" limitations and fictions.

Finally, the proffered distinction wholly omits *Rodgers*. The dissenters infer the careful line of distinction only from the above cases and do not attempt to fit *Rodgers* into the distinction.[114] Nor could they. The distinction the dissenters offer explains neither the language nor the facts of *Rodgers*. In *Rodgers*, there was no back-end exemption. The exemption of homestead interests from creditors' claims was part and parcel of those interests from the outset; indeed, the exemption was central to the state's creation of such interests. Similarly, in *Rodgers* there was no renunciation or disclaimer.

Thus, the dissenters failed to show that *Craft* was unique in that it created federalism concerns not present in prior cases. One can say, of course, that multiple wrongs do not make a right. Nonetheless, it is hard to think that *Craft* "works a sea change"[115] when it merely navigates waves and billows that have felt the same prow before.

2. *Federal Definition for Federal Purposes*

The dissenters in *Craft* objected that the decision "creates a new federal common law of property."[116] One answer to that objection is that any such creation was the work of *Drye*, not of *Craft*. Indeed, considering prior cases on the subject, *Drye* is best understood as a clarification, not a change of law.[117] *Drye* held that whether the bundle of state-created rights constitutes section 6321 property or property rights is a matter of federal law.[118] Inevitably, that calls into being a federal common law of property, for this limited purpose. The Court recognized that when it decided *Drye* because a substantial portion of the *Drye* opinion consists of the distillation of criteria from prior federal cases that bear on the resolution of this federal question, i.e., criteria indicative of section 6321 property status.

The dissenters' objection can be met with an even more fundamental answer. Creation of a federal common law of property would be objectionable if it displaced state property rules in areas traditionally and legitimately within the domain of state authority. *Drye*, *Craft*, and prior cases do not displace state property law; instead, they apply a federal definition

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[114] This omission is all the more striking in light of the heavy emphasis *Rodgers* receives in the majority opinion. *See Craft*, 122 S. Ct. at 1423-26.

[115] *Id.* at 1428 (Thomas, J., dissenting).

[116] *Id.*

[117] *See* Johnson III, *supra* note 23, at 425-32.

[118] *See Drye*, 528 U.S. at 52.

to a federal enterprise of fundamental federal interest. This act does not offend federalism; it respects it.

In this regard it is significant that: (1) a Court known for its solicitude toward the principle of federalism decided *Drye* unanimously;[119] (2) Justice O'Connor wrote the *Craft* majority opinion; and (3) she along with Chief Justice Rehnquist and Justice Kennedy—all numbered among federalism's strong advocates on the current Court—constituted half of the six-person *Craft* majority.

The majority's understanding—that federalism is not traduced by federal definitions for purposes of federal revenue laws—has considerable support in Court precedents. For example, in an early depreciation case, the Court stated: "It does not matter that in Ohio, where the properties lie, [a different characterization exists.] The Act of Congress has its own criteria, irrespective of local law."[120] Similarly, the Court instructed in an early capital gains case:

> Here we are concerned only with the meaning and application of a statute enacted by Congress, in the exercise of its plenary power under the Constitution, to tax income. The exertion of that power is not subject to state control. It is the will of Congress which controls, and the expression of its will in legislation, in the absence of language evidencing a different purpose, is to be interpreted so as to give a uniform application to a nation-wide scheme of taxation. State law may control only when the federal taxing act, by express language or necessary implication, makes its own operation dependent upon state law.[121]

Many other cases could be cited to the same effect.[122]

In short, there is no breach of federalism when, as *Drye*, *Craft*, and other cases tell us, the characterization of section 6321 property is treated as a federal question. Congress used the word "property" in section 6321 as part of a federal statute to govern federal revenue collection. The federal government is a sovereign, just as the states are sovereigns. Federalism is

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[119] *See generally* Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis for the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819 (1999).

[120] Weiss v. Wiener, 279 U.S. 333, 338 (1929).

[121] Burnet v. Harmel, 287 U.S. 103, 110 (1932) (citations omitted).

[122] *See, e.g.*, Hogan v. Comm'r, 141 F.2d 92, 94 (5th Cir. 1944); Greenough v. Comm'r, 74 F.2d 25, 26 (1st Cir. 1934).

not undercut when one sovereign defines a word in a particular fashion entirely for its own purposes. Nor is federalism undercut when one sovereign defines the word differently from how other sovereigns define the word for their own, separate purposes.

IV. *CRAFT* AND PROTECTION OF NONDEBTOR SPOUSES

Cases previously discussed are relevant to the issue of the protection of the nondebtor spouse as is a case not yet emphasized: *United States v. National Bank of Commerce*,[123] (*"NBC"*). This part of the Article first discusses *NBC*, then considers whether, in light of *NBC* and other cases, *Craft* excessively compromises the legitimate interests of entireties spouses who do not owe tax.

A. *NBC*

In *NBC*, the Service had assessed income taxes, interest, and penalties against Roy Reeves, but part of the assessments remained unpaid.[124] Roy, his wife Neva, and his mother Ruby were the joint holders of two bank accounts. The record did not disclose, indeed the parties stipulated that they would submit no evidence as to, which of the coholders owned the monies in the accounts. Under applicable state (Arkansas) law, each of the three coholders had the right to withdraw the full amounts in the accounts without notice to or consent by the other coholders.[125]

The Service sought to obtain the funds in the two accounts as part of its efforts to collect the unpaid assessments against Roy. The Service served a notice of levy on the bank.[126] The bank refused to honor the levy, maintaining that it did not know how much of the funds (or, indeed, if any part of the funds) belonged to Roy, as opposed to Neva or Ruby.[127]

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[123] 472 U.S. 713 (1985).

[124] All recited facts are drawn from *id.* at 715-23.

[125] *See Nat'l Bank of Commerce*, 472 US. at 723 (citing ARK. CODE ANN. §§ 67-521 (1980) (repealed 1983), 67-552 (1980) (amended 1983)). An account holder who withdraws money that he did not deposit and does not own does not, by virtue of the withdrawal, become the owner. *See, e.g.*, Black v. Black, 135 S.W.2d 837, 841 (Ark. 1940) (stating that the true owner may take legal steps, including suit, to secure the return of her money).

[126] *See* I.R.C. §§ 6331(a), 6332(a) (2000).

[127] A bank served with notice of levy from the Service has only two possible defenses for failure to comply: (1) that the funds are subject to judicial execution or attachment prior to the levy, or (2) that the bank is not in possession of or obligated with respect to property of the tax delinquent. *See, e.g.*, Bank of Nevada v. United States, 251 F.2d 820, 824 (9th Cir. 1957). The bank's defense in *NBC* was a variation of the second defense.

The Government brought suit against the bank for failure to honor the levy. The district court held for the bank on the constitutional ground that due process requires "something more than" the post-levy remedies available under the Code.[128] Specifically, it concluded, due process requires at least that the Service identify the other account holders, notify them of the intended levy, and give the account holders a pre-levy opportunity to be heard.[129] The Eighth Circuit affirmed, although on different grounds.[130] It expressed no opinion on the district court's constitutional analysis, but reached the same result as a matter of statutory construction.[131] Specifically, the court held that the levy statute, section 6331, imposes on the Service the burden of proving "the actual value of the delinquent taxpayer's interest in jointly owned property,"[132] which the Service had not done as to the two accounts. Although refusing to allow levy on the accounts, both the district court and the circuit court suggested that the Government would have been permitted to bring suit[133] to foreclose the tax lien against the accounts.[134]

The Eighth Circuit acknowledged that "Roy could have withdrawn any amount he wished from the account and used it to pay his debts, including federal income taxes."[135] Nonetheless, it rejected the Government's contention that the Service stood "in Roy's shoes [to the extent of the unpaid liabilities] and could do anything Roy could do."[136] This rejection was based on state law limits on the remedies available to creditors. Under Arkansas garnishment law, "at least . . . ordinary creditors [of a co-depositor are not] subrogated to that co-owner's power to withdraw the entire account."[137] Instead, creditors must join all the co-depositors,

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[128] *See infra* subpart IV.B.3 (discussing these remedies).

[129] *See* United States v. Nat'l Bank of Commerce, 554 F. Supp. 110, 114-15 (E.D. Ark. 1982). Since 1998, the Code has required notice and opportunity to be heard before the Service files a tax lien or makes levy, subject to various limitations. *See* I.R.C. §§ 6320, 6330 (2000).

[130] *See* United States v. Nat'l Bank of Commerce, 726 F.2d 1292 (8th Cir. 1984).

[131] *See id.* at 1293, 1300.

[132] *See id.* at 1293.

[133] The Code permits such a suit. *See* I.R.C. § 7403 (2000). *See infra* subpart IV.B.3 (discussing § 7403).

[134] *See Nat'l Bank of Commerce*, 554 F. Supp. at 116; *Nat'l Bank of Commerce*, 726 F.2d at 1300. Neva and Ruby would have to be joined in such a suit. *See* I.R.C. § 7403(b) (2000).

[135] *Nat'l Bank of Commerce*, 726 F.2d at 1295.

[136] *Id.* at 1295-96 (citations omitted).

[137] *Id.* at 1296.

affording them the opportunity to show the extent of their respective interests in the account.[138]

By a vote of five to four, the Court reversed the Eighth Circuit, upholding the levy. Many aspects of the Court's opinion in *NBC* undergird positions advanced earlier in this Article. These are noted briefly below.

1. Reinforcement of Prior Positions

In *NBC* the Court reemphasized that the language of section 6321 is broad and should be applied that way.[139] It also noted "the need of the government promptly to secure its revenues,"[140] which explains Congress's choice to write the tax collection statutes broadly.

The Court held that Roy's right to withdraw the funds, even if he did not own them, was a property right for section 6331 purposes.[141] Necessarily, this holding means that it was a section 6321 property right too. The Service cannot levy under section 6331 on items to which its section 6321 lien does not attach; indeed, the operative language of the two sections is identical.[142]

Because the right to withdraw in *NBC* was property or a right to property for federal tax collection purposes, it follows that, as held in *Craft*, entireties interests are as well. Plainly, the right to withdraw money that must be returned upon demand by the owner is not a thicker bundle of sticks than the powers of an entireties spouse, which include an absolute right to occupy or use the property, an absolute right to share in income from it, an absolute right to exclude third parties from it, among others.[143] That being so, *NBC* foreshadowed, indeed compelled the *Craft* result.

In *NBC* the Court noted as *Drye* later confirmed,[144] that "whether a state-law right constitutes 'property' or 'rights to property' is a matter of

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[138] *See id.*

[139] *See Nat'l Bank of Commerce*, 472 U.S. at 719-20.

[140] *Id.* at 721 (quoting Phillips v. Comm'r, 283 U.S. 589, 596 (1931)); *see also id.* at 733 (quoting *Bull*, 295 U.S. 247 (1935)); *see supra* text accompanying note 12.

[141] *See Nat'l Bank of Commerce*, 472 U.S. at 724.

[142] *See* I.R.C. § 6321 (2002) (stating that the general federal tax lien attaches to all property and rights to property of the tax delinquent); *id.* § 6331(a) (stating the Service may levy upon all property and rights to property of the tax delinquent); *Nat'l Bank of Commerce*, 472 U.S. at 719 (noting the identity of language in the two sections).

[143] For fuller recitation of the rights of entireties spouses, see Johnson I, *supra* note 2, at 860-61; *see also supra* text accompanying note 56.

[144] *See supra* text accompanying notes 27-28.

federal law," not state law.[145] In addition, the Court decisively rejected the "erroneous assumption that state law dictates the extent of the Government's power to levy. It does not. . . ."[146] The Eighth Circuit had held that because state law provided that an account holder's creditors are not subrogated to his right to withdraw, the Service was similarly limited. But the Court noted that such an approach "would remit the [Service] to the rights only an ordinary creditor would have under state law. That result 'compare[s] the government to a class of creditors to which it is superior'."[147] State law is used only to identify the powers possessed by the tax debtor as to the property. Beyond that, state law is irrelevant.[148]

2. Protection of Other Owners or Interest-Holders

For purposes of part IV, the greater significance of *NBC* lies in its instruction as to the rights of, and protections for, those persons who hold interests in property along with a tax delinquent, but do not owe tax. In *NBC*, Ruby and Neva were such persons; in entireties cases, the nondebtor spouses are such persons.

NBC teaches the following: (1) the remedies available to the nondebtor co-owner are important and must be examined; (2) such remedies may be seen as adequate even if they entail some inconvenience, burden, or risk to the co-owner; and (3) a balancing of the respective interests of the Government and the co-owner is required. These aspects are discussed below.

First, central to the Court's decision in *NBC* was the fact that administrative levy under section 6331 is only a provisional measure. It "settles no rights in the property subject to seizure."[149] Unlike a lien foreclosure suit under section 7403, "levy does not determine whether the Government's rights to the seized property are superior to those of other claimants."[150]

What if Ruby or Neva were the true owner of the funds in the accounts? An administrative remedy is available. After levy, they would

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[145] *Nat'l Bank of Commerce*, 472 U.S. at 727 (citing United States v. Bess, 357 U.S. 51, 56-57 (1958)); *see also Nat'l Bank of Commerce*, 472 U.S. at 724 n.8.

[146] *Nat'l Bank of Commerce*, 472 U.S. at 725 n.9.

[147] *Id.* at 727 (quoting Randall v. H. Nakashima & Co., 542 F.2d 270, 274 n.8 (5th Cir. 1976)).

[148] *See id.* at 726.

[149] United States v. New England Merchants Nat'l Bank, 465 F. Supp. 83, 87 (D. Mass. 1979).

[150] *Nat'l Bank of Commerce*, 472 U.S. at 721.

have the opportunity to establish their ownership and thus, to secure return of the funds from the Service. If the Service "determines that property has been wrongfully levied upon," it has authority to return to the owner, in the case of cash, "an amount of money equal to the amount of money levied upon" or, in the case of noncash property, the specific property itself or an amount equal to what the Service got by selling it.[151] The Court viewed this as "an effective and inexpensive administrative remedy" for the true owner.[152]

In addition, should the administrative remedy prove unavailing, a judicial remedy exists. "If a levy has been made on property or property has been sold pursuant to a levy, any person [other than the tax delinquent] who claims an interest in or lien on such property and that such property was wrongfully levied upon" may sue the Government in federal district court.[153] The prevailing plaintiff would receive, as appropriate, an injunction prohibiting enforcement of the levy or sale of the property,[154] return of the specific property, judgment for the amount of money levied on, or judgment for the greater of what the Service got from the sale or the fair market value of the property immediately before levy.[155] The prevailing plaintiff also may recover interest.[156]

Thus, a section 6331 levy is only provisional and does not finally determine rights to the property. In upholding such levy, the Court examined the subsequent remedies available to interest-holders other than the tax delinquent.

Second, the Court determined that the administrative and judicial remedies after levy are sufficient, even though the remedies subject the nondebtor co-owners to some inconvenience and risk. Notice need not be given (other than to the tax delinquent) of the fact of seizure,[157] and both the administrative and judicial requests for review must be begun within nine months of the levy.[158] The *NBC* dissenters argued these points with considerable force:

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[151] I.R.C. § 6343(b) (2002).

[152] *Nat'l Bank of Commerce*, 472 U.S. at 728.

[153] I.R.C. § 7426(a)(1) (2002).

[154] *See id.* § 7426(b)(1) (granted if "a levy or sale would irreparably injure rights in property which the court determines to be superior to rights of the United States in [the] property").

[155] *See id.* § 7426(b)(2).

[156] *See id.* § 7426(g).

[157] *See* 472 U.S. at 736 (Powell, J., dissenting).

[158] *See* I.R.C. §§ 6343(b), 6532(c)(1) (2000).

> [O]ne would hardly characterize as "provisional" the Government's taking of an innocent party's property without notice, especially when, even if the taking is discovered, the burden is then on the innocent party to institute recovery proceedings. Furthermore, absent notice of any kind, the nine months that the . . . remedies ordinarily give third parties to contest a levy is a short time indeed. There is no certainty that within this time they will discover that their property has been used to pay someone else's taxes.[159]

Thus, what matters is that the nondebtor co-owners have recourse to vindicate their interest. That they bear some cost or burden of vigilance is not controlling—those are normal incidents of our legal system.

Third, the implication of the foregoing is that the adequacy of the system is determined by a balancing of interests. Moreover, when Congress has effected a balance through its statutory arrangements, that balance is entitled to considerable deference. The *NBC* Court taught:

> Congress thus balanced the interest of the Government in the speedy collection of taxes against the interests of any claimants to the property, and reconciled those interests by permitting the IRS to levy on the assets at once, leaving ownership disputes to be resolved in a postseizure administrative or judicial proceeding. Its decision that certain property rights must yield provisionally to governmental need should not have been disregarded by the Court of Appeals.[160]

B. Craft

Craft raises the question as to whether permitting the tax lien to attach to the debtor spouse's interest will unduly compromise the rights and legitimate interests of the nondebtor spouse in the entireties property. Fear of such a result was one of the reasons early courts barred the liens.[161] In fact, this fear—with a gender spin—prompted Justice Scalia's separate dissent in *Craft*. He said:

> [T]he Court nullifies (insofar as federal taxes are concerned, at least) a form of property ownership that was of particular benefit

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[159] *Nat'l Bank of Commerce*, 472 U.S. at 747 (citations omitted).
[160] *Id.* at 729 (citations omitted).
[161] *See, e.g.*, Raffaele v. Granger, 196 F.2d 620, 623 (3d Cir. 1952).

> to the stay-at-home spouse or mother. She is overwhelmingly likely to be the survivor that obtains title to the unencumbered property; and she (as opposed to her business-world husband) is overwhelmingly unlikely to be the source of the individual indebtedness against which a tenancy by the entirety protects. It is regrettable that the Court has eliminated a large part of this traditional protection retained by many States.[162]

Some will think the model of social roles and relations Justice Scalia wants to protect to be of diminishing relevance in contemporary society. In my view, the injection of gender effects is unnecessary. If *Craft* truly did compromise legitimate interests of nondebtor spouses, that would be a grave deficiency, regardless of whether those spouses were mostly husbands or mostly wives.

Reasonable protection of nondebtor spouses should be a principal objective as *Craft* is implemented administratively and judicially. Collecting one person's tax liabilities out of another person's assets would be fundamentally unfair even if those persons are married to each other. Indeed, doing so would raise substantial questions of due process.[163]

However, *Craft* poses little danger of oppressing nondebtor spouses. I say this for the following three reasons: (1) *Craft* poses no risks beyond those already found acceptable in other contexts; (2) the mere attachment of the lien does not harm nondebtor spouses; and (3) realistic post-lien-attachment options contain ample protections for nondebtor spouses.

1. Uniqueness

The same fact noted as to the federalism concern operates here as well. *Craft* entails no danger to non-liable co-owners that is unique in either kind or degree. While the same concerns exist in other contexts, they have been deemed acceptable or shown to be exaggerated.

In *NBC*,[164] the dissenters warned that "the Court's decision [to allow the Service to levy on joint accounts] often will place the property rights of third parties in serious jeopardy."[165] Indeed, *NBC* arguably poses a greater risk to third parties than *Craft*.[166] The Court properly was undeterred by

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[162] *Craft*, 122 S. Ct. at 1426 (Scalia, J., dissenting).

[163] *See Rodgers*, 461 U.S. at 697.

[164] *See supra* subpart IV.A.

[165] *Nat'l Bank of Commerce*, 472 U.S. at 748.

[166] Two reasons support this statement. In *NBC*, the debtor (Roy) may not have had any beneficial ownership interest in the funds in the accounts. In contrast, in *Craft*, and in

that risk in *NBC* because the system provides substantial protections and remedies for aggrieved co-owners. As indicated below, that same situation pertains as to nondebtor spouses in entireties estates.[167]

In *Rodgers*, the Court permitted the Service to seek judicial sale of homestead property under section 7403.[168] As with *NBC*, *Rodgers* arguably poses a greater risk to third parties than *Craft*.[169] The Court concluded that the concerns were alleviated by the formidable safeguards section 7403 contains to protect nondebtor co-owners of property.[170] We will see that section 7403 will be the mechanism that the Service uses in entireties cases too, if it seeks to go beyond mere attachment of the lien. Thus, these same formidable safeguards will protect entireties spouses.[171]

Moreover, before *Craft*, entireties estates were the only kind of concurrent or marital estates immune from the federal tax lien. In addition to homestead interests, the lien attached to community property,[172] property subject to dower interests,[173] joint tenancies,[174] tenancies in common,[175] and partnerships.[176] And while some of such interests are unilaterally alienable, with or without partition, others, including homestead interests[177] and, in

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every other entireties case, the debtor spouse clearly has substantial beneficial interest in the property, whatever state law fictions may say. *See supra* text accompanying note 56. Second, *NBC* authorized a more substantial collection step, levy, than the mere lien attachment authorized by *Craft*.

[167] *See infra* subpart IV.B.3.

[168] *See supra* subpart III.A.

[169] The homestead is the marital residence, the physical core of the union. In contrast, entireties estates can hold a much wider array of assets, not just property specially related to the marital relationship. Thus, nonresidential real property (such as land held as an investment) as well as, in most entireties jurisdictions, personal property (whether used inside or outside the home) may be held by the entireties. *See, e.g.*, Tyler v. United States, 281 U.S. 497, 500 (1930); Winters v. Park, 91 So. 2d 649, 651 (Fla. 1956). Thus, every property affected by *Rodgers*, but not every property affected by *Craft*, is of fundamental importance to the nondebtor spouse and the marital union.

[170] *See Rodgers*, 461 U.S. at 699.

[171] *See infra* subpart IV.B.3.

[172] *See, e.g.*, United States v. Overman, 424 F.2d 1142, 1145 (9th Cir. 1970).

[173] *See, e.g.*, Washington v. United States, 402 F.2d 3, 7 (4th Cir. 1968).

[174] *See, e.g.*, United States v. Trilling, 328 F.2d 699, 702-03 (7th Cir. 1964).

[175] *See, e.g.*, United States v. Kocher, 468 F.2d 503, 507 (2d Cir. 1972).

[176] *See, e.g.*, *Craft*, 122 S. Ct. at 1424. Although the Service may not execute on the partnership's property, the Service is entitled to "the profits to which the [tax debtor] partner would otherwise be entitled," including operating distributions and distribution proceeds. *Id.* (quoting UNIF. P'SHIP ACT § 27(1) (1914), 6 U.L.A. 332 (2001)); *see also* Rev. Rul. 73-24, 1973-1 C.B. 602 (suggesting receivables are subject to levy).

[177] *See supra* subpart III.A.

some states, community property interests are not.[178]

Accordingly, *Craft* has not cast us into uncharted seas. Most of the property owned by spouses in this country is and has been held in forms permitting attachment of the tax lien to the interest of one spouse when only that spouse owes tax. *Craft* simply ends an anomaly. Nondebtor spouses have been adequately protected in those contexts. They can be here as well.

2. Mere Lien Attachment Not Threatening

Craft by itself is not threatening. *Craft* held only that the tax lien attaches to entireties property. Mere attachment of the lien does not imperil substantial interests of the nondebtor spouse. Nondebtor spouses can continue to occupy or use the property, receive their shares of income produced by it, exclude third parties from it, and the like. Moreover, the nondebtor spouse's contingent rights would be preserved. In the event of divorce, the nondebtor spouse would receive a tenancy-in-common interest just as before the lien attached. If the debtor spouse died first with the marriage intact, the nondebtor's survivorship interests would ripen into fee simple ownership of the whole property, just as before the lien attached.[179]

As a practical matter, the couple could not sell the property once the lien attached. After the Service files notice of the tax lien, a purchaser or grantee takes the property subject to that lien.[180] As a result, the property would be effectively unsaleable. But that is no substantial circumscription of rights. The nondebtor spouse could not unilaterally alienate the property or her interests in it even before the lien attached. She needed the consent of the other spouse. After lien attachment, she would, in effect, need the consent of the Service, which would stand in the shoes of the debtor spouse.[181]

Thus, *Craft* would not harm the nondebtor spouse if the Service simply allowed the lien to attach without taking further enforced collection action.

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[178] *See Craft*, 122 S. Ct. at 1423-24.

[179] The Service's lien then would be extinguished. The end of the debtor's interest would be the end of the lien as well. *See, e.g.*, United States v. Durham Lumber Co., 363 U.S. 522, 526 (1960).

[180] *See, e.g.*, United States v. Hughel, 20 F. Supp. 2d 1154, 1157 (S.D. Ohio 1997).

[181] The mechanism would be agreement between the couple and the Service under which the Service would agree to discharge the property from the lien (so that the property could be sold) in return for which the Service would be paid from the sale proceeds the lesser of the unpaid liabilities or the value of the debtor spouse's interest in the property. *See* I.R.C § 6325(b)(3) (2000).

How likely would it be that the Service would so forebear? Quite likely in many, though not all, cases.[182]

The Service makes levies, seizures, and sales in the distinct minority of unpaid assessment cases,[183] for a variety of reasons, which are set forth below. In some cases, the liability may be too small, or the taxpayer's interest worth too little to warrant the effort and expense of levy or sale.[184] In other cases, the Service may determine that the hardship to the taxpayer outweighs the benefit to the Government.[185] And in others, the revenue officer may feel that, on the particular facts of the case, there would be an excessive public relations risk to the Service[186] or personal career risk to the officer from aggressive collection.[187] Finally, in an increasing number of cases, there simply are not enough revenue officers to handle all, or even most, of the collection cases in the queue.[188]

Thus, the Service most likely will stop at lien attachment in many entireties cases. Indeed, counsel for the Government suggested this during

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[182] The nondebtor spouse's legitimate interests would not be unduly compromised even when the Service did proceed to enforced collection. *See infra* subpart IV.B.3.

[183] For statistics reflecting the "broad decline in enforcement activity," IRS OVERSIGHT BOARD ANNUAL REPORT 2 (Jan. 2002), see *id.* Table 2, and Joint Comm. on Tax'n, REPORT RELATING TO THE INTERNAL REVENUE SERVICE REFORM AND RESTRUCTURING ACT OF 1998, Sec. 134 (May 1, 2000).

[184] *Cf.* I.R.C. § 6325(b)(2)(B) (2000) (allowing the Service to discharge property from the tax lien when the interest of the United States is valueless).

[185] *Cf. id.* § 6334(a), (d), (e) (making certain types of property exempt from levy, reflecting hardship considerations).

[186] The Internal Revenue Service Restructuring and Reform Act of 1998 was enacted because of sensationalistic (though ultimately unsubstantiated) complaints of Service abuse during Senate hearings. *See, e.g.*, Steve R. Johnson, *A Residual Damages Right Against the IRS: A Cure Worse than the Disease*, 88 TAX NOTES 395, 398-99 (2000); Leandra Lederman, *Of Taxpayer Rights, Wrongs, and a Proposed Remedy*, 87 TAX NOTES 113, 1136 (2000).

[187] The so-called "10 deadly sins" provision of the 1998 Act provides for the firing of Service agents and officers deemed to have engaged in abuse and misconduct. *See* Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 1203, 112 Stat. 683, 720-21 (1998). Predictably, this has led to major declines in collection activity. *See, e.g.*, George Guttman, *Rossotti's Report Card*, 94 TAX NOTES 1584, 1585 (2002).

[188] Underfunding leads to inadequate staffing, and underenforcement in both collection and examination. This has plagued American tax administration for decades and continues to do so today. *See, e.g.*, C. EUGENE STEUERLE, WHO SHOULD PAY FOR COLLECTING TAXES?: FINANCING THE IRS 69-70 (1986); Jeffrey A. Dubin, Michael A. Graetz & Louis L. Wilde, *The Changing Face of Tax Enforcement*, 43 TAX LAW. 893, 912-14 (1990); George Guttman, *IRS Faces Budget Crunch*, 95 TAX NOTES 1546, 1546 (2002).

the oral argument of *Craft*.[189] That remark does not bind the Service, of course. Still, at least three reasons explain why this prediction is likely to be correct.

First, enforced collection in entireties cases will be expensive for the Service. Revenue officers usually prefer to proceed via levy or seizure followed, in the case of noncash property, by administrative sale. This process is comparatively simple and inexpensive for the Service because it usually can be effected by collection personnel only. In entireties cases, though, that preferred route typically will be infeasible, and the Service will be required to act through judicial sale under section 7403.[190]

The section 7403 avenue requires the revenue officer to send the case to Service counsel, which, if it concurs, then must send the case to the Department of Justice Tax Section for commencement of the proceeding.[191] The proceeding can be protracted and costly because "[a]ll persons having liens upon or claiming any interest in the property" must be joined in the action.[192] Moreover, the net proceeds of any ensuing sale are divided among the parties in proportion to their respective interests in the property.[193] Dividing the proceeds requires valuation, likely through expert testimony, thus adding to the expense.[194] Thus, the costs in time and dollars will incline the Service to go beyond lien attachment only as a last resort.

Second, unless pursued selectively and handled carefully, enforced collection in entireties cases presents public relations hazards that are potentially dangerous to the Service institutionally and the revenue officer personally.[195] There naturally will be sympathy for the nondebtor spouse.[196] Heavy-handed enforcement by the Service in such cases could become, either fairly or with exaggeration,[197] media and political fodder.

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[189] *See* United States Supreme Court Official Transcript at 12-14, *Craft* (No. 00-1831).

[190] *See infra* text accompanying notes 210-15.

[191] Section 7403 actions are brought in federal district court and are within the purview of the Department of Justice. *See* I.R.C. § 7403(a) (West Supp. 2001).

[192] I.R.C. § 7403(b) (2000).

[193] *See id.* § 7403(c).

[194] *See* Johnson IV, *supra* note 60, at 564-65.

[195] *See supra* text accompanying notes 186-87.

[196] *See, e.g.*, United States v. Jones, 877 F. Supp. 907, 917-18 (D.N.J. 1995), *aff'd without opinion*, 74 F.3d 1228 (3d Cir. 1995).

[197] Many of the accusations that propelled the 1998 legislation to passage have been discredited. *See, e.g.*, Ryan Donmoyer, *Secret GAO Report Is Latest To Discredit Roth's IRS Hearings*, 87 TAX NOTES 463 (2000). The accusations, however, received incomparably more media and political attention than their subsequent refutation.

Accordingly, in this era of the "ten deadly sins,"[198] this potential is unlikely to escape notice by revenue officers. The Service likely will rest at mere attachment of the lien unless some factor in the case shifts the equities in favor of more aggressive collection. The following are factors the Service will consider in judging the benefits of more aggressive collection:

> (1) Whether the property is cash or noncash. The fact that the real property in *Craft* had been sold and the case was about dividing a pot of cash, was helpful to the Government.[199]
>
> (2) Whether the property is central to the marital union or the welfare of the couple. The marital residence usually will be the most sensitive type of property[200] and probably will be actively pursued by the Government only rarely. Depending on the circumstances, certain other kinds of property also may be sensitive, an awareness reflected in various current statutes and in administrative practice.[201]
>
> (3) Whether the nondebtor spouse colluded with the debtor spouse. One of the problems with the pre-*Craft* rule was that it created a ready pathway for abuse. By filing separate returns and holding their properties by the entireties, spouses effectively could underpay their taxes with impunity from collection, especially in the full bar jurisdictions.[202] That is not to say that all entireties estates were vehicles for such abuse. Some were, but many were not. How the equities of the particular enforcement case are perceived will depend in part on whether the facts show that the nondebtor spouse colluded with the other spouse or participated in a scheme to defeat tax collection.[203]

Third, a final reason why the Service often will rest at mere lien attachment is that frequently lien attachment alone will result in payment of part or all of the assessments, without the need to take more terminal

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[198] *See supra* text accompanying note 187.

[199] *See* United States Supreme Court Official Transcript at 12-13, *Craft* (No. 00-1831) (providing remarks of Kent L. Jones, Esq., Assistant to the Solicitor General).

[200] *See Rodgers*, 461 U.S. at 704 (stating that "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").

[201] *See* Johnson IV, *supra* note 60, at 566 (describing such statutes and practices).

[202] *See id.* at 556 (describing the permutations of this strategy).

[203] *See id.* at 560.

action. This could happen in any of several ways:

(1) Sometimes, the spouses voluntarily will pay an amount corresponding to the value of the debtor spouse's interest in the property. They will do this to put the matter behind them or, more frequently, to remove the cloud on title and make the property saleable.[204] This happened occasionally before *Craft*; it will happen much more frequently now.

(2) Sometimes the Service will be able to "piggy back" onto a collection proceeding brought by another creditor. Lenders in entireties states, aware of the problems faced by separate creditors, typically require both of the spouses to be obligors. If the loan is not repaid, the lender (a joint creditor and, thus, eligible to proceed) may seek payment out of the entireties property. The Service will be joined in such a case, or will intervene, on account of the tax lien. Depending on the values and the priorities of the various claims,[205] the Service may receive some payment without being required to initiate action against the property.

(3) Divorce is common. If there is some prospect of divorce in a particular case, the Service could simply wait. When, on account of dissolution of the marriage, the entireties estate is converted into a tenancy in common,[206] the Service then could proceed against the now-severable property interest of the debtor spouse.

(4) Should the ages or health of the spouses suggest that the nondebtor spouse is likely to die first, the Service may wait until, by virtue of survivorship, the debtor spouse becomes the sole owner of the whole property.[207]

Thus, *Craft* provides only that the tax lien attaches. Mere attachment of the tax lien to the entireties property does not significantly compromise the interests of the nondebtor spouse. Moreover, for a variety of reasons, the Service often will leave the matter at the stage of mere lien attachment, taking a "wait and see" approach to further developments.[208]

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[204] *See infra* text accompanying note 214.

[205] *See generally* I.R.C. § 6323 (2000).

[206] *See supra* text accompanying note 38.

[207] *See supra* text accompanying note 39.

[208] In waiting, the Service would need to be alert to when the statute of limitations on collection will expire in the given case. However, if the Government begins, within the limitations period, a suit to reduce the assessment to judgment, the resulting judgment can be enforced at any time during its legal life, even after the ten years. *See* I.R.C. § 6502(a) (2002).

3. *Enforced Collection Not Threatening*

Although the Service often will rest at mere attachment of its lien, in many entireties cases it inevitably will proceed to enforced collection in some cases. Will such cases pose unacceptable risks to nondebtor spouses?[209] I think not. My conclusion rests on two pillars: (1) the only practicable enforced collection option for entireties cases is judicial sale and division of proceeds under section 7403, and (2) section 7403 sale-and-division entails substantial safeguards that will adequately protect nondebtor spouses.

The Court noted in *Rodgers* that the Service normally has three main tools of enforced collection.[210] First, the Government may "sue for the unpaid amount, and, on getting a judgment, exercise the usual rights of a judgment creditor."[211] Second, the Service may levy under section 6331 followed, in the case of noncash property, by administrative sale under section 6335. Third, the Government may request that a federal district court authorize a sale of the property and a division of the proceeds among the Service and the other claimants who are interest-holders under section 7403.

The first of these options will be unavailing in entireties situations except in the easiest cases. Having obtained a judgment, the Government still would need to collect on it. If the delinquent had enough nonentireties assets to satisfy the judgment, the Government could have levied on those assets without bothering to obtain a judgment. If the delinquent's nonentireties assets are not enough, the Government will be back in the original position. Obtaining a judgment is unnecessary in easy cases and not helpful in hard ones.

The second option—administrative levy and sale—would be impracticable in entireties situations.[212] The Service could sell only what it got from the debtor spouse, that is, the debtor spouse's interest in the property. But that interest would be subject to and could not derogate the similar interest of the nondebtor spouse. Thus, among other limitations, any

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[209] Throughout, I have referred to nondebtor spouses, not to "innocent spouses." As noted above, some nondebtor spouses collude with their debtor spouses to use entireties ownership as an avenue of tax abuse; others do not. *See supra* note 60. Nondebtor spouses includes both of these groups. Innocent spouses is a more restrictive term, morally speaking, which, in our context, properly applies to the second group but not to the first.

[210] *See Rodgers*, 461 U.S. at 680-83.

[211] *Id.* at 682; *see* I.R.C. §§ 6502(a), 7401, 7402(a).

[212] For further development of this point, *see* Johnson IV, *supra* note 60 at 560-61.

purchaser of the debtor's interest from the Service would be unable to eject the nondebtor from occupation and use of the property, would be unable to transfer or encumber the property without the nondebtor's consent, and would lose his interest entirely if he predeceased the nondebtor.[213] No one would buy the debtor's interest from the Service under such circumstances, at least not at a price making the effort worthwhile for the Service.[214]

Thus, neither of the principal alternatives is likely to be helpful to the Service in entireties situations. When the Service feels compelled to move beyond mere attachment of its lien, it typically will do so through the third alternative: section 7403 sale and division of proceeds.[215]

In upholding the section 7403 sale of homestead property in *Rodgers*, the Court noted that "§ 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."[216] There are four reasons why this is so.

First, the Service alone conducts administrative levy and sale. In contrast, although the Government initiates a section 7403 proceeding by petition, a court controls the procedure and makes the decisions.

Second, "[a]ll persons having liens upon or claiming any interest in the property . . . shall be made parties" to the section 7403 proceeding.[217] Thus, the court will have the advantage of hearing all viewpoints and considering all interests.

Third, the court is not compelled to grant the Government's request to sell the property. The statute is phrased permissively.[218] Accordingly, the Court held in *Rodgers* that the district court has equitable discretion to deny

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[213] *Cf.* Elfelt v. Cooper, 485 N.W.2d 56 (Wis. 1992) (stating that purchaser from Service of debtor spouse's interest in homestead in joint tenancy was divested of interest).

[214] It is widely recognized that, for this reason, undivided interests in property are essentially unsaleable by the Service. *E.g.*, United States v. Bierbrauer, 936 F.2d 373, 376 (8th Cir. 1991); United States v. Jones, 877 F. Supp. 907, 917 (D.N.J. 1995), *aff'd without opinion*, 74 F.3d 1228 (3d Cir. 1995); United States v. Bachman, 584 F. Supp. 1002, 1005 (S.D. Iowa 1984).

[215] The Court emphasized in *NBC* that Congress provided the Service with multiple collection tools and that the courts should not superintend the Service's discretion to choose among those tools. *See Nat'l Bank of Commerce*, 472 U.S. at 730-33. My point here is that, although the Service does have discretion, practical considerations normally constrain it to exercise that discretion in favor of the section 7403 option.

[216] *Rodgers*, 461 U.S. at 699.

[217] I.R.C. § 7403(b) (2000).

[218] *See id.* § 7403(a) (stating that the court "may" decree a sale).

sale,[219] although such discretion is limited, not open-ended.[220] In fact, district courts often exercise such discretion.[221] In all likelihood, there would be considerable sympathy for nondebtor entireties spouses in district courts, especially when sensitive property is involved or substantial hardship is threatened.[222]

Fourth and finally, when the district court does authorize sale of the property, the nondebtor spouse will receive a share of the proceeds corresponding to such spouse's proportionate interest in the property.[223] The Court has held that this compensation arrangement obviates possible due process objections to the sale.[224]

I have argued that the legitimate interests of nondebtor spouses will not be unduly compromised as a result of *Craft*. That is not to say that life will be precisely the same for nondebtor spouses after *Craft* as before it. For example, before *Craft,* nondebtor spouses could, by their unilateral decision, prevent entireties property from being converted into cash via sale. Were a section 7403 sale to occur after *Craft*, that power would no longer be absolute. Does that significantly disadvantage the nondebtor spouses? No. Three reasons explain such an answer.

First, the unilateral power to block the sale of entireties property still prevails in the vast majority of situations. It remains in all nontax situations. Even in tax situations, sale against the nondebtor spouse's wishes would be averted more often than not. As noted above, the Service often will not seek to go beyond mere attachment of the lien.[225] If it does,

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[219] *See Rodgers*, 461 U.S. at 703-09.

[220] *See id.* at 709-11 (discussing the factors a district court must consider before exercising this discretion).

[221] *See, e.g.*, United States v. Reid, 127 F. Supp. 2d 1361, 1381-83 (S.D. Ga. 2000); United States v. Johnson, 943 F. Supp. 1331, 1333 (D. Kan. 1996).

[222] *See, e.g.*, United States v. Jones, 877 F. Supp. 907 (D.N.J. 1995), *aff'd without opinion*, 74 F.3d 1228 (3d Cir. 1995). The Service had assessments against one spouse only, a tax protestor, in a partial bar state. Applying the *Rodgers* factors, the court refused to sell the marital residence under section 7403. As an alternative remedy, it directed the nondebtor spouse to pay the Service each month half the imputed rental value of the property, to be credited to the unpaid taxes. *See id.* at 920.

[223] This raises the important issue of how to value entireties interests. *Craft* remanded the valuation issue to the Sixth Circuit. *See* 122 S. Ct. at 1426. For a detailed discussion of the issue, *see* Johnson IV, *supra* note 60, at 564-68.

[224] *See Rodgers*, 461 U.S. at 697-99; *see also* United States v. Overman, 424 F.2d 1142, 1146 (9th Cir. 1970) (recognizing the right to just compensation by nondebtor interest-holders).

[225] *See supra* subpart IV.B.2.

the couple could preserve cherished entireties property by paying off the tax liability with their other assets, and, in extreme cases, the district courts may exercise their discretion not to sell.[226]

Second, the gate swings both ways. Both spouses—the debtor spouse as well as the nondebtor spouse—can block the other's desire to dispose of property. Presumably, cases now exist in which the debtor spouse is preventing sale of property the nondebtor spouse wants to sell. In such cases, a section 7403 sale would provide relief to the nondebtor spouse because of the adequate compensation requirement of section 7403. Thus, cases in which dispositions undesired by the nondebtor spouse occur will be partly or fully offset by cases in which dispositions desired by the nondebtor spouse now can occur. Because of *Craft* and section 7403, cases of enhanced freedom will counter cases of lessened freedom.

Third, some loss of flexibility for some nondebtor spouses should not be viewed as decisive. We have never viewed an owner's right to hold onto property as absolute when a strong public interest is involved and the owner will be adequately compensated. One example is the power of eminent domain pursuant to which a unit of government may force citizens to sell their property, whether entireties or not, to the unit.

Another example is the treatment of entireties interests in the bankruptcy process. Assume only one spouse files a bankruptcy petition. The resultant bankruptcy estate consists of "all legal or equitable interests of the debtor in property,"[227] including that spouse's interest in entireties property.[228] The bankruptcy trustee typically is empowered to sell the whole of the property, notwithstanding objection by the nondebtor spouse, and then to pay the nondebtor the value of his or her interest in the property, retaining the remainder of the sale proceeds to pay creditors.[229] This approach reminds one of section 7403, and the courts have viewed it as adequately protecting the debtor spouse.[230]

Similarly, in the tax collection area, *NBC* indicates that a balancing of interests is appropriate.[231] Any loss of prerogative that exists after the above mitigations is marginal. We accept it in eminent domain and

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[226] *See supra* text accompanying notes 218-22.
[227] 11 U.S.C. § 541(a)(1) (2000).
[228] *See, e.g.*, *In re* Grosslight, 757 F.2d 773, 775-76 (6th Cir. 1985).
[229] *See* 11 U.S.C. § 363(f), (h) (2000).
[230] *See, e.g.*, *In re* Koehler, 6 B.R. 203, 206 (Bankr. M.D. Fla. 1980); *see also* H.R. REP. NO. 95-595, 177 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6137-38.
[231] *See supra* text accompanying note 160.

bankruptcy. Surely, the loss of prerogative should yield to the Government's strong interest in collecting taxes that are owed.[232] Lien attachment, even if followed by section 7403 sale, merely would bring to the entireties area a balancing well known and accepted as reasonable in other areas.

V. CONCLUSION

Craft was long overdue. It overthrew an anomaly with respect to entireties property in the law of federal tax collection, and was compelled by fidelity to the Court's precedents in the collection area. The concerns that have been voiced about *Craft* are understandable as part of the process of human beings adjusting to change, but they do not reflect genuine problems. In particular, fears that *Craft* infringes on the legitimate prerogatives of the states and that nondebtor spouses will suffer unduly as a result of the implementation of *Craft* are misplaced or can be assuaged by intelligent and sensitive decisions by the Service and the courts. *Craft* was rightly decided, and it should not be scary.

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[232] As the Court has observed, "[n]o more essential or important power has been conferred upon the Congress" than its constitutional power to lay and collect taxes. United States v. Jacobs, 306 U.S. 363, 370 (1939).