

REFLECTIONS ON *UNITED STATES V. CRAFT*: JUSTIFYING A NEW FEDERAL COMMON LAW OF PROPERTY?

John W. Leardi*

*“The tenancy by the entirety since Blackstone has been an awkward compromise, renegotiated in each generation, and only belatedly catching up with social reality.”*¹

INTRODUCTION

In *United States v. Craft*,² the Supreme Court held that a tenant by the entirety, as defined by Michigan law, possesses “property or rights to property” to which a federal tax lien³ can attach.⁴ This decision contradicts longstanding Supreme Court precedent reserving the power to create and define property ownership and rights to state governments.⁵ Previously, a federal tax lien could not attach to an entireties estate due to the peculiar state law fiction that neither spouse possesses an individual interest in the property.⁶

* J.D. 2004, Seton Hall University School of Law; B.S. 1997, University of Scranton.

¹ John V. Orth, *Tenancy by the Entirety: The Strange Career of the Common law Marital Estate*, 1997 BYU. L. REV. 35, 48 (1997).

² *United States v. Craft*, 535 U.S. 274, 276 (2002).

³ Under the federal tax lien statute, a lien is an assessment for unpaid income tax liability levied upon a taxpayer by the Internal Revenue Service. 26 U.S.C. § 6321 (2004).

⁴ *Craft*, 535 U.S. at 276.

⁵ See *Aquilino v. United States*, 363 U.S. 509, 515 (1960) (concluding that state law determines the nature of the property interests one possesses); accord *Oregon State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378 (1977) (reaffirming the longstanding premise that “under our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several states”).

⁶ *United States v. Rodgers*, 461 U.S. 677, 702 n.31 (1983) (citing *United States v. Am. Nat’l Bank of Jacksonville*, 255 F.2d 504, 506 (5th Cir. 1958); *United States v. Hutcherson*, 188 F.2d 326, 331 (8th Cir. 1951)); see also *Raffaele v. Granger*, 196 F.2d 620, 623 (3d Cir. 1952) (holding that property held in entirety under Pennsylvania law is not subject to a federal tax lien because the “United States has no power to

Tenancy by the entirety is a form of concurrent land ownership rooted in a common-law legal fiction that views married couples holding entireties property as a single entity.⁷ The defining feature of the tenancy is the protection from liens it affords. Traditionally, liens or other judgments imposed on one spouse individually could not be enforced against property held in tenancy by the entirety because the debtor spouse had no separate or distinct interest in the estate.⁸ At common law, all transfers of property to a married couple were automatically held in tenancy by the entirety.⁹ Today, tenancy by the entirety is still recognized as a form of concurrent ownership in about one-half of the states.¹⁰

The question presented in *Craft* was whether a tenant by the entirety, as defined by Michigan law, possesses “property or rights to property” to which a federal tax lien¹¹ may attach.¹² The Court of Appeals for the Sixth Circuit previously held entireties property is exempt from federal tax liens levied against one spouse individually.¹³ The Supreme Court granted certiorari to consider whether a tenant by the entirety has a separate property interest to which a federal tax lien can attach.¹⁴ Justice O’Connor, writing for the majority, concluded that a tenant by the entirety, as defined by Michigan law, possesses rights in the estate sufficient to constitute “property or rights to property” for the purposes of the federal tax lien statute, and therefore reversed the judgment of the Court of Appeals.¹⁵

Craft is particularly noteworthy in light of the Rehnquist Court’s¹⁶

take property from one person, to satisfy the obligation of another, the delinquent spouse”).

⁷ J. GORDON HYLTON ET AL., PROPERTY LAW AND THE PUBLIC INTEREST: CASES AND MATERIALS, 367 (1998).

⁸ Guerino J. Turano & Philip H. Ward, *Joint Tenancy and Tenancy by the Entirety: The Pros and Cons*, 83 ILL. B.J. 309 (1995).

⁹ HYLTON ET AL., *supra* note 7, at 368.

¹⁰ *Id.*

¹¹ 26 U.S.C. § 6321 (1954) (“If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.”).

¹² *Craft*, 535 U.S. at 276.

¹³ *Craft v. United States*, 140 F.3d 638 (6th Cir. 1998).

¹⁴ *Craft*, 535 U.S. at 278.

¹⁵ *Id.* at 289.

¹⁶ The Rehnquist Court means each successive term of the Supreme Court commencing with the elevation of William H. Rehnquist from Associate to Chief Justice in 1986. David M. O’Brien, *The Supreme Court and Intergovernmental Relations: What Happened to “Our Federalism”?*, 9 J.L. & POL. 609, 610 (1993).

consistent protection of state sovereignty.¹⁷ Over the last decade, the Court asserted this view of federalism in numerous decisions limiting the scope of congressional powers.¹⁸ The *Craft* decision, however, contradicts that more general direction of the court by disregarding the lien protection afforded entireties property under Michigan law.¹⁹ *Craft* firmly establishes the superiority of federal tax liens over state property law definitions.²⁰

One circumstance seemingly analogous to *Craft* is the possible attachment of federal drug-forfeiture laws to property held in tenancy by the entirety. In theory, the property interest of a spouse found guilty under federal forfeiture laws cannot be reached while the entireties estate remains in effect.²¹ The Eleventh Circuit upheld this premise in concluding that the Comprehensive Drug Abuse and Prevention Act of 1970²² did not preempt Florida entirety law, which prevents the forfeiture of any portion of an innocent spouse's interest in entireties property.²³ The Third Circuit, however, has held that

¹⁷ Mitchell F. Crusto, *The Supreme Court's "New" Federalism: An Anti-Rights Agenda?*, 16 GA. ST. U. L. REV. 517, 526 (2000). Professor Crusto argues that the Rehnquist Court has taken constitutional authority away from the federal government and restored that authority to the states. *Id.*

¹⁸ See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (stating that the states possess sovereignty concurrent with that of the federal government, subject only to limitations imposed by the Supremacy Clause); *New York v. United States*, 505 U.S. 144 (1992) (concluding that while Congress has substantial power under the Constitution to encourage the States to provide for the disposal of the radioactive waste generated within their borders, the Constitution does not confer upon Congress the ability simply to compel the States to do so); *United States v. Lopez*, 514 U.S. 549 (1995) (holding that the Gun-Free School Zones Act exceeded Congress's commerce clause authority, since possession of gun in local school zone was not economic activity that substantially affected interstate commerce).

¹⁹ *Craft*, 535 U.S. at 276. The Court held that despite the legal fiction created under Michigan law of tenancy by the entirety, each tenant possessed individual rights in the estate sufficient to possess "property or rights to property" to which a federal tax lien could attach. *Id.*

²⁰ *Id.*

²¹ *Turano & Ward*, *supra* note 8, at 309 (stating that the guilty spouse has no separate interest in the property, and state laws generally protect the indivisible interests of an innocent spouse by barring forfeiture of entireties property).

²² 21 U.S.C. § 881(a) (7) (2003).

All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment.

Id.

²³ *United States v. One-Single Family Residence Without Buildings Located at 15621 SW 20th Ave. Miami, FL*, 894 F.2d 1511 (11th Cir. 1990).

one spouse's innocent-owner defense does not preclude forfeiture of state entireties property based on an alleged violation of the same statute.²⁴ Resolving this split ultimately hinges on whether the federal government's interest in seizing property tied to narcotics is afforded the same deference by future courts as was the interest in collecting from delinquent taxpayers in *Craft*.²⁵ At issue are two seemingly inapposite concerns: the preservation of an archaic legal fiction and significant federal prerogatives.²⁶ Despite the current posture of the Supreme Court, *Craft* undoubtedly frustrates the right of states to define "property and rights to property."

Part I of this Comment tracks the historical development of the tenancy by the entirety from its feudal roots in England to its modern manifestations under state property laws. Part II presents the *Craft* decision. Part III discusses the potential scope of *Craft*, in light of the "new federalism"²⁷ doctrine asserted by the Rehnquist Court.²⁸ Regardless of *Craft's* eventual scope, Part IV analyzes whether its infringement into an area of the law traditionally reserved for the states is appropriate; primarily, whether the congressional goal of enforcing the tax code impliedly preempts²⁹ any state law property classification that conflict with the overall federal scheme. Or

²⁴ *United States v. Parcel of Real Property Known as 1500 Lincoln Ave.*, 949 F.2d. 73 (3d Cir. 1991).

²⁵ *Craft*, 535 U.S. at 278 ("We look initially to state law to determine what rights the taxpayer has in the property the Government seeks to reach, then to federal law to determine whether the taxpayer's state-delineated rights qualify as 'property' or 'rights to property' within the compass of the federal tax lien legislation.") (quoting *Drye v. United States*, 528 U.S. 49, 58 (1999)).

²⁶ Barbara W. Sharp, *Losing Sticks from the Bundle: Incompatibility of Tenancy by the Entireties and Drug Forfeiture Laws*, 8 BYU J. PUB. L. 197, 208 (1993). In discussing the incompatibility of federal drug forfeiture laws and the tenancy by the entirety, Professor Sharp states that the tenancy by the entirety, as a "vestige from the feudal system," cannot "function effectively as a means of modern concurrent ownership." *Id.*

²⁷ Federalism means "a system of government in which power is divided between a central authority and constituent political units." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000). Many legal scholars postulate that "the Rehnquist Court's most significant changes in constitutional law have been in the area of federalism – limiting the scope of Congress's powers, reviving the Tenth Amendment, and greatly expanding the sovereign immunity of the states." Erwin Chemerinsky, *The Rehnquist Court and the Constitution*, 36 TRIAL 84 (2000).

²⁸ Crusto, *supra* note 17, at 519 (2000). Professor Crusto speculates that the Rehnquist Court's "new federalism seeks to elevate the power of state governments over that of the federal government and, in part, encourages state governments to pursue their own constitutional rights agenda." *Id.*

²⁹ "If there is a conflict between federal and state law, the federal law controls and the state law is invalidated because federal law is supreme." ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 284 (1997) (citing *Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 108 (1992)).

alternatively, as Justice Thomas warned in his dissent,³⁰ did the *Craft* majority create a new federal common law³¹ of property, rooted in the potential for arbitrary applications of the tax code?³² While it is clear that states reserve the right to define and recognize entireties property, it is equally clear that the federal government, at least with regard to the tax power, will no longer be bound by the states archaic property classifications.

I. TENANCY BY THE ENTIRETY

A. *Tenancy by the Entirety: In General*

The tenancy by the entirety is a form of concurrent ownership that can exist only between a husband and wife.³³ It creates the legal fiction that each spouse owns one hundred percent of the estate, and neither may sell or encumber it unilaterally.³⁴ Each spouse maintains the right to use and enjoy the estate as well as the right to survivorship, which mandates that if one spouse predeceases the other, the surviving spouse takes the estate.³⁵ No portion of the decedent spouse's interest is devisable³⁶ or descendible.³⁷ Tenancy by the entirety differs from the joint tenancy with right of survivorship in that neither party may sever the tenancy unilaterally.³⁸

³⁰ *Craft*, 535 U.S. at 294 (Thomas, J., dissenting):

By erasing the 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, the Court does not follow *Drye*, but rather creates a new federal common law of property.

³¹ Federal common law means "the judge-made law of federal courts, excluding the law in all cases governed by state law. An example is the nonstatutory law applying to interstate streams of commerce." BLACK'S LAW DICTIONARY 270 (7th ed. 1999).

³² Due to the inherent contradiction between state property law of tenancy by the entirety and federal prerogatives under 26 U.S.C. § 6321, a federal tax lien enforceable as to a taxpayer in one state, will not be enforceable as to a similarly situated taxpayer in another state based solely on differences in state property definitions.

³³ HYLTON ET AL., *supra* note 7, at 366.

³⁴ *Id.*

³⁵ *Id.*

³⁶ The term "devise" means "giving property (usually real property) by will." BLACK'S LAW DICTIONARY 463 (7th ed. 1999).

³⁷ The term "descent" means "the acquisition of real property by law, as by inheritance; the passing of intestate real property to heirs." BLACK'S LAW DICTIONARY 456 (7th ed. 1999).

³⁸ HYLTON ET AL., *supra* note 7, at 366. If either spouse attempts to transfer his or her interest in entireties property unilaterally, the transfer ultimately fails. *Id.* Also,

In order for property to be held in tenancy by the entirety, “five unities” must be present.³⁹ The unity of time⁴⁰ requires each party to acquire an interest in the property at the same time.⁴¹ The unity of title⁴² requires both parties to acquire title to the property by the same legal instrument.⁴³ The unity of interest⁴⁴ requires that each party have an equal, undivided share, and an identical interest in the property as measured by duration.⁴⁵ The unity of possession⁴⁶ means both spouses must have the right to possession of the property as a whole.⁴⁷ Finally, the unity of person⁴⁸ can only be satisfied by a legal marriage.⁴⁹ At common law, any property transferred to a married couple jointly automatically resulted in an entireties estate.⁵⁰

Neither spouse, acting unilaterally during the marriage, can terminate an entireties estate.⁵¹ The estate is only severed by the death of one spouse, legal termination of the marriage (divorce), or if both spouses convey the estate to a third party.⁵² Moreover, an estate held in tenancy by the entirety is not subject to partition,⁵³ either voluntarily or involuntarily.⁵⁴ In most states, if the parties divorce, the “tenancy by the entirety is automatically converted to a tenancy in common.”⁵⁵ Legal separation, as opposed to divorce, will not affect the estate.⁵⁶

The tenancy by the entirety has a few defining characteristics

neither spouse can request a judicial partition of property held in tenancy by the entirety. *Id.*

³⁹ ROBERT C. LAWRENCE III, *Basic Aspects of Common law Tenancies*, in INTERNATIONAL TAX AND ESTATE PLANNING: A PRACTICAL GUIDE FOR MULTINATIONAL INVESTORS, § 4:2:2 (publication page references are not available for this document).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ LAWRENCE, *supra* note 39, at § 4:2:2.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ HYLTON ET AL., *supra* note 7, at 368.

⁵¹ LAWRENCE, *supra* note 39, at § 4:2:2.

⁵² *Id.*

⁵³ Partition means “the act of dividing; esp., the division of real property held jointly or in common by two or more persons into individually owned interests.” BLACK’S LAW DICTIONARY 1141 (7th ed. 1999).

⁵⁴ LAWRENCE, *supra* note 39, at § 4:2:2.

⁵⁵ *Id.* For an example of a case holding as such, see *Shepard v. Shepard*, 336 So. 2d 496 (Miss. 1976).

⁵⁶ LAWRENCE, *supra* note 39, at § 4:2:2.

which distinguish it from the other common law tenancies.⁵⁷ First, judgments and other liens against one spouse (individually, as opposed to against both spouses) are not enforced against property held in tenancy by the entirety.⁵⁸ Second, creditors of one spouse in bankruptcy or some other form of insolvency cannot reach or sever an estate held in tenancy by the entirety.⁵⁹ Third, the interest of a spouse found guilty under federal or state forfeiture laws is, at least theoretically,⁶⁰ unreachable while the tenancy remains in effect.⁶¹ Fourth, neither spouse can file for a judicial partition of the estate without the consent of the other.⁶² Fifth, neither spouse may unilaterally sever or encumber⁶³ the estate, or sell his or her interest in it.⁶⁴ Sixth, in most jurisdictions recognizing the tenancy, a surviving spouse is not able to disclaim the interest of the decedent spouse,⁶⁵ and the Internal Revenue Service will not recognize any such disclaimer.⁶⁶ Finally, “an adult child cannot be given title to the” property.⁶⁷ A spouse cannot dispose of his or her undivided interest in the estate through a will or any other legal instrument.⁶⁸

⁵⁷ *Id.* (describing the joint tenancy with right of survivorship; tenancy in common; and tenancy by the entirety). Tenancy means the “possession or occupancy of land by right or title.” BLACK’S LAW DICTIONARY 1477 (7th ed. 1999). Common law forms of property ownership are distinguished by the manner in which tenancy rights are distributed.

⁵⁸ Turano & Ward, *supra* note 8, at 309.

⁵⁹ *Id.*

⁶⁰ *Id.* Although entireties property is unreachable under state law, there is a split in judicial authority as to whether a federal forfeiture law (specifically 21 U.S.C. § 881(a) (7)) may reach property held in entirety. See *supra* notes 23-24 and accompanying text.

⁶¹ Turano & Ward, *supra* note 8, at 309 (“[I]f the guilty spouse predeceases, it is not reachable at all.”).

⁶² *Id.*

⁶³ To “encumber” means “a claim or liability that is attached to property or some other right and that may lessen its value, such as a lien or mortgage; any property right that is not an ownership interest.” BLACK’S LAW DICTIONARY 547 (7th ed. 1999). An encumbrance cannot defeat the transfer of possession, but it remains after the property right is transferred. *Id.*

⁶⁴ Turano & Ward, *supra* note 8, at 309 (“This poses problems if the couple divorces, or if one spouse has become incompetent, has abandoned the other, or has otherwise disappeared.”).

⁶⁵ *Id.* at 310.

⁶⁶ *Id.* (“[D]isclaiming sometimes gives an estate tax advantage. If the disclaimer was made more than nine months after title was taken in tenancy by the entirety, the IRS will claim it was made too late.”).

⁶⁷ *Id.*

⁶⁸ *Id.* (“Tenancy by the entirety thus makes a common probate avoidance technique unavailable.”).

B. Tenancy by the Entirety: Historical Development

The tenancy by the entirety first appeared sometime during the Middle Ages, originating in “the feudal system’s regime of land tenures.”⁶⁹ Sir William Blackstone first mentioned the estate posthumously in the 1783 edition of the Commentaries, prepared by Richard Burn:⁷⁰

If an estate in fee be given to a man and his wife, they are neither properly joint-tenants, nor tenants in common: for husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seised of the entirety, per tout et non per my: the consequence of which is, that neither the husband nor the wife can dispose of any part of it without the assent of the other, but the whole must remain to the survivor.⁷¹

At English common law, the tenancy was the only means by which a husband and wife could hold land.⁷² The unnamed estate described by Blackstone became known as the tenancy by the entirety because of its undivided and indivisible nature.⁷³ The estate created the paradox of a severalty with two owners; the one tenant was in fact two.⁷⁴ The foundation of an entirety estate is rooted in the anomaly that two persons are, under the law, one.⁷⁵ The tenancy by the entirety was imported to the North American colonies as part of the English common law.⁷⁶

Early practical applications of the estate were plagued by gender-bias.⁷⁷ Courts consistently recognized “the right of use [of the marital estate] in the husband, even to the exclusion of the wife.”⁷⁸ All profits generated by the estate were also solely the domain of the husband.⁷⁹ Under the law, the two were one, but in actuality the “husband was the one.”⁸⁰ The wife’s entirety interest in the estate was essentially

⁶⁹ Sharp, *supra* note 26, at 198.

⁷⁰ Orth, *supra* note 1, at 38.

⁷¹ 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 182 (1765).
From 4A RICHARD R. POWELL, THE LAW OF REAL PROPERTY, ¶ 610 (1991).

⁷² *Id.*

⁷³ Orth, *supra* note 1, at 38.

⁷⁴ *Id.* at 39.

⁷⁵ *Id.* at 40. (“[T]he law was trying to perform a particularly difficult form of doublethink: to think about two persons as though they were one.”).

⁷⁶ Sharp, *supra* note 26, at 199.

⁷⁷ Orth, *supra* note 1, at 40.

⁷⁸ *Id.* See, e.g., Voight v. Voight, 147 N.E. 887 (Mass. 1925).

⁷⁹ *Id.* See, e.g., Pineo v. White, 70 N.E.2d 294 (Mass. 1946); Childs v. Childs, 199 N.E. 383 (Mass. 1936); North Carolina Bd. Of Architecture v. Lee, 142 S.E.2d 643 (N.C. 1965).

⁸⁰ JOHN E. CRIBBET ET AL., CASES AND MATERIALS ON PROPERTY 329 (6th ed. 1990).

nothing more than an indefeasible right of survivorship.⁸¹ One North Carolina court went so far as to concede, “[i]t is possible that a wife might receive no benefits at all from land held by the entirety if she predeceases her husband.”⁸²

Changing social attitudes during the nineteenth century, however, brought sweeping changes to the legal status of women.⁸³ Passage of married women’s property acts in several states during this period shook the already unstable foundations of the tenancy by the entirety.⁸⁴ Once the rights of married women were created, many states took the position that the two were no longer one, and no longer recognized entireties estates, while others modified the tenancy to allow mutual control by both spouses.⁸⁵ In England, where the estate originated, husband and wife took as joint tenants after the 1882 Married Women’s Property Act, and in 1925, Parliament abolished the tenancy by the entirety.⁸⁶ Well past the middle of the twentieth century, however, the tenancy by the entirety remained male dominated in a number of states.⁸⁷ Despite the widespread enactment of legislation recognizing the property rights of married women, the husband remained “the one” under an estate held in entirety.⁸⁸ With “glacial slowness,” states recognizing estates held in tenancy by the entirety legislated to equalize the rights of wives holding entireties property with their husbands.⁸⁹ The overall

⁸¹ Orth, *supra* note 1, at 41.

⁸² Dearman v. Bruns, 1818 S.E.2d 809, 811 (N.C. Ct. App. 1971).

⁸³ Sharp, *supra* note 26, at 199. From ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY*, § 5.5 (5th ed. 1984).

⁸⁴ LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 185 (1973). (“Major reforms came in the married women’s property acts. The first of these, a crude somewhat tentative version was enacted in 1839, in Mississippi.”).

⁸⁵ Sharp, *supra* note 26, at 199. From ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY*, § 5.5 (5th ed. 1984).

⁸⁶ Law of Property Act, 1925, 15 & 16 Geo. 5, c. 20, § 39(6), Sched. I (Eng.) (converting tenancy by the entirety into joint tenancy).

⁸⁷ See, e.g., D’Ercole v. D’Ercole, 407 F. Supp. 1377, 1380 (Mass. 1976):

The tenancy by the entirety is designed particularly for married couples and may be employed only by them. . . . This form of property ownership differs from the joint tenancy in two respects. First, each tenant has an indefeasible right of survivorship in the entire tenancy, which cannot be defeated by any act taken individually by either spouse during his or her lifetime. There can be no partition. Second, the spouses do not have an equal right to control and possession of the property. The husband during his lifetime has paramount rights to the property.

Id.

⁸⁸ Orth, *supra* note 1, at 43.

⁸⁹ *Id.* See, e.g., N.C. GEN. STAT. § 39-13.6(a) (1984). The Tenancy by the Entirety Reform Act expressly states that “[a] husband and wife shall have equal right to the

treatment of the subject by the states, however, remains a “patchwork of inconsistency.”⁹⁰

C. *Tenancy by the Entirety: Modern Treatment*

The tenancy by the entirety exists in some form in twenty-five states and the District of Columbia (including Michigan, whose entirety law is at issue in the *Craft* decision).⁹¹ States still recognizing the tenancy have altered its common law characteristics by varying degrees.⁹² Many states, however, have retained certain defining characteristics of the tenancy by the entirety.⁹³ Marriage remains a firm requirement.⁹⁴ Both spouses retain an indestructible right of survivorship;⁹⁵ therefore, neither husband nor wife can unilaterally convey or partition the estate.⁹⁶ The presumption that any conveyance made to a married couple will be treated as a tenancy by the entirety has also survived in many jurisdictions.⁹⁷

The modern tenancy by the entirety, unlike the common law estate, can end in various ways, including divorce.⁹⁸ The first way to sever the modern tenancy is by one spouse conveying his interest in

control, use, possession, rents, income, and profits of real property held by them in tenancy by the entirety.” *Id.* This statute, however, also preserves the common law restraint on severance or encumbrance of the estate by the actions of one spouse: “Neither spouse may bargain, sell, lease, mortgage, transfer, convey or in any manner encumber any property so held without the written joinder of the other spouse.” *Id.*

⁹⁰ Sharp, *supra* note 26, at 199.

⁹¹ 4A RICHARD R. POWELL, POWELL ON REAL PROPERTY, ¶ 620.3. The states recognizing tenancy by the entirety are as follows: Alaska, Arkansas, Delaware, D.C., Florida, Hawaii, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, and Wyoming. *Id.* The states that simply mention tenancy by the entirety in their codes are: Arizona, Georgia, Kansas, Nebraska, and Utah. *Id.* The states that have abolished tenancy by the entirety are as follows: California, Connecticut, Iowa, Maine, Minnesota, Nevada, New Hampshire, New Mexico, North Dakota, South Dakota, Washington, West Virginia, and Wisconsin. *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at ¶ 621.1. In a majority of states that still recognize tenancy by the entirety, divorce, since it destroys the essential unity of person, converts the estate into a tenancy in common. *Id.*

⁹⁵ *Id.* at ¶ 622.1

⁹⁶ *Id.* at ¶ 622.2. At common law, the husband had exclusive control over the entireties property and could convey or encumber it without his wife’s consent. *Id.*

⁹⁷ *Id.* at ¶ 621.2. These states include: Arkansas, D.C., Florida, Indiana, Maryland, Michigan, Missouri, New Jersey, New York, North Carolina, Pennsylvania, and Rhode Island. *Id.*

⁹⁸ *An Analysis of Estates by the Entirety in Bankruptcy*, 48 AM. BANKR. L.J. 255, 264 (1974).

the estate to the other spouse, thereby making the transferee spouse the sole owner of the property in fee simple absolute.⁹⁹ Second, an agreement between the two spouses can terminate the estate.¹⁰⁰ Third, the death of one spouse automatically vests the survivor with fee simple ownership of the estate.¹⁰¹ Fourth, the tenancy is automatically converted to a tenancy in common upon divorce, with each ex-spouse vested with a one-half ownership interest in the estate.¹⁰² Finally, some jurisdictions hold that a unilateral bankruptcy petition by one spouse severs the entireties estate.¹⁰³

Jurisdictions recognizing tenancies by the entirety are sharply divided as to their treatment of a creditor's claims against only one spouse.¹⁰⁴ Although it is universally accepted that creditors of both spouses may proceed against entireties property, states rely upon three distinct approaches to the collection rights of creditors of only one spouse.¹⁰⁵ The first approach allows creditors to proceed against the life estate¹⁰⁶ of the indebted spouse, subject to the survivorship interest of the other spouse.¹⁰⁷ The second approach allows creditors only to reach the indebted spouse's survivorship interest.¹⁰⁸ The third approach characterizes property held in tenancy by the entirety as wholly unreachable by creditors.¹⁰⁹

⁹⁹ See, e.g., *Craft v. United States*, 140 F.3d 638, 645 (Ryan, J., concurring).

¹⁰⁰ See, e.g., *Runco v. Ostroski*, 65 A.2d 399, 400 (Pa. 1949); *In re Daughtry*, 221 B.R. 889, 892 (Bankr. C.D. Fla. 1997) (consent to sale in bankruptcy context).

¹⁰¹ See, e.g., *United States v. 2525 Leroy Lane*, 910 F.2d 343, 350-51 (6th Cir. 1990), *cert denied*, 499 U.S. 947 (1991).

¹⁰² See, e.g., *Sebold v. Sebold*, 444 F.2d 864, 870 (D.C. Cir. 1971); *Smith v. Smith*, 107 S.E.2d 530, 534 (N.C. 1959); MICH. COMP. LAWS ANN. § 552.102 (West 1988).

¹⁰³ Steven R. Johnson, *The Good, the Bad, and the Ugly in Post-Drye Tax Lien Analysis*, 5 FLA. TAX REV. 415, 441 (2002).

¹⁰⁴ *Id.* at 442.

¹⁰⁵ *Id.* Individual states address the rights of creditors of one spouse differently. These differences are found either within the state statutes authorizing entireties estates, or in the interpretation of those statutes by the state's courts. *Id.*

¹⁰⁶ A "life estate" means "an estate only for the duration of a specified person's life, usually the possessor's." BLACK'S LAW DICTIONARY 568 (7th ed. 1999). Each spouse holding property in entirety holds a life estate, or possessory interest, in the subject property, as well as the right of survivorship.

¹⁰⁷ *In re Pletz*, 221 F.3d 1114, 1117 (9th Cir. 2000).

¹⁰⁸ *In re Ryan*, 282 B.R. 742, 748 (D.R.I. 2002) (holding that a debtor's contingent future interest in the entireties property was not exempt, and could be sold by a bankruptcy trustee).

¹⁰⁹ *United States v. Lee*, 232 F.3d 556, 560 (7th Cir. 2000).

II. *UNITED STATES V. CRAFT*A. *Background*

As discussed above, a creditor's rights can be severely limited by state entirety laws because liens imposed on one spouse individually cannot attach to entireties property.¹¹⁰ The tenancy by the entirety hindered the ability of the IRS to collect from delinquent taxpayers holding entireties property.¹¹¹ Early adjudication of this issue throughout the federal system¹¹² led most observers to conclude that state law determined what constituted "property or rights to property" under § 6321, the federal tax lien statute.¹¹³ Subsequent decisions have remained steadfast that the "amenability of entireties interests and entireties property to the federal tax lien depends upon the terms of state law."¹¹⁴ This exemption has become widely known as the "entireties bar."¹¹⁵

In *Drye v. United States*,¹¹⁶ however, the United States Supreme Court clarified the roles of federal and state law in defining property in tax lien attachment cases¹¹⁷ and devised a two-step analytical framework for determining whether a federal tax lien may attach to a particular property interest.¹¹⁸ First, the court determines the rights or interests a delinquent taxpayer has in the underlying property.¹¹⁹ This query is answered by consulting state law.¹²⁰ Second, the court determines whether those rights or interests, as defined by state law, rise to the level of "property or rights to property" under § 6321.¹²¹ This inquiry, the Court concluded, is purely a question of federal

¹¹⁰ Turano & Ward, *supra* note 8, at 309; *see also* Steven R. Johnson, *After Drye: The Likely Attachment of the Federal Tax Lien to Tenancy-by-the-Entirety Interests*, 75 IND. L. J. 1163 (2000).

¹¹¹ Johnson, *supra* note 103, at 442.

¹¹² *Id.* at 442 n.162. *See, e.g.*, *United States v. American Nat'l Bank*, 255 F.2d 504 (5th Cir. 1958), cert. denied as to another issue, 358 U.S. 838 (1959); *Raffaele v. Granger*, 196 F.2d 620 (3d Cir. 1952); *United States v. Hutcherson*, 188 F.2d 326 (8th Cir. 1951); *Pettengill v. United States*, 205 F. Supp. 10 (D. Vt. 1962); *United States v. Nathanson*, 60 F. Supp. 193 (E.D. Mich. 1945).

¹¹³ 26 U.S.C. § 6321 (1954).

¹¹⁴ Johnson, *supra* note 103, at 442.

¹¹⁵ *Id.*

¹¹⁶ 528 U.S. 49 (1999).

¹¹⁷ Johnson, *supra* note 110, at 1163.

¹¹⁸ Johnson, *supra* note 103, at 421.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

law.¹²² Because these terms are not defined in either the statute itself or the underlying regulations, the Court construed the reach of §6321 broadly and determined that power or control over the underlying property constitutes “property or rights to property.”¹²³

Although the *Drye* decision dealt specifically with the attachment of federal tax liens to disclaimed inheritances, as opposed to property held in entirety, it served as an important precursor to *Craft*.¹²⁴ After *Drye*, when analyzing a prospective federal tax lien attachment, state law determines the character of any property right the delinquent taxpayer may have had, but federal law determines whether or not, and at what point in time, a tax lien may attach to that property interest.¹²⁵ It is under this rubric that the Supreme Court decided *Craft*.¹²⁶

B. Facts

In 1972, Sandra and Donald Craft purchased the Berwyck property in Grand Rapids, Michigan (“Berwyck”) as tenants by the entirety.¹²⁷ Mr. Craft failed to file personal income tax returns from 1979 to 1986.¹²⁸ As a result, in 1988, the Internal Revenue Service made an assessment of \$482,446 against Mr. Craft for unpaid income tax liabilities.¹²⁹ Pursuant to 26 U.S.C. § 6321, the federal tax lien attached to all “property or rights to property,” whether real or personal, belonging to Mr. Craft.¹³⁰ Mr. Craft failed to satisfy the lien because he was insolvent from April 1980 to August of 1989.¹³¹

In August of 1989, Donald and Sandra jointly executed a quitclaim deed after the lien notice was filed, transferring Berwyck to Mrs. Craft for one dollar.¹³² In 1992, when Sandra attempted to sell Berwyck to a third party for approximately \$120,000, a title search

¹²² *Id.*

¹²³ *Id.*

¹²⁴ In *Drye*, the Court held that while state law determines what rights a taxpayer has in property, it becomes a question of federal law as to whether those rights amount to “property or rights to property” under the federal tax lien statute. *Drye*, 528 U.S. at 58. This served as the framework under which the specific facts in *Craft* were analyzed. *Craft*, 535 U.S. at 278.

¹²⁵ See *Miller v. Conte*, 72 F. Supp. 2d 952, 958 n.6 (N.D. Ind. 1999).

¹²⁶ See *supra* note 124 and accompanying text.

¹²⁷ *Craft*, 535 U.S. at 276.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

revealed the lien.¹³³ The IRS asserted that it was entitled to half of the sale proceeds because its lien attached to Mr. Craft's interest in the property.¹³⁴ The IRS also claimed that Mr. Craft fraudulently conveyed¹³⁵ his interest in Berwyck to his wife.¹³⁶ The IRS agreed to release the lien and to allow the sale to proceed, with the stipulation that half of the proceeds be held in escrow pending a judicial determination of the government's interest in the property.¹³⁷ Mrs. Craft brought "an action to quiet title to the escrowed proceeds."¹³⁸

C. Procedural History

The United States District Court for the Western District of Michigan granted summary judgment to the government, holding that the federal tax lien attached to Mr. Craft's interest in Berwyck at the moment of transfer to Mrs. Craft because the entirety estate was thereby severed.¹³⁹ The district court concluded the sale for one-dollar terminated the entirety estate, and the government was entitled to one-half of the value of the property—rather than one-half of the resulting proceeds.¹⁴⁰ Both parties appealed the decision.¹⁴¹

The United States Court of Appeals for the Sixth Circuit held that the tax lien did not attach to Berwyck at the time of the transfer.¹⁴² Under Michigan law, the court explained, Mr. Craft had "no separate interest in property held as a tenant by the entirety" to which the lien could attach.¹⁴³ The court then remanded the case to the district court for consideration "of the government's alternative claim that the conveyance" of Berwyck to Mrs. Craft was fraudulent.¹⁴⁴

On remand, the district court concluded "that where, as here, state law makes property exempt from the claims of creditors, no fraudulent conveyance can occur."¹⁴⁵ However, the district court did

¹³³ *Craft*, 535 U.S. at 277.

¹³⁴ *Id.*

¹³⁵ A conveyance means "the voluntary transfer of a right or of property." BLACK'S LAW DICTIONARY 334 (7th ed. 1999).

¹³⁶ *Craft*, 535 U.S. at 277.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Craft v. United States*, No. 1:93-CV-306, 1994 WL 669680 (W.D. Mich. 1994).

¹⁴⁰ *Id.*; *Craft*, 535 U.S. at 277.

¹⁴¹ *Craft*, 535 U.S. at 277.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Craft*, 535 U.S. at 277 (citing *Craft v. United States*, 65 F. Supp. 2d 651, 657-58 (W.D. Mich. 1999)).

find that Mr. Craft's use of non-exempt funds¹⁴⁶ to make mortgage payments¹⁴⁷ on Berwyck constituted a fraudulent act under state law.¹⁴⁸ As such, the court awarded the government a share of the sale proceeds equivalent to that amount.¹⁴⁹ Both parties again appealed the findings of the district court, with the IRS once again claiming that its lien attached to Mr. Craft's interest in Berwyck.¹⁵⁰

On the second appeal, the Sixth Circuit upheld the holding of the prior panel, affirming that the federal tax lien did not attach to Berwyck at the time of the transfer.¹⁵¹ Furthermore, the court upheld the fraud determination made by the district court with regard to Mr. Craft's mortgage payments.¹⁵²

The Supreme Court granted *certiorari* to consider the issue of whether a taxpayer's interest in an estate held in tenancy by the entirety, as defined by Michigan law, constitutes "property or rights to property" to which a federal tax lien, pursuant to 26 U.S.C. § 6321, may attach.¹⁵³

D. *The Decision*

The Supreme Court, in an opinion written by Justice O'Connor, reversed the judgment of the Court of Appeals, and held that Donald Craft's interest in Berwyck, prior to the conveyance to his wife, constituted "property" under § 6321, to which a federal tax lien could attach.¹⁵⁴ Justice O'Connor relied on the analytical framework laid out by the Court in *Drye*.¹⁵⁵ First, the Court determined that pursuant to Michigan law, Mr. Craft, as a tenant by the entirety, had a "substantial degree of control" over the underlying property.¹⁵⁶ The Court then decided that such control constituted "property" within the meaning of the tax lien statute as a matter of federal law.¹⁵⁷ Justice O'Connor, citing *Drye*, concluded that "in determining whether a federal taxpayer's state-law rights constitute 'property' or

¹⁴⁶ Non-exempt funds refer to those of Mr. Craft's property interests not protected by the entireties bar. *Craft*, 535 U.S. at 277.

¹⁴⁷ Paying the mortgage on exempted property with non-exempt funds shielded those funds from creditors. *Id.*

¹⁴⁸ *Craft*, 65 F. Supp. 2d at 659.

¹⁴⁹ *Id.*

¹⁵⁰ *Craft*, 535 U.S. at 278.

¹⁵¹ *Craft v. U.S.*, 233 F.3d 358, 363-69 (6th Cir. 2000).

¹⁵² *Id.* at 369-75.

¹⁵³ *Craft*, 535 U.S. at 278.

¹⁵⁴ *Id.* at 277.

¹⁵⁵ *See supra* Part II-A.

¹⁵⁶ *Craft*, 535 U.S. at 283.

¹⁵⁷ *Id.* at 283.

'rights to property,' [t]he important consideration is the breadth of control the [taxpayer] could exercise over the property."¹⁵⁸

Justice O'Connor's rationale for the decision was based on a broad reading of the federal statute authorizing the lien.¹⁵⁹ Justice O'Connor concluded that the statute on its face revealed the clear intent of Congress to subject every taxpayer interest in property to a federal tax lien.¹⁶⁰ If the Court were to hold otherwise, Justice O'Connor reasoned, the entireties property would essentially belong to no one.¹⁶¹ Under the Michigan law of tenancy by the entirety, Mrs. Craft had no more interest in the property than did her husband; if neither spouse has an individual interest in the entireties property to which a lien may attach, nobody does.¹⁶² Justice O'Connor scoffed at the absurdity of such a result, noting that it would allow spouses to shield their property from federal taxation by holding it as tenants by the entirety under state law.¹⁶³

Justice O'Connor acknowledged that Michigan chose to view the rights of state-law creditors much differently.¹⁶⁴ Under Michigan law, property held by husband and wife as tenants by the entirety is not subject to any lien or other judgment against either spouse alone.¹⁶⁵ Citing *Drye* again, the Court held that the exempt status created by the Michigan law does not impair the rights of the federal government.¹⁶⁶ The Court stated that the interpretation of § 6321 was purely a question of federal law.¹⁶⁷ Furthermore, the Court concluded, its analysis was in no way restricted by the decisions of "state courts answering similar questions under state law."¹⁶⁸

As such, the Supreme Court reversed the judgment of the Sixth Circuit, and remanded the case for a proper valuation of the

¹⁵⁸ *Id.* (citing *Drye*, 528 U.S. at 61).

¹⁵⁹ *Id.* at 282-83 (citing *United States v. Nat'l Bank of Com.*, 472 U.S. 713, 719-20 (1985)).

¹⁶⁰ *Id.* at 284.

¹⁶¹ *Id.* at 285.

¹⁶² *Craft*, 535 U.S. at 285.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 288.

¹⁶⁵ *Id.* at 288 ("Land held by husband and wife as tenants by the entirety is not subject to levy under execution on judgment rendered against either husband or wife alone.") (quoting *Sanford v. Bertrau*, 169 N.W. 880, 881 (Mich. Ct. App. 1918)).

¹⁶⁶ *Id.* (citing *Drye*, 528 U.S. at 59); *see also* *United States v. Rodgers*, 461 U.S. 677, 701 (1983) (clarifying that the Supremacy Clause "provides the underpinning for the Federal Government's right to sweep aside state-created exemptions").

¹⁶⁷ *Craft*, 535 U.S. at 288.

¹⁶⁸ *Id.* at 289.

husband's interest in Berwyck.¹⁶⁹ The Court directed the Sixth Circuit to evaluate the potential fraudulence of the 1989 conveyance to Mrs. Craft in light of the tax lien attaching to Mr. Craft's interest before the transfer.¹⁷⁰

In his dissent, Justice Thomas voiced an unwillingness to dismiss state recognized forms of property ownership in favor of "an amorphous federal common law definition of property."¹⁷¹ Justice Thomas sternly warned that the majority's holding ignores the "primacy of state law in defining property interests,"¹⁷² and completely undermines the distinction between "property and rights to property" under § 6321.¹⁷³ Justice Thomas further concluded that the majority misconstrued the *Drye* holding.¹⁷⁴ *Drye*, he reasoned, held only that a state-law recognized disclaimer could not retroactively divest one's interest in an estate.¹⁷⁵ Therefore, Justice Thomas argued, a federal tax lien was not barred from attaching to the taxpayer's interest in the estate.¹⁷⁶ Justice Thomas stated that:

By erasing the 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, the Court does not follow *Drye*, but rather creates a new federal common law of property.¹⁷⁷

Accordingly, Justice Thomas concluded that the federal tax lien could not attach to Mr. Craft's interest in Berwyck until the tenancy by the entirety was terminated.¹⁷⁸ Under the Michigan law, the entirety estate was not destroyed until the 1989 conveyance to Mrs. Craft.¹⁷⁹ Therefore, Justice Thomas reasoned, the IRS was only entitled to collect upon the one dollar Mr. Craft received from that sale¹⁸⁰ and not from the proceeds from the 1992 sale to a third-party.¹⁸¹ At the time of the 1992 transaction, Mrs. Craft owned

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 301 (Thomas, J., dissenting).

¹⁷² *Id.* at 291.

¹⁷³ *Craft*, 535 U.S. at 291.

¹⁷⁴ *Id.* at 293.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 294.

¹⁷⁷ *Id.* at 294.

¹⁷⁸ *Id.* at 292.

¹⁷⁹ *Craft*, 535 U.S. at 291 n.1.

¹⁸⁰ *Id.* ("[H]alf of the proceeds, or 50 cents, was 'property' or 'rights to property' 'belonging to' Mr. Craft.").

¹⁸¹ *Id.*

Berwyck in fee simple, and, consequently, Mr. Craft neither received nor was entitled to the proceeds.¹⁸² Therefore, according to Justice Thomas, the IRS was not entitled to any portion of the proceeds from the 1992 sale.¹⁸³

It is important to note that neither the majority nor the dissent disagreed as to whether a federal tax lien could attach to Mr. Craft's interest in Berwyck.¹⁸⁴ The main distinction between the two sides, rather, was when that lien could attach.¹⁸⁵ The dissenting Justices opined that based on Michigan law, the entirety estate was wholly unreachable until after the tenancy was severed.¹⁸⁶ Severance of the tenancy occurred upon the transfer of Berwyck to Mrs. Craft for one dollar.¹⁸⁷ The majority, however, concluded that tax liens under § 6321 attach to all property or interests in property, including entirety estates as defined by Michigan law.¹⁸⁸ The tax lien, therefore, attached to Mr. Craft's interest in Berwyck before the 1989 conveyance, therefore prior to the severance of the tenancy.¹⁸⁹ The dispute between the Justices over the primacy of state property law is precisely why the case is so significant.¹⁹⁰ It is within the context of this conflict that the potential scope of *Craft* must be discussed.

III. THE POTENTIAL SCOPE OF *CRAFT*

One cannot overlook the significance of the *Craft* decision. The majority opinion raises the question of the proper roles for federal and state governments in defining what constitutes property or property rights.¹⁹¹ Prior to this decision, a federal tax lien under § 6321 would only extend to property as defined under state law.¹⁹² Allowing an individual spouse's tax debt to attach to an entirety

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Craft*, 535 U.S. at 294-95.

¹⁸⁶ *Id.* at 291-92 (Thomas, J., dissenting).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 287.

¹⁸⁹ *Id.*

¹⁹⁰ The question raised by Justice Thomas in his dissent pertains to the inherent contradiction between the majority's holding in *Craft* and existing jurisprudence reserving the right to create and define property interests to the states. *See supra* note 5 and accompanying text.

¹⁹¹ This question is raised by the anomaly created by the *Craft* decision, and existing jurisprudence reserving the right to create and define property interests to the states. *See supra* note 5 and accompanying text.

¹⁹² *See Craft*, 535 U.S. at 290-91 (Thomas, J., dissenting) ("This amorphous construct ignores the primacy of state law in defining property interests, eviscerates the statutory distinction between 'property' and 'rights to property'.").

property clearly indicates a change in the law.¹⁹³ A second question presented by *Craft* is whether the holding might be extended to allow other types of federal liens or judgments to attach to state recognized entireties property,¹⁹⁴ such as the possible attachment of federal drug-forfeiture laws to property held in tenancy by the entirety.

A. *Craft In Light of the Rehnquist Court's "New Federalism"*

There is an implicit conflict between the holding in *Craft* and the "new federalism" advanced by the Rehnquist Court in recent years.¹⁹⁵ The "new federalism" was foreshadowed by then Justice Rehnquist's opinion in *National League of Cities v. Usery*.¹⁹⁶ *National League of Cities* was the first case since the New Deal where the Court enforced the Tenth Amendment of the Constitution against Congress.¹⁹⁷ In *National League of Cities*, the Court struck down amendments to the Fair Labor Standards Act that extended minimum-wage and maximum-hour requirements to all state, county, and municipal employees.¹⁹⁸ Writing for the majority, Justice Rehnquist contended that the Tenth Amendment¹⁹⁹ serves to prevent Congress from exercising "power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system."²⁰⁰ The decision, although later overturned,²⁰¹ reinvigorated the debate over the Court's role in defining the boundaries of congressional power in light of federalism.²⁰²

Four subsequent decisions clearly demonstrate the Rehnquist Court's use of federalism as a justification for limiting the scope of congressional powers.²⁰³ In *Gregory v. Ashcroft*,²⁰⁴ two state judges challenged a provision of the Missouri State Constitution mandating

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ See *supra* note 17 and accompanying text.

¹⁹⁶ *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976).

¹⁹⁷ O'Brien, *supra* note 16, at 610.

¹⁹⁸ *Id.*

¹⁹⁹ "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

²⁰⁰ *Nat'l League of Cities*, 426 U.S. at 843 (quoting *Frye v. U.S.*, 421 U.S. 542, 547 n.7 (1975)).

²⁰¹ *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985) (reaffirming that the Constitution divests the States of "their original powers").

²⁰² O'Brien, *supra* note 16, at 613.

²⁰³ Erwin Chemerinsky, *The Rehnquist Court & Justice: An Oxymoron?*, 1 WASH. U. J.L. & POL'Y 37 (1999).

²⁰⁴ *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

retirement at age seventy as violative of the Federal Age Discrimination in Employment Act of 1970.²⁰⁵ Writing for the majority, Justice O'Connor held that in drafting the statute, Congress failed to demonstrate a clear discernable intent to "preempt the historic powers of the states," and therefore upheld the state constitutional provision.²⁰⁶ Justice O'Connor noted that Congress must be explicit in stating its intent when using the Commerce Clause to infringe upon an area of state sovereignty.²⁰⁷

In *New York v. United States*,²⁰⁸ the Court invalidated a provision of the Low-Level Radioactive Waste Policy Amendments of 1985,²⁰⁹ which required states to be "responsible for providing . . . for the disposal of . . . low-level radioactive waste."²¹⁰ Once again writing for the majority, Justice O'Connor held that the "Federal Government may not compel the States to enact or administer a federal regulatory program."²¹¹ The Court concluded that Congress had interfered with the legitimate legislative processes of the states.²¹² Citing *McCullough v. Maryland*,²¹³ Justice O'Connor described an important function of the Court as protecting the sovereignty of states from congressional infringements.²¹⁴ As such, Justice O'Connor held the challenged provisions unconstitutional.²¹⁵

In *United States v. Lopez*,²¹⁶ the Court further solidified its "new federalism" doctrine.²¹⁷ *Lopez* is particularly noteworthy because, for the first time since 1937, the Court invalidated a statute for exceeding congressional authority under the Commerce Clause.²¹⁸ In *Lopez*, the Court invalidated the Gun-Free School Zone Act of 1990,²¹⁹ which prohibited possession of a firearm within one-thousand feet of a school.²²⁰ Writing for the majority, Chief Justice Rehnquist remarked

²⁰⁵ 29 U.S.C. §§ 621-634 (1988).

²⁰⁶ *Gregory*, 501 U.S. at 461.

²⁰⁷ *Id.* at 464.

²⁰⁸ *New York v. United States*, 505 U.S. 144 (1992).

²⁰⁹ 42 U.S.C. § 2021(b)-(j) (1988).

²¹⁰ *New York*, 505 U.S. at 169.

²¹¹ *Id.* at 188.

²¹² *Id.* at 176.

²¹³ *McCullough v. Maryland*, 17 U.S. 316 (1819).

²¹⁴ Crusto, *supra* note 17, at 528 (citing *New York*, 505 U.S. at 176).

²¹⁵ *New York*, 505 U.S. at 188.

²¹⁶ *United States v. Lopez*, 514 U.S. 549 (1995).

²¹⁷ Crusto, *supra* note 17, at 528.

²¹⁸ *Id.*

²¹⁹ 18 U.S.C. § 922(q)(2)(A) (1994) (formerly 18 U.S.C. § 922(q)(1)(A) (1988)).

²²⁰ *Id.* (making it unlawful "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe is a school zone").

that “[t]he Constitution creates a Federal Government of enumerated powers.”²²¹ Justice Rehnquist concluded that the statute did not fall within the commerce power vested in Congress by Article I of the Constitution.²²²

Likewise, in *Printz v. United States*,²²³ the Rehnquist Court cited federalism concerns in overturning a federal statute mandating state enforcement of regulations related to private behavior.²²⁴ *Printz* involved a challenge to portions of the Brady Handgun Violence Prevention Act²²⁵ that required state officials to conduct background checks on all handgun purchasers.²²⁶ Justice Scalia, delivering the Court’s opinion, held that Congress could not compel states to perform these background checks.²²⁷ The Court concluded that the federal government may not compel a state to exert its executive power without express constitutional authority.²²⁸

The Rehnquist Court’s “new federalism” demonstrates a clear preference for limiting federal power.²²⁹ In that regard, the *Craft* decision is inapposite to the more general direction of the Court insofar as it contradicts longstanding precedent that states reserve the power to create and define property rights and forms of property ownership.²³⁰ Justice O’Connor read § 6321 broadly so as to infer Congress’s intent to preempt the historic power of a state, despite the absence of explicit language.²³¹ Justice Thomas, however, sharply criticized the majority for ignoring precedent and infringing upon traditional state powers.²³²

²²¹ *Lopez*, 514 U.S. at 552.

²²² *Id.* at 560.

²²³ *Printz v. United States*, 521 U.S. 898 (1997).

²²⁴ Crusto, *supra* note 17, at 529.

²²⁵ *Id.* at n.51 (citing 18 U.S.C. §§ 922, 924-25 (Supp. 1993)).

²²⁶ *Printz*, 521 U.S. at 902, 909-11.

²²⁷ *Id.* at 933.

²²⁸ *Id.* at 909.

²²⁹ Crusto, *supra* note 17, at 519.

²³⁰ *Oregon State Land Board*, 429 U.S. at 378.

²³¹ *Craft*, 535 U.S. at 283.

²³² *Id.* at 294 (citing *Aquilino v. United States*, 363 U.S. 509, 513 n.3 (1960) (explaining that there is a difficulty with leaving the definition of property interests to a nebulous body of federal law, “because it ignores the long-established role that the States have played in creating property interests and places upon the courts the task of attempting to ascertain a taxpayer’s property rights under an undefined rule of federal law”).

B. *Craft as a Catalyst in the Elimination of the Entireties Bar to the Attachment of Federal Drug Forfeitures?*

The *Craft* decision potentially opens the door to the elimination of the state-law entireties bar to other federal liens and judgments.²³³ Under the ruling, states retain the power to define and regulate entirety properties as they see fit.²³⁴ The *Craft* decision, on its face however, reveals support for congressional authority to override state property law in collecting federal revenue.²³⁵ The circumstance most analogous to *Craft* is the possible attachment of federal drug-forfeiture laws²³⁶ to property held in tenancy by the entirety.²³⁷

In theory, the property interest of one spouse found guilty under federal forfeiture laws cannot be reached while the entireties estate remains in effect.²³⁸ However, Congress enacted the Comprehensive Forfeiture Act of 1984 (“Act”)²³⁹ to provide the government with stronger weapons in the war on drugs.²⁴⁰ The Act specified stricter civil forfeiture procedures under the Comprehensive Drug Abuse and Prevention Act of 1970,²⁴¹ authorizing the forfeiture of all real property “which is used, or intended to be used” to commit drug-related offenses.²⁴² Circuit courts are divided as to how the incompatibility of the tenancy by the entirety forms of property ownership and the federal forfeiture laws should be resolved.²⁴³

The Eleventh Circuit, in *United States v. 15621 S.W. 209th Ave.*,²⁴⁴ held that the civil forfeiture statute attached to all property interests

²³³ See *Craft*, 535 U.S. at 276.

²³⁴ *Id.* at 280-82.

²³⁵ *Id.* at 288.

²³⁶ See *infra* notes 239-43 and accompanying text.

²³⁷ See 21 U.S.C. § 881(a) (7) (2003) (stating forfeitures may attach to all “property, including any right”) (emphasis added). This language is similar to that of the statute in *Craft*. 26 U.S.C. § 6321 (1954) (stating a lien may attach to all “property and rights to property”) (emphasis added).

²³⁸ Turano & Ward, *supra* note 8, at 309 (stating the guilty spouse has no separate interest in the property, and state laws generally protect the indivisible interests of an innocent spouse by barring forfeiture of entireties property).

²³⁹ 18 U.S.C. § 1963 (1988).

²⁴⁰ “[T]he traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs which, with its inevitable attendant violence, is plaguing the country.” S. REP. NO. 98-225, at 191 (1983).

²⁴¹ 21 U.S.C. § 881(a) (7) (1988).

²⁴² Diana Vondra Carrig, *Criminal Law Forfeiture: Third Circuit Holds Government is Entitled to Forfeiture of Property Interest Held in Tenancy by the Entirety Despite One Spouse’s Innocent Owner Defense*, 37 VILL. L. REV. 996 (1992).

²⁴³ *Id.* at 1001.

²⁴⁴ *United States v. 15621 S.W. 209th Ave.*, 894 F.2d 1511 (11th Cir. 1990).

except those of an innocent spouse.²⁴⁵ However, under Florida law, an innocent spouse's interest in an entireties estate encompasses the entire estate; therefore, the court held that there was no forfeitable interest in the entireties estate "at the present time."²⁴⁶ The court noted that a future severance of the tenancy would create a separate interest in the property for the guilty owner, so that forfeiture of his interest would not impair the innocent spouse's rights.²⁴⁷ The court concluded, however, as long as the entireties estate remained in effect, state law completely precluded attachment of the federal drug-forfeiture statute when one spouse is innocent.²⁴⁸

In contrast, the Third Circuit, in *United States v. 1500 Lincoln Ave.*,²⁴⁹ held a wife's innocent owner defense did not preclude forfeiture of real property held by husband and wife as tenants by the entirety under Pennsylvania law.²⁵⁰ In making its decision, the Third Circuit considered the prior decision of the Eleventh Circuit.²⁵¹ The court rejected the outcome in *15261 S.W. 209th Ave.*, and held the entireties bar frustrated the strong governmental interest in forfeiture.²⁵² The court pointed out the absurdity of allowing a guilty person to keep property subject to forfeiture solely based on it being held in tenancy by the entirety.²⁵³ This observation is similar to the paradox noted by the *Craft* majority.²⁵⁴ The Third Circuit concluded that the Comprehensive Drug Abuse and Prevention Act "permits the immediate forfeiture of the interest of the guilty spouse and thus serves the goal of forfeiting property used in illegal drug activities."²⁵⁵

Although potentially distinguishable based on the source of congressional power, *Craft* suggests the Court could determine that the state-defined rights of an entireties tenant add up to "property" under federal forfeiture laws.²⁵⁶ A broad reading of the

²⁴⁵ *Id.* at 1516.

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 1516 n.6.

²⁴⁸ *Id.* at 1516.

²⁴⁹ *United States v. 1500 Lincoln Ave.*, 949 F.2d 73 (3d Cir. 1991).

²⁵⁰ *Id.* at 77-78.

²⁵¹ *15261 S.W. 209th Ave.*, 894 F.2d at 1515-16 (holding that the government has no present interest in entireties property subject to forfeiture when there is an innocent spouse).

²⁵² *1500 Lincoln Ave.*, 949 F.2d at 78.

²⁵³ *Id.*

²⁵⁴ *Craft*, 535 U.S. at 285.

²⁵⁵ *1500 Lincoln Ave.*, 949 F.2d at 77.

²⁵⁶ *Craft*, 535 U.S. at 285 (concluding that under Michigan law of tenancy by the entirety, each tenant possesses sufficient rights in the estate to constitute property or rights to property under the federal tax lien statute).

Comprehensive Drug Abuse and Prevention Act (similar to Justice O'Connor's reading of § 6321 in *Craft*) reveals congressional intent to reach all property interests of a guilty party.²⁵⁷ Based on the rationale in *Craft*, state-created forms of property ownership define what rights an individual holds as to that property, but federal law determines whether those rights constitute property subject to federal sanctions, such as forfeiture or attachment of a lien.²⁵⁸ Based on this premise, one might comfortably predict further piercing of the entireties bar based on the apparent primacy of federal revenues over the state property designations.²⁵⁹ This possibility, however, is less predictable in light of the Rehnquist Court's consistent protection of traditional state powers.²⁶⁰ Although *Craft* clearly indicates that the federal tax power supercedes concerns over those powers traditionally left to state governments, it could be read narrowly—and federal initiatives enacted under other powers, such as the Comprehensive Drug Abuse and Prevention Act, could still conceivably be thwarted by the state-created entireties bar.²⁶¹

IV. JUSTIFYING *CRAFT*: IMPLIED PREEMPTION OR A NEW FEDERAL COMMON LAW OF PROPERTY?

In her majority opinion, Justice O'Connor read § 6321 broadly, and inferred Congress's intent to "preempt the historic power" of a

²⁵⁷ Based on a broad reading of the Comprehensive Drug Abuse and Prevention Act, the United States Court of Appeals for the Third Circuit has recognized congressional intent to fully enforce all available economic sanctions to combat the illegal drug trade. *1500 Lincoln Ave.*, 949 F.2d at 77.

²⁵⁸ See *Craft*, 535 U.S. at 276.

²⁵⁹ Once a federal taxpayer's interest in property is established under the applicable state law, the question of whether or not that interest elevates to the level of "property or rights to property" under the federal tax lien statute is purely a matter of federal law. *Craft*, 535 U.S. at 283.

²⁶⁰ See *supra* note 28 and accompanying text.

²⁶¹ Since the Supreme Court's ruling in *Craft*, the question posited by this Comment has been addressed by federal bankruptcy courts. Without exception, these courts declined to extend the holding of *Craft* beyond the context of a federal tax lien. See, e.g., *In re Greathouse*, 295 B.R. 562, 567 (D. Md. 2003) (stating the *Craft* decision is not material to the decision presented to that court and is not a development in the law that changes the settled authority on this issue); *In re Kelly*, 289 B.R. 38 (D. Del. 2003) (concluding judgment does not attach to the property held by the debtor and his wife as tenants by the entirety); *In re Ryan*, 282 B.R. 742, 750 (D.R.I. 2002) (declining to extend *Craft*, reasoning that *Craft* gives no indication that the reasoning therein should be extended beyond federal tax law); *In re Knapp*, 285 B.R. 176 (M.D.N.C. 2002) (stating property held in tenancy by the entirety under North Carolina law is not available to a Bankruptcy trustee to satisfy debt which is held solely in the name of debtor).

state, notwithstanding the absence of explicit language.²⁶² In *Gade v. National Solid Waste Management Ass'n*,²⁶³ the Supreme Court summarized the modern tests for preemption:

Preemption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. Absent explicit preemptive language, we have recognized at least two types of implied preemption: field preemption, where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, and conflict preemption, where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.²⁶⁴

Discerning the intent of Congress is the "ultimate touchstone" of every preemption case.²⁶⁵ Justice O'Connor read the plain language of the federal tax lien statute and inferred congressional intent, notwithstanding the relatively vague legislative history.²⁶⁶ This conclusion appears to satisfy one theory of implied preemption—that implied preemption occurs when a "state law impedes the achievement of a federal objective."²⁶⁷ Presumably, the majority concluded the exemption resulting from the state-created entireties bar substantially interfered with the purpose and effect of § 6321. Based on congressional intent in drafting the statutory language, therefore, Michigan's definition of entireties property in this context was preempted, and the lien attached to Mr. Craft's interest in Berwyck prior to the conveyance to his wife.²⁶⁸

Alternatively, in his dissent to *Craft*, Justice Thomas warned that the majority's opinion symbolized the dawn of a new federal common law of property.²⁶⁹ Justice Thomas sharply criticized the majority,

²⁶² *Craft*, 535 U.S. at 276.

²⁶³ 505 U.S. 88 (1992).

²⁶⁴ *Id.* at 98.

²⁶⁵ *Id.* at 96.

²⁶⁶ *Craft*, 535 U.S. at 288.

²⁶⁷ CHEMERINSKY, *supra* note 29, at 286; *see also Craft*, 535 U.S. at 288-89 (citing *United States v. Rodgers*, 461 U.S. 677, 701 (1983) (clarifying that the Supremacy Clause "provides the underpinning for the Federal Government's right to sweep aside state-created exemptions")).

²⁶⁸ *Craft*, 535 U.S. at 288.

²⁶⁹ *Id.* at 294 (Thomas, J., dissenting) ("By erasing the 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, the Court does not follow *Drye*, but rather creates a new federal common law of property.").

stating the holding “ignores the primacy of state law in defining property interests, eviscerates the statutory distinction between ‘property’ and ‘rights to property’ drawn by § 6321, and conflicts with an unbroken line of authority from this Court,²⁷⁰ the lower courts,²⁷¹ and the IRS.”²⁷² Justice Thomas seemingly disagreed with the majority’s assertion that the potentially broad language of § 6321 indicated congressional intent to reach property otherwise exempted under state entirety law. Traditionally, even implied preemption must be prompted by clear congressional intent to limit federalism concerns.²⁷³ “In all preemption cases, and specifically those in which Congress has legislated in a field which the states have traditionally occupied,” courts presume state law is not preempted by federal legislation unless “that was the clear and manifest purpose of Congress.”²⁷⁴ Therefore, at least arguably, the ambiguity of the legislative history behind § 6321 potentially dooms *Craft* as an inappropriate exercise of implied preemption.

What Justice Thomas’s dissent fails to address, however, is that Supreme Court jurisprudence also permits federal courts to narrowly create federal common law in the absence of a clear statutory prescription or a direct statutory conflict to protect uniquely federal interests.²⁷⁵ Federal courts are hesitant to create federal common law, recognizing that Congress should ultimately make the decision to displace state laws.²⁷⁶ Thus, proffers of federal common law are

²⁷⁰ See note 5 and accompanying text.

²⁷¹ Justice Thomas points out that for over fifty years, every federal court confronted with a similar issue has concluded that a federal tax lien cannot attach to property held in tenancy by the entirety to satisfy the tax liability of an individual spouse. *Craft*, 535 U.S. at 299 (Thomas, J., dissenting) (citing *IRS v. Gaster*, 42 F.3d 787, 791 (3d Cir. 1994) (concluding that the IRS is not entitled to a lien on property owned as a tenancy by the entirety to satisfy the tax obligations of one spouse)).

²⁷² *Id.* at 300 (Thomas, J., dissenting) (citing Internal Revenue Manual § 5.8.4.2.3 (RIA 2000) (listing “property owned as tenants by the entirety” as among the assets beyond the reach of the government’s tax lien)).

²⁷³ See *CHEMERINSKY*, *supra* note 29, at 285; see also *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

²⁷⁴ *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Hillsborough County v. Automated Med. Labs., Inc.* 471 U.S. 707, 715 (1985)).

²⁷⁵ See *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1981); *Oregon State Land Bd.*, 429 U.S. at 378.

²⁷⁶ *CHEMERINSKY*, *supra* note 29, at 285-86. (stating that “[i]n all pre-emption cases, and particularly in those in which Congress has ‘legislated . . . in a field which the States have traditionally occupied,’ we ‘start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’”).

characterized as a “necessary expedient.”²⁷⁷ Generally, federal common law may displace state law only when “necessary” to protect uniquely federal interests.²⁷⁸ Federal common law is appropriate when a uniform federal rule is needed to prevent the federal government’s rights from varying arbitrarily based upon the application of state law,²⁷⁹ or when there is “substantial conflict” between some federal interest and state law.²⁸⁰

Craft seemingly passes muster under either theory. First, the rule proffered in *Craft*, eliminating the entirety bar to the attachment of federal tax liens, was necessary to avoid an uneven application of the Federal Tax Code to citizens based on residence. Prior to *Craft*, the ability of and extent to which the IRS reached the assets of similarly situated tax-debtors would vary by state. Second, a conflict between state property definitions and federal tax policy is at the heart of the question presented to the *Craft* Court. Therefore, at least facially, *Craft* represents an appropriate exercise of federal common-law authority. The decision, at the very least, indicates “the dominance of federal law over state law in contests involving a federal tax lien.”²⁸¹ Notwithstanding Justice Thomas’s misgivings,²⁸² and in the absence of any discernable congressional intent, the application of federal common law may have been the only way to effectively extinguish the inequities that will result from the continued recognition of a legal relic.

V. CONCLUSION

Regardless of how it is rationalized, *Craft* departs from the more general states rights posture of the Rehnquist Court, thus predicting its fallout is all the more difficult. Ultimately, its scope might be limited to those narrow instances where the federal tax power is imposed as a restraint upon a state’s power to define property or

²⁷⁷ Comm. for Consideration of Jones Falls Sewage Sys. v. Train, 539 F.2d 1006, 1008 (4th Cir. 1976) (en banc); see also Boyle v. United Techs. Corp., 487 U.S. 500 (1988) (stating the implication of uniquely federal interests changes what would otherwise be a conflict that cannot produce preemption into one that can).

²⁷⁸ LINDA MULLENIX ET AL., UNDERSTANDING FEDERAL COURTS AND JURISDICTION 564 (1998).

²⁷⁹ See e.g., Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 466 (1957).

²⁸⁰ See e.g., Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966).

²⁸¹ William H. Baker, *Drye and Craft - How Two Wrongs Can Make a Property Right*, 64 U. PITT. L. REV. 745 (2003).

²⁸² Justice Thomas was skeptical of the government’s contention that the holding in *Craft* was compelled by the potential for tax fraud. *Craft*, 535 U.S. at 301 (Thomas, J., dissenting).

rights to property.²⁸³ Alternatively, it is possible that this case might be read more broadly, leading to the elimination of the entirety bar to the attachment of other federal liens or judgments.²⁸⁴

Whether or not the Supreme Court ultimately eliminates the entirety bar to all federal collections, the history of the tenancy coupled with its modern treatment by the Court in *Craft* indicates that its future is tenuous at best. First, its continued existence can be justified only by familiarity because the circumstances under which it was created no longer exist.²⁸⁵ The tenancy by the entirety endeavors to protect marital property from seizure due to the financial difficulties of one spouse.²⁸⁶ As Justice Scalia noted in his dissent in *Craft*, it is rooted in a feudal goal to protect a wife's interest in the marital home should her husband pass away while indebted to third-party creditors.²⁸⁷ This legal paternalism is not required to protect the interests of women in modern society.²⁸⁸ Furthermore, as the modern familial relationships continue to diversify, this legal relic's preference for one relationship over another will lead to further inequities in the enforcement of liens and other judgments.²⁸⁹

Moreover, the tenancy by the entirety presents an inherent contradiction between preserving an archaic legal fiction and achieving important federal prerogatives.²⁹⁰ At the focus of this incongruity is the proper role of state governments in defining property interests and the rights associated with them.²⁹¹ As the Court in *Craft* noted, too often the tenancy by the entirety is used as an unjustifiable asset shield, resulting in arbitrary distinctions in liability under the federal tax code based on incompatible state laws.²⁹² Further recognition of the entirety bar perpetuates the same legal absurdity pointed out by Justice O'Connor in *Craft*—if neither spouse

²⁸³ See *Craft*, 535 U.S. at 276.

²⁸⁴ *Id.*

²⁸⁵ Orth, *supra* note 1, at 48-49 (“The only justification for the present system must be that people are familiar with it and that, by and large, it works.”).

²⁸⁶ Sharp, *supra* note 26, at 198.

²⁸⁷ Robert D. Null, *Tenancy by the Entirety as an Asset Shield: An Unjustified Safe Haven for Delinquent Child Support Obligors*, 29 VAL. U. L. REV. 1057, 1083 (1995) (“[T]he primary reason for the survival of the estate seems to be a desire to financially protect the marital unit.”).

²⁸⁸ Peter M. Carrozza, *Tenancies in Antiquity: A Transformation of Concurrent Ownership for Modern Relationships*, 85 MARQ. L. REV. 423, 456 (2001).

²⁸⁹ *Id.* at 458.

²⁹⁰ Sharp, *supra* note 26, at 208 (“Tenancy by the entirety is based on a fictional unity that is inconsistent with the complexities of modern law . . .”).

²⁹¹ See *supra* note 5 and accompanying text.

²⁹² Null, *supra* note 287, at 1059-60.

has a recognizable interest in the entireties property, nobody does.²⁹³

How broadly this so-called *Craft* doctrine is maintained or even extended depends ultimately on two factors. First, whether or not Congress chooses to enter the fray, passing legislation specifically addressing the issue, or amending existing legislation, including § 6321, to include express provisions dealing with the state-created entireties bar. If Congress remains silent, however, the courts will ultimately decide whether the entireties bar is eliminated as to other federal collections, like drug forfeitures.

As time passes, one might expect the legislatures of those states maintaining the tenancy to acknowledge its deficiencies, and cease recognition of it. However, the legislative process moves very slowly, and adjustments to tenancy by the entirety have rarely kept up with social realities.²⁹⁴ Absent the elimination of the entireties bar by each individual state legislature still recognizing the tenancy, or express statutory provisions indicating clear congressional intent, the contradiction between federal interests and state laws is left to the judiciary to interpret.

The role of the Supreme Court in addressing the future tenancies by the entirety is particularly perplexing. Prior to the *Craft* decision, one might have expected the Rehnquist Court to uphold the absolute right of states to define and regulate property ownership in our federal system.²⁹⁵ It appears, however, that despite a broad reluctance of the Court to allow Congress to infringe upon the traditional roles of state government, the inequities resulting from an uneven application of federal tax liens could no longer be sanctioned by inaction.²⁹⁶ While it is clear that states reserve the right to define and recognize entirety estates, it is equally clear that the federal government, at least with regard to the tax power, will no longer be bound by its draconian classifications.

²⁹³ *Craft*, 535 U.S. at 285.

²⁹⁴ Orth, *supra* note 1, at 43 (explaining the relative sluggishness associated with the legislative movement to recognize gender equality under state legislated tenancies by the entirety).

²⁹⁵ See *Gregory*, 501 U.S. at 473 (writing for the majority, Justice O'Connor stressed that Congress must be clear and unambiguous in its intent when attempting to use its commerce power to infringe upon state sovereignty).

²⁹⁶ *Craft*, 535 U.S. at 289 (stating that the Supremacy Clause provides the justification for ignoring state-delineated exemptions to the federal tax lien statute).