

After *Drye*: The Likely Attachment of the Federal Tax Lien to Tenancy-by-the-Entireties Interests

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On December 7, 1999, the United States Supreme Court unanimously decided *Drye v. United States*,¹ a case likely to be a landmark in federal tax lien law. *Drye* clarified what had been muddled by previous Supreme Court and lower court decisions: the proper relation between state law and federal law in tax lien attachment cases. That clarification will permit—indeed, compel—greater analytical precision as future courts address tax lien cases. This Article discusses one such line of cases.

It has long been the rule that the federal tax lien does not attach to tenancy-by-the-entireties interests² when (1) only one of the spouses owes tax and (2) applicable state law prohibits separate creditors of only one of the spouses from proceeding against entireties property.³ Unfortunately, that rule, though long standing, is conceptually bankrupt, indeed is fundamentally inconsistent with the modern understanding of tax liens.⁴

Thus, the tension in this area has been “which shall prevail: history or logic?”. History has had the ascendancy thus far, but only, I believe, because loose language in prior Supreme Court decisions created an environment in which imprecision could survive. The clarification of the applicable standards by *Drye* eliminates that environment. Accordingly, fidelity to *Drye* requires reexamination—and abolition—of the outdated rule as to attachment of the tax lien to entireties interests.⁵

This Article has five parts. Parts I, II, and III are foundational. Part I describes *Drye*, while Parts II and III explore the interaction of the tax lien and tenancies by the entireties before *Drye*. Specifically, Part II explains the development and nature of the current rule as to attachment of the federal tax lien to entireties interests (called hereafter the “entireties bar”). Part III argues that, for both policy and doctrinal reasons, the entireties bar was a dubious rule of law even before *Drye*.

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1. 120 S. Ct. 474 (1999).

2. Tenancy by the entireties is a form of joint ownership of property available only to spouses. Typically, in jurisdictions recognizing this form of ownership, all or nearly all types of property may be owned by the entireties, personalty as well as realty. *See generally infra* Part II.A.

3. *See, e.g.,* *United States v. Hutcherson*, 188 F.2d 326 (8th Cir. 1951).

4. As described in Part III *infra*, the rule permits taxpayer manipulation and abuse, undercuts the principle that similarly situated taxpayers should be treated similarly, ignores the differences between the IRS and ordinary creditors, and extends state law beyond its appropriate role in federal tax lien analysis.

5. The particular type of property at issue in *Drye* was disclaimed inheritances, not entireties interests. *See infra* Part I.A. My argument is that *Drye* is important for the general principles it stated, principles applicable to all types of property, not to disclaimed inheritances only. It is for that reason that *Drye* bears heavily on the attachment of tax liens to entireties interests.

Parts IV and V carry the central message of this Article: the effect of *Drye* on the current rule. Part IV begins with the central curiosity as to the entireties bar: given its shortcomings, why does the rule command widespread acceptance? The Part concludes that the explanation is historical: the rule developed before clear elaboration of modern tax lien doctrine and has survived vestigially, by inertia. Part IV then describes the doctrinal clarification wrought by *Drye*. In the glaring light of *Drye*, no corner of shadow remains in whose murk the entireties bar can plausibly be defended. Finally, Part V considers objections, that is, arguments (inadequate in my view) in favor of survival of the current rule despite *Drye*.

I. *DRYE*

A. Context

The specific issue in *Drye* is one that had divided the lower courts: whether the federal tax lien attaches to disclaimed inheritances. Rohn F. Drye, Jr. had unpaid federal tax assessments of approximately \$325,000. Although it had filed liens against Mr. Drye,⁶ the IRS had little prospect of being paid since he was insolvent.⁷

Mr. Drye's mother died intestate, leaving an estate worth over \$230,000. Mr. Drye was her sole heir and was appointed administrator of her estate. Six months later, Mr. Drye filed a written disclaimer of any interest in his mother's estate. Two days later, he resigned as administrator and was succeeded by his daughter.

Mr. Drye's disclaimer was timely and effective under the applicable state law (Arkansas). Its effect was to cause the estate to pass to his daughter, who promptly established the Drye Family 1995 Trust. The daughter used the proceeds of the estate to fund the trust. She and her parents (including Mr. Drye, the disclaimant) were the beneficiaries of the trust. Distributions from the trust were discretionary with the trustee (Mr. Drye's counsel) and could be made only for the health, maintenance, and support of the beneficiaries. The trust was a spendthrift trust. Thus, under state law, its assets were shielded from the creditors of beneficiaries of the trust.

The IRS filed a notice of tax lien against the trust as Drye's nominee and served a notice of levy on accounts held in the trust's name by an investment bank. The trust responded by filing a wrongful levy suit in federal district court.⁸ The IRS counterclaimed against the trust, the trustee, and the beneficiaries. It sought to reduce to judgment its assessments against Drye, to confirm its right to seize the trust's assets to satisfy the assessments, to foreclose on the liens, and to sell the trust property.

On cross-motions for summary judgment, the district court ruled for the IRS. The Eighth Circuit affirmed.⁹ The Supreme Court granted certiorari to resolve a conflict

6. The lien in question was the general federal tax lien authorized by I.R.C. § 6321 (1994). For fuller description of this lien, see *infra* text accompanying notes 41-44.

7. All recited facts are drawn from *Drye*, 120 S. Ct. at 478-80.

8. See I.R.C. § 7426(a)(1) (Lexis 1999).

9. See *Drye Family 1995 Trust v. United States*, 152 F.3d 892 (8th Cir. 1998).

among the circuits. Before the Eighth Circuit, three other circuits had addressed the effect of state law disclaimers on the federal tax lien. The Second Circuit had held for the IRS, the Fifth and Ninth Circuits against it.¹⁰

As is typical of American jurisdictions,¹¹ Arkansas law provides that an effective disclaimer “relates back for all purposes to the date of death of the decedent,”¹² creating the legal fiction that the disclaimant predeceased the decedent. Based on this, Drye contended that, because of his disclaimer, he never had a property interest in his mother’s estate. As a result, there was nothing to which the tax liens against him could attach.

In opposition, the IRS maintained that the liens attached to Drye’s interest in the estate on the date of his mother’s death and that the subsequent disclaimer was ineffective to remove them. Two principles supported the government’s position. First, it is well established that once the tax lien attaches, it remains on the property until released by the IRS, satisfied by payment, or extinguished by expiration of the statute of limitations.¹³ Second, federal taxation turns on realities, on substance, not on legal fictions.¹⁴

B. Teaching

The significance of *Drye* transcends its narrow issue. Foremost, the Court clarified the role of state law in federal tax lien analysis. Secondarily, the Court addressed, though it did not define, the meaning of “property” for tax lien purposes.

10. See *Leggett v. United States*, 120 F.3d 592 (5th Cir. 1997) (Texas); *United States v. Comparato*, 22 F.3d 455 (2d Cir. 1994) (New York); *Mapes v. United States*, 15 F.3d 138 (9th Cir. 1994) (Arizona).

Other courts also had addressed the issue. Compare *United States v. Davidson*, 55 F. Supp. 2d 1152 (D. Colo. 1999), and *United States v. McCrackin*, 189 F. Supp. 632 (S.D. Ohio 1960) (holding against IRS), with *Tinari v. United States*, 96-2 U.S.T.C. ¶ 50,460 (E.D. Pa. 1996), and *In re Spruance*, 95 TNT 111-24 (Pa. Ct. Common Pleas 1994), *aff’d without published opinion*, 660 A.2d 661 (Pa. Super. Ct. 1995) (holding for IRS).

11. See, e.g., UNIF. PROBATE CODE § 2-801(c) (amended 1993), 8 U.L.A. 201 (1998); Stephen E. Parker, *Can Debtors Disclaim Inheritances to the Detriment of Their Creditors?*, 25 LOY. U. CHI. L.J. 31, 33-34 (1993). See generally S. Alan Medlin, *An Examination of Disclaimers Under UPC Section 2-801*, 55 ALB. L. REV. 1233 (1992).

12. ARK. CODE ANN. § 28-2-108(a)(3) (Michie 1997).

13. See, e.g., *United States v. Bess*, 357 U.S. 51, 57 (1958) (“[I]t is of the very nature and essence of [the federal tax lien], that no matter into whose hands the property goes, it passes cum onere . . .”) (alterations added) (omission in original) (quoting *Burton v. Smith*, 38 U.S. (13 Pet.) 464, 483 (1839)). See generally I.R.C. §§ 6325 (release of lien), 6502(a) (limitations period on collection) (Lexis 1999).

14. See, e.g., *United States v. Irvine*, 511 U.S. 224, 239-40 (1994) (stating that the tax law is not “struck blind by a disclaimer”).

1. Relation of State Law to Federal Law

From the beginning, the Court left no doubt as to what it viewed as the core of the case. The second sentence of the Court's opinion announced: "This case concerns the respective provinces of state and federal law in determining what is property for purposes of federal tax lien legislation."¹⁵

This was precisely the right use to make of the opportunity presented by the case. As we will see,¹⁶ prior High Court elaborations of the matter had been imprecise. As a result, lower court judges were confused or, to be more cynical, had colorable doctrinal cover for questionable results that they wished to reach based on their own calculus of policy and values. Clarifying the law in this regard was the single greatest need in tax lien jurisprudence.

The Court's holding as to the relation of state and federal law in the tax lien area is clear: "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 'right to property' within the meaning of § 6321."¹⁷ Thus, the teaching of *Drye* is that there are two stages in analyzing whether a federal lien against a delinquent taxpayer attaches to a particular item or asset.

The first stage involves only existence and description: does the taxpayer have any ability to influence the use or disposition of the item or asset or any opportunity to benefit from its use or disposition? If so, what are the contours and occasions of such ability or opportunity? State law is relevant only here. And, only aspects of state law which bear on such existence and description are relevant—other aspects of state law (such as those which characterize the ability or opportunity or which govern or restrict creditors' remedies) are wholly irrelevant.

The second stage involves characterization: does the ability or opportunity the taxpayer has as to the item or asset rise to the level of "property" or "rights to property" as those terms are used in § 6321? This is purely a question of federal law. Any state characterization of the ability or opportunity as "property" or "not property" is inapposite.¹⁸

If the case involves not just lien attachment but subsequent enforced collection action (like administrative levy or judicial sale), a third analytical stage is appropriate: the rights and remedies available to the IRS and any limitations thereon. *Drye* did not

15. *Drye v. United States*, 120 S. Ct. 474, 478 (1999).

16. See *infra* text accompanying notes 75-79.

17. *Drye*, 120 S. Ct. at 478. And again, "[w]e 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 law lien legislation." *Id.* at 481.

18. See, e.g., *In re Kimura*, 969 F.2d 806, 811 (9th Cir. 1992); *In re Terwillinger's Catering Plus, Inc.*, 911 F.2d 1168 (6th Cir. 1990), cert. denied sub nom. *Ohio Dep't of Taxation v. IRS*, 501 U.S. 1212 (1991); *21 West Lancaster Corp. v. Main Line Restaurant, Inc.*, 790 F.2d 354 (3d Cir. 1986); *JFWIRS, Ltd. v. United States*, 607 F. Supp. 566, 568-70 (M.D. Pa. 1985) (holding that the federal tax lien attached to items expressly characterized as "privileges," not "property," by state law in each of these cases).

center on this level, but it confirmed that this level too is purely a matter of federal law.¹⁹

2. Definition of Property

Once it has been determined that, under state law, the taxpayer has some ability or opportunity as to the asset on which the IRS seeks to impress its lien, the next inquiry is whether, under federal law, that ability or opportunity constitutes a property right. The *Drye* Court did not attempt to define “property” and “rights to property” comprehensively for § 6321 purposes.²⁰ Instead, the Court framed the matter illustratively. It began by quoting approvingly the remarks of earlier Courts that the ambit of § 6321 is broad indeed and should be construed expansively.²¹

Thereafter, without committing itself to any particular formulation, the *Drye* Court reprised definitions offered or implied previously. Some of them were situation-specific, shorthand renderings, not intended to be all-encompassing. Also, considerable overlap of language or essence exists among those definitions. Nonetheless, the formulations suggest the lines along which future controversies will be fought. In order of appearance, the Court invoked the following definitions or criteria as to “property”:

- “every species of right or interest protected by law and having an exchangeable value,”²²
- a right to gain possession of an item, even if such possession does not amount to ownership,²³
- assets or items available to the taxpayer, “within [her] reach to enjoy,”²⁴
- “any beneficial interest, as opposed to ‘bare legal title,’ in the [asset] at issue,”²⁵
- “a valuable, transferable, legally protected right to the property at issue,”²⁶

19. See *Drye*, 120 S. Ct. at 478 (quoting *United States v. Bess*, 357 U.S. 51, 56-57 (1958)).

20. Consequently, struggling with definition on the facts of future cases will constitute the principal post-*Drye* issue in lien attachment jurisprudence. A comparable issue may arise under the new spousal relief enacted in 1998. Such relief is limited if “disqualified asset” transfers are made. I.R.C. § 6015(c)(4)(A) (Lexis 1999). Such assets include “any property or right to property” transferred under defined circumstances. *Id.* § 6015(c)(4)(B)(i). Presumably, future litigation about the meaning of this phrase for § 6015 purposes will advert to § 6321 jurisprudence by way of analogy.

21. See *Drye*, 120 S. Ct. at 480; *infra* text accompanying note 43.

22. *Drye*, 120 S. Ct. at 480 (quoting *Jewett v. Commissioner*, 455 U.S. 305, 309 (1982) (quoting S. REP. NO. 665, 72d Cong., 1st Sess., 39 (1932); H.R. REP. NO. 708, 72d Cong., 1st Sess., 27 (1932))).

23. See *id.* at 481 (citing *United States v. National Bank of Commerce*, 472 U.S. 713, 723-27 (1985) (holding that the right to withdraw money from a joint bank account was property or a right to property under § 6321 even though it had not been established whether the taxpayer or his codepositors owned the money in the account)).

24. *Id.* at 482 (alteration added) (quoting *Bess v. United States*, 357 U.S. 51, 56 (1958)).

25. *Id.* at 482 n.6 (quoting *Aquilino v. United States*, 363 U.S. 509, 515-16 (1960)).

26. *Id.* at 482 (citing *Drye Family 1995 Trust v. United States*, 152 F.3d 892, 895 (8th Cir. 1998)). Evincing its cautious approach as to defining property, the Court added: “we do not mean to suggest that transferability is essential to the existence of ‘property’ or ‘rights to

- “rights or interests that have pecuniary value and are transferable,”²⁷ and
- more than a mere expectancy, even if valuable and transferable.²⁸

*C. Application to
Disclaimed Inheritances*

Having identified the standards for the attachment of the tax lien, the Court had little difficulty concluding that they were met on the facts of *Drye*. Mr. Drye had an interest in his mother’s estate under Arkansas law, and that interest was of substance sufficient to constitute property or a right to property under federal law. The Court emphasized two points. First, under Arkansas law, a prospective heir can assign his interest in an estate and the assignment will be enforced by the Arkansas courts.²⁹

Second, “Arkansas law primarily gave Drye a right of considerable value—the right either to inherit or to channel the inheritance to a close family member (the next lineal descendant [who would take as a result of his disclaimer]).”³⁰ If he did nothing, the entire estate would come to him. He could deflect the estate’s vesting in him only by taking an affirmative act: disclaiming. Moreover, the result of that affirmative act would be to direct the property to a person who was both known and near: his daughter. Either way—by taking the affirmative act or by refraining from taking it—“the heir inevitably exercises dominion over the property.”³¹ This “power to channel,” this “control rein,” in the Court’s estimation, “warrants the conclusion that Drye held ‘property’ or a ‘right[t] to property’ subject to the Government’s liens.”³²

Unsurprisingly, given the Court’s unanimity in *Drye*, this conclusion is fully consistent with previous teaching by the Court. The “control rein” language recalls another metaphor, the familiar “bundle of sticks” concept of property. The Supreme Court had embraced this concept in a leading gift tax case. “‘Property’ is more than just the physical thing—the land, the bricks, the mortar—it is also the sum of all the rights and powers incident to ownership of the physical thing. It is the tangible and the intangible. Property is composed of constituent elements”³³ And, of the reins, or sticks, or constituent elements, “[t]he important consideration is the breadth of the control the [taxpayer] could exercise over the property.”³⁴

property’ under [§ 6321].” *Id.* at 482 n.7.

27. *Id.* at 482 (quoting *Drye Family 1995 Trust*, 152 F.3d at 895).

28. *See id.* at 482 n.7 (dictum) (commenting on Eighth Circuit’s *Drye* opinion).

29. *See id.* at 482 (citing cases).

30. *Id.* at 483.

31. *Id.*; *see also* Adam J. Hirsch, *The Problem of the Insolvent Heir*, 74 CORNELL L. REV. 587, 607-08 (1989).

32. *Drye*, 120 S. Ct. at 483 (alteration in original).

33. *Dickman v. Commissioner*, 465 U.S. 330, 336 (1984) (omission added) (quoting *Passailaigue v. United States*, 224 F. Supp. 682, 686 (M.D. Ga. 1963)).

34. *Morgan v. Commissioner*, 309 U.S. 78, 83 (1940).

II. THE CURRENT RULE

A. *Tenancies by the Entireties*

American law recognizes various forms of concurrent ownership of property, including community property, tenancies in common, joint tenancies, and tenancies by the entireties. At common law, tenancy by the entireties was the only concurrent estate that could be created between wife and husband³⁵ because those persons were deemed to lose their separate identities upon marriage and to become a single person or entity.³⁶

As devised by sixteenth-century English law, entireties estates served a number of ends now somewhat less in vogue: feudal military organization, male supremacy,³⁷ and scriptural literalism.³⁸ Consequently, this form of property ownership was abolished in England in 1925,³⁹ and has since been abolished in some American jurisdictions.⁴⁰

However, many states retain tenancies by the entireties. Indeed, tenancy by the entirety is much more alive and vigorous than its ancient and anachronistic purposes would suggest. Twenty-five states and the District of Columbia affirmatively recognize the tenancy; an additional five states mention the tenancy in their codes while neither governing nor restricting its use. Only thirteen states have explicitly or by strong inference abolished the tenancy; four have conflicting judicial or statutory statements; and three have taken no known position.⁴¹

For our purposes, two groups of jurisdictions are particularly relevant. First, in at least seventeen jurisdictions (hereafter called the “bar states” or “full bar states”), the liens of separate creditors (creditors of only one of the spouses) cannot attach to entireties property or interests. Second, in at least nine other jurisdictions (hereafter called the “modified bar states”), the liens of separate creditors can attach but only subject to the rights of the nondebtor spouse, that is, the property held by the

35. See generally ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY* § 5.5 (2d ed. 1993). Entireties tenancies are said to possess five unities: those of time, title, interest, possession, and person.

36. Giving rise to the expression that “at common law, husband and wife were one, and that one was the husband.” See Oval A. Phipps, *Tenancy by Entireties*, 25 *TEMP. L.Q.* 24, 24 (1951).

37. See *id.*

38. The description of Eve’s creation includes the direction that husband and wife “shall be one flesh.” *Genesis* 2:24. The entireties form of property ownership has been traced to this injunction. See *United States v. Gurley*, 415 F.2d 144, 149 (5th Cir. 1969). See generally CORNELIUS J. MOYNIHAN, *INTRODUCTION TO THE LAW OF REAL PROPERTY* 219 (2d ed. 1988) (stating that the “underlying concept of an artificial unity of husband and wife is repugnant to modern views of the status of married women”).

39. See *Law of Property Act, 1925*, 15 & 16 *Geo. 5*, ch. 20, § 37 (Eng.).

40. Either by judicial decision or by statute, such as the various Married Women’s Property Acts. See generally WILLIAM D. POPKIN, *STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION* 98, 108-12 (1999).

41. 7 RICHARD R. POWELL, *POWELL ON REAL PROPERTY* 52-1 I to 52-12 (Shelby D. Greene rev. ed., 1998) (citations omitted).

entireties estate cannot be levied on until the rights of the nondebtor spouse cease to be absolute, as happens when the entireties estate ends because of death or divorce.⁴² I am more concerned with the full bar states because they are more numerous, have greater populations, and impose greater limitation on creditor rights and remedies.

*B. Current Rule as to Attachment of the
Tax Lien to Entireties Interests*

The revenue system ultimately depends on the ability of the IRS to engage in enforced collection actions,⁴³ without which paying taxes would be essentially voluntary. Typically, enforced collection can be effected only against property to which the federal tax lien attaches. Thus, the scope of the lien is a matter of importance.

The general tax lien under I.R.C. § 6321 is the only comprehensive lien authorized by the Internal Revenue Code.⁴⁴ Under § 6321, the amount assessed⁴⁵ against the delinquent taxpayer "shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to [the taxpayer]."⁴⁶

The courts have repeatedly emphasized the breadth of this language and, consequently, of the general tax lien. The language of § 6321 "is broad and reveals on its face that Congress meant to reach *every* interest in property a taxpayer might have."⁴⁷ The reason for this is unsurprising: "taxes are the life blood of government, and their prompt and certain availability an imperious need."⁴⁸

The prevailing rule as to tenancies by the entireties stands in contrast to this generally expansive view of the federal tax lien. Under that rule, the attachment of the lien depends on the entireties regime which happens to exist in the taxpayer's home state. The IRS is held to be bound by the same limitations as bind private

42. The full bar jurisdictions include Delaware, the District of Columbia, Florida, Hawaii, Indiana, Maryland, Michigan, Mississippi, Missouri, North Carolina, Ohio, Pennsylvania, Rhode Island, Vermont, Virginia, the Virgin Islands, and Wyoming. The modified bar states are Alaska, Arkansas, Kentucky, Massachusetts, Montana, New Jersey, New York, Oregon, and Tennessee. *See, e.g., id.* ¶ 620[4]; J.H. Cooper, Annotation, *Interest of Spouse in Estate by Entireties as Subject to Satisfaction of His or Her Individual Debt*, 75 A.L.R.2d 1172 (1961). The Virgin Islands is omitted by the above sources but is a full bar jurisdiction. *See, e.g., Masonry Prods., Inc. v. Tees*, 280 F. Supp. 654 (D.V.I. 1968).

43. Such as administrative levy, *see* I.R.C. § 6331 (Lexis 1999), and judicial sale, *see id.* § 7403 (1994).

44. The Code also authorizes a variety of tax liens specific to particular contexts, including special liens with respect to estate taxes, *see id.* §§ 6324(a), 6324A, 6324B (1994), gift taxes, *see id.* § 6324(b), and taxes on distilled spirits, *see id.* § 5004.

45. The general lien arises only after the IRS has "assessed" (formally recorded) the unpaid taxes and made notice and demand for payment upon the taxpayer. *See id.* §§ 6201(a), 6203, 6303(a).

46. *Id.* § 6321.

47. *United States v. National Bank of Commerce*, 472 U.S. 713, 719-20 (1985) (emphasis added); *see also* *Glass City Bank v. United States*, 326 U.S. 265, 267 (1945).

48. *Bull v. United States*, 295 U.S. 247, 259 (1935); *see also* *United States v. Dalm*, 494 U.S. 596, 604 (1990).

creditors in that state.⁴⁹ Thus, for example, in the full bar jurisdictions, the federal tax lien is held not to attach at all to entireties interests and entireties property if only one of the spouses has unpaid tax liabilities.⁵⁰

III. CRITICISM OF THE CURRENT RULE

The current rule, making attachment of the tax lien to entireties interests dependent on state law, is a strikingly bad idea, both doctrinally and practically. I have written before on this subject, explaining the rule's shortcomings.⁵¹ I will not here rehearse in detail the points there made. A summary of the disadvantages of the current rule is necessary, though, as a foundation for the coming discussion of how *Drye* changes the landscape in this area.

A. Policy Criticisms

The entireties bar is unwise as a matter of policy. This is so for two reasons:

(1) The bar creates an opportunity for taxpayer manipulation and abuse. As an example, assume that spouses residing in a full bar state transfer all their assets into entireties ownership and thereafter file separate income tax returns.⁵² The higher-income spouse takes "highly aggressive" return positions greatly reducing reported liability while the lower-income spouse reports and pays the correct amount of tax. It would do the IRS little good to examine and challenge the higher-income spouse's incorrect returns. Any deficiencies, interest, and penalties against her would be uncollectible—the assessments would be against her separately and, under the current rule, the separate liabilities of one spouse cannot be collected out of entireties property. Thus, the existence of the entireties bar creates an avenue whereby strategically inclined taxpayers can underpay their taxes without hazard of enforced collection by the IRS. The entireties bar invites tax abuse.⁵³

(2) Our tax system is "designed to ensure as far as possible that similarly situated

49. See, e.g., *Cole v. Cardoza*, 441 F.2d 1337, 1343-44 (6th Cir. 1971) (Michigan); *Benson v. United States*, 442 F.2d 1221, 1223 (D.C. Cir. 1971) (dictum).

50. If both spouses owe tax, the tax lien attaches to entireties property up to the amount of whichever spouse's liability is less. See, e.g., *Tony Thornton Auction Serv., Inc. v. United States*, 791 F.2d 635, 637-38 (8th Cir. 1986).

51. 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 (1995).

52. It is important that the transfers occur before tax liability arises. If a spouse already indebted to the IRS transfers formerly separate property into an entireties estate, the IRS can collect against the property under fraudulent conveyance or transferee liability theories. See, e.g., *United States v. Davenport*, 106 F.3d 1333, 1335-36 (7th Cir. 1997). Theoretically, anticipatorily fraudulent schemes sometimes also can be attacked, but fraudulent conveyance statutes are not uniform in this regard and actually proving anticipatory fraud can be difficult in practice.

53. See *Craft v. Commissioner*, 140 F.3d 638, 649 (6th Cir. 1998) (Ryan, J., concurring) (the entireties bar "not only contravenes established [recent] precedent, but provides an avenue for easy avoidance of federal income-tax laws").

taxpayers pay the same [amount of] tax."⁵⁴ This principle of horizontal equity is important aspirationally and, despite various departures, often operationally in our tax system.⁵⁵

The entireties bar to collection traduces this principle. A tax delinquent in a full bar state may escape collection as to property co-owned with his spouse (in tenancy by the entireties) even though an otherwise identically situated tax delinquent in a state not recognizing entireties estates would suffer collection as to property co-owned with his spouse (such as in a joint tenancy).⁵⁶ Indeed, the federal tax lien attaches to property or interests in all forms of co-ownership excepting only tenancies by the entireties.⁵⁷ The current rule treats entireties cotenants preferentially compared to spousal joint tenants in non-bar states, traducing horizontal equity.⁵⁸

B. Doctrinal Criticisms

Arrows of policy are not the only missiles that may be shot at the entireties bar. The rule also falls short doctrinally. This is so for three reasons, of which the third is the most important:

(1) The IRS is not like an ordinary, private creditor. Thus, rules that limit the latter need not also limit the former. Most private creditors—lenders, suppliers, trade creditors, and the like—can choose with whom to do business; if they extend money or credit to one who does not repay them, that is the consequence of their own bad choice. In contrast, the IRS is an involuntary creditor; it does not choose its “customers,” so it cannot be seen as having assumed the risk of nonpayment by dealing with them.⁵⁹

An even more important distinction between the IRS and ordinary creditors involves the sources of their respective rights and powers. Private creditors generally

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

55. *See, e.g.*, *Commissioner v. Sunnen*, 333 U.S. 591, 599 (1948); *Thomas v. Perkins*, 301 U.S. 655, 659 (1937) (citing cases); *King v. United States*, 152 F.3d 1200, 1202 (9th Cir. 1998); *Security Bank S.S.B. v. Commissioner*, 116 F.3d 302, 303 (7th Cir. 1997); *Gibraltar Fin. Corp. v. United States*, 825 F.2d 1568, 1572 (Fed. Cir. 1987) (stating that it is “particularly desirable in tax cases to ensure equal application of the tax system to our citizenry”).

56. For an example, see *Johnson, supra* note 51, at 853-54. Of course, in joint tenancy and other co-ownership situations, the IRS could proceed against only the delinquent co-owner’s interest in the property. The nondelinquent owner’s interest cannot be charged to pay the delinquent owner’s taxes. *See, e.g.*, I.R.C. § 7403(c) (1994); *United States v. Rodgers*, 461 U.S. 677, 699 (1983); *United States v. Lester*, 235 F. Supp. 115 (S.D.N.Y. 1964).

57. *See infra* text accompanying notes 117-20.

58. In fact, there can be intrastate, as well as interstate, inequity. Even in bar states, entireties ownership is optional, not mandatory. Spouses choosing entireties co-ownership are treated preferentially by the current rule compared to those choosing another form of joint ownership.

59. *See, e.g.*, William T. Plumb, Jr., *Federal Liens and Priorities—Agenda for the Next Decade II*, 77 *YALE L.J.* 605, 606 (1968) (stating that tax debts are excepted from various debtor exemption laws because the latter “are more appropriately applied in circumstances where credit is voluntarily extended than where obligations are imposed for the support of the government”).

are governed by state law, indeed, if entities, probably are created under it. The rights of the IRS as a creditor, however, flow directly from the Constitution.⁶⁰ Thus, it is wrong to equate the IRS with ordinary creditors and to subject it to the same limitations imposed by state law. As the Supreme Court taught nearly twenty years ago:

[T]he Government's right to [engage in enforced collection action against] property in which a delinquent taxpayer had an interest does not arise out of its privileges as an ordinary creditor, but out of the express terms of [the Internal Revenue Code]. Moreover, the use of the power granted by [the Code] is not the act of an ordinary creditor, but the exercise of a sovereign prerogative, incident to the power to enforce the obligations of the delinquent taxpayer himself, and ultimately grounded in the constitutional mandate to "lay and collect taxes."⁶¹

(2) The rule that separate creditors cannot proceed against entireties property is best understood as a debtor-creditor rule of exemption. Yet it is well settled that state exemption rules do not shield taxpayers from federal tax liens.⁶²

This principle rests ultimately on the constitutional basis that federal law "shall be the supreme Law of the Land."⁶³ Two portions of the Internal Revenue Code are inconsistent with limitation of federal tax collection by state rules of exemption. One is § 6321 itself, which provides that the general federal tax lien attaches to "all" of the tax delinquent's property and property rights. The use of this inclusive language and the absence of any exception or qualification incorporating state exemptions is telling.⁶⁴

60. Such rights rest ultimately on the enumerated federal power to "lay and collect [t]axes," U.S. CONST. art. I, § 8, cl. 1, and, as to income taxes, on the Sixteenth Amendment. An extra-constitutional source of authority also may exist. Courts have sometimes held that the ability to tax is a fundamental attribute of sovereignty, inherent in the very idea of government. *See, e.g., Society for Sav. v. Coite*, 73 U.S. (6 Wall.) 594, 606 (1867); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819); *United States v. Alberts*, 55 F. Supp. 217, 220 (E.D. Wash. 1944).

61. *Rodgers*, 461 U.S. at 697; *see also United States v. National Bank of Commerce*, 472 U.S. 713, 727 (1985); *Randall v. H. Nakashima & Co.*, 542 F.2d 270, 274 n.8 (5th Cir. 1976) (criticizing positions which would "compare the [IRS] to a class of creditors to which it is superior").

1998 legislation enacted new I.R.C. §§ 6320 and 6330, creating additional administrative and judicial review opportunities with respect to levies and filing of tax liens. According to the legislative history, "[t]he Committee believes that taxpayers are entitled to protections in dealing with the IRS that are similar to those they would have in dealing with any other creditor." S. REP. NO. 105-174, at 67 (1998). Understood in context, however, this language merely explains new §§ 6320 and 6330 and does not abrogate the differences in source of power and in status between the IRS and private creditors. *See* I.R.C. §§ 6320, 6330 (Lexis 1999).

62. *See, e.g., National Bank of Commerce*, 472 U.S. at 722-23; *United States v. Mitchell*, 403 U.S. 190, 204-05 (1971); *Fried v. New York Life Ins. Co.*, 241 F.2d 504, 505-07 (2d Cir. 1957).

63. U.S. CONST. art. VI, cl. 2.

64. State law operates as to federal taxation only when it is incorporated into federal law expressly or by necessary implication. *See, e.g., Burnet v. Harmel*, 287 U.S. 103, 110 (1932).

The other is § 6334. Section 6334(a) makes thirteen expressly enumerated assets exempt from levy by the IRS. Entireties interests are not within the enumeration, and § 6334(c) provides: "Notwithstanding any other law of the United States, no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a)." Section 6334(c) is "specific and . . . clear."⁶⁵ "[T]here is no room in it for automatic exemption of property that happens to be exempt from state levy under state laws."⁶⁶

(3) There is an even more serious doctrinal failing of the entireties bar: it rests on an erroneous conception as to the extent to which state law is incorporated into federal law for tax collection purposes. One looks to state law only to ascertain whether the tax delinquent has any ability to influence or opportunity to benefit from the asset on which the IRS seeks to impress the tax lien. Also, one looks to state law to describe the extent of such opportunity or benefit. Thereafter, resort to state law ends.⁶⁷

Cases supporting the entireties bar go further. They also look to state law for characterization of such opportunity or benefit as "property" or "not property."⁶⁸ This is improper. It applies state law beyond the point at which its relevance ends. Specifically, the "property versus not property" characterization is a matter of federal law, not state law. This shortcoming of the entireties bar is developed in detail in Part IV.B.

IV. IMPACT OF *Drye* ON THE ENTIRETIES BAR

The entireties bar came into being because of misunderstanding by the lower federal courts of the role of state law in federal tax lien analysis. The clarification effected by *Drye* leaves no room for such misunderstanding. The error of the lower courts as to the entireties bar is now clear beyond peradventure.

A. Misunderstanding on Which the Entireties Bar Rests

The establishment of the entireties bar needs to be understood historically. Trial court bar cases go back to the 1930s,⁶⁹ but the rule was announced most forcefully by

When Congress does want to incorporate state exemption rules into federal law, it knows how to do so. *See, e.g.*, 11 U.S.C. § 522(b)(2)(A)-(B) (1994) (expressly incorporating such rules into the federal Bankruptcy Code upon state election).

65. *Mitchell*, 403 U.S. at 205.

66. *Id.*; *see also* *Rodgers*, 461 U.S. at 700 (stating that it is "clearly implicit" in section 6334(c) that state law cannot create an exemption not found in the Code); Treas. Reg. § 301.6334-1(c) (as amended in 1997).

67. *See, e.g.*, *National Bank of Commerce*, 472 U.S. at 722; *United States v. Bess*, 357 U.S. 51, 56-57 (1958).

68. *See, e.g.*, *United States v. Hutcherson*, 188 F.2d 326, 329-31 (8th Cir. 1951).

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

a series of circuit court cases in the 1950s.⁷⁰ Subsequent lower courts generally have followed the entirety bar⁷¹ although an increasing current of doubt about the bar was evident in the cases even before *Drye* was decided.⁷²

The bar cases have not always been clear as to their rationales. Still, at base, they rest on the conception that, in federal tax lien analysis, one looks to state law to determine whether particular powers or interests constitute “property” or “rights to property.” That is, state law, not federal law, *defines* property and property rights. Thus, a leading Eighth Circuit entirety case stated that the matter was to be decided “by the application of the law of Missouri determining and defining the law of property rights in that state.”⁷³ Similarly, a Fifth Circuit case stated that “the rules of property and fixing the incidents of property ownership are rules of state law which the Federal courts will respect.”⁷⁴

Concluding, from their inspection of state cases, that state law provided that neither spouse has a property interest at all or has only an undivided property interest as to property held by the entirety,⁷⁵ the bar courts held that those characterizations control for § 6321 purposes, such that the tax-delinquent spouse “did not have any

70. See *United States v. American Nat'l Bank*, 255 F.2d 504 (5th Cir. 1958) (Florida), *cert. denied as to another issue*, 358 U.S. 835 (1959); *Raffaele v. Granger*, 196 F.2d 620 (3d Cir. 1952) (Pennsylvania); *Hutcherson*, 188 F.2d 326 (Missouri).

71. See, e.g., *IRS v. Gaster*, 42 F.3d 787, 791 (3d Cir. 1994) (Delaware); *United States v. Waltman*, 98-1 U.S. Tax Cas. (CCH) ¶ 50,487 (S.D. Ind. 1998); *Theo. H. Davies & Co., Ltd. v. Long & Melone Escrow, Ltd.*, 876 F. Supp. 230 (D. Haw. 1995); *Batrus, Foldenauer & Madigan, Inc. v. United States*, 29 A.F.T.R.2d ¶ 72-629 (E.D. Va. 1972); *Pettengill v. United States*, 205 F. Supp. 10, 13 (D. Vt. 1962).

72. For discussion of some of these cases, see *Johnson*, *supra* note 51, at 876-81. A district court decision abrogating the bar was reversed on appeal. See *Craft v. United States*, 94-2 U.S. Tax Cas. (CCH) ¶ 50,493, *supplemental opinion*, 1995 WL 549317 (W.D. Mich. July 11, 1995), *rev'd*, 140 F.3d 638 (6th Cir. 1996). However, one of the three circuit judges concurred only with denying summary judgment in favor of the IRS. That judge concluded that the bar cases are inconsistent with modern tax lien law. See *Craft*, 140 F.3d at 645-48 (Ryan, J., concurring).

Also noteworthy is *Cox v. Commissioner*, 121 F.3d 390 (8th Cir. 1997). The Eighth Circuit had relied on Missouri law in a seminal bar case, *United States v. Hutcherson*, 188 F.2d 326 (8th Cir. 1951). In *Cox*, however, that same court interpreted recent Missouri cases as eroding the fiction on which *Hutcherson* was based. Under such cases, it now is clear that

the whole entirety estate is vested and held in each spouse . . . [T]he ownership interest is in the spouses, and not in a separate entity. The only conclusion that can be reached . . . is that both Mr. and Mrs. Cox had title to the building in question, and not a fictional but separate entity, as the Coxes argue.

Cox, 121 F.3d at 392. Thus, it appears that a pillar of the entirety bar was in jeopardy even before *Drye*. How long can it survive given *Drye*?

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

74. *American Nat'l Bank*, 255 F.2d at 506-07.

75. That analysis was not always sophisticated. For example, there are nontax decisions in bar states to the effect that, although neither spouse has a separate interest in the underlying property held by the entirety estate, the interest each spouse has in the entirety estate itself is her or his separate property. See, e.g., *Newman v. Equitable Life Assurance Soc.*, 160 So. 745, 747 (Fla. 1935). The bar cases failed to capture that distinction.

interest in the subject property . . . to which a lien for Federal taxes, owed by [that spouse only], could attach.”⁷⁶

The flaw in that approach is that it extends deference to state law too far. The true rule—certainly as clarified by *Drye*⁷⁷—is that characterization, that is, defining interests and powers as “property” or “not property,” is a matter of federal, not state, law. Regrettably, that this is the true rule was less clear when the seminal bar cases were being decided.

Too often, pre-*Drye* elaborations by the Supreme Court were imprecise. To be sure, there were a number of cases that should have warned the bar courts that their reliance on state law proceeded too far.⁷⁸ However, some cases sent conflicting signals. For instance, in the 1940 *Morgan* case, the Supreme Court provided a clear and correct statement of the limited role of state law,⁷⁹ but, a page later in the opinion, muddied the matter by adding: “in the application of a federal revenue act, state law controls in determining the nature of the legal interest which the taxpayer had in the property or income to be reached by the statute.”⁸⁰ One could have interpreted the “nature” language as meaning that defining interests as “property” or “not property” is a matter of state law.

Some post-*Morgan* cases compounded the confusion. Thus, a 1958 case stated: “once it has been determined that state law creates sufficient interests in the [taxpayer] to satisfy the requirements of [what is now § 6321],” recourse to state law ends.⁸¹ Also, in a 1960 case, the Court said:

The threshold question . . . is whether and to what extent the taxpayer had “property” or “rights to property” to which the tax lien could attach. In answering that question, both federal and state courts must look to state law The application of state law in ascertaining the taxpayer’s property rights and of federal law in reconciling the claims of competing lienors is based upon logic and sound legal principles. This approach strikes a proper balance between the

76. *American Nat’l Bank*, 255 F.2d at 507; see also *Hutcherson*, 188 F.2d at 329 (stating that entreties estates are “built upon the fiction . . . that a husband and wife are one and only one legal entity”).

77. See *supra* text accompanying notes 15-19.

78. See, e.g., *United States v. Union Central Life Ins. Co.*, 368 U.S. 291, 293-94 (1961) (“[T]he subject of federal taxes, including ‘remedies for their collection, has always been conceded to be independent of the legislative action of the states.’”) (quoting *United States v. Snyder*, 149 U.S. 210, 214 (1893)); *Helvering v. Stuart*, 317 U.S. 154, 162 (1942) (“Once rights are obtained by local law, whatever they may be called, these rights are subject to the federal definition of taxability.”). Among later cases, see *United States v. National Bank of Commerce*, 472 U.S. 713, 727 (1985) (“The question whether a state-law right constitutes ‘property’ or ‘rights to property’ is a matter of federal law.”).

79. *Morgan v. Commissioner*, 309 U.S. 78, 80-81 (1940).

State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed. . . . If it is found in a given case that an interest or right created by local law was the object . . . to be taxed, the federal law must prevail no matter what name is given to the interest or right by state law.

Id.

80. *Id.* at 82.

81. *United States v. Bess*, 357 U.S. 51, 56-57 (1958).

legitimate and traditional interest which the State has in creating and defining the property interest of its citizens, and the necessity for a uniform administration of the federal revenue statutes.⁸²

Thus, in the decades in which the early bar cases were being decided, one could, based on loose language in Supreme Court decisions, have concluded that state, not federal, law controls definition of property for § 6321 purposes. Indeed, that is precisely what several bar courts did.⁸³ Or, a judge who wanted to exclude entireties interests from the reach of the tax lien would have had sufficient doctrinal “cover” from such language to proceed as he wished.⁸⁴

As a postscript, we may note that the above was reinforced by another influence. For much of our judicial history, the constructional canon “statutes in derogation of the common law are to be read narrowly” held considerable sway, particularly when property rights were involved.⁸⁵ Although this canon has now fallen largely into disuse at the federal level, echoes of it have been heard even recently in tax collection jurisprudence.⁸⁶ Applying § 6321 to entireties interests surely derogates common law protections against creditors, so was a concern for some early bar courts.⁸⁷

B. Removal of Misunderstanding by Drye

Under the standards clarified and confirmed by *Drye*, the case for the overthrow of the entireties bar is compelling. Both of the stages of lien attachment analysis are satisfied: pursuant to state law, each entireties tenant has reins, strings, sticks, and constituent elements as to underlying assets and, pursuant to federal law, these powers are of sufficient substance to constitute property rights.

82. *Aquilino v. United States*, 363 U.S. 509, 512-14 (1960) (citations to *Morgan* and other cases omitted).

83. For instance, one court, although holding for the IRS on other grounds, adhered to the entireties bar. Citing *Aquilino*, *Rodgers*, and *Bess*, it pronounced it “well-settled” that “in federal taxation cases, the definition of underlying property interests is left to state law Thus, the court looks to state law to determine the character of any property right [the tax-debtor spouse] may have had.” *Miller v. Conte*, 72 F. Supp. 2d 952, 958 n.6 (N.D. Ind. 1999); see also *Foust v. Foust*, 1998 U.S. Dist. LEXIS 1806, at *14 (S.D. Ind. July 9, 1997) (citing *Aquilino* and other cases); *United States v. Klimek*, 952 F. Supp. 1100, 1114-15 (E.D. Pa. 1997) (citing *Aquilino* and other cases although holding for the IRS on other grounds); *Talbot v. United States*, 850 F. Supp. 969, 972 (D. Wyo. 1994) (citing *Morgan*).

84. Such confusion or cover was not confined to the distant past or to the entireties area. For instance, the two circuits which had held against attachment of the tax lien to disclaimed inheritances made the mistake. See *Leggett v. United States*, 120 F.3d 592, 597 (5th Cir. 1997) (“Section 6321 adopts the state’s definition of property interest.”); *Mapes v. United States*, 15 F.3d 138, 140 (9th Cir. 1994) (“For the answer to [this] question [whether the taxpayer had the requisite interest in the property], we must look to state law, not federal law.”).

85. See, e.g., *POPKIN*, *supra* note 40, *passim*.

86. See, e.g., *United States v. Rodgers*, 461 U.S. 677, 716 (1982) (Blackmun, J., dissenting).

87. See, e.g., *Raffaele v. Granger*, 196 F.2d 620, 622-24 (3d Cir. 1952).

1. Existence of Powers

Drye confirmed that one does look to state law to ascertain whether the taxpayer has any strings or reins as to the asset at issue.⁸⁸ Although state laws vary, it is clear that each spouse does have substantial strings and reins as to entireties property. These powers involve ability to use the property, to receive income from it, to exclude others from it, and to transfer it.

Use: Each spouse has an absolute right to occupy and to use any property held in an entireties estate.⁸⁹ Also, each spouse has the right to improve the property.⁹⁰

Income: Each spouse has the right to share equally in any income produced by the property, including any proceeds from sale,⁹¹ insurance,⁹² or tort recoveries.⁹³

Exclusion: Each spouse has the right to exclude from the entireties property every person in the world but one, the other spouse.⁹⁴

Transfer: A spouse acting alone cannot convey the entireties property or her interest in the entireties estate to strangers to the marriage.⁹⁵ So, an entireties spouse has four powers. First, each spouse has the unilateral power to transfer his interest to the other spouse. Second, each spouse has the unilateral power to prevent transfer of the property by the other spouse. Third, the spouses, by agreement, can sell or give the property to anyone else. Fourth, the spouses, by agreement, can terminate the entireties estate and divide the property between them.⁹⁶

Various lesser or collateral rights and powers also exist.⁹⁷ Undeniably, state law invests each spouse with many powers, sticks, strings, reins, and constituent elements as to the underlying property held by the entireties estate.

2. Sufficiency as Property or Property Rights

Drye acknowledged the imprecision of some of the Court's previous explanations of the relationship between state and federal law,⁹⁸ and it put them to rest:

Although our decisions in point have not been phrased so meticulously as to preclude *Drye's* argument, we are satisfied that the Code and interpretive case law

88. *Drye*, 120 S. Ct. at 478.

89. *See, e.g.,* *Yarde v. Yarde*, 71 N.E.2d 625, 625 (Ind. Ct. App. 1947).

90. *See, e.g.,* FLA. STAT. ANN. § 713.12 (West 1994).

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

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

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

94. *See* 7 POWELL, *supra* note 41, ¶ 622[1], [4].

95. *See, e.g.,* *Matter of Jeffers*, 3 B.R. 49, 52-53 (Bankr. N.D. Ind. 1980).

96. *See, e.g.,* *Runco v. Ostroski*, 65 A.2d 399, 400 (Pa. 1949).

97. For instance, each spouse has the right to accept payment from and to discharge obligees with respect to the property. *See, e.g.,* *Gerson v. Broward County Title Co.*, 116 So. 2d 455, 457 (Fla. Dist. Ct. App. 1959). Also, if the spouse withholds the other's share of income from the property, the aggrieved spouse is empowered to sue the miscreant spouse for an accounting. *See, e.g.,* *Lacker v. Zuern*, 109 So. 2d 180, 182-83 (Fla. Dist. Ct. App. 1959).

98. *See supra* text accompanying notes 79-83.

place under federal, not state, control the ultimate issue whether a taxpayer has a beneficial interest in any property subject to levy for unpaid federal taxes.⁹⁹

Drye did not attempt to propound a definition of “property and rights to property,” but it did refer to prior definitions illustratively.¹⁰⁰ Those definitions variously combine five elements. Not all need be present in order for “property” to be found.¹⁰¹ Nonetheless, each of those elements is present as to entireties interests.

(1) Optimally, the debtor spouse’s entireties interest should be “protected by law.”¹⁰² It is. As shown above, state law guarantees that spouse’s right to use the property, prevents the other spouse from alienating the property, and permits the debtor spouse to sue others to vindicate her rights. In fact, the entireties bar as to federal tax collection exists only because of state rules limiting creditors’ remedies, which rules are themselves “protection by law.”

(2) Optimally, the debtor spouse must “possess” or have it “within [his] reach to enjoy” the asset.¹⁰³ He does. As shown above, that spouse has inviolable rights to occupy the asset, to use the asset, and to share in income from the asset. This, by itself, weighs heavily in favor of classifying entireties interests as “property” or “rights to property” under federal definitions of those terms. As the Supreme Court has said: “the use of valuable property . . . is itself a protectible property interest.”¹⁰⁴

(3) Optimally, the debtor spouse’s entireties interest should be “exchangeable” and “transferable.”¹⁰⁵ It is. As shown above, that spouse can convey his interest unilaterally to the other spouse and to anyone else by agreement with the other spouse.

(4) Optimally, the debtor spouse’s entireties interest should be “valuable,” “have pecuniary value.”¹⁰⁶ It is, and it does. The debtor spouse’s right to use the property can be assigned a pecuniary value, measured by the property’s fair rental value. The spouse’s right to share in income produced by the property also represents pecuniary value.¹⁰⁷

(5) Optimally, the debtor spouse should have a beneficial interest in the property, not just bare legal title and not a mere expectancy.¹⁰⁸ She does. That spouse has legal title, not to the underlying property but to her interest in the entireties estate.¹⁰⁹ Also,

99. *Drye*, 120 S. Ct. at 481.

100. *See supra* text accompanying notes 19-28.

101. For example, see *Drye*, 120 S. Ct. at 482 n.7 (“[W]e do not mean to suggest that transferability is essential to the existence of ‘property’ or ‘rights to property’ under [§ 6321].”). Indeed, interests in spendthrift trusts constitute “property” to which the federal tax lien attaches despite the fact that such interests are not transferable under state law. *See, e.g., Bank One Ohio Trust Co. v. United States*, 80 F.3d 173, 176 (6th Cir. 1996).

102. *See supra* text accompanying note 22.

103. *Drye*, 120 S. Ct. at 482; *see also supra* text accompanying notes 23-24.

104. *Dickman v. Commissioner*, 465 U.S. 330, 336 (1984).

105. *See supra* text accompanying notes 22, 26-27.

106. *See supra* text accompanying notes 22, 26-27.

107. For discussion of ways to value entireties interests, see *Johnson, supra* note 51, at 884-88.

108. *See supra* text accompanying notes 25, 28.

109. *See supra* note 72.

the debtor spouse has the right to a separate interest in the property in the event of divorce and the right to fee simple ownership of the whole property if he survives the nondebtor spouse¹¹⁰—rights which are better characterized as contingent interests than as mere expectancies.¹¹¹ Most importantly, the debtor spouse does have a beneficial interest, as her rights of use, income, exclusion, and transfer demonstrate.

C. Summary

Drye instructs us to look to state law to ascertain what opportunities and controls the tax delinquent has in the property on which the IRS seeks to impress its tax lien. Doing so, we discover that tax-delinquent spouses have numerous opportunities and controls as to entireties property.

Drye then instructs us to look to federal law to ascertain whether such opportunities and controls rise to the level of being property or rights to property. When we do so, we discover that entireties interests meet all five of the elements set out by the Court illustratively, even though meeting all five likely is not necessary. When a tax-delinquent spouse can live on and otherwise occupy entireties property, can derive economic benefit from it, can exclude all but one of the Earth's six billion people from it, and can prevent or participate in its transfer, it cannot plausibly be argued that that spouse has something short of property or rights to property.

State law fictions may be to the contrary, but federal taxation “should move in an atmosphere of practical realities rather than amid the intricate and wooden concepts of local property law.”¹¹² *Drye* supports that teaching, and *Drye* makes it clear that the conception of the relation between state and federal law on which the bar rests is in error. The entireties bar is glaringly at variance with modern federal tax lien doctrine as clarified by a unanimous Supreme Court in *Drye*.

V. OBJECTIONS CONSIDERED

The observations in Part IV.B demonstrate that the entireties bar is incompatible with *Drye*. Is there anything that could be said in defense of that rule after *Drye*? Yes, but, in my view, not enough.

Four considerations might be offered in support of survival of the bar even after *Drye*: (1) protection of the nondebtor spouse, (2) legislative history, (3) federalism, and (4) the importance of precedent and settled expectations. These considerations are evaluated below.

110. See *infra* text accompanying notes 140-41.

111. Contingent interests are “property” or “rights to property” subject to the federal tax lien. See, e.g., *United States v. Solheim*, 91-1 U.S. Tax Cas. (CCH) ¶ 50,108 (D. Neb. Feb. 13, 1990), *aff’d on other grounds*, 953 F.2d 379 (8th Cir. 1992); *Bigheart Pipeline Corp. v. United States*, 600 F. Supp. 50, 53 (N.D. Okla. 1984), *aff’d*, 835 F.2d 766 (10th Cir. 1987).

112. *Kohn v. Commissioner*, 197 F.2d 480, 482 (2d Cir. 1952) (quoting Randolph E. Paul, *The Effect on Federal Taxation of Local Rules of Property*, in *SELECTED STUDIES IN FEDERAL TAXATION* 1, 21 (2d ser. 1938)); cf. *Commissioner v. Sunnen*, 333 U.S. 591, 604-05 (1948) (affirming the primacy of realities over fictions in federal taxation); *Corliss v. Bowers*, 281 U.S. 376, 378 (1930) (same).

A. Protection of the Nondebtor Spouse

Federal tax collection controversies need not be matters affecting only the delinquent taxpayer and the IRS.¹¹³ Specifically, when third parties are involved—such as those who co-own property with the tax delinquent—it is important, both constitutionally¹¹⁴ and as a matter of policy,¹¹⁵ that due regard be paid to the legitimate interests of those third parties.

At least some bar courts have feared that allowing the tax lien to attach to entireties interests would unduly burden the spouse who does not owe tax.¹¹⁶ Protection of that spouse might be asserted as a reason to continue the bar despite *Drye*. This reason is inadequate for three reasons: (1) the entireties bar is discriminatory, giving to some privileges that are unavailable to most; (2) substantial safeguards already exist with respect to enforced collection; and (3) Congress could easily craft additional safeguards if they are deemed desirable.

1. Discriminatory Application

Tenancy by the entireties is not the only form by which persons, including spouses, jointly own property. Many other forms of co-ownership exist; indeed, those other forms predominate. Yet, entireties interests are the only form of co-ownership exempt under the case law from federal tax liens. It is established that such liens attach to tax debtors' interests in joint tenancies,¹¹⁷ tenancies in common,¹¹⁸ homestead property,¹¹⁹ and community property,¹²⁰ even when the cotenant does not owe taxes.

Thus, ending the entireties bar would impose no unique burden on nondelinquent spouses. It would only put nondelinquent entireties spouses in the same position as nondelinquent spouses already are in as to other forms of co-ownership. Preserving discrimination is a poor reason for not applying the teaching of *Drye* to entireties interests.

113. In fact, they never are. The IRS represents the American people. Ultimately, one way or another, the country's other taxpayers will pick up the tab if one taxpayer underpays her legally due share of the cost of supporting government services. "[U]nlike the ordinary tort or contract case, the other real party in interest [in a tax controversy] is the taxpaying public." Theodore Tannenwald, Jr., *Tax Court Trials: A View from the Bench*, 59 A.B.A. J. 295, 295 (1973).

114. See U.S. CONST. amend. V (Due Process Clause).

115. Six of the eleven chapters of Plumb's classic book on tax liens concern protecting third parties from harm when the IRS takes collection action against delinquent taxpayers. Such third parties include prospective purchasers, lessees, secured lenders, conditional lenders, ordinary general creditors, noncontractual lienors, sureties, the taxpayer's debtors, and bailees. See WILLIAM T. PLUMB, JR., *FEDERAL TAX LIENS* chs. 2-5, 8, 9 (3d ed. 1972).

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

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

118. See, e.g., *United States v. Kocher*, 468 F.2d 503, 507 (2d Cir. 1971).

119. See, e.g., *Tillery v. Parks*, 630 F.2d 775, 776-77 (10th Cir. 1980).

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

2. Protections as to Enforced Collection

The entirety bar says that the tax lien does not attach at all to entirety interests. But lien attachment, although not trivial,¹²¹ is not the “big event” as to collection. The principal consequences arise when, later, the IRS seeks to divest the delinquent of ownership, either through administrative levy and sale or through judicial sale and division of proceeds.¹²²

Particularly after 1998 legislation,¹²³ ample protections already exist with respect to both lien attachment and subsequent collection actions, to safeguard the legitimate interests of nondelinquent spouses. Some of the protections are designed to ensure that the delinquent spouse really does owe tax and that proper collection procedures have been followed. Others advert more directly to nondelinquent co-owners, to minimize harm to them from legitimate collection actions directed at the delinquent owner.

Lien: In order to achieve priority against other creditors of the tax delinquent,¹²⁴ the IRS typically files its tax liens in the customary recording offices. When it does so, the IRS is required to notify the taxpayer of her right to administrative hearing and judicial review.¹²⁵ The issues considered at such a hearing may include spousal defenses, challenges to the appropriateness of collection actions, collection alternatives, and the merits of the underlying tax liability.¹²⁶ In addition, the IRS has authority to release tax liens or to discharge particular property from them,¹²⁷ and “any person” has the right of administrative appeal after filing of a notice of tax lien.¹²⁸

Levy: When enforced collection is required, the IRS usually administratively seizes and sells property. However, that remedy would be of little use to the IRS in entirety cases. The nondebtor spouse’s interest would remain undisturbed. That spouse would retain full rights to occupy and use the underlying property; the property could not

121. The existence of the lien clouds title, often eliminating, as a practical matter, the ability to sell the property or to use it as collateral to secure a loan. *See, e.g.,* William D. Elliott, *Tax Liens and Levies Involving Partners: Will a Partnership’s Assets Be Attached?*, 14 J. PARTNERSHIP TAX’N 320, 328, 333 (1998).

122. *See id.*

123. The Internal Revenue Service Restructuring and Reform Act of 1998 (“RRA”), Pub. L. 105-206, 112 Stat. 685 (1998). RRA created I.R.C. §§ 6320, 6326, and 6330, discussed *infra*, and amended many other sections to strengthen protections for taxpayers and third parties against inappropriate or unduly burdensome IRS collection actions. For further description of the RRA provisions, see Gerald A. Kafka, *Restructuring and Reforming the IRS and the Code—Congress Takes a Quantum Leap*, 89 J. TAX’N 133 (1998), Gerald A. Kafka, *Reformation of the Tax Collection Process—Cumulatively, A Giant Step*, 89 J. TAX’N 207 (1998), and Robert Manning & David F. Windish, *The IRS Restructuring and Reform Act: An Explanation*, 80 TAX NOTES 83 (1998).

124. *See* I.R.C. § 6323 (Lexis 1999).

125. *See id.* § 6320 (1994).

126. *See id.* §§ 6320(c), 6330(c)(2).

127. *See id.* § 6325 (Lexis 1999).

128. *Id.* § 6326(a) (1994).

be sold or pledged without her approval; and, should the debtor spouse be the first to die, the nondebtor spouse would become the sole owner of the property (extinguishing the interest of whoever had brought the delinquent spouse's interest from the IRS). All that being so, administrative sale of the delinquent's interest alone would be impracticable: no buyer could be found for that interest who would pay any worthwhile amount for it.¹²⁹

In any event, substantial safeguards exist with respect to levies. Administrative hearing and judicial review are possible, sometimes required, before levy is made.¹³⁰ Also, certain property is exempt from levy.¹³¹ Since 1998, exemptions include personal residences and business assets absent prior judicial or high-level administrative approval of levy.¹³² Finally, the IRS has authority to release levies and return property,¹³³ and a variety of civil actions are authorized whereby taxpayers or affected third parties may seek to enjoin, undo, or obtain damages for wrongful levies by the IRS.¹³⁴

Judicial sale: Given the practical inadequacy of levy, the way the IRS would proceed against entireties property, after overthrow of the bar, would be under I.R.C. § 7403. That section allows the IRS to petition the federal district court to sell the whole property then to divide the proceeds among the various owners of the property. Were entireties property to be sold, the proceeds would be distributed in part to the nondebtor spouse and in part to the IRS, standing in the shoes of the delinquent spouse to the extent of his unpaid tax liability.

Two aspects of § 7403 would protect the legitimate interests of the nondebtor spouse. First, through the division of proceeds, that spouse would obtain the cash equivalent of her interest in the property sold. This obviates any due process concern that otherwise would arise if a nondelinquent taxpayer's property were taken to satisfy a delinquent taxpayer's liabilities.¹³⁵ Second, the IRS's petition to sell may be denied outright. It is settled that the district courts have a degree of equitable discretion to deny sale when the IRS's revenue interest would be clearly outweighed by hardship to the nondelinquent owner.¹³⁶

129. *See id.* § 6335(e) (dealing with minimum price requirements as to sale of property seized by the IRS).

130. *See id.* § 6330 (Lexis 1999).

131. *See id.* § 6334.

132. *See id.* § 6334(a)(13), (e). These provisions and others have dramatically reduced IRS levies on residences and businesses. *See, e.g.,* David Cay Johnston, *IRS Collection Efforts Shrink as New Law Takes Effect*, CHATTANOOGA TIMES & FREE PRESS, May 19, 1999, at C4. From February to April 1998, the IRS made about 586,000 levies. For the comparable period in 1999, the number dropped to about 16,000. *See* Amy Hamilton, *Roth Defends Rate of IRS Seizures, Liens, Levies*, 86 TAX NOTES 155, 155 (2000).

133. *See* I.R.C. § 6343 (Lexis 1999).

134. *See id.* §§ 7426, 7432-7433.

135. *See* United States v. Rodgers, 461 U.S. 677, 697-99 (1983).

136. *See id.* at 705-11.

3. Additional Protections

As shown above, substantial safeguards already exist whereby undue burden on nondebtor spouses can be averted after overthrow of the entireties bar. In my view, these protections are ample. If desired, however, even more could be crafted.¹³⁷ For instance, to protect existing entireties estates, the overthrow of the bar could be applied only to entireties interests created after a specified, future date.¹³⁸ Alternatively, as to particularly sensitive types of property,¹³⁹ it could be provided that, although the tax lien would attach to the property, the IRS could not seek sale of it while it remains in entireties form. Thus, the IRS would have to wait until divorce¹⁴⁰ or the death of the nondelinquent spouse¹⁴¹ to move against the property.¹⁴² In essence, this would convert full bar jurisdictions into modified bar jurisdictions insofar as federal tax liens are concerned.

Although I do not advocate the above approach, it exemplifies my point. The current entireties bar is not necessary in order to protect nondelinquent spouses. The bar prevents the tax lien from attaching in the first place. Nondelinquent spouses can be adequately protected by permitting the lien to attach then applying existing post-lien safeguards and, if necessary, crafting additional ones.

Given existing and conceivable further safeguards, it would not fundamentally and unduly burden the nondelinquent spouse to permit the tax lien to attach to the delinquent spouse's entireties interest. That being the case, solicitude for the other spouse is not a good reason to spare entireties interests from the natural consequences of *Drye*.

137. Legislation is more flexible than adjudication in crafting comprehensive remedies. See Johnson, *supra* note 51, at 881-88. That fact should not lead to judicial inaction, however. Judicial abrogation of the entireties bar would place the ball squarely in Congress's court, to enact any additional protections of nondelinquent spouses should Congress view the already extensive safeguards as somehow lacking.

138. Typically, judicial interpretations of federal law are given full retroactive effect. See Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 97 (1993). Legislative overthrow of the bar could, of course, be prospective only.

139. Typically, all types of property may be held by the entireties. Even persons who might be concerned about forced sale of principal residences held by the entireties, might be far less concerned about forced sale of vacation homes, vacant land, and stocks or bonds held by the entireties.

140. Divorce converts tenancy by the entireties into tenancy in common by operation of law. See, e.g., Smith v. Smith, 107 S.E.2d 530, 534 (N.C. 1959).

141. Whereon the delinquent spouse would become fee simple owner of the whole property by operation of law. See, e.g., United States v. 2525 Leroy Lane, 910 F.2d 343, 350-51 (6th Cir. 1990), *cert. denied sub nom.* Marks v. U.S., 499 U.S. 947 (1991).

142. Were such a rule adopted, it would be appropriate to suspend the collection statute of limitations (currently generally ten years from the date of assessment, see I.R.C. § 6502(a)(1)) during the period during which the IRS is prohibited from acting against the property. Cf. I.R.C. §§ 6015(e)(2), 6320(b)(4), 6330(e), 6502(a)(2), 6503(b)-(i) (Lexis 1999) (all extending or suspending the collection limitations period in stated circumstances).

B. Legislative History

Although Congress appears not to have specifically considered the effects of disclaimers for § 6321 purposes, congressional attention was once directed to § 6321 and tenancy-by-the-entireties interests. In 1954, Congress rewrote the previous revenue code, the Internal Revenue Code of 1939. This revision included reappraisal of many sections. As part of this process, a measure passed the House of Representatives that would have expressly provided that the general federal tax lien embraces “the taxpayer’s interest as tenant by the entirety.”¹⁴³ The measure died in the Senate. Does this mean that Congress did not intend entireties interests to be amenable to the tax lien?

The Supreme Court has rejected this argument. In *United States v. Rodgers*,¹⁴⁴ the Court considered the ability of the IRS to seek judicial sale and division of proceeds of homestead property. Only one of the spouses owed tax,¹⁴⁵ and applicable state law (the Texas Constitution) immunized homestead property from collection to satisfy the separate debts of one spouse.¹⁴⁶ Nonetheless, the Court held that the homestead property was amenable to § 7403 sale. Necessarily, this meant that the tax lien attaches to such property since § 7403 is a post lien-attachment remedy. The *Rodgers* dissent analogized entireties interests and homestead interests, and it referred to the 1954 legislative activity as proof that entireties interests fall outside the ambit of § 6321.¹⁴⁷

However, another reading of the 1954 activity is possible. As viewed by the *Rodgers* majority, the 1954 House bill was an attempt merely to clarify the existing law, not to change it. “[T]he Senate rejected that clarification, not necessarily because it disagreed with it, but more likely because it found it superfluous”¹⁴⁸ If amending § 6321 to state that the general tax lien attaches to entireties interests would have been “superfluous,” then § 6321 already covers such interests. The reading given the 1954 legislative activity by the *Rodgers* majority erodes, not supports, the entireties bar.

Although the terse Senate report does not speak to this, there is another consideration—beyond mere linguistic economy—that would support the rationality of rejecting the House bill if it was no more than clarifying. A hoary precept of statutory construction is the “expressio unius” maxim. Under it, when certain items

143. H.R. 8300, 83d Cong., 2d Sess. (1954).

144. 461 U.S. 677 (1982).

145. *Rodgers* consolidated two cases. In one, taxpayer-husband owed over \$900,000 of tax, while taxpayer-wife owed nothing. *See id.* at 687. In the other, taxpayer-husband owed over \$9000 of employment taxes. Taxpayer-wife owed no employment taxes, but there also was an unpaid income tax assessment of \$283.33, which was joint. *See id.* at 688.

146. The Texas Constitution gives “each spouse in a marriage a separate and undivided possessory interest in the homestead, which is only lost by death or abandonment, and which may not be compromised either by the other spouse or by his or her heirs.” *Id.* at 685; *see also* TEX. CONST. art. 16, §§ 50-52.

147. *See Rodgers*, 461 U.S. at 719-20 (Blackmun, J., dissenting).

148. *Id.* at 702 n.31; *see* S. REP. NO. 83-1622, at 575 (1954) (“It is not clear what change in existing law would be made by the [House measure]. The deletion of the phrase [by the Senate] is intended to continue the existing law.”).

are specifically enumerated in a statute, a court may infer that the legislature intended to exclude from the statute's reach similar but unenumerated items.¹⁴⁹ The courts' application of the canons of construction are notoriously unpredictable.¹⁵⁰ Thus, it would not be wholly unreasonable to fear that, in a future close case involving application of § 6321, a court might hold against attachment of the lien to some type of property other than entireties interests, on *expressio unius* grounds. Before 1954, the Supreme Court had strongly asserted the sweeping reach of § 6321.¹⁵¹ The Senate could rationally have chosen not to complicate the picture by raising the possibility of *expressio unius* arguments.

In short, the 1954 legislative activity is at best inconclusive.¹⁵² It hardly reveals an unambiguous congressional intent that entireties interests be immune from the federal tax lien. This does not constitute a powerful reason to ignore the incompatibility of the entireties bar and the teaching of *Drye*.

C. Federalism

Overthrowing the entireties bar does not implicate concerns about federalism. States would remain free to define and regulate entireties estates and interests in any way they wished *for purposes traditionally and properly within states' ambit of control*. But such purposes do not include control of federal revenues. Federalism is not traduced when the federal government, for purposes of its revenue laws, adopts definitions and rules different from those adopted by some (or even all) of the states for their own purposes.

This principle was settled long ago. "Property" and allied concepts appear in many portions of the Internal Revenue Code, not just in § 6321. For generations, the Court has made it clear that a federal definition for federal purposes does no violence to federalism. In an early depreciation case, the Court remarked: "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 . . ."¹⁵³ Similarly, in a capital gains case, the Court stated:

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.¹⁵⁴

149. See, e.g., BLACK'S LAW DICTIONARY 581 (6th ed. 1990).

150. See, e.g., Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395 (1950).

151. See *Glass City Bank v. United States*, 326 U.S. 265, 267 (1945) ("Stronger language could hardly have been selected to reveal a purpose to assure the collection of taxes.").

152. Congress has not considered entireties interests with respect to the tax lien after 1954. Indeed, § 6321 has not been amended in any way since then.

153. *Weiss v. Wiener*, 279 U.S. 333, 337 (1929).

154. *Burnet v. Harncl*, 287 U.S. 103, 110 (1932) (citations omitted); see also *Hogan v.*

Drye is decisive in this regard. One of the defining characteristics of the current Supreme Court is its attempt to reinvigorate federalism as an operative juristic principle.¹⁵⁵ Yet that Court—a staunch defender of federalism—unanimously decided *Drye* in favor of the IRS, the word “federalism” not even appearing in its opinion. A federal rule for entireties interests under § 6321 is not problematic for federalism, just as a federal rule for disclaimed inheritances under § 6321 is not problematic for federalism.

D. Precedent

This is where the battle will be decided. In my view, the best case in favor of survival of the entireties bar after *Drye* is: “Yes, I admit it, the entireties bar is inconsistent with the modern understanding of tax lien law. If the matter were to arise today as a case of first impression, the tax lien would be held to attach to entireties interests, regardless of state law. But this is not a case of first impression. The current rule has been around for decades, and nearly every decision has followed it. As Justice Brandeis remarked, often ‘it is more important that the applicable rule of law be settled than that it be settled right.’”¹⁵⁶

Let me give the devil his maximum due. I acknowledge that “stare decisis embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychological need to satisfy reasonable expectations.”¹⁵⁷ Further, stare decisis is stronger as to statutory than constitutional matters (since the legislature can freely amend the statute),¹⁵⁸ and it is “at [its] acme in cases involving property rights and contract rights, where reliance interests are involved.”¹⁵⁹

Yet, even this best defense of the entireties bar is, I believe, insufficient. As Justice Brandeis himself acknowledged: “Stare decisis is not . . . universal inexorable command. ‘The rule of stare decisis . . . is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court’”¹⁶⁰

Commissioner, 141 F.2d 92, 94 (5th Cir. 1944); *Greenough v. Commissioner*, 74 F.2d 25, 26 (1st Cir. 1934).

155. See, e.g., Frank B. Cross, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304, 1304 (1999); Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court’s Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819, 819 (1999).

156. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

157. *Helvering v. Hallock*, 309 U.S. 106, 119 (1940); see also *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (“Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.”).

158. See, e.g., *Coronado*, 285 U.S. at 407 (Brandeis, J., dissenting). Nonetheless, the Supreme Court “overruled or materially modified [its own] statutory precedents more than eighty times” between 1961 and 1988, for example. William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1363 (1988).

159. *Payne*, 501 U.S. at 828 (citing cases); see also *Hallock*, 309 U.S. at 119 (solicitude is due those “rules of decision around which, by the accretion of time and the response of affairs, substantial interests have established themselves”).

160. *Coronado*, 285 U.S. at 405-06 (Brandeis, J., dissenting) (omissions added) (quoting

Thus, "when governing decisions are unworkable or are badly reasoned," "[the Supreme] Court has never felt constrained to follow precedent."¹⁶¹ Specifically, when convinced of error, the Supreme Court has overturned prior decisions in the area of tax, even when (1) the issue was statutory, not constitutional, (2) Congress had not acted to change the law after the prior decision, (3) the overruled decision was that of the Supreme Court, not lower courts, and (4) property rights were involved.¹⁶²

Within that context, there are five reasons why, after *Drye*, the entireties bar should be discarded, *stare decisis* notwithstanding. First, it is important that the bar never has been endorsed by the Supreme Court. The bar rests entirely on lower court decisions.

Second, to the extent that respect for precedent is based on reliance interests, reliance on the bar has been problematic for nearly twenty years. Even before *Drye*, Supreme Court cases in 1983 and 1985 cast doubt on the validity of the bar.¹⁶³ At least since then, lawyers and citizens should have been on notice of the shakiness of the bar.¹⁶⁴ Indeed, the literature after those cases contained ample warning.¹⁶⁵

Third, again as to reliance, the case for protecting private planning is weaker here than in some other contexts. As we have seen, tax "planning" involving use of the entireties bar too easily can become tax abuse, strategic manipulation harmful to the

Hertz v. Woodman, 218 U.S. 205, 212 (1910)). Indeed, in that case, Justice Brandeis was arguing that a prior Supreme Court tax decision "was wrongly decided and should now be frankly overruled." *Id.* at 405.

161. *Payne*, 501 U.S. at 827 (alteration added) (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944)).

162. An example is *Hallock*, 309 U.S. at 106. Other examples of the Supreme Court's overruling its own tax precedents include *Sansone v. United States*, 380 U.S. 343, 347-49 (1965) (implicitly overruling *Achilli v. United States*, 353 U.S. 373 (1957)), and *James v. United States*, 366 U.S. 213, 221 (1961) (explicitly overruling *Commissioner v. Wilcox*, 327 U.S. 404 (1946)).

163. The cases are *United States v. Rodgers*, 461 U.S. 677 (1983), and *United States v. National Bank of Commerce*, 472 U.S. 713 (1985). The impact of these cases on the entireties bar is discussed by Johnson, *supra* note 51, at 868-76.

One aspect of *Rodgers*—its reading of the legislative record as suggesting that entireties interests are already within the ambit of § 6321—is discussed *supra* text accompanying notes 146-50. As part of the same discussion, the Court referred to leading bar decisions, saying "if the tenancy by the entirety cases are correct" 461 U.S. at 703 n.31 (emphasis in original). By italicizing "if," the Court signaled doubt as to the correctness of those lower court decisions.

164. Significantly, the lower court cases casting doubt on the bar, *see supra* text accompanying note 72, were decided after the Supreme Court's 1983 and 1985 cases.

165. The author of the leading treatise on federal tax collection (who also was taxpayers' counsel in *Rodgers*) wrote that, after *Rodgers* and *National Bank of Commerce*, "perhaps it is only a matter of time" before the bar is overturned. WILLIAM D. ELLIOTT, *FEDERAL TAX COLLECTIONS, LIENS & LEVIES* 9-92 (2d ed. 1995); *see also* John F. Hernandez, *The Federal Tax Lien: Beyond United States v. Rodgers*, 36 U. FLA. L. REV. 1081, 1098 (1984) ("Clearly, a literal reading of section 7403 would invade the tenancy by the entirety sanctuary."); Johnson, *supra* note 51; Terrence C. Brown-Steiner, Comment, *Federal Tax Liens and State Homestead Exemptions: The Aftermath of United States v. Rodgers*, 34 BUFF. L. REV. 297, 323 (1985) ("A strong argument can be made that *Rodgers* does apply to tenancy-by-the-entirety situations.").

values on which our tax system rests.¹⁶⁶ We should want to discourage this kind of planning, not protect it.

Fourth, the bar arose at a time when the role of state law in federal tax lien controversies was less well understood.¹⁶⁷ The clarification of this relationship by *Drye* can be viewed as a change of the legal landscape, and accommodating rules to such changes is a recognized circumstance for not adhering to precedent.¹⁶⁸ Parallels support such an approach. Change in, even clarification of, the general body of the case law since an earlier decision is recognized as reason to depart from that decision for purposes of both collateral estoppel¹⁶⁹ and the *Golsen* rule.¹⁷⁰

Fifth, the textualist school of statutory interpretation often strongly defends *stare decisis*, as a way to prevent arbitrary “government by judiciary.”¹⁷¹ However, these values are reversed in the entireties context. The text of the controlling statute here—§ 6321—is clear and expansive on its face, as the Supreme Court has repeatedly held.¹⁷² The bar cases carve out an exception to that expansive text. To uphold those cases because of attachment to precedent would operate to preserve judicial alteration of the plain meaning of the text enacted by the legislature. Textualists (and others) should be reluctant to do so.

CONCLUSION

Drye is an important decision. It brings long needed clarity to federal tax lien law, clarity undergirded by the Court’s unanimity. The benefits of the clarification will come as lower courts apply *Drye* in the myriad factual contexts future cases will involve.

One of those contexts will be reexamination of the current rule with respect to attachment of the tax lien to tenancy-by-the-entireties interests. That rule was dubious before. Now, after *Drye*, its incorrectness is glaringly clear. The current rule cannot

166. *See supra* text accompanying notes 52-53.

167. *See supra* text accompanying notes 74-87.

168. *Stare decisis* exists to “ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion . . . [Thus, departures from precedent] have occurred for articulable reasons, and only when the Court has felt obligated ‘to bring its opinions into agreement with experience and with facts newly ascertained.’” *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986) (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting)).

169. *See, e.g.*, *Commissioner v. Sunnen*, 333 U.S. 591, 599-603 (1948).

170. Decisions of the Tax Court typically are appealable to the circuit court of appeals within whose demesne the taxpayer resides. *See* I.R.C. § 7482(a) (1994 & Supp. III 1997). Under *Golsen*, if that circuit previously has decided an issue, the Tax Court generally will follow the circuit’s view in cases appealable to that circuit, even if the Tax Court believes that view is erroneous. *Golsen v. Commissioner*, 54 T.C. 742, 756-58 (1970), *aff’d*, 445 F.2d 985 (10th Cir. 1971), *cert. denied*, 404 U.S. 940 (1971). However, *Golsen* deference is not owed when the development of the law subsequent to the circuit’s decision suggests that that decision does not comport with current doctrine. *See, e.g.*, *Aladdin Indus., Inc. v. Commissioner*, 41 T.C.M. (CCH) 1515, 1520 (1981); *Kent v. Commissioner*, 61 T.C. 133, 137 (1973).

171. POPKIN, *supra* note 40, at 158.

172. *See supra* text accompanying notes 46-47.

be satisfactorily defended in light of *Drye*. The best argument for it is adherence to error simply because of its vintage. But can we really be satisfied with a rule that perpetuates known error?¹⁷³

Change often comes slowly and with difficulty to a legal system. Indeed, the very survival in some jurisdictions of tenancies by the entireties is a curious relic of the Middle Ages. Those states are, of course, free to cling to that relic for their own purposes, but *Drye* makes it clear that the time has come to let go of it for purposes of the federal tax lien.

173. See Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 571 (1987).