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I. Introduction

Suppose that a debtor stands to receive an amount of real or personal property by will that he does not wish to use in satisfying his creditors. Suppose also that the same debtor expects that he will soon have to file bankruptcy. Should his creditors be able to take this family property even if the debtor refuses to accept it under the will? Is it reasonable to allow creditors to reach family property even though they did not inquire into the debtor's expectations of receiving the property before extending credit?

Under common law, a debtor may disclaim devised property or, in other words, refuse to accept it. Many jurisdictions apply the common law relation-back doctrine, a legal fiction that title to the property never vested in the disclaimant.[1] The relation-back doctrine causes the property to pass to other relatives, as if the disclaimant had predeceased the decedent.[2] As a practical matter, the relation-back doctrine results in the debtor's children or siblings receiving the property so that creditors cannot reach it.

Some states have curtailed the power of debtors to disclaim property to avoid the claims of creditors.[3] However, this Note focuses on whether state laws permitting disclaimers conflict with federal bankruptcy law. It is relatively clear that a disclaimer occurring after the debtor has filed bankruptcy is not effective because the property has already become part of the bankruptcy estate.[4] The law is not so clear with regard to disclaimers occurring before the

1. *See, e.g.*, Jones v. Atchison (*In re* Atchison), 101 B.R. 556, 557 (Bankr. S.D. Ill. 1989) (explaining that a disclaimer, under Illinois law, relates back to the time of the devise, and the property does not vest in the disclaiming party), *aff'd*, 925 F.2d 209 (7th Cir. 1991).

2. *See id.* (providing that a disclaimer causes an estate to descend as though the disclaimant had predeceased the testator).

3. *See, e.g.*, Pennington v. Bigham, 512 So. 2d 1344, 1347 (Ala. 1987) (finding a disclaimer to be a fraudulent transfer of a property interest under Section 43-8-294 of the Alabama Code); Stein v. Brown, 480 N.E.2d 1121, 1124 (Ohio 1985) (holding a disclaimer to be a fraudulent conveyance under Section 1339.60(B) of the Ohio Revised Code when the beneficiary displays an actual intent to defraud present or future creditors); *In re* Reed's Estate, 566 P.2d 587, 591 (Wyo. 1977) (concluding that a disclaimer made with actual intent to hinder a creditor amounts to a fraudulent conveyance under Section 34-144 of the Wyoming Statutes Annotated).

4. *See* Adam J. Hirsch, *The Uniform Disclaimer of Property Interests Act: Opportunities and Pitfalls*, 28 EST. PLAN. 571, 576 n.38 (2001) ("If the beneficiary delays the disclaimer until after a bankruptcy proceeding has begun . . . it is more likely that the court will determine the effectiveness of insolvent disclaimer under federal law."); *see also* Cornelius v. Cornell (*In re* Cornell), 95 B.R. 219, 222 (Bankr. W.D. Okla. 1989) (declaring that an interest in the disclaimant's mother's estate vested in the debtors after they filed a bankruptcy petition and thus the interest became property of the bankruptcy estate).

debtor files for bankruptcy (prepetition disclaimers).[5] The fraudulent transfer provisions of the Bankruptcy Code empower a bankruptcy trustee to prohibit the transfer of any "interest of the debtor in property" within one year prior to filing for bankruptcy if the transferor possesses an "actual intent to hinder, delay, or defraud" creditors or "received less than a reasonably equivalent value in exchange for such transfer."[6] Whether prepetition disclaimers are fraudulent transfers largely depends on whether the disclaimed property was actually a property interest of the debtor.[7]

In *Drye v. United States*,[8] the Supreme Court held that a disclaimer does not defeat a federal tax lien.[9] Since *Drye*, courts have disagreed as to whether its holding should extend to disclaimers that frustrate creditors other than the Internal Revenue Service (IRS).[10] The *Drye* holding suggests that federal tax law preempts state disclaimer law with respect to the existence and character of a property right.[11] Does this preemption mean that federal bankruptcy law also should predominate over state disclaimer law with respect to the definition of property interests?

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5. *See* Gregory M. McCoskey, *Death and Debtors: What Every Probate Lawyer Should Know About Bankruptcy*, 34 REAL PROP. PROB. & TR. J. 669, 684–90 (2000) (expressing uncertainty as to whether prepetition disclaimers are fraudulent transfers); Stephen E. Parker, *Can Debtors Disclaim Inheritances to the Detriment of Their Creditors?*, 25 LOY. U. CHI. L.J. 31, 40 (1993) (same).

6. 11 U.S.C. § 548(a)(1)(A)-(B) (2003).

7. *See infra* Part III.A (discussing whether a prepetition disclaimer constitutes a transfer of any property interest of the debtor).

8. Drye v. United States, 528 U.S. 49 (1999). In *Drye*, the Supreme Court considered the interplay between state and federal law in defining property for the purposes of federal tax law. *Id.* at 52. Rohn F. Drye Jr. owed the IRS $325,000 in unpaid taxes when his mother died intestate, leaving him her entire estate valued at $233,000. *Id.* Months after she died, Drye disclaimed his interest in his mother's estate, and the property passed to his daughter. *Id.* The Court considered whether Drye's interest in the estate was a "right[ ] to property" under 26 U.S.C. § 6321. *Id.* The Court determined that Drye had dominion over the property because his disclaimer allowed him to channel the gift to a close family member. *Id.* at 60–61. The Court held that Drye had a property interest subject to federal tax liens under 26 U.S.C. § 6321. *Id.* at 61.

9. *Id.* at 52 ("We hold that the disclaimer did not defeat the federal tax liens.").

10. *Compare In re* Kloubec, 247 B.R. 246, 256 (Bankr. N.D. Iowa 2000) (concluding that federal bankruptcy law predominates over the state law relation-back doctrine), *aff'd*, 286 B.R. 173 (N.D. Iowa 2001) *with* Grassmueck v. Nistler (*In re* Nistler), 259 B.R. 723, 726–27 (Bankr. D. Or. 2001) (distinguishing *Drye* on the grounds that the IRS has superior rights over other creditors).

11. *See Drye*, 528 U.S. at 56 (discussing precedent concluding that I.R.C. § 6321 gives a broad construction to "property," thus giving the federal government vast power to determine which property of the delinquent taxpayer is subject to a tax lien).

The issue of prepetition disclaimers appears very technical, but it has important policy implications regarding federal involvement in defining property rights. The issue also has interesting implications regarding the power relationship between creditors and debtors. What is the underlying rationale of the power to disclaim? Is it merely a way to cheat one's creditors, or is it a power that prevents creditors from overreaching into property upon which they did not rely when extending credit? Is it a legitimate device by which a person can protect property with sentimental value, or is it a license for sons and daughters of the wealthy to spend extravagantly with the comfort of knowing that creditors will not attach family property? This Note attempts to answer these questions, focusing on the issue of disclaimers in advance of bankruptcy.

Part II of this Note discusses the common law and state statutory regimes that permit disclaimers. Part III considers whether the federal Bankruptcy Code permits prepetition disclaimers. In order to highlight the federal treatment of disclaimers, Part III.A explores what constitutes a transfer of a debtor's interest in property. Part III.B explores whether the Supreme Court's opinion in *Drye* applies to prepetition disclaimers. Finally, Parts IV and V consider policy arguments for and against permitting the use of disclaimers in advance of bankruptcy. In Part VI, this Note concludes that state law should control prepetition disclaimers. Principles of federalism and equitable distribution form the basis of this conclusion.

II. State Law Treatment of Disclaimers

Long-standing common law doctrine permits debtors to disclaim testamentary gifts.[12] Some courts and commentators have recently noticed state trends toward curtailing disclaimers by applying fraudulent transfer statutes.[13] However, many state courts consistently hold that disclaimers do not amount to fraudulent transfers.[14] These courts base their conclusions on the relation-back doctrine.[15]

12. *See* Mary Moers Wenig, *Disclaimer: Handle with Care*, 25 TAX MGMT. EST. GIFTS & TR. J. 275, 277 (2000) (noting that very few cases prior to *Drye* departed from the long-standing rule permitting a debtor to disclaim testamentary gifts); McCoskey, *supra* note 5, at 684 (same).

13. *See* Wenig, *supra* note 12, at 277 (surveying twenty reported cases from the 1990s and finding that, despite a long-standing rule to the contrary, approximately half of those cases held that a creditor may take property regardless of a debtor's disclaimer); *see also* Stein v. Brown, 480 N.E.2d 1121, 1123 (Ohio 1985) (noting that an increasing number of states have ruled that a disclaimer is a transfer of property similar to the exercise of a general power of appointment that creditors may attack as fraudulent).

14. *See* Wood v. Bright (*In re* Bright), 241 B.R. 664, 671 (B.A.P. 9th Cir. 1999) (stating that a "vast majority" of state courts have held that a disclaimer cannot constitute a fraudulent

A. Relation-Back Doctrine

Under the relation-back doctrine, a testator's estate does not automatically vest in a disclaiming beneficiary at the time of the testator's death.[16] When the beneficiary disclaims, the disclaimer "relates back" to the time of the testator's death, and the property passes as if the beneficiary had predeceased the testator.[17] Many states have statutes that codify the common law relation-back doctrine.[18]

Under common law, the relation-back doctrine does not apply when property passes by intestacy.[19] A beneficiary under a will need not accept a testamentary gift, but under intestacy, the property descends automatically upon the decedent's death, irrespective of the taker's intention to accept or reject the

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conveyance under state law).

15. *See, e.g.*, Tompkins State Bank v. Niles, 537 N.E.2d 274, 279 (Ill. 1989) (concluding that under the state's disclaimer statute, a disclaimer related back to the date of the testator's death and had the effect of barring the passage of title or vesting of the estate in the defendant); Frances Slocum Bank & Trust Co. v. Estate of Martin, 666 N.E.2d 411, 415 (Ind. Ct. App. 1996) (same); Baltrusaitis v. Cook, 435 N.W.2d 417, 420 (Mich. Ct. App. 1988) (finding that a judgment debtor could disclaim an interest in her deceased husband's life insurance policy because the disclaimer related back to before the effective date of the insurance contract); Parks v. Parker, 957 S.W.2d 666, 669–70 (Tex. App. 1997) (concluding that a judgment debtor's disclaimer was effective because it related back to the date of the testator's death); Abbott v. Willey, 479 S.E.2d 528, 530 (Va. 1997) (permitting a judgment debtor to disclaim life insurance benefits because the disclaimer related back to the effective date of the insurance policy and the statute contained no exception for creditors to contest a disclaimer based on fraudulent transfer).

16. *See, e.g.*, Tompkins State Bank v. Niles, 537 N.E.2d 274, 279 (Ill. 1989) (explaining that title does not vest in a devisee if the devisee disclaims).

17. *See id.* (noting that present property interests, when disclaimed, descend as if the disclaimant had predeceased the decedent).

18. *See, e.g.*, CAL. PROB. CODE § 283 (West 2002) ("A disclaimer is not a fraudulent transfer by the beneficiary."); *see also* CAL. PROB. CODE § 283 Law Review Commission cmt. (West 2002) (stating that the 1990 revision rejected the rule of *In re Estate of Kalt*, 108 P.2d 401 (Cal. 1940), that a disclaimer after a testator's death may be a fraudulent conveyance); FLA. STAT. ANN. § 732.801(3)(a) (West Supp. 2003) (stating that the "interest disclaimed shall descend . . . in the same manner as if the disclaimant had died immediately preceding the death" of the testator and that "[t]he disclaimer shall relate to that date for all purposes."); VA. CODE ANN. § 64.1-193 (Michie 2002) (providing that "property . . . disclaimed and any future interest which is to take effect in possession or enjoyment at or after the termination of the interest disclaimed shall be distributed as if the disclaimant had died before the effective date of the nontestamentary instrument").

19. *See* Christian Marius Lauritzen, *Only God Can Make an Heir*, 48 NW. U. L. REV. 568, 574–75 (1953) (presenting authorities for the notion that a disclaimer does not prevent property from vesting in an heir taking title by intestacy between the time of decedent's death and the disclaimer); *see also* Bostian v. Milens, 193 S.W.2d 797, 801 (Mo. Ct. App. 1946) (stating that title to property passes automatically if a decedent dies intestate, regardless of a taker's intention to receive it).

property.[20] Although some modern statutes remove the practical distinction between testacy and intestacy in disclaimers,[21] the common law distinction remains instructive of the assumptions underlying the relation-back doctrine. The relation-back doctrine rests on the principle that a devise is merely an offer that a devisee can either accept or reject.[22] If a devisee rejects a gift of property, he never possesses the asset and his disclaimer is not a fraudulent transfer.[23]

In order to disclaim property, a disclaimant must comply with statutory filing requirements.[24] When a beneficiary disclaims in compliance with all of the statutory provisions, a court will treat him as if he predeceased the testator, without regard to the beneficiary's motive or reason for disclaiming.[25] A few states have repealed their disclaimer filing requirements and replaced them with the new Uniform Disclaimer of Property Interests Act (UDPIA).[26] Interestingly, the Uniform Law Commission plans to incorporate UDPIA into the next revision of the Uniform Probate Code.[27] This incorporation will likely have a positive effect on the willingness of states to adopt UDPIA.[28]

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20. *See Bostian*, 193 S.W.2d at 801 (providing that a testator's will does not require a devisee to accept a gift of property because property under a will does not automatically vest in the devisee as it does in an heir through intestacy).

21. *See, e.g.*, *In re* Estate of Dankner, 384 N.Y.S.2d 683, 684 (Sur. Ct. 1976) (noting that, through the enactment of EPTL 4-1.3, the legislature granted distributees under intestacy identical rights to disclaim property that devisees had under common law).

22. *See* Welder v. Hitchcock, 617 S.W.2d 294, 297 (Tex. Civ. App. 1981) (expressing the theory that a devise in a will is an offer that a devisee may accept or reject, but that the intestate share vests immediately in an heir upon the decedent's death).

23. *See* Frances Slocum Bank & Trust Co. v. Estate of Martin, 666 N.E.2d 411, 415 (Ind. Ct. App. 1996) (explaining that a "disclaimer is not a transfer because the disclaimant is merely rejecting a gift").

24. *See, e.g.*, OKLA. STAT. tit. 84, § 25 (1990) (making a disclaimer effective upon filing in district court and delivering copies to the executor or trustee and, if the disclaimer is of real property, the county clerk).

25. *See* Estate of Oot, 408 N.Y.S.2d 303, 305 (Sur. Ct. 1978) (stating that motives for renunciation "have no bearing" on the right to disclaim unless evidence of fraud or collusion exists).

26. *See, e.g.*, N.M. STAT. ANN. § 46-10-1 *et seq.* (Michie 2001) (replacing Section 45-2-801(C) of the New Mexico Statutes, which was repealed in 2001); *see also* Adam J. Hirsch, *Revisions in Need of Revising: The Uniform Disclaimer of Property Interests Act*, 29 FLA. ST. U. L. REV. 109, 110 & nn.4–5 (2001) (reporting that the drafters completed UDPIA in 1999, and by 2001, Hawaii, New Mexico, and North Dakota had adopted it).

27. *See* Prefatory Note, UNIFORM DISCLAIMER OF PROPERTY INTERESTS ACT (1999) (reporting that UDPIA "will be incorporated into the Uniform Probate Code to replace current UPC § 2-801").

28. *See* Hirsch, *supra* note 26, at 110 & n.7 (noting that eleven states have already enacted UPC Article II).

UDPIA abandons the relation-back doctrine, but specifies that a disclaimer "is not a transfer, assignment, or release."[29] UDPIA leaves the matter of creditors' claims in the context of disclaimers to the state statutory law in effect prior to adoption of the Act.[30] However, state precedents on disclaimer law will likely be void after the adoption of UDPIA, so states will be able to completely reevaluate their case law on disclaimers.[31]

B. Fraudulent Transfer Statutes

Irrespective of the federal Bankruptcy Code, most states have fraudulent transfer statutes that could arguably apply to defeat prepetition disclaimers. Many states have adopted some version of the Uniform Fraudulent Transfer Act (UFTA).[32] Under UFTA, "[a] transfer made . . . by a debtor is fraudulent as to a creditor . . . if the debtor made the transfer . . . with actual intent to hinder, delay, or defraud" the creditor.[33] UFTA defines "transfer" as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance."[34]

Many state courts hold that the relation-back principle precludes the vesting of any property interest in the disclaimant, so the disclaimer cannot be a fraudulent transfer.[35] But Ohio has decided that a disclaimer is a fraudulent transfer against creditors who had claims at the time of the testator's death.[36]

29. LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 68 (3d ed. 2002) (citing UDPIA § 5(e)–(f)).

30. *See* Hirsch, *supra* note 4, at 574 (noting that the UPDIA fails to resolve the fraudulent conveyances issue but that it respects any bar to disclaimers contained in state statutes).

31. *See id.* ("Decisions construing prior statutes should lose their authority once the statutes are replaced by UDPIA.").

32. *See* WAGGONER, ET AL., *supra* note 29, at 450 (reporting that about forty states have adopted the Uniform Fraudulent Transfer Act (1984) and about five states have adopted the Uniform Fraudulent Conveyance Act (1918)).

33. UNIFORM FRAUDULENT TRANSFER ACT § 4(a)(1) (1984).

34. *Id.* § 1(12).

35. *See supra* notes 14–15 and accompanying text (noting that state courts following the relation-back principle do not view disclaimers as fraudulent transfers); *see also* TEX. BUS. & COM. CODE ANN. § 24.002(12) (Vernon 2002) (stating that a "transfer," for fraudulent transfer purposes, does not include disclaimers).

36. *See* Stein v. Brown, 480 N.E.2d 1121, 1124 (Ohio 1985) (holding that a disclaimer with the actual intent to defraud a present or future creditor is a fraudulent conveyance under Section 1336.07 of the Ohio Revised Code and has no legal effect); McGraw v. Betz (*In re* Betz), 84 B.R. 470, 472 (Bankr. N.D. Ohio 1987) (applying Ohio law to find that a disclaimer

Ohio views the power to disclaim as analogous to a general power of appointment under which the disclaimant can decide who will receive the disclaimed property.[37] The tension in state law between the relation-back theory and state fraudulent transfer statutes mirrors the tension between state laws permitting disclaimers and the federal fraudulent conveyances statute, 11 U.S.C. § 548(a).[38]

III. Federal Law Treatment of Disclaimers

Federal tax and bankruptcy laws often conflict with state disclaimer statutes. Under federal tax law, the Internal Revenue Code (I.R.C.) permits "qualified disclaimers" for estate and gift tax planning purposes.[39] But the Supreme Court has construed the I.R.C. to prohibit disclaimers for avoiding collection on tax liens.[40]

In bankruptcy, federal law appears to affect disclaimers differently depending on whether the disclaimer occurs before or after the debtor files for bankruptcy.[41] The Bankruptcy Code treats any interest in property held by the debtor at the time of filing, or acquired within 180 days *after* filing, as part of the bankruptcy estate.[42] The Bankruptcy Code specifically lists bequests, devises, and inheritances as property that may enter the bankruptcy estate.[43]

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for the purpose of letting family, rather than creditors, receive property is a fraudulent conveyance).

37. *See Stein*, 480 N.E.2d at 1123 (following Justice Traynor's reasoning in *Kalt v. Youngworth (In re Kalt's Estate)*, 108 P.2d 401 (Cal. 1940), that the right to disclaim is "closely analogous to a general power of appointment and, therefore, subject to the scrutiny of the fraudulent conveyance statutes").

38. *See infra* Part III.B (noting that a possible implication of *Drye v. United States*, 528 U.S. 49 (1999) is that 11 U.S.C. § 548(a) defeats disclaimers occurring within one year prior to filing a bankruptcy petition).

39. *See* 26 U.S.C. §§ 2518(a)-(b), 2046, 2614(c) (2002) (identifying various rules for qualified disclaimers).

40. *See* Drye v. United States, 528 U.S. 49, 57 & n.3 (1999) (observing that the qualified disclaimer rules appear in the wealth transfer provisions of the I.R.C. but do not appear in the tax lien provisions).

41. *See* McCoskey, *supra* note 5, at 684–90 (discussing the different Bankruptcy Code provisions that appear to apply to prepetition and postpetition disclaimers and opining that estate planners should counsel debtors that courts are more likely to allow prepetition disclaimers).

42. 11 U.S.C. § 541(a)(5) (2003); *see also* Parker, *supra* note 5, at 35 (surveying current case law holding that disclaimed property becomes "property of the estate" under § 541(a)(5) if the debtor files for bankruptcy and later disclaims).

43. 11 U.S.C. § 541(a)(5)(A) (2003).

If the debtor disclaims *prior* to filing for bankruptcy, he may keep the property out of the bankruptcy estate as long as the federal fraudulent transfer provisions do not apply.[44] These Bankruptcy Code provisions at 11 U.S.C. § 548(a) empower the bankruptcy trustee to "avoid any transfer of an interest of the debtor in property" made within one year prior to filing a bankruptcy petition if the debtor made the transfer with "actual intent to hinder, delay, or defraud" his creditors or if the debtor "received less than a reasonably equivalent value in exchange for such transfer."[45] Whether this section applies depends on whether the disclaimer amounts to a "transfer of an interest of the debtor in property" during the one-year period prior to filing.[46]

A. What Constitutes a Transfer of an Interest in Property?

The Bankruptcy Code defines "transfer" as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property . . . ."[47] The Bankruptcy Code does not define the terms "property" or "interest in property."[48] In the absence of controlling bankruptcy law, state law must govern the determination of property interests in the debtor's estate.[49]

Congress intended some federal bankruptcy provisions, including 11 U.S.C. § 541, to require a broader construction of "property interests" than state law allows.[50] But Congress has never intended anything other than state law

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44. *See supra* note 5 and accompanying text (expressing uncertainty as to whether the Bankruptcy Code treats prepetition disclaimers as fraudulent transfers).

45. 11 U.S.C. § 548(a)(1)(A)-(B) (2003).

46. *See* McCoskey, *supra* note 5, at 685 (describing a disclaimer as a transfer, but noting that a disclaimer may not fall under the fraudulent transfer provisions because of uncertainty whether the debtor ever possesses any interest in disclaimed property under the relation-back doctrine).

47. 11 U.S.C. § 101(54) (2003).

48. *See* Garrett v. Bank of Okla. (*In re* Faulk), 281 B.R. 15, 18 (Bankr. W.D. Okla. 2002) (observing that the Bankruptcy Code "does not state what constitutes" a property interest and concluding that state law must control).

49. *See* Butner v. United States, 440 U.S. 48, 55 (1979) (reasoning that state law creates and defines property interests in federal bankruptcy proceedings unless federal law requires a different result); Barnhill v. Johnson, 503 U.S. 393, 398 (1992) (explaining that federal law controls what constitutes "transfer" but "[i]n the absence of any controlling federal law, 'property' and 'interests in property' are creatures of state law").

50. *See* Bd. of Trade v. Johnson, 264 U.S. 1, 10 (1924) (recognizing congressional intent for a broad construction of bankruptcy provisions governing assets to include in the bankruptcy estate); Jess v. Carey (*In re* Jess), 169 F.3d 1204, 1207 (9th Cir. 1999) ("While state law may ultimately determine whether an asset is property of the estate, in the final analysis section

definitions of "property interests" to control under the federal fraudulent transfer provisions in 11 U.S.C. § 548.[51] In states that apply the relation-back doctrine, disclaimed property does not become an "interest of the debtor in property" pursuant to the provisions of 11 U.S.C. § 548(a).[52]

State law generally governs what constitutes "property interests" in bankruptcy, but recent jurisprudence on what constitutes a property interest in federal tax law could change that. In 1998, the United States Court of Appeals for the Eighth Circuit decided *Drye Family 1995 Trust v. United States*,[53] concluding that a disclaimer cannot remove property from the reach of a federal tax lien.[54] The court found clear congressional intent for 26 U.S.C. § 6321 to place limits on the role of state law in determining what property the IRS may reach to satisfy outstanding tax liabilities.[55] The court reasoned that state law defines a taxpayer's property interests, but

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541(a) supplies the basic definition." (citing *In re* Jess, 215 B.R. 618, 621 (B.A.P. 9th Cir. 1997))).

51. *See* Simpson v. Penner (*In re* Simpson), 36 F.3d 450, 451–52 (5th Cir. 1994) (applying *Barnhill v. Johnson*, 503 U.S. 393 (1992), and concluding that state law defines property interests under the fraudulent transfer provisions because § 548(a) of the Bankruptcy Code does not define property interests). *But cf.* United States v. Whiting Pools, 462 U.S. 198, 205 & n.10 (1983) (noting that § 548 can bring property into the estate in which the debtor did not have a possessory interest at the time of filing, such as property that the IRS had repossessed).

52. *See Garrett*, 281 B.R. at 20–21 (asserting that a disclaimer under Oklahoma law "relates back *for all purposes*, including for the purpose of determining whether there was a fraudulent transfer," so § 548 does not affect the inclusion of disclaimed property in the bankruptcy estate); Jones v. Atchison (*In re* Atchison), 101 B.R. 556, 557 (Bankr. S.D. Ill. 1989) (stating that the Illinois disclaimer statute prevented disclaimed property from vesting in the debtor, so the disclaimer was not a transfer of an interest in property under 11 U.S.C. § 548(a)), *aff'd*, 925 F.2d 209 (7th Cir. 1991).

53. Drye Family 1995 Trust v. United States, 152 F.3d 892 (8th Cir. 1998). In *Drye Family 1995 Trust*, a taxpayer claimed that the district court erred in failing to hold that his disclaimer voided any property interests on which a federal tax lien could attach. *Id.* at 892–93. The court, noting a circuit split on the issue, applied Supreme Court precedent to conclude that what constitutes "rights to property" under 26 U.S.C. § 6321 is ultimately a question of federal law. *Id.* at 894. The court reasoned that, even though the I.R.C. does not define "rights to property," Congress intended the reach of § 6321 to be broad. *Id.* at 895. The court stated that the state law consequences of the disclaimer under the doctrine of relation-back were "of no concern to the operation of the federal tax law," and that the disclaimed property fell under § 6321. *Id.* at 898–99.

54. *See id.* at 898 (holding that state law consequences of a disclaimer cannot frustrate the operation of federal tax law).

55. *See id.* at 899 (reasoning that the congressional intent for § 6321 suggests that disclaimers cannot prevent the IRS from reaching "any and all interests of pecuniary value to which a taxpayer may be entitled in order to satisfy outstanding tax liability").

that federal law determines whether those interests constitute a "right to property" pursuant to § 6321.[56]

In *Drye v. United States*, the Supreme Court unanimously affirmed *Drye Family 1995 Trust*.[57] *Drye* arguably overruled contrary opinions from other circuits that used state law to determine what property the IRS could reach under a tax lien.[58] *Drye*'s approach to property interests under federal tax law left lingering questions as to what constitutes a property interest for purposes of the Bankruptcy Code.

B. *Effect of* Drye v. United States

The Supreme Court's unanimous opinion in *Drye* concluded that federal law ultimately controls whether a taxpayer has an interest in property subject to a tax lien.[59] The Court reasoned that the right to disclaim is a property interest because the taxpayer could choose whether to receive all of the property or to channel it to his daughter.[60] Although it did not express what type of property interest existed, the Court held that the taxpayer had an interest in property that the IRS could subject to a federal tax lien in accordance with 26 U.S.C. § 6321.[61]

To support its conclusion, the Court cited the academic commentary of Adam J. Hirsch, who compares the right to disclaim to the assignment of an

56. *See id.* at 898 (explaining that state law determines a right or interest and federal law dictates whether that right or interest constitutes property reachable under § 6321 (quoting United States v. Nat'l Bank of Commerce, 472 U.S. 713, 723 (1985))).

57. *See* Drye v. United States, 528 U.S. 49, 54–55 (1999) (reciting Eighth Circuit opinion that "state law determines whether a given set of circumstances creates a right or interest," while federal law determines whether that right or interest is a property interest under § 6321 (quoting Drye Family 1995 Trust v. United States, 152 F.3d 892 (8th Cir. 1998))).

58. *See, e.g.*, Leggett v. United States, 120 F.3d 592, 594 (5th Cir. 1997) (concluding that state law must determine whether a taxpayer has a "property interest" because § 6321 does not define that term); Mapes v. United States, 15 F.3d 138, 140 (9th Cir. 1994) (reasoning that state law must answer the question whether a taxpayer has an interest in property); United States v. Davidson, 55 F. Supp. 2d 1152, 1154–55 (D. Colo. 1999) (declining to interpret subsequent court decisions as overruling precedent that state law defines property rights, even for purposes of federal tax liens (citing Aquilino v. United States, 363 U.S. 509, 513 (1960) and United States v. Bess, 357 U.S. 51, 78 (1958))).

59 *See Drye*, 528 U.S. at 55–58 (citing precedent that § 6321 provides a broad definition of "property" that gives the federal government control in determining what property of a delinquent taxpayer falls under a tax lien).

60. *See id.* at 60–61 (concluding that the right to disclaim is not a choice between the acceptance or rejection of property, but amounts to control over who will receive the property).

61. *See id.* at 61 (holding that a taxpayer had "rights to property" under § 6321 because he exercised dominion over it in determining who would receive the property).

inheritance and, alternatively, to the exercise of a general power of appointment.[62] These analogies seem to confirm various state court opinions concluding that disclaimers should fail under fraudulent conveyance statutes.[63] But the Hirsch article ultimately rejects these analogies and describes the disclaimer as a "quasi-conveyance" in which a disclaimant determines who will take property by examining the will before deciding to disclaim.[64] Due to the difficulty of assigning disclaimers a place in the complex realm of property theory, Hirsch suggests that a better approach would be to decide the disclaimer issue on the basis of public policy.[65]

It appears that the Court took Hirsch's advice and resolved *Drye* on the basis of public policy concerns rather than on the theoretical grounds of what constitutes an interest in property.[66] The Court's discussion of a devisee's dominion over disclaimed property was something of an afterthought, coming at the end of the decision after it was clear that the Court would uphold the Eighth Circuit's decision on other grounds.[67] The bulk of the decision focused on the IRS's power to reach property regardless of state law hurdles.[68] As such, the Court could have rested the theoretical underpinnings of this case on the concept of "imperium"[69] rather than on "dominium."[70]

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62. *See id.* (citing Adam J. Hirsch, *The Problem of the Insolvent Heir*, 74 CORNELL L. REV. 587, 607–08 (1989)) (concluding that the taxpayer's exercise of a disclaimer amounted to a property right because he exercised dominion over who would ultimately receive the property).

63. *See, e.g.*, Stein v. Brown, 480 N.E.2d 1121, 1123 (Ohio 1985) (following Justice Traynor's reasoning in *Kalt v. Youngworth (In re Kalt's Estate)*, 108 P.2d 401 (Cal. 1940), that the right to disclaim is "closely analogous to a general power of appointment and, therefore, subject to the scrutiny of the fraudulent conveyance statutes").

64. *See* Adam J. Hirsch, *The Problem of the Insolvent Heir*, 74 CORNELL L. REV. 587, 607–08 (1989) (arguing that a disclaimant does not actually accept property and cannot actually assign it, but since he can examine the will to determine who receives property upon a disclaimer, it is a "quasi-conveyance").

65. *See id.* at 609–10 (questioning the usefulness of dominion theory by stating that it offers no basis for effectively characterizing ownership rights in disclaimed property and by suggesting that such an approach might be inconsistent with the public policy goals of debtor-creditor law).

66. *See* Andrew S. Bender, Note, *Disclaimer Law: A Call for Statutory Reform*, 2001 U. ILL. L. REV. 887, 907 (2001) (speculating that the Court decided *Drye* on the narrow issue of protecting the functionality of the federal tax system).

67. *See* Drye v. United States, 528 U.S. 49, 59–61 (1999) (presenting the rationale that the federal power to collect taxes trumps state law and afterward presenting the additional rationale that the right to disclaim resembles a property right).

68. *See id.* at 59 (comparing state disclaimer law to state exemptions that do not bind the federal tax collector).

69. *See* BLACK'S LAW DICTIONARY 757 (7th ed. 1999) (defining "imperium" as the absolute legal authority of the state, a term that derives from the Roman Empire).

Lower courts have disagreed as to whether *Drye*'s holding should extend to disclaimers for avoiding creditors other than the IRS. In *In re Kloubec*,[71] a case that follows *Drye*, the Bankruptcy Court for the Northern District of Iowa concluded that, "even though *Drye* was a tax lien case, the issue decided was identical to the issue presented here, that is, whether the state doctrine of relationship-back can modify rights created under Federal Statutes."[72] According to the court, the disclaimer had the effect of channeling property out of the bankruptcy estate and "into the hands of Debtor's children."[73] This reasoning appears to rest on the theory that the debtor had rights in the disclaimed property, thus placing the property within the bankruptcy estate.[74] Going further than *Drye*, in which the Supreme Court largely focused on the federal government's strong interests in tax collection,[75] *Kloubec* seems to exclusively rely on the dominion theories that the Hirsch article acknowledged but ultimately rejected.[76]

Although few recent cases reach the issue of prepetition disclaimers, most of them limit the application of *Drye* to tax lien cases pursuant to 26 U.S.C. § 6321. In one case, *Grassmueck v. Nistler (In re Nistler)*,[77] the Bankruptcy

70. *See id.* at 502 (defining "dominium" as the absolute right to private ownership of property, including the right to possession and use).

71. *In re* Kloubec, 247 B.R. 246 (Bankr. N.D. Iowa 2000), *aff'd*, 268 B.R. 173 (N.D. Iowa 2001). In *Kloubec*, a debtor who stood to inherit a portion of his grandfather's estate disclaimed one day before filing a petition for Chapter 12 bankruptcy. *Id.* at 250. On the disclaimer issue, the court considered whether the disclaimer was a transfer of any interest of the debtor that would amount to a fraudulent transfer. *Id.* at 253. The court considered the effect of *Drye v. United States* and concluded that *Drye*, even though it was a tax lien case, stood for the principle that the state doctrine of relation-back could not modify rights created under the Bankruptcy Code. *Id.* at 256. The court ruled that the disclaimer was a fraudulent transfer because it channeled at least $85,000 of inherited assets from the bankruptcy estate to the debtor's children. *Id.*

72. *Id.* at 256.

73. *Id.*

74. *See, e.g.*, 11 U.S.C. § 541(a)(5) (2000) (including in the bankruptcy estate property in which the debtor has an ownership interest on the date of filing).

75. *See supra* notes 66–68 and accompanying text (suggesting that the Court resolved *Drye* on the basis of absolute federal supremacy in tax collection).

76. *See supra* notes 62–65 and accompanying text (describing the commentary of Professor Hirsch, who evaluated comparisons of a disclaimer to the assignment of inheritance and to the exercise of a general power of appointment and concluded that both analogies are imperfect and that the best approach would be to decide the issue on the basis of public policy).

77. Grassmueck v. Nistler (*In re* Nistler), 259 B.R. 723 (Bankr. D. Or. 2001). In *Nistler*, a debtor disclaimed his right to receive property under will, trust, or intestacy from the estate of Werner G. Nistler. *Id.* at 724. The debtor and his wife later filed for Chapter 7 bankruptcy. *Id.* The trustee sought to avoid the disclaimer as a transfer under 11 U.S.C. § 548. *Id.* at 725. The court recognized that the primary issue was whether *Drye v. United States* indirectly overruled

Court for the District of Oregon observed that *Drye* "specifically relied on the language of § 6321 of the Internal Revenue Code."[78] It further noted that "[a]ll of the cases cited by the *Drye* Court involved tax liens."[79]

Similar reasoning appears in another recent case, *Garrett v. Bank of Oklahoma (In re Faulk)*,[80] in which the Bankruptcy Court for the Western District of Oklahoma acknowledged that while *Drye* broadly construed 26 U.S.C. § 6321, that construction did not extend to 11 U.S.C. § 548(a), under which state law determines what constitutes an "interest in property."[81] Another recent case also held that *Drye* did not change the fact that Congress allows state law to determine the nature of property rights under § 548.[82]

Both *Nistler* and *Garrett* observed that *Drye* rests on precedent suggesting that the IRS has superior rights over private creditors.[83] The *Nistler* court provided the distinction that state exemption statutes are not enforceable against the IRS but are enforceable in bankruptcy.[84] Congress's intent in drafting the

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In re Bright, 241 B.R. 664 (B.A.P. 9th Cir. 1999), which held that a disclaimer was not a transfer of an interest in property under § 548. *Id.* The court distinguished *Drye* on grounds that the Supreme Court based its decision on the broad language of 26 U.S.C. § 6321 and justified its decision only with cases that involved tax liens. *Id.* at 726. The court ruled that Nistler's disclaimer was not a transfer of an interest in property. *Id.* at 727.

78. *Id.* at 726.

79. *Id.*

80. Garrett v. Bank of Okla. (*In re* Faulk), 281 B.R. 15 (Bankr. W.D. Okla. 2002). In *Garrett*, a debtor executed a prepetition disclaimer of his beneficiary status under a trust and the bankruptcy trustee challenged the disclaimer as a fraudulent transfer under 11 U.S.C. § 548. *Id.* at 16. The issue was whether the disclaimer was "a transfer of an interest of the debtor in property" under § 548. *Id.* at 17. The court noted that the Bankruptcy Code does not state what constitutes an "interest in property" and that state law must determine that issue. *Id.* at 18. The court distinguished *Drye v. United States* on two grounds: (1) the tax lien in *Drye* had already attached to the property before the debtor disclaimed, making the disclaimer more similar to a postpetition, rather than prepetition disclaimer, and (2) *Drye* was a tax lien case in which the IRS had superior rights over other creditors. *Id.* at 20.

81. *See id.* (noting that *Drye* broadly construed the tax lien statute, I.R.C. § 6321, in line with precedent viewing the rights of the IRS as superior to those of other creditors, whereas the Bankruptcy Code in § 548(a) requires a state law determination of what constitutes an "interest in property").

82. *See* Cassel v. Kolb, 267 B.R. 861, 866 (Bankr. N.D. Cal. 2001) (acknowledging that federal law deems state disclaimers inoperable for tax liens, but asserting that state law predominates in determining what assets make up the bankruptcy estate (citing Butner v. United States, 440 U.S. 48, 54 (1979))).

83. *See Garrett*, 281 B.R. at 20 (noting that the *Drye* Court "cited cases holding that the Internal Revenue Service has rights superior to those of other creditors of a taxpayer"); Grassmueck v. Nistler (*In re* Nistler), 259 B.R. 723, 726 (Bankr. D. Or. 2001) ("There are many instances where the IRS has superior rights over other creditors . . . .").

84. *See Nistler*, 259 B.R. at 726–27 (providing example that the IRS has superior rights over other creditors in that "state exemption statutes are not enforceable against the IRS").

I.R.C. was not to recognize state law exemptions.[85] In 26 U.S.C. § 6334, Congress provided an exhaustive list of creditor-specific exemptions, showing an intent that tax law should ignore state law exemptions.[86] In contrast, the Bankruptcy Code generally respects state exemptions.[87] Under 11 U.S.C. § 522, debtors may choose to apply either the federal law exemptions in the Bankruptcy Code or the exemptions available under the law of the debtor's state.[88] State governments may also "opt out" of the federal exemption rules and require all bankruptcy exemptions to comply with state law.[89]

In addition to reasoning that the IRS has superior rights over private sector creditors, the *Garrett* court observed that the tax lien in *Drye* had already attached when the debtor disclaimed.[90] Thus, the court concluded that *Drye* could only apply to postpetition disclaimers and not to prepetition disclaimers.[91] The tax lien in *Drye* had already attached when the debtor disclaimed, whereas the debtor in *Garrett* disclaimed prior to filing for bankruptcy.[92] The distinction is that most courts treat postpetition disclaimers as invalid, while they generally treat prepetition disclaimers as valid.[93] Further, the debtor in *Drye* disclaimed property he had inherited by intestacy.[94] Although the court

85. *See* United States v. Bess, 357 U.S. 51, 57 (1958) ("The provisions of the Internal Revenue Act creating liens upon taxpayer's [sic] property for unpaid income taxes, unlike . . . the Bankruptcy Act . . . do not specifically provide for recognition of such state laws.").

86. *See* Drye Family 1995 Trust v. United States, 152 F.3d 892, 899 (8th Cir. 1998) (reasoning that Congress intended that federal tax law not respect state law exemptions because 26 U.S.C. § 6334 provides an exhaustive list of tax law property exemptions).

87. 1 WILLIAM F. FRATCHER, SCOTT ON TRUSTS § 36.1, at 396 (4th ed. 1987).

88. *See* 11 U.S.C. § 522(b) (2003) (giving the debtor a choice between applying federal bankruptcy exemptions in § 522(d) or applying exemptions under state law and non-bankruptcy federal law).

89. *See id.* § 522(b)(1) (2003) (specifying that "an individual debtor may exempt from property of the estate . . . property that is specified under [the federal exemption provisions], unless the State law that is applicable to the debtor . . . specifically does not so authorize").

90. *See* Garrett v. Bank of Okla. (*In re* Faulk), 281 B.R. 15, 20 (Bankr. W.D. Okla. 2002) (distinguishing this case from *Drye*, in which the government attached a tax lien prior to the debtor's filing of a disclaimer).

91. *See id.* (noting that the situation in *Drye* was analogous to filing a postpetition disclaimer in which property became part of the bankruptcy estate prior to the debtor filing a disclaimer).

92. *See id.* (distinguishing the facts in *Drye*).

93. *See id.* (stating that postpetition disclaimers are not valid in bankruptcy but that prepetition disclaimers are effective because they do not qualify as fraudulent transfers); *see also supra* notes 42–44 and accompanying text (noting that any interest in property included in the debtor's estate at the time of filing or 180 days thereafter becomes a part of the bankruptcy estate regardless of a disclaimer, but that a disclaimer occurring prior to debtor's filing for bankruptcy is valid if the federal fraudulent transfer provisions do not apply).

94. *See* Drye v. United States, 528 U.S. 49, 52 (1999) (reciting the fact that the debtor's

did not address any distinction between taking by intestacy or by will, common law does not allow disclaimers of property passing by intestacy.[95]

IV. Policy Considerations

Based on the above discussion, when state disclaimer law applies the relation-back doctrine, a debtor's prepetition disclaimer clearly does not amount to a fraudulent transfer. This Note now turns to the policy question of whether federal law should allow this result. In other words, should federal law defeat disclaimers, regardless of state laws applying the relation-back doctrine? In considering the question, this Note examines various arguments, including the tension between effectuating the principles of the Bankruptcy Code and respecting the principles of federalism, and also the tension between fairness to creditors and fairness to debtors.

A. Uniformity in Bankruptcy Laws

The Constitution authorizes Congress to "establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."[96] At first glance, this clause seems to require uniformity in the impact of bankruptcy laws.[97] But the authority to establish uniform laws does not necessarily imply a requirement to establish them. The Supreme Court, in construing the constitutional authorization for bankruptcy laws, tends to enforce federal law only on issues that Congress has directly addressed.[98] The Bankruptcy Code does not address what constitutes a property interest.[99] Ample precedent suggests that state law governs the issue of whether disclaiming defeats a debtor's rights in the disclaimed property.[100]

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mother died intestate).

95. *See supra* notes 19–20 and accompanying text (explaining the common law distinction between disclaimers in intestacy and disclaimers under wills).

96. U.S. CONST. art. I, § 8.

97. *See* David E. Leigh, Note, *Renunciation of a Legacy or Devise as a Fraudulent Transfer Under the Bankruptcy Act*, 49 IND. L.J. 290, 297 (1974) (arguing that the Constitution requires uniformity in bankruptcy laws).

98. *See, e.g.*, McKenzie v. Irving Trust Co., 323 U.S. 365, 369–70 (1945) (stating that what constitutes a "transfer" is a federal question because the federal bankruptcy statute directly addresses it).

99. *See* Garrett v. Bank of Okla. (*In re* Faulk), 281 B.R. 15, 18 (Bankr. W.D. Okla. 2002) (noting that the Bankruptcy Code "does not state what constitutes" a property interest, so state law must control).

100. *See, e.g.*, Barnhill v. Johnson, 503 U.S. 393, 398 (1992) (stating that federal law defines "transfer," but "[i]n the absence of any controlling federal law, 'property' and 'interests in property' are creatures of state law"); Butner v. United States, 440 U.S. 48, 55 (1979)

Numerous commentators lament the lack of uniformity that results from applying state law principles to certain bankruptcy-related issues that the Bankruptcy Code does not address.[101] Particularly in the area of disclaimers, this lack of uniformity can be profound because different states take different approaches to disclaimers.[102] This divergence can result in uncertainty and forum shopping.[103]

Stephen Parker argues that federal courts should interpret the word "transfer" in 11 U.S.C. § 101(54) to include disclaimers.[104] In support of this argument, Parker notes the similarity between the definitions of "transfer" in the Bankruptcy Code and in the I.R.C.[105] Parker's reasoning fails because the I.R.C. directly addresses the issue of disclaimers while the Bankruptcy Code does not. The I.R.C. expressly preempts state law on qualified disclaimers for estate and gift tax purposes.[106] In this context, the I.R.C. views a disclaimer as a transfer of property.[107] The Bankruptcy Code does not provide similar clarity on disclaimers.

For the Bankruptcy Code to preempt a disclaimer, state law must determine that the debtor has obtained an interest in property and that the debtor has fraudulently transferred the property by way of the disclaimer.[108]

(reasoning that state law creates and defines property interests in federal bankruptcy proceedings unless federal law requires a different result).

101. *See* Parker, *supra* note 5, at 48 (noting that the application of state law on disclaimers defeats the Bankruptcy Code's goal of uniformity); Vern Countryman, *The Use of State Law in Bankruptcy Cases (Part I)*, 47 N.Y.U. L. REV. 407, 407–08 (1972) (criticizing federal bankruptcy laws as a "helter-skelter" mix of federal provisions and state substantive law).

102. *See* Parker, *supra* note 5, at 48 (explaining that federal proceedings under the Bankruptcy Code will produce divergent results based on the different treatment of disclaimers under different states' laws); *see also supra* notes 12–14 and accompanying text (noting that many states follow the common law rule permitting disclaimers, whereas others apply fraudulent transfer statutes to curtail the power of disclaimers to defeat creditors' claims).

103. *See* Parker, *supra* note 5, at 48 & n.138 ("Uniform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty [and] to discourage forum shopping." (quoting Butner v. United States, 440 U.S. 48, 55 (1979))).

104. *See id.* at 49 (asserting that the relation-back doctrine provides debtors with the opportunity to abuse disclaimers in bankruptcy cases).

105. *See id.* (arguing that courts should interpret "transfer" as it applies to disclaimers in bankruptcy in the same way that *McDonald v. Comm'r*, 853 F.2d 1494, 1499 (8th Cir. 1988) applied the definition of "transfer" under the I.R.C.).

106. *See* 26 U.S.C. §§ 2518(a)-(b), 2046, 2614(c) (2003) (identifying the various rules for qualified disclaimers).

107. *See* McDonald v. Comm'r, 853 F.2d 1494, 1499 (8th Cir. 1988) (providing that a qualified disclaimer, under 26 U.S.C. § 2518, is an indirect transfer that falls within the language of the gift tax statute).

108. *See* Simpson v. Penner (*In re* Simpson), 36 F.3d 450, 452 (5th Cir. 1994) (specifically applying *Barnhill v. Johnson*, 503 U.S. 393 (1992) to 11 U.S.C. § 548(a) and concluding that

Despite this limitation, some courts take the approach that Stephen Parker espoused and recharacterize disclaimers as "transfers" regardless of how state law views the relevant property interests.[109] Under this approach, a court construes a disclaimer as being a transfer despite the fact that the relation-back doctrine treats the property as if the disclaimant had never accepted it.[110] Justification for preempting the relation-back doctrine rests on the argument that relation-back subverts the federal prerogative to define what constitutes a "transfer."[111] At the heart of this position is the view that the relation-back doctrine is an archaic legal fiction that should not defeat the effective administration of the Bankruptcy Code.[112]

Irrespective of concerns about uniformity, Congress created a bare-bones Bankruptcy Code that does not address every issue. In approaching a federal statute, courts must presume that Congress intended its legislation to act in concert with legal relationships that state law has already established.[113] Courts must react to congressional silence by applying state law.[114]

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state law defines property interests under the Bankruptcy Code's fraudulent transfer provisions).

109. *See* Lowe v. Brajkovic (*In re* Brajkovic), 151 B.R. 402, 409–10 (Bankr. W.D. Tex. 1993) (construing a disclaimer as a transfer under 11 U.S.C. § 101(54)); Casciato v. Stevens (*In re* Stevens), 112 B.R. 175, 177 (Bankr. S.D. Tex. 1989) (same); Nashville City Bank & Trust Co. v. Peery (*In re* Peery), 40 B.R. 811, 814 (Bankr. M.D. Tenn. 1984) (same); *In re* Estate of Scrivani, 455 N.Y.S.2d 505, 510 (Sup. Ct. 1982) (treating a disclaimer as a transfer of a resource despite the relation-back doctrine, causing the state to view the disclaimed property as part of the disclaimant's "available resources" that the state counted to determine the disclaimant's Medicare eligibility).

110. *See, e.g.*, *Brajkovic*, 151 B.R. at 410 (characterizing disclaimers as transfers because "no matter what state law says the *effect* of such a disclaimer might be, state law may *not* define the transfer away").

111. *See id.* (reasoning that the application of relation-back amounts to state subversion of the federal prerogative to construe what constitutes a "transfer").

112. *See id.* at 409 & n.15 (criticizing the circular logic of the relation-back doctrine); *In re* Dinsdale, 1993 WL 1112064, at *6 (Bankr. N.D. Iowa Sept. 19, 1993) (same), *aff'd*, Agristor Leasing v. Dinsdale, 1995 WL 1312673 (N.D. Iowa Apr. 6, 1995); Nashville City Bank & Trust Co. v. Peery (*In re* Peery), 40 B.R. 811, 815 (Bankr. M.D. Tenn. 1984) (reasoning that state law fictions cannot defeat the "express limitations periods" in the Bankruptcy Code); *see also* Hirsch, *supra* note 64, at 604 (criticizing the relation-back doctrine as a legal fiction arising out of archaic considerations such as the evasion of feudal incidents).

113. *See* HENRY MELVIN HART & HERBERT WESCHLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 521–22 (4th ed. 1996) (explaining that Congress builds upon legal relationships that states have already established and that those background rules remain in force unless legislation expressly changes them).

114. *See* Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143, 164–65 (1987) (Scalia, J., concurring) (referring to the application of state statutes of limitations and stating, "[A]fter a century and a half of the Court's reacting to congressional silence by applying state statutes . . . it *is* reasonable to say that such a result is what Congress must expect, and hence intend, by its silence."); BFP v. Resolution Trust Corp., 511 U.S. 531, 546 (1994) ("[W]here the

B. Policies of the Bankruptcy Code

Many courts formalistically apply property theories to characterize disclaimers as inside or outside the scope of the Bankruptcy Code's fraudulent transfer provisions.[115] Professor Hirsch suggests that a better approach would be to decide the issue on the basis of the public policies underlying the Bankruptcy Code.[116] When courts have invalidated disclaimers, they have often included policy reasons such as upholding the "express limitations periods" in the Bankruptcy Code.[117]

In order to dispense with state property law and apply federal standards, courts must overcome a traditionally strong presumption that state law governs issues of family property and probate law.[118] One situation that overcomes the presumption is when Congress has directly addressed the issue and preempted state law.[119] Courts may also overcome the presumption when state law conflicts with policies underlying the federal statute, but only when those policies are clear, substantial, and unequivocal.[120]

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intent to override is doubtful, our federal system demands deference to long-established traditions of state regulation.").

115. *See* Hirsch, *supra* note 64, at 602–10 (criticizing the case law on disclaimers as being overly formalistic in its application of property theories).

116. *See id.* at 609–10, 651–54 (favoring a policy-based approach over the formalistic application of property theories in determining whether disclaimers should survive federal fraudulent transfer scrutiny); *see also In re Dinsdale*, 1993 WL 1112064, at *7 (Bankr. N.D. Iowa Sept. 19, 1993) (reasoning that, due to the difficulty of resolving whether relation-back falls into the definitional categories of "transfer" or "property," courts should decide the question of disclaimers based on policy considerations), *aff'd*, *Agristor Leasing*, 1995 WL 1312673 (N.D. Iowa Apr. 6, 1998).

117. *See, e.g.*, Nashville City Bank & Trust Co. v. Peery (*In re* Peery), 40 B.R. 811, 815 (Bankr. M.D. Tenn. 1984) (asserting that state law fictions cannot defeat the "express limitations periods" in the Bankruptcy Code).

118. *See* Egelhoff v. Egelhoff, 532 U.S. 141, 151 (2001) (noting, in the context of Employee Retirement Income Security Act (ERISA) preemption analysis, that a presumption exists against preemption in areas of traditional state regulation, including family law and probate law).

119. *See id.* at 151–52 (explaining that the Court has applied federal law when state law conflicts with Congress's clear desire for preemption, such as in ERISA (citing Boggs v. Boggs, 520 U.S. 833 (1997))).

120. *See id.* at 157 (Breyer, J., dissenting) (stating, on the issue of family property law, that federal law cannot control unless a court finds a "clear and manifest purpose of Congress" to preempt state law (quoting N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995))). Also, federal law cannot control unless a court finds that applying state law would do "major damage to clear and substantial federal interests." *Id.* (quoting Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979)).

Respect for creditors' rights is one of the Bankruptcy Code's primary policies.[121] This Note discusses the contractual expectations between debtors and creditors at greater length below.[122] Because the goal of protecting private sector creditors represents an entirely different federal interest from promoting the effective administration of the I.R.C., the Supreme Court's opinion in *Drye* does not support a creditors' rights argument.[123]

Another of the Bankruptcy Code's primary policies is to give the debtor a fresh start.[124] However, this "fresh start" does not apply to all categories of debt.[125] Professor Hirsch suggests that the Bankruptcy Code's lonely references to bequests, devises, and inheritances in § 541 display a policy to except them from any "immediate fresh start."[126] But Professor Hirsch's argument fails in the prepetition context because § 541 does not apply to disclaimers that a debtor executes prior to filing for bankruptcy.[127] Indeed, only the fraudulent transfer provisions in § 548 appear to apply to prepetition disclaimers.[128]

The Bankruptcy Code also values administrative efficiency in the distribution of the debtor's assets to creditors.[129] Although precedent suggests

121. Parker, *supra* note 5, at 34 & n.22 (explaining that the purpose of the automatic stay provision under § 362 is to protect the interests of all creditors (citing H.R. REP. NO. 95–595 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6296–297)).

122. *See infra* Part V (discussing creditors' and debtors' expectations and their impact on whether disclaimers should be valid in bankruptcy).

123. *See supra* notes 66, 68, 83 and accompanying text (suggesting that the Court resolved *Drye* on the basis of public policy concerns, including the necessity to protect the functionality of the federal tax system and on the recognition of the IRS's superior rights over private sector creditors).

124. *See* Grogan v. Garner, 498 U.S. 279, 286 (1991) (acknowledging the Bankruptcy Code's purpose of providing procedures whereby debtors can "reorder their affairs" and enjoy the opportunity to be unhampered by debt (quoting Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934))).

125. *See id.* at 287 (recognizing congressional intent to exclude certain debts including child support, alimony, unpaid educational loans, unpaid taxes, and liabilities arising from fraud, from the general policy of discharge).

126. Adam J. Hirsch, *Inheritance and Bankruptcy: The Meaning of the "Fresh Start"*, 45 HASTINGS L.J. 175, 180 (1994) ("Thus, section 541(a)(5) *distinguishes* legacies from income and carves out an exception to the traditional policy of an *immediate* fresh start.").

127. *See* 11 U.S.C. § 541(a)(5) (2003) (indicating that the bankruptcy estate will include property that the debtor inherits on the date of filing or 180 days thereafter).

128. *See supra* Part III (explaining that a debtor, prior to filing bankruptcy, may keep property out of the bankruptcy estate as long as the federal fraudulent transfer provisions do not apply).

129. *See In re* Beaty, 306 F.3d 914, 922 (9th Cir. 2002) (recognizing that a fundamental purpose of bankruptcy law is to secure "prompt and effectual administration and settlement of the [debtor's] estate . . . within a limited period" (quoting Katchen v. Landy, 382 U.S. 323, 328

that state law controls the property rights of parties in a bankruptcy action,[130] some commentators suggest that a uniform federal approach would be more efficient.[131] For purposes of analogy, this Note turns to the Employee Retirement Income Security Act (ERISA), a federal statute that takes a uniform federal approach to property rights in order to promote administrative efficiency.[132]

In *Egelhoff v. Egelhoff*,[133] Justice Thomas delivered an opinion that broadly construed the provision in ERISA that provides for federal preemption of state law.[134] He explained that one of Congress's primary goals in passing ERISA was to "establish a uniform administration scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits."[135] The Court reasoned that requiring multi-state employers to understand and apply fifty different state property law regimes on beneficiary designations under ERISA-qualified plans would undermine the congressional goal of minimizing administrative burdens.[136]

(1966))); Chemetron Corp. v. Jones, 72 F.3d 341, 346 (3d Cir. 1995) (same); *see also* MARGARET HOWARD & PETER A. ALCES, CASES AND MATERIALS ON BANKRUPTCY 21 (2d ed. 2001) (recognizing the purpose of bankruptcy to "reduce overall collection costs and to preserve the estate in order to maximize the creditors' recovery").

130. *See* Butner v. United States, 440 U.S. 48, 55 (1979) (stating that no reason exists for courts to depart from the practice of analyzing property interests under state law merely because an interested party faces bankruptcy).

131. *See* Parker, *supra* note 5, at 48 (asserting that the application of state law in the disclaimer context results in inconsistency).

132. *See* Boggs v. Boggs, 520 U.S. 833, 835–36 (1997) (holding that ERISA preempts state property law due to the federal interest in "uniform and comprehensive regulation" of pension plans that have an effect on the national economy).

133. Egelhoff v. Egelhoff, 532 U.S. 141 (2001). In *Egelhoff*, children whose father died in a car accident sought to receive the death benefit from his life insurance policy. *Id.* at 144. The decedent had designated his wife as beneficiary under the plan but had divorced his wife two months before his death and had not changed the beneficiary designation. *Id.* A Washington statute would have revoked the wife's designation as beneficiary on all nonprobate assets upon the divorce, so the issue was whether ERISA preempted this state statute. *Id.* at 143–46. The Court concluded that the statute had a "connection with" ERISA plans and that federal law preempted it. *Id.* at 150. The Court reasoned that the Washington statute would interfere with the uniform national plan administration that Congress clearly intended to create when it passed ERISA. *Id.* at 148.

134. *See id.* at 146 (observing that the ERISA preemption provision in 29 U.S.C. § 1144(a) has an expansive reach).

135. *See id.* at 148 (reasoning that a Washington state statute would interfere with the policy underlying ERISA (quoting Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 9 (1987))).

136. *See id.* at 149–50 ("Requiring ERISA administrators to master the relevant laws of 50 states . . . would undermine the congressional goal of 'minimiz[ing] the administrative and financial burden[s]' on . . . administrators.").

The prepetition disclaimer situation does not pose the same degree of administrative difficulty as the situation in *Egelhoff.* Because the bankruptcy trustee would not begin the process of identifying property of the bankruptcy estate until after the debtor had already completed his disclaimer, a prepetition disclaimer would present minimal administrative burdens. To date, the author finds no cases in which a court has applied the Bankruptcy Code's policy of administrative efficiency to preempt state law and aid the bankruptcy trustee in reaching property under the fraudulent transfer provisions in 11 U.S.C. § 548.

Congress has expressed a clear intent for ERISA to preempt state laws that would otherwise apply to multi-state employee benefit plans.[137] The Bankruptcy Code does not have such clear boundaries, especially as to the definition of "property interests" in § 548.[138] Because state statutes are entitled to a presumption of nonpreemption,[139] and because disclaimers do not seem to frustrate any strong policies underlying the Bankruptcy Code, it appears from the "totality of the circumstances" that Congress leaves this issue to the states.[140]

C. Impact of Federalism

Preempting state law on the basis of a federal statute's underlying policy creates difficulties in that a court might run afoul of the principles of federalism and separation of powers.[141] While federal courts may create binding doctrine

137. *See* District of Columbia v. Greater Wash. Bd. of Trade, 506 U.S. 125, 127 (1992) (acknowledging the breadth of ERISA's federal regulatory scheme and its clear provision in 29 U.S.C. § 1144(a) that federal law will supersede state laws "insofar as they may now or hereafter relate to any employee benefit plan" under ERISA).

138. *See, e.g.*, Garrett v. Bank of Okla. (*In re* Faulk), 281 B.R. 15, 18 (Bankr. W.D. Okla. 2002) (noting that the Bankruptcy Code "does not state what constitutes" a property interest and that state law must control).

139. *See* Maryland v. Louisiana, 451 U.S. 725, 746 (1981) ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.").

140. *See* Bldg. & Constr. Trades Council v. Associated Builders & Contractors, 507 U.S. 218, 224 (1993) (explaining that the application of preemption principles implicates three questions: whether state law directly conflicts with federal law; whether applying state law would frustrate the federal scheme; or whether, from the "totality of the circumstances," Congress apparently sought to displace state authority on a particular issue) (citations omitted).

141. *See* Bender, *supra* note 66 at 908 & n.219 (criticizing the *Drye* Court for judicial activism and for encroaching on legislative power (citing Leggett v. United States, 120 F.3d 592, 598 (5th Cir. 1997))); Timothy R. West, Note, Drye v. United States: *Limiting the Traditional State Right to Define Property*, 69 U. MO. KAN. CITY L. REV. 909, 909 (2001) (charging that the *Drye* decision diminished state sovereignty).

in areas where Congress has legislated, they should avoid developing a body of federal common law in areas traditionally reserved to the states.[142] However, it is often difficult for courts to draw the line between construing congressional intent and creating new law.

The majority opinion in *Egelhoff* is surprising because Justice Thomas and other justices who are usually "solicitous of state interests"[143] read ERISA to preempt a state statute based on its underlying policy.[144] One possible reason why the majority reached this result was its hesitation to develop a body of federal common law on the subject of family property.[145] Justice Breyer, writing for the dissent, wanted to partake in a line-by-line reading of the ERISA statute "in order to determine how best to reconcile [the] . . . statute's language and purpose with federalism's need to preserve state autonomy."[146] Justice Breyer viewed the true test of federalism to lie not in cases trimming Congress's commerce power at its edges, but in cases interpreting technical detail to determine whether state or federal law should apply.[147] The majority preferred a broad reading of the statute, suspecting that a line-by-line analysis would place the Court in the position of circumventing Congress's prerogative to reconcile the boundary between state and federal law.[148]

142. *See* Henry J. Friendly, *In Praise of* Erie*—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 404 (1964) (explaining that, although *Erie v. Tompkins*, 304 U.S. 64 (1938), disallows the application of general federal common law in areas reserved for state law, it allows specific federal common law in areas where Congress has created federal law); Peter L. Strauss, *Courts or Tribunals? Federal Courts and the Common Law*, 53 ALA. L. REV. 891, 901–02 (2002) (reasoning that the majority in *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001), preferred to construe ERISA broadly rather than risk developing federal common law in specific areas traditionally governed by state law that ERISA happens to preempt in application).

143. *See* Strauss, *supra* note 142, at 901 (commenting on *Egelhoff*, Strauss stated, "It is striking that the majority, whose members have generally been so solicitous of state interests, gave the federal statute such broad sweep.").

144. *See* Egelhoff v. Egelhoff, 532 U.S. 141, 148 (2001) (noting that the purpose of ERISA is to establish a "uniform administration scheme" for employee benefit plans in nationwide organizations).

145. *See* Strauss, *supra* note 142, at 902 ("For the majority, perhaps conscious of the implications of their capacity to control the actions of lower courts, the development of a common law on the subject was not to be trusted.").

146. *Egelhoff*, 532 U.S. at 160 (Breyer, J., dissenting).

147. *Id.* at 160–61 (Breyer, J., dissenting).

148. *See* Strauss, *supra* note 142, at 902 (speculating that the *Egelhoff* majority feared "acknowledging any responsibility for reconciling state and federal law for themselves," preferring to leave that responsibility with Congress, "or, rather, Congress's language as the judges chose to read it").

One year after deciding *Egelhoff*, Justice Thomas wrote a dissent in *United States v. Craft*[149] that decried the majority opinion as coming perilously close to establishing a new federal common law of property:

> 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.[150]

Interestingly, the majority in *Craft* cited *Drye*'s treatment of disclaimers as support for the proposition that a federal tax lien should apply to property held in a tenancy by the entirety.[151] In *Craft*, the Court concluded that a husband's rights in a tenancy by the entirety with his wife constituted an interest in property to which the government could attach a tax lien, despite the fact that the husband had no separate interest in the property under state law.[152]

Thomas expressed concern that the majority in *Craft* had gone too far in contravening the long-settled role of the states in creating property interests upon which federal law may later attach consequences.[153] Thomas accused the majority of misinterpreting *Drye*, arguing that the disclaimant in that case sought to "retroactively undo a vested right in an estate the taxpayer already held," while in *Craft*, the taxpayer never had a vested individual interest in the property under state law.[154] Indeed, the taxpayer in *Drye* executed his

149. United States v. Craft, 535 U.S. 274 (2002). In *Craft*, a delinquent taxpayer who owned land as a tenant by the entirety with his wife executed a quitclaim deed to transfer his entire interest in the property to his wife. *Id.* at 276–77. The United States claimed that its tax lien had attached to the husband's interest in the tenancy by the entirety before he transferred it. *Id.* at 277. State law would have applied the legal fiction that an individual tenant in a tenancy by the entirety has no separate interest in the property. *Id.* at 276. The Court refused to enforce this legal fiction and concluded that the husband had rights in the land because he could use the property, exclude third parties from it, and receive an equal share of the income from it. *Id.* at 279–82. In concluding that the legal fiction did not control the federal question, the Court cited *Drye v. United States*, 528 U.S. 49, 53 (1999). *Id.* at 279.

150. *Id.* at 293–94 (Thomas, J., dissenting).

151. *See id.* at 279 (supporting the proposition that state legal fictions cannot defeat the federal prerogative to determine property interests on which the IRS may attach a tax lien (citing Drye v. United States, 528 U.S. 49 (1999))).

152. *See id.* at 277–82 (acknowledging that a husband had no separate interest under Michigan law, but concluding that a tax lien on the husband's interest in a tenancy by the entirety constituted a property interest because he enjoyed the power to use, exclude, and garner income from the property).

153. *See id.* at 294 (Thomas, J., dissenting) (criticizing the majority's usurpation of state powers (quoting Aquilino v. United States, 363 U.S. 509, 513 n.3 (1960))).

154. *See id.* at 292–93 (Thomas, J., dissenting) (distinguishing *Drye* as a situation in which

disclaimer only after a federal tax lien had attached, making his disclaimer more analogous to a postpetition disclaimer.[155]

The difference between Justice Thomas's approaches in *Egelhoff* and *Craft* demonstrates the difficulty of recognizing the extent to which broadly worded federal statutes preempt state law. At first glance the approaches of Justice Thomas in these cases appear inconsistent. But both opinions express discomfort with a "busy-body" construction of federal statutes that gives the Court too much power to impose its version of the law. Federalism, as the Court has traditionally viewed it, clearly respects Congress as being in a better position than the courts to determine whether state or federal law should apply to a given issue.[156] In construing federal statutes, courts should not apply the federal rule unless the determination of Congress is clear, unambiguous, and unmistakable.[157]

Justice O'Connor's majority opinion in *Craft* resembles cases that use criticism of common law fictions to justify federal usurpation of state property law.[158] But if courts are to follow the principles of federalism, they must take a less cavalier attitude toward state policy prerogatives. Absent congressional authorization, the principles of federalism and separation of powers mandate that federal courts may not "abridge, enlarge or modify any substantive right" or intrude upon the states' ability to apply their own policies in traditional areas of

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state law had already recognized a property interest in the taxpayer but that a disclaimer retroactively divested that interest).

155. *See* Garrett v. Bank of Okla. (*In re* Faulk), 281 B.R. 15, 20 (Bankr. W.D. Okla. 2002) (noting that the situation in *Drye*, in which the government attached a tax lien prior to the taxpayer's filing of a disclaimer, was analogous to filing a postpetition disclaimer in which property would become part of the bankruptcy estate prior to the debtor's filing of a disclaimer); *see also supra* notes 42–44 and accompanying text (noting that any interest in property included in a debtor's estate at the time of filing or 180 days thereafter becomes part of the bankruptcy estate regardless of a disclaimer, but that a prepetition disclaimer is valid if the federal fraudulent transfer provisions do not apply).

156. *See* Paul J. Mishkin, *Some Further Last Words on* Erie*—The Thread*, 87 HARV. L. REV. 1682, 1685 (1974) (discussing the constitutional limits on federal judicial power in *Erie v. Tompkins*, 304 U.S. 64 (1938), and arguing that Congress, not federal courts, should make the law because Congress includes representatives from the states).

157. *See id.* at 1686 (reasoning that courts should not recognize a federal policy unless Congress has "squarely and unmistakably" spoken in unambiguous terms on that issue); *see also* BFP v. Resolution Trust Corp., 511 U.S. 531, 546 (1994) ("[W]here the intent to override is doubtful, our federal system demands deference to long established traditions of state regulation.").

158. *See* United States v. Craft, 535 U.S. 274, 279 (2002) ("Such state law labels are irrelevant to the federal question of which bundles of rights constitute property that may be attached by a federal tax lien."); *see also supra* notes 110–12 and accompanying text (recognizing criticism of the relation-back doctrine in disclaimer cases).

state competence.[159] Surely property laws, especially those in the area of disclaimers for estate planning purposes, are areas of traditional state competence.

Prior to *Drye*, federal law did not create property rights but merely attached consequences to property rights created under state law.[160] Absent contrary congressional intent, courts upheld state laws that advanced important state interests.[161] This approach struck the proper balance between legitimate and traditional state interests in defining property rights and the necessity of uniformity in the administration of federal law.[162] Indeed, this balance rested on the long-standing principle that federal courts cannot make law in the absence of some clear constitutional or statutory authorization.[163]

In light of its application in *Craft*, the Supreme Court's *Drye* decision complicates matters.[164] The majority in *Craft* apparently viewed *Drye* as giving the Court a green light to develop a new federal common law approach to property rights that would trump state law, including the relation-back doctrine.[165] Not all of the members of the unanimous Court in *Drye* would view that case as having such an expansive scope.[166] Some members of that Court would make a stricter analysis of the Bankruptcy Code before

159. *See* Mishkin, *supra* note 156, at 1686–87 & n.18 (discussing the limits of federal courts' power to intrude upon state policies in areas of state competence without express authorization from Congress (quoting Rules Enabling Act, 28 U.S.C. § 2072 (1970))).

160. *See* Aquilino v. United States, 363 U.S. 509, 513 (1960) (reasoning that the Federal Revenue Act does not create property rights but only attaches federal consequences to property rights created by state law); United States v. Davidson, 55 F. Supp. 2d 1152, 1154 (D. Colo. 1999) (same).

161. *See, e.g.*, Penn Terra Ltd. v. Dep't of Envtl. Res., 733 F.2d 267, 273–74 (3d Cir. 1984) (upholding a state environmental policy because it embodied an important state interest and did not conflict with the automatic stay provisions of the Bankruptcy Code).

162. *Aquilino*, 363 U.S. at 514.

163. *See* Henry P. Monaghan, *Hart and Wechsler's the Federal Courts and the Federal System*, 87 HARV. L. REV. 889, 892 (1974) (book review) (arguing that *Erie v. Tompkins*, 304 U.S. 64 (1938), recognized constitutional limitations on the power of federal courts to "displace state law absent some relevant constitutional or statutory mandate"); Friendly, *supra* note 142, at 421–22 (stating that courts may only create federal common law on "subjects within national legislative power where Congress has so directed").

164. *See also* Bender, *supra* note 66, at 907 (asserting that the *Drye* opinion creates uncertainty and confusion).

165. *See* United States v. Craft, 535 U.S. 274, 278–79 (2002) (introducing a "bundle of rights" approach to determining property interests pursuant to 26 U.S.C. § 6321). This approach appears to apply regardless of state property law. *Id.*

166. *See id.* at 289–90 (Scalia, J., dissenting) (joining Justice Thomas's dissent and observing that the majority's approach nullifies, "insofar as federal taxes are concerned," one traditional form of property ownership observed by many states).

determining that its policy warrants disavowal of state law relation-back principles in the prepetition context.[167]

V. Equity and the Expectations of Creditors and Debtors

A disclaimer does not occur in a vacuum. Creditors and debtors maintain certain expectations in the course of their relationship. These expectations inevitably will clash when the disrupting event of bankruptcy occurs. Bankruptcy courts, essentially being courts of equity,[168] seek to prevent windfalls to any party.[169] But bankruptcy courts ultimately face the dilemma of choosing which party is in a better position to bear the incidence of loss.[170]

A. Creditors' Expectations

The Introduction to this Note asks whether a disclaimer is merely a way to cheat one's creditors. One answer to that question is that a disclaimer causes the creditor to suffer "inequitable results"[171] and gives a windfall to the ultimate recipient of the property.[172] It seems that a bankruptcy court could combine its equity powers under 11 U.S.C. § 105 with the fraudulent transfer provisions in 11 U.S.C. § 548 to defeat a disclaimer and deliver the disclaimed property to creditors. But in order to use its equity powers to trump state law, a bankruptcy court must observe either a specific grant of authority from Congress or face

167. *See* Hartford Underwriters Ins. Co. v. Union Planters Bank, 530 U.S. 1, 13–14 (2000) (stating that courts will not assess the relative merits of bankruptcy policy in the absence of direct congressional authority).

168. *See* Local Loan Co. v. Hunt, 292 U.S. 234, 240 (1934) (stating that bankruptcy courts have jurisdiction both at law and in equity); *In re* Lee Way Holding Co., 178 B.R. 976, 985 (Bankr. S.D. Ohio 1995) ("Bankruptcy courts have broad equity powers to balance the interests of the relevant parties . . . ."); *see also* 11 U.S.C. § 105 (2003) (codifying courts' broad equity powers in bankruptcy).

169. *See, e.g.*, Condor One, Inc. v. Homestead Partners, Ltd. (*In re* Homestead Partners, Ltd.), 201 B.R. 1014, 1024 (Bankr. N.D. Ga. 1996) (noting that the Bankruptcy Court, as a tribunal of equity, must strive to prevent inequitable windfalls).

170. *Cf.* Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047, 1048 (1987) (recognizing that the goal of discharge is to allocate the risk of loss between the debtor and creditor in bankruptcy).

171. *See* Hirsch, *supra* note 64, at 610–11 & n.122 (criticizing disclaimers as creating "inequitable results" (citing Note, *Renunciation of a Devise In Fraud of Creditors as a Fraudulent Conveyance*, 27 VA. L. REV. 936, 938–39 (1941))).

172. *See* Kalt v. Youngworth (*In re* Kalt's Estate), 108 P.2d 401, 403 (Cal. 1940) (arguing that the application of a disclaimer would yield a windfall to the ultimate recipient of the property).

other exceptional circumstances.[173] Those exceptional circumstances only include situations in which the legislative history clearly shows that Congress had strong policy objectives to justify applying a federal rule.[174]

The protection of creditors is a strong policy objective of the Bankruptcy Code.[175] Many courts and commentators have viewed debts as "moral obligations" that a debtor must repay.[176] But according to Professor Hirsch, the policy goals of the Bankruptcy Code do not take on a moral tone.[177] Further, Congress did not intend for the protection of creditors to come at the expense of the rights of debtors.[178]

Judge Posner advocates that the purpose of law is to promote the efficient allocation of resources.[179] People make decisions under conditions of uncertainty with the goal of maximizing their utility.[180] Thus, when two parties reach a deal, they have effectively located a point at which they expect their optimal utilities to intersect. In the course of the deal, the parties maintain certain expectations that they have developed based on their reasonable calculations of the costs, risks, and responsibilities of achieving optimal

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173. *See* Johnson v. First Nat'l Bank, 719 F.2d 270, 274 (8th Cir. 1983) ("From the . . . *Butner* opinion . . . as well as from the language of § 105(a) itself, it follows that, absent a specific grant of authority from Congress or exceptional circumstances, a bankruptcy court may not exercise its equitable powers to create substantive rights which do not exist under state law.").

174. *See id.* at 273 (noting that courts can apply equity to suspend state law only to the extent of an "actual conflict with the bankruptcy system provided by Congress"); *In re* Challa, 186 B.R. 750, 756–57 (Bankr. M.D. Fla. 1995) (demonstrating that a court can use its equity power to override state law when clear policy foundations to do so exist in the Bankruptcy Code).

175. *See, e.g.*, Parker, *supra* note 5, at 34 & n.22, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6296–97) (stating that the purpose of the automatic stay provision in 11 U.S.C. § 362 is to protect creditors' interests (citing H.R. REP. NO. 95-595, at 340 (1978)).

176. *See* Hirsch, *supra* note 64, at 610–11 & n.121–23 (surveying early cases and commentators who viewed the payment of debts as a moral obligation and found disclaimers and spendthrift trusts to be "morally wrong").

177. *See id.* at 611 (arguing that viewing debts as a moral obligation misconstrues the arm's length nature of consensual debtor-creditor relationships); *see also* Dewsnup v. Timm, 502 U.S. 410, 435 (1992) (Scalia, J., dissenting) ("[B]ankruptcy law has little to do with natural justice.").

178. *See, e.g.*, Grogan v. Garner, 498 U.S. 279, 286 (1991) (acknowledging the purpose of the Bankruptcy Code to empower debtors to "reorder their affairs" and enjoy new opportunities free of debt).

179. *See* Richard A. Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757, 763–64 (1975) (discussing aspects of the legal system that contribute, both intentionally and unintentionally, to the goal of promoting the most efficient allocation of resources).

180. *See. id.* at 761 (discussing the choices that parties to legal disputes make with the goal of rationally maximizing their satisfaction under conditions of uncertainty).

utility.[181] Bankruptcy frustrates the accomplishment of these expectations. Therefore, bankruptcy law faces the dilemma of choosing which party should bear the incidence of loss.[182]

Many commentators agree that the risk of loss should fall on the party most able to protect itself from loss.[183] But they disagree as to which party will normally occupy that position. For some, the debtor is better able to bear the risk of loss because he controls his own financial affairs.[184] For others, creditors are more able to bear the risk of loss because they have better systems of evaluating risk of default, insuring against bad debt, and diversifying their risks.[185]

Beyond the actuarial focus on risk of loss, the ultimate issue appears to be: What expectations do creditors and debtors entertain? Creditors might indeed expect that the property a debtor expects to receive by will is "fair game" in the event of bankruptcy.[186] But legal scholars have long recognized that creditors who voluntarily enter arm's length transactions have "abundant means for their own protection."[187]

Because creditors take calculated risks when entering arm's length transactions, a debtor does not hinder his creditors when he refuses to accept

181. *See id.* at 761–64 (discussing the rational calculations that parties make while negotiating over legal disputes). *But see* DAVID A. SKEEL, A HISTORY OF BANKRUPTCY LAW IN AMERICA 200 (2001) (noting criticism of the law-and-economics assumption that debtors make rational, calculated decisions).

182. *See* Howard, *supra* note 170, at 1048 (noting that one goal of bankruptcy may be "to achieve economic efficiency in its allocation of the risk of loss . . . between debtor and creditor").

183. *See* Rafael Efrat, *The Fresh-Start Policy in Bankruptcy in Modern Day Israel*, 7 AM. BANKR. INST. L. REV. 555, 558 & n.18 (1999) (citing commentary supporting the view that the party who can best protect itself from the risk of loss should bear that risk in bankruptcy).

184. *See* Theodore Eisenberg, *Bankruptcy Law in Perspective*, 28 UCLA L. REV. 953, 982–83 (1981) (arguing that debtors should bear the risk of loss because they normally have greater responsibility and control over whether they will enter bankruptcy); Robert A. Hillman, *Contract Excuse and Bankruptcy Discharge*, 43 STAN. L. REV. 99, 126 (1990) (same).

185. *See* Steven L. Harris, *A Reply to Theodore Eisenberg's Bankruptcy Law in Perspective*, 30 UCLA L. REV. 327, 362–63 (1982) (noting that creditors evaluate risk more frequently and dispassionately than debtors, have better access to insurance, and self-insure more effectively through diversification); Howard, *supra* note 170, at 1063–64 (observing that commercial creditors are more able than consumer debtors to assess the likelihood of default because they regularly assess actuarial data).

186. *See* Hirsch, *supra* note 126, at 192–93 (entertaining the notion that creditors might rely on a debtor's inheritance prospects, especially when they are known to the creditor).

187. *See* ORLANDO F. BUMP, FRAUDULENT CONVEYANCES 73 (2d ed. 1876) (arguing that courts should not administer the law for the sole benefit of creditors because they "become creditors by their own volition, and have abundant means for their own protection").

property upon which the creditor never relied when calculating those risks.[188] Creditors generally do not consider a debtor's expectations of taking property by will when assessing whether or not to do business with the debtor.[189] Thus, if creditors could reach a debtor's family property by defeating his disclaimer, they actually would receive more than that for which they had bargained.[190]

Allowing creditors to reach the debtor's disclaimed property in this situation would actually give creditors a windfall by reason of the debtor's bankruptcy.[191] This result is particularly disturbing given that the bankruptcy court would have to trample on state property law to achieve such a result.[192] Therefore, serious considerations weigh against disregarding prepetition disclaimers.[193] These considerations include preventing a windfall to creditors and also promoting states' legitimate interests in "familial devotion and estate planning" that justify their disclaimer laws.[194]

Despite its relevance to voluntary creditor-debtor relations, this expectations analysis does not seem to apply in the context of involuntary creditors. Professor Hirsch argues that courts should permit involuntary creditors, such as tort claimants, to defeat a debtor's disclaimer.[195] In such situations, the debtor incurs the debt without the creditor's consent, so he

188. *See* Hirsch, *supra* note 64, at 612–13 (demonstrating that a debtor's refusal to accept property does not reduce creditors' opportunities for recovery, but only fails to increase them beyond those opportunities that creditors agreed upon after calculating the risks of contracting with the debtor).

189. *See id.* at 613–14 (noting that creditors would not rely on a debtors' inheritance prospects when setting the price of credit, due to their inability to foresee access to the inheritance and the difficulty of valuing uncertain expectancy interests).

190. *See id.* at 614 ("If creditors stood in a position to prevent disclaimers by insolvents they would receive, literally, more than they bargained for: The expectancy of inheritance will not be reflected in the price of credit.").

191. *See id.* at 614 n.135 ("[C]reditors would be the ones receiving a 'windfall' if they could capture their debtors' expectancies!").

192. *Cf.* Butner v. United States, 440 U.S. 48, 55 (1979) ("Uniform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving 'a windfall merely by reason of the happenstance of bankruptcy.'").

193. *See* Succession of Neuhauser, 579 So. 2d 437, 442 (La. 1991) (recognizing policy problems in allowing a creditor to defeat a disclaimer merely because the disclaimer increased debtor's insolvency (citing Hirsch, *supra* note 64, at 614)).

194. *See id.* at 442 (discussing legitimate motives for disclaimers that render the "fraudulent transfer" label questionable).

195. *See* Hirsch, *supra* note 64, at 651–52 (employing a "bifurcated analysis" in which voluntary creditors should have no right to prevent a debtor's disclaimer, but involuntary creditors should be able to "veto" a debtor's disclaimer).

assumes an "equitable obligation" to make the involuntary creditor whole.[196] But the vast majority of debtors are consumer debtors, and most of their creditors are commercial lenders.[197] Due to federalism concerns and in light of the fact that the Bankruptcy Code does not distinguish voluntary from involuntary creditors, federal courts, in the absence of congressional action, should not invalidate state law disclaimers for the benefit of involuntary creditors.

B. Debtors' Expectations

This Note contemplates disclaimers by debtor beneficiaries who expect to receive property under a will. Until the testator dies and the executor probates his will, a debtor beneficiary merely has an expectancy interest in the property.[198] Even after probate, if the debtor disclaims, the doctrine of relation-back provides that no legal or equitable title ever vested in the debtor.[199] Therefore, the debtor never has anything greater than an expectancy interest in the property.

Most courts hold that a prospective beneficiary under a will cannot legally transfer his expectancy interests in property.[200] But if state law allows such a transfer, a court might apply equity to invalidate a disclaimer if the debtor has previously assigned or pledged the property to a creditor.[201] Even if state law does not allow such a transfer, a court might uphold the transfer in equity if the

196. *See id.* at 618 (stating that the debtor has an equitable obligation to restore the creditor to the status quo).

197. *Cf.* Howard, *supra* note 170, at 1065 ("Given that most bankrupts are consumer debtors and that most of their creditors are commercial lenders, economic analysis leads to the conclusion that discharge should be freely given.").

198. *See* JOHN A. BORRON, THE LAW OF FUTURE INTERESTS § 391, at 418 (3d ed. 2002) (defining an expectancy as the possibility that a prospective legatee or devisee might acquire property by will upon the death of the testator).

199. *See supra* Part II.A (discussing the effect of the relation-back doctrine).

200. *See* BORRON, *supra* note 198, § 395, at 426 (finding that the rationale of most courts is that "a bare expectancy is not assignable at law because the grantor has nothing to assign"); Gregory S. Alexander, *The Concept of Property in Private and Constitutional Law: The Ideology of the Scientific Turn in Legal Analysis*, 82 COLUM. L. REV. 1545, 1572–73 (1982) (explaining that heirs apparent cannot legally assign or transfer expectancy interests because the putative grantor has nothing to assign or transfer).

201. *See* Pher Partners v. Womble (*In re* Womble), 289 B.R. 836, 847 (Bankr. N.D. Tex. 2003) (reasoning that it would be unjust to allow a debtor to disclaim after having legally assigned or pledged his inheritance to a third party (citing Badouh v. Hale, 22 S.W.3d 392, 396–97 (Tex. 2000))).

creditor has given fair consideration for the expectancy or if the debtor has granted a security interest in the property.[202]

In exercising its equitable powers, a bankruptcy court cannot completely disregard statutory dictates.[203] Federal bankruptcy law does not treat an expectancy interest as an interest in property for inclusion in the bankruptcy estate unless the debtor actually accepts the property on the date of filing or within 180 days thereafter.[204] If a debtor has not accepted the property prior to filing and has not attempted to assign the expectancy or grant a security interest in it, a bankruptcy court clearly cannot apply equity to bring the property into the bankruptcy estate.[205]

The Introduction to this Note asks whether the power to disclaim gives license to the wealthy to spend extravagantly with the knowledge that creditors will not attach their family property. Commentators pose a similar question with respect to transfers of expectancy interests.[206] Professor Dawson explains that restraints on alienation of expectancy interests began with the concerns of English chancellors that "improvident sales" would lead to the dispersal of England's landed estates.[207] Their motive was "to preserve for a dominant class the economic resources on which its prestige and power depended."[208]

In light of this background, one might suggest that the power to disclaim also represents a perverse protection for the wealthy. But modern American courts addressing expectancy interests have not focused on preserving

202. *See* BORRON, *supra* note 198, § 396, at 431 (asserting that "[t]he transfer of an expectancy by way of security is held just as effective as an outright assignment" (citing Hofmeister v. Hunter, 283 N.W. 330 (Wisc. 1939))); Alexander, *supra* note 200, at 1573 (noting that a "contract to convey the inherited interest in the future is specifically enforceable in equity, so long as fair and substantial consideration is given in exchange for the expectant heir or legatee's promise to convey his interest").

203. *See Womble*, 289 B.R. at 849 (stating that bankruptcy courts must resist the temptation to apply equity to disregard a disclaimer when the particular circumstances of a case show that the disclaimer was otherwise legally valid).

204. *See* BORRON, *supra* note 198, § 396, at 432 n.2 (explaining that an expectancy, in bankruptcy proceedings, is not an asset of the devisee unless it qualifies as a bequest, devise, or inheritance that the bankruptcy estate may reach under 11 U.S.C. § 541(a)(5)(A)).

205. *See Womble*, 289 B.R. at 849 (suggesting that a court cannot apply equity to defeat a disclaimer when the debtor's pre-disclaimer actions do not legally bring property into the bankruptcy estate).

206. *See, e.g.*, John P. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253, 267–76 (1947) (analyzing the history of courts' protection of expectant heirs in equity).

207. *See id.* at 268 (describing the practice of English chancellors in the late seventeenth and eighteenth centuries that restrained expectant heirs who endangered family estates through their conspicuous expenditures).

208. *Id.*

dominant economic classes, but on protecting expectant beneficiaries from unscrupulous creditors.[209] For instance, in allocating economic power between parties in dispute, American courts have increasingly addressed the problems that stem from inequality in bargaining power.[210]

Allowing creditors to reach a debtor's expectancy to receive property by will would frustrate the efficient and equitable allocation of resources in two major ways.[211] First, as the previous paragraph suggests, it would allow creditors to take unfair advantage of the expectant beneficiary.[212] Second, it would frustrate the testator's intended course of devolution for his property.[213] This Note next addresses these two issues in turn.

1. Bargaining Power

Professor Dawson explains that the doctrine against transferring expectancy interests first developed when the landed elite held the political power, while their creditors were merely "hangers-on of polite society who pandered to extravagance by supplying it with the necessary means."[214] Dawson suggests that judges who used their power to protect the wealthy rested

209. *See id.* at 274–76 & n.62 (discussing the rejection of the policy to prevent dissipation of family estates in American law, but recognizing rare cases that maintained strict controls over sales of expectancies to protect the adequacy of price); *see also* Klingensmith v. Klingensmith, 185 N.W. 75, 77 (Iowa 1921) (concluding that a bank received unjust enrichment when it induced an expectant heir to quitclaim his expectancy interest in his father's estate by representations that it was merely security for a loan rather than full consideration for the loan).

210. *See* Dawson, *supra* note 206, at 253 (noting that courts, as they have increasingly taken a stand on control of economic power in the modern world, have confronted problems of inequality in bargaining power).

211. *Cf. supra* notes 179–81 & accompanying text (analyzing the law-and-economics view that the purpose of the law is to promote the efficient allocation of resources by effectuating the reasonable expectations of parties in conflict).

212. *See* BORRON, *supra* note 198, § 395, at 426 (observing an objection to the alienability of expectancies on grounds that it permits creditors to take unfair advantage of a devisee apparent, who may be inclined to "discount the future and 'sell his birthright for a mess of pottage'").

213. *See id.* (recognizing an objection to the alienability of expectancies on grounds that they are unfair to the testator, who should enjoy the privilege to determine the course of his property's devolution by will).

214. *See* Dawson, *supra* note 206, at 268 ("It was honorable to maintain a gentlemanly extravagance, even where current income did not suffice; all blame was reserved for those hangers-on of polite society who pandered to extravagance by supplying it with the necessary means.").

their judgments on inequitable and elitist grounds.[215] But in modern day America, creditors are no longer "hangers-on of polite society."

Today corporate creditors dominate social and political power in America.[216] Credit card companies extend unsecured credit to lower and middle class Americans with a feverish zeal that some might describe as predatory.[217] The same creditors actively lobby Congress for tighter bankruptcy laws, using the moral argument that "debtors have a responsibility to make good on their obligations."[218] While the latest congressional effort to make bankruptcy laws more favorable to creditors fell to a presidential veto,[219] some commentators believe that even the current bankruptcy laws, in practice, stack the deck against consumers.[220]

Against this backdrop, restraints on alienation of a debtor's expectancy interest should apply to the prepetition disclaimer context. Courts should shield a debtor's expectancy from creditors, especially creditors that have not bargained for a security interest in the expectancy. This conclusion is particularly salient given that creditors are often in a position of superior bargaining power.

215. *See id.* at 268 & n.37 (citing several cases that display courts' "snobbery" in protecting expectant heirs of "ancient families" from their own merchant-fed extravagance).

216. *See* Donald L. Bartlett & James B. Steele, *Soaked By Congress: Lavished with Campaign Cash, Lawmakers are "Reforming" Bankruptcy*, TIME, May 15, 2000, at 64 (discussing the extensive lobbying efforts of credit card companies and other financial services businesses that contributed more than twenty million dollars to members of Congress during the 2000 debate on the Bankruptcy Reform Bill).

217. *See* TERESA A. SULLIVAN ET AL., THE FRAGILE MIDDLE CLASS 18, 108–11, 134–40 (2000) (reporting that credit card companies vastly increased lending to middle class and even poor Americans in the 1980s and 1990s); William C. Whitford, *The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy*, 68 AM. BANKR. L.J. 397, 399 (1994) (attributing some of the growth in consumer bankruptcy filings during the 1980s and 1990s to a declining economic status of the lower middle class combined with an increased availability of credit card lending).

218. *See* SKEEL, *supra* note 181, at 191 (discussing the recurring emphasis on "credit morality" by creditors' lobbyists during the debates on bankruptcy laws in Congress); Bartlett & Steele, *supra* note 217, at 64 (describing the credit card industry's public relations campaign during the 2000 bankruptcy reform debate that portrayed the bankruptcy system as "rife with abuse" and in need of legislation that would make it easier to collect from debtors in bankruptcy). *But see* Hirsch, *supra* note 64, at 610–11 (arguing that viewing debts as a moral obligation misconstrues the arm's length nature of consensual debtor-creditor relationships).

219. *See* SKEEL, *supra* note 181, at 209–10 (reporting the factors responsible for President Clinton's veto of the 2000 Bankruptcy Reform Bill).

220. *See* Whitford, *supra* note 217, at 415–16 (suggesting that most debtors who enter bankruptcy are not in an optimal position to make the numerous strategic choices necessitated by the complex Bankruptcy Code because they lack the necessary resources).

Allowing creditors to defeat a disclaimer and reach a debtor's expectancy interest in family property would create a loss of value to the beneficiary's family that would be disproportionate to the gain in value to creditors.[221] For instance, a forced sale would likely yield less than the property's actual value[222] and would certainly yield less than the sentimental value of the property to the beneficiary's family. Such a result would frustrate the law's goal of enforcing deals in a way that promotes the optimal allocation of resources.[223]

2. *Testator Intent*

Is a disclaimer a legitimate device by which a person can protect property that has sentimental value to his family? A debtor cannot argue that defeating a disclaimer frustrates his intention that family property will pass to his children.[224] Such an argument would lead to the conclusion that the debtor's disclaimer amounted to an exercise of a general power of appointment.[225] Actually, most disclaimer statutes prohibit the disclaimant from specifically directing property to a taker of his choice.[226] The rationale behind disclaimers is that the devisee should be able to reject any devise.[227] In rejecting a devise, the debtor cannot then determine to whom the property will pass.

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221. *See* BORRON, *supra* note 198, § 395, at 426–27 (noting that if creditors could reach expectancy interests, expectant devisees might seek immediate credit that creditors could unreasonably discount in comparison to the eventual value of the property).

222. *See id.* at 426–27 ("A forced sale would in all probability bring but a small fraction of the actual value . . . which the debtor expected to acquire.").

223. *See supra* notes 179–81 and accompanying text (analyzing the law-and-economics view that the purpose of the law is to promote the efficient allocation of resources by effectuating the reasonable expectations of parties in conflict); *cf.* SKEEL, *supra* note 181, at 201 (suggesting that the law-and-economics analysis need not always result in a conclusion that favors creditors).

224. *See* Lowe v. Brajkovic (*In re* Brajkovic), 151 B.R. 402, 411 (Bankr. W.D. Tex. 1993) (rejecting the debtor's argument that defeating her disclaimer frustrated her intentions to assure that her property would pass to her children).

225. *See supra* note 37 and accompanying text (identifying the holdings in *Stein v. Brown*, 480 N.E.2d 1121 (Ohio 1985), and *Kalt v. Youngworth* (*In re Kalt's Estate*), 108 P.2d 401 (Cal. 1940), stating that a disclaimer is closely analogous to a general power of appointment under which a disclaimant can determine to whom the disclaimed property will pass).

226. *See* Bender, *supra* note 66, at 903 (asserting that the general power of appointment argument fails to recognize that disclaimer statutes "specifically prohibit the disclaimant from directing the interest to another transferee of her choice").

227. *See supra* notes 20–23 and accompanying text (discussing the right to reject a gift as a rationale for allowing disclaimers).

Courts should not try to effectuate the disclaimant's intent about to whom the property should pass. But they should, in fact, try to come as close as possible to effectuating the intent of the testator.[228] A court should reasonably infer that the testator, in the event of a beneficiary's disclaimer, would prefer that the property pass to another member of his family.[229] In many circumstances, the testator's will expressly anticipates the possibility of disclaimer.[230] Creditors reaching disclaimed assets in such situations would directly interfere with the testator's estate plan. The testator's intent is something that bankruptcy law should protect.

States have an interest in protecting the family devotion and estate planning goals of testators.[231] Allowing creditors to defeat a disclaimer and reach a debtor's expectancy of receiving property by will would frustrate the testator's intended course of devolution for his property.[232] "Instead of his property passing to his heir or devisee as he had supposed, it would pass to a stranger, perhaps even to some unscrupulous loan shark."[233] Thus, defeating a disclaimer would create a result that "ministers to the mercenary passions at the expense of benevolent affections."[234]

228. *See, e.g.*, *In re* Estate of Tateo, 768 A.2d 243, 246 (N.J. Super. Ct. App. Div. 2001) (directing that the court should focus on the testator's subjective intent based on his "dominant plan and purpose" in light of the surrounding circumstances (citing Fid. Union Trust Co. v. Robert, 178 A.2d 185, 187 (N.J. 1962))).

229. *See id.* at 246–47 (reasoning that the court, in deciding what the testator's intent would be in changed circumstances, should presume that the testator held impulses common to human nature). *But see* Barner v. Sheldon, 678 A.2d 717, 717 (N.J. Super. Ct. App. Div. 1996) (refusing to find malpractice liability when a lawyer failed to propose a tax saving disclaimer for the testator's children because such a disclaimer would frustrate the testator's express intent to minimize the benefits that would pass to his wife).

230. *See, e.g.*, JEROME A. MANNING ET AL., MANNING ON ESTATE PLANNING § 2:10, at 2-51 (5th ed. 2001) (noting that a testator's will should clearly provide for the disposition of property in the event of a disclaimer).

231. *See* Succession of Neuhauser, 579 So. 2d 437, 442 (La. 1991) ("[T]he legitimate motives of familial devotion and estate planning that may underlie [disclaimers] arguably should not be threatened or frustrated, and therefore they should not be vulnerable to attack unless there are grounds to claim that the [disclaiming] party's intent was fraudulent.").

232. *See* BORRON, *supra* note 198, § 395, at 426 (recognizing an objection to the alienability of expectancies on the grounds that it would be unfair to the testator, who should enjoy the privilege to determine the course of his property's devolution by will).

233. *Id.*

234. *See* BUMP, *supra* note 187, at 73 (reasoning that the law should not always give creditors priority if that means trampling on others who have a strong beneficial or sentimental interest in property because creditors "become creditors by their own volition and have abundant means for their own protection").

VI. Conclusion

Does the Supreme Court's holding in *Drye v. United States* extend to disclaimers occurring within one year prior to a debtor's filing of a bankruptcy petition? The author concludes that it does not. This conclusion rests on the formulation of what constitutes an interest of the debtor in property pursuant to the federal fraudulent conveyances statute, 11 U.S.C. § 548(a). In states that apply the common law doctrine of relation-back, disclaimed property is never an interest of the debtor in property.[235] While some courts assert that the Bankruptcy Code preempts the relation-back doctrine,[236] most post-*Drye* courts distinguish the prepetition bankruptcy disclaimer situation from the tax lien situation in *Drye*.[237] It appears that the Supreme Court decided *Drye* largely on the basis of public policy concerns about the ability of the federal government to collect delinquent taxes, not on the basis of property law doctrine.[238]

While property law does not permit the bankruptcy trustee to reach disclaimed property, some commentators advocate the application of public policy to decide the prepetition disclaimer question.[239] From a public policy standpoint, should *Drye* extend to defeat prepetition disclaimers? The author concludes that it should not. This conclusion rests on the principles of federalism and separation of powers, specifically that federal courts should not preempt areas of traditional state control without clear congressional intent to do so.[240] Since the Bankruptcy Code and its underlying policies do not clearly

235. *See* Garrett v. Bank of Okla. (*In re* Faulk), 281 B.R. 15, 20–21 (Bankr. W.D. Okla. 2002) (explaining that the Oklahoma relation-back doctrine prevents the bankruptcy trustee from reaching disclaimed property under 11 U.S.C. § 548(a) (2002)); Jones v. Atchison (*In re* Atchison), 101 B.R. 556, 557 (Bankr. S.D. Ill. 1989) (stating that the Illinois relation-back doctrine prevents the bankruptcy trustee from reaching disclaimed property under § 548).

236. *See, e.g.*, *In re* Kloubec, 247 B.R. 246, 256 (Bankr. N.D. Iowa 2000) (concluding that the bankruptcy trustee could avoid a disclaimer under 11 U.S.C. § 548(a) despite the Iowa relation-back doctrine because the disclaimer allowed the debtor to transfer the property to his children).

237. *See supra* notes 77–82 and accompanying text (discussing recent cases on prepetition disclaimers that limit the application of *Drye* to tax lien cases under 26 U.S.C. § 6321).

238. *See Garrett*, 281 B.R. at 20 (observing that *Drye* rested on authority suggesting that the IRS has rights superior to private creditors); *In re* Nistler, 259 B.R. 723, 726–27 (Bankr. D. Or. 2001) (same); *see also supra* notes 66–68 and accompanying text (suggesting that the Court resolved *Drye* on the basis of public policy concerns rather than on the theoretical grounds of what constitutes an interest of a debtor in property).

239. *See, e.g.*, Hirsch, *supra* note 64, at 609–10 (asserting that courts should resolve the issue of disclaimers with reference to the public policy goals of the Bankruptcy Code rather than on the basis of arcane property theories).

240. *See supra* notes 141–42 and accompanying text (arguing that federal courts should only create federal common law in areas where Congress has clearly shown an intent to preempt

defeat prepetition disclaimers, federal courts should not defeat prepetition disclaimers absent future congressional action.[241]

This conclusion also rests on the relative expectations of the debtor and his creditors. While bankruptcy disrupts creditor-debtor relations, a prepetition disclaimer does not actually defeat any expectations of the creditor to receive property that he has not relied upon when deciding to extend credit.[242] Creditors usually do not bargain with debtors for a security interest in their expectancy property.[243] Defeating a debtor's prepetition disclaimer would work against the testator's wishes of keeping assets in the family rather than in the hands of creditors. Overriding the disclaimer would also unfairly frustrate the efficient and equitable allocation of resources by taking assets out of the family to benefit creditors who, despite their superior bargaining power,[244] never actually bargained for the property.

state law with federal law).

241. *See* Bender, *supra* note 66, at 909 (proposing that Congress pass legislation to obliterate "inconsistencies arising when federal law implicates state law disclaimers").

242. *See supra* notes 188–91 (observing that allowing creditors to reach debtors' disclaimed property would result in a windfall to creditors because voluntary creditors take calculated risks when entering arm's length transactions which usually do not rest on considerations of the debtors' expectations of receiving property by will).

243. *See* BORRON, *supra* note 198, § 396, at 431–32 (noting that a debtor may transfer an expectancy interest by granting a security interest to a creditor).

244. *See supra* Part V.B.1 (discussing the unequal bargaining power between most creditors and debtors and suggesting that politically powerful corporate creditors routinely take advantage of consumer debtors).