Washington and Lee Law Review

Volume 75 | Issue 1 Article 2

1-1-2018

The Federal Law of Property: The Case of Inheritance Disclaimers and Tenancy by the Entireties

David Gray Carlson
Benjamin N. Cardozo School of Law

Recommended Citation
David Gray Carlson, *The Federal Law of Property: The Case of Inheritance Disclaimers and Tenancy by the Entireties*, 75 Wash. & Lee L. Rev. 3 (2018), https://scholarlycommons.law.wlu.edu/wlulr/vol75/iss1/2

The Federal Law of Property: The Case of Inheritance Disclaimers and Tenancy by the Entireties

David Gray Carlson*

Table of Contents

* Professor of Law, Benjamin N. Cardozo School of Law. I would like to acknowledge the fine research assistance provided by Antonio Fuertes. This Article has benefited from comments by my esteemed colleagues Jeanne Schroeder and Stewart Sterk.

I. Introduction

Federal statutes often invoke the word "property" without defining it. For example, according to the Internal Revenue Code, "[I]f any person liable to pay any tax neglects . . . to pay . . . the amount . . . shall be a lien in favor of the United States upon all *property* and *rights to property*, whether real or personal, belonging to such person."[1]

---

1. I.R.C. § 6321 (2012) (emphasis added). I shall occasionally refer to federal criminal forfeiture provisions which invoke the undefined term "property":

> Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—
>
> > (1) any *property* constituting, or derived from, any proceeds of the person obtained, directly or indirectly, as the result of such violation;
> >
> > (2) any of the person's *property* used, or intended to be

The Bankruptcy Code often invokes the word "property." A very prominent example:

> The commencement of a case under [the Bankruptcy Code] creates an estate. Such estate is comprised of all the following *property*, wherever located and by whomever held:
>
> > (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in *property* as of the commencement of the case.[2]

My thesis is that there exists a federal law of property which must be understood as natural law.[3] When federal law encounters the word "property" in a statute, it is unable to define the word except by reference to non-federal law.[4] Yet this non-federal law must ultimately stand judgment in the docket of natural law.[5]

> > used, in any manner or part, to commit, or to facilitate the commission of, such violation; and
> >
> > (3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 408 of this title, the person shall forfeit, in addition to any *property* described in paragraph (1) or (2), any of his interest in, claims against, and *property* or contractual rights affording a source of control over, the continuing criminal enterprise.

21 U.S.C. § 853(a) (2012) (emphasis added). Section 853(b) goes on to state that property includes real property and personal property both tangible and intangible. In criminal drug cases, we have this pronouncement:

> The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> . . .
>
> > (7) All *real property*, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or facilitate the commission of, a violation of this [title] punishable by more than one year's imprisonment.

21 U.S.C. § 881 (emphasis added).

2. 11 U.S.C. § 541(a) (emphasis added).

3. *Infra* Parts II–III.

4. *See* William H. Baker, Drye *and* Craft*—How Two Wrongs Can Make a Property Right*, 64 U. PITT. L. REV. 745, 759 (2003) (noting that the Supreme Court and other courts first acknowledge the proposition that state law determines the nature of the property interest before turning to federal law).

5. *See* JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 103–06 (1985) (describing the state-federal dialectic).

Natural law bears a specific psychoanalytic structure—the structure of the superego.[6] All common law (state or federal) is superegoic in nature. In common law reasoning, settled rules are susceptible to destruction and obliteration from within. Under the common law, positive law is never settled.[7] It always quakes in fear before its natural law master, which can in an instant release destructive horror upon its subservient head.[8] The destruction of positive law is traumatic and disturbing.[9] The only therapy for this trauma is for the bystanders to positivize what just happened, integrating the trauma back into a new positivist symbolic order.[10] Thus is the positive federal law of property born—as the obliteration and correction of state law.[11]

In this vision, state law stands for positive law—the symbolic realm, without which the superego remains forever silent. The destructive power of natural law presupposes something that can be destroyed.[12] Thus, natural law can be observed only in the negation of positive law.[13] So initially state law must propose what property is. But just because state law proclaims that interest "property" does not make it so. Natural law negates state law and re-issues it in federal form.[14] The horror of destruction (that's all the superego is)[15] is cabined by a reformulated symbolic realm that

---

6. *See* David Gray Carlson, *The Traumatic Dimension in Law*, 24 CARDOZO L. REV. 2287, 2295 (2003) [hereinafter Carlson, *Traumatic Dimension*] ("The element of law that the superego exploits to the hilt is the requirement that action is to be judged according to pre-existing rules.").

7. *See id.* (noting that the system reworks to justify or condemn earlier acts).

8. *Id.* at 2296.

9. *See id.* at 2288 (stating that every judicial decision is traumatic—providing causal narrative after the fact).

10. *Id.* at 2306.

11. *Infra* Parts II.B–C.

12. *See* Jeanne L. Schroeder & David Gray Carlson, *The Appearance of Right and the Essence of Wrong*, 24 CARDOZO L. REV. 2481, 2485 (2013) (arguing that a concept must exist to be negated).

13. *See id.* (discussing the relationship between existence and negation).

14. *See infra* notes 86–89 and accompanying text (noting that federal law defeats state law interpretation).

15. *See* Jeanne L. Schroeder & David Gray Carlson, *Kenneth Starr: Diabolically Evil?*, 88 CAL. L. REV. 653, 671 (2000)

> [T]he preontological law is the Freudian superego as rewritten by Lacan. In ordinary Freudian understanding, the "superego" is the

is distinctly federal in nature. To be sure, sometimes the federal intuition replicates the state law result and seems to repeat it and uphold it.[16] In truth, every repetition is a creative act.[17] By repeating the state law result, a court is actually *creating* a new federal result. And, on the other hand, perhaps state law will not be reissued in federal form. Rather, a federal court will discover that the federal law of property was and always has been something at odds with the state law result. Federal law *discovers* that which always was. It does not just invent something new—that would be mere heteronomous legislation.[18] In discovering what it presupposes, federal law always speaks in a future anterior tense.[19] It discovers what "will have been" the federal law all along.

Positivists will bristle at this and say that property has no existence beyond what positive legislation claims it to be. Property is entirely "conventional," the objection goes.[20] But purely conventional law is contradictory. The rules cannot possibly account full for the concept of "property" (or any other concept).[21] This is the lesson of Russell's Paradox in set theory, and because of this lesson, mathematics itself cannot entirely be reduced to rules.[22] If mathematics is not entirely captured by rules, how much less so can we expect this of property law? It is the highest paradox

---

> internalization of law as prohibition . . . roughly equivalent to what is commonly called "conscience" . . . . It chastises the subject for "doing evil." But the Lacanian superego has a "diabolical" side as well. This is the side that requires the possibility of its own transgression. Consequently, the Lacanian superego, as the condition of law, must sadistically cause the possibility of the very evil it condemns.

16. *See generally* Steve R. Johnson, *Why* Craft *Isn't Scary*, 37 REAL PROP. PROB. & TR. J. 439, 448–49 (2002) [hereinafter Johnson, *Why* Craft *Isn't Scary*].

17. *See generally* ARTHUR J. JACOBSON, HEGEL AND LEGAL THEORY 97 (Drucilla Cornell et al. eds., 1991).

18. *See infra* notes 46–48 and accompanying text (discussing the heteronomous judicial process).

19. *See* Carlson, *Traumatic Dimension*, *supra* note 6, at 2287 (explaining that natural and positive law work in tandem to discover the truth).

20. *See* David Gray Carlson, *Legal Positivism and Russell's Paradox*, 5 WASH. U. JUR. REV. 257, 259 (2013) [hereinafter Carlson, *Russell's Paradox*] (arguing that positivism defines law as the set of all primary and secondary rules selected according to conventional rules of recognition).

21. *See id.* (emphasizing that legal positivism is contradictory).

22. *See id.* ("[L]aw cannot be reduced to a closed set of rules by which law can be recognized.").

in mathematics that, thanks to Bertrand Russell, set theory has no theory of the set.[23] Defining a set is legislatively forbidden[24] because it leads to contradiction. Similarly, the rules that describe the natural law of property generally—and especially federal property, for our purposes—can never be fully set forth.[25] There is no "rule of recognition."[26] There is only recognition *simpliciter*.[27] The rules are manufactured after the fact to make sense of the recognition.[28]

That property law is natural is to say that the concept exceeds the conventions that describe it. Practice precedes theory—in law as in any other discourse. Hilary Putnam, in his famous antitheoretic essay, *The Meaning of Meaning*,[29] shows that the definition of a word cannot reduce to conventional rules of usage. There is always an "indexical" moment of dumb pointing, where the speaker finally points at an object (in Putnam's example, at $H_2 0$) and says, "*That's* what I mean!" As with Russell's paradox, it is impossible to reduce the meaning of any word to the rules of its usage. Indexicality is the stumbling block that establishes the truth that practice always exceeds our ability to theorize it.[30] The surplus of practice over theory is precisely what I mean by natural law. Positive law *is*, but natural law *does*.[31] And what it does is to destroy.[32]

---

23. *See id.* (stating that legal positivism is a set that does not belong to itself and so suffers from contradiction).

24. *See id.* at 281 (explaining that the axiom scheme of separation prevents contradiction).

25. *See id.* ("But the price of this banishment is that set theory has no criterial theory of what a set is.").

26. *See id.* at 259 (noting that primary rules cannot be reduced to a determinate rule of recognition).

27. *See id.* (stating that there is no rule of recognition, only incomplete set of individual laws).

28. *See id.* (noting that, under the Paradox, it is impossible to say in advance what the law is).

29. *See* 2 HILARY PUTNAM, MIND, LANGUAGE AND REALITY: PHILOSOPHICAL PAPERS 215 (1975) (introducing how meaning may depart from syntax of natural languages).

30. *Id.* at 229.

31. *See* Carlson, *Traumatic Dimension*, *supra* note 6, at 2296 (describing the interaction between positive and natural law).

32. *See id.* at 2288 (noting the inherent trauma in judicial decisions).

Now how is a federal judge to intuit whether some property interest, as defined by state law, is or is not really federal property after all? The process is ably described by the United States Supreme Court in *United States v. Craft*.[33] In her analysis of the Michigan tenancy by the entirety, Justice Sandra Day O'Connor uses a "common idiom"—property is a "bundle of sticks."[34] The bundle of sticks is the traditional categories of right to use, right to possess (i.e., the right to exclude others),[35] and the right to alienate. "State law determines only which sticks are in a person's bundle. Whether those sticks qualify as 'property' for purposes of the federal tax lien statute is a question of federal law."[36] Labels assigned to the bundle by state law are to be ignored.[37] Labels are "form," but federal law is "substance."[38] State law is guilty of "fictions."[39] The federal courts are not blinded by state law fictions.[40] The federal law manifests what is *real*.[41]

Justice O'Connor's procedure for separating real wheat from fictional chaff depends on a faith that federal courts can be in touch with the substance, not merely the form, of the bundle of sticks to determine whether the bundle rises to the dignity of natural property.[42] The procedure works as follows: The federal judge sits in judgment of a claim by a litigant that it has a property interest (or perhaps that it has *no* property interest).[43] The judge must consult the natural law of property to see if the claim of the litigant

---

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

34. *Id.* at 278.

35. *See id.* at 283 (stating that "the right to exclude others" is "one of the most essential sticks in the bundle of rights that are commonly characterized as property" (citations omitted)).

36. *Id.* at 278.

37. *See* Johnson, *supra* note 16, at 444 (arguing that state-created labels are not controlling or relevant).

38. *See id.* (emphasizing that substance trumps form in federal taxation).

39. *See id.* ("Fictions [are] labels that diverge from underlying substance or reality . . . .").

40. *See* United States v. Irvine, 511 U.S. 224, 240 (1994) ("Absent such a legal fiction, the federal gift tax is not struck blind by a disclaimer.").

41. *See* Hannon v. City of Newton, 820 F. Supp. 2d 254, 259 (D. Mass. 2011) (noting that *Craft* saw what Michigan law was "in reality").

42. *See Craft V*, 535 U.S. 274, 276 (2002) (noting that, despite the state law fiction, the individual rights in the estate constitute federal property).

43. *See id.* (delaing with a litigant's claim that no property interest existed).

is correct.[44] This is done by entering into the state of rational autonomy.[45] The judge must purge herself of all heteronomy—defined as any emotion, inclination, fear, awe of the litigant's counsel, or hope for praise in the law reviews.[46] All of these things are imposed from the outside of the rational autonomous self. If the judge successfully purges herself of all heteronomy, then the judge will correctly intuit whether the litigant has a natural property right or not.[47]

The difficulty the judge faces is that, like all humans, she is doomed to the realm of appearances. She has an intuition that the litigant has (or has not) a property interest. But perhaps this is not natural law speaking through the oracle of the autonomous judge. Perhaps it is a hallucination—a mere appearance. The devil hath power to assume the pleasing shape of federal law. The judge never knows whether she has peered into the sublime abyss of natural law or whether she has succumbed to evil, heteronomous forces that merely assume the pleasing guise of natural reason.[48] The undecidable issue for the judge is whether her intuition is an autonomous vision of property law itself (proceeding from Homer's gate of horn),[49] or whether her intuition emanates from heteronomy (the gate of ivory). Her intuition may only be the product of what the judge had for breakfast—for legal realism,

---

44. *See* Carlson, *Russell's Paradox*, *supra* note 20, at 277 (discussing natural law as independent from arbitrary human will).

45. *See* Schroeder & Carlson, *supra* note 12, at 2494 (noting the autonomous person is not objective to itself).

46. *See* David Gray Carlson, *Hart avec Kant: On The Inseparability of Law and Morality*, 1 WASH. U. JURIS. REV. 21, 38 (2009) [hereinafter Carlson, *Hart avec Kant*] (defining heteronomy to include inclination and emotion).

47. *See* David Gray Carlson, *Dworkin in the Desert of the Real*, 60 U. MIAMI L. REV. 505, 517 (2006) [hereinafter Carlson, *Desert of the Real*] (emphasizing that moral legal interpretation requires a practitioner to suppress her heteronomy).

48. *See id.* ("It is the state of the interpreter that she never knows for sure what the status of her own interpretation is.").

49. *See* HOMER, ODYSSEY 19.560–19.565 (1758)

> Stranger, dreams verily are baffling and unclear of meaning, and in no wise do they find fulfillment in all things for men. For two are the gates of shadowy dreams, and one is fashioned of horn and one of ivory. Those dreams that pass through the gate of sawn ivory deceive men, bringing words that find no fulfillment. But those that can forth through the gate of polished horn bring true issues to pass, when any mortal sees them.

that's all intuition *ever* is.[50] But for psychoanalysis, it is equally possible that the judge has communed directly with the natural law of property.[51] Morality may be smeared with pathology,[52] but it is equally true that pathology is reciprocally smeared with morality.[53]

A judge can never know for certain whether her intuition is a mere illusion of natural law or is the real thing. The only therapy for the judge is legal research. The judge can consult the historic intuitions that other judges, in the similar dilemmas, have in fact reached. If the precedents can be pieced together to justify the intuition, then the judge can have some degree of confidence (though never any certainty) that her intuition conforms with the natural law of property.[54]

Of course, she may find that her research contradicts her intuition. Intuition says that the litigant's claim to property law is a sham, but the research says otherwise. In that case, the judge has the option of proclaiming the previous case law as "wrong"—i.e., not in conformity with natural law.[55] This was the option Justice O'Connor chose in *Craft*.[56] Or the judge has the option of concluding that the fault is with her intuition.[57] Perhaps the past precedents *are* in touch with natural law, in which case her intuition has proven to be a false impression proceeding from a heat-oppressed brain. The judge realizes after the fact that, for breakfast, she has eaten on the insane root that takes reason prisoner. In that case, intuition must be set aside, and federal law must (creatively) repeat state law.[58] Whatever the judge decides,

---

50. *See* Carlson, *Desert of the Real*, *supra* note 47, at 516 (defining intuition in the practice of law).

51. *See id.* (noting that interpretation may occur in either an autonomous or heteronomous manner).

52. *See* Jeanne L. Schroeder, *The Stumbling Block: Freedom, Rationality, and Legal Scholarship*, 44 WM. & MARY L. REV. 263, 319 (2002) (stating the theory that all practical action is necessarily smeared with pathology).

53. Carlson, *Hart avec Kant*, *supra* note 46, at 40.

54. *See* Carlson, *Traumatic Dimension*, *supra* note 6, at 2293 (noting that precedent may justify the present decision).

55. *Id.*

56. *Infra* Part II.D.

57. Carlson, *Desert of the Real*, *supra* note 47, at 516.

58. Carlson, *Traumatic Dimension*, *supra* note 6, at 2293.

she can never really be certain that her intuition was right or wrong.[59]

Eventually, the judge writes an opinion giving reasons for her intuition. This opinion is designed to convince the litigant that the reliance on state law is contrary to (or conforms with) natural law, and also to convince the judge herself that her judgment is indeed the child of integrity, rather than the spawn of heteronomy.[60] The opinion sets forth what appears to be the pre-existing federal law of property—the major premise of a syllogism. The state law is the minor premise, and the intuition either condemns or upholds state law. But the opinion that positivizes federal law is misleading. Natural law can never be successfully positived, once and for all. Natural law is pure destruction of the positive law and nothing more than that. The opinion is an attempt to contain the monstrosity of natural law by integrating it within a familiar symbolic universe.[61] But that therapeutic opinion is itself just positive law, which must stand in the docket against future superegoic confrontations.[62] Natural law is incapable of being saturated by positive descriptions of it.[63]

In the following three sections, I will review two empirical examples of natural law judgements about state law.[64] The examples initially appear in federal tax law, with occasional illustrations from the closely aligned law of criminal forfeiture.[65] The examples concern the right of an heir to disclaim an inheritance.[66] In *Drye v. United States*,[67] the Supreme Court

59. *See* Carlson, *Desert of the Real*, *supra* note 47, at 516 (noting it is typically unclear if a judicial decision is made with autonomy or heteronomy).

60. *See id.* (describing the pronouncement of an opinion as unreasoned, instinctual, and revelatory).

61. *See id.* (describing the opinion as post-hoc rationalization).

62. *See* Carlson, *Traumatic Dimension*, *supra* note 6, at 2293 (noting that common law is subject to natural law later justifying or condemning earlier acts).

63. In mathematics, a saturated model is one in which every formula's variables is realized by a constant in the language in which the model is expressed. C.C. CHANG & JEROME KEISLER, MODEL THEORY 100 (3d ed. 1990).

64. *See infra* Parts II.B–C (demonstrating natural law in federal tax decisions).

65. *Infra* Part II.D.2.

66. *Infra* Part II.C.

67. 528 U.S. 49 (1999); *see* Thomas Merrill, *The Landscape of Constitutional Property,* 86 VA. L. REV. 885, 916 (2000) (finding that *Drye* created a clear

renounced state disclaimer law as an illusion, thereby permitting the Internal Revenue Service (IRS) to claim a lien on an inheritance the taxpayer had validly (under state law) disclaimed. The second concerns the tenancy by the entirety.[68] In *Craft*,[69] the Supreme Court ignored a Michigan fiction that a husband and wife do not own any interest in the tenancy, thereby allowing the IRS to encumber the husband's individual interest in the tenancy.

The Thesean thread picked up in tax law is then followed into federal bankruptcy law. First, I rehearse the career of *Drye* in the bankruptcy labyrinth.[70] Then the career of *Craft* is pursued at very considerable length.[71] The conclusion I reach is that the Bankruptcy Code itself is superegoic. The *Drye-Craft* technique is embedded in the Bankruptcy Code itself *avant la lettre*.

In each section, we observe a litigant denying a positive property claim based on state law, only to have a judge, under the delirium of federal law, decree that the claim to the property interest exists as a matter of federal law. State law is revealed to be an illusion.[72]

---

relationship between state and federal law in determining the existence of property). Professor Merrill criticizes constitutional law for not developing a definition of property. He finds in *Drye* a model that could be imported into questions of due process, eminent domain, etc. Merrill, *supra*, at 893, 895. "*Drye* comes as a breath of fresh air after the three previous decisions [concerning takings or due process]." *Id.* at 916. Professor Merrill finds the *Drye* opinion "to be mercifully free of any ulterior jurisprudential objectives. But it bears the marks of being rushed into print with considerable haste. Barely one month elapsed between argument and decision." *Id.* at 997.

68. *Infra* Part II.D.

69. *See Craft V*, 535 U.S. 274, 276 (2002) (dismissing the state law's characterization of property); *infra* Part II.D.

70. *Infra* Part III.A.

71. *Infra* Part III.B.

72. This Article deliberately evades what "property" means for the United States Constitution—the Takings Clause or the Due Process Clause. *See generally* Merrill, *supra* note 67 (analyzing property under the Takings and Due Process Clauses). On Professor Merrill's article, I could not presume to make any improvement. For the record, Professor Merrill mentions, but ultimately evades a confrontation with natural law and chooses to see that state law is positivist law and federal is another competing (on unequal terms) positive law. I maintain that federal law is a natural concept. In fact, so is state law, to the extent it deeply ponders the category of "property" to determine answers to legal disputes. Nevertheless, I take state law as having formulated a positive vision of what property is, a vision which has been submitted to the judgment of the superegoic federal courts.

II. Tax Law

Taxes are for little people, and pay we little people must. The Internal Revenue Code (IRC) authorizes the government to sue for the unpaid tax and, upon getting a judgment, exercise the usual rights of a judgment creditor.[73] But the IRC does not consign the Secretary of the Treasury to obtainment of a money judgment.[74] This would immerse that Secretary in a dismal world governed entirely at state law. Even though a federal court would have "federal question" jurisdiction over the taxpayer,[75] all that a federal court could do is issue a money judgment, which then could only be collected according to local rules.[76]

The IRC profoundly strengthens the Secretary's hand. It creates for the tax claim a lien that is more powerful than any mere state law lien arising from a money judgment.[77] According to I.R.C. § 6321, a lien attaches to all of a taxpayer's "property" and "rights in property."[78] According to § 6322, this lien arises as soon as the tax is assessed.[79]

"Property" in the first instance means that which state law proposes to be property. But federal judges do not take this judgment at face value. Rather, the claim of the litigant to have property must be tested against the natural law concept that overrides anything positive state law says it is.[80]

---

73. *See* I.R.C. §§ 7401, 7402(a) (2012) (outlining authorization and jurisdiction for collection); United States v. Rodgers, 461 U.S. 677, 682 (1983) (detailing the process of collecting unpaid taxes).

74. *See* I.R.C. § 7403 (authorizing the Secretary to file a civil action in district court).

75. *See id.* (describing enforcement procedures).

76. *See* FED. R. CIV. P. 69(a)(1) (deferring to state law as to the procedure for enforcing a money judgement).

77. *See Rodgers*, 461 U.S. at 683 ("The common purpose of this formidable arsenal of collection tools is to ensure the prompt and certain enforcement of the tax laws in a system relying primarily on self-reporting.").

78. *See* I.R.C. § 6321 (defining the federal tax lien).

79. *See id.* § 6322 (noting the period of a lien). Assessment is notation of a tax liability in records maintained in the office of the IRS district director; *id.* § 6203; Hefti v. I.R.S., 8 F.3d 1169, 1172 (7th Cir. 1993) (noting that assessment occurs when an assessment officer signs a summary record of assessment).

80. *Infra* Parts II.C–D.

A. Ancient History

The history of the present superegoic practice within tax law goes way back. In 1866, Congress created for the Treasury Department a lien on a debtor's "property."[81] The lien was designated to be a "first in time first in right" style.[82]

Meanwhile, in the early 20th century, state law began to experiment with security interests in personal property.[83] Starting in 1929, however, the Supreme Court[84] ruled, in effect, that inchoate liens were not really liens. Inchoate liens were uncertain as to "(1) the identity of the lienor, (2) the property subject to the lien, and (3) the amount payable were fixed beyond possibility of change or dispute."[85] Any creditor with a prior "floating" security interest found it could not claim to have a lien at all, insofar as the tax lien was concerned.[86] Thus, at an early stage, federal law felt entitled to call the bluff of state law.[87] Just because state law called the inchoate lien "property" did not make it so.[88] Inchoate liens were not liens at all, as far as the federal courts are concerned.[89]

---

81. *See* Act of July 13, 1866, ch. 184, § 9, 14 Stat. 107 (creating the initial federal tax lien).

82. *See id.* (determining priority by beneficial use).

83. *See generally* GRANT GILMORE & DAVID GRAY CARLSON, GILMORE AND CARLSON ON SECURED LENDING: CLAIMS IN BANKRUPTCY (2d ed. 2000) (detailing the evolution of personal property security interests).

84. *See* Spokane Cty. v. United States, 279 U.S. 80, 94 (1929) (determining that inchoate lien rights were wholly different from other lien rights); Frank Kennedy, *From* Spokane County *to* Vermont*: The Campaign of the Federal Government Against the Inchoate Lien*, 50 IOWA L. REV. 724, 725–27 (1965) (discussing Supreme Court's inchoate lien doctrine).

85. *See* United States v. City of New Britain, 347 U.S. 81, 86 (1954) (stating that inchoate liens may become certain as to amount, identity of the lienor, or the property subject thereto only after the date the federal liens attach); William T. Plumb, Jr., *Federal Liens and Priorities—Agenda for the Next Decade*, 77 YALE L.J. 228, 230 (1967) (describing the Supreme Court's evaluation for designating a federal inchoate lien).

86. *See* Baker, *supra* note 4, at 748–57 (analyzing the role of state law in determining tax lien priority).

87. *See id.* at 759 (noting that federal law then determines the priority between state property interests and the federal tax lien).

88. *See id.* at 760 (emphasizing that after Craft, state law merely determines which "sticks" are in a person's bundle, but federal law determines if those sticks are property for the purposes of federal tax liens).

89. *See id.* at 752 (noting the Supreme Court's indication that a state-determined inchoate lien could not operate to defeat a federal tax lien).

As is too well known to be recounted here, the drafters of the Uniform Commercial Code (UCC) were keen to create a fully effective floating lien on personal property. This could not be accomplished at the level of state law.[90] Federal legislation was required to overrule Supreme Court intuitions.[91] The natural law insight that inchoate liens are not liens at all had to be tamed by positive legislation. Under the 1966 amendments to the IRC,[92] a very limited set of floating liens was given priority over the federal tax lien. Thus, did Athena imprison the Furies under Areopagus, if only for forty-five days.[93]

Since 1966, two leading Supreme Court cases have established beyond doubt the superegoic procedure that now governs the federal common law of property.[94] But we need a preliminary visit with a case that is less overtly superegoic than the other two.[95]

B. Rodgers

In *United States v. Rodgers*,[96] the Supreme Court pondered the meaning of I.R.C. § 7403(a), which gives the federal courts

---

90. *See* Patricia Nassif Fetzer, *The Purchase Money Security Interest and the Federal Tax Lien: A Proposal for Legislative Change*, 36 HASTINGS L.J. 873, 888–89 (1985) (noting that the vulnerability of floating liens under the Uniform Commercial Code fomented federal legislation).

91. *See id.* at 886–92 (outlining the legislative history of the Federal Tax Lien Act). *See generally* AESCHYLUS, THE EUMENIDES.

92. Federal Tax Lien Act of 1966, Pub. L. 89-719, 80 Stat. 1125.

93. *See* I.R.C. § 6323(c)(2)(B), (d) (2012) (requiring that, on the forty-sixth day, U.C.C. floating liens turn inchoate again).

94. *See infra* Part II.C–D (discussing *Drye* and *Craft*).

95. Omitted from this Article is a line of cases that allow tax liens to attach to beneficial interests in spendthrift trusts. *See* Lauschner v. First W. Bank & Tr. Co., 261 F.2d 705, 708 (9th Cir. 1958) (stating that, so long as the taxpayer has a property interest in these payments, the government has the power to seize them); United States v. Dall. Nat'l Bank, 164 F.2d 489, 489 (5th Cir. 1947) (determining that a lien could be enforced by requiring a trustee to pay over all money held belonging to taxpayer); Bank One Ohio Tr. Co. v. United States, 80 F.3d 173, 176 (6th Cir. 1996) (finding that a state-law restraint on alienation would not defeat a federal tax lien). *Bank One Ohio Trust Co. v. United States* was cited favorably in *Drye*. Drye v. United States, 528 U.S. 49, 58 n.5 (1999); *see* Robert T. Danforth, *The Role of Federalism in Administering a National System of Taxation*, 57 TAX LAW. 625, 648–55 (2013) (exploring the common law of federal tax liens and spendthrift trusts).

96. 461 U.S. 677, 693–94 (1983).

jurisdiction "to subject any *property*, of whatever nature, of the [tax] delinquent, or in which he has any right, title, or interest to the payment of [a] tax or liability."[97] This garbled phrase[98] authorizes federal courts to order the sale of property encumbered by the tax lien.

In *Rodgers*, the Supreme Court had to decide what the statutory word "property" means.[99] To illustrate the definitional choice, suppose a taxpayer is a 50% cotenant of Blackacre. There are two things § 7403(a) could mean. The taxpayer's "property" could be the 50% cotenancy, which the IRS may then sell. Or the "property" is Blackacre itself, in which case the IRS can sell 100% of Blackacre.[100] Of course, the IRS can only keep 50% of the proceeds, as the nontaxpayer cotenant is not liable for the tax.[101] This was the issue in *Rodgers*.[102] The Supreme Court decided that "property" means Blackacre and not the taxpayer's interest in Blackacre.[103]

In effect, the Supreme Court granted to federal courts the power to order "partition sales of the whole," whereby the fee

---

97. I.R.C. § 7403(a) (emphasis added).

98. *See Rodgers*, 461 U.S. at 692 n.18 (noting the obtuseness of the phrase).

99. *See id.* at 691 (discussing the difference between an interest in the property and the physical property).

100. *See* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 21 (1913)

> Both with lawyers and with laymen [the term "property"] has no definite or stable connotation. Sometimes it is employed to indicate the physical object to which various legal rights, privileges, etc., relate; then again—with far greater discrimination and accuracy—the word is used to denote the legal interest (or aggregate of legal relations) appertaining to such physical object.

101. *See Rodgers*, 461 U.S. at 691 ("We also agree that the Government may not ultimately collect . . . more than the value of the property interests that are actually liable for that debt.").

102. *See id.* (noting the issue of the nonliable interest).

103. S*ee id.* at 693–94 (defining "property" as the entire thing, not just the taxpayer's interest). In the same year, the Supreme Court reached an identical conclusion in the context of bankruptcy. *See* United States v. Whiting Pools, Inc., 462 U.S. 198, 203 (1983) (viewing the interests of the debtor in property as an example of what is included in the estate, rather than a limitation). One year later, however, the Supreme Court said: "[P]roperty is more than just the physical thing—the land, the bricks, the mortar—it is also the sum of all the rights and powers incident to ownership of the physical thing. It is the tangible and the intangible. Property is composed of constituent elements." Dickman v. Comm'r, 465 U.S. 330, 336 (1984).

simple absolute could be put up for sale, not just the taxpayer's 50% share.[104] This ruling is not quite superegoic.[105] According to Justice Brennan, "it has long been an axiom of our tax collection scheme that, although the definition of underlying property interests is left to state law, the consequences that attach to those interests is a matter left to federal law."[106] So far, ostensibly, state law is not being erased. It is being procedurally enhanced. State law is not being destroyed. Its consequences are only being examined.

In *Rodgers*, Lucille and Philip Bosco owned a residence in Dallas and occupied it as a homestead.[107] Phillip, an accomplished gambler, garnered enough winnings to generate a $900,000 gambling tax liability between 1966 and 1971.[108] By 1972, these taxes were formally assessed against Philip, creating a lien on Philip's share of the residence.[109] The residence was exempt under Texas law, but the IRC has its own exemptions, which, in 1982, did not include any real property.[110] Philip died in 1974.[111] In 1977, the government filed suit against Lucille (now surnamed Rodgers).[112] The trial court awarded Lucille summary judgment on the issue of whether the tax lien could affect her homestead rights.[113] These

---

104. *See* United States v. Rodgers, 461 U.S. 677, 702 (1983) (stating that, after payment of compensation for the property interest, no further deference is required to the Texas homestead law).

105. *See* Carlson, *Traumatic Dimension*, *supra* note 6, at 2323 (explaining superegoic law as law that is rewritten to judge prior acts).

106. *Rodgers*, 461 U.S. at 683; *see also* Steve R. Johnson, *The Good, the Bad, and the Ugly in Post-*Drye *Tax Lien Analysis*, 5 FLA. TAX REV. 415, 426–30 (2002) (providing a history of this tax scheme sentiment).

107. *See Rodgers*, 461 U.S. at 687 (discussing the acquisition of the homestead property). *Rodgers* was a consolidated case. Also before the Court was a second set of facts concerning Donald and Joerene Ingram. *See id.* at 689 (providing how the Ingrams were brought into the suit). I save the Ingram story for later to make an important point in the context of Kentucky law. *Infra* notes 275–286 and accompanying text.

108. *Id.* at 687.

109. *Id.*

110. *See* United States v. Rogers, 649 F.2d 1117, 1121 (5th Cir. 1981) ("Homestead property is not listed in [I.R.C.] § 6334(a) as exempt property."), *rev'd sub nom.* United States v. Rodgers, 461 U.S. 667 (1983).

111. *Id.* at 1119.

112. *See id.* (stating that Phillip's children and estate executor were made parties).

113. *See id.* (detailing the summary judgement on the grounds that the

included the right to live in the homestead for life,[114] plus the right to veto any sale of her late husband's interest.[115] "The [trial] court implied that the Government had the choice of either waiting until Mrs. Rodgers' homestead interest lapsed, or satisfying itself with a forced sale of only Philip Bosco's interest in the property."[116] The Fifth Circuit Court of Appeals affirmed, stating that:

> [W]hen a delinquent taxpayer shares his ownership interest in property jointly with other persons rather than being the sole owner, his "property" and "rights to property" to which the federal tax lien attaches under 26 U.S.C. § 6321 . . . involve only his interest in the property, and not the entire property.[117]

The Court of Appeals made clear that, had Lucille claimed a mere state law exemption against a federal tax lien, Lucille would have lost.[118] But Texas gives homesteaders something more—the right of the non-debtor spouse to a life estate, and against this the IRS could not foreclose.[119]

The Supreme Court reversed. It held that the IRS could indeed foreclose upon the nontaxpayer's life estate.[120] True, the IRS could

---

federal lien would not defeat her interest in the property).

114. *See* TEX. CONST. ART. XVI, § 52 (proscribing the treatment of the homestead upon the death of a husband or wife). The life estate determined if Lucille were to cease residing at the homestead. *See Rodgers*, 461 U.S. at 686 ("[H]omestead laws have the effect of reducing the underlying ownership rights in a homestead property to something akin to . . . life estate in the property."). Justice Brennan, therefore, was not quite correct when he opined "that a homestead estate is the exact economic equivalent of a life estate." *Id.* at 698.

115. *See* TEX. CONST. ART. XVI, § 50 ("An owner or claimant of the property claimed as homestead may not sell or abandon the homestead without the consent of each owner and the spouse of each owner . . . .").

116. *Rodgers*, 461 U.S. at 688.

117. *Rogers*, 649 F.2d at 1125.

118. *See id.* at 1121 ("[W]e note at the outset that the homestead interest of a taxpayer spouse, i. e., that of one who himself has tax liability, clearly cannot by itself defeat a federal tax lien.").

119. *See id.* at 1125

> If, on the other hand, a homestead interest is, under state law, a property right possessed by the nontaxpayer spouse at the time the lien attaches to the taxpayer's interest, then the federal tax lien may not be foreclosed against the homestead property for as long as the nontaxpayer spouse maintains his or her homestead interest under state law.

120. *See* United States v. Rodgers, 461 U.S. 677, 694 (1983) (recognizing of third-party interests through judicial valuation and distribution).

not collect Philip's tax liability from the proceeds of Lucille's property,[121] but a federal court could liquidate Lucille's property, contrary to Texas law, in order to maximize the total value of the property to which the tax lien attached.[122] In short, the Court found that the word "property," in § 7403(a), means Blackacre, not Philip's interest in Blackacre.[123] Thus, a federal court could subject "any property . . . in which [the taxpayer] has any . . . interest" to sale.[124]

Although not yet fully superegoic, there is still a monster lurking in the bowels of this holding. The government no doubt felt that sale of a fee simple absolute estate (which would foreclose

---

121. *Id.* at 691.

122. *Id.* at 694.

123. *See id.* (stating that this interpretation is consistent with the policy in favor of the prompt collection of delinquent taxes).

124. *Id.* at 692 (citing I.R.C. § 7403(a) (2012)). Other parts of § 7403 were found supportive, or at least not in contradiction, with this view. According to § 7403(b): "All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto." Why must *all* persons claiming an interest in Blackacre be made parties? It must be that they are foreclosable by a junior IRS lien! *See Rodgers*, 461 U.S. at 693 ("Obviously, no joinder of persons claiming independent interests in the property would be necessary if the Government were only authorized to seek the sale of the delinquent taxpayer's own interests."); I.R.C. § 7403(c)

> The court shall . . . proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property . . . and may decree a sale of such property . . . and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States . . . .

The order to distribute proceeds must mean that persons senior to the IRS are foreclosable. *See Rodgers*, 461 U.S. at 694

> Again, we must read the statute to contemplate, not merely the sale of the delinquent taxpayer's own interest, but the sale of the entire property (as long as the United States has any "claim or interest" in it), and the recognition of third-party interests through the mechanism of judicial valuation and distribution.
>
> One could make sense of these provisions as *not* giving the federal government a powerful right to force nontaxpayers into partition sales. For instance, a tax lien might be *senior* to nontaxpayer interests, and these this priority would have to be adjudicated in a foreclosure action in which the junior interest holders must be made parties. Senior parties need not be made parties. This would explain both provisions without indicating a powerful right to sell out parties senior to the IRS, Nevertheless, the majority chose to find these statutes as authorizing the right to force nontaxpayers into partition sales.

Lucille) would enhance the value of the tax lien on Philip's interest.[125] In real estate, the whole is equal to more than the sum of the parts, as is well known.[126] But suppose the IRS were to decide that its position would be enhanced even more if the entire city block on which Lucille's house was located could be sold in fee simple absolute? That way Lucille *and her neighbors* would succumb to the IRS power of her sale. What prevents this monstrous result? Why is Blackacre limited to precisely the real property in which the taxpayer has an interest and not neighboring plots of land? If the point is to maximize the value the IRS is entitled to keep, why shouldn't the entire city block be sold? Here is how Justice Brennan describes the monster:

> Admittedly, if § 7403 allowed for the gratuitous confiscation of one person's property interests in order to satisfy another person's tax indebtedness, such a provision might pose significant difficulty under the Due Process Clause of the Fifth Amendment. But . . . § 7403 makes no further use of third-party property interests than to facilitate the extraction of value from those concurrent property interests that *are* properly liable for the taxpayer's debt. To the extent that third-party property interests are 'taken' in the process, § 7403 provides compensation for that 'taking' by requiring that the court distribute the proceeds of the sale 'according to the findings of the court in respect to the . . . interests of the parties and of the United States.[127]

These remarks are fully consistent with sacrificing the neighbors' property (along with that of the taxpayer's cotenants).[128]

---

125. *See Rodgers*, 461 U.S. at 694 (expressing that interests sold separately may have a different value from the sum of their parts).

126. Prospective buyers of the part face holdout power from the owners of the other parts, who can abstract economic rents from the part buyer. They will therefore reduce their bid for the part in anticipation of these expenses. *See In re* Spears, 308 B.R. 793, 815 (Bankr. W.D. Mich. 2004) (noting that it is preferable for a bankruptcy trustee to sell the entire fee than sell only the undivided interest), *rev'd on other grounds sub nom.* Spears v. Boyd (*In re* Spears), 313 B.R. 212 (W.D. Mich. 2004).

127. *Rodgers*, 461 U.S at 697–98 (citation omitted).

128. Justice Blackmun raised this possibility. *See id.* at 724 (Blackmun, J., dissenting)

> First, the Court claims that its construction is consistent with the policy favoring "the prompt and certain collection of delinquent taxes." This rationale would support any exercise of governmental power to secure tax payments. . . . But when one interpretation contravenes

Of course, what I suggest is monstrous, but until the Supreme Court speaks, the monster inhabits I.R.C. § 7403(a), and neighbors may not sleep in spite of thunder or tell pale-hearted fear that it lies.

The neighbors may tell themselves that partition sales ought to be limited between cotenants with a right of possession, or between present and future interest holders, where the future interest portends a right to possess the same territory as the present possessor. But, as articulated by the Supreme Court, the goal is to increase the value of what the IRS may keep, and the suggested containment is merely externally imposed on this principle to prevent this goal from consuming whole neighborhoods.[129] It is a mere legislative solution that purports to contain natural law monstrosity.

Another check against the monstrosity of *Rodgers* is the fact that I.R.C. § 7403(c) ultimately says that a federal court "*may* decree a sale of such property."[130] "May" implies judicial discretion.[131] Justice Brennan therefore gives advice as to when a court may use its discretion and refuse to sell the whole of Blackacre just because the IRS claims a lien on some small part of it.[132] One of the factors in the balancing test speaks to the monstrosity just described:

> [W]hether the third party with a nonliable separate interest in the property would, in the normal course of events (leaving aside § 7403 and eminent domain proceedings, of course), have a legally recognized expectation that the separate property

---

> both traditional rules of law and common sense and common values on which they are built, the fact that it favors the Government's interest cannot be dispositive.

(citation and footnote omitted)

129. *See id.* at 694 (majority opinion) (noting that it is more logical for the Government to sell the whole, not the part).

130. I.R.C. § 7403(c) (2012) (emphasis added). "May" replaced "shall" in 1936. *See* United States v. Rodgers, 461 U.S. 677, 706 (1983) (examining how the change in language impacts congressional intent). Of this change, Justice Brennan remarks: "[T]here is support in our prior cases for the proposition that an explained change in statutory wording from 'shall' to 'may' is best construed as indicating a congressional belief that equitable discretion existed all along." *Id.* at 708.

131. *See Rodgers*, 461 U.S. at 708–09 (noting that judicial sales have traditionally been accompanied by a degree of discretion).

132. *See id.* at 710–11 (listing four factors to govern judicial discretion).

> would not be subject to forced sale by the delinquent taxpayer or his or her creditors.[133]

It is fair to say that a homeowner expects that the government will not devour her home because her neighbor is a tax cheat. Therefore, the homeowner has a claim on court discretion to prevent the sale.[134] Expectation is but one factor, however, in a more complicated balancing test prescribed by Justice Brennan.[135]

Rodgers may be compared with *United States v. National Bank of Commerce*,[136] where a taxpayer had a joint deposit account with two nontaxpayers.[137] Any one of them could withdraw 100% (although to do so would be a wrong against the other two).[138] Under Arkansas law, a levying creditor could not step into the shoes of a debtor and withdraw all funds (like the debtor could).[139] Nevertheless, the Supreme Court ruled that the IRS, by levy,[140] could have all the funds because the very right of the taxpayer to withdraw all was a property right in all the funds.[141] The wronged

---

133. *Id.* Careful readers of this passage will note that the words "the property" reflect an assumption that the IRS might attack cotenants but not out-and-out neighbors. Nevertheless, the attack on neighbors is not flatly precluded in *Rodgers*.

134. *See id.* at 711 (noting the third factor for consideration of prejudice to the third party).

135. *See supra* note 130 and accompanying text (detailing the balancing test).

136. 472 U.S. 713 (1985).

137. *Id.* at 716.

138. *See id.* (noting that the three individuals were authorized by contract with the bank to make withdrawals from the account).

139. *See id.* at 726 ("[U]nder Arkansas garnishment law, a creditor of a depositor is not subrogated to the depositor's power to withdraw the account . . . .").

140. *See id.* at 719 (discussing the relevant I.R.C. provision). The case construes I.R.C. § 6331(a) as follows:

> If any person liable to pay any tax neglects . . . to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax . . . by levy upon all property and rights to property . . . belonging to such person or on which there is a lien . . . for payment of such tax.

Id. (quoting I.R.C. § 6331(a) (2012)). "[P]roperty and rights to property" mimic the phraseology under which the tax lien is created. *See id.* § 6321 (creating the federal tax lien on all property and rights to property.

141. *See National Bank*, 472 U.S. at 724 ("Roy, then, had the absolute right under state law and under his contract with the bank to compel the payment of the outstanding balances in the two accounts . . . . [S]uch a state-law right

innocent parties could ask the IRS to refund the (pardon the expression) *stolen* money after the fact.[142] The case is not quite superegoic in that it purports to follow state law.[143] Because the debtor could withdraw all, so could the IRS.[144] Local immunity from ordinary creditors was set aside, as taxpayers only get the exemptions that the IRC chooses to give.[145] The case is therefore an extension of *Rodgers* in the context of deposit accounts.

C. Drye

The first genuinely superegoic opinion within the scope of our attention is *Drye*. In the case, Rohn Drye was heir apparent to his mother's estate.[146] When his mother died,[147] the taxpayer

constituted 'property [or] rights to property . . . belonging to' [the taxpayer].").

142. *See id.* at 728 ("[O]ne claiming an interest in property seized for another's taxes may bring a civil action against the United States to have the property or the proceeds of its sale returned." (citing I.R.C. § 7426)). Justice Powell dissented and quoted *Rodgers* against the result in *National Bank*. Justice Powell claimed high significance for the fact that the IRS asserted its power of levy under I.R.C. § 6331(a), rather than under I.R.C. § 7403, which *Rodgers* newly interpreted as a super-partition sale provision. *See id.* at 739 (Powell, J., dissenting)

> Under § 6331(a), the Government may sell for the collection of unpaid taxes all nonexempt 'property and rights to property . . . *belonging to [the delinquent taxpayer]*. . . .' Section 6331, unlike § 7403, does not require notice and hearing for third parties, *because no rights of third parties are intended to be implicated by § 6331*. Indeed, third parties whose property or interests in property have been seized inadvertently are entitled to claim that the property has been 'wrongfully levied upon,' and may apply for its return . . . .

(quoting United States v. Rodgers, 461 U.S. 677, 696 (1983)).

The use of this quote can be criticized because the majority had already described the taxpayer's power to steal from his account partners as the taxpayer's own property right. For what it is worth, Justice Powell was with the majority in *Rodgers*, and Justice Brennan, who wrote the majority opinion in *Rodgers*, joined in Justice Powell's dissent.

143. *See* Carlson, *Traumatic Dimension*, *supra* note 6, at 2322 (noting that a superegoic common law system is constantly reworked to justify or condemn earlier acts).

144. *See* United States v. Nat'l Bank of Commerce, 472 U.S. 713, 725 (1985) (stating that in a levy proceeding, the IRS steps into the taxpayer's role).

145. *See* I.R.C. § 6334(a) (setting forth exemptions).

146. Drye v. United States, 528 U.S. 49, 49 (1999).

147. Apparently on the day of her death, Drye's mother was to meet with lawyers to write a will bypassing Drye in favor of Drye's daughter. If she had

disclaimed his inheritance.[148] Under Arkansas law, the effect of the disclaimer was to impose upon the inheritance the fiction that the disclaiming party had predeceased the decedent.[149] As a result of this disclaimer, the taxpayer's daughter was the heir.[150] She immediately took her inheritance and used it to fund a spendthrift trust for the benefit of her parents and herself.[151] The IRS claimed that a tax lien attached to the daughter's property and therefore followed it into the spendthrift trust.[152]

The courts at all levels supported the IRS.[153] For the Supreme Court, Justice Ginsburg articulated the superegoic principle: "[W]e look initially to state law to determine what rights the taxpayer has in the property the Government seeks to reach, then to federal law to determine whether the taxpayer's state-delineated rights qualify as 'property' or 'rights to property' within the compass of the federal tax lien legislation."[154] The claim of the IRS was that Drye owned the inheritance before he disclaimed it.[155] Before

---

signed a will on that day, the IRS would have been defeated. *See* Adam J. Hirsch, *Disclaimers and Federalism*, 67 VAND. L. REV. 1871, 1894 (2014) [hereinafter Hirsch, *Disclaimers and Federalism*] ("Here, Ginsburg adverted to the issue of testamentary intent, which pertains to any and all disclaimers, including those confounding federal creditors."); Sargent v. Sargent (*In re* Sargent), 337 B.R. 661, 665 (Bankr. N.D. Ohio 2006) ("[A] debtor's mere expectancy interest does not rise to the level to be included within the bankruptcy estate . . . .").

148. *Drye*, 528 U.S. at 52–53.

149. *See* ARK. CODE ANN. § 28-2-108(a)(1), *repealed by* Acts of 2003, Act 610, § 20 (providing that a disclaimer effected under the provision relates back for all purposes to the date of death of the decedent); *Drye*, 528 U.S. at 53–54 ("The disclaimer creates the legal fiction that the disclaimant predeceased the decedent . . . ."). Arkansas had enacted the Uniform Probate Code, which allows relation back of disclaimers. Some states do not permit heirs to defeat creditors in this way. *See In re* Estate of Clark, 410 A.2d 795, 798–800 (Pa. 1980) ("Pennsylvania's long-standing rule . . . precludes a beneficiary's renunciation of an interest 'where that interest has been attached . . . .'" (quoting Buckius Estate, 4 Dist. Rep. 755 (Orphans' Ct. Phila. 1895))).

150. *Drye*, 528 U.S. at 53.

151. *Id.*; Hirsch, *Disclaimers and Federalism*, *supra* note 147, at 1893–94 (suggesting that the disclaimer was collusive and therefore (as a matter of state law) ineffective).

152. *Drye*, 528 U.S. at 53.

153. *See generally* Brett A. Bluestein, *Disclaimers and Federal Tax Liens' Effect on Inheritances*, 36 REAL PROP. PROB. & TR. J. 291 (2001) (discussing the state of the law prior to the Supreme Court's grant of certiorari in *Drye*).

154. Drye v. United States, 528 U.S. 49, 57 (1999).

155. Drye Family 1995 Tr. v. United States, 152 F.3d 892, 896 (8th Cir. 1998).

disclaimer, the IRS lien attached to the inheritance[156] and, as against this lien, the disclaimer was ineffective. If so, the tax lien followed the inheritance into the possession of Drye's daughter.[157] When she created the trust, she conveyed encumbered property into it. Being encumbered, the IRS could sell this property to pay Drye's tax debt.

Drye's claim was that he never had property. The inheritance was tendered as a gift, and gifts need not be accepted.[158] Just because he was tendered a gift does not mean that he was the transferee of property.[159] But, Justice Ginsburg thought, Drye had property immediately upon his mother's death because of his control over the inheritance.[160] Control is property. The assets in question had pecuniary value and were transferable. But neither of these factors was dispositive. The critical question was "breadth of control."[161] "[T]he heir inevitably exercises dominion over the property. He determines who will receive the property—himself if he does not disclaim, a known other if he does. This power to channel the estate's assets warrants the conclusion that Drye held 'property' . . . subject to the Government's liens."[162]

To emphasize Drye's control, Justice Ginsburg borrowed a point from Professor Adam Hirsch[163]:

> Drye overlooks this crucial distinction. A donee who declines an *inter vivos* gift generally restores the status quo *ante*, leaving the donor to do with the gift what she will. The disclaiming heir or devisee, in contrast, does not restore the status quo, for the

156. *See id.* at 896 (noting the government's argument that the federal tax liens attached at the time of the decedent's death).

157. *See id.* at 893 (stating that Drye disclaimed all interests to the estate, then shortly after named his daughter Administratrix of the estate).

158. *See* Legett v. United States, 120 F.3d 592, 595 (5th Cir. 1997), *abrogated by* Drye v. United States 528 U.S. 49 (1999) (describing the theory that there is no property right if a taxpayer does not accept the inheritance).

159. *See Drye*, 528 U.S. at 57 (discussing Drye's argument that under state law, the disclaimer served to eliminate his interest).

160. *See id.* at 60–61 (distinguishing the *inter vivos* gift disclaimer, which restores the status quo, from an inheritance disclaimer which does not).

161. *Id.* (citing Morgan v. Comm'r, 309 U.S. 78, 83 (1940)).

162. *Id.*

163. *See* Adam J. Hirsch, *The Problem of the Insolvent Heir*, 74 CORNELL L. REV. 587, 607–08 (1989) [hereinafter Hirsch, *The Problem of the Insolvent Heir*] (arguing the difference between dominion over an *inter vivos* gift and an inheritance).

> decedent cannot be revived. Thus, the heir inevitably exercises dominion over the property. He determines who will receive the property—himself if he does not disclaim, a known other if he does.[164]

If natural law is destruction of positive law, the question arises: can the destructive principle be contained? Can we get the genie back in the bottle? What keeps the IRS from claiming a lien on Drye's mother's estate even before she dies? This is something Justice Ginsburg feared. Quoting the lower court, Justice Ginsburg noted that "a prospective heir may effectively assign his expectancy in an estate under Arkansas law, and the assignment will be enforced when the expectancy ripens into a present estate."[165] If that is so, does the IRS have a lien on the expectancy before any such attempted assignment? Justice Ginsburg assumed not: "Nor do we mean to suggest that an expectancy that has pecuniary value and is transferable under state law would fall within § 6321 prior to the time it ripens into a present estate."[166]

But one may question whether the fear is entirely dissipated. Under Arkansas law, Drye could have "released" his inheritance to his mother before she died.[167] Would that release be valid against the IRS? Perhaps not. At the moment of his mother's surcease, the inheritance instantly transfers to Drye, at which point the IRS lien attaches. Only simultaneously therewith does the "release" constitute a conveyance back to the estate. But this is too late. The IRS already has its lien.[168] Likewise, if Drye were to attempt an assignment of his prospective intestate rights, the assignment is

164. Drye v. United States, 528 U.S. 49, 61 (1999).

165. *Id.* at 60.

166. *Id.* at 60 n.7.

167. *See* Leggett v. Martin, 156 S.W.2d 71, 95 (Ark. 1941) (allowing an expectant heir to release any claim to inheritance if it is supported by consideration and there is no fraud). Some states do not permit this. *See, e.g.*, *In re* Estate of Baird, 933 P.2d 1031, 1035 (Wash. 1997) (en banc) (finding that a disclaimer of interest is not possible when the interest is through intestate succession, because the interest does not exist until the death of the successor). On releases and assignments by heirs apparent, see Katheleen R. Guzman, *Releasing the Expectancy*, 34 ARIZ. ST. L.J. 775, 778–780 (2002) (stating that releases prior to death are honored but only for fair consideration).

168. This exact theory would be followed by the district court in *Craft v. United States ex rel. I.R.S.* (*Craft I*), No. 1:93-CV-306, 1994 U.S. Dist. LEXIS 13310, at *10 (W.D. Mich. Sept. 12, 1994). *Infra* note 217 and accompanying text.

only enforceable when Drye's mother dies.[169] By then the IRS lien will have attached. In both cases, we would be faced with an inscrutable case of simultaneous attachment—the IRS lien and the rights of the assignee-releasee will have come into existence at the same time.[170] This is very close to saying that the IRS has a lien on the estate of the decedent even before she dies—the very proposition that Justice Ginsburg denied.

Other fears, worse than horrible imaginings, may be mentioned. Suppose, in a will, Drye was given an estate in land that was subject to a condition subsequent. For instance, "testator to Drye so long as Drye does not serve alcohol on the premises." An IRS lien attaches to Drye's fee simple determinable. Thereafter, Drye serves alcohol. Does the land revert back to the testator's estate? Perhaps not. Drye was in control of serving alcohol, and so perhaps the condition subsequent cannot be asserted against the IRS. Monsters lurk under the surface of the *Drye* case.[171]

---

169. *See* Bradley Lumber Co. of Ark. v. Burbridge, 210 S.W.2d 284, 288 (Ark. 1948) ("[A]n assignment of a future interest, or expectancy, though unenforceable at law, is valid in equity and may be enforced in the latter forum when such expectancy ripens into a present and enjoyable estate.").

170. On the jurisprudence of simultaneous attachment of liens, see David Gray Carlson, *Simultaneous Attachment of Liens on After-Acquired Property*, 6 CARDOZO L. REV. 505 (1985).

171. Professor Hirsch criticizes the *Drye* opinion for failing to provide any materials by which the scope of the rule can be extended or restricted. Hirsch, *Disclaimers and Federalism*, *supra* note 147, at 1892–95. Hirsch notes that disclaimers are not taxable events. *Id.*; I.R.C. § 2518 (2012). "Why, then, does the disclaimant's degree of dominion applicable to the collection of back taxes differ from the degree of dominion applicable to the assessment of *front* taxes?" Hirsch, *Disclaimers and Federalism*, *supra* note 147, at 1893. Hirsch also wonders whether, in case of a will, a disclaimer that enriches some person that is not a blood relative should be given the *Drye* treatment. *Id*. Professor Hirsch remarks:

> [T]he diligence of the Justices often appears to flag when they depart from the lofty issues of constitutional law upon which they lavish so much effort. . . . In a word, the Justices find cases like *Drye* too dry. They bore the Justices. The instant opinion offers a stark reminder that judicial attention is a scarce resource, which courts may or may not allocate optimally.

Id. at 1895.

D. Craft

> [T]he individual interest of the husband or wife in an estate by the entirety is, like a rainbow in the sky or the morning fog rising from the valley, not such an estate as may be subjected to the grasp of an attaching creditor . . . .[172]

Our second superegoic case on "property" in tax cases is *United States v. Craft*,[173] where the Supreme Court, in order to impose a tax lien on an interest in a tenancy by the entirety, saw past the "fiction[s]" that the state of Michigan had concocted.[174]

By way of background, on May 26, 1972, Don and Sandra Craft acquired a tenancy by the entirety at 2656 Berwyck Road in Grand Rapids, Michigan, for $48,000.[175] To finance this purchase, Don and Sandra conveyed a mortgage deed for $37,000.

A few words about the tenancy by the entirety are needed to grasp the radical import of the *Craft* case. Michigan recognizes the marriage as a legal person separate from the personhood of the husband and wife individually.[176] It is to this entity that land was conveyed in 1972.[177] The marriage is like a partnership in this regard, as Justice Clarence Thomas pointed out.[178] Indeed, Justice Scalia's dissent referred directly to Michigan's "decision to treat the marital partnership as a separate legal entity, whose property

---

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

173. *Craft V*, 535 U.S. 274 (2002).

174. *See id.* at 276 (concluding that the tenants possess "rights to property" despite the fiction).

175. *See* Craft v. United States *ex rel.* Comm'r (*Craft II*), 140 F.3d 638, 639 (6th Cir. 1998) (discussing the purchase of the "Berwyck Property"). A view from Google Maps reveals a modest dwelling on a corner lot with a smaller backyard than many of the neighboring houses enjoy. Many of the neighbors have swimming pools, but the Crafts had none.

176. *See* LADNER ON CONVEYANCING IN PENNSYLVANIA, § 1.15 at 18 (3d ed. 1961)

> [H]usband and wife are looked upon, together, as a single entity, like a corporation. The single entity is the owner of the whole estate. When the husband or wife dies, the *entity* continues, although it is now composed of only one natural person rather than two . . . . [N]either tenant by the entirety owns any undivided share at all . . . .

177. *See Craft II*, 140 F.3d at 639 (describing the purchase of the property).

178. *Craft V*, 535 U.S. at 292 (Thomas, J., dissenting); *see also id.* at 301 ("Ownership by 'the marriage' is admittedly a fiction of sorts, but so is a partnership or a corporation.").

cannot be encumbered by the debts of its individual members."[179] Partners do not own an interest in real property held in the name of the partnership.[180] By analogy, neither did Don or Sandra.

Because the husband owns nothing, the husband is unable to convey any ownership interest in the tenancy by the entirety.[181] This is because the husband owns, in Blackstone's oft-quoted words, *per tout, et non per my*.[182]

If, however, the wife joins in the deed, the act of husband and wife together is the act of the marital entity. For this reason, Don and Sandra joined in the mortgage deed to the purchase money lender, which successfully obtained a mortgage lien on the tenancy by the entirety. For similar reasons, the husband's individual creditors are unable to place a lien on the husband's real property for the reason that the husband has none; the *marital entity* is the owner.[183] Where the husband and wife are jointly liable on a debt, however, the marital entity owes the debt, and the joint creditor is able to obtain a judicial lien on the tenancy by the entirety.[184]

---

179. *Id.* at 289 (Scalia, J., dissenting).

180. *See* UNIF. LTD. P'SHIP ACT § 701, 6B U.L.A. 394 (2001) ("[T]he only interest of a partner which is transferable is the partner's transferable interest. A transferrable interest is personal property."). One hears the confusing term "tenancy in partnership," which is not a tenancy at all. "Partnership law is admittedly misleading in this respect . . . . But this peculiar tenancy systematically negates all individual rights, including possession, transferability, rights of inheritance, and so forth, so that the partner's individual rights are nominal only." Larry E. Ribstein, *Why Corporations?*, 1 BERKELEY BUS. L.J. 183, 191–92 (2004). Thankfully, the Revised Uniform Partnership Act abolishes the concept. Jeanne M. Rickert, *Ohio's New Partnership Law*, 57 CLEV. ST. L. REV. 783, 785 (2009).

181. *See Craft V*, 535 U.S. 274, 281 (2002) (noting the inability to unilaterally alienate interest in a tenancy by the entirety).

182. *Per my* means "by the moiety." According to Blackstone:

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

2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *182 (1753).

183. *See* Lawrence Kalevitch, *Some Thoughts on Entireties in Bankruptcy*, 60 AM. BANKR. L.J. 141, 143 (1986) (addressing the general exemption of entireties properties from bankruptcy in most states).

184. *See* Sumy v. Schlossberg (*In re* Sumy), 777 F.2d 921, 925 (4th Cir. 1985)

The Michigan pattern may be compared to the New York version of the tenancy by the entirety. In New York, each individual spouse owns his or her requisite share.[185] The marriage is not considered a separate legal person capable of owning property, as is the case in Michigan.[186] Thus, the New York husband is able to convey his 50% possessory right plus his right of survivorship.[187] He may not, however, compel his spouse to sell the whole in a partition proceeding[188] (as would be true if they were tenants in common or joint tenants with the right of survivorship). Because an individual spouse owns something in a New York tenancy by the entirety, individual creditors can obtain judicial liens on the debtor's share of the tenancy by the entirety. In an execution sale, the buyer becomes a cotenant with the nondebtor spouse.[189]

Back to the *Craft* saga, starting in 1977, Don saw no reason to file further income tax returns. Accordingly, the IRS assessed taxes for $482,446 covering the period of 1979 to 1986.[190] Assessment of a tax creates a lien on any property Don may have

("[I]f both spouses filed for bankruptcy, 'courts would consolidate the cases and consider the tenants by entirety property as an asset of their joint estates and permit liquidation of that property . . . .'" (quoting Martin v. Martin (*In re* Martin), 20 B.R. 374, 376 (Bankr. E.D. Va. 1982))). What makes a creditor a *joint* creditor? This is a subtle question of state law. *In re* Holler, 463 B.R. 733, 743 (Bankr. E.D. Pa. 2011). I will omit this issue from this already-too-long Article and will simply assume that joint creditors can be distinguished from the individual creditors of a debtor spouse.

185. Goldman v. Goldman, 733 N.E.2d 200, 202 (N.Y. 2000).

186. *Supra* note 176 and accompanying text.

187. *Goldman*, 733 N.E.2d at 202.

188. *See id.* (addressing that the ability to sell is subject to the continuing rights of the spouse).

189. *See In re* Spears, 308 B.R. 793, 810 (Bankr. W.D. Mich. 2004) (discussing how New York law differs from Michigan), *rev'd sub nom.* Spears v. Boyd (*In re* Spears), 313 B.R. 212 (W.D. Mich. 2004); David Gray Carlson, *Critique of Money Judgment Part One: Liens on New York Real Property*, 82 ST. JOHN'S L. REV. 1291, 1392–96 (2008) (addressing New York law on tenancies by the entirety). There is a third type: the tenancy by the entirety in Kentucky and Tennessee. Here, the marital entity owns the possessory right, but the individual spouses separately own the survivorship right. *Infra* notes 262–263, 1023–1048 and accompanying text. In our later discussion concerning bankruptcy cases, we shall see that there are other varieties as well. *Infra* notes 1023–1124 and accompanying text.

190. *Craft V*, 535 U.S. 274, 276 (2002).

had.[191] The issue in *Craft* would be whether a lien attached to any part of the tenancy by the entirety, where Don owed tax debt and Sandra did not.[192]

After the assessment of taxes, Don used his personal funds to pay interest and principal on the mortgage.[193] It can be observed that the funds used by Don for this purpose were already IRS property by virtue of the lien that attached to them.[194] Although Don intended to pay down the mortgage debt, he was using IRS money to achieve this goal.[195] Accordingly, the IRS was entitled to insist that Don "bought" (and did not merely "pay") the mortgage. The "bought" mortgage would then belong to the IRS.[196] The same can be said about Don's payment of local property taxes.[197] Property taxes generate super priority liens, senior to the lien of the IRS.[198] Don did not *pay* this tax but rather *bought* it on behalf of the IRS. The IRS would be subrogated to this tax lien, as Don was paying these taxes with money the IRS owned in advance.[199]

On March 30, 1989, the IRS filed notice of its tax lien in the Michigan real estate records.[200] On August 28, 1989, Don and

---

191. *See* I.R.C. § 6322 (2012) ("[T]he lien imposed by section 6321 shall arise at the time the assessment is made . . . .").

192. *See Craft V*, 535 U.S. at 278 ("We granted certiorari to consider the Government's claim that respondent's husband had a separate interest in the entireties property to which the federal tax lien attached.").

193. *Id.* at 277.

194. *See id.* at 276 (noting the tax lien attached to all of his personal property).

195. *See* Craft v. United States *ex rel.* Comm'r (*Craft IV*), 233 F.3d 358, 373 (6th Cir. 2000) ("Don essentially hid funds to which the IRS was entitled (by virtue of its lien) by investing them in a property to which the lien could not attach.").

196. What I express here is *not* a fraudulent conveyance theory, but is based on the fact that the IRS, through its tax lien, owned Don's funds even before Don paid the mortgage lender. *See* Hatchett v. United States, 330 F.3d 875, 888 (6th Cir. 2003) (describing this theory).

197. *See* Craft v. United States *ex rel.* I.R.S. (*Craft III*), 65 F. Supp. 2d 651, 653 (W.D. Mich. 1999) (mentioning that Don and Sandra also paid property taxes during the relevant period).

198. 26 U.S.C. § 6323(b)(6) (2012).

199. *See Hatchett*, 330 F.3d at 888 ("Under the lien tracing theory, the Government argues that since it had a lien on Elbert's money, it is entitled to place a lien on properties improved or purchased with that money.").

200. *Craft I*, No. 1:93-CV-306, 1994 U.S. Dist. LEXIS 13310, at *1 (W.D. Mich. Sept. 12, 1994). "The lien imposed by section 6321 [of the I.R.C.] shall not be valid as against any purchaser . . . or judgment lien creditor until notice thereof which

Sandra jointly deeded the tenancy by the entirety to Sandra, who became the sole owner.[201] Sandra's title was of course encumbered by the outstanding mortgage of the purchase money lender, but it was also encumbered (or should be regarded as encumbered) by the IRS's mortgage and tax liens which Don, in effect, had bought with encumbered funds for the benefit of the IRS.

In January 1992, Don sought refuge in the bankruptcy courts.[202] He did not list any interest in the tenancy by the entirety on his schedule of assets. Indeed, the Michigan "fiction" is that he did not own any real property interest.[203] Bankruptcy law says otherwise, however.[204] Don should have listed the tenancy by the entirety as an asset. In any case, the bankruptcy case closed in June 1992 and ended with Don's general discharge.[205] The IRS, however, was (presumably) not discharged; tax claims are generally not dischargeable, especially in cases where no tax returns were filed.[206]

---

meets the requirements of subsection (f) has been filed by the Secretary." I.R.C. § 6323(a) (2012). With regard to real estate, the notice must be filed "in one office within the state (or the county, or other governmental subdivision), as designated by the laws of such State, in which the property subject to the lien is situated . . . ." *Id.* § 6323(f)(1)(A)(i).

201. *Craft V*, 535 U.S. 274, 267–76 (2002). *But see Craft III*, 65 F. Supp. 2d at 652 ("Don terminated the entireties estate by delivering a quitclaim deed to Sandra on August 28, 1989.").

202. *Craft I*, 1994 U.S. Dist. LEXIS 13310, at *1.

203. *Supra* note 174 and accompanying text.

204. *See* Napotnik v. Equibank & Parkvale Sav. Ass'n, 679 F.2d 316, 318 (3d Cir. 1982) (defining the "debtor's estate" as broad enough to include any interest in a tenancy by the entirety); *infra* notes 477–537 and accompanying text.

205. *Craft I*, 1994 U.S. Dist. LEXIS 13310, at *1.

206. *See* 11 U.S.C. § 523(a)(1)(B) (2012) (stating that a tax claim is not discharged if no return is filed). Where nonfraudulent tax returns are timely filed, a taxpayer who files for bankruptcy is entitled to a discharge of "stale" tax claims, as that concept is defined in Bankruptcy Code 11 U.S.C. § 507(a)(8)(A), describing as a priority claim:

> [T]ax on . . . income . . . for . . . a tax year ending on or measured by income . . . for a taxable year ending on or before the date of the filing of the petition—(i) for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition . . . .

Id. § 507(a)(8)(A). Section 507(a)(8) becomes relevant by virtue of the reference in Bankruptcy Code 11 U.S.C. § 523(a)(1)(A).

In 1992, Sandra sought to sell her encumbered fee simple absolute.[207] The prospective buyer discovered the notice of tax liens against Don. The buyer balked, uncertain as to whether the buyer's title would be sullied by a continuing tax lien for Don's taxes.[208] Sandra at first moved to open Don's bankruptcy in order to bring an adversary proceeding against the IRS "to force it to release the lien."[209] The bankruptcy case was reopened but the court reclosed the case upon determining that the bankruptcy court had no jurisdiction: Don had never listed the house as property of the bankruptcy estate.[210]

Failing on that score, Sandra was able to convince the IRS to waive its tax lien (if any), so that title granted to the buyer would be free of any IRS claims.[211] In exchange for this waiver, Sandra agreed to pay half the purchase price into a non-interest-bearing escrow account. Mollified by this waiver, the buyer paid the agreed price of just under $120,000.[212] Half of this went to the escrow fund and half went to Sandra.[213]

Sandra then brought suit to "quiet title" to the escrowed funds in favor of herself.[214] The IRS defended itself by asserting that a

---

207. *See Craft II*, 140 F.3d 638, 640 (6th Cir. 1998) (addressing the contract Sandra entered into to sell the property).

208. *See id.* (stating that the discovery of the lien ended the sale).

209. *Craft I*, No. 1:93-CV-306, 1994 U.S. Dist. LEXIS 13310, *1 n.1 (W.D. Mich. Sept. 12, 1994).

210. *See Craft II*, 140 F.3d at 640 (discussing the decision of the bankruptcy court to close the case the second time). Later, Sandra moved in the district court that, to the extent the IRS had a fraudulent conveyance theory, the matter should be remanded to the bankruptcy court. *Id.* at 638. The court denied the motion, but it indeed had merit. *Id.* If fraudulent conveyance was the IRS's theory, then the recovery belonged to Don's bankruptcy estate, not to the IRS. In fact, the IRS did not have a proper fraudulent conveyance theory but rather one based on subrogation. *Infra* notes 232–239 and accompanying text.

211. *See Craft II*, 140 F.3d at 640 ("The IRS subsequently agreed to release its lien on the property to enable Sandra to sell it.").

212. *See id.* ("Sandra finally sold the property in June 1992 and received half the proceeds, amounting to $59,944.10.").

213. *See id.* (noting the condition of the escrow account).

214. *See id.* (mentioning Sandra's complaint under 28 U.S.C. § 2410(a)). When Sandra sold to the buyer, $19,412 of the price was paid to the purchase money mortgagee. *Id.* at 641. The parties agreed that this paydown should be apportioned on a 50-50 basis between the 50% cotenancy that Sandra took free of the IRS tax lien and to 50% which was allegedly encumbered by the tax lien. *Id.* at 640. Therefore, although just under $60,000 was paid into escrow, it was agreed

tax lien attached to Don's share of the tenancy by the entireties.[215] If this were true, then the IRS could have all of the escrowed funds. In the alternative, the IRS claimed that the conveyance from the marital entity to Sandra was fraudulent.[216]

Several times the case traveled up and down Jacob's ladder of appellate review. The District Court for the Western District of Michigan began by awarding summary judgment to the IRS.[217] Judge Gordon J. Quist's theory of the case was that, when the house was still owned in the entirety by the marital entity, Don had no interest in it. Therefore, a lien based on Don's taxes could not affix itself to the tenancy by the entirety. But, thought Judge Quist, the conveyance by the marital entity did not go directly to Sandra. First, it must have been the case that Don and Sandra bilaterally ended the tenancy by the entirety, creating in each a tenancy in common. An instant later, Don, as a tenant in common, conveyed to Sandra.[218] In this instant, the IRS lien attached, so that Sandra took title to Don's 50% cotenancy as encumbered by the IRS lien.[219] So far, the IRS was victorious.

---

that the maximum share of the IRS to this fund was $50,293. *Id.* at 641.

215. *See id.* (describing the grounds for the government's motion for summary judgment).

216. *See id.* at 640 ("The government further asserted that Don's conveyance to his wife was fraudulent.").

217. *Craft I*, No. 1:93-CV-306, 1994 U.S. Dist. LEXIS 13310, at *10 (W.D. Mich. Sept. 12, 1994).

218. *Id.*

219. *See id.* at *10 ("[E]ach spouse took an equal half interest in the estate and the government's lien attached to Mr. Craft's interest."). This was precisely the "monstrous" theory that lurks in the *Drye* opinion. In so ruling, Judge Quist declined to follow a seemingly binding precedent against his theory. *Id.* at *4–5. *See generally* Cole v. Cardoza, 441 F.2d 1337 (6th Cir. 1971). Judge Quist felt compelled to do so by a subsequent criminal forfeiture case. *See generally* United States v. 2525 Leroy Lane (*Leroy Lane I*), 910 F.2d 343 (6th Cir. 1990), *cert. denied sub nom.* Marks v. United States, 499 U.S. 947 (1991). In *Leroy Lane I*, an individual spouse used the tenancy by the entirety in the sale of illegal drugs. *Id.* at 345. The spouse's land (if any) was therefore deemed forfeit to the federal government. *Id.* The federal government agreed to the sale of the house "and the proceeds of the sale were designated as a substitute res in which the parties were deemed to have the same interest as they had in the real estate." *Id.* In *Leroy Lane I*, the federal government advocated the natural law thesis being investigated here. *See id.* at 347 ("The government argues that state property law should not be determinative, but rather that the federal courts should develop a federal common law of forfeiture to govern the treatment of property interests."). The *Leroy* court, in effect, agreed and held that the federal courts could pierce

The Court of Appeals for the Sixth Circuit reversed.[220] It denied the general notion that there is a natural law of property operating at the federal level.[221] "In Michigan," said the court, "it is well established that one spouse does not possess a separate interest in an entireties property."[222] The Sixth Circuit specifically rejected the district court's theory of instantaneous seizin in Don by which the IRS tax lien encumbered the 50% share Sandra allegedly took from Don directly.[223] The court of appeals remanded as to whether the

---

through Michigan fictions to hold that the guilty spouse had a *future interest* (but not a present interest) in the tenancy by the entirety. *See id.* at 352 (leaving the determination of the scope of the government's interest to the district court, but acknowledging that Michigan law does not preclude attachment of a lien to any interest that the spouse does have at termination of the entirety). This future interest belonged to the government. The *Leroy I* court ruled that the funds should be invested and that the innocent spouse should receive half the interest income. *Id.* She would receive the whole fund if she were to survive her husband. *Id.* In *United States v. 2525 Leroy Lane (Leroy Lane II)*, the court of appeals learned that subsequently the spouses divorced and the state court had awarded the "house" entirely to the wife. 972 F.2d 136, 137 (6th Cir. 1992). The wife then persuaded the district court to release all the escrowed funds to her. *Id.* The court of appeals ruled that the state court action was entitled to res judicata respect, but that perhaps the state court had been tricked by failure of the spouses to disclose the forfeiture proceeding. *Id.* at 138. If the state court were to reconsider, possibly the state court would have ruled that, upon divorce, the guilty spouse would instantaneously be seized, which would allow the government to take half the funds in criminal forfeiture. Because a joint conveyance by husband and wife also ends the tenancy by the entirety, Judge Quist reasoned that the conveyance was like a divorce: each spouse was instantly seized of a cotenancy. *See Craft I*, 1994 U.S. Dist. LEXIS 13310, at *9. This instantaneous seizin was enough for the IRS tax lien to attach to Don's share before the conveyance to Sandra, individually. *Id.* at *10.

Professor Johnson suggests that Judge Quist "followed" *Leroy I*. *See generally* Steve R. Johnson, *Fog, Fairness, and the Federal Fisc: Tenancy-by-the-Entireties Interests and the Federal Tax Lien*, 60 MO. L. REV. 839 (1995) [hereinafter Johnson, *Fog*]. But, in fact, Judge Quist traveled well beyond a lien on the future interest to a lien on the present possessory interest.

220. *Craft II*, 140 F.3d 638, 644–45 (6th Cir. 1998).

221. *See id.* at 641 ("Federal tax law 'creates no property rights but merely attaches consequences, federally defined, to rights created under state law.'" (citing United States v. Bess, 357 U.S. 51, 55 (1958))). The court rejected the suggestion that two Supreme Court cases had ushered in natural law at the federal level. *See id.* at 643 (stating that *United States v. Irvine*, 511 U.S. 224 (1994), and *Rodgers* have no effect on the present case). Said the court: "[T]hese cases do not alter the basic tenet that state law governs the issue of whether any property interests exist in the first place." *Id.*

222. *Id.*

223. *See id.* at 644 ("We are unaware of any precedent indicating that an entireties estate is automatically transformed into a tenancy in common as an intermediary step in the conveyance of the property. . . . Don never held an interest in the Berwyck

IRS had a fraudulent transfer theory to the escrowed funds.[224] Shortly after the remand, Don Craft died.[225]

Back in the district court,[226] Judge Quist ruled that the IRS owned a lien on the escrowed funds by virtue of fraudulent conveyance law.[227] The conveyance of the tenancy by the entirety (for $1) was held not to be a fraudulent conveyance because Don's "share" was exempt property, and a conveyance of exempt property is never fraudulent as to creditors.[228] But Don had used assets to

---

property to which the United States' lien could attach.").

224. *See id.* ("[T]here remains an issue of whether a fraudulent conveyance occurred in this case, an issue that the district court did not address."). Judge James L. Ryan filed a concurring opinion. He thought, prior to conveying to Sandra, Don had a "contingent remainder" to which the tax lien could attach. *Id.* at 645 (Ryan, J., concurring). By this, Judge Ryan meant that:

> [Don] had a right to the entire Berwyck property if his wife predeceased him, and he had a right to half the proceeds of the sale or lease of the home if the property were ever sold or leased. Although Don Craft did not have the whole bundle of property rights, it cannot be denied that he had some of them. And, most assuredly, the IRS could attach these rights.

Id. Although Michigan dicta said that Don had no future interest in the marital estate, no case ever turned on this and so Judge Ryan thought the question was still open. *Id.* at 646.

225. *See Craft IV*, 233 F.3d 358, 373 (6th Cir. 2000) (discussing the issue of whether Don's death in August 1998 makes the issue moot).

226. *Craft III*, 65 F. Supp. 2d 651 (W.D. Mich. 1999).

227. *See id.* at 662 ([P]ayments made by Don . . . did constitute a fraudulent conveyance. Therefore, the Government is entitled to recover that amount from the escrowed funds . . . ."). The government raised its fraudulent transfer assertions as a defense to Sandra's quiet title action to the escrowed funds. *Id.* at 654. Sandra claimed the matter could not be asserted as a defense. *Id.* On this point, the court decreed Sandra was wrong. Sandra asserted ownership of the funds. *Id.* The IRS asserted ownership (by virtue of fraudulent transfer theory). *Id.* Because the fraudulent transfer theory was defensive, Sandra was unable to plead the statute of limitations on an independent fraudulent conveyance action. *Id.* at 654 n.4; *see also* FED. R. CIV. P. 8(c)(2) ("If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.").

The court rejected Sandra's claim that Don's bankruptcy discharge barred the IRS's fraudulent conveyance theory. *Craft III*, 65 F. Supp. 2d at 660. This is undoubtedly correct. First, because Don had not filed returns at all, *Craft IV*, 233 F.3d at 358, Don's obligation to the IRS was not discharged. 11 U.S.C. § 523(a)(1)(B)(i) (2012). Second, even if it were, the IRS's action was directed at Sandra. Sandra is not permitted to assert Don's bankruptcy as a reason why she should not be sued. *Id.* § 524(e); Dixon v. Bennett, 531 A.2d 1318, 1326 (Md. Ct. Spec. App. 1987).

228. *Craft III*, 65 F. Supp. 2d at 657–68. This goes under the name of "no harm

pay down liens that had attached to the tenancy by the entirety.[229] These assets were in effect fraudulently conveyed.[230] Thus "the Government [was] entitled to a lien on Don's share of the proceeds of the sale of the Berwyck property equal to the amount by which the value of the entireties property was enhanced by payments made by Don during the period of insolvency."[231]

In fact, the fraudulent conveyance theory does not work at all for the IRS. Suppose Don owned unencumbered dollars and paid them to a creditor like the mortgage lender. The mortgage lender is surely a good faith purchaser for value, and such purchasers cannot be made liable for receiving unencumbered assets on a fraudulent conveyance theory.[232] True, payments enhanced the value of Don's equity in a tenancy by the entirety. But it is impossible to show that any part of the entireties was *transferred* to any third party. There being no *transfer*, there could be no *fraudulent* transfer. Michigan does, however, have a home-grown

---

no foul." Nino v. Moyer (*In re* Nino), 437 B.R. 230, 235 (W.D. Mich. 2009). The court had distinguished the interesting case of *Lasich v. Estate of Wickstrom (In re Wickstrom)*, 113 B.R. 339 (Bankr. W.D. Mich. 1990), in which "no harm no foul" was not followed. *Craft III*, 65 F. Supp. 2d at 658. In *Wickstrom*, a married couple gave away their tenancy by the entirety to relatives. *In re Wickstrom*, 113 B.R. at 341–42. A bankruptcy trustee was held able to avoid the transfer as a fraudulent conveyance. *Id.* at 352. Judge Quist distinguished *Wickstrom* on the ground that it was a bankruptcy case. *Craft III*, 65 F. Supp. 2d at 658. A tenancy by the entirety enters into the bankruptcy estate. *Infra* notes 512–532 and accompanying text. Once there, the debtors lost the ability to exempt the tenancy by the entirety because they had voluntarily conveyed it away. *Craft III*, 65 F. Supp. 2d at 658; *see* 11 U.S.C. § 522(g)(1)(A) (stating that a debtor may not claim proceeds of a fraudulent conveyance as exempt where the debtor voluntarily conveyed the claimed exempt property). Cases like *Wickstrom* are further discussed *infra* notes 832–844 and accompanying text. For criticism of § 552(g)(1)(A) and an attempt to reason around it, see generally Alyssa Pompei, Note, *"No Harm, Still Foul": Unharmed Creditors and Avoidance of a Debtor's Pre-Petition Transfer of Exemptible Property*, 89 ST. JOHN'S L. REV. 967 (2015).

229. *See Craft III*, 65 F. Supp. 2d at 659 (discussing Don's "enhancements" of the property while insolvent).

230. *See id.* at 658 (addressing how payments to enhance an estate while insolvent is fraudulent, regardless of the intent).

231. *Id.* at 659.

232. *See* UNIF. FRAUDULENT TRANSFER ACT § 8(a) (UNIF. LAW COMM'N 1884) (proclaiming not voidable transfers to "a person who took in good faith and for a reasonably equivalent value"); UNIF. FRAUDULENT CONVEYANCE ACT § 9 (UNIF. LAW COMM'N 1918) (allowing a claim by a creditor against anyone except an unknowing purchaser for fair consideration).

doctrine that says, where an insolvent owner of a tenancy by the entirety pays down a mortgage and thereby enhances the value of the immune tenancy, an unsecured creditor is subrogated to the mortgage to the extent of the payment.[233] This the IRS could plead, though it is not strictly speaking a fraudulent conveyance theory.

In either case, the fraudulent conveyance or fraudulent enhancement theory belonged to Don's bankruptcy estate.[234] True, Don's case was closed.[235] But bankruptcy cases can be re-opened. Indeed, Don's case was re-opened.[236] The bankruptcy court erred in not taking jurisdiction of the recovery—if indeed the fraudulent conveyance theory is valid at all.

What the IRS should have pleaded was a theory based on its tax lien. By virtue of the tax lien, the IRS owned in advance the

---

233. McCaslin v. Schouten, 292 N.W. 696, 700 (Mich. 1940). A subrogation theory suggests that the creditor bringing the action has a mortgage on the entireties itself. This was overlooked in *Lewis v. Harlin* (*In re Harlin*), 325 B.R. 184 (Bankr. E.D. Mich. 2005), where a debtor had paid a mortgage on the entireties just prior to the bankruptcy. In an action against the nondebtor spouse, the bankruptcy trustee had established that the paydown was a fraudulent conveyance, for which she was 100% liable (though only a 50% owner of the entireties). *Id.* at 191–92. Properly, the trustee was subrogated to a mortgage on the entireties itself, which could then be realized for the benefit of the bankruptcy estate. *Id.* at 192; *see also* 11 U.S.C. § 522(g) (2012) (providing that a debtor may not exempt property voluntarily conveyed away); *id.* § 551 (stating that avoided conveyances are preserved for the benefit of the bankruptcy estate).

The *In re Harlin* court seemed to think that all the trustee had was a money judgment against the nondebtor spouse. *In re Harlin*, 325 B.R. at 186. This part of the case is also questionable. The debtor had used his own funds ($146,861) to retire a mortgage on the tenancy by the entirety. *Id.* Why should the nondebtor spouse be liable for this? The answer is that she was not personally liable, but the trustee could subrogate to the mortgage to the extent of the fraudulent payment, and the mortgage encumbered her share as well as the debtor's share of the tenancy.

In the end, the trustee was denied the right to sell the entireties, and the trustee was limited to an in personam judgment against the nondebtor spouse. *Id.* at 192. Furthermore, she seemed (inappropriately) to be *entirely* liable, even though she received only 50% of the gain from payment of the mortgage. *Id.* at 192–93.

234. *See Craft III*, 65 F. Supp. 2d 651, 658 (W.D. Mich. 1999) (discussing the difference between the fraudulent conveyance theory when under the bankruptcy code as opposed to Michigan law).

235. *Craft I,* No. 1:93-CV-306, 1994 U.S. Dist. LEXIS 13310, at *1 (W.D. Mich. Sept. 12, 1994).

236. *Craft II*, 140 F.3d 638, 640 (6th Cir. 1998).

funds Don used to pay the mortgage lender.[237] The IRS was therefore entitled to articulate a constructive trust theory whereby Don, as fiduciary for the IRS, bought a mortgage lien from the mortgage lender, which Don held in trust for the IRS. This was the best theory for the IRS,[238] and one that Don's bankruptcy trustee could never expropriate from the IRS in a re-opened bankruptcy case. A use of a constructive trust theory would also allow the IRS to receive all the payments Don made on local tax and mortgage interest. Under fraudulent conveyance law, the court felt constrained to limit the IRS to retirement of principal with regard to the mortgage.[239]

Up once more to the court of appeals on cross-appeals, the IRS claimed that it held a tax lien directly on the tenancy by the entirety.[240] This was rejected on the ground of "law of the case."[241]

---

237. *See Craft IV*, 233 F.3d 358, 362 (6th Cir. 2000) (noting that the IRS placed a lien on all of Don's personal property).

238. There is a moment in *Craft IV* where this alternative theory is arguably recognized:

> Rather, the district court found that the IRS could recover the value of mortgage payments Don made on behalf of the entireties property under a fraudulent enhancement theory. In other words, Don essentially hid funds *to which the IRS was entitled (by virtue of its lien) by investing them in a property to which the lien could not attach*.

Id. at 373 (emphasis added). The emphasized language is couched in the language of statutory lien, not fraudulent conveyance.

239. *See Craft III*, 65 F. Supp. 2d at 662 (limiting the government to a recovery of $6.693, the amount by which "Don's funds reduced the outstanding balance of the mortgage"). Don's payment of mortgage interest and local property tax was held not to enhance value. *Id.* at 661. This is wrong. If Don had *not* paid mortgage interest or local tax, the value of the tenancy by the entirety would have radically plunged. Therefore, paying these amounts enhanced value just as much as paying down mortgage principal. As the court put it:

> To this Court's knowledge, no Michigan court has ever held that the interest component of mortgage payments or property tax payments enhance entireties property to the detriment of creditors. The reason is obvious: such payment do not increase a debtor's equity or constitute a fraud on creditors. Rather, payments of interest and property taxes are no more than payments made by the debtor to certain creditors in preference over other creditors, which the law allows debtors to do.

Id. The court's last remark completely undercuts every part of the fraudulent conveyance theory. All that happened when Don paid the mortgage lender was that a creditor was preferred, "which the law allows [the] debtor[] to do." *Id.*

240. *Craft IV*, 233 F.3d at 363.

241. *Id.* at 363–64. According to the Sixth Circuit, a prior ruling in the same case will be reconsidered "where a subsequent contrary view of the law is decided

Sandra's appeal from the fraudulent conveyance holdings was also rejected.[242] So far, the IRS had only a partial victory on its fraudulent conveyance theory.

The case finally arrived on the doorstep of the Supreme Court in 2001.[243]

1. The Federal Bundle of State Sticks

The Supreme Court reversed and ruled for the IRS—the IRS had a lien on Don's full 50% share.[244]

---

by the controlling authority." *Id.* at 364. One such subsequent authority was *Drye*, which I have discussed in detail. *Supra* Part I.C. The Sixth Circuit found that "*Drye* has not so fundamentally changed the legal landscape as to overrule *Craft I*." *Craft IV*, 233 F.3d at 369.

242. *Craft IV*, 233 F.3d at 369–75. Sandra had claimed that the earlier remand had encompassed only the theory that the conveyance of the entireties was fraudulent, and that the "enhanced value" theory was beyond this scope. *Id.* at 370. The court rejected this claim. *Id.* at 370–71. She also claimed that the IRS did not plead this theory and therefore it could not be raised at trial. *Id.* at 371. The court rejected this claim as well. *Id.* The pretrial order of the district court listed the issue as one to be tried and Sandra did not object to the pretrial order. *Id.* Sandra also claimed that the IRS claim was barred by the statute of limitations. *Id.* at 372. But, since the IRS *answer* to Sandra's complaint raised fraudulent conveyance issues, the matter was pleaded within the relevant IRC time limit. *Id.* at 373.

Sandra also claimed that Don's death in August 1998 rendered the IRS claim moot. *Id.* Her theory was that the IRS lien was on Don's share that was subject to survivorship, so that when Don died, the tax lien died also. *Id.* The court rejected this claim because the lien was based on "fraudulent enhancement" of the tenancy by the entirety, which survived both the conveyance to Sandra and Don's subsequent death. *Id.*

The court also rejected Sandra's demand for interest compensation on that part of the escrowed funds not awarded to the IRS. *Id.* at 375.

243. *See Craft V*, 535 U.S. 274, 278 (2002) (granting certiorari to consider if the tax lien could attach to the property).

244. *See id.* at 288 (concluding that Don's interest constituted "rights to property," and that the state interpretation does not bind when there is a federal question). In so ruling, the Supreme Court may have reversed a prior dictum in *National Bank*, where the Court ruled that the IRS could levy a joint deposit account because the taxpayer had a unilateral right to withdraw (even though doing so was wrongful where a nontaxpayer actually owned the funds). United States v. Nat'l Bank of Commerce, 472 U.S. 713, 726 (1985). Justice Powell dissented and cited *Raffaele v. Granger*, 196 F.2d 620 (3d Cir. 1952), as contrary to the majority opinion. *National Bank*, 472 U.S. at 743 n.8 (Powell, J., dissenting). In *Raffaele*, the IRS attempted to levy a deposit account held by a taxpayer and his spouse as tenants by the entirety. *See Raffaele*, 196 F.2d at 622.

In her opinion for the Court, Justice Sandra Day O'Connor strongly staked out for federal courts a natural law of property that simply looks past what state law proposes:

> Whether the interests of respondent's husband in the property he held as a tenant by the entirety constitutes "property and rights to property" for the purposes of the federal tax lien statute is ultimately a question of federal law. The answer to this federal question, however, largely depends upon state law. The federal tax lien statute itself "creates no property rights but merely attaches consequences, federally defined, to rights created under state law." Accordingly, "[w]e look initially to state law to determine what rights the taxpayer has in the property the Government seeks to reach, then to federal law to determine whether the taxpayer's state-delineated rights qualify as 'property' or 'right to property' within the compass of the federal tax lien legislation."[245]

Here we see the superegoic structure. Federal law is speechless on its own. State law must speak first. Federal law then passes judgment on the state-law proposition that its citizen has or does not have "property."

In her analysis, Justice O'Connor used a "common idiom"—property is a "bundle of sticks."[246] "State law determines only which sticks are in a person's bundle. Whether those sticks qualify

---

The taxpayer moved to quash the levy. *Id.* Although the taxpayer had a unilateral right against the bank to withdraw 100% of the funds, such a withdrawal was wrongful as against the marital entity that owned the proceeds. *Id.* at 622–23. The Third Circuit quashed the levy. *Id.* at 624. Justice Blackmun retorted that the majority had not transgressed *Raffaele*:

> The decision there did not concern the propriety of a provisional remedy, but the final ownership of the property in question. The court held that under Pennsylvania law a husband and wife's joint bank account was held by them together as tenants by the entirety, and that therefore the Government could not use the money in the account to satisfy the tax obligations of one spouse.

National Bank, 472 U.S. at 728 n.11. Here, the Supreme Court seems to assume that the IRS had no lien on the taxpayer's share of the account held in the entirety. *I.R.S. v. Gaster*, 42 F.3d 787, 791 (3d Cir. 1994). The exchange between Justices Blackmun and Powell was cited by the court of appeals in *Craft IV* to justify the ruling of no lien on Don's share. *Craft IV*, 233 F.3d at 364 n.7.

245. *Craft V*, 535 U.S. at 278 (citations omitted).

246. *Id.*

as 'property' for purposes of the federal tax lien statute is a question of federal law."[247]

The idea is that Michigan law creates "sticks"—relations between persons with regard to a thing. Michigan supplies the sticks but is disabled from labelling a given set of sticks as a bundle. This could be done only by the federal courts. The sticks located by the Court include "the right to use, to exclude, and to enjoy a share of the property's income."[248]

Usually the right to alienate is an important stick in the bundle. With regard to the Michigan tenancy by the entirety, "[n]either spouse may unilaterally alienate or encumber the property."[249] There was, to be sure, an alienation right, but it could only be exercised with the consent of the other spouse.[250] A stick, Justice O'Connor admitted, was missing from the bundle. But no matter. "There is no reason to believe, however, that this one stick—the right of unilateral alienation—is essential to the category of 'property.'"[251]

---

247. *Id.* at 278–79.

248. *Id.* at 280. These "sticks" are drawn from Professor Steve R. Johnson. Steve R. Johnson, *After* Drye*: The Likely Attachment of the Federal Tax Lien to the Tenancy-by-the-Entireties Interests*, 75 IND. L.J. 1163, 1178 (2000) [hereinafter Johnson, *After* Drye]. In my view, the listing of the right to receive income is redundant. It is simply a subset within "right to use and/or alienate." The right to income is actually a composite of different ideas. Suppose *H* and *W* own by the entirety in Michigan and *W* enters into a lease to *T*, promising *T* exclusive possession of Blackacre in exchange for an agreed rent. If *H* does not ratify the lease, *T* has no possessory right at all as *W* has no unilateral right to convey anything. Here *W* has purported to act for *H* without authority to do so. Under the law of agency, however, *H* may ratify *W*'s unauthorized act after the fact. If he does, *H* and *W* have joined in the lease to *T*. *T* has the exclusive right of possession, and *H* and *W* have an equal share to the agreed rent from *T*. What we witness is merely the right to use and alienate.

249. *Craft V*, 535 U.S. at 282.

250. *See id.* at 283–84 (discussing the ability to alienate or encumber with his wife's consent). According to Professor Johnson, there *is* a unilateral power to convey without consent of the other spouse—when the taxpayer spouse conveys precisely to the nontaxpayer spouse. *See* Johnson, *Why* Craft *Isn't Scary*, *supra* note 16, at 450. But deeds of gift must be *accepted*. Shepard v. Shepard, 129 N.W. 201, 208 (Mich. 1910). If the spouse refuses the deed, the property is not conveyed. *Id.* So it is sounder to think there is *no* unilateral power to convey.

251. *Craft V*, 535 U.S. 274, 284 (2002); *see also* Drye v. United States, 528 U.S. 49, 60 n.7 (1999) ("[W]e do not mean to suggest that transferability is essential to the existence of 'property' or 'rights to property' . . . .").

2. The Partnership Analogy

The problem with natural law theories is that they turn monstrous. The dissent in *Craft* pointedly found that Justice O'Connor's property intuitions threatened major collateral damage on the relation of the federal tax lien to partnership property.[252]

In Michigan, the marital entity (not the individuals) owns the tenancy by the entirety.[253] What the Supreme Court did was to pierce the marital veil, as it were. The marriage was proclaimed a fiction—a sham.[254] The dissent interpreted the majority opinion as licensing the piercing of *any* "fictional" entity whenever doing so facilitates collecting a tax.[255] According to Justice Thomas:

---

252. *See Craft V*, 535 U.S. at 301 (Scalia, J., dissenting) (suggesting that the court's policy will lead to "wholesale tax fraud").

253. *Supra* note 176 and accompanying text.

254. *See Craft V*, 535 U.S. at 281 (discussing how the separate legal person theory of marriage is a state law "fiction"). *Craft*, therefore, could be read as one that makes veil piercing, or "alter ego" doctrine, a matter of federal property law. One case, however, expressly denies this. *See* Old W. Annuity & Life Ins. Co. v. Apollo Grp., 605 F.3d 856, 861–62 (11th Cir. 2010); Johnson, *Why* Craft *Isn't Scary*, *supra* note 16, at 445 ("[T]his tenancy was based on a fiction: the notion that, by virtue of marriage, the husband and especially, the wife had lost their separate identities and became one person in law."). Professor Johnson elsewhere refers to the marital entity as "metaphysical," whereas his veil piercing instincts are based on substance and reality. *See* Johnson, *Fog*, *supra* note 219, at 858. This overlooks the Kantian point that reality *itself* is a metaphysical assumption. *See* Christian Onof, *Thinking the In-itself and its Relation to Appearances*, *in* KANT'S IDEALISM: NEW INTERPRETATIONS OF A CONTROVERSIAL DOCTRINE 211, 213 (Dennis Schulting & Jacco Verburgt eds., 2011) (noting that Kant's theory relies on this assumption).

Professor Johnson also falls into syllogistic error in concluding that marital entities are fictions but partnership entities are not. *Id.* at 862. The defective syllogism goes like this: (1) Partnerships are entities. (2) Partnerships must file information returns. *Id.*; I.R.C. § 6031(a) (2012). (3) Marital entities need not file information returns. Therefore (4) marital entities are not entities. Johnson, *Fog*, *supra* note 219, at 862. The flaw is the illegitimate introduction of the principle that all legal entities have to file information returns. The argument falls apart if not all legal entities must file information returns. Professor Johnson's error has a name: *quaternion terminorm*, which has the following form: (A) all stars are in heaven. (B) Angelina Jolie is a star. (C) Angelina Jolie is in heaven. IRVING M. COPI & CARL COHEN, INTRODUCTION TO LOGIC 234 (11th ed. 2002). The ambiguity is in the definition of the word "star."

255. *See Craft V*, 535 U.S. at 301 (Thomas, J., dissenting) (rejecting dismissal of state law fictions).

> [U]nder the logic of the Court's opinion partnership property could be attached for the tax liability of an individual partner. Like a tenant in a tenancy by the entirety, the partner has significant rights to use, enjoy, and control the partnership property in conjunction with his partners. I see no principled way to distinguish between the propriety of attaching the federal tax lien to partnership property to satisfy the tax liability of a partner, in contravention of current practice, and the propriety of attaching the federal tax lien to the tenancy by the entirety property in order to satisfy the tax liability of one spouse, also in contravention of current practice.[256]

Stung by this criticism, Justice O'Connor responded directly to it, assuring that no IRS lien would attach to partnership property when an individual partner owed a tax.[257]

What kills the monster, in the mind of Justice O'Connor, is that the IRS can get at partnership assets indirectly—by levying the partnership interest of the taxpayer.[258] But in the case of the tenancy by the entirety, there is no way of levying against the taxpayer's individual interest in the marital entity, because (says Michigan) this interest supposedly does not exist.[259] This inability of the IRS to reach anything directly or indirectly showed that Michigan law was "absurd."[260] Michigan "would also allow spouses to shield their property from federal taxation by classifying it as entireties property, facilitating abuse of the federal tax system."[261]

This particular line of argument leads one to think that, if Michigan had provided for something resembling a partnership interest in the marital entity, then only that individual interest

256. *Id.* at 295 n.4.

257. *See id.* at 286 ("The Federal Government may not compel the sale of partnership assets (although it may foreclose on the partner's interest)." (internal citations omitted)).

258. *Id.* at 286; *cf.* N.Y. C.P.L.R. § 5201(c)(3) (McKinney 2007) ("Where property consists of an interest in a partnership, any partner other than the judgment debtor, on behalf of the partnership, shall be the garnishee.").

259. *Craft V*, 535 U.S. 274, 281–82 (2002).

260. *Id.* at 285.

261. *Id.* (citing Johnson, *After* Drye, *supra* note 248, at 1171). An early bankruptcy case illustrates the potential of the entireties to flummox the creditors. In *Michigan National Bank v. Chrystler (In re Trickett)*, 14 B.R. 85, 86 (Bankr. W.D. Mich. 1981), the debtors exempted entireties property valued at $3,701,314.50 (in 1981 dollars, mind you). Total debts were $2,400,375.55. *Id.*; *see also In re* Ginn, 186 B.R. 898, 900 (Bankr. D. Md. 1995) (stating that the entireties exemption was worth $2,900,000).

could be levied; the real property owned by the marital entity could not be reached directly. In fact, Kentucky reaches this precise conclusion. The Kentucky Court of Appeals has ruled that a creditor of the husband could presently sell the husband's individual right of survivorship, which was his individual property[262] (as opposed to property of the marital entity).[263] In Kentucky, the "absurdity" of no individual interests does not exist and therefore, I suggest, *Craft* is *not binding precedent* for Kentucky entireties. Rather, the Kentucky entireties are directly analogous to a partnership, where the tax lien reaches the private interest of the taxpayer spouse but not the underlying real estate.[264]

But if *Craft* does not apply in Kentucky, *Rodgers* still does. The question arises whether the IRS has a partition privilege, even if the IRS lien attaches only to the taxpayer's "contingent remainder" in the entireties. In considering this question, we view the marital entity as owning the present right of possession for the joint lives of the spouses. The taxpayer spouse and the innocent spouse each have a future interest, in case one survives the other. Could a *Rodgers*-style sale eliminate the interests of the marital entity and of the innocent spouse? Although we commonly think of partition sales as occurring between present possessors, they can also occur between a present possessor and future interests.[265]

---

262. *See* Hoffman v. Newell, 60 S.W.2d 607, 613 (Ky. 1932) (determining that the lower court erred in holding that the creditor was without the right to present sale). The *Hoffman* court referred to the husband's individual property as a "contingent remainder." *Id.* at 609. This is an abuse of notation. A remainder is an interest of a third-party grantee that follows a fee tail, life estate or leasehold interest. *See* RESTATEMENT (FIRST) OF PROP. § 156 (AM. LAW INST. 1936) ("[A] remainder is any future interest limited in favor of a transferee in such manner that it can become a present interest upon the expiration of all prior interests simultaneously created, and cannot divest any interest except an interest in the transferor."). A better term would be "executory interest." *Id.* § 158.

263. Tennessee also follows the Kentucky model. *See generally* Arango v. Third Nat'l Bank in Nashville (*In re* Arango), 992 F.2d 611, 613 (6th Cir. 1993); Cole Mfg. Co. v. Collier, 31 S.W. 1000, 1002 (Tenn. 1895); Oval A. Phipps, *Tenancy by Entireties*, 25 TEMPLE L.Q. 24, 35 (1951).

264. *But see* United States v. Winsper, 680 F.3d 482, 488 (6th Cir. 2012) (assuming, apparently, that *Craft* governs a Kentucky tenancy by the entirety).

265. *See* Candler S. Rogers, *Removal of Future Interest Encumbrances—Sale of the Fee Simple Estate*, 17 VAND. L. REV. 1437, 1439 (1964) (describing laws that allow for partition by sales of land encumbered by future interests under particular circumstances).

In *United States v. Winsper*,[266] the Winspers held by the entireties in Kentucky.[267] Malcolm, but not Barbara, was the taxpayer.[268] The court of appeals assumed too quickly that *Craft* applied, but it also considered whether *Rodgers* applied—particularly whether the court had discretion to refuse to sell the whole.[269] In the discussion that follows, we will assume that *Craft* is out of bounds. Otherwise, all of partnership law yields to the exigency of the tax man, as Justice Thomas predicted.

In *Winsper*, the district court refused to order the sale because it thought the IRS (not the court) had discretion to sell or not to sell.[270] "This confusion appears to have infected the decision."[271] The court of appeals held that the IRS was *entitled* to a sale of the whole unless the district court could justify otherwise by means of a balancing test set forth in *Rodgers*.[272] This balancing test consisted of four factors.

(1) *Financial prejudice to the government*. The first of four points in the *Rodgers* balancing test was the "extent to which the Government's financial interests would be prejudiced if it were relegated to a forced sale of the partial interest actually liable for the delinquent taxes."[273] For instance, if the IRS could garner the same amount by selling the taxpayer's private interest without selling the whole, the government would not be prejudiced if the court refused to order a sale of the whole. Or if a sale of the taxpayer's interests in other, different property raised enough cash to pay the tax, the court could prevent the sale of the whole of Blackacre on "marshaling of assets" grounds.

The district court held that prejudice to the government was small because the sale was sure to garner a small percentage of the taxpayer's total debt and because the tax debt was already a

266. 680 F.3d 482 (6th Cir. 2012).

267. *See id.* at 486–87 (discussing Malcolm's tax liability and the effect of the individual tax lien against Malcolm on his property interest).

268. *Id.*

269. *Id.* at 488.

270. *See* Johnson, *Why* Craft *Isn't Scary*, *supra* note 16, at 475 (predicting that district courts will have sympathy for the non-debtor spouse).

271. *Winsper*, 680 F.3d at 489.

272. *Id.*

273. United States v. Rodgers, 461 U.S. 677, 710 (1983).

decade old at the time of the motion for a sale.[274] The court of appeals ruled that the percentage could not be considered; such an item was not mentioned in *Rodgers*.[275] Where the IRS had not been dilatory in pursuit of collection, the length of time required to collect could not be considered.[276]

Rather, it was obvious that the IRS would be prejudiced because the sale of the taxpayer's contingent remainder would have minimal value if sold separately. Here, the court of appeals neglects to observe that a feedback loop exists in the argument. If the IRS could sell the whole, then the tenancy by the entirety would end and the taxpayer could get not just the value of the contingent remainder but the taxpayer's 50% of the proceeds in cash, which the IRS could then take. Thus, a sale of the whole has the effect of vastly increasing the IRS take, not just because the contingent remainder in isolation would be more valuable.

There is something of a cheat in considering such a factor. The IRS is supposed to be increasing the ratio of the taxpayer's contingent remainder over the fee simple absolute value. But, in fact, the sale itself transforms the remainder into the cash equivalent of a present possessory interest, all to the great benefit of the IRS.

Remembering our assumption that *Craft* does not apply to Kentucky entireties, but only *Rodgers* does, there is support in *Rodgers* for the IRS. This is Justice Brennan's "broken dam" point. In order to grasp this point, we must visit the other fact pattern that had been consolidated with the case involving Lucille Rodgers.

The *Rodgers* case also concerned Joerene Ingram, ex-wife of Donald. The two held a homestead as community property.[277] "Community property" signified that Donald's creditors could reach the wife's share of property obtained during the marriage.[278] As part of their divorce, Donald conveyed all his interest in the homestead to Joerene.[279] Joerene tried to sell the house, but the

274. United States v. Winsper, 680 F.3d 482, 490 (6th Cir. 2012).

275. Also, such a factor "would tend to favor delinquent taxpayers with the largest tax liability (*i.e.,* the greater the debt, the smaller the percentage of that debt would be satisfied in most cases by a forced sale." *Id.* at 490–91.

276. *Id.* at 490.

277. *Rodgers*, 461 U.S. at 712.

278. *Id.* at 683.

279. *See id.* at 688 (detailing provisions of the divorce property settlement

docketed tax assessment scared off the buyers.[280] Joerene then brought suit to have the tax lien removed.[281] The IRS counterclaimed for a sale of the whole.[282] The parties agreed that the property could be sold for cash and "that their rights, claims and priorities would be determined as if the sale had not taken place, and that the proceeds would be divided according to their respective interests."[283] The district court then granted summary judgment to the government (even though the property was already sold).[284]

The court of appeals reversed. The IRS could take from the fund the small amount of tax ($283) Joerene and Donald owed jointly to the IRS.[285] But, it denied the IRS access to any other part of the funds. It remanded to the district court, however, to determine whether Joerene had "abandoned" the homestead by attempting to sell even before the stipulation entered into with the IRS.[286]

The Supreme Court first announced that it was "constrained to treat the escrow fund now sitting in the registry of the District Court as if it were a house."[287] It noted that, because the IRS had a direct claim against Joerene, the IRS could sell her half of the house.[288] That is, her right to veto a sale was with regard to creditors of her husband. As to her own creditors, she owned exempt property, insofar as state law was concerned, but her property was not exempt from tax liens within the meaning of I.R.C. § 6334(a).[289] The IRS could therefore sell her half to reach this small amount. "Moreover, once the dam is broken, there is no

---

where in exchange for $1,500, Donald would convey his interest in the real property to Joerene).

280. *See id.* (hypothesizing that efforts to sell the property were unsuccessful because of federal tax lien encumbrances).

281. *See id.* (noting efforts by Joerene to secure quiet title to the property and removal of the federal tax liens in Texas state court).

282. *See id.* at 689 (discussing the government's prayer for relief which included in part a judicial sale of the property).

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.* at 689–90.

287. *Id.* at 712.

288. *See id.* (noting that Joerene was not a "third party" as to joint liability).

289. *Id.* at 700.

reason . . . not to allow the Government also to collect on the individual debt of Donald Ingram *out of that portion of the proceeds of the sale representing property interests properly liable for the debt*."[290]

The "broken dam" in *Rodgers* supports the idea in *Winsper* that, once the IRS is able to sell the whole, the tenancy by the entirety is presumably at an end. Half the cash must be accorded to the taxpayer in *Winsper*, and this the IRS may take in satisfaction of the tax debt. If a sale of the whole were not to occur, the dam would not be broken and the IRS would not be able to cash in. The inability to sell is therefore prejudicial to the IRS.

So far, in *Winsper*, the IRS leads as to the first factor in the balance test. We have four balancing factors to consider.

(2) *Expectations under state law*. The second point is:

> [W]hether the third party with a nonliable separate interest in the property would, in the normal course of events (leaving aside § 7403 and eminent domain proceedings, of course), have a legally recognized expectation that the separate property would not be subject to forced sale by the delinquent taxpayer or his or her creditors.[291]

In *Winsper*, the district court ruled that this factor favored the innocent spouse, and the court of appeals could not disagree.[292] In Kentucky, ordinary creditors cannot sell a present possessory estate.[293] "Accordingly, the district court properly found that this factor weighed in favor of Barbara Winsper and the exercise of discretion not to foreclose the lien and force the sale of the entire property."[294] So far, Barbara and the IRS were in a tie.

(3) *Prejudice to third parties*. The third balancing factor concerned "the likely prejudice to the third party, both in personal dislocation costs"[295] and in the risk of "practical

290. *Id.* (emphasis added).

291. *Id.* 710–11.

292. *See* United States v. Winsper, 680 F.3d 482, 491 (6th Cir. 2012) ("Once she was no longer a delinquent taxpayer herself, Barbara Winsper had a legally recognized expectation that the entire property would not be subject to forced sale to satisfy her husband's separate tax liability.").

293. *See id.* (describing Kentucky law as disallowing forced sales of property interests in order to satisfy the debts of one of the spouses).

294. *Id.*

295. United States v. Rodgers, 461 U.S. 677, 710–11 (1983).

undercompensation."[296] By this, the Supreme Court meant the possibility that actuarial tables would assign to the third party a specific life span, but the third party might live longer and therefore be undercompensated.[297]

The district court in *Winsper* found that this factor favored Barbara.[298] The court of appeals, however, complained that there was no evidence on the record that Barbara might live longer than predicted.[299] The court of appeals also found that Barbara's claim of sentimental value of her home could not be counted.[300] And whereas the district court ruled that Barbara's expected share ($71,500) was insufficient to allow for other housing, this was mere speculation and could not be upheld.[301] What Barbara had to show was that her dislocation costs in this instance were higher than what was usually encountered in a lien foreclosure.[302]

After three factors, Barbara and the IRS were still in a dead heat.

(4) *The character of third-party interests*. The final factor from *Rodgers* is that:

> [A] court should consider the relative character and value of the non-liable and liable interests held in the property: if, for example, in the case of real property, the third party has no present possessory interest or fee interest in the property, there may be little reason not to allow the sale; if, on the other hand, the third party not only has a possessory interest or fee interest, but that interest is worth 99% of the value of the property, then

---

296. *Id.*

297. *See id.* at 704 ("[A]ny calculation of the cash value of a homestead interest must of necessity be based on actuarial statistics, and will unavoidably undercompensate persons who end up living longer that the average." (citation omitted)). Imagine the chagrin of a life tenant at finding she is still alive when the actuarial table had promised sleep after life's fitful fever.

298. *Winsper*, 680 F.3d at 491–92.

299. *Id.*

300. *See id.* at 492 (noting that consideration of this factor would render the Government's foreclosure process of any property impossible because this factor would always tip in favor of the person dislocated).

301. *Id.*

302. *See id.* (concluding that, if Barbara were able to show this, sentimental factors could be considered but otherwise a sentimental argument would be too speculative).

> there might well be virtually no reason to allow the sale to proceed.[303]

In *Winsper*, who were the non-liable third parties? Recall our premise is that *Craft* does not apply in Kentucky; otherwise, partnership property law is destroyed. If that is the case, then the third party is the marital entity, which had the possessory right, and also Barbara, who had a contingent remainder. Under our premise, we are not piercing the marital veil.

The *Winsper* court, however, assumed that *Craft did* apply and that the marital entity had to be viewed as an impermissible fiction.[304] That meant that the taxpayer had a 50% share of the tenancy.[305] Yet, thought the court of appeals, only persons with over 50% of the value could win the fourth balancing factor.[306] Given the 50-50 split, the fourth factor favored neither side.[307] Keeping score, the government won on prejudice grounds (thanks to the dam-breaking argument) and Barbara won on state-expectation grounds (Kentucky creditors could not force the sale of a possessory right to the home). On remand, the factors were exactly tied.

If, however, we recognize that *Craft* does not apply in Kentucky, and if we recognize that the dam-breaking point is an illegitimate self-referential trick, the balance shifts in Barbara's direction.[308]

---

303. United States v. Rodgers, 461 U.S. 677, 711 (1983).

304. United States v. Winsper, 680 F.3d 482, 488 (6th Cir. 2012).

305. Does this not assume that Malcolm and Barbara have precisely the same life expectancy? Yes, it does, but an earlier Sixth Circuit precedent mandated that valuations of an individual share of a tenancy by the entirety exclude actuarial estimates. United States v. Barr, 617 F.3d 370, 374 (6th Cir. 2010) (one judge dissenting), *cert. denied* 562 U.S. 1287 (2011).

306. *Winsper*, 680 F.3d at 492–93.

307. *See id.* at 493 (ruling that the defendants failed to offer a compelling reason to ignore the assumption that the spouses held equal interests in the property).

308. For bankruptcy cases refusing a sale of the whole where the bankruptcy trustee claimed the contingent remainder, see *Geddes v. Livingston* (*In re Livingston*), 804 F.2d 1219, 1220 (11th Cir. 1986) (involving joint life estates with a contingent remainder to the survivor); *Kovacs v. Sargent* (*In re Sargent*), 337 B.R. 661, 665 (Bankr. N.D. Ohio 2006); *Waldschmidt v. Shaw* (*In re Shaw*), 5 B.R. 107, 112 (Bankr. M.D. Tenn. 1980). In these cases, the trustee had asked for a partition sale pursuant to Bankruptcy Code § 363(h), which requires that the debtor and a non-debtor have "an undivided interest as a tenant in common, joint

But, our remarks on the Kentucky situation give reason to criticize the Michigan result in *Craft*. Michigan authorities state that a deed by Don Craft would not convey his survivorship rights[309] (as it would in Kentucky). Yet the Sixth Circuit had already held (in the context of criminal forfeiture) that the government takes the criminal spouse's future interest—the individual right to 100% ownership if the criminal spouse were the survivor of his wife.[310] As Judge James L. Ryan remarked in his dissenting opinion in *Craft II*:

> In effect, then, the government in *Leroy I* had a lien on the debtor spouse's contingent remainder. Thus, regardless whether Don Craft could alienate his contingent remainder pursuant to Michigan law, under federal tax law the IRS lien attached to it in 1989. This future interest was a "right[] to property" as defined by Michigan law, and attachable as provided by federal law.[311]

So, the Sixth Circuit had already looked past a fiction—a very limited fiction. The fiction that the marital entity was a separate person was honored. But the lesser fiction that the guilty spouse had no individual interest was overridden. Furthermore, in *Fischre v. United States*,[312] the court assumed that the meaning of *Leroy Lane I* was that, as a matter of Michigan law, the husband had an individual contingent remainder interest to which ordinary

---

tenant, or tenant by the entirety." 11 U.S.C. § 363(h) (2012). The *Shaw* court rightly pointed out that the debtor and the non-debtor were not cotenants insofar as the contingent remainder was concerned. Therefore, where the tenancy by the entirety was completely exempt in the bankruptcy, there could be no sale of the whole. This case is a good reading of § 363(h). The *Winsper* court, however, was bound by the *Rodgers* reading of I.R.C. § 7403(a), which exceeds the narrow *Shaw* reading of Bankruptcy Code § 363(h).

309. Rogers v. Rogers, 356 N.W.2d 288, 292–93 (Mich. 1984).

310. United States v. 2525 Leroy Lane, 910 F.2d 343, 350 (6th Cir. 1990). Professor Johnson wrongly claims that the forfeiture cases show that the individuals—not the marital entity—own the possessory right. Johnson, *Fog*, *supra* note 219, at 863–64. One of the cases he cites is the aforementioned *Leroy Lane I* case. Another is *United States v. 1500 Lincoln Avenue*, 949 F.2d 73 (3d Cir. 1991) (Alito, J.), which agrees with *Leroy I*. *See also* United States v. Lee, 232 F.3d 556 (7th Cir. 2000) (stating that the government could not take criminal spouse's share of a Florida tenancy by the entirety).

311. *Craft II*, 140 F.3d 638, 643 (1998). Judge Ryan also observed that "the proposition that a spouse's future interest is inalienable does not appear to have ever been the rule of decision in any case decided by Michigan courts." *Id.* at 646.

312. 852 F. Supp. 628 (W.D. Mich. 1994).

judicial liens could attach.[313] If this is true, Justice O'Connor's reasoning falls apart. The individual *does* have a private interest in the marital entity, just as a partner has an interest in the partnership.[314]

One can go further to claim that the tenancy by the entirety that Justice O'Connor assumed to exist in Michigan does not exist there *or anywhere*. Pennsylvania is supposed to be a state that resembles the Michigan pattern. Yet in *United States v. 1500 Lincoln Avenue*,[315] then-Judge Samuel Alito reached the same result as in *Leroy Lane I*. Judge Alito upheld a federal complaint for forfeiture of the drug-dealing husband's contingent remainder "but preserv[ed] Mrs. Bernstein's right to full and exclusive use and possession of the property, during her life, her protection against conveyance of or execution by third parties upon her husband's former interest, and survivorship right."[316] The fact that the government got *anything* suggested that the drug dealer had *something*. Thus, Judge Alito treated Pennsylvania as following the Kentucky pattern.

The Florida case of *United States v. 15621 S.W. 209th Avenue*[317] is to the same effect. The court cited Florida authority to the effect that "[n]either spouse can sell, forfeit or encumber any part of the estate without the consent of the other"[318] and on the basis of this, the court dismissed the forfeiture action against the tenancy by the entirety used in drug transactions. But then, contrary to this logic, the court remarked:

> Nothing would prevent the government from attempting to execute or levy on its interest should the entireties estate be altered by changes in circumstances or by court order. That is, we do not rule out the possibility that if the United States filed a lis pendens against the property, the government might acquire in later forfeiture proceeding Mr. Aguilera's interest in the property should he divorce his spouse, should Mrs. Aguilera predecease him, or should their interests be transmuted into

313. *Id.* at 629.

314. *See id.* at 630 (describing each spousal interest as distinct and therefore sufficient to support the attachment of a creditor's lien).

315. 949 F.2d 73 (3d Cir. 1991).

316. *Id.* at 78.

317. 894 F.2d 1511 (11th Cir. 1990).

318. Parrish v. Swearington, 379 So. 2d 185, 186 (Fla. Dist. Ct. App. 1980).

> some divisible form by their actions or by law. In such case, their interests would become distinct and separable so that forfeiture of his interest in the property would not affect her rights.[319]

This passage confesses that the husband had a future interest in the tenancy by the entirety. To see why, suppose the husband were to acquire a new house that was completely unconnected with the drug trade. The husband would not forfeit the new house because it is causally unconnected with any crime. The government can have only "real property . . . which is used, or intended to be used, in any manner or part, to commit, or facilitate the commission of, a violation of this [title]."[320] But, with regard to the house from which the drugs were dealt, should the husband be the survivor of his innocent spouse, that house likewise would not be forfeit because it *was not the husband's house* when drugs were being dealt there. If the Eleventh Circuit thinks the house is *forfeitable*, then it must be because the husband owned a piece of the house when he was dealing drugs. So, the court's comment makes sense if and only if the husband already had an individual interest—a contingent remainder—in the house at the time of drug dealing.[321] Ergo, it is not clear that the Michigan style of the tenancy by the entirety exists in Florida or *anywhere*—at least as a federal matter. Rather, we have the Kentucky pattern or the New York pattern, and that's it.

Consider this possibility: Suppose in Michigan a husband deeds the marital home to *X*. *X* gets precisely nothing, according to the Michigan fiction. But suppose soon thereafter the wife dies and the husband takes fee simple absolute by survivorship. Would not *X* be able to claim the home under the doctrine of estoppel by deed? Probably so.[322] This supports the idea that, under the federal law

---

319. *See* United States v. 15621 S.W. 209th Ave., 894 F.2d 1511, 1516 n.6 (11th Cir. 1990).

320. 21 U.S.C. § 881(a)(7) (2012).

321. For a case finding that the debtor's survivorship right in the Florida tenancy by the entirety (in personal property) is the debtor's individual property, see *In re Tharp*, 237 B.R. 213, 216 (Bankr. M.D. Fla. 1999). The court's use of precedent, however, is shaky. The court relies on a case involving a joint bank account with right of survivorship (not exempt at all) and a New York real estate case (also not exempt property). *Id.* at 216–17.

322. According to the Supreme Court:

> [W]hatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument, by

of property, the husband has an individual right in the tenancy by the entirety in the nature of a future interest, which the husband can sell today, much like an Arkansas heir apparent can enter into a binding sale of his expectancy to inherit from some aspiring decedent.[323]

Digging deeply into the law of tenancy by the entirety one finds anything but clarity. In *Beihl v. Martin*,[324] husband and wife owned Pennsylvania real property by the entireties.[325] An individual creditor then obtained a judgment against the husband alone.[326] Later, the spouses contracted with *X* for the sale of the entireties.[327] *X* claimed that a judgment lien encumbered at least a contingent remainder in the real property, which constituted a breach of the duty to convey marketable title.[328] The husband and wife successfully petitioned for specific performance against *X* because there was indeed no lien against the real property to spoil the marketable title.[329]

Beihl, however, had to deal with a prior case. In *Fleek v. Zillhaver*,[330] the husband's individual creditor had a judgment against the husband. Thereafter, the couple granted a mortgage to

> way of recital or averment, that he is seized or possessed of a particular estate in the premises, and which estate the deed purports to convey; or, what is the same thing, if the seizin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor, and all persons in privity with him, shall be estopped from ever afterwards denying that he was so seized and possessed at the time he made the conveyance.

Van Rensselaer v. Kearney, 52 U.S. (11 How.) 297, 326 (1850).

323. *See supra* notes 146–152 and accompanying text (discussing *Drye*).

324. 84 A. 953 (Pa. 1912).

325. *Id.* at 955.

326. *Id.*

327. *Id.*

328. *Id.*

329. *See id.* at 956 ("A little reflection upon the nature of the estate by entireties should make it apparent, we think, that while the estate continues it is utterly impossible for either party, without the other joining, to sell or assign his or her interest therein, even the expectancy of survivorship."); *see also* Jordan v. Reynolds, 66 A. 37, 38 (Md. 1907) ("The right of survivorship . . . can not be destroyed except by the joint act of the two; and upon the death of either the other succeeds to the entire property . . . .").

330. 12 A. 420 (Pa. 1887).

some lender.[331] And after that, the wife predeceased her husband.[332] In a later priority contest, the judgment was held senior to the mortgage:

> As against the husband, the judgment was the first lien and the mortgage the second, simply because the judgment was obtained before the mortgage was given. Had the wife survived, the mortgage would certainly have had precedence to the exclusion of the judgment because the estate bound by the lien of the judgment was defeasible by the death of the husband before the wife. For the same reason if the husband survived the wife, the estate of the later was divested, and the mortgage only became operative against the husband because he had joined in its execution. But as to him it was not the first lien, he having become subject to a judgment at the time anterior to the giving of the mortgage.[333]

The *Beihl* court dealt with *Fleek* by admitting that the creditor had a lien on the debtor's contingent remainder but that the debtor had power (exercisable jointly with his wife) to convey a good title free and clear of the existing lien.[334] This seems to me a contradiction. If there is a lien on the contingent remainder, it should survive any *inter vivos* conveyance of the whole. Nevertheless, it appears that, in Pennsylvania, a defeasible lien *does* attach to the contingent remainder.[335] The Pennsylvania tenancy begins to resemble the Kentucky version after all.

Under the federal common law of property, an individual spouse may have—perhaps always has—a contingent remainder that can be attached by a tax lien or be deemed forfeited in a criminal action. If so, then the Supreme Court in *Craft* could have characterized Don's individual interest as a contingent remainder in the tenancy by the entirety. Because the "absurdity" of no ownership would not exist, the marital veil need not have been pierced. The tax lien would attach to the individual contingent remainder but not to any property that the marital entity owned.

---

331. *Id.* at 421.

332. *Id.*

333. *Id.*

334. Beihl v. Martin, 84 A. 953, 954 (Pa. 1912). Similarly, in *Ross v. Maryland* (*In re Ross*), 475 B.R. 279, 283 (Bankr. D.D.C. 2012), the court imagines that the spouses can convey marketable title in an *inter vivos* deal but also that liens might exist on the contingent remainder of each spouse.

335. *See Beihl*, 84 A. at 965.

Under this more limited "setting aside of fictions," there would be no need to label Don's "sticks in the bundle" as a present possessory right, just as there would be no such exercise with regard to partnership property. These observations suggest that by economizing on the smashing of fictions, *Craft* could have come out differently in Michigan. If Don Craft individually had a contingent remainder, then there is *no distinction* between partnership law and tenancies by the entirety. Because partnership assets cannot be levied, according to Justice O'Connor, then assets of the marital entity cannot be levied either, where Don has an individual interest in the contingent remainder.

But, as long as we are brushing up against partnership law, a few words should be dedicated to straight partnership cases, where the taxpayer is an individual and the partnership owns real property.[336] Justice O'Connor hints that the IRS cannot sell the real estate, but that the IRS can reach the partnership interest of the taxpayer—an interest that counts as *personal*—not real—property. As to the individual's property, Justice O'Connor writes:

> [T]he federal tax lien does attach to an individual partner's interest in the partnership, that is, to the fair market value of his or her share in the partnership assets. As a holder of this lien, the Federal Government is entitled to "receive . . . the profits to which the assigning partner would otherwise be entitled," including predissolution distributions and the proceeds from the dissolution.[337]

Notice that Justice O'Connor assumes that the IRS could collect dividends from the partnership, but she does not mention the sale of the partnership itself. In fact, under the Uniform Partnership Act (UPA), there could be a sale of the partnership interest. Suppose Cravath, Swaine and Moore (CSM) are partners, and Moore is a tax deadbeat. The IRS could sell Moore's partnership to *X*,[338] who would then be what the UPA calls a "transferee."[339] *X*

336. A partner is not a co-owner of partnership property. UNIF. P'SHIP ACT § 501 (NAT'L CONF. COMM'R UNIF. STATE LAWS 1997).

337. *Craft V*, 535 U.S. 274, 286 (2002) (citation omitted).

338. UNIF. P'SHIP ACT § 503.

339. A transferee is "a person to which all or part of a transferable interest has been transferred, whether or not the transferor is a partner." *Id.* § 102(24). A transferable interest is "the right, as initially owned by a person in the person's capacity as a partner, to receive distributions from a partnership, whether or not

would be entitled to dividends (if any) that CSM chooses to issue,[340] and if CSM decides to dissolve,[341] *X* would be entitled to the liquidation dividend. But *X* is not entitled to participate in management[342] and may not insist that the partnership dissolve in order to generate a dividend.[343] In short, CSM can fit it so that *X* obtains absolutely nothing of value. If *X* receives nothing, *X* pays the IRS nothing.

One of the reasons that Justice O'Connor distinguishes between entireties and partnerships is that, if the IRS cannot reach the real property owned by the marital entity, then valuable real property can be put beyond the reach of the IRS.[344] But this is equally true of partnerships, where the IRS may collect dividends from the partnership or sell the right to collect dividends, but the IRS may not contrive to force the sale of partnership assets. The partnership form is just as much a mode for cheating the IRS as is the tenancy by the entirety.[345] For example, suppose Don and Sandra had formed the partnership of D&S. In 1972, D&S purchases a home on Berwyck Avenue. Don and Sandra live in the house. Don fails to file tax returns and so the IRS garnishes D&S for Don's tax assessment. D&S fails to vote any dividends for decades, while Don continues to live comfortably in the house. Under Justice O'Connor's reasoning, the partnership "facilitat[es]

---

the person remains a partner or continues to own any part of the right. *Id.* § 102(23).

340. *Id.* § 503(b).

341. A partner dissociates from a partnership by becoming a debtor in bankruptcy or by executing an assignment for the benefit of creditors. *Id.* § 601(6). If dissociation results in a dissolution and winding up of the partnership's business, Article 8 applies. *Id.* § 603(a). Otherwise Article 7 applies. *Id.* Under Article 8, a partnership is dissolved and its business must be wound up if: (i) within 90 days after a partner's dissociation a majority of the remaining partners vote to wind up the partnership business. *Id.* § 801(2). If dissociation does not result in a dissolution and a winding up, Article 7 applies, and the partnership shall cause the dissociated partner's interest in the partnership to be purchased for a buyout price. *Id.* § 701(a). Under Article 7, CSM may either jointly or unilaterally dissolve the partnership. The transfer, however, is liable to a judicial termination that it is equitable to wind up the partnership business. *Id.* § 801(6).

342. *Id.* § 503(3).

343. *Id.* § 801(6).

344. *See Craft V*, 535 U.S. at 286 (analyzing the differences between interests in the entirety and partnership interests).

345. *See id.* (analyzing potential abuse stemming from property held by the entirety).

abuse of the federal tax system."[346] Accordingly, the fiction of partnership personhood should be disregarded and the partnership's real property would be encumbered by the tax lien. Being superegoic in nature, the *Craft* opinion allows for such a conclusion. Logically, the monster foretold by Justice Thomas slouches toward Grand Rapids to be born.[347]

III. Bankruptcy Law

The superegoic position has emerged in tax lien cases, where the IRC gives the IRS a lien on taxpayer "property."[348] The other great federal statutory regime where statutes invoke the word "property" is bankruptcy law.[349]

The touchstone of interpreting the word in bankruptcy is the old warhorse, *Butner v. United States*,[350] which holds: "Unless some federal interest requires a different result, there is no reason why such interests [i.e., property interest created under state law] should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding."[351]

This tired remark is brimming with psychoanalytic content. First, it *leads* with an invitation to superegoic intervention.[352] Only thereafter is the safe banality of state law asserted.[353] And, it may be added, the remark is made in a case where the Supreme Court actually *upheld* a federal override of state law.[354] *Butner* is a

---

346. *Id.* at 285.

347. *See id.* at 289 (Scalia & Thomas, JJ., dissenting) (discussing the potential problems with the majority decision in nullifying a form of property ownership).

348. *See* 26 U.S.C. § 6321 (2012) (outlining lien for taxes).

349. *See* 11 U.S.C. § 541 (establishing what property comprises an estate in bankruptcy).

350. 440 U.S. 48 (1979), *superseded by statute* 11 U.S.C. §§ 101–1532.

351. *Id.* at 55.

352. *See* BFP v. Resolution Tr. Corp., 511 U.S. 531, 546 (1994) (stating that when the meaning of the Bankruptcy Code is clear, "its operation is unimpeded by contrary state law or prior practice").

353. For a defense of the safe banality of state law, see Charles W. Mooney, Jr., *A Normative Theory of Bankruptcy Law: Bankruptcy As (Is) Civil Procedure*, 61 WASH. & LEE L. REV. 931, 996 (2004).

354. *Compare* David Gray Carlson, *Philosophy in Bankruptcy: The Logic and Limits of Bankruptcy Law*, 85 MICH L. REV. 1341, 1377–78 n.117 (1987) (concluding that *Butner* upheld a federal override of state law), *with In re* Spears,

superegoic monster, disguised in the sheep's clothing of ordinary deference to state law.[355]

For the remainder of this Article, I follow the lead of the Supreme Court in the tax cases. First, I briefly review the career of *Drye v. United States*[356] in the bankruptcy courts. In the main, the bankruptcy courts withdraw with horror from the implications of *Drye* and will have none of it, where the disclaimer occurs before the bankruptcy petition is filed. But, contradictorily, post-petition disclaimers are dishonored. In the docket of logical consistency, *Drye is* the law in bankruptcy cases. There is no principled distinction between prepetition and post-petition disclaimers.

---

308 B.R. 793, 805 (Bankr. W.D. Mich. 2004) (stating that the court in *Butner* upheld state law), *rev'd on other grounds sub nom.* Spears v. Boyd (*In re* Spears) 313 B.R. 212 (W.D. Mich. 2004).

355. The superegoic instinct long predates *Butner*. In *Board of Trade of City of Chicago v. Johnson*, 264 U.S. 1 (1924), the debtor owned a seat on the Chicago Board of Trade. According to the rules of the board, the debtor could sell this seat to a buyer approved by the board, and then only if the debtor or the debtor's corporation owed no obligations to other members of the board. *Id.* at 7. If the debtor wanted to sell the seat, any creditor who was a member of the board could block the transfer until that creditor was duly paid. *Id.* The debtor filed for bankruptcy. *Id.* The trustee wanted a court order requiring the board to recognize the trustee as owner of the seat. *Id.* In response, the board asserted that the seat was not "property," within the meaning of § 70(a)(5) of the 1898 Act. *Id.* at 9. In support of that position, the board could cite an Illinois Supreme Court opinion proclaiming that a seat on that very board was not "property." *Id.* at 8–9 (citing Barclay v. Smith, 107 Ill. 349, 349 (1883)). The United States Supreme Court articulated the superegoic position:

> Of course, where the bankrupt law deals with property rights which are regulated by the state law, the federal courts in bankruptcy will follow the state courts; but when the language of Congress indicates a policy requiring a broader construction of the statute than the state decisions would give it, federal courts cannot be concluded by them.

Id. at 10 (citing Bd. of Trade of Chicago v. Weston, 243 Fed. 332 (1917)). On the merits, the Supreme Court reversed the lower court, which had ruled that the debtor had obtained the right to sell prior to bankruptcy because all blocking positions had been withdrawn. *Id.* at 16. Two post-bankruptcy objectors were too late, under the rule of the board. *Id.* at 14–15. The Supreme Court read the rules differently and held that the late-objecting creditors were still timely. *Id.* at 15. Furthermore, the seat did *not* pass to the trustee free and clear of blocking rights. *Id.* Rather, the trustee took the seat subject to any blocking rights that were still timely under board rules. *Id.*

356. Drye v.United States, 528 U.S. 49 (1999).

Second, we examine the career of *United States v. Craft*[357] in the bankruptcy courts. Here we discover that, *avant la lettre*, the Bankruptcy Code encoded *Craft* within the Bankruptcy Code. The trustee's hypothetical judicial lien in bankruptcy is *precisely* the IRS tax lien outside of bankruptcy—with one key difference. In the tax cases, the tenancy by the entirety is not exempt from the tax lien because I.R.C. § 6334(a) makes no reference to it. But Bankruptcy Code § 522(b)(3)(B) *invites* debtors to claim the tenancy by the entirety as an exemption.[358] Where the debtor declines the invitation, preferring, say, the federal homestead exemption over the state-law exemptions, the trustee's hypothetical judicial lien is *precisely identical* to the *Craft*-style IRS lien. It pierces the marital veil and treats the marital entity as a fiction. Several courts have declared *Craft* to be a monster imprisoned in a tax cage, but, in fact, the monster is unloosed and has ravaged bankruptcy law for nearly forty years.

A. Disclaimers

Many states[359] permit disclaimer of inheritance as a means of flummoxing creditors. We have seen that Arkansas permitted it, and that the Arkansas "fiction" was blown up on behalf of the IRS by the *Drye* Court.[360]

---

357. *Craft V*, 535 U.S. 274 (2002).

358. *See In re* Knapp, 285 B.R. 176, 182 (Bankr. M.D.N.C. 2002) ("Nonetheless, the power of the federal tax collector to disregard state exemptions has not been expanded to other creditors and the Bankruptcy Code explicitly incorporates exemptions allowable under state law."). In *Musolino v. Sinnreich (In re Musolino)*, 391 F.3d 1295 (11th Cir. 2004), a creditor tried to argue that *Craft* means that a tenancy by the entirety may not be exempted from the trustee's hypothetical judicial lien. The claim was properly rejected. *Id.* at 1297. The hypothetical judicial lien *initially* attaches to the tenancy by the entirety, just as in *Craft*. *Id.* But Bankruptcy Code § 522(b)(2)(b) expressly invites the tenancy by the entirety to be exempted after the fact. *Id.* In contrast, the IRS tax lien in *Craft* attached, but the IRS never invites an exemption of the tenancy by the entirety. *Id.* at 1298.

359. *See* Wood v. Bright (*In re* Bright), 241 B.R. 664, 671 (B.A.P. 9th Cir. 1999) ("The vast majority of state courts which have addressed the issue of whether a disclaimer can constitute a fraudulent conveyance under state law have held it cannot.").

360. *See supra* Part II.B (discussing *Drye*).

In a few states,[361] however, the disclaimer does not relate back to the time of the gift in order to erase it. Rather, the inheritance is an unconditional ("vested") conveyance to the debtor and the disclaimer is conceived as a conveyance back to the estate of the donor.[362] Under this state law theory of disclaimer, bankruptcy trustees will have no trouble recovering the conveyance back to the decedent estate as a fraudulent conveyance.

What about states like Arkansas? Can bankruptcy trustees rely on *Drye* to pierce the Arkansas fiction? If so, the inheritance is a conveyance to an insolvent debtor and the disclaimer is a (fraudulent) conveyance back.

1. Prepetition Disclaimers

In the United States, "neither statutes nor decisions in America have uprooted the basic tenet of the common law that title to a decedent's realty passes at once on his death to his heirs or devisees and not to his personal representatives."[363] Statutes have emerged, however, to make land liable for debts of the decedent

---

361. Parker counts six such states. *See* Stephen E. Parker, *Can Debtors Disclaim Inheritances to the Detriment of Their Creditors?*, 25 LOY. U. CHI. L.J. 31, 48 (1993). Two states declare that fraudulent conveyance law applies to disclaimers without declaring that the disclaimer is indeed a transfer back to the decedent estate. MASS GEN. LAWS ANN. ch. 190B § 2-801(b)(2) (2012); OKLA. STAT. tit. 60, § 756 (1984). Other states claim that disclaimer by an insolvent heir is "ineffective," "annulled." FLA. STAT. ANN. §§ 739.402(2)(d), (5) (2009); LA. CIV. CODE ANN., art. 967 (1997); MINN. STAT. ANN. §§ 524.2-1106(b)(4), (f) (2012).

362. *See* N.Y. Tr. Co. v. Halkin, 68 N.Y.S.2d 404, 406–07 (1936) (stating that the debtor was entitled under his spouse's will to the remainder of her estate); Stein v. Brown, 480 N.E.2d 1121 (Ohio 1985) (holding a disclaimer to be a fraudulent conveyance "where a will beneficiary sought to disclaim an inheritance" under state law with the intent to defraud a creditor, the conveyance was fraudulent); Pennington v. Bigham, 512 So. 2d 1344, 1347 (Ala. 1987) (concluding a disclaimer of interest void when the sole purpose to disclaim the interest was to place "the estate out of the claimant's reach."); Christian Marius Lauritzen II, *Only God Can Make an Heir*, 48 NW. U. L. REV. 568, 576 (1953-1954); Mary Moers Wenig, *Disclaimer: Handle with Care*, 25 TAX MGMT. EST. GIFTS & TR. J. 275, 277 (2000) (noting that few cases preceding *Drye* departed from the long-standing rule allowing a debtor to disclaim testamentary gifts); *see also* Hirsch, *The Problem of the Insolvent Heir*, *supra* note 163, at 591–601 (analyzing the historical backdrop for the rejection of disclaimers).

363. Thomas E. Atkinson, *Title After Probate Action*, *in* 3 AMERICAN LAW OF PROPERTY § 14.7, at 576 (A. James Casner ed. 1952).

and to empower the executor or administrator to sell both land and chattels in order to satisfy creditor claims.[364] The executor or administrator thus represents the unsecured creditors of the decedent. Only after the creditor claims are satisfied may the legatees or heirs obtain distributions.[365]

> The common law rule is thus, in effect, abrogated or is almost a mere empty shell. Still it is the principle upon which American courts must proceed and they depart therefrom only to the extent that there is statutory authority. Very important manifestations of the common law rule remain, notably the right of the heir or devisee to enjoy immediate possessory rights unless or until the person has exercised his statutory powers.[366]

The best way of viewing a probate proceeding is that it is, essentially, bankruptcy for the dead.[367] The executor or administrator supervises an estate for the benefit of unsecured creditors of the decedent.[368] Heirs own a residual interest in the probate estate, but the executor, in effect, has a lien on this residual interest and may sell what is necessary to satisfy the unsecured creditors.[369]

In light of the probate estate, it is very hard to figure out, strictly as a matter of state law, whether the disclaiming devisee at first has something and then gives it back, or whether the devisee never has anything because the gift is not final until the gift is accepted. If the disclaimer is a gift back, it is a fraudulent conveyance if made when the debtor is insolvent. If the disclaimer is simply the refusal of heir to accept the gift, then the debtor never had property in the first place, and the disclaimer is not a conveyance at all.

A challenging attempt to puzzle out the metaphysics of disclaimer occurs in *Lowe v. Brajkovic (In re Brajkovic)*.[370] In his

---

364. *Id.* at 567.

365. *Id.*

366. *Id.* at 578.

367. *See generally* David B. Young, *The Intersection of Bankruptcy and Probate*, 49 S. TEX. L. REV. 351, 353 (2007).

368. *Id.* at 372.

369. *See id.* (stating that beneficiaries acquire rights to the decedent's estate upon the decedent's death but subject to creditor claims against the estate).

370. Lowe v. Brajkovic (*In re* Brajkovic), 151 B.R. 402 (Bankr. W.D. Tex. 1993).

provocative analysis, Judge Leif Clark assumed that state law provides the content of the concept "property."[371] But federal law defines the concept of "transfer," because the Bankruptcy Code expressly defines "transfer" in § 101(54).[372] Thus, *Brajkovic*, antedating *Drye*, has a slightly different approach than the one we witness in *Drye*.

In *Brajkovic*, the decedent died slightly before the legatee's eventual bankruptcy, and the legatee disclaimed the inheritance under Missouri law.[373] The beneficiaries of the disclaimer were the debtor's own children, for whom the debtor was guardian.[374] As guardian, the debtor-as-fiduciary argued that the debtor-as-individual never did have any property interest in the inheritance and so she could hardly have "transferred" debtor property.[375]

In Judge Clark's view, prior to disclaimer, there was no decedent estate.[376] Rather, upon the death of the decedent, all real

---

371. *Id.* at 405.

372. *See* 11 U.S.C. § 101(54) (2012)

> The term "transfer" means—
>
> (A) the creation of a lien;
>
> (B) the retention of title as a security interest;
>
> (C) the foreclosure of a debtor's equity of redemption; or
>
> (D) each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with—
>
> (i) property; or
>
> (ii) an interest in property.

373. *Brajkovic*, 151 B.R. at 404; *see also* Hirsch, *Disclaimers and Federalism*, *supra* note 147, at 1923 ("[T]he universal conflicts rule is that the law of the domicile of the benefactor at the time of his or her death governs disclaimers of property distributed out of the benefactor's probate estate."). *But see* Parker, *supra* note 361, at 48 ("[R]eal property generally passes under the law of the estate in which the property is located. This disclaimer's effectiveness, therefore, may depend upon the laws of more than one state.").

374. *See Brajkovic*, 151 B.R. at 404 (noting that, upon the legatee's valid disclaimer, her interest automatically transferred to her minor children as if she had preceded them in death).

375. *See id.* at 404

> The defendant argues that, by virtue of the "relation back" provisions of the Missouri disclaimer statute, whatever interest she might have had in the property . . . was erased. . . . Thus, she maintains, . . . the property . . . *never was* property of the defendant . . . .

376. *See id.* at 406 ("[E]quitable title to a decedent's real estate passes immediately to the heirs of devisees.").

and personal property was instantly transferred to the debtor—as a matter of Missouri law.[377] In support, he quoted a Missouri statute that reiterated the ancient formula described above. According to a Missouri statute:

> When a person dies, his . . . property . . . passes to persons to whom it is devised by his last will, or . . . to the persons who succeed to his estate as his heirs; but it is subject to the possession of the executor or administrator and to the election of the surviving spouse and is chargeable with the expenses of administering the estate, the payment of other claims and allows to the family . . . .[378]

The lesson that Judge Clark draws from this provision:

> A probate estate is itself not a legal entity that can own property. A probate estate *is* the property, not the possessor or owner of the property. The probate estate cannot possess or own; it can only *be* possessed or owned.[379]

When the debtor disclaimed, the debtor made a conveyance—to whom? In Judge Clark's view, because in Missouri there is no such entity as a decedent's estate, the debtor had property initially and then conveyed her interest directly to her children—not back to the probate estate.[380] Accordingly, the disclaimer was a fraudulent transfer, and the trustee could state a valid cause of action against the children[381] under § 548(a)(1), which provides:

> The trustee may *avoid* any . . . transfer of an *interest* of the debtor *in property* . . . that was made . . . within 2 years before the date of the filing of the petition, if the debtor voluntarily . . .
>
> > (a)(1)(B)(i) received less than a reasonably equivalent value in exchange for such transfer; and
> >
> > (ii)(I) was insolvent on the date that such transfer was made . . . .[382]

---

377. *Id.*

378. MO. REV. STAT. § 473.260 (2017).

379. Lowe v. Brajkovic (*In re* Brajkovic), 151 B.R. 402, 406–07 (Bankr. W.D. Tex. 1993).

380. *See id.* at 411 (claiming that the Missouri statutory scheme codifies automatic transfer to heirs upon a valid disclaimer).

381. The debtor and her husband, also a bankrupt, were guardians, and so the trustee sued the children by suing the guardians. *Id.* at 411.

382. 11 U.S.C. § 548 (2012) (emphasis added).

Judge Clark placed heavy emphasis on the fact that "transfer" is a federally defined term. According to Bankruptcy Code § 101(54), a transfer includes, *inter alia*, each mode, "direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with—(i) property; or (ii) an interest in property."[383] Judge Clark had no trouble finding that disclaiming is a mode of "parting with property."[384]

What is the point of this emphasis on the federality of the "transfer?" The problem was that the debtor never deeded her property directly to her children.

> It is not important that a disclaimer does not purport to transfer property *to* someone, for the definition of 'transfer' in the Bankruptcy Code focuses on property *leaving* the debtor, without regard to where it goes . . . .[385]

Key to Judge Clark's opinion is that the debtor had inherited the property (state law) and then she "transferred" it (federal law) directly to her children. Use of state-law notions of "relation back" erase the *federal* fact that property was transferred by the disclaiming debtor to the next best legatee or heir.[386] Such an erasure was an affront to federalism.[387]

Thus, Judge Clark[388] was highly critical of the Seventh Circuit's use of "relation back" in *Jones v. Atchison (In re Atchison)*[389] to erase the federal transfer. There, the trustee argued that disclaimer of property meant "there had to be some property interest which the beneficiary disclaimed."[390] Such an argument, said the *Atchison* court, "ignores the express language of the Illinois disclaimer statute which says for all purposes there was

383. *Id.* § 101(54)(D).

384. *Brajkovic*, 151 B.R. at 405.

385. *Id.* at 406 n.7.

386. *See id.* at 409 ("[E]ven though state law confers an interest in property as of the date of death, a disclaimer is not a transfer of that interest because, *after* the disclaimer is executed, the relation back doctrine erases that interest."); *see also* Casciato v. Stevens (*In re* Casciato), 112 B.R. 175, 177 (Bankr. S.D. Tex. 1989) (reaching the same conclusion under Texas law).

387. *Id.* at 409.

388. Lowe v. Brajkovic (*In re* Brajkovic), 151 B.R. 402, 407–09 (Bankr. W.D. Tex. 1993).

389. 925 F.2d 209 (7th Cir. 1991), *cert. denied*, 502 U.S. 860 (1991).

390. *Id.* at 211.

not."[391] A disclaimer "retroactively erases any interest in the beneficiary disclaiming."[392] According to the *Atchison* court:

> Although a testamentary gift passes directly to a beneficiary upon the testator's death, a valid disclaimer under [Illinois law] relates back to the testator's death for all purposes and eliminates any interest of the beneficiary has in the property disclaimed. Therefore, we hold that the disclaimer does not constitute a transfer of an interest in property which the trustee may avoid under Section 548(a) of the Bankruptcy Code.[393]

In Judge Clark's view, *Atchison* uses the *state law* notion of "relation back" to "erase" a *federal* transfer of the decedent estate to the debtor.[394] According to Judge Clark, "this courts are not free to do."[395] The proper function of "relation back" is to identify who the next proper legatee or heir is, once the disclaimer is given effect.[396] "Relation back" could not overrule the Bankruptcy Code's definition of "transfer."[397]

---

391. *Id.*

392. *Id.*

393. *Id.* at 212.

394. *Brajkovic*, 151 B.R. at 409.

395. *Id.* Judge Clark accused the *Atchison* court of circular reasoning—begging the question:

> In *Atchison*, the court recognizes that, immediately prior to the execution of a disclaimer, there resides in the debtor/beneficiary an interest in property, and that the debtor disposes of that interest by executing a disclaimer. The court further recognizes that this analysis would bring the execution of the disclaimer within the ambit of section 548(a). The court then seeks to avoid that consequence by announcing that the debtor did *not* dispose of an interest of the debtor in property, because the debtor did not *have* an interest in property. How does the court reach this conclusion? By presuming that, immediately *after* the execution of the disclaimer, the property interest that existed prior to the disclaimer disappears, by virtue of the relation back doctrine. Therefore, the argument concludes, nothing existed *before* the transaction, so nothing was transferred, Of course, the transfer has to be executed in order for nothing to be transferred, and that is the faulty premise in *Atchison's* logic.

Id. at 409 n.15.

396. *See id.* at 410 (describing the proper role of the relation back doctrine).

397. *See id.* ("[S]tate law may *not* define the transfer away is, as of the moment of execution, all the requisites for transfer under the Bankruptcy Code are present.").

In *Drye*, however, the Supreme Court read an analogous Arkansas statute in a way that differs from Judge Clark's interpretation.[398] According to this view, there *is* such a thing as a decedent's estate. Evidence of this is that an executor or administrator may sell real or personal property for the benefit of the decedent's creditors or to pay administrative costs.[399] On this view, the estate owns the property until a legatee or heir elects to receive it. As one commentator put it, "[u]nder the relation-back doctrine, a testator's estate does not automatically vest in a disclaiming beneficiary at the time of the testator's death."[400] If this is true, the vested ownership must be *somewhere*. That place must be in the decedent estate over which the executor presides.

Judge Clark denied this. He claimed the executor is not an "owner":

> These persons merely take custody of the property, to discharge whatever debts burden the property before distribution; it is the beneficiary who has the real interest in the property. In fact, real property cannot even be sold through the probate court without making the named beneficiaries party to the action.[401]

At each turn, this characterization can be challenged. The power to take custody *is* an interest in the property concerned. The unsecured claims against the decedent do not "burden" the property except that the executor is charged with the task of liquidating sufficient property. This would be like saying that unsecured claims "burden" the bankruptcy estate. This is true only in the loosest sense. The bankruptcy trustee has a hypothetical judicial lien on the debtor's property for the benefit of the unsecured creditors. It is the bankruptcy trustee's hypothetical lien that burdens property of the estate. The same can be said of

---

398. *See* Drye v. United States, 528 U.S. 49, 60 (1999) (emphasizing that the Arkansas law is not "a mere 'personal right . . . to accept or reject [a] gift'").

399. *See id.* at 61 ("Drye had the unqualified right to receive the entire value of his mother's estate (less administrative expenses) . . . ."). This implies that the administrator has a property claim prior to acceptance or disclaimer of the inheritance.

400. Kevin A. White, Note, *A Clash of Expectations: Debtors' Disclaimers of Property in Advance of Bankruptcy*, 60 WASH. & LEE L. REV. 1049, 1053 (2003).

401. Lowe v. Brajkovic (*In re* Brajkovic), 151 B.R. 402, 407 (Bankr. W.D. Tex. 1993).

an executor of a probate estate. The executor likewise has a lien as representative of the unsecured creditors.

Meanwhile, when a debtor files for bankruptcy, "[w]hat the bankruptcy estate acquires is the debtor's claim or chose in action against the decedent's estate."[402] Thus, executors can be sued.[403] Likewise, executors typically have authority to sue tortfeasors that have looted the probate estate.[404] Finally, the fact that the devisees must be joined if the property is to be sold is not probative. It means that the legatees have *some* property. Due process requires that they have notice and a hearing before they are deprived of that property. The executor, though, has a *senior* property interest—a lien on behalf of the administrative expenses and unpaid unsecured claims against the decedent.[405]

Continuing with the alternative reading, the decedent's estate owns the property prior to its acceptance by the legatee or heir. During that time, the power to accept or disclaim[406] is the debtor's

---

402. Young, *supra* note 367, at 374.

403. *See* Official Comm. of Unsecured Creditors of Enron Corp. v. Whalen (*In re* Enron Corp.), 357 B.R. 32, 35 (Bankr. S.D.N.Y. 2006) (describing suit against the executrix of a decedent's estate).

404. *See* Drummond v. Freeland (*In re* Freeland), 360 B.R. 108, 129 (Bankr. D. Md. 2006) (determining that defendants were jointly liable to the plaintiffs to compensate damage to the plaintiff's property).

405. A probate estate is an "entity" within the meaning of Bankruptcy Code, 11 U.S.C. § 101(15), though not a "person" within the meaning of 11 U.S.C. § 101(33). *In re* Estate of Patterson, 64 B.R. 807, 808 (Bankr. W.D. Tex. 1986).

406. The ability to accept (or disclaim) has been analogized to a power. Parker, *supra* note 361, at 42–43. Bankruptcy Code § 541(b)(1) provides that the bankruptcy estate does not include "any power that the debtor may exercise solely for the benefit of an entity other than the debtor." 11 U.S.C. § 541(b)(1) (2012). The negative pregnant of § 541(b) is that powers exercisable for the debtor's benefit *do* enter the bankruptcy estate. *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 13.6 cmt. c (AM. LAW INST. 1986) ("The bankruptcy estate does include the general powers of the bankrupt that are presently exercisable because they inherently are exercisable for the benefit of the bankrupt.").

One commentator thinks that the power to disclaim is not a power that goes into the bankruptcy estate because it is exercisable only for the benefit of someone else. *See* Young, *supra* note 367, at 391 ("The power no longer belongs to the debtor personally, and, if anyone may exercise it, it is the trustee."). The power to disclaim is, however, the opposite side of the coin to the power to accept, which is exercisable for the benefit of the debtor alone. Young further comments:

> If the trustee could exercise a state law right to disclaim, this would circumvent the Bankruptcy Code procedure for abandoning estate property . . . . If a trustee could simply execute a disclaimer in accordance with state law, this would allow the trustee to evade the

interest in property of another—the property of the decedent estate. The power to accept *is* the property in question. When this power is disclaimed, this power is transferred back to and merges with the decedent estate, where (by the relation-back fiction) the next best legatee or heir is ascertained.[407]

This alternative characterization sustains a recovery under § 548(a)(1), which provides:

> The trustee may *avoid* any . . . transfer of an *interest* of the debtor *in property* . . . that was made . . . within 2 years before the date of the filing of the petition, if the debtor voluntarily . . .
>
> (B)(1) received less than a reasonably equivalent value in exchange for such transfer . . . ."[408]

Note that the issue under § 548(a) is whether the debtor has an interest in property—perhaps an interest in property of another. If a right to disclaim is an "interest" in the property of the decedent estate, and if exercising the right is a "transfer," then the trustee has a valid cause of action to "avoid" the transfer.[409]

> statutory requirements for notice and a hearing [that abandonment entails]. It could also be highly offensive and prejudicial to the debtor, as by depriving the debtor of property of great sentimental value, while providing no benefit whatsoever to creditors.

Id. at 391; *see also* 11 U.S.C. § 554(a) (requiring notice and hearing for abandonment). This overlooks the point that the trustee needs court authority to use, sell or lease property of the bankruptcy estate. 11 U.S.C. § 363(b)(1). To exercise the power to accept or disclaim is to *use* property of the estate, and this can be done only "after notice and a hearing." *Id.*

407. *See* Hoecker v. United Bank of Boulder, 476 F.2d 838, 841 (10th Cir. 1973)

> We think . . . that the Colorado legislature intended that where a beneficiary filed a disclaimer within the six-month period, none of the property disclaimed would pass to or be vested in the disclaiming beneficiary, or would pass from him to his children, but rather such property would pass directly from the testator to the children.

408. 11 U.S.C. § 548(a)(1) (emphasis added).

409. This characterization better fits a remark by Judge Clark: If the disappointed heirs are deprived by the trustee's fraudulent transfer theory, "they also have the defenses of section 550(b)(1), which should, in the usual case, be more than adequate to preserve legitimate expectations." Lowe v. Brajkovic (*In re* Brajkovic), 151 B.R. 402, 411 (Bankr. W.D. Tex. 1993). Section 550(b) which states, "[t]he trustee may not recover under *section (a)(2)*," creates a "good faith transferee" defense for transferees of a transferee. 11 U.S.C. § 550(b) (emphasis added). In Judge Clark's theory, the heirs would be "initial transferees" under

Even before *Drye*, Judge Clark, in *Brajkovic*,[410] anticipated *Drye* by holding that a prepetition disclaimer within a year of bankruptcy (then the applicable statute of limitations)[411] was a fraudulent transfer under § 548(a).[412] The Fifth Circuit expressly took Judge Clark to the woodshed in *Simpson v. Penner (In re Simpson).*[413] Judge Clark, however, noted that *Simpson* was pre-*Drye* and boldly predicted that the Fifth Circuit would reverse *Simpson* on *Drye* grounds.[414]

The prediction, however, turned out to be incorrect. In *Laughlin v. Nouveau Body & Tan, L.L.C. (In re Laughlin)*,[415] a debtor lost a business tort action to a creditor,[416] executed a prepetition disclaimer, and then was forced into bankruptcy.[417] The creditor that forced the debtor into bankruptcy then sought to deny a discharge on the ground that prepetition disclaimers are fraudulent conveyances, and fraudulent conveyances within a year of bankruptcy are grounds to deny the debtor any discharge.[418] The

---

§ 550(a)(1), not transferees of a transferee. *Brajkovic*, 151 B.R. at 411. Under what I have suggested, the decedent estate is the initial transferee and the heirs are transferees of the initial transferee. Admittedly, Judge Clark could easily respond that, as *initial* transferees, the disappointed heirs have a good faith transferee defense under § 548(c), and that I am just quibbling about which section supplies the good faith transferee defense for the disappointed heirs.

410. *Supra* notes 370–401 and accompanying text.

411. At the time of *Brajkovic*, the look-back period in § 548(a) was one year. Congress would extend this period to two years in 2005. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109–8, 119 Stat 23, § 1402(1) (codified as amended in scattered sections of 11 U.S.C.).

412. Lowe v. Brajkovic (*In re* Brajkovic), 151 B.R. 402, 412 (Bankr. W.D. Tex. 1993).

413. *See* Simpson v. Penner (*In re* Simpson) 36 F.3d 450, 453 (5th Cir. 1994) ("The *Brajkovic* court . . . does not give state law its full effect.").

414. *See* Lowe v. Sanflippo (*In re* Schmidt), 362 B.R. 318, 322 (Bankr. W.D. Tex. 2007) ("The Fifth Circuit has not had occasion to revisit *Simpson* since *Drye*, and if it does so, there is a strong argument that the court would rule *Simpson* to no longer be good law.").

415. 602 F.3d 417 (5th Cir. 2010).

416. The debtor had been sued for product disparagement by a business competitor and had been visited with a ruinous jury verdict. *Id.* at 419.

417. *Id.* at 419–20.

418. *Id.* According to Bankruptcy Code § 727(a)(2), the court must grant the debtor a discharge, unless "the debtor, with intent to hinder, delay, or defraud a creditor . . . has transferred . . . (A) property of the debtor, within one year before the date of the filing of the petition." 11 U.S.C. § 727(a)(2) (2012). For a case denying a discharge because of a disclaimer within a year of bankruptcy, see

court of appeals reversed the lower courts and allowed the debtor to have his discharge.[419] It may be noted that, in *Laughlin*, the debtor disclaimed under color of *Simpson*, and the trustee sought to deny a discharge for an act directly endorsed by a Fifth Circuit precedent.[420] Whereas a fraudulent conveyance action would have deprived the alternate legatee's happy windfall, the lower courts would have imposed a lifelong obligation to pay a business tort debt for what, at the time, appeared to be a lawful act of disclaimer directly authorized by Fifth Circuit precedent. *Laughlin* illustrates the adage that hard cases make bad law.[421]

Judge Clark's view and the version induced from *Drye* has been rejected by the Ninth Circuit Court of Appeals in *Gaughan v. Edward Dittlof Revocable Trust (In re Costas)*,[422] where the court, "struck blind by a disclaimer,"[423] refused to give it the *Drye* treatment.[424] Shortly before filing for bankruptcy, the debtor

Nashville City Bank & Trust Co. v. Peery (In re Peery), 40 B.R. 811, 813 (Bankr. M.D. Tenn. 1984). *See also* Flanigan v. Lewis (*In re* Lewis), 45 B.R. 27, 31 (Bankr. W.D. Mo. 1984) (holding open the possibility that following advice of counsel might justify a discharge in spite of a disclaimer).

419. *Laughlin*, 602 F.3d at 430.

420. *See id.* at 422 (describing that the debtor disclaimed under *Simpson*, but the trustee argued that the transfer was fraudulent).

421. The issue in *Laughlin* was whether the debtor, "with intent to hinder, delay or defraud a creditor," transferred property within a year of bankruptcy. 11 U.S.C. § 727(a)(2). Perhaps the Fifth Circuit could have proclaimed following a Fifth Circuit precedent, though harmful to the creditor, was not fraudulent for the purposes of § 727(a)(2), but it was a "constructive fraud" under § 548(a)(1)(B). *Id.* § 548(a)(1)(B). This would have permitted the discharge while allowing the court to be in line with *Drye*. *See* Drye v. United States, 528 U.S. 49, 52 (1999) (holding that state law disclaimers do not defeat federal tax liens).

422. *See generally* 555 F.3d 790 (9th Cir. 2009) (applying Arizona law).

423. United States v. Irvine, 511 U.S. 224, 225 (1994).

424. *See In re Costas*, 555 F.3d at 797 ("[W]e find that *Drye* is distinguishable and we refuse to extend its logic to the bankruptcy context."). The only other post-*Drye* court of appeals case to consider this issue agrees. Laughlin v. Nouveau Body & Tan, L.L.C. (*In re* Laughlin), 602 F.3d 417, 426 (5th Cir. 2010) (emphasizing "the particularities and structure of the IRC").

Professor Hirsch praises such holdings:

> This conclusion appears technically sound: Although the relevant provisions of the Bankruptcy Code and the tax code display linguistic similarities, the two cover separate problems and hence can support conflicting outcomes.

Hirsch, *Disclaimers and Federalism*, *supra* note 147, at 1913 (footnote omitted). With respect, I differ with this view. As the subsequent lengthy treatment of disclaimed a modest inheritance.[425] The trustee sued the decedent's estate under § 548(a)(1).[426] The court ruled that "Arizona law says that [the debtor] had no property interest in the disclaimed property."[427] If the debtor never had any property, disclaimer cannot be a fraudulent transfer under § 548(a)(1).[428]

The *Costas* court thought the issue was whether the debtor ever had any "property," not whether the debtor's right to disclaim was an interest in someone else's property.[429] Indeed, the court assumes that "interest" and "property" are precisely the same thing.[430] The court also assumes that "property" means *the debtor's* property—not the property of some other.[431] In fact, § 548(a)(1) plausibly refers to the *debtor's interest* in *someone else's* property.

The *Costas* assumption is faulty. The power to accept the inheritance is a power over property of another. It is an option in property. A contractually created option to buy real property is an interest in the property itself.[432] If an insolvent debtor owned a

---

tenancies by the entirety makes clear, the Bankruptcy Code deliberately invokes the superegoic approach to that form of ownership. *Infra* notes 517–539 and accompanying text. If the *Craft* result is commanded by the text of § 541(a), as courts have uniformly recognized, so is the *Drye* result.

Professor Hirsch, however, contradicting his above-quoted remark, suggests that bankruptcy courts:

> [C]ould make an argument similar to the one that appeared in that opinion . . . that a right of disclaimer is both an attribute of property *and* a species of transfer. This duality frees courts to consider—or demands that they consider—the policy implications of focusing on one or the other feature of a disclaimer when applying section 548.

Hirsch, *Disclaimers and Federalism*, *supra* note 147, at 1913. This second passage articulates the position I wish to defend.

425. *In re Costas*, 555 F.3d at 792.

426. *Id.*; 11 U.S.C. 548(a)(1) (2012).

427. *In re Costas*, 555 F.3d at 794.

428. *See id.* ("Arizona's relation-back rule says that a disclaimant neither transfers or possesses an interest in disclaimed property . . . .").

429. *See id.* (focusing the discussion on whether disclaimer "retroactively eliminates" any property interest).

430. *See id.* at 792 ("We begin with the two relevant and disputed terms from § 548: 'transfer' and 'property' (or, more broadly, 'an interest . . . in property')."); *id.* at 795 ("The Trustee urges us to extend *Drye* to the bankruptcy context and recognize that 'right to channel' as an 'interest . . . in property' for purposes of the [Bankruptcy] Code.").

431. *Id.* at 794.

432. *See* Daniels v. Anderson, 642 N.E.2d 128, 132 (Ill. 1994) (describing a

valuable option against a third party and then released it, surely such a release is a transfer of the option *in someone else's property* back to that someone else.[433] In this case, the power to buy *is* the property, and its release *is* the transfer.

Similarly, in the case of a disclaimer, the insolvent debtor has a power to *accept* the inheritance,[434] and disclaiming this power is like releasing a valuable option for less than a reasonably equivalent value.

The *Costas* court devastatingly undermines its own pro-debtor position in stating:

> *Drye* is distinguishable based on timing issues. Although *Drye*, like this case, involved a collision between federal law and state relation back doctrines, the impact between the two occurred at a different time. In *Drye*, the tax lien was already in place prior to the execution of the disclaimer. Thus, before the taxpayer attempted to execute his disclaimer, the federal government already had an interest in the subject property. Application of the state law fiction would have stripped the government of this interest.
>
> In contrast, the disclaimer here occurred pre-petition, meaning that the retroactive divestment of property interests occurred *prior* to the bankruptcy estate gaining any interests in the right to disclaim. Therefore, the state law did not operate to defeat any pre-existing interests. Rather, the situation in *Drye* is more analogous to a post-petition disclaimer, where a debtor invokes the disclaimer protections of state law only after the creation of the bankruptcy estate. In cases of post-petition disclaimers, courts have generally included disclaimed property in the estate, reasoning that the right to disclaim itself belongs to the estate as of the time of filing. This context mirrors *Drye* because

---

right of first refusal).

433. In *Jimmy Swaggart Ministries v. Hayes (In re Hannover Corp.)*, 310 F.3d 796 (5th Cir. 2002), the alleged fraudulent conveyance was cash, but the transferee claimed it gave value in the form of real estate options. *Id.* at 789–99. The court considered whether this "property" was valuable for the purpose of the bona fide transferee defense of Bankruptcy Code § 548(c). 11 U.S.C. § 548(c) (2012). Ultimately the court concluded that the options were valueless. *In re Hannover Corp.*, 310 F.3d at 805. If creation of the option is a transfer of property, surely the release of it is.

434. *See* Kalt v. Youngworth (*In re* Kalt's Estate), 108 P.2d 401, 403 (Cal. 1940) ("[W]hen a testator dies, the legatee obtains a power, in itself a limited right of ownership . . . to determine the ultimate disposition of the property . . . ."). *But see* CAL. PROB. CODE § 283 (West 2016) ("A disclaimer is not a voidable transfer by the beneficiary . . . .").

> in both situations full deference to the state's disclaimer rules would strip parties of pre-existing interests. Thus, *Drye* accords well with the post-petition situation, but not with pre-petition disclaimers where no prior interests exist.[435]

Here, the court admits *Drye does* apply—when the disclaimer is postpetition. Thus, the trustee's hypothetical judicial lien attaches to the inheritance on the day of the bankruptcy petition before any disclaimer is exercised, and the very power to disclaim is property of the bankruptcy estate. Now, if the power to disclaim is property of the estate, it must be that power came into the bankruptcy estate via § 541(a)(1).[436] That is, the court admits that the power to disclaim is an interest of the debtor in property.[437]

If (as a matter of federal property law) the power to accept or disclaim the inheritance is debtor property at the moment of the bankruptcy petition, the property is also debtor property (as a federal matter) in the prepetition period as well. It cannot be the case that the debtor is devoid of an interest in property until just before bankruptcy, in which case the debtor's property interest *springs up* instantaneously just a nanosecond before it enters the bankruptcy estate under § 541(a)(1). Rather, it must be the case that the Bankruptcy Code federalizes state property law in the prepetition period.

Highly relevant here is Justice Thurgood Marshall's remark in *Begier v. Internal Revenue Service*.[438] Writing in the context of voidable preference law under § 547,[439] Justice Marshall stated something that should equally apply to avoidance under § 548(a):

> Because the purpose of the avoidance provision is to preserve the property includable in the bankruptcy estate—the property available for distribution to creditors—"property of the debtor" subject to the preferential provision is best understood as that property that would have been part of the estate had it not been

435. Gaughan v. Edward Dittlof Revocable Tr. (*In re* Costas), 555 F.3d 790, 795–96 (9th Cir. 2009) (citations omitted).

436. *See* 11 U.S.C. § 541(a)(1) (2012) (stating that the bankruptcy estate is comprised of "all legal and equitable interests of the debtor in property as of commencement of the [bankruptcy] case").

437. *See In re Costas*, 555 F.3d at 796 ("In cases of post-petition disclaimers, courts have generally included disclaimed property in the estate, reasoning that the right to disclaim itself belongs to the estate at the time of filing.").

438. Begier v. IRS, 496 U.S. 53 (1990).

439. *See* 11 U.S.C. § 547 (defining the concept of voidable preference).

> transferred before the commencement of the bankruptcy proceeding.[440]

On the view described here, the right to accept an inheritance is a property interest. Disclaimer of it is a transfer of this power. Therefore, the trustee *does* have a valid cause of action to avoid the use of the disclaimer power in the prepetition period. Once the disclaimer is avoided, the trustee is free to accept the inheritance for the benefit of the unsecured creditors.

As every bankruptcy theorist knows, upon the commencement of the case, the trustee is deemed to have a judicial lien.[441] This point is established by Bankruptcy Code § 544(a) which states that the trustee has:

> [A]s of the commencement of the case . . . the rights and powers of . . .
>
> > (1) a creditor that extends credit to the debtor at the time of the commencement of the case and that obtains at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists . . . .[442]

In the above-quoted passage, the *Costas* court admits that the trustee's judicial lien is *exactly* like the IRS tax lien. The bankruptcy trustee has the weird monstrous power to penetrate the fictions of state law.

We must pause and consider the very function of a fraudulent conveyance law, such as that given directly to the trustee under § 548(a). Where a creditor can successfully establish a judicial lien

---

440. *Begier*, 496 U.S. at 58; *see* Bear, Stearns Sec. Corp. v. Gredd, 275 B.R. 190, 194 (S.D.N.Y. 2002) (applying *Begier* in a § 548(a) case). *Begier* is, however, theoretically suspect on different grounds. For criticism, see David Gray Carlson, *Voidable Preferences and Proceeds: A Reconceptualization*, 71 AM. BANKR. L.J. 517, 540–43 (1997) [hereinafter Carlson, *Voidable Preferences*].

441. I have described this hypothetical judicial lien as bankruptcy's "organizing principle." *See generally* David Gray Carlson, *Bankruptcy's Organizing Principle*, 26 FLA. ST. U. L. REV. 549 (1999). *See also* 11 U.S.C. § 101(54) ("The term 'transfer' means—(A) the creation of a lien . . . .").

442. 11 U.S.C. § 544(a) (2012). There is much peculiarity in the way that the trustee's hypothetical judicial lien is described. For a history of how this description became so contorted, see 1 GRANT GILMORE & DAVID GRAY CARLSON, CARLSON AND GILMORE ON SECURED LENDING: CLAIMS IN BANKRUPTCY § 1.04 (2d ed. 2000).

on property, fraudulent conveyance is superfluous. Who needs the concept if the creditor's lien has already attached before the conveyance? But where the debtor has given away the property before the lien can be created, fraudulent conveyance law empowers the creditor to place a lien on the transferred property now in the hands of the third party.[443]

If it is true, as the *Costas* court admits, that the trustee's hypothetical judicial lien is "superegoic," and if it is true that fraudulent conveyance law is designed to permit judicial liens to attach to property the debtor has craftily conveyed before the judicial lien could accrue, then fraudulent conveyance law, as articulated in § 548(a),[444] should be read in a superegoic fashion, just as the *Costas* court has read the trustee's hypothetical judicial lien under § 544(a)(1)[445] in a superegoic fashion. That is, § 548(a)[446] should be read in such a way as to permit the hypothetical judicial lien to attach to that which, if not transferred away, would have entered into the bankruptcy estate. This fits precisely with the theory of avoidance described by Justice Marshall in *Begier*.[447]

If I am right, a distinction must be noted between the trustee's subrogation right under § 544(b)(1) and the trustee's direct right to avoid a fraudulent conveyance under § 548(a). According to § 544(b)(1):

> [T]he trustee may avoid any transfer of an interest of the debtor in property . . . is voidable under applicable law by

---

443. *See* David Gray Carlson, *The Logical Structure of Fraudulent Transfers and Equitable Subordination*, 45 WM. & MARY L. REV. 157, 168 (2003) [hereinafter Carlson, *Fraudulent Transfers*] ("[F]raudulent transfer law stands for the proposition that creditors may impose judicial liens on the property of non-debtors, when such property . . . was fraudulently conveyed . . . by a debtor.").

444. *See* 11 U.S.C. § 548(a) ("The trustee may avoid any transfer . . . of an interest of the debtor in property, or any obligation . . . incurred by the debtor, that was made or incurred on within 2 years before the date of filing of the petition . . ." that is an actual or constructive fraud).

445. *See id.* § 544(a)(1) ("The trustee shall have . . . the rights and powers of . . . a creditor . . . that obtains . . . a judicial lien.").

446. *See id.* § 548(a) (describing the fraudulent transfers the trustee may avoid).

447. *See* Begier v. IRS, 496 U.S. 53, 58 (1990) ("[T]he property available for distribution to creditors . . . is best understood as that property that would have been part of the estate had it not been transferred before the commencement of bankruptcy proceedings.").

> a creditor holding an unsecured claim . . . .[448]

This provision requires the trustee to locate a live, existing creditor (no hypothetical creditor will do!) who has a right to avoid a transfer under state law.[449] Here there can be no question of superegoic federal law supplementing the trustee's power to avoid conveyances. The trustee may only rely on the state law of property.[450] Section 548(a), however, is different; it is superegoic in nature.[451] The *Drye* principle works to recast the debtor's right to accept the inheritance as a *federal* property right that the debtor must not (within two years of bankruptcy) transfer away. Thus, we must revise Professor Hirsch's witticism that, when it comes to fraudulent conveyances, the trustee can kill "one bird with two stones."[452] With most fraudulent conveyances (if within two years of bankruptcy) the trustee indeed has two stones. But there are also two birds. The stone of § 544(b)(1) cannot kill the disclaimer bird.[453] Only the § 548(a) stone can do that.[454]

We should make express what the *real* argument is in *Costas*: *Drye* is a monster and it must be locked in a dungeon and not be allowed to maraud about the neighborhood of private law.[455] The tax statute uses the same language as the Bankruptcy Code—both refer to "property" without defining the concept.[456] The *Costas*

---

448. 11 U.S.C. § 544(b)(1) (2012).

449. *See, e.g.*, *In re* PWS Holding Corp., 303 F.3d 308, 314 (3d Cir. 2002) ("In other words, § 544(b) places the debtor in possession in the shoes of its creditors, giving it the right to prosecute individual creditors' fraudulent transfer claims for the benefit of the bankruptcy estate.").

450. *See* Blackwell v. Lurie (*In re* Popkin & Stern), 223 F.3d 764, 768–69 nn.11–12 (8th Cir. 2000) (noting that *Drye* did not apply because the trustee proceeded under Missouri fraudulent conveyance law only).

451. For a skillful elaboration of this argument, see Jon Finelli, Comment, *In re* Costas*: The Misapplication of Section 548(a) to Disclaimer Law*, 14 AM. BANKR. INST. L. REV. 567, 591–97 (2006).

452. Hirsch, *Disclaimers and Federalism*, *supra* note 147, at 1915.

453. *See* 11 U.S.C. § 544(b)(1) (explaining the trustee's right to avoid "any transfer of an interest of a debtor in property . . . that is voidable . . . by a creditor holding an unsecured claim").

454. *See id*. § 548(a) (providing that the trustee may avoid any transfer of a property interest of the debtor that was made within two years before the date of filing).

455. *See generally* Gaughan v. Edward Dittlof Revocable Tr. (*In re* Costas), 555 F.3d. 790, 797 (9th Cir. 2009).

456. *Compare* 11 U.S.C. § 541 (2012) (referring to property for the purposes

court said, "[a]dmittedly, similarities exist between the tax lien statute and the [Bankruptcy] Code, as both broadly rely on state law to define 'property.'"[457] But tax law is simply different from bankruptcy law, the *Costas* court opined:

> In the tax lien context, collection is the primary focus. This vital function often "justifies the extraordinary priority accorded federal tax liens." Indeed, the Supreme Court has repeatedly construed tax lien provisions to permit the government to reach property beyond the grasp of other creditors.[458]

In other words, the tax lien is a vicious, insatiable beast, governed only by the imperative to collect. It should be quarantined.

Meanwhile, *Butner* counsels the safe haven of state law. Following state law "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.'"[459]

Maybe so. But *Butner* is king in the old regime. *Drye* and *Craft* are the French revolution, overthrowing the discredited king. The *Costas* legislative instinct is a Thermidorian betrayal of the revolution. Besides, the *Costas* court has already admitted that *Drye* applies as of the day of the bankruptcy opinion.[460] The camel's nose is in the tent of bankruptcy, and, if logic holds sway, the camel will not be denied total access to the ground on which the tent is pitched.[461]

Note should be taken of the penultimate sentence of Justice O'Connor's opinion in *Craft*. In that sentence, Justice O'Connor referred to the lower courts' ruling that the conveyance by Don and Sandra was not fraudulent on the "no harm no foul"[462] principle:

---

of the bankruptcy proceeding), *with* 26 U.S.C. § 6321 (referring to property for the purposes of the tax code).

457. *In re Costas*, 555 F.3d at 796.

458. *Id.* (citing United States v. Kimbell Foods, Inc., 440 U.S. 715, 734 (1979)).

459. *See* Butner v. United States, 440 U.S. 48, 55 (1979) (quoting Lewis v. Mfrs. Nat'l Bank, 364 U.S. 603, 609 (1961)).

460. *See In re Costas*, 555 F.3d at 796–97 (distinguishing the case from *Drye* because of timing issues).

461. *See In re* Kloubec, 247 B.R. 246, 256 (Bankr. N.D. Iowa 2000) ("There is nothing in the [*Drye*] opinion to suggest that its clearly articulated ruling is limited to a tax lien application. To the contrary, the opinion broadly suggests that, in all contexts, the result would be the same.").

462. *See supra* note 228 (discussing further the application of the "no harm no foul" principle).

because the individual creditors could not reach the tenancy by the entirety, conveyance by the marital entity could not possibly be a fraudulent conveyance. Here is the sentence:

> Since the District Court's judgment was based on the notion that, because the federal tax lien could not attach to the property, transferring it could not constitute an attempt to evade the Government creditor . . . [but] in future cases, the fraudulent conveyance question will no doubt be answered differently.[463]

The background assumption that motivates this remark is that, where a tax lien does not yet exist and where a Michigan-style tenancy by the entirety is conveyed to defraud the IRS, the IRS will have a fraudulent conveyance right—the right to attach a lien to third-party property. *Costas* precedes *Craft*. *Costas* admits *Drye* applies to the bankruptcy trustee's hypothetical judicial lien. Putting all this together, *Craft* therefore preempts *Costas*. *Craft* implies that the bankruptcy trustee has a cause of action against the decedent estate for exercise of the disclaimer within two years of bankruptcy. If the IRS has this fraudulent transfer right, then so does the bankruptcy trustee.

2. Postpetition Disclaimers

As for postpetition disclaimers, they arise in two circumstances. (1) The inheritance is prepetition, but the disclaimer is postpetition. (2) Both the inheritance and the disclaimer are postpetition. Here, the great weight of authority is that, in the postpetition period, the debtor may disclaim neither a prepetition inheritance nor a postpetition inheritance that accrues within 180 days of bankruptcy and thus enters the bankruptcy estate under § 541(a)(5).

Lowe v. Sanflippo (In re Schmidt)[464] is perhaps the leading modern case[465] on postpetition disclaimer of a prepetition

463. *Craft V*, 535 U.S. 274, 289 (2002).

464. 362 B.R. 318 (Bankr. W.D. Tex. 2007).

465. An early exemplar is Justice Story's opinion in *Ex parte Fuller*, 9 F. Cas. 976, 977 (C.C.D. Mass 1842) ("[A bankrupt debtor has] no right to disclaim . . . . It would be a fraud upon his creditors . . . . As an honest debtor, he must desire, that his creditors should derive as much benefit from all his 'rights of property,' as is

inheritance. In *Schmidt*, Judge Leif Clark (again) held that a debtor may not disclaim an inheritance in the postpetition period, once the inheritance as already entered into the bankruptcy estate.[466] Judge Clark drew this rule from *Burgess v. Sikes (In re Burgess)*:[467] "[T]he [Bankruptcy] Code also provides a temporal limitation: property of the estate is determined at '[t]he commencement of the case.'"[468] *Burgess* holds that a government reimbursement for a prepetition loss—one legislatively created after the debtor's bankruptcy petition—was postpetition property of the debtor, not prepetition property of the bankruptcy estate.[469] Judge Leif Clark analogized exercise of the disclaimer to the act of Congress in *Burgess*—it was a postpetition event that must be ignored in calculating property of the bankruptcy estate.[470] Judge Clark went on to proclaim that *Drye* applies *directly* to postpetition disclaimers in bankruptcy cases.[471]

With regard to postpetition disclaimers, does § 546(b) save the debtor who wishes to disclaim the inheritance? According to § 546(b):

> The rights and powers of a trustee under sections 544, 545, and 549 of this title are subject to any generally applicable law that—
>
> (A) permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection . . . .[472]

In *Schmidt*, Judge Clark explained that, while § 546(b) permits state-law grace periods with regard to "perfection of an interest in property," a disclaimer is not an act of perfection.[473] A disclaimer

---

possible.").

466. *See Schmidt*, 362 B.R. at 325 (concluding that the debtor's post-petition disclaimer is unauthorized and avoidable by the trustee).

467. 438 F.3d 493 (5th Cir. 2006) (en banc).

468. *Id.* at 496 (citing 11 U.S.C. § 541(a)(1) (2012)).

469. *Id.* at 507.

470. *Schmidt*, 362 B.R. at 323.

471. *See id.* at 324 ("The Supreme Court's decision in *Drye* also supports this conclusion. . . . [T]he logic employed by the court applies with equal force in the bankruptcy context.").

472. 11 U.S.C. § 546(b) (2012).

473. Lowe v. Sanflippo (*In re* Schmidt), 362 B.R. 318, 325 (Bankr. W.D. Tex. 2007).

is, rather, "a mechanism with which to *refuse* or *redirect* an interest in property."[474] This seems correct to me. First, the legislative history to § 546(b) certainly takes for granted that perfection is something *lien creditors* often have to do:

> The trustee's rights and powers under [§ 544(a)(1)] are limited by section 546. First, if an interest holder against whom the trustee would have rights still has, under applicable nonbankruptcy law, and as of the date of the petition, the opportunity to perfect his lien against an intervening interest hold, then he may perfect his interest against the trustee . . . .[475]

The grace period for purchase money security interests under the UCC is an example that the legislative history explicitly gives.[476] Furthermore, § 547(e)(1) defines perfection as something a lien creditor does to best a subsequent hypothetical judicial lien creditor (personal property) or bona fide purchaser (real property).[477] Although this definition is said to be "[f]or purposes of this section,"[478] we may with fairness liberate it from the confines of § 547 and set to work on § 546(b).[479] If so, it becomes clear that perfection is something that transferees (not debtors) do.[480]

Indeed, one hears in the verb "to perfect" a requirement that someone *has* a property interest and does something that makes it better. As a result of perfecting, a property right, previously feeble, is greatly energized. Before perfection, the transferee had something flawed. After perfection, he still has that lien, now much improved. But disclaimer, in contrast, does not leave the debtor in possession of anything. It obliterates or cancels his property, just as Judge Clark suggested.[481] Disclaimer is therefore the opposite of perfection. It is obliteration.

---

474. *Id.*

475. H.R. REP. NO. 95-595, § 546, at 371 (1977).

476. *Id.*

477. 11 U.S.C. § 547(e)(1).

478. *Id.* § 547(e)(1) (preamble). That is, for the purposes of voidable preference law, as it is set forth in § 547.

479. *Id.* § 546(b).

480. *See* Global Dist. Network, Inc. v. Star Expansion Co., 949 F.2d 910, 913 (7th Cir. 1991) ("Debtors transfer assets; creditors perfect security interests.").

481. *See* Lowe v. Brajkovic (*In re* Brajkovic), 151 B.R. 402, 410 (Bankr. W.D. Tex. 1993) ("[I]n disclaiming, the beneficiary ridded herself of an interest in

There is a second reason to believe that disclaiming is not perfecting within the meaning of § 546(b). Judge Clark imagined the disclaimer power to be something the debtor retains in spite of the bankruptcy petition.[482] In his view, the power becomes useless (a disability, Hohfeld would say)[483] because the bankruptcy estate is determined on the day of the bankruptcy petition, and postpetition events cannot be brought to bear on the matter.[484]

But a better way to conceive of a disclaimer is that it is a power over property of *another*—the decedent estate.[485] Thus, a debtor can accept the gift or decline it. As a power over property of another, it is an "interest" in this property. According to § 541(a)(1), the disclaimer right is a "legal . . . interest[] of the debtor in property as of the commencement of the case."[486] Therefore, the disclaimer right is an interest in property that goes into the bankruptcy estate itself and is exercisable by the trustee alone.[487] After bankruptcy, the power to disclaim continues to

property.").

482. *See* Lowe v. Sanflippo (*In re* Schmidt), 362 B.R. 318, 323 (Bankr. W.D. Tex. 2007) (remarking that the debtor did not execute the disclaimer prior to filing the bankruptcy petition and therefore should have reported her interest in the disclaimer in her schedules).

483. Hohfeld, *supra* note 100, at 30. According to Hohfeld's famous system of opposites and correlatives, all law can be described by eight terms. Arranged by correlatives, any legal relationship between *A* and *B* can be described as follows: If *A* has a right, privilege, power, or immunity, then *B* has a no-right, duty, disability, liability. *Id.*

484. *See In re Schmidt*, 362 B.R. at 323 ("[S]ubsequent events . . . [can] not be used to revise the state of affairs as they existed as of the date of the bankruptcy filing.").

485. Judge Clark wanted the inheritance to be property of the *debtor*. *See Brajkovic*, 151 B.R. at 406 ("Thus, there seems to be some interest in property residing in the debtor at the moment the disclaimer is executed just by virtue of the fact that it takes a written disclaimer to get rid of it."). But this is not necessary. The decedent estate could own the property and the debtor could have the right to accept or disclaim the gift. As Judge Clark noted, the act of acceptance is passive. If enough time passes, acceptance is presumed. *Id.* (citing MO. REV. STAT. §§ 473.260, 474.490 (1992)).

486. 11 U.S.C. § 541(a)(1) (2012).

487. *See In re* Scott, 385 B.R. 709, 711–12 (Bankr. D. Neb. 2008) ("[O]nce [the debtor] became entitled to the inheritance, the entitlement became property of the bankruptcy estate and she had the duties of the trustee to preserve that property for the benefit of creditors."); Wolfe v. Farrior (*In re* Farrior), 344 B.R. 483, 486 (Bankr. W.D. Va. 2006) ("The right to disclaim after the filing of the bankruptcy petition became property of the estate and only the trustee could administer that legal interest of the debtor. To hold otherwise would permit state

exist, but it *belongs to the trustee*. Therefore, § 546(b) does not apply because the debtor has already been divested of the power to disclaim. In contrast, the power of a lien creditor to perfect does not go into the bankruptcy estate, because the power to perfect, though an interest in property, is not an interest of the *debtor* in property. It is the power of the creditor. Accordingly, § 541(a)(1) leaves the creditor's right to perfect intact.[488] For this reason, lien creditors can have access to § 546(b) grace periods, but the debtor cannot.

As for postpetition disclaimers of postpetition inheritances, there is an additional consideration that warrants ignoring debtor's exercise of the disclaimer.

Postpetition inheritances do not enter the bankruptcy estate through § 541(a)(1), which applies to "interests of the debtor in property *as of the commencement of the case*."[489] In the case of a postpetition inheritance, the property in question belongs to the still-living legator, still breathing at the commencement of the case. Rather, the inheritance enters the bankruptcy estate through the postern gate of § 541(a)(5), which swings open for:

> Any interest in property that would have been property of the estate if such had been an interest of the debtor on the date of the filing of the petition, and that the debtor *acquires or becomes entitled to acquire* within 180 days after such date—

---

law to preempt the Federal Bankruptcy Code.").

488. Judge Clark was certainly aware of this alternate conception and at one point remarked, "[i]f anyone had the authority to execute a disclaimer, it was the chapter 7 trustee." *In re Schmidt*, 362 B.R. at 325. Somewhat inconsistently, Judge Clark asserted that § 549 avoids the transfer. Cornelius v. Cornell (*In re* Cornell), 95 B.R. 219, 222 (Bankr. W.D. Okla. 1989). In fact, § 549 should be left out of the analysis. The point is that the right to disclaim has passed to the bankruptcy trustee and the debtor no longer has it. End of matter. Section 549 avoidance requires an adversary proceeding by the trustee. FED. R. BANKR. P. 7001. The trustee can simply ignore the attempt to disclaim as an exercise of a power that the debtor no longer has. *See In re* Stambaugh, No. 04-00679, 2010 Bankr. LEXIS 3141, at *11 (Bankr. N.D. Iowa Sept. 17, 2010) ("Trustee also certainly would have the authority to set the post-petition transfer of property of the estate aside under § 549."). I have argued for the superfluity of § 549(a) in most alleged cases of postpetition transfer in, David Gray Carlson, *Bankruptcy's Acephalous Moment: Postpetition Transfers Under the Bankruptcy Code*, 21 EMORY BANKR. DEV. J. 113, 115–22 (2004) [hereinafter Carlson, *Bankruptcy's Acephalous Moment*].

489. *See* 11 U.S.C. § 541(a) (2012) (emphasis added).

(A) by bequest, devise, or inheritance . . . .[490]

The italicized language indicates that, not acquisition itself, but *entitlement* to acquisition is the *desideratum*.[491] Section 541(a)(5) therefore indicates that the disclaimer is irrelevant in deciding whether the inheritance comes into the estate through this postern gate.[492]

To conclude, it is illogical for courts to proclaim that prepetition disclaimers are never transfers that *can* be avoided and that postpetition disclaimers are always transfers that can be avoided. The postpetition cases have federalized the property aspects of the disclaimer, so that the trustee's hypothetical judicial lien attaches to the power to accept or disclaim.[493] Taking a cue from Justice Marshall in *Begier*,[494] the federal definition should extend to the prepetition period as well. That is to say, the *Drye* reasoning should apply fully in the bankruptcy context.

As it stands, disclaimer law is capricious. In *Geekie v. Watson (In re Watson)*,[495] the debtor was unaware she was a legatee on the day of bankruptcy.[496] She tried to exercise a post-petition disclaimer to flummox the creditors but was denied the

490. *Id.* § 541(a)(5) (emphasis added).

491. *See* Parker, *supra* note 361, at 34–35 (making this point).

492. *See In re* Chenoweth, 3 F.3d 1111, 1113 (7th Cir. 1993) (assuming *sub silentio* that postpetition disclaimer of a postpetition inheritance is ineffective); *In re Scott*, 385 B.R. at 711. *Michelson v. Detlefsen (In re Detlefsen)*, 610 F.2d 512 (8th Cir. 1979), is a case under the 1898 Act. For our purposes, the court assumed that, under the Bankruptcy Code (which had just become effective), postpetition disclaimers cannot prejudice the bankruptcy trustee. *Id.* at 517. For the record, *Detlefsen* is mystifying in its interpretation of the 1898 Act. In the case, the debtor filed for bankruptcy at a time when he had a contingent remainder in an estate. *Id.* at 513. This contingent remainder should have gone into the bankruptcy estate and that should have been the end of the matter. After bankruptcy, the life tenant died, and the debtor only then disclaimed the gift. *Id.* at 514. The court seemed to think that a prepetition right to disclaim went into the bankruptcy estate but a postpetition disclaimer did not (the opposite of what one might suppose). *Id.* at 517.

493. *See In re Scott*, 385 B.R. at 711–12 (stating that once the inheritor became entitled to the inheritance, that entitlement became property of the bankruptcy estate and she may not disclaim that property to the detriment of the creditors).

494. *Supra* notes 440–441 and accompanying text.

495. 65 B.R. 9 (Bankr. C.D. Ill. 1986).

496. *Id.* at 10.

opportunity.[497] Yet this same scheme would be upheld if she had, like a Dickensian vulture, kept watch at the deathbed so as to execute a prepetition disclaimer, which would have been upheld. Better for the federal courts to rule that disclaimers two years before bankruptcy are fraudulent conveyances under § 548(a) because *Drye* has articulated the generally applicable federal law of property.

B. Tenancy by the Entireties

Administering the tenancy by the entirety is a "bedeviling issue in bankruptcy law."[498] To beat it into submission, we shall now pound a great many round pegs into some very square holes, during the course of which we shall wear out several hammers.

Our problem is mostly with the Michigan-style tenancy by the entirety.[499] The New York-style entireties, in contrast, poses no problem at all. In New York, the individual spouse owns a co-tenancy, which goes into the bankruptcy estate when the individual files for bankruptcy.[500] Against this individual's interest the debtor may apply the standard homestead exemption (if the entireties is the spouse's principal residence).[501] Assuming there is a valuable equity for the unsecured creditors after the exemption is applied, this individual interest can be sold. Under New York law, the buyer of the debtor's interest takes a 50% present possessory right and the debtor's survivorship right.[502] The nondebtor spouse also has a survivorship right if he survives the debtor.[503] Also, under New York law, the nondebtor spouse has an

---

497. *Id.* at 12.

498. Bunker v. Peyton (*In re* Bunker), 312 F.3d 145, 148 (4th Cir. 2002).

499. We shall also struggle with the statutory tenancies by the entirety in Tennessee, Illinois, and Massachusetts. *Infra* Part III.B.10.

500. *See* Cmty. Nat'l Bank & Tr. Co. of New York v. Persky (*In re* Persky), 893 F.2d 15, 18–19 (2d Cir. 1989) (asserting that the debtor's interests are alienable).

501. Debtors in New York tried to claim that the tenancy by the entirety was exempt because a few lower courts had used their discretion, N.Y. C.P.L.R. LAW § 5240 (McKinney 2017), to delay execution sales of the debtor's interest in a tenancy by the entirety. In *In re Persky*, 893 F.2d at 15, the Second Circuit ruled that, just because courts had discretion to delay an execution sale, did not make the entireties exempt in New York.

502. Lover v. Fennell, 179 N.Y.S.2d 1017, 1020 (1958).

503. Hammond v. Econo-Car of the N. Shore, Inc., 336 N.Y.S.2d 493, 496

immunity against partition by sale,[504] but the Bankruptcy Code overrides this immunity.[505] According to Bankruptcy Code § 363(h):

> [T]he trustee may sell both the estate's interest . . . and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenancy by the entirety, only if:
>
> (1) partition in kind of such property among the estate and such co-owners is impracticable;
>
> (2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners; [and]
>
> (3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners . . . .[506]

The nondebtor spouse is given the right of first refusal to buy the debtor spouse's tenancy[507] and, if he does not exercise this option, he must submit to the trustee's power of sale and receive his share of the ultimate sales proceeds.[508] Here, we have a straightforward federal preemption of a state anti-partition rule, similar to the tax rule interpreted in *United States v. Rodgers*.[509]

(1972).

504. *See id.* at 494–95 ("[T]he sale of the husband's interest in the real property would convey a hybrid tenancy in common, with survivorship but no partition rights, to a third-party . . . .").

505. *See In re Persky*, 893 F.2d at 16 ("[The Bankruptcy Code] permit[s] a trustee to realize fully on a debtor's interest in property owned as a tenant by the entirety by granting the trustee the authority to sell it without the consent of the non-debtor spouse.").

506. This section does not apply if the tenancy by the entirety is used in the production, transmission, or distribution of electric energy of natural gas. 11 U.S.C. § 363(h)(4) (2012). According to the legislative history, Congress feared that "public utilities [might be] deprived of power sources because of the bankruptcy of a joint owner." 124 Cong. Rec. H11,093 (Sept. 28, 1978).

507. *See* 11 U.S.C. § 363(i) ("Before the consummation of a sale of property . . . the debtor's spouse, or a co-owner of such property . . . may purchase such property at the price at which such sale is to be consummated.").

508. *See id*. § 363(j) ("After a sale of property . . . the trustee shall distribute to the debtor's spouse or the co-owners of such property . . . the proceeds of such sale . . . according to the interest of such spouse or co-owners, and of the estate.").

509. *See generally* United States v. Rodgers, 461 U.S. 677 (1983).

The New York-style tenancy by the entirety is compatible with the Bankruptcy Code, but compatibility dissolves when we consider the Michigan-style entireties. In Michigan, the marital entity owns the entireties (not the individual spouses).[510] This and other assumptions will cause endless doctrinal headaches.

For the moment, we assume (unless otherwise indicated) that one spouse has filed for bankruptcy and the other spouse has not.[511]

1. Into the Estate and Out

Under the old Bankruptcy Act of 1898,[512] exempt property[513] was never part of the bankruptcy estate. According to § 70(a)(5) of the 1898 Act (repealed in 1978), only debtor property "which might have been levied on and sold under judicial process" entered the bankruptcy estate.[514]

In contrast, Bankruptcy Code § 541(a)(1) brings "all legal or equitable interests of the debtor in property as of the commencement of the case" into the bankruptcy estate.[515] This includes the debtor's exempt property.[516] Thereafter, the debtor (or a dependent of the debtor) must fetch out the property by claiming exemptions on Schedule C.[517] That the Michigan-style tenancies by

---

510. *See In re* Spears, 308 B.R. 793, 802–03 (Bankr. W.D. Mich. 2004) (stating that Michigan law "characterizes its tenancy by the entirety as creating no individual rights"), *rev'd on other grounds sub nom.* Spears v. Boyd (*In re* Spears), 313 B.R. 212 (W.D. Mich. 2004).

511. Joint bankruptcy petitions by spouses under 11 U.S.C. § 302 are discussed *infra* in notes 1195–1218 and the accompanying text.

512. Bankruptcy Act, chs. 540–41, 30 Stat. 544 (1898).

513. "Exempt" is basically not defined in the Bankruptcy Code. One does read that the tenancy by the entirety must be "exempt from process." 11 U.S.C. § 522(b)(3) (2012). Classically, "[e]xempt property is that which is free from liability to processes such as seizure and sale, or attachment, to satisfy debts." *In re* Marriage of Logston, 469 N.E.2d 167, 171 (Ill. 1984).

514. Bankruptcy Act § 70(a)(5).

515. 11 U.S.C. § 541(a)(1) (2012).

516. *See* Chippenham Hosp., Inc. v. Bondurant, 716 F.2d 1057, 1058 (4th Cir. 1983) ("Section 541 has been construed logically to include the debtor's interest in entireties property."); H.R. REP. NO. 95-595, at 368 (1977).

517. *See* 11 U.S.C. § 522(*l*); Owen v. Owen, 500 U.S. 305, 308 (1991) ("No property can be exempted (and thereby immunized), however, unless it first falls *within* the bankruptcy."). *See generally* David Gray Carlson, *The Role of*

the entirety enter into the bankruptcy estate (and may *never* come back out) is extremely significant in my argument that *Craft* was baked into the Bankruptcy Code from the beginning.

Once exempt property goes into the bankruptcy estate, the Bankruptcy Code invites debtors to choose state-law exemptions (in lieu of the federal exemptions provided for in § 522(d)(2)).[518] According to § 522(b)(1):

> Notwithstanding section 541 . . . , an individual debtor may exempt from property of the estate the property listed in either paragraph (2) or, in the alternative, paragraph (3) of this subsection.[519]

Paragraph (3) refers to the state-law exemptions. These exemptions include:

> [A]ny interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenancy by the entirety . . . to the extent such interest as a tenant by the entirety . . . is exempt from process under applicable nonbankruptcy law.[520]

Where the debtor chooses the federal exemptions, the Michigan entireties goes into the bankruptcy estate and *never* comes back out. The federal exemption in § 522(d) includes a *homestead* exemption[521] but no exemption for the entireties.

At first thought, one is tempted to think that § 541(a)(1) does not bring the Michigan-style tenancy by the entirety into the

---

Valuation in the Federal Bankruptcy Exemption Process: The Supreme Court Reads Schedule C, 18 AM. BANKR. INST. L. REV. 461 (2010) [hereinafter Carlson, *Role of Valuation*]. Form B-206C became effective in December 2015. Most of the authorities reviewed here involve old Schedule C. So, shedding a tear, I shall nostalgically refer to Schedule C instead of B-206C.

518. Congress also invites state legislatures to prohibit its citizens from choosing the federal exemptions. 11 U.S.C. § 522(b)(2). About two-thirds of the states have done so. 4 COLLIER ON BANKRUPTCY, ¶ 522.02 n.5 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2009).

519. 11 U.S.C. § 522(b)(1).

520. *Id.* § 522(b)(3)(B).

521. *See id.* § 522(d)(1)

> The debtor's aggregate interest, not to exceed $23,675 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor.

bankruptcy estate because the debtor has *no property interest* in the tenancy. Rather, the *marital entity* owns all. The individual debtor owns nothing. Indeed, this was precisely the result under the Bankruptcy Act of 1898.[522]

For that matter, it is distinctly odd even to say that the tenancy by the entirety is considered the debtor's *exempt* property when it is *not the debtor's property at all*. The property belongs to a separate person—the marital entity.[523] When it comes to exempt property, one typically expects that (i) the debtor actually owns something and (ii) a statute says the creditors of the debtor can't have it. Usually,[524] no state statute says that the debtor's 50% entireties share is immune from process issued on behalf of *some* creditors—the individual creditors of an individual spouse.[525] Rather, the entireties theory is usually from the common law and holds that the marital entity is the owner.[526] It is not, precisely

522. *See generally* Dioguardi v. Curran (*In re* Dioguardi), 35 F.2d 431, 432 (4th Cir. 1929); Mich. Nat'l Bank v. Chrystler (*In re* Trickett), 14 B.R. 85, 88 (Bankr. W.D. Mich. 1981). This was so, even if selected creditors had access to that property. Lockwood v. Exch. Bank of Fort Valley, 190 U.S. 294, 299–300 (1903); *In re* Hunter, 970 F.2d 299, 301 (7th Cir. 1992).

523. *See* Grosslight v. Grosslight, 757 F.2d 773, 775 (6th Cir. 1985) ("Michigan is among the minority of states retaining the common law tenancy by the entirety. Tenants by the entirety, who must be a husband and wife, hold under a single title with right of survivorship.").

524. We shall encounter statutory entireties in Illinois, Massachusetts, Michigan, New Jersey, and Rhode Island. The Michigan statute seems merely to restate preexisting common law notions. *Infra* note 567 and accompanying text.

525. *See In re* Amici, 99 B.R. 100, 101 (Bankr. M.D. Fla. 1989) ("Nowhere in the Constitution of [Florida] or in any Statute is there any reference to any exemption based on tenancy by the entireties."). The trustee in *In re Ford*, 3 B.R. 559, 574–75 (Bankr D. Md. 1980), *aff'd sub nom. Greenblatt v. Ford*, 638 F.2d 14 (4th Cir. 1981), tried to argue "exemption" means "statutory" exemption, not the common law in general. This was dispatched with a citation to *Eaton v. Boston Trust Co.*, 240 U.S. 427 (1916), where the Supreme Court upheld the common law spendthrift trust as exempt property, even though no statute said so. *See also In re* Allard, 196 B.R. 402, 410 (Bankr. N.D. Ill. 1996) ("Fairly applying the practical function of the relevant statute is more important than using some bright line test hinging upon the statute's use or non-use of the words "exempt" or "exemption" to determine whether or not a state exemption exists for purposes of [§ 522(b)(3)(B)] in a bankruptcy case."), *aff'd* 202 B.R. 938 (N.D. Ill. 1996).

526. *See Grosslight*, 757 F.2d at 775 ("Neither husband nor wife acting alone can alienate any interest in the property . . . ."); *In re Trickett*, 14 B.R. at 86 ("At common law, the individual creditors of neither the husband or wife could reach entireties property by judicial process nor could either spouse transfer any interest in the property.").

speaking, *debtor* property that is being exempted. Shall we also say that when a debtor files for bankruptcy, property of "other persons" is exempt? That would imply that all the property of all other persons goes into the bankruptcy estate under §541(a)(1), where the debtor must trouble to bail it out again under § 522(*l*). Needless to say, this is absurd, but it is the underlying assumption when we say that the Michigan-style entireties is exempt property.

On the contrary, we must recognize that the Bankruptcy Code simply denies the Michigan fiction, just as the Supreme Court did in *Craft*.[527] Contrary to the Michigan "fiction" that the debtor is propertyless, courts have held that § 541(a) is "certainly broad enough to include an individual debtor's interest in property held as a tenant by the entirety."[528] Such holdings anticipate the reasoning in *Craft*, which sets aside the Michigan "fiction" of marital entity ownership.[529] Obviously this is precisely what Congress intended. The tenancy by the entirety appears in § 522(b)(3)[530] as exempt property, implying that the debtor must have a property interest in the tenancy for § 541(a) purposes.[531] Indeed, the very fact that § 522(b)(3) refers to the *debtor's* interest in a tenancy by the entirety proves that the marital veil has already been pierced by the Bankruptcy Code. This implies that Congress intended for the Michigan tenancy by the entirety to come in to the bankruptcy estate via § 541(a), so that the debtor (if she chooses) could fetch it out again as a § 522(*l*) exemption.[532] In

527. *Supra* Parts II—III.

528. Napotnik v. Equibank & Parkvale Sav. Ass'n, 679 F.2d 316, 318 (3d Cir. 1982); *see also In re* Paeplow, 972 F.2d 730, 737 (7th Cir. 1992) ("[C]ongress intended entirety property to enter the bankruptcy estate and to pass out of the estate if subject to an exemption, and if claimed by the debtor on his or her bankruptcy schedules.").

529. Thus, the tenancy by the entirety proves that "the Bankruptcy Code does not always incorporate a state's definition of property into section 541(a)(1)." Arango v. Third Nat'l Bank in Nashville (*In re* Arango), 992 F.2d 611, 614 (6th Cir. 1993).

530. Prior to BAPCPA, this section bore the number § 522(b)(2)(B). Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109–8, 119 Stat. 23.

531. An earlier Bankruptcy Commission had specifically recommended that the tenancy by the entirety become part of the bankruptcy estate. Report of the Commission on Bankruptcy Law of the United States, H.R. Doc. 93–137, 93rd Cong., 1st Sess. Pt. I at 194 (1973).

532. *See* Garner v. Strauss (*In re* Garner), 952 F.2d 232, 234 (8th Cir. 1991)

short, by implication, Congress legislated a piercing of the marital veil in the same fashion that Justice O'Connor pierced the fiction in *Craft*.[533]

2. Severance of the Tenancy

In *Craft*-like fashion, the trustee's hypothetical judicial lien attaches to the Michigan-style entireties even though state law says that the individual spouse owns nothing.[534] Unlike the IRC, the Bankruptcy Code invites the entireties to be exempted.[535] If the debtor spouse so elects, the entireties is expelled from the

("[I]t is at least clear that by allowing an individual debtor to exempt certain interests as a tenant by the entirety, Congress intended that such interests be included in the estate in the first place.").

533. Also relevant here is Bankruptcy Code § 541(c)(1)(A), which holds:

> [A]n interest of the debtor in property becomes property of the estate under subsection (a)(1) . . . notwithstanding any provision in . . . applicable nonbankruptcy law—
>
> (A) that restricts or conditions transfer of such interest by the debtor . . . .

11 U.S.C. § 541(c)(1)(A) (2012). State law restricts the ability of an individual spouse to convey the tenancy by the entirety. Indeed, it denies that the individual spouse has *any* interest in the tenancy by the entirety. But the *Craft*-like move in § 541(a)(1) and § 522(b)(3) guarantees that the debtor *does* have an interest, and therefore § 541(c)(1) facilitates the concept of the tenancy by the entirety entering the bankruptcy estate.

Judge Jeffrey Hughes argues that § 541(c) is *absolutely necessary* to the tenancy by the entirety entering into the estate. It is no mere facilitator. *See In re* Spears, 308 B.R. 793, 805 (Bankr. W.D. Mich. 2004)

> If Section 541(c)(1) did not exist, a debtor's interest in property held as a tenant by the entirety with a non-debtor spouse could not become property of the estate, for *Butner* directs that the void which would be left by the absence of Section 541(c)(1) is to be filled by state law and applicable law in Michigan clearly prohibits a debtor from transferring his interest in the entireties property without the consent of his spouse.

Rev'd on other grounds sub nom. Spears v. Boyd (*In re* Spears), 313 B.R. 212 (W.D. Mich. 2004). I think "facilitate" is more accurate, because § 522(b)(3) presupposes that the debtor has an interest in the Michigan-style tenancy by the entirety. From this, we can deduce straight out that § 541(a)(1) brings the entireties into the bankruptcy estate.

534. *See* Grosslight v. Grosslight, 757 F.2d 773, 775 (6th Cir. 1985) ("Michigan is among the minority of states retaining the common law tenancy by the entirety. Tenants by the entirety, who must be a husband and wife, hold under a single title with right of survivorship.").

535. 11 U.S.C. § 522(b)(3)(B).

bankruptcy estate.[536] The two spouses continue to be tenants by the entirety going forward.

If the debtor chooses *not* to exempt tenancy by the entirety, then the debtor's tenancy stays in the estate.[537] The trustee can then sell the debtor's 50% share to some buyer,[538] who becomes a tenant in common with the nondebtor spouse.[539] Because the sale destroys the traditional five unities of the entireties,[540] the nondebtor spouse's share likewise becomes a tenancy in common.[541] The nondebtor spouse loses the state-law expectation that the individual creditors of the debtor cannot cause the liquidation of the estate.[542] Severance is achieved—when the debtor never exempts the property and when the trustee achieves the sale, if ever.

A different conclusion was drawn by Judge Jeffrey Hughes in *In re Spears*.[543] In an impressive (though flawed) opinion, Judge Hughes concluded that, when the entireties enters the bankruptcy estate, the *trustee* and the nondebtor spouse are co-owners.[544] As a matter of Michigan law, Judge Hughes reasoned, the five required unities are disrupted and so the entireties instantly becomes a tenancy in common.[545] Nevertheless, the debtor may still exempt

536. *Id.* § 522(*l*).

537. *See id.* § 541(c)(1) (providing that "an interest of the debtor in property becomes property of the [bankruptcy] estate").

538. *See Grosslight*, 757 F.2d at 776 ("If not specifically exempted, the debtor's interest in the entireties property may be sold pursuant to 11 U.S.C. § 363(h)–(i).").

539. *See In re* Spears, 308 B.R. 793, 807 (Bankr. W.D. Mich. 2004) (stating these unities to be time, title, interest, possession, and marriage), *rev'd on other grounds sub nom.* Spears v. Boyd (*In re* Spears), 313 B.R. 212 (W.D. Mich. 2004).

540. *See id.* at 812 (stating that these unities are time, title, interest, possession, and marriage).

541. *See id.* at 816 ("[T]he commencement of a bankruptcy proceeding severs a tenancy by the entirety between a debtor and his spouse in Michigan and replaces it with a tenancy in common between the bankruptcy estate and the debtor's spouse.").

542. *See* Waldschmidt v. Hamilton (*In re* Hamilton), 32 B.R. 337, 341 (Bankr. M.D. Tenn. 1983) (stating that the debtor who elects the federal exemptions and the non-debtor spouse are exposed to the risk of losing possession of the family house).

543. *In re* Spears, 308 B.R. 793, 807 (Bankr. W.D. Mich. 2004), *rev'd on other grounds sub nom.* Spears v. Boyd (*In re* Spears), 313 B.R. 212 (W.D. Mich. 2004).

544. *Id.* at 814–16.

545. *See id.* at 813 ("[I]f there were such a severance, the tenancy by the

her newly-transformed tenancy in common because this cotenancy was a share in the entireties "immediately before the commencement of the case."[546] That is, exemptibility is determined by prepetition criteria, but severance occurs instantly upon the filing of the bankruptcy petition.[547] Thus, even when the nondebtor spouse chooses to exempt the entireties, the debtor's bankruptcy destroys that immunity for the non-debtor spouse and "breaks the dam"—*Rodgers*-style—for the benefit of the nondebtor spouse's individual creditors.

This conclusion, however, is based on a theoretical error. The error is that the bankruptcy trustee becomes the fee simple owner of whatever goes into the estate. If that were so, then the severance theory of Judge Hughes follows.[548]

In fact, the transfer from the debtor to the bankruptcy estate is not a conveyance of fee simple. Rather, the creation of the bankruptcy estate is the creation of a lien.[549] The trustee is a creditor representative, and so the trustee's ownership is not qualitatively absolute but is, rather, quantitatively limited. Beyond that limit, the debtor owns an equity interest, as the Bankruptcy Code makes clear.[550] True, according to Bankruptcy Code § 544(a)(3), the trustee has:

> [A]s of the commencement of the case . . . the rights and powers of . . .

---

entireties, would become a tenancy of a different kind.").

546. *See id.* at 813–14 ("Section 522(b)(2)(B) does not require that the interest of the bankruptcy estate that the debtor claims as exempt actually be owned by the bankruptcy estate as a tenant by the entirety."); *see also* 11 U.S.C. § 522(b)(3) (2012) (requiring only that the debtor have owned the claimed interest as a tenancy by the entirety "immediately before the commencement of the case").

547. *See In re Spears*, 308 B.R. at 816 ("[T]he commencement of a bankruptcy proceeding severs a tenancy by the entirety between a debtor and his spouse in Michigan and replaces it with a tenancy in common between the bankruptcy estate and the debtor's spouse.").

548. *Cf. In re* Szekely, 936 F.2d 897, 897 (7th Cir. 1991) (making this same assumption of the bankruptcy estate).

549. *See* 11 U.S.C. § 544(a)(1) ("[A] creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains . . . a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists."). *See generally* Carlson, *Fraudulent Transfers*, *supra* note 443.

550. *See* 11 U.S.C. § 726(a)(6) ("[P]roperty of the estate shall be distributed . . . (6) sixth, to the debtor.").

> (3) a bona fide purchaser of real property, other than fixtures, from the debtor. against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.[551]

A "purchase," admittedly, is not inconsistent with a fee simple absolute transfer to the bankruptcy trustee, but because the trustee is a creditor representative, there must be a quantitative limit here too. In effect, bankruptcy constitutes the creation of a *mortgage* for the benefit of the unsecured creditors.[552] This mortgage, however, is superegoic. It attaches to the debtor's entireties interest until such time as the tenancy is exempted and expelled from the estate.[553] Exemption should be understood as the dissolution or release of the trustee's hypothetical lien.

Accordingly, when the individual spouse files for bankruptcy, the superegoic lien of the trustee attaches to the tenancy by the entirety. Underneath that lien, the tenancy by the entirety remains unsevered. The unities remain intact.[554] If the entireties exemption is chosen, the debtor's 50% share is exonerated from the trustee's lien, and no severance ever does occur.[555]

---

551. *Id.* § 544(a)(3).

552. *See* Vladimir Elgort, Note, *Do Debtors Owe Rent to Their Bankruptcy Trustee for Remaining in the Home After Filing and Prior to Foreclosure, Notwithstanding a Homestead Exemption?*, 23 CARDOZO L. REV. 2253, 2263, 2274 (2002) (stating that the trustee holds the status of mortgagor rather than a fee simple absolute owner).

553. *Supra* notes 511–520 and accompanying text.

554. This was recognized in an influential early case in *In re Ford*, 3 B.R. 559 (Bankr. D. Md. 1980) (en banc), *aff'd sub nom. Greenblatt v. Ford*, 638 F.2d 14 (4th Cir. 1981):

> The trustee merely obtains and retains custody of the debtor's undivided interest consisting of the same unities, intact and unaltered, as they existed immediately prior to the filing of the petition, until such time as that interest, still intact and unaltered is exempted from the estate under [§] 522[(b)(3)].

Id. at 570.

555. *See id.* at 575 (stating that "what . . . became an asset of the [bankruptcy] estate was Mr. Ford's individual undivided interest as a tenant by the entirety" and no severance occurred as a result of Mr. Ford's interest becoming an asset of the bankruptcy estate).

Judge Hughes found himself reversed[556] on the severance question, but on inscrutable reasoning. According to the district court, Judge Hughes applied *Craft* to the Bankruptcy Code.[557] *Craft*, thought Judge Enslen, is a tax case, and tax law cannot be applied to bankruptcy cases:

> The Bankruptcy Court then concludes that section 541 of the Bankruptcy Code and other code sections, like the tax law sections in *Craft*, operate to sever property held by the entireties when a bankruptcy petition by a single spouse if filed. This conclusion is not supported by any explicit language in those code sections . . . . While the notion that there is no escape from the tax man, which wins the day in *Craft*, is well understood as part of federal law, the Bankruptcy Code's treatment of the entireties is not supported by any established or new found Congressional policy. It runs directly contrary to the central premise of the bankruptcy system—that relief from debts is available and is to be liberally construed in favor of debtors and in accordance with both state law and the laws of Congress.[558]

Here we see the standard move: *Craft* is a monster and must be contained to tax cases. But, as we have seen, the Bankruptcy Code is *Craft avant la lettre*. Judge Hughes is quite right that *Craft* was baked into the Bankruptcy Code in 1978. *Craft* is no tax monster. In fact, Justice O'Connor borrowed the bankruptcy principle for tax cases—just the opposite of what Judge Enslen supposed.

Nevertheless, as often happens in bankruptcy appeals, Judge Enslen was right for the wrong reasons. Justice was achieved by dumb accident. Because the trustee is only a lien creditor and never a co-owner with the nondebtor spouse, no severance of the unities occurs until a sale is achieved. Properly, severance requires (1) a failure by the debtor to elect the entireties exemption and (2) sale of the debtor's 50% share by the trustee to some buyer. After such a sale, the buyer and the nondebtor spouse are cotenants.[559]

---

556. *See* Spears v. Boyd (*In re* Spears), 313 B.R. 212, 218 (W.D. Mich. 2004) ("In short, the Court will apply the traditional approach approved by the Sixth Circuit in *Grosslight* . . . .").

557. *Id.* at 217.

558. *Id.* at 218.

559. Technically, *Spears* was not ripe for appeal. The issue before Judge Hughes was the debtor's claim that a tenancy by the entirety was totally exempt. The trustee objected to the exemption on the ground that bankruptcy constituted severance and that the debtor's interest was changed into a tenancy in common.

3. Wholly or Partially Exempt?

Often, exemption of a specific thing applies to certain creditors but not to others. In New York, for example, items listed in CPLR § 5205(a)—wedding rings, stoves, family bibles, domestic animals worth less than $1,000, among other items—are exempt,[560] *except* from judgments "for the purchase price of the exempt property" or judgments "recovered by a domestic, laboring person or mechanic."[561] These items listed seem to qualify as "exempt" under § 522(b)(3), even though these items are not *purely* exempt. Rather, they are *partially exempt*—exempt from some creditors but not others.

Tenancies by the entirety are the classic and by far the most important example of partially exempt property. The individual creditors of the debtor may not place liens on the tenancy by the entirety, but a creditor with a "joint" claim against both spouses may do so.[562] Suppose at least one joint creditor has a claim against

---

In re Spears, 308 B.R. 793, 798 (Bankr. W.D. Mich. 2004), *rev'd on other grounds sub nom.* 313 B.R. 212 (W.D. Mich. 2004). Judge Hughes neither sustained nor denied the trustee's objection, but rather ordered Spears to state which of her creditors were individual and which were joint. *Id.* at 836. The exemption could not be adjudicated until the court determined whether joint creditors existed. Because this determination had not been made, the appeal seemed to have been most unripe and should never have been entertained by Judge Ensler.

In any case, whatever Judge Hughes said about severance was dictum. The severance theory he presents was not necessary to the issue at hand (whether the trustee's objection to the exemption had merit). The state of ownership following the exemption could have been left for the state courts to figure out. Being just a dictum, it seems unnecessary for the district court to have expressed its own opinion on the matter, much less entertain an appeal at all.

Upon remand, Judge Hughes analogized the Michigan tenancy by the entirety with the solar system, himself with Galileo, and the higher court playing the role of the Catholic Church. *See In re* Spears, 314 B.R. 360, 361–62 (Bankr. W.D. Mich. 2004) ("[Galileo] had hoped, perhaps naively, that its attack would be confined to logic and reasoned argument. The Church instead chose other tools, including insult and sarcasm."). Judge Hughes does concede that "issues concerning bankruptcy law and tenancy by the entirety are insignificant motes next to the cosmological issues debated by Galileo and the Church." *Id.* at 362.

560. *See* N.Y. C.P.L.R. LAW § 5205(a) (McKinney 2011) (listing personal property exempt from application to the satisfaction of monetary judgments).

561. *Id.*; *see also* William T. Vukowich, *Debtors' Exemption Rights Under the Bankruptcy Reform Act*, 58 N.C. L. REV. 769, 805–06 (1980) ("The most common additional exceptions [from exemptions] are debts owed to laborers, debts for necessaries, and tort liabilities.").

562. *See* Grosslight v. Grosslight, 757 F.2d 773, 776–77 (6th Cir. 1985)

the bankruptcy estate. Once inside the belly of the bankruptcy beast, is the tenancy by the entirety *totally* exemptible or *partly* exemptible or *not exemptible at all*, given the datum that joint creditors can obtain liens on the tenancy outside bankruptcy? How much of the entireties can the bankruptcy estate digest and how much must be expelled? Authority can be found for each of these positions. Only a few scattered lower court opinions assert that there is no exemption at all when a joint creditor exists.[563] We ignore this outlier view for the moment and focus on the choice between *total* and *partial* exemption.

Very early in the career of the Bankruptcy Code, the Fourth Circuit took the position that, if the tenancy by the entirety was exempt against an *individual* creditor of the spouse, it was also exempt against *joint* creditors as well.[564] In other words, the tenancy by the entirety was *totally*, not *partially*, exempt. This rule was established in the Fourth Circuit's affirmance of *In re Ford*,[565] an opinion that still remains influential today. The *Ford* court reasoned that, while the entireties was *in* the bankruptcy estate, the tenancy was exempt even from joint creditors.[566] Although the

(stating that joint creditors can reach entireties interests); Napotnik v. Equibank & Parkvale Sav. Ass'n, 679 F.2d 316, 320–21 (3d Cir. 1982) (stating that a tenancy by the entirety was not exempt from joint creditors).

563. *See In re* Anderson, 132 B.R. 657, 660 (Bankr. M.D. Fla. 1991) ("If there is such a [joint] judgment creditor, there is a sufficient basis upon which this Court should sustain the objection to the claimed exemption of the jointly held property."); *In re* Amici, 99 B.R. 100 (Bankr. M.D. Fla. 1989) (sustaining objection to exemption where joint creditors were present).

564. *In re* Ford, 3 B.R. 559, 576 (Bankr. D. Md. 1980) (en banc)

> In order for joint creditors to execute upon entireties property, the husband's interests must be joined with the interests of the co-tenant wife. As a result, the debtor's interest in entireties property, standing alone, is unavailable to the joint creditor. Therefore, the interest of the debtor in tenancy by the entireties property which became an asset of the estate is exempt from process under Maryland law. Since the debtor's interest in entireties property is exempt from process by both his individual and joint creditors under Maryland law, the debtor's interest in property which he holds as a tenant by the entirety may be exempted from the estate by Mr. Ford under § 522(b)(2)(B).

Aff'd sub nom. Greenblatt v. Ford, 638 F.2d 14 (4th Cir. 1981).

565. 3 B.R. 559 (Bankr. D. Md. 1980) (en banc), *aff'd sub nom.* Greenblatt v. Ford, 638 F.2d 14 (4th Cir. 1981).

566. *Id.* at 576. Judge Jeffrey Hughes reads Michigan's 2004 legislation as aiming to achieve the *Ford* result in Michigan bankruptcy cases. The statute in question is a set of "bankruptcy only" exemptions which include "real property,

Ford opinion is in many respects a scholarly gem deserving close study,[567] the metaphysics by which this particular deduction was achieved is peculiar and, eventually, overruled in subsequent Fourth Circuit opinions.

The *Ford* argument for exemption against joint creditors depends on five premises.

(1) Not the *whole* of the tenancy by the entirety but only the *debtor's* 50% interest was property of the estate because it is property of the debtor (contrary to the Michigan fiction).[568] This first point is proven by the full *Craft*-like treatment on a Maryland tenancy to find that the individual spouse (not the marital entity) had a future interest, as well as a present right of possession.[569] Most courts would come to disagree; they would find, explicitly or implicitly, that the *whole* of the entireties comes into the bankruptcy estate—not just 50%. The very coherence of entireties administration depends on the whole of the entireties coming into the bankruptcy estate.[570]

---

held jointly by a husband and wife as a tenancy by the entirety, except that this exemption does not apply with regard to a claim based on a joint debt of the husband and wife." MICH. COMP. LAWS § 600.5451(1)(o) (2012), *invalidated by In re* Raynard, 327 B.R. 623 (Bankr. W.D. Mich. 2005). To my eye, this statute simply repeats the nonstatutory tenancy by the entirety exemption. But Judge Hughes seemed to assume that the Michigan legislature would not stoop to mere imbecilic repetition. According to Judges Hughes:

> The only logical interpretation of . . . § 600.5451(1)(o) is that it exempts all interests in property owned by the debtor as entireties property regardless of whether the debtor files for bankruptcy relief individually or jointly with his or her spouse but that the interest, once exempted, remains subject to execution by a pre-petition creditor if that creditor had a joint claim against both spouses.

In re Raynard, 327 B.R. at 642 n.26, *rev'd on other grounds sub nom.* Raynard v. Rogers (*In re* Raynard), 354 B.R. 834 (B.A.P. 6th Cir. 2006). Judge Hughes ruled this to be an unconstitutional attempt of Michigan to overrule the effect of Bankruptcy Code § 522(c). On the meaning of § 522(c), see *infra* notes 620–625 and accompanying text.

567. *See* Shaw v. Waldschmidt (*In re* Shaw), 5 B.R. 107, 109 (Bankr. M.D. Tenn. 1980) ("This court . . . commends the Maryland judges for what appears to be the definitive opinion . . . on entireties property.").

568. *See Ford*, 3 B.R. at 575 (stating that only the debtor's individual interest in the tenancy by the entirety became an asset of the bankruptcy estate).

569. *See id.* at 566 ("In addition to the debtor's present right of survivorship, the court finds that the debtor has an undivided, indivisible present right to use, possession, and income from his tenants by the entireties property.").

570. *Infra* notes 691–728 and accompanying text.

(2) This individual interest of the debtor could not be reached by the debtor's *individual* creditors.[571]

(3) But to joint creditors could levy on the whole of the entireties.[572]

(4) If the joint creditors are to realize cash from the entireties, the individual interest of the debtor spouse "must be joined with the interests of the co-tenant wife."[573] That is to say, there must be a lawsuit by the joint creditor against the spouses *jointly*.

(5) Because a joint creditor may not join the debtor in a lawsuit against the nondebtor spouse (thanks to bankruptcy's automatic stay),[574] "the debtor's interest in entireties property, standing alone, is unavailable to the joint creditor."[575]

Ergo, the *Ford* court concludes, "[s]ince the debtor's interest in entireties property is exempt from process by both his individual *and joint creditors* under Maryland law, the debtor's interest in property . . . may be exempted from the estate" by the debtor.[576]

Point (1) would seem to violate *United States v. Rodgers*,[577] and *United States v. Whiting Pools, Inc.*,[578] both of which imply that property is the "whole thing," not just the debtor's interest in the thing. Because point (1) falls, point (5) falls as well. That is, the debtor's individual interest and the non-debtor spouse's interest *can* be joined—*inside the bankruptcy proceeding*. This is a point that the Fourth Circuit would soon assert, in contravention of *Ford*.[579] The *Ford* court also unconvincingly grounded its point (5) in Maryland law when it is strictly bankruptcy's automatic stay that prevents joinder of the husband to the foreclosure of wife's

571. *See Ford*, 3 B.R at 575 (stating that "property held by the entirety is not subject to the claims of individual creditors of either spouse").

572. *See id*. at 575 ("[I]n order for a joint creditor to execute upon entireties property to satisfy obligations due him from both spouses, the husband's interest must be joined with his wife's interest in entireties property.").

573. *Id.* at 576.

574. *See* 11 U.S.C. § 362(a)(1) (2012) (prohibiting "the commencement . . . of a judicial . . . proceeding against the debtor that . . . could have been commenced before the commencement of the case").

575. *In re* Ford, 3 B.R. 559, 576 (Bankr. D. Md. 1980) (en banc), *aff'd sub nom.* Greenblatt v. Ford, 638 F.2d 14 (4th Cir. 1981).

576. *Id.* (emphasis added).

577. 461 U.S. 677 (1983).

578. 462 U.S. 198 (1983).

579. *Infra* notes 652–654 and accompanying text.

share under Maryland law. Inability to join is a federal, not a Maryland, result. We are strictly on the superegoic side of the *Butner* principle.

In any case, the *Ford* court thought that the joint creditors were entitled to relief from the automatic stay. Once the stay was lifted, joint creditors could obtain liens under state law against the tenancy by the entirety.[580] For this reason, *Ford* was a disappointment to individual debtors. Joint creditors had full access to the tenancy by the entirety after all, so long as the debtor's discharge had not yet transformed the joint creditor into an individual creditor.[581] According to *Ford*, only in bankruptcy was the tenancy by the entirety exempt against the joint creditors.[582]

Ford was soon overruled *sub silentio* in *Ragsdale v. Genesco, Inc.*[583] In this case, prior to bankruptcy, a joint creditor had succeeded in latching a judicial lien onto the entireties.[584] Thereafter, the husband and wife filed jointly for bankruptcy.[585] In the bankruptcy, the debtors moved to avoid the judicial lien pursuant to § 522(f)(1).[586] This adversary proceeding had merit, if *Ford* was good law. The judicial lien impaired an exemption, and therefore it should have been entirely avoided.[587] But the *Ragsdale*

---

580. *See Ford*, 3 B.R. at 576 ("As in the past, a joint creditor may, prior to the discharge of the bankrupt spouse from the debt of such creditor and upon lifting of the stay, proceed to obtain judgment, execute or foreclose upon property owned . . . as tenancy by the entireties.").

581. On the effect of discharge on joint creditors, see *infra* notes 604–653 and accompanying text.

582. *See Ford*, 3 B.R. at 576 (providing that the debtor's interest in entireties property, standing alone, is unavailable to joint creditors).

583. Ragsdale v. Genesco, Inc., 674 F.2d 277 (4th Cir. 1982).

584. *Id.* at 278.

585. *Id.*; *see also* 11 U.S.C. § 302 (2012)

> (a) A joint case under a chapter of this title is commenced by the filing with the bankruptcy court of a single petition under such chapter by an individual that may be a debtor under such chapter and such individual spouse . . . .
>
> (b) After commencement of a joint case, the court shall determine the extent, if any, to which the debtors' estates shall be consolidated.

586. *Ragsdale*, 674 F.2d at 278.

587. *See* Lashley v. Fuhrer (*In re* Lashley), 206 B.R. 950, 953 (Bankr. E.D. Mo. 1997) ("In those instances when a creditor's joint debt is secured by a security interest that is based on a judicial lien, the lien may be avoided to the extent that

court ruled that the judicial lien could not be avoided.[588] This result contradicts (and overrules) the metaphysics of *Ford*.

By way of background, § 522(f)(1) was added to the Bankruptcy Code because the Bankruptcy Code also added optional federal exemptions into the bankruptcy mix.[589] Because these federal exemptions might be nonexempt under state law, the danger arose that federally exempt property would arrive in bankruptcy already encumbered by a judicial lien.[590] In such a case, a choice of the federal exemption would seem to be defeated. Section 522(f)(1) allows the prepetition lien to be removed, thereby vindicating the federal exemption.[591] But § 522(f) potentially applies to state exemptions as well. For example, in some states, a debtor must file notice of a homestead in the local real estate records.[592] Section 522(f)(1) permits a homestead to be exempted if a joint creditor has obtained a lien before any such declaration could be filed by the debtor.[593]

According to § 522(f)(1) (in its current version)[594]:

> [T]he debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an

---

it impairs a debtor's allowed exemption.").

588. *Ragsdale*, 674 F.2d at 279; *accord* Napotnik v. Equibank & Parkvale Sav. Ass'n, 679 F.2d 316, 316 (3d Cir. 1982) (holding that a joint creditor's pre-existing lien not avoidable); Mich. Nat'l Bank v. Chrystler (*In re* Trickett), 14 B.R. 85, 85 (Bankr. W.D. Mich. 1981) (same). *But see In re Lashley*, 206 B.R. at 950 (holding inexplicably that a joint creditor's lien always impairs an exempt tenancy by the entirety).

589. *See* 11 U.S.C. § 522(b)(2), (d) (adding an enumerated list of exemptions). As is well known, § 522(b)(2) invites state legislatures to "opt out" of the federal exemption.

590 *See generally* Margaret Howard, *Multiple Judicial Liens in Bankruptcy: Section 522(f)(1) Simplified*, 67 AM. BANKR. L.J. 151, 152 (1993).

591. *See* 11 U.S.C. § 522(f)(1) (2012) (providing that "the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption").

592. CAL. CIV. PROC. CODE § 704.950(a)(1) (West 2018); *see also* Paul Epstein, Note, *First-to-File, Last-in-Line: After* Jones v. Haskett, *Creditors Dragged Into Bankruptcy Lose the State Law Race of the Diligent*, 33 U.S.F. L. REV. 285 (1999) (discussing the required declaration of homestead in California).

593. Farrey v. Sanderfoot, 500 U.S. 291, 298 (1991).

594. Section 522(f) was substantially amended in 1994 in ways not pertinent to the current discussion. On these amendments, see generally David Gray Carlson, *Security Interests on Exempt Property After the 1994 Amendments to the Bankruptcy Code*, 4 AM. BANKR. INST. L. REV. 57 (1996).

> exemption to which the debtor would have been entitled under subsection (b) . . . if such lien is—
>
> (A) a judicial lien . . . .[595]

Under *Ford*, the avoidance theory was straightforward. The tenancy by the entirety was exempt from joint creditors.[596] The joint creditor's lien impaired the exemption that would have existed had there been no lien.[597] Of course, once the lien was avoided, the joint creditor was entitled to relief from the automatic stay, so that the joint creditor could get a *new* lien. (This implication constitutes a major embarrassment for *Ford*'s logic: The judicial lien impairs the entireties exemption, but, once avoided, the lien can be re-established, so long as no discharge has intervened to change the joint creditor into an individual creditor.)[598]

The *Ragsdale* court upheld the joint creditor's prepetition lien.[599] This implies either that (1) *Ford* is overruled or (2) the fact that the Ragsdales filed a joint petition under § 302 somehow

595. Section 522(f)(1) states that "the *debtor* may avoid the fixing of a lien . . . to the extent that such lien impairs an exemption." 11 U.S.C. § 522(f)(1) (emphasis added). Yet, § 551 states: "Any transfer avoided under section 522 . . . of this title . . . is preserved for the benefit of the estate *but only with respect to property of the estate*." *Id.* § 551 (emphasis added). Does § 551 take away from the debtor what § 522(f)(1) gives? If so, § 522(f)(1) is a dead letter. Clearly, this is not the case. The lien avoided under § 522(f) encumbers exempt property—property that is *not* in the bankruptcy estate. The italicized portion of § 551 prevents the trustee from arguing that the trustee inherits the avoided lien from an individual creditor.

596. *See In re* Ford, 3 B.R. 559, 576 (Bankr D. Md. 1980) (en banc) (providing that the debtor's interest in entireties property, standing alone, is unavailable to joint creditors), *aff'd sub nom.* Greenblatt v. Ford, 638 F.2d 14 (4th Cir. 1981).

597. *See* Owen v. Owen, 500 U.S. 305, 310–11 (1991) ("To determine the application of § 522(f), they ask not whether the lien impairs an exemption to which the debtor is in fact entitled, but whether it impairs an exemption to which he *would have been entitled* but for the lien itself.").

598. We may add that, in addition to the uselessness of total exemption, the *Ford* court overlooked the effects of Bankruptcy Code § 522(c), which prohibits most creditors from pursuing even partially exempt property after the bankruptcy proceeding ends. *Infra* notes 618–643 and accompanying text.

599. *See* Ragsdale v. Genesco, Inc., 674 F.2d 277, 279 (4th Cir. 1982) ("It is fundamental that a creditor holding a judgment against two or more persons jointly and severally may execute against real property owned by those same persons jointly or held by them as tenants by the entirety.").

means that the tenancy by the entirety was not exempt.[600] As we shall see, a subsequent Fourth Circuit ruling eliminated (2)[601] and so, on *modus tolens* grounds, we are left with the conclusion that *Ragsdale* overrules *Ford*.[602] The entireties is *not entirely* exempt in the bankruptcy proceeding from the claims of joint creditors.[603] It is only partly exempt—where joint creditors exist.

Partial exemption is the near universal assumption of the courts today.

4. Cases Where Joint Creditors Are Present

Outside of bankruptcy, joint creditors can place a lien on the Michigan-style entireties by obtaining a money judgment against both spouses. In a bankruptcy case, however, the joint creditors are automatically stayed from doing so.[604] The stay might be lifted,[605] but still the joint creditor faces two obstacles to this goal. First, should the debtor receive a discharge of the joint claim, the

---

600. *See* Napotnik v. Equibank & Parkvale Sav. Ass'n, 679 F.2d 316, 320–21 (3d Cir. 1982) (disapproving *Ford*).

601. *See* Bunker v. Peyton (*In re* Bunker), 312 F.3d 145, 153 (4th Cir. 2002) ("[T]he presence of individual claims against either or both of the spouses in a joint case does not prevent the debtor spouses from exempting their interests in entireties property."); *infra* notes 1181–1218 and accompanying text.

602. The court in *Sumy v. Schlossberg (In re Sumy)*, 777 F.2d 921, 926 (4th Cir. 1985) observed that there is no indication in *Ford* that joint creditors existed. Therefore, *Ford*'s holding that the tenancy by the entirety is exempt from joint creditors was dictum. *See id.* ("[W]e decline to adopt this dicta [sic] from *Ford*."). *Ford* draws praise in *Sovran Bank, N.A. v. Anderson*, 743 F.2d 223, 224 (4th Cir. 1984) (finding *Ford* "persuasive, if not controlling"), but the case deals with lifting the stay for mortgage lenders, not with exemptions against joint unsecured creditors.

603. According to the *Ragsdale* court:

> [T]he Ragsdales assert that as joint debtors, they were entitled to claim as exempt from creditors, under 11 U.S.C. § 522(b)(2)(B), the equity in the residence held by them as tenants by the entirety . . . . The phrase "to the extent that such interest . . . is exempt from process under applicable nonbankruptcy law" is of decisive importance. If the Ragsdales' residential real property could be reached to satisfy a state court judgment in Virginia, it could not be successfully claimed as exempt under Section 522(b)(2)(B).

Ragsdale, 674 F.2d at 278–79.

604. 11 U.S.C. § 362(a)(1), (2), (4), (5) (2012).

605. *See id.* § 362(d) (enumerating criteria for granting relief from the stay).

joint claim becomes an *individual* claim against the nondebtor spouse.[606] As an individual claim against the debtor spouse, the formerly-joint creditor loses the ability to obtain a lien against the marital estate.[607]

It seems unfair that, because the debtor spouse gets a discharge, the nondebtor spouse suddenly enjoys immunity from suit. Bankruptcy Code § 524(e) states that "discharge of a debt of the debtor does not affect the liability of any other entity on, or property of any other entity for, such debt."[608] Yet, courts assume, nevertheless, that discharge of the joint debt turns the debt into an individual debt, which is unable to generate a lien on the tenancy by the entirety.

Courts have gone so far as to refer to the discharge as a "legal fraud against the joint creditors."[609] Indeed, Michigan courts had ruled that a joint creditor was *still* a joint creditor even if the debtor spouse had earlier received a bankruptcy discharge. A Sixth Circuit panel in *Harris v. Manufacturer's National Bank of*

606. To evade this conclusion, joint creditors following the debtor's discharge tried to claim that the right of a joint creditor against the tenancy by the entirety is an in rem right against the tenancy by the entirety, in which case the joint claims were not discharged. This was soundly rejected in *In re Paeplow*, 972 F.2d 730, 738 (7th Cir. 1992), though pre-Code law supported it. *See generally* First Nat'l Bank of Goodland v. Pothuisje, 25 N.E.2d 436 (Ind. 1940); William G. Craig, Jr., *An Analysis of Estates by the Entirety in Bankruptcy*, 48 AM. BANK. L.J. 255, 286–87 (1974); Note, *The Effect of Bankruptcy on Estates by Entireties*, 89 U. PA. L. REV. 1073, 1079–81 (1941) [hereinafter Note, *Effect of Bankruptcy on Estates by Entireties*].

607. *See generally* Van Der Heide v. LaBarge (*In re* Van Der Heide), 164 F.3d 1183, 1186 (8th Cir. 1999); Munos v. Dembs (*In re* Dembs), 757 F.2d 777, 781 (6th Cir. 1985); Craig, *supra* note 606, at 284–86. In addition, a discharge "operates as an injunction against the commencement . . . of an action . . . to collect any [discharged] debt as a personal liability of the debtor." 11 U.S.C. § 524(a)(2).

608. 11 U.S.C. § 524(e).

609. *In re* Hunter, 970 F.2d 299, 301 (7th Cir. 1992); *see also Sumy*, 777 F.2d at 929 ("[I]f [the debtor] were to make full use of the code's broad powers and protections for debtors, he might be able to commit the very 'legal fraud' that we have repeated condemned."); *In re* James, 498 B.R. 813, 823–25 (Bankr. E.D. Tenn. 2013) (preventing legal fraud justified bringing entireties into the bankruptcy estate for the benefit of joint creditors); *In re* Townsend, 72 B.R. 960, 967–68 (Bankr. W.D. Mo. 1987) ("A review of the inequitable consequences of exempting entireties property from the claims of joint creditors and the opportunity such an exemption creates for legal fraud only reinforces this Court's conclusions.").

Detroit[610] found such holdings to be an unconstitutional assault on the federal concept of discharge.

A discharge is defined in Bankruptcy Code § 524 as "an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect . . . any such debt as a personal liability of the debtor."[611] A few courts have suggested that, just as the automatic stay can be lifted, so the discharge stay can be lifted for the limited purpose of permitting the joint creditor to join the debtor spouse to a suit against the nondebtor spouse.[612]

Hendrix v. Page (In re Hendrix)[613] constitutes solid ground for such a practice. In *Hendrix*, the Seventh Circuit allowed a personal injury creditor to join a discharged debtor in a law suit for the technical purpose of impleading the debtor's insurance company, which was obliged to cover any judgment the debtor might incur. The proviso was that the creditor could not collect from the discharged debtor—only from the insurance company.[614] Indeed, Judge Posner suggested that the creditor could sue the debtor utterly without permission from a bankruptcy court, so long as the insurance company was only the ultimate payer.[615]

The nondebtor spouse is directly analogous to the insurance company. Neither the insurance company nor the nondebtor

---

610. 457 F.2d 631 (6th Cir. 1972), *cert. denied* 409 U.S. 885 (1972).

611. 11 U.S.C. § 524 (a)(2) (2012).

612. *See* Grant v. Himmelstein (*In re* Himmelstein), 203 B.R. 1009, 1014 (Bankr. M.D. Fla. 1996) (confirming the power to modify a discharge injunction); *In re* Snow, 38 B.R. 19, 21 (Bankr. M.D. Fla. 1983) (same); Frank J. Spirak, Note, *Estates by the Entirety in Bankruptcy*, 15 U. MICH. J.L. REFORM 399, 414–19 (1982) (describing the procedure for reopening a bankruptcy case for this purpose).

613. 986 F.2d 195 (7th Cir. 1993).

614. *See id.* at 197 (stating that "because only the insurance company would be asked to pay anything, and hence such a suit would not infringe the discharge").

615. *See id.* at 195

> But as to whether such an injunction extends to a suit only nominally against the debtor because the only relief sought is against his insurer, the cases are pretty nearly unanimous that it does not. . . . The reasoning is that a suit to collect merely the insurance proceeds and not the plaintiff's full damages (should they exceed the insurance coverage) would not create a "personal liability of the debtor," because only the insurance company would be asked to pay anything, and hence such a suit would not infringe the discharge. 11 U.S.C. § 524(a)(2).

(citations omitted).

spouse should be permitted to hide behind the debtor's discharge to gain an advantage outside the bankruptcy proceeding. If this analogy were to be recognized, the "legal fraud" could easily be cured.[616] Of course, this implies that *Harris* was wrongly decided.[617] Application of *Hendrix*, therefore, authorizes the joinder of the discharged debtor without impinging on the debtor's discharge, provided that the joint creditor never collects from the debtor beyond the amount of the (nonexempt) tenancy by the entirety.[618]

Aside from the discharge, joint creditors in the bankruptcy have a second, independent difficulty. Once the tenancy by the entirety becomes exempt, § 522(c) of the Bankruptcy Code prevents the joint creditors from pursuing the tenancy by the entirety.[619] According to § 522(c), "property exempted under this section is not liable during or after the case for any debt of the debtor that arose . . . before the commencement of the case."[620] There follows a list of "liabilities" that retain the right to pursue exempt property in spite of § 522(c).[621] Debts for taxes and domestic support obligations are excepted.[622] So are secured

616. *See In re Hunter*, 970 F.2d at 302 (explaining that, prior to the Bankruptcy Code, "there was a potential for legal fraud against joint creditors of a husband and wife").

617. *See Harris*, 457 F.2d at 631 (holding "that . . . satisfaction of joint judgment notwithstanding fact that husband's provable debts have been discharged in bankruptcy directly conflicted with provisions and purpose of Bankruptcy Act").

618. *In re Hunter* seems to agree with *Harris*, but the opinion is based on legislation in Indiana (now amended) that made the tenancy by the entirety exempt from joint creditors in a bankruptcy proceeding. *See In re* Hunter, 970 F.2d 299, 299 (7th Cir. 1992) (explaining that the Bankruptcy Code and Indiana state law, together, "ensure that no creditor—including a joint creditor—can reach any part of the entirety property exempted under the Indiana provision"). Today, the Indiana tenancy by the entirety is merely partially exempt, and so *In re Hunter* is no longer good law. *See* IND. CODE § 34-55-10-2(c)(5) (2012) ("The exemption under this subdivision does not apply to a debt for which the debtor and the debtor's spouse are jointly liable."); *In re* Cross, 255 B.R. 25, 37 (Bankr. N.D. Ind. 2000) (declaring the bankruptcy-only aspect of the Indiana exemption unconstitutional).

619. *See* 11 U.S.C. § 522(a)(3)(B) (2012) ("[A]n interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law.").

620. *Id.* § 522(c).

621. *See id.* § 522(c)(1)–(4) (providing a list of exemptions).

622. *See id.* § 522(c)(1) (explaining that "a debt as specified in paragraph (1)–

claims,[623] and claims for embezzlement and malicious torts where the victim is a federal depository institution's regulatory agency acting as a receiver.[624] The dog that does not bark here is the joint claim against a Michigan-style tenancy by the entirety. Joint creditors will find that they are not included on this list. Accordingly, per § 522(c), if exempt property is ever expelled from the bankruptcy estate, it is immune from *all* unsecured creditors, even if, under state law the creditor is invited to levy on the exempt asset.

The leading case on the meaning of § 522(c) is *Patriot Portfolio, LLC v. Weinstein (In re Weinstein)*.[625] In *Weinstein*, the debtor claimed an ordinary homestead exemption (not a tenancy by the entirety).[626] A creditor with a claim predating the acquisition of this real property obtained a judicial lien.[627] Later, the debtor filed a homestead declaration and then filed for bankruptcy.[628] The debtor successfully avoided the lien under § 522(f)(1), which was not controversial.[629] More to our point, the creditor also complained that the Massachusetts homestead was not valid "for a debt

---

(5) of section 523(a)" is exempt). The purpose of this exception is to preempt state law and to allow domestic creditors to levy on assets, even when state law says they cannot. Alan M. Ahart, *The Liability of Property Exempted in Bankruptcy for Pre-Petition Domestic Support Obligations after BAPCPA: Debtors Beware*, 81 AM. BANKR. L.J. 233, 235–36 (2007).

623. The lien must escape avoidance by the trustee, however, under 11 U.S.C. § 522(c)(2).

624. *See* 11 U.S.C. § 522(c)(3) (explaining that debts "owed by an institution-affiliated party of an insured depository institution to a Federal depository institutions regulatory agency acting in its capacity as conservator, receiver, or liquidating agent for such institution" are also exempt).

625. Patriot Portfolio, LLC v. Weinstein (*In re* Weinstein), 164 F.3d 677, 682–83 (1st Cir. 1999).

626. *Id.*

627. *Id.*

628. *Id.*

629. *Id.* The lien was voidable under the direct holding of *Owen*. *Id.* at 680. In *Owen*, the Supreme Court explained that one should wish away the lien and ask if, absent the lien, the property would be exempt. If the answer is "yes," then the lien impairs the exemption and can be avoided under § 522(f)(1). *See id.* at 680 (explaining the "two requirements" for avoiding a lien "under § 522(f)"). Dictum in *Farrey* also supports avoidance. *See* Farrey v. Sanderfoot, 500 U.S. 291, 298 (1991) (stating that § 522(f)(1) "cannot be concerned with liens that fixed on an interest before the debtor acquired that interest").

contracted prior to the acquisition of said estate of homestead."[630] The First Circuit held that § 522(c) preempts Massachusetts law.[631] Once the homestead was exempted, only those debts specifically listed as exceptions to § 522(c) may proceed against the property.[632] Applying *Weinstein*, if a tenancy by the entirety is exempt and joint creditors have not been paid, joint creditors are barred from pursuing the entireties even if the debtor does not qualify for a discharge.

The court in *Sumy v. Schlossberg (In re Sumy)*[633] took this to be the meaning of § 522(c) in the context of a tenancy by the entirety.[634] In effect, this means that *Ford* (the tenancy by the entirety is *purely* exempt) is overruled so long as the tenancy by the entirety remains in the bankruptcy estate, but once the tenancy is expelled from the estate under § 522(*l*), the *Ford* holding is resurrected.[635] The exemption becomes absolutely good, even against the joint creditors.

Thus, even if we apply *Hendrix*[636] to solve the discharge problem, § 522(c) constitutes a separate insurmountable obstacle.

Where joint creditors exist in a bankruptcy case, courts have developed two extra-statutory schemes for administering the tenancy by the entirety, both designed to vindicate joint creditor rights. But whether they succeed logically can be disputed.

First, bankruptcy courts have entertained motions from joint creditors to lift the automatic stay, thereby permitting them to establish judicial liens under state law.[637] This procedure works

---

630. *Weinstein,* 164 F.3d at 680; *accord* MASS. GEN. LAWS ch. 188, § 1 (2011).

631. *See Weinstein,* 164 F.3d at 687 ("[W]e hold that Bankruptcy Code §§ 522(f) and 522(c) preempt the Massachusetts provision excepting preexisting liens and prior contracted debts from homestead protection.").

632. *See id.* at 683 (explaining that state laws "yield to the overriding policies of § 522(c)").

633. 777 F.2d 921 (4th Cir. 1985).

634. *See id.* at 928 ("A debtor does not lose all benefits of § 522(b)(2)(B) when joint creditors are present.").

635. *See supra* notes 565–576 and accompanying text (explaining the holding of *Ford*).

636. Hendrix v. Page (*In re* Hendrix), 986 F.2d 195 (7th Cir. 1993). *Hendrix* authorizes lifting the discharge injunction if not prejudicial to debtors. *Supra* notes 613–615 and accompanying text.

637. *See* Chippenham Hosp., Inc. v. Bondurant (*In re* Bondurant), 716 F.2d 1057, 1057 (4th Cir. 1983) (affirming the lifting of the stay for a joint creditor).

only if it is accomplished prior to the discharge of the joint debt.[638] To prevent "legal fraud," courts are authorized by the Supreme Court itself to *delay* the discharge until such time as the joint creditor has successively established a judicial lien on the tenancy by the entirety.[639] This practice of delaying the discharge, highly developed under the 1898 Act,[640] continues to be authorized in modern times,[641] with some dissents.[642] The trouble with lifting the stay is that § 522(c) still independently prevents the joint creditors from pursuing the exempt property.[643] Indeed, lifting the automatic stay seems to be useless if § 522(c) prevents joint creditors from pursuing the property.

Second, courts starting with *Sumy*[644] (and with scant support from the Bankruptcy Code)[645] permitted trustees, within the

---

638. *See id.* at 1058 (explaining that "when one spouse filed for bankruptcy, a joint creditor could, before discharge and on lifting of the stay, seek a judgment against the debtor and his spouse").

639. *See* Lockwood v. Exch. Bank of Fort Valley, 190 U.S. 294, 294 (1903) ("Judgment of the District Court reversed and proceeding remanded, with direction to sustain the exemption and to *withhold discharge* to permit proceedings to be taken in the state court to subject the exempt property to the claims of the creditors." (emphasis added)); Phillips v. Krakower, 46 F.2d 764, 765 (4th Cir. 1931) (affirming "an order suspending the discharge in bankruptcy until" the creditor "had an opportunity to obtain judgement . . . against property held by . . . tenants by the entireties").

640. *See* Benjamin C. Ackerly, *Tenants by the Entirety Property and the Bankruptcy Reform Act*, 21 WM. & MARY L. REV. 701, 706–09 (1980) ("Under the 1898 Act," in order to prevent unfairness "courts . . . delayed the bankrupt's discharge until a joint judgment and lien could be obtained").

641. *See In re Bondurant*, 716 F.2d at 1057 (affirming the lifting of the stay for a joint creditor); *In re* Oberlies, 94 B.R. 916, 922 (Bankr. E.D. Mich. 1988) (endorsing the "prior practice" which "was to timely move the bankruptcy court for an order staying the entry of discharge and for an order for relief from the stay for the purpose of levying execution on the entireties assets").

642. *See* Mich. Nat'l Bank v. Chrystler (*In re* Trickett), 14 B.R. 85, 90 (Bankr. W.D. Mich. 1981) ("Therefore, it should no longer be the case that only those joint creditors who apply for a lift of stay be entitled to proceed against entireties property as was the case under the Bankruptcy Act of 1898.").

643. *Supra* notes 619–625 and accompanying text.

644. *Sumy* may have recently been undermined by *Alvarez v. HSBC Bank USA, Natl. Assoc. (In re Alvarez)*, 733 F.3d 136 (4th Cir. 2012). On this possibility, see *infra* notes 862–871 and accompanying text.

645. *See Oberlies*, 94 B.R. at 918–20 ("The trustee is obviously correct that no statutory basis exists for requiring the bankruptcy trustee to administer a separate estate within the context of the overall bankruptcy case for the benefit of joint creditors."). Typically, courts like to plead, "*Butner* made me do it!" *See In*

bankruptcy proceeding, to sell the tenancy by the entirety for the sole benefit of the joint creditors.[646] This innovation, not pursued under the 1898 Act,[647] bypasses the problem of discharge, since the discharge affects collection activity outside bankruptcy.[648] Does it bypass the obstacle of § 522(c)? The courts so assume § 522(c) says that "property exempted under this section is not liable *during* . . . the case."[649] An unstated assumption is that § 522(c) must be speaking of liability for claims *during the case but outside bankruptcy*.[650] Within the bankruptcy proceeding, evidently,

re Monzon, 214 B.R. 38, 46–47 (Bankr. S.D. Fla. 1997) (relying on *Butner* and holding "that since the Debtor's individual creditors could have never reached the TBE Property under state law, they cannot obtain a different and more favorable result in bankruptcy by sharing the distribution of these assets").

646. *See* Williams v. Peyton (*In re* Williams), 104 F.3d 688, 688 (4th Cir. 1997) (stating that the "trustee had [the] right to sell property for benefit of joint creditors, despite debtor's claimed exemption"); Sumy v. Schlossberg (*In re* Sumy), 777 F.2d 921, 932 (4th Cir. 1985) (holding that "the trustee may administer such property for the benefit of the joint creditors"); *In re* McRae, 308 B.R. 572, 572 (N.D. Fla. 2003) (holding that "debtor's non-exempt entireties property could be distributed only to the joint creditors of both spouses, and not to individual creditors"); *Oberlies*, 94 B.R. at 916 ("Thus, state law, which gives joint creditors, but only joint creditors, rights in entireties property, should prevail in this context."). *Oberlies* documents occasions on which bankruptcy courts have preferred suppliers entitled to trust property "under the Perishable Agricultural Commodities Act, 7 U.S.C. §§ 499a–499s." *Id.* at 922. But these suppliers had in rem rights in the proceeds of vegetables, which the trustee could distribute under § 725 directly to the supplier. *See generally* 7 U.S.C. § 725 (repealed 1936). These occasions do not seem analogous, in that joint creditor have no in rem rights against the tenancy by the entirety. Meanwhile, the court in *Monzon* documents preferences given to the proceeds of seats on the Chicago Board of Exchange. *See Monzon*, 214 B.R. at 47 (citing a Supreme Court decision which "held that distribution of the proceeds was governed by the CBOE Rules, despites the conflict with the" Bankruptcy Code). These creditors also had in rem rights—the ability to block alienation of the seat until they were paid in full. *See* Bd. of Trade of Chi. v. Johnson, 264 U.S. 1, 15 (1924) (ruling that "[t]he claims of the petitioners . . . must be satisfied before the trustee can realize anything on the transfer of the seat to the estate").

647. Nor was it possible under the *Ford* holding. *Supra* notes 565–582 and accompanying text.

648. *See* 11 U.S.C. § 524(a)(2) (2012) (injunction against collections).

649. *Id.* § 522(c) (emphasis added).

650. *See* Cadle Co. v. Banner (*In re* Banner), 394 B.R. 292, 299 (Bankr. D. Conn. 2008) ("[T]o the extent set forth in Section 522(c), the exempt property is placed beyond the reach of the debtor's prepetition creditors *outside of bankruptcy*." (emphasis added)).

§ 522(c) does not apply, and so the tenancy by the entirety can be made liable to joint claims.[651]

Courts that permit administration of the entireties for the joint creditor contradict *Ford*, which held that the entireties was entirely (not partially) exempt. The effect of the *Ford* holding is to preclude selling the tenancy by the entirety *within* the bankruptcy estate. For the Michigan-style tenancy by the entirety, *Ford* made § 363(h) a dead letter.[652] Entireties administration therefore entails the view that these tenancies are partially (not wholly) exempt when joint creditors exist.

5. The Trustee's Subrogation to Joint Claims

Under *Sumy*,[653] a trustee must subrogate herself to the claims of the joint creditors and sell the entireties for their benefit; otherwise, the debtor's discharge and/or § 522(c) forever prohibit the joint creditors from obtaining liens on the tenancy by the entirety.[654]

---

651. The *Sumy* court feared that an individual debtor will use § 522(f)(1) to flummox the joint creditors unless the trustee sells the tenancy by the entirety during the bankruptcy proceeding. Sumy v. Schlossberg (*In re* Sumy), 777 F.2d 921, 930 (4th Cir. 1985). This does not seem a risk, however, if *Ford* is good law. To see why not, suppose the tenancy by the entirety is worth $100 if sold as a fee simple absolute. The debtor and his non-debtor spouse have sustained $80 in debt to a joint creditor. Suppose the creditor obtains relief from the stay and obtains a judgment against the tenancy by the entirety for $80. At this point, the debtor draws no benefit from § 522(f)(1) because the lien does not "impair the exemption." 11 U.S.C. § 522(f)(1). According to the formula of § 522(f)(2), we add the lien ($40, as prorated to the debtor's interest), all other liens (which we assume to be none), and the amount the debtor's exemption ($10) to get $50. *See id.* § 522(f)(2)(A)(i)–(iii) (providing the method for calculating when "a lien shall be considered to impair and exemption"). We compare this to the value of the debtor's 50% interest in the absence of any liens ($50). This calculation shows that there is no impairment of the exemption. Meanwhile, the joint creditor sells the tenancy by the entirety under state law and obtains $80. The debtor and his spouse each receive $10. *See* Raskin v. Susquehanna Bank (*In re* Raskin), 505 B.R. 684, 689 (Bankr. D. Md. 2014) (explaining "the mandatory arithmetic for determining impairment").

652. *See In re* Ford, 3 B.R. 559, 578 (Bankr. D. Md. 1980) (en banc) (explaining that "under Maryland common law, sections 363(h) and (j) do not become applicable or operative"), *aff'd sub nom.* Greenblatt v. Ford, 638 F.2d 14 (4th Cir. 1981).

653. *Supra* notes 633–652 and accompanying text.

654. For a case denying that a trustee subrogates herself to claims of the joint

In general, the trustee subrogates to *all* the claims of a debtor's unsecured creditors. On their behalf, § 544(a) states that the trustee has:

> [A]s of the commencement of the case . . . the rights and powers of . . .
>
> > (1) a creditor that extends credit to the debtor at the time of the commencement of the case and that obtains at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists . . . .[655]

Bankruptcy constitutes a transfer from the debtor to a bankruptcy trustee, but what kind of transfer? Section 544(a)(1) makes clear that the transfer is in the nature of the creation of a judicial lien.[656] Liens are quantitative in nature.[657] That is to say, the trustee's hypothetical judicial lien is measured by the amount of unsecured claims that the trustee represents in the bankruptcy proceeding. Beyond this quantitative limit, the debtor owns the surplus (if any).[658]

---

creditors, see Rodriguez v. Countrywide Home Loans, Inc. (*In re* Rodriguez), 402 B.R. 299, 312 (Bankr. N.D. Ind. 2009)

> But what of the joint creditors of Rodriguez, one might ask? There are existing joint creditors, and the interests of both Rodriguez and her spouse in the subject real estate are subject to their interests, aren't they, by operation of I.C. 34-55-10-2(c)(5)? First, again, there cannot be a hypothetical bona fide purchaser from Rodriguez alone, necessary for the utilization of section 544(a)(3). Next, even if one were to hypothesize the use of 11 U.S.C. § 544(b)(1)—which allows the trustee to avoid a fiduciary of an interest of the debtor in property that is voidable by a creditor actually holding an allowed unsecured claim—the result would be the same. . . . [T]he mere holding of a joint debt does not a BFP make. A joint unsecured creditor could not avoid Countrywide's mortgage under Indiana law.

In fact, if *Sumy* is good law, the trustee can indeed subrogate to the unsecured claims of the joint creditors of the bankruptcy.

655. 11 U.S.C. § 544(a) (2012).

656. *See id.* § 101(54)(A) ("The term 'transfer' means—(A) the creation of a lien . . . .").

657. *See id.* § 101(37) ("The term 'lien' means charge against or interest in property to secure payment of a debt performance of an obligation.").

658. *See id.* § 726(a)(6) ("Except as provided in section 510 of this title, property of the estate shall be distributed . . . to the debtor.").

The way the hypothetical judicial lien works for exempt property is that, if the exemption is absolute and the debtor claims an item as exempt, the trustee's judicial lien initially attaches to the exempt item (even though it never attaches under state law). The trustee's hypothetical judicial lien is superegoic and *Craft*-like. If and when the exemption is successfully asserted, the lien ceases to encumber the item. Subrogation is useless, in such a case. For example, in Illinois, the family bible is *entirely* exempt—even if it has great value in the rare book market.[659] The hypothetical judicial lien attaches but then is scrubbed clean from the pages of the Good Book—once the debtor, pursuant to § 522(*l*), fetches it out of bankruptcy's hellfire.[660]

The matter is different with regard to monetarily-limited exemptions. For example, suppose a New York debtor has a pet dog worth $1,100. Immediately upon filing a bankruptcy petition, Fido goes into the bankruptcy estate, pursuant to Bankruptcy Code § 541(a). There, leashlike, the trustee's lien attaches to Fido. The debtor must fetch his pet back out pursuant to § 522(*l*), but Fido's exemption is monetarily limited to $1,000.[661] Only 10/11 of Fido comes bounding out of the bankruptcy estate and into the arms of his doting master. A 1/11 share stays within the bankruptcy estate, and by virtue of this 1/11 share, the trustee, subrogated to the unsecured creditors, has a judicial lien on the whole of Fido. Fido then may be sold by the bankruptcy trustee pursuant to Bankruptcy Code § 363(b). The trustee must therefore give the debtor 10/11 of the cash, because 10/11 is proceeds of

659. *See In re* Robinson, 811 F.3d 267, 268 (7th Cir. 2016) (holding that a first edition Book of Mormon worth $10,000 is exempt under Illinois law).

660. *See* 11 U.S.C. § 522(*l*) (providing that the "[t]he debtor shall file a list of property that the debtor claims as exempt" and "[u]nless a party in interest objects, the property claimed as exempt of such a list is exempt").

661. *See* N.Y. C.P.L.R. LAW § 5205(a)(4) (2011) (providing that "domestic animals" are "exempt from application to the satisfaction of a money judgement . . . provided that the total value . . . does not exceed one thousand dollars").

non-estate property.[662] The trustee may realize 1/11 for the unsecured creditors, as this part of Fido is not exempt.[663]

The tenancy by the entirety enjoys attributes of both the absolute exemption and the quantitatively limited exemption. The tenancy by the entirety is *absolutely* exempt from the claims of the individual creditors.[664] Simultaneously, if joint creditors exist, the tenancy by the entirety is a *limited* exemption.[665] Therefore, in cases where there are joint creditors, the trustee has a judicial lien on the tenancy by the entirety. The trustee may therefore sell to a buyer in fee simple absolute.[666]

---

662. *See* 11 U.S.C. § 725 (2012) ("[B]efore final distribution of property of the estate under section 726 . . . the trustee . . . shall dispose of any property in which an entity other than the estate has an interest . . . and that has not been disposed of under another section of this title"); Schwab v. Reilly, 560 U.S. 770, 792 (2010) ("[T]he debtor will be guaranteed a payment in the dollar amount of the exemption.").

663. *See* C.P.L.R. § 5205(A)(4) (exempting $1,000 interest in a domestic animal).

664. *See In re* McRae, 308 B.R. 572, 572 (N.D. Fla. 2003) (holding that "debtor's non-exempt entireties property could be distributed only to the joint creditors of both spouses, and not to individual creditors").

665. *Supra* notes 648–652.

666. Shall we then say that, pursuant to § 544(a)(1), the trustee may imagine that *all* the creditors are joint creditors? After all, it is a *hypothetical* lien we are imagining. It should be apparent that this move, if authorized, completely prevents the exemption of the Michigan-style tenancy by the entirety, because such tenancies are not exempt from joint creditors. *See In re* Eichhorn, 338 B.R. 793, 796 (Bankr. S.D. Ill. 2006) (rejecting this move); *see also* Schlossberg v. Barney, 380 F.3d 174, 182 (4th Cir. 2004) (holding that a trustee could not hypothesize a tax debt to exploit the *Craft* opinion). The *Schlossberg* case emphasizes that Bankruptcy Code § 544(a)(1) and (2) require the bankruptcy trustee to imagine that she "extends credit to the debtor at the time of the commencement of the case," 11 U.S.C. § 544(a)(2), an odd restriction based on a congressional desire to overrule a disfavored pre-Code case. *See generally In re* Federal's, Inc., 553 F.2d 509 (6th Cir. 1977). Because the IRS never "extends credit," but rather charges a tax, the trustee can never imagine that she has a tax lien. *Schlossberg*, 380 F.3d at 180–81.

Yet Bankruptcy Code § 522(b)(3) does indicate that this tenancy is *at least* partly exempt. 11 U.S.C. § 522(b)(3). It is exempt "to the extent that such interest . . . is exempt from process under applicable nonbankruptcy law." *Id.* § 522(b)(3)(B).

Because the tenancy by the entirety is usually in real estate, account should be taken of § 544(a)(3), which provides that the trustee:

> [A]s of the commencement of the case, . . . the rights and powers of . . .
>
> (3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be

The trustee's interest in property is quantified by the amount of claims against the bankruptcy estate.[667] For our purposes, the trustee, in part, subrogates to the individual creditors and, in part, to the joint creditors. Because the trustee subrogates to whatever joint creditors there are, she has a judicial lien on *all* the tenancy by the entirety.[668] On this theory, the whole thing can be sold, even without any reference to § 363(h), which authorizes partition sales in preemption of state law.[669] Just as the joint creditors can sell the whole outside the bankruptcy, when they get a lien, so the trustee can sell the whole *inside* the bankruptcy.[670]

> perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

Id. § 544(a)(3).

In Michigan-like jurisdictions, a bona fide purchaser from the individual debtor spouse takes no part of the tenancy by the entirety, because the individual debtor owns no part of it. *Supra* notes 33–36 and accompanying text. The marital owner, not the debtor spouse, is the owner of it. *Supra* notes 623–624 and accompanying text. But, if the nondebtor spouse were to join in the deed, the marital entity successfully conveys the tenancy. *Supra* notes 623–624 and accompanying text.

May the trustee pretend to be a bona fide purchaser from *both* spouses? If so, the exemption disappears, since exemptions are good against creditors and are never good against purchasers such as mortgagees. Here, such an imaginary move is prohibited on the face of § 544(a)(3)—the trustee may only imagine herself to be a purchaser of real estate "from the debtor," not from the debtor *and* a third person. Rodriguez v. Countrywide Home Loans, Inc. (*In re* Rodriguez), 402 B.R. 299, 311 (Bankr. N.D. Ind. 2009); *see also In re* Sivley, 14 B.R. 905 (Bankr. E.D. Tenn. 1981) (noting that where the debtor did not claim her tenancy by the entirety was exempt, the debtor could *still* claim the homestead even though the trustee was deemed a bona fide purchaser under § 544(a)(3)).

667. *See* 11 U.S.C. § 541(a) (providing that the "estate is comprised of . . . *all legal or equitable interests of the debtor in property*" (emphasis added)).

668. *See In re* Clifton, No. 09-02379-8-RDD, 2013 Bankr. LEXIS 2930, at *31–32 (Bankr. E.D.N.C. July 19, 2013) ("Based on the solid Fourth Circuit precedents of *Sumy* and *Bondurant*, the Net Proceeds shall go to the sole joint creditor . . . .").

669. *See In re* Spears, 308 B.R. 793, 815 (Bankr. W.D. Mich. 2004) ("What is important to recognize about Section 363(b)(1) is that the authority granted to the bankruptcy trustee under that subsection is entirely independent of any authority granted to the trustee under Section 363(h)."), *rev'd on other grounds sub nom.* Spears v. Boyd (*In re* Spears), 313 B.R. 212 (Bankr. W.D. Mich. 2004).

670. A case that "has it backwards" is *Grant v. Himmelstein (In re Himmelstein)*, 203 B.R. 1009 (Bankr. M.D. Fla. 1996). *See* Olson v. Parker (*In re* Parker), 395 B.R. 12, 18 n.6 (Bankr. W.D. Mich. 2008) ("*Himmelstein*, however, has it backwards."). In *Himmelstein*, the debtor claimed personal property as a Florida tenancy by the entirety. *Himmelstein*, 203 B.R. at 1009. The husband filed for bankruptcy and the wife did not. *Id.* The husband's trustee sought permission

to sell this stock on behalf of a joint creditor but was denied. *Id.* The *Himmelstein* court ruled that the trustee is only subrogated to joint creditors who already have *judgments* against both spouses. *Id.* Said the court, "because Florida law allows for a joint creditor holding a judgment to pursue entireties property, the Code will not shield the debtor who wishes to claim an exemption for such property." *Id.* at 1013. This is a confusion. Yes, a joint creditor must get a judgment as a pre-condition to getting a lien. *See* Lockwood v. Exch. Bank of Fort Valley, 190 U.S. 294, 294 (1903) (holding that the "[j]udgment of the District Court reversed and proceedings remanded, with direction to sustain the exemption and to *withhold discharge* to permit proceedings to be taken in the state court to subject the exempt property to the claims of the creditors" (emphasis added)). The trustee represents unsecured creditors in general, whether they have judgments or not. So, the trustee is likewise subrogated to any unsecured joint creditor, whether reduced to judgment or not. *See In re* Sefren, 41 B.R. 747, 748 (Bankr. D. Md. 1984) (concluding that "[t]he debtor need not have joint, judgment creditors for the trustee to defeat his claim of entireties exemptions").

The *Himmelstein* court misconceived the trustee's strong arm power. According to the court, "the trustee is given the powers of a creditor who holds a judgment at the time of the filing of the petition. 11 U.S.C. § 544(b)." *Himmelstein*, 203 B.R. at 1013. The citation to § 544(b) seems to be a scrivener's error. According to § 544(b)(1): "[T]he trustee may avoid any transfer of an interest of the debtor in property . . . that is voidable under applicable law by a creditor holding an unsecured claim." 11 U.S.C. § 544(b)(1) (2012). Nothing here requires the creditor in question to have a *judgment*. *Id.* Surely the court meant to cite § 544(a), which gives to the trustee:

> the rights and powers of . . .
>
> (1) a creditor . . . that obtains, at such time . . . a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists . . . .

Id. § 544(a)(1). If I am right about the slip of the pen, the court misstates the trustee's power under § 544(a)(1). Under that provision, the trustee is deemed to have a judicial *lien*. *Id.* This lien is quantified by the amount of individual and joint claims, whether or not they have been reduced to judgment. *Id.*

The *Himmelstein* result (no sale for the benefit of joint creditors allowed) is in fact a disaster for the joint creditors. If the trustee in *Himmelstein* is unable to sell the tenancy by the entirety at all, then presumably the property will be abandoned by the trustee. *See id.* § 554(a) ("After notice and hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate."). Once abandoned, being at least partly exempt, § 522(c) prevents the joint creditors from pursuing this property, and so the debtor obtains more exemption than she deserved. *See id.* § 522(c) (explaining that "property exempt under this section is not liable during or after the case").

6. The Debtor's Interest in the Proceeds of the Trustee's Sale

Where joint creditors exist, the trustee may, within the bankruptcy proceeding, sell the whole of the tenancy by the entirety.[671] What is controversial is disposition of the proceeds.

First, to the extent the proceeds equate with the individual creditors of the debtor spouse, these proceeds are exempt and belong to the debtor alone.[672] This is so in spite of Justice Brennan's dam-bursting theory in *United States v. Rodgers*.[673] It will be recalled that Joerene Ingram's home was community property liable for her ex-husband individual debts, but she also had a right to veto a sale that would benefit of those creditors.[674] Joerene herself owed a small tax, which authorized the IRS to sell her half of the property.[675] Justice Brennan ruled the IRS could have *all* the proceeds: "Moreover, once the dam is broken, there is no reason . . . not to allow the Government also to collect on the individual debt of Donald Ingram *out of that portion of the proceeds of the sale representing property interests properly liable for the debt*."[676]

Does this dam-bursting theory mean that the trustee may retain 100% of the proceeds from the sale, thereby depriving the debtor spouse of any benefit from the exemption? After all, many states hold that the tenancy by the entirety may not be reached by the individual creditor, but once the tenancy by the entirety is sold, the cash proceeds are *not* held in the entirety and are the individual property of the debtor.[677] In general, cash is *not* exempt

---

671. *See* Sumy v. Schlossberg (*In re* Sumy), 777 F.2d 921, 932 (4th Cir. 1985) (holding that, "to the extent the debtor and the nonfiling spouse are indebted jointly, property owned as tenant by the entireties may not be exempted from an individual debtor's bankruptcy estate under § 522(b)(2)(B) and the trustee may administer such property for the benefit of the joint creditors").

672. *See id.* at 928 (explaining that "entireties property is not exempt from process to satisfy joint claims in Maryland").

673. United States v. Rodgers, 461 U.S. 677 (1983); *see also supra* note 290 and accompanying text (referencing and discussing Justice Brennan's dam theory).

674. *Supra* notes 275–282 and accompanying text.

675. See *Rodgers*, 461 U.S. at 688 ("In addition, in 1973, the Service made an assessment against both Donald and Joerene in the amount of $283.33 plus interest, relating to their joint income tax liability for 1971.").

676. *Id.* at 712.

677. Such a result would follow in any jurisdiction where the tenancy by the

property under state law.[678] Other states hold that, unless the spouses intend otherwise, the cash proceeds are held by the entireties, just as the real property was.[679] But where a *trustee* sells pursuant to a hypothetical judicial lien, it should be apparent that the *trustee* never intends that the tenancy by the entirety be perpetuated in cash form. The trustee's fiduciary duty to the unsecured creditors requires that the trustee favors them over the welfare of the spouses.

Ultimately, the dam-bursting theory fails because the parameters of exemptibility are set as of the day of the bankruptcy petition. Recall that § 522(b)(3)(B) exempts a tenancy by the entirety "in which the debtor had, *immediately before the commencement of the case* . . . to the extent such interest . . . is exempt from process under applicable nonbankruptcy law."[680] Post-bankruptcy changes of status cannot be considered.[681]

True it may be that cash proceeds of exempt property are not necessarily exempt under state law.[682] The debtor, however, obtains the proceeds from a bankruptcy sale regardless of state law. The cash measured by total value minus the joint claims is proceeds of the entireties, but not proceeds of the *bankruptcy*

---

entireties is not permitted for personal property. *See* Phipps, *supra* note 263, at 25 (stating that a minority of states do not permit personal property to be held by the entireties). On whether a cash surplus from a foreclosure sale is held by the entireties, see *infra* notes 1168–1184 and accompanying text.

678. For example, although income streams are mentioned in N.Y. C.P.L.R. § 5205, cash as such is not mentioned. Often cash proceeds of *other* exempt property is protected. *See generally* David Gray Carlson, *Critique of Money Judgment (Part Two: Judicial Liens on New York Personal Property)*, 83 ST. JOHNS L. REV. 43, 207–26 (2009) [hereinafter Carlson, *Critique of Money Part Two*]; Darrell W. Dunham, *Tracing the Proceeds of Exempt Assets in Bankruptcy and Nonbankruptcy Cases*, 3 S. ILL. U. L.J. 317 (1978).

679. *See* Ross v. Maryland (*In re* Ross), 475 B.R. 279, 286 (Bankr. D.D.C. 2012) (noting that "[i]n the District of Columbia, proceeds of a sale of entirety real property retain that entirety character (unless both spouses agree otherwise)"); Oliver v. Givens, 129 S.E.2d 661, 663 (Va. 1963) (same).

680. 11 U.S.C. § 522(b)(3)(B) (2012) (emphasis added).

681. *See id.* (explaining that the exemption applies to "any interest in property in which the debtor had, immediately before the commencement of the case").

682. *See* Carlson, *Critique of Money Part Two*, *supra* note 678, at 208–09 (noting that, in New York, the real estate provision, but not the personal property provision, "safeguards the cash proceeds of real estate").

estate.[683] Prior to the imagined sale, the property has already been exempted—*partially* expelled from the bankruptcy estate.[684] What gets expelled is the quantitative share measured by total value minus the joint claims. What is *not* exempted is the part of the entireties equating with the joint claims. The trustee has a lien on the whole for the joint claims—that is why there was a sale in the first place.[685] When the trustee sells the whole, only part of the cash received is proceeds of property of the bankruptcy estate.[686] This is the amount associated with the *joint* claims, to which the trustee is subrogated.[687] Part of the cash, however, is proceeds of the *debtor's individual property*.[688] That is, the debtor has already exempted part of the bankruptcy estate and the cash generated from the sale of *this* property is not proceeds of property of the bankruptcy estate, but is rather proceeds of individual property *outside* the bankruptcy estate.[689] For this reason, the dam-bursting theory of *Rodgers* is inapplicable in bankruptcy.

7. Priority for the Joint Creditors

The trustee may subrogate herself to the claims of the joint creditors.[690] Does this subrogation translate into a priority for the joint creditors when the tenancy by the entirety is sold? I think the answer is yes, but before I say why, I will acknowledge some seemingly powerful reasons suggesting otherwise.

---

683. *See* 11 U.S.C. § 541(a)(6) (providing that proceeds of the bankruptcy estate are part of the bankruptcy estate).

684. *See id*. § 522(b) ("[A]n individual debtor may exempt from property of the estate . . . before the commencement of the case, an interest as a tenant by the entirety . . . to the extent such interest . . . is exempt from process under applicable nonbankruptcy law . . . .").

685. *Supra* note 670 and accompanying text.

686. *See In re* Ginn, 186 B.R. 898, 903 (Bankr. D. Md. 1995) (explaining that the proceeds from the "sale of Debtors' entireties property" is given to "the joint creditors, but any remaining equity would be retained by Debtors as entireties property").

687. *Supra* note 670 and accompanying text.

688. *See In re Ginn*, 186 B.R. at 903 (stating that "such proceeds may be exempted from the bankruptcy estate").

689. *See id.* at 903 (explaining that "any remaining equity would be retained by Debtors as entireties property").

690. *Supra* note 670 and accompanying text.

It may be protested that, by reserving within the bankruptcy proceeding the tenancy by the entirety for the joint creditors alone, courts in effect treat the joint creditors as *secured* creditors (junior, of course, to any perfected mortgage against the tenancy by the entirety).[691] One may complain that this preference is nowhere sanctioned by the Bankruptcy Code.[692]

One may also complain that subrogation to a claim is unrelated to the priority of the claimant. Witness the much-overlooked Bankruptcy Code § 507(d): "An entity that is subrogated to the rights of a holder of a claim of a kind specified in subsection (a)(1), (a)(4), (a)(5), (a)(7), (a)(8) or (a)(9) of this section is not subrogated to the right of the holder of such claim to priority under such subsection."[693] The section indicates that a subrogee cannot use priority status to leap over the unsecured nonpriority creditors in the distribution process. That is precisely what the trustee hopes to do when she subrogates to the joint creditors and produces for them a high priority.

Furthermore, the situation has been compared to a famous subrogation case—*Moore v. Bay (In re Estate of Sassard & Kimball, Inc.).*[694] To illustrate the concept of *Moore v. Bay*, suppose a debtor conveys property worth $1 million to *X*. Under state law, a creditor, *C*, claims $50, as to which the $1 million conveyance is fraudulent. No other creditor has an avoidance right. Under Bankruptcy Code § 544(b)(1),[695] the trustee may subrogate to *C*'s

---

691. For example, in *Monzon*, joint creditors were preferred even though they never filed proofs of claim. *Secured* creditors don't have to file proofs of claims. *See* 11 U.S.C. § 506(d)(2) (2012) (providing that for a "secured claim," "failure of any entity to file a proof of such claim" does not destroy the claim). So the joint creditors were being treated as secured creditors.

692. *See* Lawrence Kalevitch, *Some Thoughts on Entireties in Bankruptcy*, 60 AM. BANKR. L.J. 141, 148 (1986) ("[T]he Code section granting the exemption says nothing about the proceeds distribution where the exemption is properly denied. . . . [T]he Code explicitly passes non-exempt property into the estate and explicitly lays forth distribution rules nowhere specially providing for the joint creditor.").

693. 11 U.S.C. § 507(d). For a case applying § 507(d), see Aetna Cas. & Surety Co. v. Clerk, U.S. Bankr. Court (*In re* Chateaugay Corp.), 89 F.3d 942, 951 (2d Cir. 1996) (providing an "interpretation of § 507(d)").

694. Moore v. Bay (*In re* Estate of Sassard & Kimball, Inc.), 284 U.S. 4 (1931).

695. *See* 11 U.S.C. § 544(b)(1) (providing that "the trustee may avoid any of an interest of the debtor in property . . . that is voidable under applicable law by a creditor holding an unsecured claim").

right to avoid the conveyance.[696] But the trustee's recovery is not limited to $50. The trustee may recover the entire $1 million conveyance. Furthermore, *C* has no special priority as to this recovery. Rather, the entire $1 million is tossed into the bankruptcy estate where *C* has a mere pro rata share of the creditor, the same as all the creditors who had no avoidance right.[697]

Moore v. Bay roughly supports the idea that the proceeds of the claim to which the trustee is subrogated do not belong to the subrogee. Rather, they belong to the bankruptcy estate. In Chapter 7, distribution is governed by § 726(a).[698] According to § 726(a)(2), unsecured creditors who have timely filed proofs of claim share equally.[699] Therefore, it is maintained, an amount equal to the joint claims can be taken from the tenancy by the entirety and put into the bankruptcy estate where individual and joint creditors (who have timely filed proofs of claim) share on a pro rata basis.[700]

In addition, it has been noted that, in § 726(c), Congress enacted a special distribution rule concerning community property

---

696. *See id.* § 544(b)(1) (providing that "the trustee may avoid any transfer of an interest of the debtor in property . . . that is voidable under applicable law by a creditor holding an unsecured claim").

697. David Gray Carlson, *The Logical Structure of Fraudulent Conveyances and Equitable Subordination*, 45 WM. & MARY L. REV. 157, 162 (2003). *Moore v. Bay* is related to the idea that a fraudulent conveyance is *no* conveyance, and so the world should be remade as if the conveyance never occurred. *See Moore v. Bay*, 284 U.S. at 4 (explaining that "[t]he trustee in bankruptcy gets the title to all property which has been transferred by the bankrupt in fraud of creditors"). In fact, a fraudulent conveyance *is* a conveyance to a third party, and fraudulent conveyance law invites creditors of the debtor to place judicial liens on third party property. Carlson, *Fraudulent Transfers*, *supra* note 443, at 162.

698. *See* 11 U.S.C. § 726(a) (2012).

699. *See id.* § 726(a)(2) (providing the procedure for "payment of any allowed unsecured claim").

700. *See In re* Owens, 400 B.R. 447, 455 (Bankr. W.D. Pa. 2009) ("To the extent that the law of Pennsylvania concerning tenancies by the entirety does apply, however, it is preempted by the distribution scheme set forth in the Bankruptcy Code."); *In re* Boyd, 121 B.R. 622, 625 (Bankr. N.D. Fla. 1989) (applying this concept), *rev'd sub nom.* Boyd v. Strickland, TCA 90-40132-WS (N.D. Fla, Nov. 1, 1991); Julio E. Castro III, Note, *Florida's Treatment of Entirety Property: Do Unsecured Joint Creditors Lose the Benefit of Their Bargain or Achieve a Higher Status than Specifically Provided by the Bankruptcy Code?*, 45 FLA. L. REV. 275, 298–300 (1993) (claiming that "if a joint creditor exists, the debtor's whole interest in entireties property becomes available to satisfy all creditors' claims").

between married persons. That it did not do so in connection with the tenancy by the entirety arguably proves that Congress intended equality of distribution between joint and individual creditor.[701] This is what is called a "knew how to" argument[702]: Our omnicompetent Congress knew how to write a special distribution rule for community property and so it must have knowingly intended no special rule for tenancies by the entirety.

Also, as Judge Hughes learnedly wrote in *In re Raynard*,[703] suppose in a Michigan case the debtor eschews the entireties exemption, but instead chooses the federal exemptions, which give a monetarily limited exemption on residences.[704] As a result, the trustee would sell the residence if the price received exceeded the monetary limit. "As for the remainder of the proceeds, it is clear that the trustee would distribute the remainder to all creditors, not just joint creditors."[705] This point serves to remind us that the joint creditors are not secured creditors claiming the tenancy by the entirety as collateral.[706]

---

701. *In re* Raynard, 327 B.R. 623, 636 (Bankr. W.D. Mich. 2005)

> The detailed procedure set forth in § 726(c) establishes not only that Congress was aware of the special issues raised in connection with marital property, but also that Congress was capable of enacting special procedures to address these issues when it determined that such procedures were necessary. Consequently, it is fair to ask why Congress did not adopt another set of special procedures with respect to non-exempt entireties property under § 522(b)(2)(B), if in fact Congress intended that result.

Rev'd sub nom. Raynard v. Rogers (*In re* Raynard), 354 B.R. 834 (B.A.P. 6th Cir. 2006); *see also In re* Spears, 308 B.R. 793, 824 (Bankr. W.D. Mich. 2004) (noting the same), *rev'd sub nom.* Spears v. Boyd (*In re* Spears), 313 B.R. 212 (W.D. Mich. 2004).

702. *See* Charles Jordan Tabb, *The Bankruptcy Reform Act in the Supreme Court*, 49 U. PITT. L. REV. 477, 574 (1988) (explaining the "knew how to" theory).

703. 327 B.R. 623 (Bankr. W.D. Mich. 2005), *rev'd sub nom.* Raynard v. Rogers (*In re* Raynard), 354 B.R. 834 (B.A.P. 6th Cir. 2006).

704. *See* 11 U.S.C. § 522(d)(1) (2012) (providing an exemption of a maximum "$23,675" for "real property").

705. *In re Raynard*, 327 B.R. at 637. *But see generally In re* Clifton, No. 09-02379-8-RDD, 2013 Bankr. LEXIS 2930 (Bankr. E.D.N.C. July 19, 2013) (favoring the joint creditors over priority tax claim under these circumstances).

706. Later, Judge Hughes would deny that *Butner* dictates the priority for joint creditors because joint creditors have no "property rights" in the tenancy by the entirety. *See In re Raynard*, 327 B.R. at 638 ("The reason why joint creditors enjoy the position that they do with respect to entireties property is not because they themselves have an interest in the entireties estate. Rather, it is unique

In spite of these reasons, the correct answer is that the trustee takes that proceeds for the exclusive benefit of the joint claims. This follows from a heretofore unacknowledged allocation decision that any sale of the entireties implies. If the wrong allocation decision is made, then the nondebtor spouse is forced to subsidize the creditors of the debtor spouse. Presumably, we should not rob Peter to pay the creditors of Paul.

To illustrate, suppose the tenancy by the entirety is worth $100. Only one spouse is bankrupt. The debtor owes $80 to joint creditors and $80 to individual creditors. Suppose also that there are $10 in non-exempt assets in the debtor's bankruptcy estate.

Because she is subrogated to the joint creditors, the trustee is entitled to sell the whole. The following allocation decisions arise. Once the sale is accomplished and $100 is realized, shall we give the nondebtor spouse 50% off the top and give the other 50% to the joint creditors? If so, the joint creditors are short $30 and must compete with the individual creditors of the debtor for the non-exempt assets. This view assumes the *Ford* holding, that only the debtor's 50% interest is in the bankruptcy estate.[707] Or shall we give $80 off the top to the joint creditors (because the nondebtor spouse owes $40 of this) in which case the nondebtor spouse obtains $10 and the debtor receives $10, because this comports with his exemption? The individual creditors of the debtor now do not compete with the joint creditors, and so the individual creditors are better off. The nondebtor spouse is not harmed because, after, all the nondebtor spouse owes $40 to those creditors, and we have just given the nondebtor's $40 to the joint creditors. This view depends upon the 100% of the entireties coming in the bankruptcy

---

character of the debtor's property in the entireties estate that gives a joint creditor its advantage."). Judge Hughes also asserted that it cannot be:

> Seriously believed that a joint creditor's ability to levy is in fact a property right. Otherwise, [one is] compelled to explain why unsecured creditors generally should not be treated as having property rights [in a fee simple absolute] simply because each of those creditors had the ability to levy . . . prepetition. Moreover, the court would have to explain why a joint creditor should not be able to demand the establishment of a similar separate estate for the administration of its supposed property rights when the debtor with an interest in entireties property chooses the federal exempts under Section 522(b)(1) instead.

Id. at 639.

707. *Supra* notes 565–576 and accompanying text.

estate for the benefit of the joint claims, contrary to what the *Ford* court assumed.

Within each branch of the above-described decision tree we have a sub-issue. Shall we prefer the joint creditors to the extent of the tenancy by the entirety, or, in the style of *Moore v. Bay*, deny any priority to the joint creditors and put the money into the bankruptcy estate where § 726(a)(2) imposes equality of distribution between the joint and individual creditors?[708]

Because of the allocation decision described above, the trustee must pay all proceeds to the joint creditors, even though this allocation prefers the joint claims over the individual claims. Otherwise, the nondebtor spouse will be forced to subsidize a recovery for the debtor's individual creditor—an anomalous result. Individual creditors are supposed to gain *no benefit* from the tenancy by the entirety. Yet the *Moore v. Bay* position implies that they *will* benefit.

The following example shows why the nondebtor spouse subsidizes the individual creditors if the joint claim is not preferred. As before, the spouses own a tenancy by the entirety worth $100, against which there are $80 in joint claims (*JC*). The debtor spouse (*D*) files for bankruptcy and claims the tenancy by the entirety as exempt. Given the $80 in joint claims, the exemption is worth $10 (50% of the surplus) to the debtor *D*. Imagine further that *D* owes $80 in individual claims (*IC*) and also has $10 in nonexempt assets. Assume that the nondebtor spouse (*W*) is solvent. Assume, heroically, a world of no transaction costs. Finally, assume that the trustee has sold the tenancy by the entirety for $100.

How shall the proceeds be allocated? There are four logical possibilities.

1. *Give $50 to W off the top. Give $40 to the JCs, $10 to D and $10 to W.* Here, we assume that only the debtor's interest in the entireties (not the whole of it) goes into the bankruptcy estate. The whole is nevertheless sold under authority of Bankruptcy Code § 363(h).[709] *W* is not bankrupt and so deserves 50% of the proceeds

708. *See* Carlson, *Fraudulent Transfers*, *supra* note 443, at 162 (noting that, "[a]ccording to *Moore v. Bay*, a bankruptcy trustee is subrogated to an individual creditor's fraudulent transfer rights, but these rights must be used for the benefit of all creditors equally").

709. 11 U.S.C. § 363(h) (2012).

off the top.[710] If this is done, the *JC*s will be short $40. This they collect immediately from *W*, who is liable on this debt.[711] Because the *JC*s have collected $40 from *D*'s share of the tenancy by the entirety and $40 from *W*'s assets, the *JC*s are paid $80. Meanwhile, the *IC*s receive the $10 in non-exempt assets. The nondebtor *W* receives $50 - $40 = $10.

2. *Give $80 to the JCs off the top, $10 to D and $10 to W.* Here, we assume that all of the tenancy by the entirety goes into the bankruptcy estate, against which the joint creditors have a priority. The *JC*s receive all $80. *D* gets the exemption amount of $10 and *W* gets $10 under § 363(j). This disposes of the tenancy by the entirety proceeds. Shut out from the tenancy proceeds, the *IC*s receive the $10 in nonexempt "other" assets.

Note that, in the first and second scenarios, where the *JC*s receive the proceeds of the non-exempt portion of the entireties, the results are exactly the same. The *IC*s get $10 and the nondebtor *W* gets $10. It does not matter whether *W* gets $50 or $10 from the proceeds of the sale. The *JC*s successfully collect from *W* if they do not receive the money directly from *D*'s trustee.

3. *Give W $50 off the top. Give the bankruptcy estate $40, representing the amount of D's share of liability to the JCs. All creditors of D share equally in the bankruptcy estate.*[712] In this case, the *JC*s have not been paid. The *JC*s, in our cost-free universe, do not wait around for a dividend from *D*'s bankruptcy. They

---

710. *See id.* § 363(j) ("After a sale of property to which subsection . . . (h) of this section applies, the trustee shall distribute to the debtor's spouse . . . and to the estate, the proceeds of such sale, . . . according to the interests of such spouse."); Garner v. Strauss (*In re* Garner), 952 F.2d 232, 245 (8th Cir. 1991) (calling for a 50% payment "of the cash received" to comply with the intent of the Code"); *In re* Spears, 308 B.R. 793, 822, 831 n.42 (Bankr. W.D. Mich. 2004) (noting that "the Chapter 7 trustee would reduce gross value of the subject property by the amount of liens and encumbrances and *divide the remainder in half*" (emphasis added)), *rev'd sub nom.* Spears v. Boyd (*In re* Spears), 313 B.R. 212 (W.D. Mich. 2004).

711. *See In re Spears*, 308 B.R. at 827 ("[A] creditor's effort to proceed in this manner would not be impeded by the automatic stay imposed by the debtor's bankruptcy.").

712. *See* Van Der Heide v. LaBarge (*In re* Van Der Heide), 164 F.3d 1183, 1185 (8th Cir. 1999) (providing an analogous fact pattern); *In re Garner*, 952 F.2d at 236 (noting that "[s]ubsection (h) of Section 363 . . . permits the sale of both the bankrupt estate's interest and the interest of any co-owner in tenancy by the entirety property"); Brown v. Eads (*In re* Eads), 271 B.R. 371, 376 (Bankr. W.D. Mo. 2002) (applying the analysis of *In re Garner*).

immediately collect \$80 from *W*. *W* therefore has a \$40 contribution claim in *D*'s bankruptcy.[713] The bankruptcy estate now totals \$50—the extraneous \$10 in other assets and the \$40 that was not paid to the *JC*s. The *IC*s, who claim 2/3 of this, get \$33.33. This is a \$23.33 improvement over scenarios 1 and 2. *W*, who gets 1/3, takes \$16.66 from the bankruptcy estate. Thus, *W* has subsidized the *IC*s. *W*'s situation is \$50 - \$80 + \$16.67 = - \$13.33. *W* received \$10 in scenarios 1 and 2, but now *W* is \$23.33 worse off. The sum \$23.33 equates exactly with the subsidy that the *IC*s received.

4. *Give the bankruptcy estate \$80, representing the amount of JCs. Give \$10 to D as an exemption and \$10 to W. All creditors of D share equally in the bankruptcy estate*. In this case, we honor the "equal distribution" rule of § 726(a)(2).[714] First, because *W* is liable to the *JC*s for \$80, *W* pays the *JC*s in full. *W* thereafter has a \$40 contribution claim against *D* and so is now a creditor in *W*'s bankruptcy.[715] The claims against the \$90 bankruptcy estate are the *IC*s (\$80) and *W* (\$40). The *IC*s obtain 2/3 of \$90, or \$60. The *IC*s therefore have gained \$50, compared to scenarios 1 and 2. The gain comes at the expense of *W*. *W*'s bankruptcy dividend is 1/3 of \$90, or \$30. So, *W*'s situation is \$10 - \$80 + \$30 = - \$40. This is \$50 worse than the scenarios 1 and 2 provided.[716]

These examples prove the counter-intuitive result that failing to pay the joint creditors 100 cents on the dollar from the sale of the tenancy by the entirety forces the nondebtor spouse to subsidize the recovery of the debtor's individual creditors. This subsidy comes about because the nondebtor spouse is 100% liable to the joint creditor, but is entitled only to claim 50% in contribution. The joint creditors would have claimed \$80 in *D*'s bankruptcy, but *W* can only claim \$40 in reimbursement from *D*'s bankruptcy estate.[717]

---

713. *See* 11 U.S.C. § 502(e)(2) (providing that "[a] claim for reimbursement or contribution of such an entity . . . shall be allowed").

714. 11 U.S.C. § 726(a)(2).

715. *Id.* § 502(e)(1).

716. The court in *McRae*, 308 B.R. 572 (N.D. Fla. 2003), favored priority for the joint creditors because otherwise they would have to share with the individual creditors who had no access to the tenancy by the entirety. *Id.* at 578. But, this overlooks the fact that the joint creditors have ready access to the nondebtor's spouse other assets. If these exist, it is the nondebtor spouse who subsidizes the individual creditors, not the joint creditors.

717. The court in *Monzon* comes close to articulating this point: "Granting an

8. The Paradox of an Over-Encumbered Tenancy by the Entirety

Courts have generally administered the entireties for the sole benefit of the joint creditors.[718] Doing so prevents a wealth transfer from the nondebtor spouse to the individual creditors of the debtor spouse.[719] Because such administration favors the nondebtor

---

individual creditor the opportunity to reap the assets of entireties property in bankruptcy diminishes the nondebtor spouse's interest in such property since the debtor spouse would not have been able to subject the entireties property to the reach of individual creditors under Florida law." *In re* Monzon, 214 B.R. 38, 47 (Bankr. S.D. Fla. 1997); *see also In re* Raynard, 327 B.R. 623, 641 (Bankr. W.D. Mich. 2005) (distinguishing this case from *Monzon*, because the *Monzon* court "was concerned that the non-filing spouse might otherwise unfairly shoulder the burden of the joint obligation"), *rev'd sub nom.* Raynard v. Rogers (*In re* Raynard), 354 B.R. 834 (B.A.P. 6th Cir. 2006); Grant v. Himmelstein (*In re* Himmelstein), 203 B.R. 1009, 1015–16 (Bankr. M.D. Fla. 1996) (recognizing that individual creditors get more than they are entitled to if the joint creditors do not have a preference).

At one point in his opinion in the original *In re Raynard*, Judge Hughes also noted that the nondebtor spouse subsidizes the individual creditors of the debtor spouse:

> My interpretation of Section 522(b)(2)(B) does create an issue when only one spouse files a petition for relief. If, as I have concluded, the debtor's undivided interest in entireties property is to be liquidated for the benefit of all his creditors, and not just his joint creditors . . . then it is very unlikely that his joint creditors will be paid in full.

In re Raynard, 327 B.R. at 641 n.23. Not paid in full from the bankruptcy, perhaps, but paid in full eventually because the nondebtor spouse is fully liable to the joint creditors. In the case, two spouses filed jointly in Chapter 13 and wrote a plan discriminating in favor of the joint creditors over the individual creditors. *Id.* at 626. They justified this discrimination on the ground that, in a Chapter 7 case, the joint creditor would be preferred when the tenancy by the entirety was sold. *Id.* at 630. Judge Hughes denied confirmation of the plan, but admitted that, if only one of the spouses filed individually, discrimination would be justified because of the above-documented wealth effects. *Id.* at 641 n.23. On appeal, the Bankruptcy Appellate Panel ruled that discrimination was permissible, even in a joint case. *In re Raynard*, 354 B.R. at 839. *See generally In re* Chandler, 148 B.R. 13 (Bankr. E.D.N.C. 1992). In fact, it is mandatory, because in a Chapter 13 case, every creditor is entitled to receive at least as much as that creditor would have received in a hypothetical Chapter 7 liquidation. 11 U.S.C. § 1325(a)(4) (2012). As joint creditors are entitled to a preference in a Chapter 7 case, the joint creditors must also receive a preference in a Chapter 13 case.

718. *See In re* Droumtsekas, 269 B.R. 463, 467 (Bankr. M.D. Fla. 2000) (finding "that only debts owed to joint creditors should be satisfied from the proceeds of entireties property").

719. *See id.* at 469 (concluding that "the individual creditors of the Debtor are not entitled to share in the proceeds").

spouse, we can assume that the nondebtor spouse consents (hypothetically) to the sale of the entireties.[720]

Two circumstances prevent this administration from occurring. First, if there are *no* joint creditors, then the Michigan-style tenancy by the entirety is absolutely exempt. Therefore, the tenancy is absolutely expelled from the bankruptcy estate. The trustee no longer has a lien on it, and administration becomes impossible.

The *opposite* situation also prevents an administration for the benefit of the joint creditors. Suppose the amount of the joint claims exceeds the debtor's equity in the tenancy by the entirety. Then *none* of the tenancy is exempt.[721] It is purely part of the bankruptcy estate. But in that case, the joint creditors lose their preference and must share equally with the individual creditors.

For example, imagine that the tenancy by the entirety is worth $100 and the joint creditors claim $101. Imagine further that the bankruptcy is paying one cent on the dollar. Because the tenancy by the entirety is not exempt, the joint creditors lose their right to the proceeds of the tenancy. Oddly, if they had limited their claims to $99, they would have received 99.1 cents on the dollar. But because they claimed $101, the exemption disappears entirely and the joint creditors get $1.01, the same as the individual creditors.[722] What a difference $2 makes![723]

When the marital entity is insolvent, debtors benefit by asserting a *homestead* right under the federal exemption (if that is

720. *See infra* note 736 (discussing the jurisdiction over the nondebtor spouse).

721. *See, e.g.*, Jennings v. Royal (*In re* Jennings), No. WY-17-002, 2017 Bankr. LEXIS 4006, at *1 (B.A.P. 10th Cir. Nov. 21, 2017); *In re* Spears, 308 B.R. 793, 822 (Bankr. W.D. Mich. 2004), *rev'd sub nom.* Spears v. Boyd (*In re* Spears), 313 B.R. 212 (W.D. Mich. 2004); United States Trustee v. Duncan (*In re* Duncan), 201 B.R. 889, 897–98 (Bankr. W.D. Pa. 1996) (finding that, "even if this Chapter 7 case were permitted to go forward . . . none of respondent's interest in the residence, held with his wife as tenants by the entirety, could be exempted under § 522(b)(2)(B)"); *In re* Wenande, 107 B.R. 770, 775 (Bankr. D. Wyo. 1989) (finding that the entireties property held by the spouses was not exempt).

722. If the debtor is discharged, the joint creditors may also lose their ability to lien the entireties, as they are no longer joint creditors. *Supra* notes 585–595 and accompanying text.

723. *See* Bank of Am., N.A. v. Caulkett, 135 S. Ct. 1995, 2001 (2015) ("[S]ometimes a dollar's difference will have a significant impact on bankruptcy proceedings.").

available) or under a state statute. In such a case, the tenancy by the entirety plays no conceptual role, and one looks solely to the homesteading rules.[724]

9. The Shadow Bankruptcy

Hidden assumptions underlie the bankruptcy administration of the Michigan-style entireties for the exclusive benefit of the joint creditors. First, we must recognize that 100% of the entireties enters the bankruptcy estate. This accords with the ancient Blackstonian adage that the debtor spouse owns the tenancy by the entirety *per tout et non per my*.[725] It is not the case that only 50% interest in the tenancy by the entirety enters the bankruptcy estate (as per the *Ford* opinion).[726] If we say that only the debtor's 50% is in the bankruptcy estate, we violate the premise of *United States v. Rodgers*,[727] and *United States v. Whiting Pools, Inc.*,[728] both of which imply that "property" means Blackacre, not the debtor's interest in Blackacre.

If we admit that 100% of the entireties goes into the bankruptcy estate, we could recognize that the trustee's judicial lien (per § 544(a)(1))[729] encumbers the tenancy by the entirety, just as the tax lien did in *Craft*.[730] Beyond the trustee's lien (just as beyond the tax lien in *Craft*), the marital entity continues to own the tenancy by the entirety. If later the bankrupt debtor chooses to exempt the tenancy by the entirety, the trustee's hypothetical judicial lien on it (to the extent of the exemption) is erased (i.e., the tenancy by the entirety is partially expelled from the bankruptcy

---

724. *But see In re* Clifton, No. 09-02379-8-RDD, 2013 Bankr. LEXIS 2930, at *6 (Bankr. E.D.N.C. July 19, 2013) ("The issue before the Court is the proper disbursement of sale proceeds of tenants by the entirety property."); *supra* notes 668–670 and accompanying text.

725. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *182 (1753).

726. *Supra* notes 565–576 and accompanying text.

727. 461 U.S. 677, 685–86 (1983).

728. 462 U.S. 198, 206 (1983).

729. *See* 11 U.S.C. § 544(a)(1) (2012) ("The trustee shall have . . . a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists . . . .").

730. *Craft V*, 535 U.S. 274, 288 (2002).

estate under § 522(*l*)).[731] The tenancy by the entirety does not magically reconstitute itself; rather, it always existed and the trustee's lien is erased to the extent of the exemption.

So, what is going on when the trustee liquidates entireties for the sole benefit of the joint creditors? Following the lead of Judge Hughes in *In re Raynard*,[732] we should recognize that, when a debtor files an individual bankruptcy petition, she implicitly creates a *shadow bankruptcy proceeding* for the entireties. In this shadow bankruptcy proceeding, the trustee is a hypothetical judicial lien creditor representing the *joint creditors only*. In the main bankruptcy case, the trustee is a hypothetical judicial lien creditor representing the *individual creditors only*. This is the logical consequence of permitting bankruptcy trustees to liquidate tenancies by the entirety for the exclusive benefit of the joint creditors.

Judge Hughes, who opposed this concept in *In re Raynard*[733] (at least when both spouses have filed jointly) and who for his troubles was reversed, nevertheless describes the shadow bankruptcy perfectly:

> These courts in effect create a separate bankruptcy estate to administer the entireties property in which the debtor has claimed a Section 522(b)(2)(A) exemption. Unless an accommodation can be reached with the debtor, the trustee administers this second estate by disposing of the entireties property pursuant to Section 363(b) and (h) and then distributing the proceeds to the two spouses' joint creditors based upon a procedure that parallels that which a trustee would normally follow when distributing other proceeds to a debtor's individual creditors.[734]

---

731. *See* 11 U.S.C. § 522(*l*) (inviting the debtor to "file a list of property that the debtor claims as exempt . . . . Unless a party in interest objects, the property claimed as exempt on such list is exempt").

732. *See In re* Raynard, 327 B.R. 623, 641 (Bankr. W.D. Mich. 2005) (concluding that "the Raynards' Chapter 13 plan . . . cannot be confirmed because it unfairly discriminates in favor of their joint unsecured creditors and to the detriment of their individual unsecured creditors"), *rev'd sub nom.* Raynard v. Rogers (*In re* Raynard), 354 B.R. 834 (B.A.P. 6th Cir. 2006).

733. *In re* Spears, 308 B.R. 793, 829 (Bankr. W.D. Mich. 2004), *rev'd sub nom.* Spears v. Boyd (*In re* Spears), 313 B.R. 212 (W.D. Mich. 2004).

734. *In re Raynard,* 327 B.R. at 630. Judge Hughes calls this "speculation, not statutory interpretation." *Id.* at 636.

Thus, we should recognize that there is a bankruptcy within the bankruptcy—a wheel within a wheel[735]—whenever a spouse files for bankruptcy with joint creditors claiming the entireties.[736] What are the rules of the shadow bankruptcy? Here is what has emerged so far.

a. Creditor Claims

We may start with the premise that, where the only joint creditor is an over-secured mortgage lender, the bankruptcy trustee (who works for the unsecured creditors only)[737] should not administer the tenancy by the entirety for the mortgagee.[738] Only where there is a joint *unsecured* creditor can there be any question of the shadow bankruptcy.

In the shadow bankruptcy, only joint unsecured creditors have claims against the shadow estate. The individual creditors do not. In fact, the individual creditors stand for that part of the entireties

---

735. *See Ezekiel* 1:16 (King James) ("[T]heir appearance and their work was as it were a wheel in the middle of a wheel.").

736. Presumably, this could be accomplished in the course of the § 363(h) motion, which implies that the nondebtor spouse has been made a party to the action. *See In re* Romano, 378 B.R. 454, 472–73 (Bankr. E.D. Pa. 2007) (arguing that a nondebtor spouse has a right to notice on a § 363(h) motion). This raises jurisdiction questions. According to *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), a bankruptcy judge without life tenure is not supposed to entertain a debtor's cause of action based purely on state law against a nondebtor. *See id.* at 87 (determining that "the broad grant of jurisdiction to the bankruptcy courts contained in [the Bankruptcy Reform Act] is unconstitutional"). Here, it is even worse. The court would entertain a creditor's state-law cause of action against a nondebtor. The late Professor Kalevitch has assured us that *Marathon* is no obstacle to this process: "The salient difference [with the cause of action in *Marathon*] is the nexus between questions of exemption and bankruptcy so lacking in the simple state law claim made in *Marathon*." Kalevitch, *supra* note 692, at 152.

737. *See* Steven Rhodes, *The Fiduciary and Institutional Obligations of a Chapter 7 Bankruptcy Trustee*, 80 AM. BANKR. L.J. 147, 168 (2006) ("[I]t is clear that the duty of maximization focuses upon maximizing distributions to unsecured creditors.").

738. *See In re* Droumtsekas, 269 B.R. 463, 466–67 (Bankr. M.D. Fla. 2000) (agreeing that a trustee should abandon the tenancy by the entirety where the only joint creditor is fully secured); *In re* Monzon, 214 B.R. 38, 42 (Bankr. S.D. Fla. 1997) (stating that "this Court adopts the simple and sensible rule that a Trustee should not and may not seek to administer TBE property if the *only* joint debt is the secured debt against that property").

which is exempt. Accordingly, the individual creditors cannot claim any surplus from the shadow bankruptcy.[739] By definition, the surplus is exempt and belongs to the non-debtor spouse (under Bankruptcy Code § 363(j)) and to the debtor (as proceeds of exempt property).

On the other hand, the joint creditors *do* simultaneously have a claim against the regular bankruptcy estate. This raises a "marshaling of assets" issue. Shall the joint creditors *first* take the tenancy by the entirety in order to maximize the dividend of the individual creditors?

One of the earliest cases to advocate the shadow bankruptcy is *Michigan National Bank Michiana v. Chrystler (In re Trickett)*.[740] There, Judge David Nims ruled that the joint creditors first had to take a dividend from the individual cases before they had access to the tenancy by the entirety.[741] This marshaling rule serves to increase the exemption for the debtors. Such a rule seems questionable, in that the debtor is not entitled to an exemption to the extent of the joint claims. If the joint creditors have received a share of the regular bankruptcy estate, the joint claims diminish in size, and the debtor obtains more than the amount that equates with the individual claims.[742] The better view is to require judgment creditors to take the 100% dividend from the tenancy by the entirety first, to prevent expansion of the exemption at the expense of the individual creditors.

---

739. *See Monzon*, 214 B.R. at 41 (explaining that "the surplus equity in entireties property is exempt from the trustee's reach").

740. Mich. Nat'l Bank v. Chrystler (*In re* Trickett), 14 B.R. 85 (Bankr. W.D. Mich. 1981).

741. *See id.* at 92 (ruling "that the joint debtors should first proceed to obtain their distribution out of the general estate and then proceed against the entirety estate").

742. Judge Nims thought he was compelled to such a rule by *Meyer v. United States*, 375 U.S. 233 (1963). In *Meyer*, an IRS tax lien could reach the cash surrender value of a life insurance policy. *Id.* at 234. A consensually created security interest encumbered this and also encumbered the payout to the widow. *Id.* The IRS demanded marshaling to the prejudice of the widow. *Id.* at 235. The Supreme Court held that marshaling should not be ordered where to do so would deprive the widow of a state-law exemption on life insurance proceeds. *Id.* at 239–40. *Meyer* can be distinguished, however. In *Meyer*, the widow of the deceased was entitled to an exemption that marshaling would deny her. *Id.* But, in *Trickett*, marshaling would actually *increase* the exemption, which would seem well beyond what the *Meyer* opinion demands. In support of the *Trickett* reasoning, see Vukowich, *supra* note 561, at 798–99.

In *Trickett*, Judge Nims also proposed a procedure for the shadow bankruptcy to follow.[743] Judge Nims ordered the bankruptcy trustee for the regular case to notify joint creditors that they had to file a proof of joint claim and, once filed, the debtor would have 120 days to object.[744]

Does this imply that joint creditors who do not file proofs of claim by whatever bar date is set are thereafter disentitled to a distribution in the shadow bankruptcy?[745] Failure to file a proof of claim would certainly prevent a distribution in the main case. According to § 726(a), only "allowed secured claims" are entitled to distributions.[746] "Allowed claim" is a bankruptcy code-word, meaning that a proof of claim has been filed.[747] This may be compared with distributions to secured creditors under § 725, where the phrase "allowed claim" never appears. Secured creditors need not file proofs of claim to receive distributions under § 725.[748]

The mysterious case of *Grosslight v. Grosslight*[749] assumes that the proof of claim is necessary if a joint creditor is going to collect. In *Grosslight*, a joint creditor had *not* filed a proof of claim; rather, it filed an adversary proceeding to lift the automatic stay[750]

---

743. *Trickett*, 14 B.R. at 90–91.

744. *Id.*

745. Judge Hughes, for one, reads *Trickett* as absolutely requiring the proof of claim as a *sine qua non* of obtaining a distribution. *See In re* Raynard, 327 B.R. 623, 641 (Bankr. W.D. Mich. 2005) ("If the bankruptcy estate's portion of the proceeds is greater than the amount of the allowed joint claims, the surplus is distributed to the debtor."), *rev'd sub nom.* Raynard v. Rogers (*In re* Raynard), 354 B.R. 834 (B.A.P. 6th Cir. 2006); *see also In re* Spears, 308 B.R. 793, 822 (Bankr. W.D. Mich. 2004) ("[A] Michigan debtor's allowed exemption pursuant to Section 522(b)(2)(B) is inversely related to the amount of the valid claims that creditors have against both the debtor and his non-filing spouse."), *rev'd sub nom.* Spears v. Boyd (*In re* Spears), 313 B.R. 212 (W.D. Mich. 2004).

746. 11 U.S.C. § 726(a) (2012).

747. *See id.* § 502(a) ("A claim . . . proof of which is filed under section 501 . . . is deemed allowed, unless a party in interest . . . objects."); *but see* 11 U.S.C. § 1111(a) (in chapter 11 a "proof of claim . . . is deemed filed [unless] scheduled as disputed, contingent, or unliquidated").

748. *See* 11 U.S.C. § 506(d)(2) (voiding a lien if it "secures [a disallowed secured] claim against the debtor" unless disallowance is "due only to the failure of any entity to file . . . proof . . . under section 501"); *see also id.* § 725 (omitting any mention of allowed claims).

749. 757 F.2d 773 (6th Cir. 1985).

750. This should have been filed as a motion rather than as an adversary proceeding. *See* FED. R. BANKR. P. 4001(a)(1) (requiring "[a] motion for relief from

so that it might obtain a lien under Michigan law. The bankruptcy court denied the relief and ordered the debtor discharged.[751] The creditor appealed the ruling as to the automatic stay, but apparently did not object to the discharge or to the exemption of the tenancy by the entirety.[752] Properly, the discharge had the effect of making the joint creditor into an individual creditor of the non-debtor spouse.[753] As such the creditor was no longer entitled to obtain a lien on the entireties, if the automatic stay were to be lifted.[754] As a result, the whole appeal was moot.[755] Nevertheless, the court reversed and remanded.[756] It treated the adversary proceeding to lift the stay as the equivalent of a timely objection to the exemption.[757] Significantly, for present purposes, the court ordered that the joint creditor file a proof of claim.[758] We may presume, then, that in the Sixth Circuit, a proof of claim is required for a joint creditor in the shadow bankruptcy.

A few other cases, without much discussion, assert that joint creditors with no proof of claim are not entitled to a distribution in the bankruptcy case.[759] At least one case seems to permit distributions to joint creditors who have not filed proofs of claim.[760]

---

an automatic stay provided by the Code").

751. *Grosslight*, 757 F.2d at 77.

752. *See id.* (detailing Liberty State Bank and Trust's appeal).

753. *See id.* at 777 (explaining the applicable bankruptcy statutes and case law).

754. *Id.*

755. *See id.* (noting this consequence).

756. *Id.*

757. *See id.* ("We therefore treat this adversary proceeding as an objection to the claim of exemptions. Taken as such, it was not untimely." (citation omitted)).

758. *Id.*

759. *See In re* Kim, No. 08-12266-SSM, 2009 Bankr. LEXIS 914, at *11 (Bankr. E.D. Va. Jan. 13, 2009) (finding that, in a Chapter 13 case, a joint creditor who did not file a proof of claim was entitled to no distribution under the confirmed plan); *In re* Cerreta, 116 B.R. 402, 406 (Bankr. D. Vt. 1990) (denying the "Trustee's objection to exemption and request to sell jointly owned property" because the "creditor has not filed a proof of claim"). In *Schlossberg v. Fischer (In re Fischer)*, 411 B.R. 247 (Bankr. D. Md. 2009), the trustee tried to file proofs of claim over the opposition of the joint creditors (who were "insiders" of the debtor). *Id.* at 251–52. The court held that the trustee could not do this. *Id.* at 263. *But see* 11 U.S.C. § 501(c) (2012) ("If a creditor does not timely file a proof of such creditor's claim, . . . the trustee may file a proof of such claim.").

760. *See generally In re* Monzon, 214 B.R. 38, 40 (Bankr. S.D. Fla. 1997).

If joint creditors are required to file proofs of claim but do not, this would seem to increase the exemption of the debtor spouse. Furthermore, the discharge (if it ensues) will render the joint creditors into individual creditors with no right to pursue the entireties. Trustees may object that § 522(b)(3) permits the debtor "to the extent that such interest as a tenant by the entirety . . . is exempt from process under applicable nonbankruptcy law."[761] A creditor who files no proof of claim *is* entitled to "process" as a matter of state law.[762] Therefore, the exemption should not increase for the debtor just because the joint creditor did not meet some post-petition bureaucratic requirement. But, if the debtor cannot get an expanded exemption, who then profits from the failure of a joint creditor to file a proof of claim?

It might be possible for a trustee to subrogate to the *disallowed* claim of a joint creditor for the purpose of pursuing the tenancy by the entirety. We have already drawn parallels between the trustee's subrogation to joint creditors and the trustee's subrogation to unsecured creditors' right to avoid fraudulent conveyances (*à la Moore v. Bay*).[763] When it comes to subrogation under § 544(b)(1), some cases hold that the trustee may subrogate to a creditor with avoidance rights even though the creditor never filed a proof of claim.[764] Similarly, a trustee might subrogate to a

---

761. 11 U.S.C. § 522(b)(3).

762. *See, e.g.*, Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 36 (1989) ("The question presented is whether a person who has not submitted a claim against a bankruptcy estate has a right to a jury trial when sued by the trustee in bankruptcy . . . . We hold that the Seventh Amendment entitles such a person to a trial by jury . . . .").

763. *Supra* notes 693–695 and accompanying text.

764. *See* Finkel v. Polichuk (*In re* Polichuk), 506 B.R. 405, 426 (Bankr. E.D. Pa. 2014) (allowing the trustee "to assert that the Debtor owed pre-petition taxes" when the IRS had not filed a proof of claim). Two courts have disagreed with this and would limit subrogation to a creditor that filed a proof of claim. *See, e.g.*, Levey v. Gillman (*In re* Republic Window & Doors, LLC), No. 08-34113, 2011 Bankr. LEXIS 3936, at *33 (Bankr. N.D. Ill. Oct. 12, 2011) (finding that "[t]he generous IRS limitation provision is not available unless the IRS files its own claim or the Trustee files a claim on behalf of the IRS"); Campbell v. Wellman (*In re* Wellman), No. 97-01350-W, 1998 Bankr. LEXIS 2097, at *9 (Bankr. D.S.C., June 2, 1998) (deciding that "as Robert McKittrick was the only creditor . . . to file a proof of claim, he is the only one with an allowable claim into whose shoes the Trustee may step pursuant to § 544(b)"). Furthermore, § 544(b)(1) refers to "a creditor holding an unsecured claim that is allowable." *In re Wellman*, 1998 Bankr. LEXIS 2097, at *5.

joint creditor without a proof of claim and recover, not for the benefit of the joint creditor (who is barred from a distribution), but rather for the benefit of the main bankruptcy. This would be odd. The purpose of the proof of claim requirement is to relieve the trustee of having to investigate who the creditors are.[765] But, where the trustee *knows* who a joint creditor is and how much the claim is, it seems perverse for the trustee to use the failure to follow a bureaucratic rule to enrich the individual creditors in the main case.

It is clear that the debtor is not entitled to the windfall, because the amount that accords with the joint claim is not exempt. By default, this sum must go into the main bankruptcy estate where the individual creditors benefit. But, the joint creditor who failed to file the proof of claim collects from the nondebtor spouse, who (as has been emphasized)[766] then subsidizes the individual creditors in the main case. This too seems unfair. There seems to be no right answer. Probably the best solution is for courts to waive the proof of claim for joint creditors, in order to prevent the subsidy of the individual creditors by the nondebtor spouse.

On this point, it may be noted that the *trustee herself* is empowered to file proofs of claim for those joint creditors who have neglected to file.[767] Or, a joint creditor can file a late proof of claim.[768] Late filed claims are subordinated to timely filed claims.[769] But, by definition, the marital entity is solvent. Hence, all the joint creditors receive 100% distributions; therefore, lateness of filing is immaterial. Because the trustee *ought* to file for a joint creditor, a court may well deem the deed already done.[770]

765. *See In re* R.H. Macy & Co., 161 B.R. 355, 360 (Bankr. S.D.N.Y. 1993) ("Adherence to the bar date furthers the policy of promptly reconciling claims against the estate . . . because it allows parties in interest to determine 'the identity of those making claims against the estate and the general amount of the claims.'" (citations omitted)).

766. *Supra* notes 714–717 and accompanying text.

767. *See* 11 U.S.C. § 501(c) (2012) ("If a creditor does not timely file a proof of such creditor's claim, the debtor or the trustee may file a proof of such claim.").

768. *See id.* (permitting the opposite to occur, as well).

769. *Compare id.* (allowing a trustee to file a proof of a claim when a joint creditor has not), *with id.* § 726(a)(2)–(3) (prioritizing timely filed claims over tardy claims).

770. *See* Walker v. Brown, 165 U.S. 654, 665 (1897) ("Equity regards as done

As for costs of administration, Bankruptcy Code § 363(j) indicates that the trustee is to distribute proceeds of the sale, "less the costs and expenses, not including any compensation of the trustee, of such sale."[771] The case may arise that the tenancy by the entirety is "administratively insolvent." That is, the cost of selling the tenancy by the entirety exceeds the proceeds received. In *In re Eads*,[772] the trustee asked that the court invade the exempt proceeds to cover the overdraft, claiming that the debtor had been supremely litigious against the trustee. The court, however, refused to surcharge the debtor:

> The conclusion reached herein is distasteful to the Court and unfair to creditors. By all rights, Tina and David should be required to pay the Trustee's attorney's fees and expenses out of their separate (though exempt) funds, particularly since those fees and expenses were largely incurred as a result of the debtors' continued marital squabbles. . . . Requiring that the fees and expenses be paid out of the monies that would otherwise be paid to the joint creditors of the Eadses is unfair to those creditors and seems to reward the Eadses for their intransigence. Not paying [attorneys'] fees and expenses in full is likewise unfair. Nevertheless, the Court has concluded that the Bankruptcy Code dictates the result reached.[773]

In this respect, the *Eads* court anticipated *Law v. Siegal*,[774] where the Supreme Court barred administrative surcharges on exempt property in general, even in cases where the debtor's behavior has been irritating.[775]

---

that which ought to be done." (internal quotation omitted)).

771. 11 U.S.C. § 363(j). The *Trickett* opinion awarded the trustee his attorney's fees. *See* Mich. Nat'l Bank v. Chrystler (*In re* Trickett), 14 B.R. 85, 91 (Bankr. W.D. Mich. 1981) (deciding the distribution of the proceeds from sales). More controversially, attorneys for the joint creditors were also held entitled to fees from the tenancy by the entirety. *Id.*

772. 307 B.R. 219 (Bankr. W.D. Mo. 2004).

773. *Id.* at 225.

774. 134 S. Ct. 1188 (2014).

775. *See id.* at 1195–97 (finding that the surcharges violated § 522); *see also* Holley v. Corcoran (*In re* Holley), No. 16-1081, 2016 U.S. App. LEXIS 19425, at *396 (6th Cir. Oct. 25, 2016) (denying a charge on proceeds of tenancy by the entirety to cover general administrative expenses).

b. Surplus and Subrogation

Any surplus from the shadow estate does not go into the regular bankruptcy estate. The surplus, by definition, constitutes the debtor's exempt property, so only the debtor has access to the surplus.

In *In re McRae*,[776] a debtor with a tenancy by the entirety filed for bankruptcy and then paid his only joint creditor in the post-petition period. This post-petition event was held irrelevant—post-petition payment could not increase the size of the exemption because the situation was to be judged as it stood on the day of the bankruptcy petition.[777] At that time, the debtor had not yet paid the joint creditor.[778] But surely the debtor who paid is subrogated to the claim of the joint creditor in the shadow bankruptcy. The debtor then takes the joint creditor's distribution, which is the same as saying the debtor may increase the exemption by paying joint creditors in the post-petition period. In any case, the *McRae* court ruled that the trustee should not administer the tenancy by the entirety.[779] As a practical matter, the trustee had to abandon the tenancy, and because the only joint creditor who could pursue the tenancy has been paid, the debtor had a de facto total exemption.

In *In re Oberlies*,[780] the spouses had jointly guaranteed a non-debtor vendee who, after bankruptcy, paid his debt.[781] When the vendee paid up, the joint guaranty creditor disappeared.[782] The court held that such a post-petition event could not increase the debtor's exemption.[783] But, as in *McRae*, the court ruled that any surplus after joint creditors have been paid belongs to the debtor,

---

776. 308 B.R. 572 (N.D. Fla. 2003).

777. *See id.* at 575 ("The fact that a debtor's non-petitioning spouse has paid off a joint obligation after a petition in bankruptcy has been find does not retroactively make the entireties property exempt from process immediately before the case was filed.").

778. *Id.* at 574; *accord In re* Sefren, 41 B.R. 747, 748 (Bankr. D. Md. 1984) (acknowledging the debt that the debtor owed at the time the case was filed).

779. *McRae*, 308 B.R. at 579.

780. 94 B.R. 916 (Bankr. E.D. Mich. 1988).

781. *Id.* at 917.

782. *Id.*

783. *Id.* at 919.

and if all joint creditors have disappeared through payment, there should be no sale at all and the entireties should be viewed as entirely exempt.[784]

Inconsistently, it has been held that post-petition reaffirmation of all the joint claims makes the shadow bankruptcy case disappear.[785] Reaffirmation, however, only means that the debt will not be discharged.[786] The reaffirmed debt remains a joint claim in the shadow bankruptcy, justifying a sale of the entireties in the shadow bankruptcy.

c. Double Dipping

Suppose a debtor owns a Michigan-style entireties property, but joint creditors exist. May the debtor (i) against the individual creditors choose the entireties exemption under § 522(b)(2)(B) *and* (ii) against the joint creditors choose a monetary homestead exemption under § 522(b)(2)(A)? Can the same house be exempted twice?

The answer seems to be yes,[787] but it turns out that, mathematically, the homestead exemption against the joint creditors entirely duplicates the entireties exemption against the individual creditor. Nevertheless, debtors have the opportunity to visit malicious injury on the non-debtor spouse. Three examples will prove this.

First, we replicate our earlier example, in which no limited homestead against the joint creditors is claimed.

---

784. *Id.* at 924.

785. *See In re* Rentfro, 234 B.R. 97, 100 (Bankr. W.D. Mo. 1999) ("If the debtor rescinds the reaffirmation agreement with the joint creditor . . . the Trustee may renew his objection to the exemption in entireties property . . . ."); *see also In re* Boyd, 121 B.R. 622, 625 (Bankr. N.D. Fla. 1989) ("Thus it is apparent that the trustee standing in the debtor's shoes could alienate the joint property and hence it would not be immune from process . . . ."), *rev'd sub nom.* Boyd v. Strickland, TCA 90-40132-WS (N.D. Fla. Nov. 1, 1991); *In re* McRae, 308 B.R. 572, 576–77 (N.D. Fla. 2003) (noting that *Boyd* had been reversed "with respect to the bankruptcy court's discussion of the proper distribution scheme for entireties property").

786. *See* 11 U.S.C. § 524(k)(3)(J)(i) (2012) ("A reaffirmed debt remains your personal legal obligation. It is not discharged in your bankruptcy case.").

787. *See generally* Mich. Nat'l Bank v. Chrystler (*In re* Trickett), 14 B.R. 85, 89–90 (Bankr. W.D. Mich. 1981).

$$JC = \$80$$
$$TE = \$100$$
$$H = \$0$$
$$W = \$10$$
$$D = \$10$$

First Example[788]

In this first example, *D* obtains $10 from the entireties exemption and has no homestead exemption at all.

We now increase the homestead exemption slightly.

$$JC = \$80$$
$$TE = \$100$$
$$H = \$5$$
$$W = \$5 + \$5 = \$10$$
$$D = \$5 + \$5 = \$10$$

Second Example

In the second example, both *D* and *W* have a homestead right against the joint creditors. In administering the entireties, *D*'s trustee must honor both the exemptions of *D* *and* the exemption of *W*. Each is entitled to assert the $5 homestead right. Thus, *W* gets $10. Of this, $5 is attributable to the homestead right and $5 is attributable to the fact that individual creditors cannot reach *W*'s share of the entireties. We reach the same conclusion as to *D*'s share. In each case, the homestead right does not increase the cash that each spouse takes from the trustee's sale. This example shows that the homestead right simply replicates the entireties right.

$$\text{JC} = \$80$$
$$\text{TE} = \$100$$
$$\text{H} \geq \$10$$
$$\text{W} = \$10$$
$$\text{D} = \$10$$

Third Example

788. In my examples, *JC* is the amount of joint claims; *TE* is the total value of the tenancy by the entirety; *H* is the amount of the homestead exemption; *W* is the nondebtor spouse's share; and *D* is the debtor's share, in light of the entireties exemption.

In the third example, we increase the homestead right to $10 or more. Assume the right is exactly $10. At this point, the trustee liquidates for $100. Of this, the trustee distributes $10 to *D* for the homestead right and $10 to *W* on the same basis. The remaining $80 equates with the amount of joint claims. In this example, we observe that the shadow bankruptcy is insolvent. In light of the homestead rights of *D* and *W*, the non-exempt proceeds go entirely to *JC*. This means that the entireties exemption has been displaced. The entireties is "not exempt" from an entireties viewpoint. The property therefore does not belong to the shadow bankruptcy but to the main bankruptcy estate. The $80 is therefore not distributed to the joint creditors but to *all* the creditors pursuant to § 726(a). In short, we have the paradox that denies the joint creditors their priority over the individual creditors.

In the third example, the assertion of the homestead exemption means that the non-debtor *W* contributes wealth to the individual creditors of *D*. That is, where the *JC* are not paid, they collect from *W*, and *W* is entitled only to a 50% contribution from *D*'s bankruptcy estate. The individual creditors are enriched when *W* is limited to a claim for contribution. *D*, however, can prevent this from occurring by renouncing the homestead exemption and relying solely on the entireties exemption. In any case, it once again shows that, from *D*'s perspective, the homestead exemption simply replicates the entireties exemption.

If, however, the debtor spitefully insists on the homestead exemption, the non-debtor spouse may avail herself of the invitation in § 522(*l*): "[A] dependent of the debtor may . . . claim property as exempt from property of the estate on behalf of the debtor."[789] The non-debtor spouse is a dependent under Bankruptcy Code § 522(a)(1).[790]

These issues arose in *In re Capelli*,[791] where the debtor owned a Virginia entireties with his estranged spouse, but resided in West Virginia. The debtor fell afoul of the domicile restriction in

789. 11 U.S.C. § 522(*l*) (2012).

790. *See In re* Crouch, 33 B.R. 271, 274 (Bankr. E.D.N.C. 1983) ("When a debtor who has not met obligations to support a spouse has claimed inadequate exemptions, the spouse should be permitted to claim additional exemptions as long as the additional exemptions do not unduly prejudice the debtor.").

791. 518 B.R. 873 (Bankr. N.D. W. Va. 2014).

Bankruptcy Code § 522(b)(3)(A), but this restriction does not apply to entireties claims under § 522(b)(3)(B).[792]

The debtor did not wish to claim the entireties as exempt, however; instead, he wished to claim a homestead exemption, which would result in his spouse's loss of wealth to his individual creditors.[793] The trouble was that the debtor, residing in West Virginia, was not entitled to the West Virginia exemption because his real property was located in Virginia.[794] He could not have the Virginia homestead exemption because he resided in West Virginia.[795] But he could claim a *federal* exemption of $21,625, because "a dependent of the debtor" used the property "as a residence."[796]

Virginia was the choice of law under § 522(b)(3)(A) because Virginia was:

> [T]he place in which the debtor's domicile had been located for the 730 days immediately preceding the date of the filing of the petition or if the debtor's domicile has not been located in a single State for such 730-day period, the place in which the debtor's domicile was located for 180 days immediately preceding the 730-day period . . . .[797]

The debtor had not resided in West Virginia for the 730 days prior to his bankruptcy petition.[798] But he had been in Virginia for the 180-day period referenced in § 522(b)(3)(A).[799]

Virginia, however, is an "opt-out" state that does not permit its citizens to choose the federal exemption.[800] Nevertheless,

792. *See id.* at 876–77 (distinguishing these claims).

793. *Id.* at 875.

794. *Id.* at 877.

795. *See id.* at 875 ("During the 730-day period before the petition date, the Debtor lived in both Virginia and West Virginia."); *see also* VA. CODE ANN. § 34-24 (2012) ("When any person . . . removes from this Commonwealth, his right to claim or hold any estate as exempt under the provisions of this chapter, shall cease . . . .").

796. 11 U.S.C. § 522(d)(1) (2012).

797. *Id.* § 522(b)(3)(A).

798. *In re Capelli*, 518 B.R. at 875.

799. *See id.* ("For the 180-day period preceding the 730-day period prepetition, the Debtor lived in Virginia."); *see also* 11 U.S.C. § 522(b)(3)(A) (referencing the 180-day period).

800. *See* VA. CODE ANN. § 34-3.1 (2017) ("No individual may exempt from the property of the estate in any bankruptcy proceeding the property specified in

opt-out legislation is overridden by the hanging paragraph at the end of § 522(b)(3):

> If the effect of the domiciliary requirement under subparagraph (A) is to render the debtor ineligible for *any* exemption, the debtor may elect to exempt property that is specified under subsection (d).[801]

That is, because the domiciliary rule denied the debtor the West Virginia exemption *and* because the Virginia exemptions did not apply to nonresidents,[802] the debtor thought he was entitled to the federal exemption, in spite of the fact that Virginia has "opted out" of the federal exemption.[803]

The non-debtor spouse intervened to prevent the use of the federal exemption on the Virginia property, under the theory that the debtor had not been denied *every* Virginia exemption.[804] The debtor still had the entireties exemption because the domiciliary restriction applied only to the exemptions under § 522(b)(2) and not to the entireties exemption under § 522(b)(3).[805] In light of this, the debtor had *some* Virginia exemptions and so could not take the federal exemption in West Virginia.[806]

The court, however, ruled that the debtor could have *both* the Virginia entireties exemption *and* the federal homestead

---

[§ 522(d)] . . . .").

801. 11 U.S.C. § 522(b)(3) (emphasis added).

802. *See In re* Capelli, 518 B.R. 873, 875–78 (Bankr. N.D. W. Va. 2014) (describing the relevant law). This denial extends to exemptions of any kind. *See id.* at 877 n.4 ("[A] nonresident of Virginia is not entitled to take any of the other exemptions in property that are afforded by Virginia law." (internal quotation omitted)).

803. *Id.* at 875.

804. *See id.* ("Ms. Capelli objects to the Debtor's claimed exemptions based upon her belief that the Debtor cannot claim as exempt property listed in § 522(d) given his ability to exempt property that he holds with her as a tenancy by the entireties.").

805. *See id.* ("The Debtor argues that although he holds such property with Ms. Capelli, he may claim as exempt property listed in § 522(d) because he cannot claim exemptions under Virginia law such that the concluding sentence of § 522(b)(3) permits his claimed exemptions.").

806. *See id.* at 877 ("[T]he parties agree that the Debtor . . . is ineligible to claim West Virginia exemptions, and . . . the Debtor has an exemptible interest in real property, which he holds as a tenancy by the entirety with Ms. Capelli, located in Virginia.").

exemption.[807] The word "any," ruled the court, applied to subparagraph (b)(2) and not to subparagraph (b)(3).[808]

It is not clear, however, that the debtor won anything valuable because the homestead exemption entirely replicates the entireties exemption. Possibly, if the case is illustrated by the third example, the debtor could deprive the nondebtor spouse of wealth, which would be transferred to the individual creditors of the debtor. Given the spiteful nature of this result, the court might permit the nondebtor spouse to choose the entireties exemption over the opposition of the debtor pursuant to Bankruptcy Code § 522(*l*).

d. Avoidance Actions

The shadow bankruptcy for the entireties engenders its own avoidance actions. Avoidance in this environment is theoretically complex and often basically useless.

i. Voidable Preferences

If we take the concept of the shadow bankruptcy seriously, avoidance should be judged from within the bounds of the shadow case. For example, suppose the debtor's tenancy by the entirety is worth \$100 and the joint creditors together claim \$80. The marital entity is therefore solvent. One of the joint creditors (*JC*) obtains a judicial lien for \$60 against the tenancy by the entirety just before bankruptcy. Judicial liens that attach just before bankruptcy are ordinarily the quintessential voidable preference, but not this one! Bankruptcy Code § 547(b)(5) provides that a transfer is a voidable preference if it is a transfer:

---

807. *See id.* at 880 (ruling that debtors could "claim as exempt both property according to the exemption scheme of their domicile and property held as a tenancy by the entirety, which may be located outside their domicile").

808. *See id.* ("[T]he triggering feature of the [hanging] sentence is the failure of 'any exemption' based upon a domiciliary requirement. [Subparagraph (3)(B) is] not domicile dependent and thus cannot fail based upon the effect of a domiciliary requirement under subparagraph (A).").

> (5) that enables such creditor to receive more than such creditor would receive if—
>
> (A) the case were a case under chapter 7 of this title;
>
> (B) the transfer had not been made; and
>
> (C) such creditor received payment of such debt to the extent provided by the provisions of this title.[809]

Applying this test, *JC* has received a lien worth $60. We are to imagine that the "transfer had not been made."[810] As a result, *JC* enters the Chapter 7 liquidation as an unsecured creditor with a claim against the entireties. But as an unsecured joint creditor, *JC* receives the full $60 in the shadow bankruptcy. Therefore, *JC* has not received more from the $60 judicial lien because $60 is the amount of the hypothetical bankruptcy dividend. Accordingly, the judicial lien is no voidable preference.[811]

It is important to emphasize that the lien in question is only $60, less than the $100 value of the entireties. If the joint creditor claimed, say, $120 against a $100 entireties, then the entireties would not be exemptable in the first place. In that case, the tenancy is part of the main case, where the $120 lien would be a voidable preference.[812]

---

809. 11 U.S.C. § 547(b)(5) (2012).

810. *Id.* § 547(b)(5)(B).

811. *See* Shapiro v. Homecomings Fin. Network, Inc. (*In re* Davis), 319 B.R. 532, 537 (Bankr. E.D. Mich. 2005) ("If the mortgage is avoided, the [mortgagee] will become the only joint creditor of the Debtor and his non-debtor spouse, and proceeds from the same of the entireties property could be applied only to satisfy that joint debt."). In *Shapiro v. First Franklin Financial Corp. (In re Rechis)*, 339 B.R. 643, 647 (Bankr. E.D. Mich. 2006), the debtor did not claim the entireties as exempt. The trustee sought to void a tardily recorded mortgage as a voidable preference. The debtor then tried to amend Schedule C to claim the property was exempt as a tenancy by the entirety. The court found that the debtor was estopped from amending Schedule C because it would have ruined the trustee's preference action in which the trystee had invested. By so ruling, the court implied that the joint creditor's mortgage would not have been voidable in the shadow bankruptcy.

812. *Infra* notes 718–724 and accompanying text. In *Shapiro*, 319 B.R. at 537, it is important that there was debtor equity above the mortgage. If the property was "under water," then avoidance of the mortgage implies the presence of a joint unsecured creditor whose claim exceeds the value of the entireties. *See* 11 U.S.C. § 502(h) ("A claim arising from the recovery of property under section . . . 550 . . . shall be allowed . . . ."). In that case, the entireties is not exemptible in the first place, and shadow bankruptcy disappears. The mortgage would be voidable after all.

This point may be applied to the facts of *Ross v. Maryland (In re Ross)*,[813] where a debtor and his spouse guaranteed a third-party obligation and granted a second mortgage on their District of Columbia entireties.[814] The debtor filed for Chapter 11 bankruptcy two years later.[815] As debtor-in-possession, he commenced an adversary proceeding claiming that the mortgage was a voidable preference.[816] It should be apparent that this voidable preference action is useless. Suppose the mortgage is avoided. The mortgage lender still has a joint claim, and the very possibility that the tenancy by the entirety is partially exempt means that, logically, the lender has not received a voidable preference by grace of § 547(b)(5).

Nevertheless, Judge Martin Teel awarded summary judgment to the debtor-in-possession.[817] Now, this decision is very short on facts. For instance, how could a mortgage that was two years old at the time of the bankruptcy petition be a voidable preference, when Bankruptcy Code § 547(b)(4) requires that the transfer to a non-insider be within ninety days before bankruptcy?[818] The case does not appear to involve delayed perfection.[819] It is also clear that the marital entity was solvent.[820] Voidable preference law requires the debtor to be insolvent at the time of the transfer;[821] the debtor's insolvency in the regular bankruptcy case should be irrelevant.

---

813. 475 B.R. 279 (Bankr. D.D.C. 2012).

814. *Id.* at 280–81.

815. *Id.* at 281.

816. *Id.* at 280–81.

817. *Id.* at 286.

818. *See* 11 U.S.C. § 547(b)(4) (2012) (giving the ninety-day requirement).

819. The decision hints that the mortgage was in fact recorded against the nondebtor spouse. *See Ross*, 475 B.R. at 283 (quoting the debtor as saying that "[t]he deed of trust is deemed to have been recorded as a lien against her interest (but not against Mr. Ross's)"). So it probably would have been recorded against the debtor as well. Perfection of a mortgage within ninety days of bankruptcy could result in voidable preference liability. *See* 11 U.S.C. § 547(e)(2)(B) (stating that "a transfer is made . . . at the time such transfer is perfected, if the transfer is perfected after such 30 days"); *see also* David Gray Carlson, *Security Interests in the Crucible of Voidable Preference Law*, 1995 U. ILL. L. REV. 211, 221–25 (describing the rules regarding the timing of transfers).

820. *See Ross*, 475 B.R. at 285 ("Mr. Ross's chapter 11 plan calls for the sale of the property, with proceeds to be distributed to joint creditors, or alternatively for a refinancing.").

821. 11 U.S.C. § 547(b)(3).

What matters is the marital entity's insolvency in the shadow bankruptcy. All these issues seemed to have been improvidently waived by the state of Maryland.[822]

What the case does decide is that the mortgage constituted a transfer of *debtor* property, even though District of Columbia law holds that the debtor had *no* interest in the tenancy by the entirety.[823] This straightforward superegoic moment is well justified by the legislative history of and holdings under § 541(a)(1).[824] Judge Teel also held that, because the debtor transferred his own property when he joined in the mortgage on the tenancy by the entirety, his 50% share of the conveyance was void.[825] And, because the debtor's conveyance was void, the nondebtor spouse was deemed to have made an *individual* conveyance, not a *joint* conveyance.[826] Therefore, the mortgage was invalid not only against the debtor's 50% share but also void against the nondebtor spouse's share.[827] Judge Teel, however, went on to hold that, as a matter of District of Columbia law, the mortgagee would continue to have a mortgage lien on the nondebtor spouse's contingent remainder.[828] As such, Judge Teel

822. *See* Ross v. Maryland (*In re* Ross), 475 B.R. 279, 281 (Bankr. D.D.C. 2012) (discussing how, at a pretrial conference, "the Department conceded that, but for legal arguments next discussed, Ross had shown that his transfer, pursuant to the deed of trust of his interest in Swann House was an avoidable preference").

823. *See id*. at 281–82 (ruling that the transfer of the interest at issue was "a transfer of property of the debtor" under § 547 (internal quotation omitted)).

824. *Supra* notes 515–533 and accompanying text.

825. *See Ross*, 475 B.R. at 283 ("An avoidance under § 544 . . . is only as to Mr. Ross's interest in the property, not Ms. Ross's interest.").

826. *See id.* ("The deed of trust is deemed to have been recorded as a lien against [Ms. Ross's] interest (but not against Mr. Ross's). Ms. Ross's transfer remains intact.").

827. *See id.* at 282

> The lien on the non-debtor's spouse's interest remains intact, but without the debtor's transfer remaining intact, only Ms. Ross (the non-debtor spouse) made a transfer, and that transfer by one spouse alone was inadequate to transfer an interest that is enforceable against the entirety property so long as the property remains entirety property.

828. *See id.* (explaining that, under D.C. law, the lien on Ms. Ross's interest continued). If that is so, then, by implication, the debtor's contingent remainder was his own individual property and, therefore, within the bankruptcy estate in the main case. The mortgage on this contingent remainder would seem to be a voidable preference *in the main case*.

imagined the District of Columbia to follow the Kentucky pattern for the tenancy by the entirety.

At least theoretically, § 522(g) complicates this issue:

> [T]he debtor may exempt . . . property that the trustee recovers under section . . . 550 . . . to the extent that the debtor could have exempted such property . . . if such property had not been transferred, if—
>
> > (1)(A) such transfer was not a voluntary transfer of such property by the debtor; and
> >
> > (B) the debtor did not conceal such property . . . .[829]

Section 550 references a grab bag of avoidance theories, including voidable preference and fraudulent conveyance.[830] Where the conveyance avoided is the debtor's voluntary transfer, the recovery negates the exemption and so benefits the individual creditors and the joint creditors equally.[831]

Section 522(g) makes no difference to the analysis in *Ross*, however. The debtor there voluntarily conveyed a mortgage,[832] but the equity retained is still exemptible in spite of § 522(g). "Equity" is, by definition, that which remains after the mortgage lien is conveyed. In any case, if the marital entity is solvent, the creditor, deprived of the mortgage, still recovers 100% as a joint creditor in the shadow bankruptcy.

Section 522(g) can make a difference in cases like *Boyd v. Petrie (In re Tompkins)*,[833] where the spouses granted an unrecorded mortgage to a lender. At least one other joint creditor was present in the case. The spouses then tendered an "asset

829. 11 U.S.C. § 522(g) (2012).

830. *See id.* § 550(a) ("[T]o the extent that a transfer is avoided under [§§] 544, . . . 547, [or] . . . 548, . . . the trustee may recover, for the benefit of the estate, the property transferred . . . .").

831. *See generally* Tavenner v. Smoot, 257 F.3d 401 (4th Cir. 2001); *In re* Lawson, No. 10-11001, 2011 Bankr. LEXIS 1154 (Bankr. E.D. Tenn. Mar. 31, 2011); McCarthy v. Fin. Freedom Senior Funding Corp. (*In re* Early), No. 05-01354, 2008 Bankr. LEXIS 1605 (Bankr. D.D.C. May 12, 2008). The *Lawson* court erroneously assumes that the contingent remainder is exempt under Tennessee law but that the attempt to convey a voidable mortgage on it means a forfeiture of the exemption. Because the contingent remainder was property of the bankruptcy estate in any event, the error must be considered harmless.

832. Ross v. Maryland (*In re* Ross), 475 B.R. 279, 280 (Bankr. D.D.C. 2012).

833. 428 B.R. 713 (W.D. Mich. 2010).

payment"—a deed in lieu of foreclosure—that made the mortgage lender a fee simple owner. The voluntary nature of the transfer meant that no part of the recovered property could be exempt.[834] If there is no exemption, there is no shadow bankruptcy. Although the unperfected lender would be a joint creditor, there is no exemptible entireties against which the joint claim might be asserted. Therefore, the recovery is one in which all the creditors—joint and individual—share in equally.

In *Tompkins*, the conveyance diminished the estate of the debtor, because the joint creditor's only recourse was to share pro rata in the assets of the debtor's bankruptcy estate. Therefore, unlike in *Ross*, voidable preference analysis could be applied to the case. Accordingly, the court in *Tompkins* reversed the bankruptcy court's dismissal of the voidable preference action which had found no diminution of the bankruptcy estate.[835]

ii. Fraudulent Conveyances

In the context of inheritance disclaimers, a distinction was made between the trustee's avoidance power under § 548(a) (which was superegoic) and the trustee's subrogation right under § 544(b)(1) (which was not superegoic).[836] This distinction holds in fraudulent conveyance cases involving the entireties. Under *Begier v. Internal Revenue Service*,[837] "property of the debtor" must be considered "property that would have been part of the estate had it not been transferred before the commencement of the bankruptcy proceeding."[838] Any entireties property voluntarily conveyed away *would have been property of the bankruptcy estate*

834. *See* 11 U.S.C. § 522(g)(1)(A) (exempting "property that the trustee recovers" where the "transfer was not a voluntary transfer of such property by the debtor").

835. *See generally* Barbera v. Nathan (*In re* Barbera), No. 97-1459, 1998 U.S. App. LEXIS 13171 (6th Cir. June 17, 1998); Tardif v. MBNA Am. Bank, N.A. (*In re* Kepley), No. 2:06-cv-532-FtM-29, 2007 U.S. Dist. LEXIS 66657 (M.D. Fla. Sept. 10, 2007) (showing that the check from the bank account was owned by the entireties); Lasich v. Estate of Wickstrom (*In re* Wickstrom), 113 B.R. 339, 347 (Bankr. W.D. Mich. 1990).

836. *Supra* notes 449–451 and accompanying text.

837. 496 U.S. 53 (1990).

838. *Id.* at 58–59.

had it not been conveyed away.[839] And, because it was voluntarily conveyed, such property is not exemptible thanks to § 522(g). Therefore, the trustee can sustain a § 548(a) action for a voluntary fraudulent conveyance of exempt property.[840] On the other hand, if the trustee has no § 548(a) theory (because the conveyance was more than two years old by the time of the conveyance), then the trustee must rely solely on state law where the doctrine of "no harm no foul"[841] implies that it is impossible for a debtor to fraudulently convey the entireties.[842] Under pure state law, such property cannot be recovered.

A voluntary fraudulent conveyance of entireties property (otherwise exempt from creditors under state law) results in a forfeiture of the exemption when and if the trustee avoids the conveyance. When fraudulent conveyances are made with "intent to hinder, delay, or defraud a creditor or an officer of the estate,"[843] such a fraudulent conveyance has another serious effect. It results in a denial of a discharge to the debtor (where the conveyance was made within a year of the bankruptcy petition).[844] It is hard to imagine that a conveyance of the entireties was intended to harm individual creditors when they had no access to the entireties under state law. And it is certainly odd to think that the conveyance was intended to defraud a bankruptcy trustee, when

839. *See id.* at 58 (discussing how "the purpose of the avoidance provision is to preserve the property includable within the bankruptcy estate").

840. *See generally* Fox v. Smoker (*In re* Noblit), 72 F.3d 757 (9th Cir. 1995) (stating that it is a voidable preference case involving exempt funds); Hitt v. Glass (*In re* Glass), 164 B.R. 759 (B.A.P. 9th Cir. 1994); *In re Wickstrom*, 113 B.R. at 339. For contrary cases, see generally Jarboe v. Treiber (*In re* Treiber), 92 B.R. 930 (Bankr. N.D. Okla. 1988) (stating that the transfer of homestead is not a voidable preference, but § 522(g) was never cited); Tavormina v. Robinett (*In re* Robinett), 47 B.R. 591 (Bankr. S.D. Fla. 1985).

841. *Supra* notes 227, 462–463 and accompanying text.

842. *See* Noland v. Turner (*In re* Turner), 45 B.R. 649, 650 (Bankr. S.D. Ohio 1985) (trustee relied on § 544(b)). This distinction was overlooked in *Jensen v. Montemoino (In re Montemoino)*, 491 B.R. 580 (Bankr. M.D. Fla. 2012) (New Jersey law), where cash was held in the entireties. *Id.* at 583–84. Even though § 548(a) applied, the court permitted the debtor to plead "no harm no foul" as a defense. In contrast, in *Maxwell v. Barounis (In re Swiontek)*, 376 B.R. 851 (Bankr. N.D. Ill. 2007), § 522(g) was applied in a § 544(b) case to permit the trustees to recover. *Id.* at 864.

843. 11 U.S.C. § 727(a)(2) (2012).

844. *Id.*

the conveyance itself is the reason the exemption is forfeit. Absent the fraudulent conveyance, the trustee has no right to recover, and so the fraudulent conveyance is, at best, a positive boon to the trustee—not a hindrance. Accordingly, the court in *T.R. Press, Inc. v. Whitcomb (In re Whitcomb)*[845] refused to quash the debtor's discharge for such a conveyance.[846] Nowhere does the *Whitcomb* opinion refer to § 522(g).

On the other hand, if such a conveyance was made in a fraud on joint creditors, it would appear that the discharge is indeed forfeit. Paradoxically, § 522(g) destroys the exemption, which destroys the priority joint creditors obtain from the administration of the entireties. The recovery then goes into the bankruptcy estate in the main case, where the joint creditors must share equally with the individual creditors. Oddly, the intent to defraud the *joint* creditors results in a windfall for the *individual* creditors.

iii. Post-Petition Conveyances

The principle of § 522(g) must be applied with care when the debtor makes a post-petition conveyance of her entireties interest.

In *Olson v. Parker (In re Parker)*,[847] a debtor filed for bankruptcy and thereafter purported to convey her share of the tenancy by the entirety to her soon-to-be ex-husband. The trustee claimed that this "conveyance" could be avoided under Bankruptcy Code § 549(a) as a post-petition transfer for the benefit of the bankruptcy estate.[848] The debtor had not yet claimed the tenancy as an exemption.[849] (Later, she would claim the federal homestead

845. 140 B.R. 396 (Bankr. E.D. Va. 1992).

846. *Id.* at 399–400.

847. 395 B.R. 12 (Bankr. W.D. Mich. 2008).

848. *Id.* at 15. According to § 549(a):

> [T]he trustee may avoid a transfer of property of the estate—
> (1) made after the commencement of the case; and
> (2)(A) that is authorized only under section 303(f) or 542(c) of this title; or
> (B) that is not authorized under this title or by the court.

11 U.S.C. § 549(a).

849. *In re Parker*, 395 B.R. at 15.

exemption, not the state exemptions.)[850] Now, if the bankruptcy estate owned the debtor's interest in the tenancy by the entirety and the debtor did not, the debtor's quitclaim deed conveys nothing to her husband, and so there is nothing to avoid.[851] Nevertheless, Judge Jeffrey Hughes ruled that the trustee had avoidance rights.[852] This had the effect of canceling the debtor's exemption right under § 552(g). Section 550(a) references § 549, and the debtor made a voluntary conveyance. Under § 552(g), the debtor could not exempt the property that the trustee "recovered."[853] If, however, it is observed that the debtor's deed conveyed nothing and avoidance was not even necessary, the debtor could still have her exemption because Bankruptcy Code § 522(g) would not apply. All we observe is that the debtor wrote an inefficacious deed. In any case, assuming § 549(a) was a valid theory, this recovery would benefit the individual creditors, because it portended the end of the exemption. Oddly, if the debtor had delayed the deed until after the deadline for objecting to Schedule C had passed, the quitclaim deed she wrote would have been entirely lawful. Once exempt property is expelled from the bankruptcy estate, nothing in the Bankruptcy Code brings it back in.[854]

iv. Lien Stripping

The idea of a shadow bankruptcy is denied in *Alvarez v. HSBC Bank USA, National Ass'n (In re Alvarez)*.[855] Arguably, the *Alvarez*

850. *Id.* at 22.

851. I have argued for the superfluity of § 549(a) in most alleged cases of post-petition transfer. Carlson, *Bankruptcy's Acephalous Moment*, *supra* note 488, at 115–22. Technically, it could be said that the debtor *does* have a property interest in the tenancy by the entirety after bankruptcy—the right to receive a surplus under Bankruptcy Code § 726(a)(6). But, this property is precisely *not* property of the estate, and so any conveyance of this right to a surplus would not be avoidable under § 549.

852. *See In re Parker*, 395 B.R. at 23 (finding no "issue of fact regarding Trustee's ability to avoid the subject transfer under Section 549").

853. 11 U.S.C. § 522 (2012).

854. *See* Taylor v. Freeland & Kronz, 503 U.S. 638 (1992) (denying the trustee the right to undo an effectuated exemption); Birney v. Smith (*In re* Birney), 200 F.3d 225, 228 (4th Cir. 1999) ("There must also be some applicable statutory mechanism by which the estate 'captures' the post-petition property.").

855. Alvarez v. HSBC Bank USA, Nat'l Ass'n (*In re* Alvarez), 733 F.3d 136

decision contradicts *Sumy v. Schlossberg (In re Sumy)*,[856] which invented the idea of the shadow bankruptcy.[857]

In *Alvarez*, a debtor moved to "strip off" a second mortgage that was entirely out of money.[858] This is a practice that is universally recognized in Chapter 13 cases.[859] According to § 1322(b)(2), a home mortgage may not be modified.[860] But courts have found that, when a second mortgage is entirely underwater, it has a market value of zero.[861] And what has a market value of zero must not be a property interest at all.[862] Lien stripping can be accomplished by plan confirmation, where the underwater second mortgagee is simply treated as an unsecured creditor.[863]

(4th Cir. 2013).

856. Sumy v. Schlossberg (*In re* Sumy), 777 F.2d 921, 930 (4th Cir. 1985).

857. *Supra* notes 647–648 and accompanying text.

858. *Alvarez*, 733 F.3d at 138.

859. *See id.* (noting that "every other circuit to have considered the question" has concluded that a bankruptcy court has the authority to strip off a completely valueless lien).

860. *See* 11 U.S.C. § 1322(b)(2) (2012) (explaining that a plan may not modify the rights of holders of "a claim secured only by a security interest in real property that is the debtor's principal residence").

861. *See Alvarez*, 733 F.3d at 139 (discussing how "the value of the property when the petition was filed was less than the full amount owed on the first-priority lien, rendering the second-priority lien valueless").

862. *See* Zimmer v. PSB Lending Corp. (*In re* Zimmer), 313 F.3d 1220, 1223 (9th Cir. 2002) (stating that "the status of a claim depends on the valuation of the property"); Lane v. W. Interstate Bancorp (*In re* Lane), 280 F.3d 663, 668 (6th Cir. 2002) (distinguishing between the creditor whose mortgage has some "value" and the creditor whose mortgage is "valueless"); Bartee v. Tara Colony Homeowners Ass'n (*In re* Bartee), 212 F.3d 277, 284 (5th Cir. 2000) (discussing how "a claim is secured only to the extent of the value of the property on which the lien is fixed"); McDonald v. Master Fin., Inc. (*In re* McDonald), 205 F.3d 606, 610 (3d Cir. 2000) (holding that a creditor is not secured if the lien attaches to property with no value); Pond v. Farm Specialist Realty (*In re* Pond), 252 F.3d 122, 127 (2d Cir. 2001) (holding that a claim was not "secured" because there was "insufficient equity in the property to cover any portion of that lien"); Griffey v. U.S. Bank (*In re* Griffey), 335 B.R. 166, 169 (B.A.P. 10th Cir. 2005) (noting that "valuation will control the determination of the mortgagee's security interest").

863. Many courts also thought that § 506(d) or § 506(a) independently support lien stripping. *See, e.g.*, Hunter v. Citifinancial, Inc., (*In re* Hunter), 284 B.R. 806, 809 (Bankr. E.D. Va. 2002) (discussing the application of § 506(d) in bankruptcy proceedings). In fact, these theories are unnecessary. Plan confirmation is ultimately what sustains lien stripping without any reference to § 506(a) or § 506(d). In any case, the Supreme Court, in *Bank of America, N.A. v. Caulkett*, 135 S. Ct. 1995 (2015), has ruled that § 506(d) cannot be used to void an

In *Alvarez*, the debtor wished a pre-confirmation declaration that the underwater claim was not a lien.[864] He wished to do so by reference to § 506(a).[865] Although not bankrupt, the non-debtor spouse joined in the complaint.[866] The court ruled that the debtor was entitled to no such declaration because such a declaration would eliminate the creditor's rights against the non-debtor spouse.[867] In asserting the right to eliminate the joint mortgage lien entirely, the debtor argued that, when he filed for bankruptcy, the tenancy by the entirety entered into the bankruptcy estate in the guise of a shadow bankruptcy.[868] Because the entireties was within the bankruptcy estate, the plan could value the lien at zero—a valuation that would be binding outside of bankruptcy if the second mortgage lender ever attempted to foreclose against the non-debtor spouse.[869]

The *Alvarez* court denied the very concept of a shadow bankruptcy:

> The Alvarezes nevertheless contend that Mrs. Alvarez and her interest in the entireties property are properly before the bankruptcy court, because Mr. and Mrs. Alvarez filed a joint complaint seeking to strip off the lien. The Alvarezes maintain that their act of jointly filing the complaint satisfied the requirement of Maryland law that tenant by the entirety act together to alter their interests in their entireties property . . . .
>
> Here, however, the Alvarezes' complaint did not bring Mrs. Alvarez's interest in the property before the court. The filing of the complaint did not alter the property rights contained in Mr. Alvarez's bankruptcy estate or the power of the court to bind only the debtor and his creditors in any reorganization plan. Thus, the Alvarezes were not entitled to obtain the removal of

underwater lien. *Id.* at 1997.

864. Alvarez v. HSBC Bank USA, Nat'l Ass'n (*In re* Alvarez), 733 F.3d 136, 138 (4th Cir. 2013).

865. *Id.* at 139.

866. *Id.*

867. *See id.* at 138 (affirming the district court's judgment upholding a bankruptcy court's refusal to "strip off" a "valueless lien" against certain real property that a debtor owned with his non-debtor spouse).

868. *Id.*

869. *Id.* at 139.

> the lien against their entireties property without submitting both parties to the burden of a bankruptcy filing.[870]

In denying the concept of the shadow bankruptcy, the *Alvarez* court contradicts *Sumy v. Schlossberg (In re Sumy)*,[871] the early Fourth Circuit case that established that concept in the first place. Therefore, in the Fourth Circuit, which gave birth to the concept, the shadow bankruptcy is currently in doubt.

Perhaps, however, *Alvarez* and *Sumy* can be reconciled. In *Alvarez*, the underwater mortgagee must have been a joint creditor, as only a joint conveyance to a mortgage lender by both spouses is capable of encumbering the entireties in the first place.[872] Since the underwater lender had to be treated in the Chapter 13 case as a joint unsecured creditor, the entireties was not exemptible in the first place. If there is no exemption, there can be no shadow bankruptcy.[873] On this analysis, the Fourth Circuit rule is that the shadow bankruptcy disappears only when the spouse's equity in the entireties (in light of valid mortgages) falls to zero.

e. Disclaiming the Tenancy as an Exemption

Does the shadow bankruptcy depend upon the debtor's election to exempt the entireties under Bankruptcy Code § 522(b)(3)(B)? What if the debtor makes *no* such claim but instead claims a monetarily limited homestead under § 552(b)(3)(B) (state homestead) or § 522(b)(2) (federal homestead option)? A debtor will wish to do this when the joint creditors are so numerous that exempting the entireties would be useless or not even possible.

Van Der Heide v. LaBarge (In re Van Der Heide)[874] implies that no shadow bankruptcy exists where the debtor claims only the homestead under § 522(b)(2). In the case, the debtor claimed a $9,900 homestead exemption against the entireties property.[875] He

870. *Id.* at 142; *accord In re Hunter*, 284 B.R. at 806 (Bankr. E.D. Va. 2002).
871. 777 F.2d 921 (4th Cir. 1985).
872. *Infra* notes 176–184 and accompanying text.
873. *Infra* notes 718–724 and accompanying text.
874. 164 F.3d 1183 (8th Cir. 1999).
875. *Id.* at 1185.

did not claim that the entireties as such was exempt (probably because the joint creditors claimed more than 100% of the equity in the property).[876] He then filed a Chapter 13 plan, which required that he show that each creditor would get at least what he or she would have received in a Chapter 7 liquidation.[877] The debtor claimed that this would be 50% of the homestead minus $9,900.[878] The trustee asserted that the case included a shadow bankruptcy in which the joint creditors would receive 100% of the tenancy by the entirety (minus the $9,900 exemption).[879] The court thought 50% minus $9,900 was the right answer, which denied the existence of the shadow bankruptcy.[880]

Similarly, in *In re Raynard*,[881] Judge Hughes said in dictum that, in the absence of the exemption claim, the shadow bankruptcy is out of the question. He imagined an individual debtor claiming a monetarily limited homestead exemption,[882] which implies that a trustee may sell when the sales price exceeds the monetary exemption. The debtor obtains the exemption amount, of course.[883] "As for the remainder of the proceeds, it is clear that the trustee would distribute the remainder to all creditors, not just joint creditors."[884]

To the contrary is *In re Clifton*,[885] where the court implied that the shadow bankruptcy does not turn on the tenancy by the entirety being claimed as exempt. In *Clifton*, a debtor had a joint creditor with so large a claim that it exceeded the debtor's equity

---

876. *Id.* at 1186.

877. *See* 11 U.S.C. § 1325(a)(4) (2012) (requiring the court to confirm a plan if "the value . . . of property to be distributed . . . is not less than the amount that would be paid . . . if the estate of the debtor were liquidated under chapter 7").

878. *Van Der Heide*, 164 F.3d at 1184.

879. *Id.*

880. *Id.*

881. 327 B.R. 623 (Bankr. W.D. Mich. 2005), *rev'd on other grounds sub nom.* Raynard v. Rogers (*In re* Raynard), 354 B.R. 834 (B.A.P. 6th Cir. 2006).

882. *See id.* at 637–38 (assuming that the imagined debtor "chooses the so-called federal exemptions . . . instead of the . . . state exemptions").

883. *See* Schwab v. Reilly, 560 U.S. 770, 792 (2010) ("[T]he debtor will be guaranteed a payment in the dollar amount of the exemption.").

884. *In re Raynard*, 327 B.R. at 637.

885. No. 09-02379-8-RDD, 2013 Bankr. LEXIS 2930 (Bankr. E.D.N.C. July 19, 2013).

entirely.[886] Based on the paradox described earlier,[887] the marital entity was insolvent. There was no exemption for the tenancy by the entirety in this case and so there could be no shadow bankruptcy.[888]

Nevertheless, in *Clifton*, the debtor also had a sizable tax liability to the IRS, which was not dischargeable in the debtor's bankruptcy.[889] Every dollar diverted from the main case to the shadow case was a dollar that would not go to the IRS as a priority creditor in the main case,[890] and was a dollar for which the debtor would remain liable after the close of the bankruptcy proceeding. On the other hand, if the shadow bankruptcy could be dissolved and the tenancy by the entirety could be thrown in the main case, the joint creditor would lose greatly, but the IRS (and hence the debtor) would be enriched. Accordingly, the debtor hit upon the plan of amending Schedule C[891] (where he had previously claimed the entireties as exempt) to renounce the exemption.[892] Judge Doub ruled that, even though the tenancy by the entirety was not exempt, the joint creditor took priority in the shadow bankruptcy.[893] In this shadow bankruptcy, the IRS had no claim at all and could not therefore assert its priority.[894] Such a holding is untenable. Priority for joint claims presupposes that an exemption exists and has been selected for the entireties. In effect, *Clifton*

---

886. *See id.* at *2–3 (noting that a creditor "holds a joint claim against the Debtor and her non-filing spouse . . . in excess of $600,000.00").

887. *See supra* notes 718–723 and accompanying text (demonstrating how a two-dollar difference can have a significant impact on bankruptcy proceedings).

888. *Clifton*, 2013 Bankr. LEXIS 2930, at *32.

889. *See generally* 11 U.S.C. § 523(a)(1) (2012).

890. *See id.* § 507(a)(8) (placing the claim of "allowed unsecured claims of governmental units" eighth in priority for creditors).

891. *See* FED. R. BANKR. P. 1009(a) (stating that Schedule C "may be amended by the debtor as a matter of course at any time before the case is closed").

892. *See In re* Romano, 378 B.R. 454, 463 (Bankr. E.D. Pa. 2006) (noting that the court has discretion to prevent this amendment if prejudicial to the trustee); Shapiro v. First Franklin Fin. Corp. (*In re* Rechis), 339 B.R. 643, 644 (Bankr. E.D. Mich. 2006) (same). In *Ray v. Dawson (In re Dawson)*, 10 B.R. 680 (Bankr. E.D. Tenn. 1981), *aff'd* 14 B.R. 822 (E.D. Tenn. 1981), the debtor claimed a homestead only but was permitted to claim the tenancy by the entirety as exempt for the purposes of successfully opposing a § 363(h) sale of the whole. *Id.* at 684–85.

893. *In re* Clifton, No. 09-02379-8-RDD, 2013 Bankr. LEXIS 2930, at *30 (Bankr. E.D.N.C. July 19, 2013).

894. *Id.*

awards a super-priority to joint creditors even when the tenancy by the entirety is not exemptible at all, due to marital insolvency.[895]

We have said that the Bankruptcy Code presages *Craft* by empowering the trustee with a hypothetical judicial lien on the debtor's 50% interest in the tenancy by the entirety. The only difference between *Craft* and the Bankruptcy Code is that the Bankruptcy Code invites an entireties exemption and the IRC does not.[896] Suppose a debtor, seeing that the entireties exemption is useless, deliberately does not claim the entireties as exempt (perhaps by choosing the federal exemption, which has a limited homestead provision but no entireties provision). Cases like *Van Der Heide*[897] assume that the bankruptcy trustee (like the IRS in *Craft*) may sell a 50% tenancy in common, subject to any monetary homestead right. Basically, only the debtor's 50% interest goes into the bankruptcy estate. The non-debtor spouse's 50% does not come into the bankruptcy estate because (where the debtor does not choose the entireties exemption) there is no shadow bankruptcy.

Some cases, however, are inconsistent with this assumption and hold that 100% of the tenancy enters the bankruptcy estate,

---

895. In *Clifton*, the IRS intervened to point out that, even though the IRS never filed notice of its lien pursuant to I.R.C. § 6323, it nevertheless had a lien under § 6321, and this unperfected lien took priority over the joint creditor, which had no lien at all. *Id.* at *30–31. Judge Doub was able to counteract this point by asserting the bankruptcy trustee's status as hypothetical judicial lien creditor for the benefit of the joint creditors. *Id.* at *31. Thus, the joint creditors had a lien, via the trustee, and, under I.R.C. § 6323(a), the joint creditors took priority over the unperfected tax lien. *Id.* at *31–32. For a similar result, see *In re* Surles, No. 01-13070C-7G, 2003 Bankr. LEXIS 2455, at *1 (Bankr. M.D.N.C. May 1, 2003). In *Surles*, two spouses (both bankrupt) did not claim their tenancy by the entirety as exempt. *Id.* at *2. The trustee sold the house and was about to distribute the proceeds when one of the spouses died. *Id.* The court gave priority to the joint creditors over the individual creditors of the two spouses. *Id.* at *6. Ironically, if the debtor had not filed for bankruptcy, then the IRS tax lien, albeit unperfected, would have taken priority over the unsecured joint creditors, by the direct application of *Craft*. But, because the debtor filed for bankruptcy, the trustee's status as a hypothetical judicial lien creditor made the joint creditors into secured creditors with a better claim to the tenancy by the entirety than the IRS's unperfected tax lien. *See id.* at *12 (concluding that "the proceeds may be used to pay the claims for which only the male Debtor is liable as well as joint claims").

896. *See generally* 11 U.S.C. § 522(b)(3)(B) (2012).

897. Van Der Heide v. LaBarge (*In re* Van Der Heide), 164 F.3d 1183, 1184 (8th Cir. 1999).

even though the debtor renounces the entireties exemption.[898] Although correct when the debtor chooses the entireties exemption, it is incorrect when the exemption is not chosen. This being said, it is still true that Bankruptcy Code § 363(h) empowers the sale of the non-debtor spouse's 50% share.[899]

One case where the court assumes incorrectly that the debtor is 100% owner is *In re Brannon*,[900] where the debtors in an unconsolidated joint case owned a stock portfolio valued at $15,796.[901] The wife's 50% share of this portfolio was $7,898.[902] The wife, however, claimed to own $10,200 of the portfolio, against which she applied her available federal exemption amount of $10,200.[903] The husband claimed to own the rest, as to which he claimed an available $1,150 in exemptions.[904] The debtors admitted that the bankruptcy estate owned $4,446 worth of the portfolio.[905] The lower courts held that the wife owned only 50% of the portfolio, meaning that she could exempt only $7,898.[906] This ruling increased the size of the share that was in the bankruptcy estate. On appeal, however, the Third Circuit reversed on *per tout et non per my* grounds—that is, the wife was assumed to be a 100% owner of the entireties.[907]

The *Brannon* court relied on *Madden v. Gosztonyi Savings & Trust Co.*,[908] a joint bank account case. In *Madden*, spouses had a

898. *See In re* Brannon, 476 F.3d 170, 172 (3d Cir. 2007) (assuming incorrectly that the debtor is 100% owner); Madden v. Gosztonyi Sav. & Tr. Co., 200 A. 624, 630 (Pa. 1938) (arguing that "either spouse presumptively has the power to act for both").

899. *See* 11 U.S.C. § 363(h) (explaining that "the trustee may sell both the estate's interest . . . and the interest of any co-owner in property in which the debtor had . . . an undivided interest as a . . . tenant by the entirety").

900. 476 F.3d 170 (3d Cir. 2007).

901. *Id.* at 172.

902. *Id.*

903. *Id.*

904. *Id.*

905. *Id.*

906. *See id.* (quoting the bankruptcy judge's reasoning that "[t]he presumption is that each spouse is a one-half owner of the tenancy by the entirety asset").

907. *See id.* at 173 (relying on "relevant tenancy by the entireties principles").

908. 200 A. 624 (Pa. 1938).

bank account in the entireties.[909] The husband unilaterally agreed to take a haircut on the account in a bank reorganization.[910] Later, the spouses sued for the original amount of the account.[911] They claimed that the unilateral release by the husband could not bind the wife, just as a unilateral deed of real estate could not have any effect.[912] The bank prevailed because the husband was the *agent* of the wife for purposes of agreeing to the haircut.[913] In the course of deciding for the spouses against the bank, the *Madden* court made the following remark about ordinary withdrawals from the bank account: "[E]ither spouse presumptively has the power to act for both, so long as the marriage subsists, in matters of entireties, without any specific authorization, provided the fruits or proceeds of such action inures to the benefit of both that the estate is not terminated."[914] Using this idea, the Third Circuit observed that:

> [E]ach of the debtors identified unequal parts of the entireties property that they wished to exempt. . . . [T]he spouses agreed to the respective allocations. We hold these uses were permissible under the Bankruptcy Code. The trustee's attempt to limit exemptions at 50% of the total allowed through the bankruptcy system is a restriction of each spouse's rights to act with respect to the portion of the entireties property eligible for exemption.[915]

Brannon can be criticized on the following ground: At the time of the bankruptcy petition, the husband and wife had not yet agreed that the wife owned 2/3 of the stock portfolio, so, presumptively, 50% of the portfolio went into the husband's bankruptcy estate, where the husband deliberately eschewed the entireties exemption. Accordingly, the trustee's hypothetical judicial lien attached to 50% of the portfolio. Later, by means of Schedule C, the husband transferred 1/6 of this property to his

909. *Id.* at 626.

910. That is, the spouse agreed that the account would be deemed 50% of its proper amount, pursuant to a plan of reorganization. *Id.*

911. *Id.*

912. *Id.*

913. *See id.* at 630 (noting that "there is nothing in the law relating to the entireties that would prevent the wife from giving the husband express authority to sign for her as her agent").

914. *Id.* at 630–31.

915. *In re* Brannon, 476 F.3d 170, 176–77 (3d Cir. 2007).

wife. But this could not be done in derogation of the trustee's lien. In short, the Third Circuit acquiesced to a post-petition transfer of estate property that is nowhere authorized by the Bankruptcy Code.

If we applied *Craft* to the case, we could say that the trustee (in analogy to the IRS) has a lien on the husband's 50%. True, in bankruptcy the husband Kenneth Brannon could have elected the entireties exemption.[916] (In comparison, Don Craft had no exemption under the IRC.) But Kenneth did *not* choose this exemption. Therefore, *Craft* directly applies, and Kenneth could not make a post-petition conveyance of 1/6 of the portfolio to his spouse.

The *Brannon* court wrongfully rejected any *Craft* analysis, because *Craft* is a monster. *Craft* "was concerned with the power of the [IRS] under a statute authorizing a lien on all 'property' or 'rights to property' of a delinquent taxpayer."[917] Its principle cannot be extended to bankruptcy cases because that would unleash the monster. In fact, the bankruptcy trustee *also* has "the rights and powers of . . . (1) a creditor [who] obtains . . . a judicial lien on all *property* [of the debtor]."[918] The Bankruptcy Code uses the same word as the IRC—*property*! And for that reason (where the debtor eschews the entireties exemption), the *Craft* opinion is *directly applicable*. The *Brannon* result should be rejected because it fails to honor the Supreme Court's holding in *Craft*.

Other courts affirm what the *Brannon* court illegitimately assumed: When a spouse with an entireties interest files for bankruptcy, she brings 100% of the property into the estate even when she eschews the entireties exemption.

In *In re Snyder*,[919] a debtor chose the federal exemption, not the entireties exemption, and so the case is congruent with *Brannon*.[920] A pre-existing lien of $65,000 existed.[921] This was the lien of an individual creditor, but Massachusetts permits

916. *See generally* 11 U.S.C. § 522(b)(3)(B) (2012).

917. *Brannon*, 476 F.3d at 177.

918. 11 U.S.C. § 544(a)(1) (emphasis added).

919. 231 B.R. 437 (Bankr. D. Mass. 1999), *aff'd sub nom.* Snyder v. Rockland Tr. Co. (*In re* Snyder), 249 B.R. 40 (Bankr. 1st Cir. 2000), *aff'd*, No. 00-9009, 2001 U.S. App. LEXIS 16685 (1st Cir. Mar. 2, 2001).

920. *Id.* at 440.

921. *Id.* at 439.

individual creditors of a spouse to obtain a present judicial lien.[922] The lien, however, may not be presently enforced.[923] It may be enforced only if and when the individual spouse survives her non-debtor spouse.[924]

Under the formula of Bankruptcy Code § 522(f)(2), impairment of the exemption is defined by:

Column A	Column B	Column C	Column D	Column E
Value of Debtor's Interest in Property	Minus Challenged Lien	Minus Valid Mortgages	Minus Exemption	= Avoidance

Examining this formula, avoidance (column E) is maximized if the value of the debtor's interest in the property (column A) is minimized. Therefore, the debtor benefits—more lien is avoided—if the debtor claims only 50% of the total value of Blackacre.[925] (To compensate for this assumption, only 50% of the valid mortgages may be subtracted in Column C.)[926] The *creditor* benefits if the debtor is considered the 100% owner *per tout et non per my*. In *Snyder*, the court concluded that the debtor was the 100% owner, hereby limiting avoidance to $8,286.82.[927] Had the debtor been a 50% owner, avoidance would

922. *See id.* (stating that Rockland Trust Company held the $65,000 judicial lien on the debtor's interest alone).

923. *See id.* at 444 (noting that "Rockland cannot enforce its lien until either the tenancy is terminated or the nondebtor spouse ceases to occupy the property as her primary residence").

924. *See infra* Part III.B.11.c (summarizing Massachusetts law regarding tenancy by the entirety).

925. The debtor in fact argued for less than 50% based on actuarial concerns—he was older than his spouse and, as a male, not likely to live as long. *Snyder*, 249 B.R. at 45–46. The court rejected the use of actuarial data. *Id.*

926. *See* Janitor v. Fid. Bank (*In re* Janitor), No. 10-22594-JAD, 2011 Bankr. LEXIS 5285, at *16 (Bankr. W.D. Pa. Jan. 4, 2011) (holding that 100% should apply in both Columns A and C).

927. *See In re* Snyder, 231 B.R. 437, 441 (Bankr. D. Mass. 1999), *aff'd sub nom.* Snyder v. Rockland Tr. Co. (*In re* Snyder), 249 B.R. 40 (Bankr. 1st Cir. 2000), *aff'd*, No. 00-9009, 2001 U.S. App. LEXIS 16685 (1st Cir. Mar. 2, 2001); *see also In re* Nichol, No. 08 B 19054, 2009 Bankr. LEXIS 370, at *17 (Bankr. N.D. Ill. Feb. 6, 2009); *In re* Levinson, 372 B.R. 582, 584 (Bankr. E.D.N.Y. 2007) (applying incorrectly *per tout, et non per my* in a New York case). In *Brinley v. LPP Mortgage, Ltd. (In re Brinley)*, 403 F.3d 415 (6th Cir. 2005), a debtor with an entireties interest filed for bankruptcy, but did not choose the entireties exemption. *Id.* at 418. The court imposed 100% value on the debtor on *per tout et*

non per my grounds. *Id.* at 423. Here are the relevant data:

$280,000	The 100% value of Blackacre as unencumbered
$180,000	The amount of a senior mortgage
$112,418.35	The junior judicial lien
$ 80,345.09	Another mortgage (third in priority)
$ 6,000	The Kentucky homestead exemption

Here are the § 522(f)(2) calculations, where, as in the text, column A is the value of the property, column B is the targeted lien, column C is the valid liens to be deducted, D is the homestead exemption, and E is the avoidance amount:

The Debtor's Calculation

A	B	C	D	E
140,000	-112,418.35	-180,000	-6,000	= -158,418.35

The Bankruptcy Court's Calculation

A	B	C	D	E
280,000	-112,418.35	-180,000	-6,000	= -8,418.35

The District Court's Calculation

A	B	C	D	E
280,000	-112,418.35	-180,000 -80,345.09	-6,000	= Total Avoidance

The Court of Appeals' Calculation

A	B	C	D	E
280,000.00	-112,418.35	-180,000 -80,345.09	-6,000	= -98,763.44

The Correct Calculation

A	B	C	D	E
140,000	-112,418.35	-90,000	-6,000	= -68,418.35

The debtor's calculation may be faulted for not halving the deduction for the senior mortgage in C. The bankruptcy court may be faulted for treating the debtor as the 100% owner in A (instead of the 50% owner, as *Craft* requires). The district court may be faulted for counting the third mortgage in the calculation (as a literal reading of § 522(f)(2) requires). Using the $80,345.09 in C "may give a debtor contemplating bankruptcy the ability to wipe out judicial liens by persuading a lender to take an otherwise junior consensual lien that renders the exempt property over-encumbered and therefore ripe for impairment." *See* Kolich v. Antioch Laurel Veterinary Hosp. (*In re* Kolich), 328 F.3d 406, 410 (8th Cir. 2003) (adding a third mortgage per the literal words of § 522(f)(2)). The district court can be further faulted by declaring the judicial lien utterly void, when arithmetic shows otherwise. The court of appeals is to be commended for actually doing the math, but it should not have added the $80,345.09. Adding this number rewrites § 522(f)(1) by prohibiting impairment of the exemption *or* impairing a third mortgage junior to the judicial lien. Why should the judicial lien be avoided because it impaired a third mortgage?

have been complete.[928]

Treating the individual entireties owner as the 100% owner overlooks the congressional intent to pierce the marital veil in the *Craft* style. It may be true that, under state law, the marital entity owns 100% of the property, but Congress has decided that the *debtor* is the owner (not the marital entity) for the purposes of § 541(a).[929] And what the debtor owns is a 50% share.[930] It is true that 100% of the entireties goes into the bankruptcy estate, where a shadow bankruptcy might possibly administer it. In the shadow bankruptcy, the marital entity owns 100%. But it is still true that the debtor's share of the entireties is only 50%.

In *Snyder*, the court felt that it should issue a "provisional order" in light of the fact that the post-bankruptcy lien was embargoed.[931] It favored the creditor by using the 100% value.[932] After bankruptcy, the lien would continue to be embargoed, but if the debtor survived his wife, the lien would be presently enforceable. If, however, the tenancy by the entirety ended earlier by sale or divorce, the court would entertain, in a re-opened bankruptcy, a recalculation of the § 522(f)(2) formula based on the debtor's 50% share.[933] Thus, the lien would continue to be mostly

928. *Accord In re* Brumbaugh, 250 B.R. 605 (Bankr. W.D. Ky. 2000) (presumably overruled by *Brinley*); *In re* Coley, 437 B.R. 779 (Bankr. E.D. Pa. 2010).

929. *See* 11 U.S.C. § 541(a) (2012) (including "all legal or equitable interests of the debtor in property").

930. *Supra* notes 498–510 and accompanying text.

931. *See Snyder*, 231 B.R. at 445 (discussing how the "more reasonable option is to enter a provisional order that resolves the motion in such a way that both parties' rights . . . are preserved until the tenancy is terminated").

932. *Id.*

933. *See id.* (explaining that "the order shall be subject to reconsideration for changed circumstances").

valid but could be downgraded later.[934] In the long run, no harm was done.[935]

10. Fraudulent Tenancies by the Entireties

Suppose a debtor and her spouse own real property as tenants in common, not by the entireties. May the couple convey a Michigan-style tenancy by the entirety to the marital entity on the eve of bankruptcy? If so, nonexempt property has been transformed into exempt property. Major wealth has been transferred from the debtor's unsecured creditors to the marital entity.

Properly, a fraudulent tenancy by the entirety is not exemptible. According to Bankruptcy Code § 522(b)(3)(B), a debtor may exempt an entireties "to the extent that such interest as a tenants by the entirety . . . is *exempt from process* under applicable nonbankruptcy law."[936] A fraudulently conveyed entireties *is* subject to process under applicable nonbankruptcy law. In *Newlove v. Callaghan*,[937] creditors of a debtor who fraudulently conveyed a tenancy by the entirety to a marital entity successfully brought a creditor's bill in equity in aid of a levy on the entireties. That meant the entireties was *not* exempt from process. In the bankruptcy

---

934. According to Judge Carol Kenner:

> I use this assumption not because I have an opinion as to how things will turn out but because the result it dictates better preserves [the creditor's] lien rights pending termination of the tenancy and, if necessary, reconsideration of this order at that time. This way, [the] lien will remain of record until the tenancy is terminated. This serves two purposes: it preserves the priority of [the] lien pending termination of the tenancy and possible reconsideration; and it places the onus on the Debtor—the party who is more familiar with the ongoing status of the tenancy by the entirety and of the extent of his interest if and when it is terminated—to seek reconsideration if it is warranted.

Id. at 445 n.6.

935. This solution resembles the Tennessee solution deferring the decision until the moment when the debtor establishes herself as the surviving spouse. *Infra* notes 995–999 and accompanying text. For a similar invitation to reopen the case to vindicate the homestead exemption in the case the debtor survived his spouse, see *In re* Dick, 136 B.R. 1000, 1005 (Bankr. W.D. Tenn. 1992).

936. 11 U.S.C. § 522(b)(3)(B) (2012) (emphasis added).

937. 48 N.W. 1096 (Mich. 1891).

context, this means that a fraudulent entireties is not exemptible.[938]

The transfer from cotenant spouses to the spouses as tenants by the entirety would seem, at first glance, to be a fraudulent transfer. According to Bankruptcy Code § 548(a)(1):

> The trustee may avoid any transfer . . . if the debtor . . .
>
> (B)(i) received less than a reasonably equivalent value in exchange for such transfer . . . ; and
>
> (ii)(I) was insolvent . . . .[939]

The marital entity is the transferee. The marital entity gave no reasonably equivalent value for this transfer. If the spouses were insolvent, does not the trustee have a fraudulent transfer theory to recover the conveyance to the marital entity?

The superegoic nature of the bankruptcy estate throws the matter into doubt. Even without any reference to fraudulent transfer theory, the tenancy by the entirety comes into the bankruptcy estate via § 541(a)(1).[940] By its entry into the estate, the tenancy by the entirety is transformed into a tenancy in common. This transformation occurs because the debtor is unable to exempt her share of the marital property as a tenancy by the entirety. In that case, the trustee may sell the debtor's share as if it were a tenancy in common. Once that sale occurs, the entireties is severed. The nonbankrupt spouse suddenly finds herself a tenant in common.[941] All this occurs without any reference to fraudulent transfer law.

The consequence of this observation for fraudulent transfer theory is profound. Before bankruptcy the debtors had tenancies in common. These they conveyed to the marital entity. By virtue of the bankruptcy, the marital entity is deprived of the entireties and the bankruptcy estate has a tenancy in common. The tenancy remains "in common" because the debtor cannot exempt an entireties share by claiming the § 522(b)(2)(B) entireties exemption. Given that the entireties is stuck in the bankruptcy estate as a tenancy in common, it is impossible to say there has

---

938. *Accord In re* Elkins, 94 B.R. 932 (Bankr. W.D. Mich. 1988).

939. 11 U.S.C. § 548(a)(1) (2012).

940. *Supra* notes 495–516 and accompanying text.

941. *Supra* notes 518–542.

been a fraudulent transfer prejudicial to the unsecured creditors. The debtor started with a tenancy in common and the bankruptcy estate ends up with a tenancy in common.

In *In re Mickens*,[942] the debtors owned Michigan real property as joint tenants with the right of survivorship—tenancies that creditors could reach (unless the homestead laws were to apply).[943] On advice of counsel, the debtors, on the eve of their joint bankruptcy, conveyed to themselves a tenancy by the entirety. In the bankruptcy, the trustee sued the debtors as recipients of a fraudulent conveyance,[944] and the debtors claimed their entireties shares as exempt.[945]

The trustee objected to the exemption on the theory that its exercise interfered with the trustee's right to recover the fraudulent transfer.[946] More directly, the trustee could have noted simply that, because a fraudulent tenancy by the entirety is subject to process under state law, it is not exemptible.[947] Be that as it may, the *Mickens* court disallowed the exemption.[948]

Accepting defeat, the debtors in *Mickens* amended their Schedules C to claim the Michigan homestead right.[949] The trustee objected to this exemption too. The trustee figured, under § 522(g), the debtors had forfeited the homestead exemption. According to § 522(g):

> [T]he debtor may exempt under subsection (b) of this section property that the trustee recovers under section . . . 550 . . . to the extent that the debtor could have exempted such property

---

942. 575 B.R. 797 (Bankr. W.D. Mich. 2017).

943. *See id.* at 802 (contrasting joint tenancies with tenancies by the entirety).

944. The trustee won summary judgment on this claim. *Id.* at 800.

945. The exemption claim was pursuant to MICH. COMP. LAWS ANN. § 600.5451(1)(n) (West 2018). *Mickens*, 575 B.R. at 801.

946. *See Mickens*, 575 B.R. at 800 ("[T]he court characterized the Trustee's objection as essentially seeking 'conditional relief' in the event that the Trustee was successful in avoiding the transfer and recovering the Property in the adversary proceeding.").

947. *See generally* 11 U.S.C. § 522(b)(3)(B) (2012).

948. *Mickens*, 575 B.R. at 805.

949. *Id.* at 801. Although the amendment was based on a failure to put over a fraud, the debtors had an absolute right to amend Schedule C. *See* Ellman v. Baker (*In re* Baker), 791 F.3d 677, 683 (6th Cir. 2015) ("[B]ankruptcy courts do not have authority to use their equitable powers to disallow exemptions or amendments to exemptions due to bad faith or misconduct.").

> under subsection (b) of this section if such property had not been transferred, if
>
> (1)(A) such transfer was not a voluntary transfer of such property by the debtor . . . .[950]

Section 550, in turn, is the omnibus remedial section that incorporates all fraudulent transfer recoveries.[951]

The trustee's theory was that, prior to bankruptcy, the debtors had joint tenancies that could have been homesteaded. But these tenancies were voluntarily conveyed away and so could no longer be homesteaded under § 522(g)(1)(A).

The *Mickens* court, however, permitted the homestead exemption. The trustee, said the court, had not *recovered* a fraudulent transfer pursuant to § 550. All that the trustee did was block the entireties exemption.[952]

This seems to be correct. A few days prior to bankruptcy, the debtors had nonexempt cotenancies that creditors could reach but that could be homesteaded. These cotenancies were conveyed to the marital entity. Five days later, the marital entity lost these cotenancies to the bankruptcy estate, and they entered the bankruptcy estate as cotenancies, not as tenancies by the entirety. In short, the superegoic effect of federal property law completely undercut the trustee's recovery of a fraudulent transfer. As a consequence, § 522(g)(1)(A) was no impediment to the homestead claim.

As we are soon to learn, an exemption claimed on Schedule C is valid unless a party in interest objects, even if nonexempt property listed on Schedule C is exempt.[953] If the trustee permitted the entireties exemption to proceed, might the trustee recover the exempted entireties shares as fraudulent transfers? If so,

950. 11 U.S.C. § 522(g).

951. *Id.* § 550(a) ("[T]o the extent that a transfer is avoided under [§§] 544 [or] 548 . . . , the trustee may recover, for the benefit of the estate, the property transferred . . . .").

952. *In re* Mickens, 575 B.R. 797, 810 (Bankr. W.D. Mich. 2017) ("Here, the avoidance of the prepetition transfer did not result in new property coming into the estate. It simply, but importantly, restricted the Debtors' ability to claim an entireties exemption in Property that was unquestionably property of the estate both before and after the transfer.").

953. *Infra* notes 972–1004 and accompanying text.

§ 522(g)(1)(A) prevents the homestead exemption from being asserted.

In *In re Page*,[954] the debtor was permitted to exempt a fraudulent entireties share in corporate stock because the creditors' objection to the exemption was too late. Nevertheless, lateness of the objection was "without prejudice to any action by the trustee to recover property, e.g., by using his strong arm powers under section 544."[955] The trustee, however, cannot get past Bankruptcy Code § 522(c), which provides:

> [P]roperty exempted under this section is not liable during or after the case for any debt of the debtor that arose . . . before the commencement of the case . . . .[956]

Perhaps the trustee is entitled to the exception in § 522(c)(2)—"a debt secured by a lien."[957] The trustee is subrogated to all the unsecured claims that arose before the commencement of the case and has a *hypothetical* judicial lien by virtue of § 544(a)(1).[958] In that case, the trustee could "recover" the entireties and the debtors could not then claim the recovered property as a homestead. But this overlooks the fact that exemption in bankruptcy *is* the renunciation of the trustee's hypothetical judicial lien. It would be contradictory to read § 522(c) to mean that the trustee can always take back exempted property because the trustee's lien still encumbers it, when exemption is renunciation of the hypothetical lien *by definition*. Therefore, if the entireties is successfully exempted, the trustee's future cause of action is blocked by § 522(c).

One last thought on this topic. Suppose a husband (*H*) owns a 100% fee simple absolute interest in real property. Shortly before filing for bankruptcy, *H*, seeking to flummox the creditors, conveys the fee simple to the marital entity in the entireties. In *H*'s bankruptcy, *H* has a cotenancy for 50% on the terms just described.

954. 240 B.R. 548 (Bankr. W.D. Mich. 1999).

955. *Id.* at 553.

956. 11 U.S.C. § 522(c) (2012).

957. *Id.* § 522(c)(2).

958. *Id.* § 544(a) ("The trustee shall have, as of the commencement of the case . . . the rights and powers of . . . (1) a creditor that [has] a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien . . . .").

His wife (*W*), however, holds the other cotenancy, and this has been fraudulently conveyed to *W*. Accordingly, the trustee can recover *W*'s 50%. But this does not interfere with *H*'s homestead exemption. *H*'s homestead applies to *H*'s 50% share. *H* is not trying to exempt *W*'s share, and so § 522(g) is no impediment to *H*'s exemption.

The marital entity has liability for having received *W*'s 50% share in a fraudulent transfer. But if *W* also files for bankruptcy, a surprising result ensues. *W*'s bankruptcy trustee takes a tenancy in common from the marital entity free and clear of *H*'s bankruptcy trustee. *W*, therefore, can homestead her share, which she could not have done outside bankruptcy.

The key to this result is to see that bankruptcy constitutes a transfer of *W*'s prepetition property to *W*'s bankruptcy estate. Bankruptcy Code § 541(a) provides:

> The commencement of a case under section 301, 302, or 303 . . . creates an estate, Such estate is comprised of all the following property, wherever located and by whomever held:
>
> (1) . . . all legal or equitable interests of the debtor in property as of the commencement of the case.[959]

Why is commencement of the case a "transfer?" It suffices to observe that, a few minutes before the bankruptcy petition, *W* had power to possess the marital property. Pending avoidance, *W* had power[960] to convey a good title to a subsequent good faith transferee.[961] After the bankruptcy petition, at least some of these powers have disappeared and have been created in the bankruptcy trustee. The simultaneous disappearance of power in *W* and the

959. *Id.* § 541(a)(1).

960. Recall that *H*'s bankruptcy made *W* a cotenant, not a tenant by the entirety. Therefore, *W* has a unilateral right to convey.

961. Under Michigan's newly-enacted Uniform Voidable Transactions Act, *see* 2016 Mich. Pub. Acts. 552 (effective April 10, 2017), *W*'s power can be located in MICH. COMP. LAWS ANN. § 566.38(2)(b) (West 2017) ("Recovery pursuant to section 7(1)(a) or (2) of or from the asset transferred or its proceeds, by levy or otherwise, is available only against a person described in subdivision (a)(i) or (ii)." (emphasis omitted)). Since a good faith transferee is not described in § 566.38(a)(ii), *W* has the power described in the text. Section 7(1)(a) would seem to be a reference to § 566.37(1)(a) and deals with "[a]voidance of the transfer." *Id.* § 566.37(1)(a). Section (2) seems to be a reference to § 566.37(c)(2): "If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds." *Id.* § 566.37(c)(2).

appearance of the same power in *W*'s trustee means that bankruptcy consists of a transfer from *W* to the bankruptcy trustee. According to Judge Jeffrey Hughes:

> Ironically, the creation of a separate bankruptcy estate and the immediate transfer of the debtor's property into that newly created estate are so basic to bankruptcy law that they have become virtually transparent to the critical observer. While court after court will incant that a bankruptcy proceeding creates an estate and that all of the debtor's property becomes property of the estate, it is seldom that a court has actually paused to appreciate the profound effect these principles have upon property law.[962]

What kind of transfer? This question is answered by Bankruptcy Code § 544(a). With regard to personal property (and, for that matter, real property), the Bankruptcy Code creates a judicial lien in favor of the trustee.[963] Creation of a lien is always a transfer from the debtor to a creditor (in this case, the bankruptcy trustee, a fiduciary representative of creditors).[964] A special rule makes the trustee a bona fide purchaser (who has recorded) of the debtor's prepetition realty.[965]

Thus, *W*'s bankruptcy trustee is a transferee of a transferee of *H*'s fraudulent transfer. *W* was the initial transferee and *W*'s trustee is the second-order transferee. *W* is liable for *H*'s fraudulent transfer as "the initial transferee of such transfer."[966] But now she is bankrupt and protected by the automatic stay.[967] *W*'s trustee is liable as an "immediate . . . transferee of such initial transferee."[968] As a transferee of a transferee, *W*'s bankruptcy trustee is entitled to a defense against *H*'s bankruptcy trustee. According to this defense:

---

962. *In re* Spears, 308 B.R. 793, 800–01 (Bankr. W.D. Mich. 2004), *rev'd on other grounds sub nom.* Spears v. Boyd (*In re* Spears), 313 B.R. 212 (W.D. Mich. 2004).

963. 11 U.S.C. §§ 544(a)(1)–(2) (2012).

964. *See id.* § 101(54) ("The term 'transfer' means—(A) the creation of a lien . . . .").

965. *Id.* § 544(a)(3).

966. *Id.* § 550(a)(1).

967. *See id.* § 362(a)(2) (prohibiting postpetition commencement of collection actions).

968. *Id.* § 550(a)(2).

> The trustee may not recover under section (a)(2) of this section from—
>
> (1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided . . . .[969]

As creditor representative for *W*'s unsecured creditors, the trustee takes title to *W*'s 50% as a "securing of [the] antecedent debt," which *W*'s trustee represents.[970] Furthermore, *W*'s trustee takes the transfer "without regard to any knowledge of the trustee or of any creditor."[971] Thus, *W*'s bankruptcy defeats *H*'s bankruptcy. *W* may therefore claim the entireties share as a homestead (but not as an entirety).

11. Deadline for Objecting

In bankruptcy, the exempt property goes into the bankruptcy estate and the debtor must fetch it out under Bankruptcy Code § 522(*l*) by filing Schedule C.[972] Once this is done, the creditors are subject to a thirty-day deadline under Federal Rule of Bankruptcy Procedure 4003(b)(1).[973] After 2008, the deadline has been softened: "The trustee may file an objection to a claim of exemption at any time prior to one year after the closing of the case if the debtor fraudulently asserted the claim of exemption."[974] The Supreme Court has twice visited this deadline in its pre-2008 version.[975]

---

969. *Id.* § 550(b).

970. *Id.*

971. *Id.* § 544(a).

972. *See id.* § 522(*l*) (explaining that "[t]he debtor shall file a list of property that the debtor claims as exempt").

973. According to Rule 4003(b)(1):

> [A] party in interest may file an objection to the list of property claimed as exempt within 30 days after the meeting of creditors held under § 341(a) is concluded or within 30 days after any amendment to the list or supplemental schedules is filed, which is later.

Fed. R. Bankr. P. 4003(b)(1).

974. *Id.* 4003(b)(2).

975. *See* Schwab v. Reilly, 560 U.S. 770, 791 (2010) (finding the objection deadline inapplicable because Reilly's exemptions were unobjectionable under the

As of December 1, 2015, a new Form B-106(C) governs the debtor's claim of an exemption, pursuant to Bankruptcy Code § 522(*l*).[976] But, at the time the Supreme Court decided *Schwab v. Reilly*,[977] the debtor had to list every exempt item on Schedule C. Schedule C had four columns in it. Here are the column headings and here is how a New York debtor must account for a pet dog (Fido) according to our previous example[978]:

Description of Property	Specific Law Providing Each Exemption	Value of Claimed Exemption	Current Value of Property Without Deduction Exemption[979]
Fido	N.Y. C.P.L.R. § 5205(a)(4)	$1,000	$1,100

If the trustee or a creditor wishes to object to this exemption, she has thirty days after the first scheduled-creditors meeting to do it (where the debtor has not been fraudulent).[980] What if the trustee fails to object to the debtor's Schedule C by this deadline? Is there any practical effect on Fido? According to the Supreme Court in *Schwab*, the answer is no.[981] Fido is exempt only to the extent that New York C.P.L.R. § 5205(a)(4) says he is. Beyond that, the trustee has a hypothetical judicial lien on the whole of Fido, and this the

---

Code); Taylor v. Freeland & Kronz, 503 U.S. 638, 644 (1992) (discussing how "[d]eadlines may lead to unwelcome results, but they prompt parties to act and they produce finality").

976. *See* 11 U.S.C. § 522(*l*) advisory committee's note to 2015 revision of Form B-106(C) (making the schedules "easier to read and, as a result, likely to generate more complete and accurate responses").

977. 560 U.S. 770 (2010).

978. *Supra* notes 660–665 and accompanying text.

979. Under new Form B-106(C), the four columns have become:

Brief description of the property and line on Schedule A/B that lists this property	Current value of the portion you own	Amount of the exemption you claim	Specific laws that allow exemption

980. *See* FED. R. BANKR. P. 4003(b) (setting the deadline for objecting to an exemption as "30 days after the meeting of creditors").

981. *Schwab,* 560 U.S. at 770.

trustee may sell under Bankruptcy Code § 363(b).[982] In the sale, the trustee sells both the exempt portion and the nonexempt portion of Fido. The trustee may retain $100 and must remit $1,000 of the proceeds to the debtor, as the $1,000 are not proceeds of the bankruptcy estate. In effect, a monetarily-limited exemption is not immune from the sale of the whole. It is merely a charge in the debtor's favor on the cash proceeds obtained by the trustee upon sale of the whole.

Translating these points to the tenancy by the entirety, suppose a debtor spouse files individually for bankruptcy and lists on Schedule C a Michigan-style entireties. We would expect to see something like this:

Description of Property	Specific Law Providing Each Exemption	Value of Claimed Exemption	Current Value of Property Without Deduction Exemption
Blackacre (tenancy by the entirety)	Mich. Comp. Laws § 600.5451(1)(o)[983]	Total value minus claims of joint creditors	$290,000[984]

Suppose neither the bankruptcy trustee nor any other creditor objects to this exemption. Where does the matter stand?

The bankruptcy trustee has a lien on the entireties to the extent of the joint claims. Schedule C (as we have filled it out) does not set forth the amount of joint claims (if any). Must the trustee object to this exemption by the Rule 4003(b) deadline? *Schwab* indicates that no objection is needed. The debtor is not trying to claim anything more than what the law allows. If it turns out there *are* joint claims, the trustee has a lien on the entireties representing the joint claims in the shadow bankruptcy of the marital entity. The trustee has the leisure to investigate the jointness of claims free and clear of any deadline at all.[985] Leisure

982. *See* 11 U.S.C. § 363(b) (2012) (permitting sale out of the ordinary course of business with court approval).

983. Judge Hughes thinks that this entry should refer to Bankruptcy Code § 522(b)(3). *In re* Spears, 308 B.R. 793, 835 n.47 (Bankr. W.D. Mich. 2004), *rev'd sub nom.* Spears v. Boyd (*In re* Spears), 313 B.R. 212 (W.D. Mich. 2004). Michigan itself has now codified the common law version of its tenancy by the entirety.

984. This would be the debtor equity in light of outstanding valid mortgages.

985. Indeed, the trustee may close a case and reopen it later to sell the

to investigate is needed because the Bankruptcy Code nowhere requires that the individual debtor schedule a creditor as a *joint* creditor with his spouse. Indeed, *unscheduled* joint creditors might be discovered who would benefit from a shadow bankruptcy and whose existence reduces the size of the debtor's exemption.

Years before *Schwab*, the Fourth Circuit in *Williams v. Peyton (In re Williams)*[986] anticipated what the Supreme Court would later hold:

> [S]ince Williams never claimed that her interest in the real estate was exempt from the claims of her joint creditors, [the trustee] is free to administer the real estate for the benefit of those creditors.[987]

This holding admirably anticipates *Schwab* if in fact the debtor in *Williams* filled out Schedule C in the manner set forth above.[988]

What if the debtor fills out Schedule C as follows?

Description of Property	Specific Law Providing Each Exemption	Value of Claimed Exemption	Current Value of Property Without Deduction Exemption
Blackacre (tenancy by the entirety)	Common law	$290,000	$290,000

Is the debtor now claiming joint creditors do not exist and that therefore Blackacre is entirely exempt? And must the trustee or

entireties if it later turns out that there were some joint claims. This is so even if the debtor has received a discharge and the joint claims are joint no longer. Because the trustee is subrogated to the joint claims, the discharge is no impediment to administering the entireties at a later time. *See generally In re* Shelton, 201 B.R. 147 (Bankr. E.D. Va. 1996).

986. 104 F.3d 688 (4th Cir. 1997).

987. *Id.* at 690.

988. What did Schedule C in the *Williams* case look like? All we learn from the opinion is this:

> On her schedule of property claimed as exempt (Schedule C), Williams listed a parcel of real estate that she owned as a "tenant by the entirety" with her husband. She claimed that $48,600 of this value of this real estate was exempt from the bankruptcy estate under 11 U.S.C. § 522(b)(2)(B).

Id. at 689.

the joint creditors come forth before the Rule 4003(b) deadline to preserve their right to a shadow bankruptcy?[989]

In *Schwab*, the Supreme Court was very specific about what debtors must do to flummox the bankruptcy trustee with regard to a monetarily-limited exemption:

> Where, as here, it is important to the debtor to exempt [illegally] the full market value of the asset or the asset itself, our decision will encourage the debtor to declare the value of her claimed exemption in a manner that makes the scope of the exemption clear, for example, by listing the exempt value as "full fair market value (FMV)" or "100% of FMV." Such a declaration will encourage the trustee to object promptly to the exemption if he wishes to challenge it . . . . If the trustee fails to object, . . . the debtor will be entitled to exclude the full value of the asset.[990]

The *Schwab* majority also insisted that this claim be made in Column 3 of Schedule C, over a heated dissent to the effect that disclosure in column 4 suffices to cheat the trustee.[991]

In a pre-*Schwab* case, the Sixth Circuit Court of Appeals assumed that the joint creditors lose if they or the trustee do not file an objection to the exemption within the deadline. In *Grosslight v. Grosslight*,[992] the debtor spouse had a joint creditor. The joint creditor moved to lift the automatic stay so that it might obtain a lien under Michigan law.[993] Apparently, the joint creditor did not file a proof of claim. The bankruptcy court denied the relief and ordered the debtor discharged.[994] The creditor appealed the ruling as to the automatic stay,[995] but apparently did not object to the discharge or to the exemption of the tenancy by the entirety. Properly, the discharge had the effect of making the joint creditor an individual creditor of the non-debtor spouse. As such, the creditor was no longer entitled to a lien on the entireties.[996] As a

989. Judge Hughes implies that the answer is "yes" here. *Spears*, 308 B.R. at 835 n.47.

990. Schwab v. Reilly, 560 U.S. 770, 792–93 (2010).

991. *See id.* at 801 (Ginsburg, J., dissenting) ("The Court's account . . . shuts from sight the vital part played by the fourth entry on Schedule C . . . .").

992. 757 F.2d 773 (6th Cir. 1985).

993. *Id.* at 775.

994. *Id.*

995. *Id.*

996. *Id.*

result, the whole appeal was moot. Nevertheless, the court reversed and remanded for the purpose of allowing the creditor to file a proof of claim.[997] (What good this would do is the mystery we referenced earlier.)[998] No order was given to lift the stay. And indeed, lifting the stay was useless in that, because of the discharge, the creditor was no longer a joint creditor. Nevertheless, the court worried about a failure to object to the exemption. The court implied that an objection to the exemption was *required* to preserve the creditor's ability to lien the entireties after bankruptcy.[999] It elected to treat the adversary proceeding concerning the automatic stay to be an *ersatz* objection to the exemption.[1000] But, we may observe, objecting to the exemption was useless because the discharge made the creditor into an individual creditor, as to whom the tenancy by the entirety was exempt.[1001]

---

997. *See id.* (ruling that the creditor "is entitled to file a proof of claim on remand" because of an "excusable uncertainty as to the proper procedure").

998. *See supra* notes 754–764 and accompanying text (arguing that "the whole appeal was moot").

999. *See Grosslight*, 757 F.2d at 777 (discussing how the proper procedure "is to file an objection to the claim of exemptions"); *see also* Spears v. Boyd (*In re* Spears), 313 B.R. 212, 218–19 (W.D. Mich. 2004) (directing the Bankruptcy Court to apply the procedure specified in *Grosslight*); Frederick Cty. Nat'l Bank v. Lazerow (*In re* Lazerow), 119 B.R. 74, 76 (Bankr. D. Md. 1990) (discussing the time to object to the exemptions).

1000. *See In re* James, 498 B.R. 813, 825 (Bankr. E.D. Tenn. 2013) (reading *Grosslight* accordingly); *see also* Lee v. Field (*In re* Lee), No. 15-00278 SOM/RLP, 2015 U.S. Dist. LEXIS 155403, at *1–2 (D. Haw. Nov. 17, 2015) (challenging the debtor's conveyance to himself and spouse as tenants by the entireties constituted a timely objection to the exemption).

1001. The mystery of *Grosslight* dissipates if the Sixth Circuit indulged in the unspoken assumption that bankruptcy court would sell the entireties for the benefit of the joint creditors. In that case, the discharge would be no impediment to the trustee's subrogation to the claims of the joint creditors. *See In re* Oberlies, 94 B.R. 916, 922 (Bankr. E.D. Mich. 1988) (stating that *Grosslight* made the "use of the bankruptcy estate itself as a vehicle to vindicate the claims of joint creditors" the "preferred vehicle"). The debtors so read the case in *In re Raynard*, 327 B.R. 623, 636 (Bankr. W.D. Mich. 2005), *rev'd sub nom. Raynard v. Rogers (In re Raynard)*, 354 B.R. 834 (B.A.P. 6th Cir. 2006). Judge Hughes refused to go along:

> I recognize that *Grosslight* can be interpreted as an implicit (and prophetic) adoption of the position later taken by other courts. . . . Nonetheless, my conscience does not permit me in this instance to accept as controlling law yet another implication of *Grosslight* when there is no evidence that the Sixth Circuit even

In re James,[1002] like *Grosslight*, imposes the short Rule 4003(b) deadline on the creditors.[1003] In *James*, a husband (*H*) filed for bankruptcy and his wife (*W*) filed seven and a half months later.[1004] Though apparently residents of Tennessee, they owned a Florida condominium by the entireties.[1005] In his schedules, *H* listed the Florida pleasure dome as having a value of $260,000.[1006] This seems to have been the unencumbered value.[1007] We are not told if this number was in all-important Column 3 or in the meaningless Column 4. We shall assume the entry was in Column 3. In fact, there was a (joint) $160,000 mortgage on the property, so that the equity was only $100,000.[1008] Furthermore, *H* could only claim 50% of this amount.[1009] Nevertheless, *H* listed the value of the exemption as $260,000.[1010] The trustee never objected to the exemption.[1011] The court ruled that *H* could claim $260,000 in

deliberated on the issue at hand.

Id. at 634. Judge Hughes would be reversed by a panel that implied the *debtors* had read *Grosslight* correctly. *In re Raynard*, 354 B.R. at 89–40.

1002. 498 B.R. 813 (Bankr. E.D. Tenn. 2013).

1003. *Id.* at 822.

1004. *Id.* at 817.

1005. Although § 522(b)(3)(A) has stringent choice of law rules tied to the domicile of the debtors, § 522(b)(3)(B), covering the tenancy by the entirety does not. Therefore, the court was correct in applying Florida law to the Florida exemption. *See* Holland v. Sofanda (*In re* Holland), 366 B.R. 825, 830 (N.D. Ill. 2007) (finding that, even though Illinois limits the tenancy by the entirety to principal residences, the debtor could claim a nonresidence under Florida law); *In re* Zolnierowicz, 380 B.R. 84, 87 (Bankr. M.D. Fla. 2007) (applying Florida law to determine a claim of property as exempt entireties property under § 522(b)(3)(B) when the debtor was an Illinois domiciliary).

1006. *See James*, 498 B.R. at 817 (describing the condominium as worth $260,000 according to Mr. James's schedule).

1007. *See id.* (stating that the husband "listed the Condominium with a value of $260,000").

1008. *See id.* at 823 (explaining that the value of the condominium is $260,000 and the debt mortgage on the condominium is $160,000).

1009. The court never makes this limiting assumption explicit. It is possible the court thought that *H* could claim 100%, thereby snatching bread from the mouths of *W*'s creditors.

1010. *In re* James, 498 B.R. 813, 818 (Bankr. E.D. Tenn. 2013).

1011. *Id.* at 816. In *James*, the trustee tried to claim that *H*'s claim of the exemption was fraudulent. *James*, 498 B.R. at 816; FED. R. BANKR. P. 4003(b)(2). If so, the trustee can file an objection to the exemption up to a year after the case closes. It is clear that, after *Taylor v. Freeland & Kronz*, 503 U.S. 638, 644 (1992), it is not fraudulent to claim illegal exemptions on Schedule C. The trustee tried exemptions, even though joint creditors claimed far more than this.[1012]

Confusingly, in her own subsequent bankruptcy, *W* also claimed the house was exempt.[1013] *Her* trustee timely objected to the exemption.[1014] So, in her case, the house was not exempt—the joint claims exceeded the value of her 50% share.[1015] Ultimately, then, the joint creditors obtained only 50% of the equity in the

---

to claim that *any* attempt to seek both a discharge from joint claims and the tenancy by the entirety exempt was an inherent fraud, as some courts have suggested. *See In re* Hunter, 970 F.2d 299, 302 (7th Cir. 1992) (explaining that there was a potential for fraud when a married couple sheltered their assets as unencumbered entirety property and then sought a discharge from joint claims); Reid v. Richardson, 304 F.2d 351, 354–55 (4th Cir. 1962) (finding that a fraud occurs when the rules of law "allow the tenants by the entireties to keep the entireties property secure from the claims of their creditors even though that property was never available in bankruptcy for the satisfaction of those claims"); Phillips v. Krakower, 46 F.2d 764, 765 (4th Cir. 1931) (determining that "the effectual withdrawing of the property from the reach of those entitled to subject it to their claims, for the beneficial ownership and possession of those who created the claims against it" would result in fraud). The court declined to find that *H* had acted in bad faith:

> Although Mr. James did not have a right to claim his whole entirety interest in light of the existence of joint creditors, he never claimed that (a) he did not own the property, (b) his exemption had no value or (c) joint creditors did not exist. Based on the holding in *Taylor*, the lack of a timely objection by any creditor or the trustee, and insufficient evidence that Mr. James' filing was an abuse of the bankruptcy process, the court declines to use any equitable remedy or its power under 11 U.S.C. § 105 to allow the trustee to extend the deadline to object to Mr. James' exemption.

James, 498 B.R. at 827.

1012. *See James*, 498 B.R. at 828 (discussing how the condo's "listing agreement for $449,500 raises the question of whether the value of the Condominium is substantially more than the amount of the exemption claimed").

1013. *Id.* at 818.

1014. *Id.* at 828.

1015. *Id.* *W*'s trustee, representing the joint creditors, could sell the entire condominium for $290,000. 11 U.S.C. § 363(f)(3), (h) (2012). Of this, $190,000 must be given to the secured creditor with a mortgage on the Florida entireties. The $100,000 surplus would go into the bankruptcy estate where joint and individual creditors share alike. The bankruptcy court, however, seems committed to the view that proceeds of *H*'s exempt property are themselves exempt. So, on this view, *H*'s $50,000 falls under the exemption he won when the trustee tardily objected to *H*'s exemption on behalf of the joint creditors. Meanwhile, since *W* had no exemption, the creditors (joint and individual) shared her 50%.

Florida property *H*'s share, in contrast, was successfully and illegally claimed on his Schedule C.

It is unclear what a debtor must enter onto Schedule C in order to claim more from the tenancy by the entirety than the law allows. Trustees had better be aware that any representation of the amount of joint claims might be binding on the trustee if the trustee or the joint creditors do not timely object to Schedule B-106(C).[1016]

But, whatever unlawful claim the debtor makes on Schedule C, a failure to object should *not* affect the secured status of a joint creditor who has *already obtained a lien* on the tenancy by the entirety.[1017] At least, if we are dealing with state-law exemptions, a judicial lien will attach generally to property only when the property is in fact not exempt.[1018] Suppose a debtor wrongfully claims an encumbered item is exempt. The purpose of Schedule C is to expel part of the tenancy by the entirety from the bankruptcy estate.[1019] A judicial lien creditor does not really care whether the property is expelled or not, because the creditor has already established a lien. Such liens survive the exemption process.[1020] If the debtor wishes to avoid the lien under § 522(f)(1), the debtor must prove that the property really would have been exempt if there had been no lien.[1021] The debtor may not make a false claim

---

1016. *See In re* Bois, 191 B.R. 279, 281 (Bankr. D.R.I. 1996) (explaining that, in states where the contingent remainder is not exempt, trustees should be aware that a general claim to *all* the entireties (not just the present possessory interest) triggers the duty of the trustee to object to the exemption).

1017. *See In re* Schoonover, 331 F.3d 575, 577–78 (7th Cir. 2003) (determining that a judicial lien allows a creditor who has not objected in a timely manner to "wait out the bankruptcy and enforce the lien at its conclusion").

1018. At least insofar as state law is concerned, exempt property is defined as that property to which no judicial lien may attach. *In re* Marriage of Logston, 496 N.E.2d 167, 171 (Ill. 1984).

1019. 11 U.S.C. § 522(*l*).

1020. *Id.* § 522(c).

1021. According to Federal Rule of Bankruptcy Procedure 4003(d) (as amended in 2008):

> A proceeding by the debtor to avoid a lien . . . exempt under § 522(f) . . . shall be made by motion in accordance with Rule 9-14. Notwithstanding the provisions of subdivision (b), a creditor may object to a motion filed under § 522(f) by challenging the validity of the exemption asserted to be impaired by the lien.

FED. R. BANKR. P. 4003(d).

made on Schedule C and then expect to avoid an existing lien, if the lien creditor forgets to protest Schedule C by the Rule 4003(b) deadline.[1022]

12. Future Interests

Whether or not joint creditors exist, a baffling issue is how to administer a contingent remainder of the debtor spouse if, as is true in Kentucky or Tennessee, this future interest is the debtor's individual nonexempt property. That is, the marital entity has the present right of possession, but the individual spouse has a presently alienable future interest to which a judicial lien may attach. Indeed, I went so far as to speculate that, even in Michigan, the Kentucky pattern holds as a matter of federal common law—perhaps as a matter of state law, if the Michigan Supreme Court really confronted the issue—especially if so ruling protects Michiganders from the monstrosity of *Craft*[1023] in tax cases.[1024]

Under pure state law, the question rarely matters.[1025] But, bankruptcy courts deal with future interests frequently.[1026] In particular, Tennessee bankruptcy courts have often pondered administration of the contingent remainder in the bankruptcy estate.

1022. *Id.*

1023. *Craft V*, 535 U.S. 274, 297 (2002).

1024. *Supra* notes 310–347 and accompanying text.

1025. The question arises under state law when an individual creditor has docketed a judgment and the two spouses are under contract to convey marketable title to a buyer. Marketable title requires that there be no lien on the debtor spouse's contingent remainder. In Pennsylvania, for example, there *is* a lien, but the spouses may nevertheless convey marketable title. *See supra* notes 329–335 and accompanying text (explaining how the Pennsylvania tenancy begins to resemble that of Kentucky after all).

1026. *See In re* Arwood, 289 B.R. 889, 895 (Bankr. E.D. Tenn. 2003) (discussing future interests in the context of homestead rights); Nunley v. Paty Co. (*In re* Nunley), 109 B.R. 784, 786 (Bankr. E.D. Tenn. 1990) (discussing a dispute regarding a future interest between two debtors).

a. Tennessee

In Tennessee, the debtor's contingent remainder goes into the bankruptcy estate as nonexempt property.[1027] Debtors have tried to apply a monetary homestead against this contingent remainder in the hopes of exempting the contingent remainder.[1028] Such attempts have been properly rejected in Tennessee cases.[1029] The homestead is connected with a *present* right of possession.[1030] By definition, the contingent remainder is not a present right of

---

1027. *See* Arango v. Third Nat'l Bank in Nashville (*In re* Arango), 992 F.2d 611, 615–16 (6th Cir. 1993) (finding that a pre-existing judicial lien on the contingent remainder cannot be avoided because the contingent remainder is not exempt in bankruptcy).

1028. *See In re Arwood*, 289 B.R. at 895 (explaining that a homestead right is a right of occupancy and not an estate in land); *In re* Walls, 45 B.R. 145, 147 (Bankr. E.D. Tenn. 1984) ("[T]he homestead right is a right of occupancy, not an estate in land . . . ."); Carey v. Carey, 43 S.W.2d 498, 499 (Tenn. 1931) (stating that the homestead right "does not constitute an estate in the lands, but is merely a right of occupancy and use"). A contrary case is *Nunley*. In a joint case, two debtors claimed a $7,500 homestead in a tenancy by the entirety worth $7,298 after senior mortgages were accounted for. *Nunley*, 109 B.R. at 785. The husband had an individual creditor with a large docketed judgment. *Id.* He sought to avoid this judicial lien because it impaired his homestead exemption. *Id.* Because it was a joint case, the court reasoned that the bankruptcy trustee could sell a fee simple absolute estate. *Id.* at 787–88. This is not so if there were no joint creditors. The two unconsolidated bankruptcy estates each had a contingent remainder in it, and the two contingent remainders were all that could be sold. *Infra* notes 1168–1193.

Based on its false assumption, the court figured that, if the trustee were to sell, the spouses would be entitled to take $7,500 of the proceeds because of the homestead right. *See* TENN. CODE ANN. § 26-2-301 (2007) (providing that a couple jointly may claim $7,500 as a homestead right). In other words, the trustee's sale would "burst the dam" and end the tenancy by the entirety. The existing judicial lien would then encumber the proceeds of Daniel's 50% share of the tenancy. In this event, the judicial lien would impinge on the homestead right. Accordingly, the judgment lien was avoided. *Nunley*, 109 B.R. at 789. Properly, the judgment lien encumbered only the future interest, which was not presently homesteadable.

1029. *See In re Arwood*, 289 B.R. at 895 (explaining that homestead rights are a right of occupancy and not an estate in land); *Walls*, 45 B.R. at 147 (explaining that the homestead right is not an estate in land but a right of occupancy); *Carey*, 43 S.W.2d at 499 (stating that the homestead right is not an estate in the lands, but merely a right of occupancy).

1030. *See* Carey v. Carey, 43 S.W.2d 498, 500 (Tenn. 1931) ("But being a mere exemption of a right of occupancy, the right of present occupancy is essential to the existence of the homestead.").

possession, and, therefore, may not be made subject to the homestead right—for the moment!

The contingent remainder is therefore not presently homesteadable, and so the trustee may presently sell it. Because the future interest is not exempt property, the trustee may keep all the proceeds[1031] and need give none of them to the debtor.[1032]

A present homestead right applied to the future interest is a comparison of apples and oranges. For example, in *In re Walls*,[1033] the debtor had a 50% entireties share worth $27,000.[1034] If this equity could be *presently* liquidated for the benefit of joint creditors claiming more than that amount, the debtor could justly and *presently* claim a $5,000 homestead right. But, the debtor's contingent remainder in this equity was worth far less than $27,000 because this amount could only be realized in the future, and is therefore subject to discount—both for the time value of money and for the considerable risk that the debtor may not survive the nondebtor spouse.[1035] For example, let's suppose there is a 10% chance that the debtor will be the surviving spouse. The remainder is thus worth only $2,700, and even this figure must be further discounted because survivorship might not be determined for many years. But, if we are going to impose these discounts on the value of the real property, it follows that we should also discount the $5,000 homestead for the same contingencies.[1036]

1031. *See In re* Dick, 136 B.R. 1000, 1004 (Bankr. W.D. Tenn. 1992) (explaining that "the debtor may not claim any proceeds from the sale of that survivorship interest").

1032. *See In re* Elsea, 47 B.R. 142, 144 (Bankr. E.D. Tenn. 1985)

> There is no good practical reason to allow the homestead exemption from the proceeds of a sale of the right of survivorship. Sale of the right of survivorship will not deprive the debtor of the use of the property. That will occur only if the debtor is the survivor. Then the purchaser will be entitled to the property. . . . The better approach is to sell the survivorship interest subject to the debtor's right to a homestead exemption if and when he is the survivor.

1033. 45 B.R. 145 (Bankr. E.D. Tenn. 1984).

1034. *Id.* at 145.

1035. *See id.* at 147–48 (explaining how courts will postpone the sale until the debtor's homestead right has expired).

1036. *See In re Dick*, 136 B.R. at 1004 ("If the debtor were allowed to receive his homestead exemption when the survivorship interest was sold, then the debtor would have received a windfall in the event that he did not survive his wife.").

In *Walls*, the trustee already had received a bid of $500 for the remainder and proposed to auction it off to a higher bidder, if any.[1037] The debtor claimed that there could be no sale unless the bid exceeded $5,000—enough to fund his homestead exemption.[1038] The court properly rejected the debtor's claim.[1039] The debtor was seeking to apply an undiscounted $5,000 charge against the present sale of a deeply contingent future interest.[1040]

Just as a Tennessee judicial lien creditor could sell,[1041] the *Walls* court thought that the "trustee may sell the debtor's

---

1037. *Walls*, 45 B.R. at 145.

1038. *Id.*

1039. *See id.* at 149 ("The trustee may sell the debtor's survivorship interest in his marital residence subject to the debtor's homestead right upon notice in accordance with Bankruptcy Rules 2002 and 6004.").

1040. *Id.* at 145. This point was missed in a Rhode Island case, where the tenancy by the entirety resembled the Tennessee pattern. *See generally In re* Ryan, 282 B.R. 742 (D.R.I. 2002). In *In re Ryan*, the debtor attempted to assert the Rhode Island homestead exemption to prevent the sale of the contingent remainder. *Id.* at 746. Under the *Walls* reasoning (soon to be explained), the sale should go forward, and the homestead exemption would apply only if the debtor spouse survived the nondebtor spouse. Instead, the district court entertained the possibility that the homestead amount might prevent the present sale of the remainder. *Id.* at 748. According to the facts of the case, the debtor's house had $150,000 in equity in it, given a first mortgage. *Id.* at 746. The debtor's share of this was 50% or $75,000 (if we ignore the comparative life expectancies between the spouses). *Id.* The Rhode Island homestead limitation was $100,000. *Id.* The debtor argued that the homestead amount could protect the contingent remainder if there was an excess homestead right after it was applied to the debtor's present right of possession. *Id.* That is, the debtor's share of the house was worth $75,000, the homestead amount was $100,000 and so (argued the debtor) no sale of the contingent remainder could occur unless the trustee obtained a price of better than $25,000. *Id.* The trustee was permitted to sell the contingent remainder for only $5,000. *Id.* The court erroneously treated the debtor as the 100% owner of the property, not a 50% owner. *Id.* at 750. Therefore, the $100,000 homestead right was exhausted against the total equity of $150,000. *Id.* Being exhausted, the homestead right could not be invoked to prevent the present sale of the contingent remainder.

1041. *See* Waddy v. Waddy, 291 S.W.2d 581, 581 (Tenn. 1956) (finding that it was proper for the "defendant's interest in the property be sold subject to the defendant's homestead rights"). A confusing statement is made in *Walls*: "A judgment creditor may levy on the survivorship interest of a tenant by the entirety, but the creditor succeeds to the estate only in the event his debtor outlives the other tenant by the entirety." *In re* Walls, 45 B.R. 145, 146 (Bankr. E.D. Tenn. 1984). The creditor, in fact, has a *present* right of sale to a buyer, and it is the *buyer* who would succeed to the (fee simple) estate if the debtor is the survivor. The *Walls* statement is right only if the judgment creditor bids in the judgment *presently* and becomes the buyer of the contingent remainder.

survivorship interest in his marital residence *subject to the debtor's homestead right*."[1042] Now what may *that* mean? The idea in *Walls* is that, later, should the debtor survive the nondebtor spouse, the buyer has a present right of possession and the debtor has a *present* homestead right of $5,000 (or $7,500 in a joint case).[1043] While the nondebtor spouse lived, the contingent remainder did not represent a *present* right of possession, but only a future one. But, once the nondebtor spouse is predeceased, the debtor spouse has a *present* right of possession and therefore a present homestead right. Of course, knowing this, the buyer discounts her present bid by the future expected value of the homestead obligation. Ultimately, the present creditors effectively pay for the debtor's future homestead right.

Metaphysically, this is odd. The homestead right is usually in conflict with *liens*, not with a right of possession. Typically, where a sale of exempt property occurs, the buyer takes complete title and the exemption is, at best, a charge against the proceeds of the sale.[1044] A conflict between the new possessor-buyer and the old possessor never comes into view. The *Walls* solution, therefore, engenders the conflict between two possessors—the debtor and the buyer who bought the contingent remainder.

How shall one adjudicate this conflict? The Tennessee courts have yet to provide any guidance, so one must indulge in pure speculation. For instance, the buyer has a present right of possession, once the nondebtor spouse has died. As present possessor, the buyer is entitled to a writ ejecting the debtor from the premises. Perhaps the homestead right is a defense to this ejectment action. That is to say, the price of an ejectment is payment by the buyer of the $5,000. Or, alternatively, suppose the buyer uses self-help to take possession away from the debtor. Perhaps the debtor has an equitable lien on the premises in order to realize the $5,000. What if the buyer has a purchase money lender with a mortgage on the contingent remainder? What

---

Alternatively, the creditor could defer enforcing the lien until the husband was the fee simple owner. At that point, the creditor could force the sale of a fee simple estate to a buyer.

1042. *Walls*, 45 B.R. at 149 (emphasis added).

1043. *Id.*

1044. Often proceeds of exempt property are not themselves exempt. Dunham, *supra* note 677, at 317.

priority does that mortgage have once the debtor is established as the survivor of his spouse? One can imagine that, because the debtor's homestead right is "prior" to the buyer's ownership of the contingent remainder, the buyer cannot possibly give a senior mortgage to block the homestead right. In other words, under these circumstances, the homestead right is a lien—not something usually conceived when one contemplates a monetarily limited exemption. Exemptions are an immunity *from* a lien and not usually thought to *be* a lien (i.e., a power of sale) as such.[1045]

b. Illinois

The question of administering the future interest has challenged bankruptcy courts in Illinois. In 1990, Illinois revived the tenancy by the entirety after having abolished it in 1861 as a medieval barbarism.[1046] According to 765 ILCS § 1005/1c:

> Whenever a . . . conveyance . . . of property . . . *maintained or intended for maintenance as a homestead* by both husband and wife together during coverture shall be made and the . . . conveyance . . . expressly declares that the . . . conveyance is made to tenant by the entirety, . . . the

1045. A strange and questionable vision of the Tennessee situation is presented in *Dick*. *In re* Dick, 136 B.R. 1000, 1004 (Bankr. W.D. Tenn. 1992). A creditor had recorded a judgment against the debtor spouse. *Id.* at 1001. In bankruptcy, the debtor claimed that the creditor's judicial lien impaired the homestead exemption and thus should be avoided under Bankruptcy Code § 522(f)(1). *Id.* The court found that the judicial lien on the debtor's contingent remainder did not impair the $5,000 homestead exemption because the homestead exemption could not be applied to the contingent remainder. *Id.* at 1006. So far so good. The court went on to speculate that the trustee might sell the contingent remainder to a buyer, even though the creditor had a judicial lien on the remainder. *Id.* at 1004. In the court's view, the trustee could sell the remainder free and clear of the judicial lien. *Id.* at 1005. The cash received would be escrowed to bankroll the debtor's homestead exemption. *Id.* The trustee would receive a sales expense (presumably pursuant to Bankruptcy Code § 506(c)), and the judgment creditor would receive only proceeds beyond this amount. *Id.* This vision, however, asserts that the debtor *does* have a homestead in the contingent remainder, when earlier in the opinion this very proposition was denied.

1046. *See In re* Tolson, 338 B.R. 359, 365 n.3 (Bankr. C.D. Ill. 2005) (explaining how the Illinois General Assembly "reinstituted in Illinois the form of ownership known as tenancy by the entirety, ending a 129 year hiatus"); *In re* Chinosorn, 243 B.R. 688, 692–93 (Bankr. N.D. Ill. 2000) (discussing the revival of the tenancy by the entirety estate in Illinois).

> estate created shall be deemed to be in tenancy by the entirety.[1047]

Note that Illinois limits the tenancy by the entirety to real property used as *the debtor's principal residence*—a limitation not generally present in the Michigan-style tenancy by the entirety.[1048]

According to 735 ILCS 5/12-112:

> All the lands . . . (except such as is by law declared to be exempt) of every person against whom any judgment has been . . . entered in any court, for any debt . . . shall be liable to be sold upon such judgment. Any real property, any beneficial interest in a land trust, or any interest in real property held in a revocable inter vivos trust or revocable inter vivos trusts created for estate planning purposes, held in tenancy by the entirety shall not be liable to be sold upon judgment entered on or after October 1, 1990 against only one of the tenants . . . .[1049]

Several bankruptcy courts in Illinois have wondered whether or not this language exempts the contingent remainder of the debtor spouse. The result is a string of challenging lower court cases on the question, many of which misread the cases that preceded. I shall consider four of them in chronological order. All of these cases involve § 522(f)(1), avoidance of judicial lien obtained by individual creditors.

1047. 765 ILL. COMP. STAT. 1005/1c (2011) (emphasis added). "Coverture" simply means "during the marriage." *Chinosorn*, 243 B.R. at 693 n.3.

1048. *See* Planas v. Feltman (*In re* Planas), No. 98-0506-CIV-NESBITT, 1998 U.S. Dist. LEXIS 20524, at *4–13 (S.D. Fla. Aug. 21, 1998) (noting that warehouses were held by the entireties).

1049. 735 ILL. COMP. STAT. 5/12-112. Because of this reference to trusts, an equitable interest in trust property can be held in the entireties. *See* Loventhal v. Edelson, 844 F.3d 662, 665 (7th Cir. 2016) ("So the tenancy by the entirety will perdure no matter what changes Mr. Edelson makes in the trust."). *See generally* 765 ILL. COMP. STAT. 1005/1c. Elsewhere, ownership by a trustee for the benefit of spouses is thought to be inconsistent with the entireties form. *See* Jensen v. Anderson (*In re* Anderson), 561 B.R. 230, 238 (Bankr. M.D. Fla. 2016) (finding that a trustee is not protected by the tenancy by the entireties); Lewiston v. Kohut (*In re* Lewiston), 539 B.R. 154, 159 (E.D. Mich. 2015) (finding that the trustee could not hold by the entireties); *In re* Brewer, 544 B.R. 177, 181 (Bankr. W.D. Mo. 2015) (same). *But see In re* Bellingroehr, 403 B.R. 818, 821 (Bankr. W.D. Mo. 2009) (stating that the trust property could be held in the entireties).

The first in our quartet of confusion is *In re Allard*,[1050] where the debtor and his nondebtor spouse held by the entireties.[1051] Thereafter, a creditor filed a memorandum of judgment with the Recorder of Deeds in the local county.[1052] If the debtor had non-exempt real property, this filing would have created a judgment lien on such property.[1053]

The debtor responded with a bankruptcy petition and, on Schedule C, claimed the tenancy by the entirety was exempt.[1054] He likewise claimed a $7,500 homestead exemption.[1055] Neither the trustee nor any unsecured creditor objected to Schedule C.[1056] Thirty days after the first scheduled creditor meeting, any such objection was barred by Federal Rule of Bankruptcy Procedure 4003(b).[1057] The debtor then sought to avoid the creditor's alleged lien under § 522(b)(1).[1058]

Judge John Squires ruled that the creditor "cannot now object to the Debtor's claims of exemption, and the inquiry could end at this point."[1059] Why this should be so is a mystery. The issue in the case is *not* whether the tenancy by the entirety was exempt.[1060] The issue was whether a lien attached to it in a way that impaired the exemption. In any case, Judge Squires waived this alleged point and gave advice on the nature to the tenancy by the entirety.[1061]

1050. 196 B.R. 402, 410 (Bankr. N.D. Ill. 1996), *aff'd*, 202 B.R. 938 (N.D. Ill. 1996).

1051. *Id.* at 408.

1052. *Id.* at 406.

1053. *See generally* 735 ILL. COMP. STAT. 5/12-101 (2014).

1054. *Allard*, 196 B.R. at 408.

1055. *Id.*

1056. *Id.*

1057. FED. R. BANKR. P. 4003(b).

1058. *In re* Allard, 196 B.R. 402, 408 (Bankr. N.D. Ill. 1996), *aff'd*, 202 B.R. 938 (N.D. Ill. 1996).

1059. *Id.*

1060. Suppose a debtor were to list land as a tenancy by the entirety which was in fact not held in that capacity. In *In re Mukhi*, 246 B.R. 859 (Bankr. N.D. Ill. 2000), the court ruled that the Rule 2003(b) deadline precluded a challenge to the status of ownership—a position now reversed by the 2008 amendment to Rule 4003(d). *Id.* at 866. But *Allard* was a different case. In *Allard*, no one disputed that the land was held by the entirety. *Allard*, 196 B.R. at 405. The only question was whether, under Illinois law, any judicial lien attached to it. *Id.*

1061. *See Allard*, 196 B.R. at 408 ("Due to the lack of any bankruptcy case law in the area of Illinois entireties homestead property, however, the Court will

Judge Squires noted that, whereas 735 ILCS 5/12-101 states generally that judgments memorialized by the recorder of deeds are liens on local property, 735 ILCS 5/12-112 states that "tenancy by the entirety shall not be liable to be sold."[1062] Judge Squires interpreted this to mean that there *was* a lien on the tenancy by the entirety, but there was also a moratorium on sale.[1063] Meanwhile, Bankruptcy Code § 522(b)(3)(B) holds that the entireties must be "exempt from process under applicable nonbankruptcy law."[1064] Judge Squire figured that the debtor's tenancy was *partially* exempt from process.[1065]

This notion of partial exemption is metaphysically complex. On the one hand, the individual creditor has a lien,[1066] which cannot be enforced, for the moment. Presumably, it can be enforced later, when the tenancy by the entirety is transformed by death, divorce, sale, or cessation of principal residency.[1067] So the lien begins to resemble a lien on the debtor's contingent remainder. But, not quite. A true lien on a contingent remainder could result in a *present sale* of this right.[1068] In Judge Squire's view, there could be *no* sale until the contingent remainder became possessory.[1069] Meanwhile, should the debtor and his spouse try to sell the residence, a buyer would receive an estate encumbered by

---

further discuss the issues surrounding . . . the Debtor's motion" to avoid the creditor's alleged judicial lien under § 522(f)(1)).

1062. *Id.* (emphasis omitted) (quoting 735 ILL. COMP. STAT. 5/12-112 (2016)).

1063. *See id.* at 410 (explaining that "Great Southern's lien will remain on the Property" and that "under the Illinois statute the Debtor's Property cannot be sold upon Great Southern's judgment, it is exempt from the forced sale process").

1064. 11 U.S.C. § 522(b)(3)(B) (2012).

1065. *See Allard*, 196 B.R. at 410 (holding that "the language of the Illinois statute, 'shall not be liable to be sold upon judgment' is akin to property being partially 'exempt from process' as provided in § 522(b)(2)(B)").

1066. Judge Squires concluded that, under Illinois law, "where the right of sale cannot be asserted, the existence of the lien must be denied." *Id.* at 410. But he does not really do anything with this observation, in that he assumes that the creditor in *Allard did* have a lien (though no right of sale).

1067. This vision somewhat resembles the result in *Fleek v. Zillhaver*, 12 A. 420 (Pa. 1887). *Supra* notes 330–335 and accompanying text.

1068. Such a lien exists in Tennessee and Rhode Island. *See generally* Stephenson v. Gen. Motors Acceptance Corp. (*In re* Stephenson), 19 B.R. 185, 189 (Bankr. M.D. Tenn. 1982); *In re* Ryan 282 B.R. 742, 748 (D.R.I. 2002).

1069. *In re* Allard, 196 B.R. 402, 415 (Bankr. N.D. Ill. 1996), *aff'd*, 202 B.R. 938 (N.D. Ill. 1996).

the creditor's judicial lien.[1070] The marital entity would not be in a position to deliver a marketable title, as the Pennsylvania marital entity was able to do in *Beihl v. Martin*.[1071]

On the other hand, the tenancy by the entirety is exempt. The nature of the exemption is immunity from any present sale, whether a sale of the present right of possession or of the contingent remainder. So, "partial" exemption accommodates both the creditor's existing lien *and* the temporary immunity from sale.

On this analysis, it is hard to see how the lien impairs an exemption, under § 522(f)(1). The exemption is limited to an immunity from sale. The tenancy by the entirety is not *wholly* exempt from the lien.

Nevertheless, Judge Squires avoided the lien by applying the test for impairment which (since 1994)[1072] is set forth in § 522(f)(2)(A):

> For the purposes of this subsection, a lien shall be considered to impair an exemption to the extent that the sum of—
>
> (i) the lien;
>
> (ii) all other liens on the property; and
>
> (iii) the amount of the exemption that the debtor could claim if there were no liens on the property exceeds the value that the debtor's interest in the property would have in the absence of any liens.[1073]

According to Judge Squires, the lien:

> [I]mpairs the Debtor's exemptions claimed in the Property because that lien ($140,441.04), which is the only lien on the Property, and the amount of the exemptions ($120,000 and $7,500) that the Debtor could and did claim if there were no liens on the Property, exceeds the value that the Debtor's

1070. For a similar holding under Vermont law, see *In re Cerreta*, 116 B.R. 402, 405 n.5 (Bankr. D. Vt. 1990) ("In effect, what happens is the [individual] judgment creditor must play a vulture's waiting game.").

1071. *See generally* Beihl v. Martin, 84 A. 953 (Pa. 1912); *supra* notes 335–336 and accompanying text.

1072. Bankruptcy Reform Act of 1994, Pub. L No. 103-394, § 303, 108 Stat. 4106, 4132.

1073. 11 U.S.C. § 522(f)(2)(A) (2012).

> interest in the Property would have in the absence of any liens.[1074]

That is, the § 522(f)(2)(A) formula yielded $147,941.04 worth of avoidance, more than enough to destroy the creditor's (allegedly) secured claim of $140,441.04.[1075]

In this interpretation, Judge Squires changed horses midstream. Although the debtor was entitled only to an immunity from sale (the *partial* exemption), Judge Squires assumed a *total* exemption for the purpose of applying § 522(f)(2)(A).[1076] That is, as a matter of state law, the debtor enjoyed an immunity from sale, which would end when the property was no longer a principal residence or a tenancy by the entirety. But in bankruptcy, the tenancy by the entirety was viewed as *wholly* exempt for the purpose of the § 522(f)(2)(A) calculation.[1077] This makes no sense.

This view of the Illinois judicial lien wreaks havoc on subsequent joint creditors seeking enforcement under state law. Recall that joint creditors may obtain liens on the tenancy by the entirety as a matter of state law.[1078] If the *individual* creditor in *Allard* really had a lien, this lien would be senior to any

---

1074. *Allard*, 196 B.R. at 411. The $120,000, representing the estimated unencumbered value of the residence, should have been $60,000 because the debtor's share of the value was only a 50% share. The $7,500 exemption represents the Illinois homestead exemption. *Id.* at 407.

1075. That is, $267,941.04 - $120,000 = $147,941.04. This calculation can be challenged. First, Judge Squires allowed the debtor to exempt the whole value $120,000 *and* to claim $7,500 to boot. *Id.* at 411. This overtaxed the creditor by $7,500. The minuend should have been $260,941.04. Much mitigating this error, however, Judge Squires valued the property at $120,000, whereas the debtor only owned 50% of the property. *Id.* Judge Squires should have listed the subtrahend as $60,000, which actually increases the avoiding effect of the formula. *Id.* For a similar calculation resulting in total obliteration of a lien on a tenancy by the entirety (if it existed at all), see *In re* Mukhi, 246 B.R. 859, 866 (Bankr. N.D. Ill. 2000).

1076. *See Allard*, 196 B.R. at 411 (holding that "Great Southern's lien impairs the Debtor's exemptions claimed in the Property because that lien ($140,441.04) . . . and the amount of the exemptions ($120,000 and $7,500) . . . exceeds the value that the Debtor's interest in the Property would have in the absence of any liens"); 11 U.S.C. § 522(f)(2)(A).

1077. *See* 11 U.S.C. § 522(f)(2)(A) (including the full amount of the exemptions ($120,000 and $7,500) in the calculation).

1078. *See* 735 ILL. COMP. STAT. 5/12-112 (2016) ("Any real property . . . [held] in tenancy by the entirety shall not be liable to be sold upon judgment . . . against only one of the tenants . . . .").

subsequent joint creditor's lien. If a subsequent joint creditor were to attempt a sale, the lien of the individual creditor would survive the execution sale. If the individual creditor's lien is large enough, the joint creditor will realize on only the non-debtor spouse's 50%. The sale bursts the dam, so that the buyer takes only the subject to a presently enforceable lien on a 50% cotenancy. In effect, the joint creditor is squeezed out of the debtor's 50% share and the individual creditor.

Inside the bankruptcy proceeding, however, all is well, because the individual creditor's lien is entirely avoided. Subrogatin to the claims of the joint creditors, the trustee can sell free and clear of the individual creditors' liens.[1079] Thus, the bankruptcy result exalts the unsecured joint creditors over the secured individual creditors, whereas the state result (implied by Judge Squires' ruling) subordinates the joint creditors to the individual creditors. Thus, the bankruptcy result and the state result are out of kilter.

In re Chinosorn[1080] was the next case to puzzle out whether liens attach to any part of the Illinois tenancy by the entirety. In his decision, Judge Eugene Wedoff skillfully evaded the issue of the contingent remainder, reasoning that, if a judicial lien attached to no part of the tenancy by the entirety, a § 522(f)(1) was out of order because there was no lien.[1081] On the other hand, if a lien attached to the debtor's contingent remainder, that lien did not impair an exemption because the future interest was not

1079. That is the judicial liens have been avoided via 11 U.S.C. § 522(f)(1)(A) (2012) and *supra* notes 1053–1056 and accompanying text.

1080. 243 B.R. 688 (Bankr. N.D. Ill. 2000).

1081. *Id.* at 700–01; *accord* Giles v. Chevy Chase Bank FSB (*In re* Giles), 222 B.R. 766, 768–70 (Bankr. D. Md. 1998). But see *CRP Holdings, A-1, LLC v. O'Sullivan (In re O'Sullivan)*, 544 B.R. 407 (B.A.P. 8th Cir. 2016), where the court upheld an avoidance action against an individual creditor with a judgment against a debtor spouse, even though the lien did not attach to the tenancy by the entirety. *Id.* at 413–14. The mere fact that the docketed judgment existed was a "cloud on the title" meriting avoidance. *Id.* There seems to be an unwarranted assumption in the case law that, where an individual creditor has docketed a judgment, its "lien" on the tenancy by the entirety (which never did *exist*) should be "avoided." *See generally* Massie v. Yamrose, 169 B.R. 585 (W.D. Va. 1994); *In re* Holler, 463 B.R. 733 (Bankr. E.D. Pa. 2011); Allan v. Putnam Cty. Nat'l Bank, 431 B.R. 580 (Bankr. M.D. Pa. 2010). Such cases ignore the language of § 522(f)(1), which requires the *fixing* of a lien.

exempt.[1082] The proof of non-exempt status was the very fact that the lien attached in the first place. Once again, § 522(f)(1) avoidance was out of order.[1083] In the course of this reasoning, Judge Wedoff conceded that the existence of a lien on the contingent remainder was possible but not certain.[1084] It was simply an *Erie* guess[1085] he did not have to make.

The *Chinosorn* vision differs from that in *Allard*. In *Chinosorn*, the present right of possession would be exempt. If the lien on the contingent remainder exists, it is fully enforceable after bankruptcy. It would not (at least in Judge Wedoff's imagination) be an embargoed lien, as in *Allard*.[1086] Of this possible lien on the contingent remainder, Judge Wedoff wrote:

> Moreover, recognizing such a lien may be the most reasonable method of balancing the interests involved in tenancy by the entirety. On one hand, since the lien would only apply to contingent future interests of an individual tenant, the interests of the other tenant would be protected. Thus, for example, a wife's interest in the family home held in tenancy by the entirety would not be alienable as a result of her husband's debts. On the other hand, where one tenant did incur individual debt, judgments recorded against that tenant's interest would provide for an orderly priority of . . . tenancy . . . .[1087]

On appeal, Judge Wedoff was reversed based on a misunderstanding. Here is what the district court thought Judge Wedoff had ruled:

1082. *Accord* Arango v. Third Nat'l Bank in Nashville (*In re* Arango), 992 F.2d 611, 615 (6th Cir. 1993) (finding that the debtor could not avoid a lien on his contingent remainder under § 522(f)(1)).

1083. One court has implied that, even if a judicial lien never affixes to the exemption, the debtor is nevertheless entitled to avoidance. *See generally In re* Moreno, 352 B.R. 455 (Bankr. N.D. Ill. 2006); *In re* Allard, 196 B.R. 402, 410 (Bankr. N.D. Ill. 1996), *aff'd*, 202 B.R. 938 (N.D. Ill. 1996).

1084. *See Chinosorn*, 243 B.R. at 696 (explaining that "a judgment against an individual owning property as a tenant by the entirety, when properly recorded, appears to give rise to a lien, not against the entirety property itself, but rather against the individual tenant's contingent future interests").

1085. *See* Haley N. Schaffer & David F. Herr, *Why Guess?* Erie *Guesses and the Eighth Circuit*, 36 WM. MITCHELL L. REV. 1625, 1626 (2010) ("An '*Erie* guess' is an attempt to predict what a state's highest court would decide if it were to address the issue itself.").

1086. *Chinosorn*, 243 B.R. at 698.

1087. *Id.* at 696.

> The bankruptcy judge [found] . . . that in order to avoid a lien under § 522(f)(1)(A), Chinosorn must have substantive entitlement to the claimed exemption. Thus, under 11 U.S.C. § 522(f)(1)(A), Chinosorn could not avoid the judicial lien, regardless of the fact that [the creditor] failed to timely object. In essence, the bankruptcy judge found that the exemption by default provision set forth in § 522(*l*) does not apply to lien avoidance motions.[1088]

In other words, the district court thought that Judge Wedoff should have recognized the supposed efficacy of the Rule 4003(b) deadline for objecting to Schedule C. The missed deadline should have implied total lien avoidance. In fact, what Judge Wedoff had ruled is that, *whether or not* the property was exempt, § 522(f)(1) did not apply. Be that as it may, the case was remanded where presumably Judge Wedoff could simply reissue his opinion, because failure to object under Rule 4003(b) was entirely immaterial.[1089] In any case, the Seventh Circuit, in *In re Schoonover*,[1090] would soon rule that the 4003(b) deadline cannot be used to avoid judicial liens on property wrongly claimed to be exempt.[1091] In the course of so doing, the *Schoonover* court went out of its way to disapprove of the *Chinosorn* reversal.[1092] Meanwhile, the Advisory Committee for the Federal Rules of Bankruptcy Procedure has confirmed the *Schoonover* conclusion in a 2008 amendment to Rule 4003(d).[1093]

We get another interpretation of the Illinois tenancy by the entirety in *In re Tolson*.[1094] Again, the case concerns § 522(f)(1) avoidance.[1095] The decision is post-*Schoonover*, so happily there is nothing in *Tolson* about the lien creditor's failure to object to the

1088. Chinosorn v. Fleet Bus. Credit Corp. (*In re* Chinosorn), 248 B.R. 324, 325 (N.D. Ill. 2000).

1089. *See id.* at 328 ("Therefore, the bankruptcy court should have granted Chinosorn's motion to avoid the lien on the basis that Fleet's failure to timely object to the claimed exemption prevented Fleet from later objecting to the validity of the exemption.").

1090. 331 F.3d 575 (7th Cir. 2003).

1091. *Id.* at 577–78.

1092. *See id.* at 578 ("To the extent that [*Chinosorn*] reaches a different conclusion, it is disapproved.").

1093. *Supra* notes 972–973 and accompanying text.

1094. *In re* Tolson, 338 B.R. 359 (Bankr. C.D. Ill. 2005).

1095. *See id.* at 363 (explaining that the case involved a debtor who moved to avoid a judicial lien pursuant to § 522(f) of the Bankruptcy Code).

exemption under Rule 4003(b). Indeed, *Tolson* makes clear that the Rule 4003(b) deadline always was a red herring, entirely irrelevant to the analysis of any of the foregoing cases.[1096]

In *Tolson*, Judge Thomas Perkins declared that the contingent remainder in the tenancy by the entirety is the individual property of the debtor.[1097] As to this a lien could attach.[1098] Without more, one would say that the contingent remainder is not exempt property, and the lien that attaches to it impairs no exemption. But, Judge Perkins found otherwise. Avoidance was permitted.[1099]

If indeed there were a lien on the contingent remainder, the sheriff could hold a present execution sale where the future interest could be liquidated. But Judge Perkins also stated that "the judgment creditor's ability to enforce a lien is suspended."[1100] "Construing the lien as attaching to the judgment debtor's future interest, though presently unenforceable, in this Court's view, does not diminish the special protection afforded the marital unity by the entireties estate."[1101]

Judge Perkins' vision is that the individual creditors have present liens that cannot be enforced:

> Moreover, because the primary purpose of the tenancy by the entirety law is to protect the ability of a married couple to retain occupancy of the marital homestead against the creditors of only one spouse while the marriage is intact, there is no apparent reason to upset the traditional lien priority scheme of first in time, first in right. That purpose is fully served by restricting the enforceability of single-tenant judgments so long as the entireties tenancy remains in place while still permitting the lien to attach to the judgment debtor's interest. Once the tenancy is broken, however, and the property becomes fair game for all creditors, judgment lienors should be permitted to queue

1096. *Id.*

1097. *Id.* at 367.

1098. *See id.* ("[T]he contingent right of survivorship of each entireties tenant is a present property right to which a judicial lien extends."). For this proposition, Judge Perkins finds inspiration in *Beihl*. *See supra* notes 324–329 and accompanying text (discussing the *Beihl* case and its finding that, after a spouse dies, the estate stays the same, but the estate holder becomes the individuality of the survivor).

1099. *See Tolson*, 338 B.R. at 371 ("Since he is entitled to the full exemption, the DEBTOR may avoid the fixing of HEIGHTS BANK'S judicial lien.").

1100. *Id.* at 366.

1101. *Id.* at 369 n.8.

> up in the order in which they recorded their liens regardless of whether they hold a judgment against both or only one tenant. There is no reason to deprive the holder of a judgment against only one tenant of the priority obtained by winning the face to the recorder's office notwithstanding that enforceability of the judgment was temporarily stayed.[1102]

This particular vision has the negative side effect, noted earlier,[1103] on the lien of a joint creditor, which (outside bankruptcy) *is* presently enforceable. In bankruptcy, this vision does not seriously interfere with the administration of the tenancy by the entirety where joint creditors are present for the simple reason that the lien of the individual creditor is entirely avoided.

Judge Jack Schmetterer went a step further in *In re Yotis*[1104] to predict that the Illinois Supreme Court would, if asked, hold that a present lien attaches to the contingent remainder of the debtor spouse.[1105] As a result, the contingent remainder is not exempt property.[1106] The lien against it is not subject to avoidance.[1107] As to the lien on the possessory interest of the marital entity, Judge Schmetterer affirmed that no lien exists.[1108] Confusingly, Judge Schemetterer also referred to the need to *avoid* the nonexistent lien on the possessory right.[1109] That which does not exist need not be avoided. Indeed, the need to avoid implies that, outside of bankruptcy, the lien exists, which is surely not what Judge Schmetterer meant to imply.

1102. *Id.* at 368–69.

1103. *Supra* notes 1033–1040 and accompanying text.

1104. 518 B.R. 481 (Bankr. N.D. Ill. 2014).

1105. *See id.* at 488–89 ("Thus, under the reasoning in *Chinosorn*, which is the reasoning likely to be adopted by the Illinois Supreme Court if it is squarely presented with the issue, the judgment lien involved here does not attach to the fee interest presently held in tenancy by the entirety . . . .").

1106. *See id.* at 489 (finding that, for contingent future interests, "the exemption under § 522(b)(2)(B) has been held not to apply").

1107. *Id.* at 490.

1108. *See id.* at 488 ("When a creditor obtains a judgment against either spouse of a married couple but not both jointly, the resulting judicial lien does not attach to the fee interest in property held by the married couple as tenants by the entirety.").

1109. *See id.* at 485 (explaining that a lien must be avoided when a right of sale cannot be asserted).

c. Massachusetts

A flaw with at least two of the four Illinois cases discussed is that § 522(b)(3)(B) requires that the tenancy by the entirety be "exempt from process under applicable nonbankruptcy law."[1110] But, if under Illinois law, the individual creditor may obtain an embargoed lien on the whole, then is not the entireties *subject* to process under applicable law? In that case, the tenancy by the entirety is not exempt property at all. Rather, the individual debtor can only claim the homestead (quantitatively limited in amount) on the principal residence.

This was the conclusion reached in *In re Smither*.[1111] Massachusetts has a statutory tenancy by the entirety that exactly matches that of Illinois.[1112] In *Smither,* the debtor maintained a revolving equity home loan facility to cover business expenses.[1113] On his Schedule C, the debtor listed his rather monumental home[1114] as an exempt tenancy by the entirety, and also exempt for $500,000 under Massachusetts law as a homestead of an aged or disabled person.[1115] Before bankruptcy, the debtor reduced the amount of the outstanding revolving credit, thereby increasing the exemption value of the house for the debtor.[1116]

The Chapter 7 trustee in the case wished to reduce exemption by the amount of the revolving credit paydown. Section 522(o) provides that:

> For [the] purposes of subsection (b)(3)(A), and notwithstanding subsection (a), the value of an interest in—

1110. 11 U.S.C. § 522(b)(3)(B) (2012).

1111. *In re* Smither, 542 B.R. 39 (Bankr. D. Mass. 2015).

1112. MASS. GEN. LAWS ch. 209 § 1 (2011); *see also generally supra* Part III.B.12.b.

1113. *Smither*, 542 B.R. at 42.

1114. *Google Maps*, GOOGLE, https://www.google.com/maps/place/13+Presidential+Dr,+Southborough,+MA+01772/@42.3238588,-71.5466083,17z/data=!3m1!4b1!4m5!3m4!1s0x89e38b1ec0e09f9f:0xe24d9d5a0a148af5!8m2!3d42.3238588!4d-71.5444196 (last visited Feb. 18, 2018) (on file with the Washington and Lee Law Review).

1115. *See* MASS. GEN. LAWS ch. 188, § 2(a) (protecting the homestead of a disabled person against attachment).

1116. *Smither*, 542 B.R. at 44.

> (1) real or personal property that the debtor . . . uses as a residence . . .
>
> shall be reduced to the extent that such value is attributable to any portion of any property that the debtor disposed of in the 10-year period ending on the date of the filing of the petition with the intent to hinder, delay, or defraud a creditor and that the debtor could not exempt, or that portion that the debtor could not exempt, under subsection (b), if on such date the debtor had held the property so disposed of.[1117]

The debtor argued that his exemption was based (in the alternative) on the tenancy by the entirety, which is exempt under subsection (b)(3)(B), not (b)(3)(A).[1118] Therefore, the debtor figured, § 522(o) did not apply[1119] and so he was privileged to pay down his mortgage in fraud of the creditors.[1120] The court ruled that, under Massachusetts law, the tenancy by the entirety was not exempt from process. According to Mass. Gen. Laws ch. 209, § 1:

> The interest of a debtor spouse in property held as tenants by the entirety shall not be subject to seizure or execution by a creditor of such debtor spouse so long as such property is the principal residence of the nondebtor spouse; provided, however, both spouses shall be liable jointly or severally for debts incurred on account of necessaries furnished to either spouse or to a member of their family.[1121]

As interpreted by the Massachusetts Supreme Judicial Court in *Peebles v. Minnis*,[1122] this statute permits an individual creditor to obtain a lien on the tenancy by the entirety. The lien, however, is presently unenforceable:

1117. 11 U.S.C. § 522(o) (2012).

1118. *Smither,* 542 B.R. at 44.

1119. *See* Dillworth v. Hinton (*In re* Hinton), 378 B.R. 371, 379 (Bankr. M.D. Fla. 2007) ("[F]inding that Section 522(o) does not limit a debtor's ability to claim as exempt property owned as tenants by the entireties . . . ."). On the loophole that exists for tenancies by the entirety from § 522(o) avoidance, see Leigh J. Francis, *Calling All Debtors, Want to Defraud Your Creditors? Here is How: The Tenancy by the Entirety Loophole and the Nullification of Section 522(o), (p) and (q) of the 2005 Bankruptcy Amendments*, 18 U. MIAMI BUS. L. REV. 1, 35 (2010).

1120. Ultimately, the court would acquit the debtor of any fraudulent intent in the paydown.

1121. MASS. GEN. LAWS ch. 209, § 1 (2017).

1122. 521 N.E.2d 1372 (Mass. 1988).

> By its terms, G.L. c. 209 § 1, protects a nondebtor spouse's principal resident from "seizure or execution." It does not exempt such property from attachment. It would be an unwarranted extension of the protections afforded by the statute to construe it as also prohibiting attachment of the debtor-spouse's interest in such property. The purpose of the protections afforded is to safeguard the nondebtor-spouse's right to continued possession of his principal residence. This right is unaffected by a creditor's attaching the debtor-spouse's interest in the property. The attachment is simply a security device which protects the creditor's interest in the property as against the debtor's other creditors. . . . The defendants are entitled to the attachment to establish, among other things, the priority of their security interest in the Peebles' residence as against the claims of other creditors. This interest may be a subject of execution at some future time if, for example the nondebtor predeceases the debtor spouse, or the parties are divorced. These possibilities are sufficient to support attachment.[1123]

On the basis of *Peebles*, the *Smithers* court ruled that tenancies by the entirety are not exempt in Massachusetts.[1124] On this reasoning, they are not exempt in Illinois either.[1125]

1123. *Id.* at 1373.

1124. *In re* Smithers, 542 B.R. 39, 50 (Bankr. D. Mass. 2015); *accord In re* Weza, 248 B.R. 470, 474 (Bankr. D.N.H. 2000) (applying Massachusetts law). For a contrary case, see *In re Patenaude*, 259 B.R. 481, 483 (Bankr. D. Mass. 2001) (rejecting the notion "that the interest of an individual owner in property held as a tenancy by the entirety is so ephemeral that a continuing lien thereon impairs no exemption therein").

1125. Rhode Island has a similar state-court precedent. *See* Cull v. Vadnais, 406 A.2d 1241, 1245 (R.I. 1979) ("[A] spouse's interest in real property held by the entirety is legally sufficient to sustain a prejudgment attachment notwithstanding the fact that interest is not subject to levy and sale on execution."). On the basis of this opinion, one bankruptcy court long ago declared that tenancies by the entirety were not exempt in Rhode Island. *See In re* Gibbons, 52 B.R. 861, 868 (Bankr. D.R.I. 1985) ("Until Rhode Island legislators or courts go further than they have in insulating tenancy by the entirety property . . . we are not inclined to hold that Rhode Island law shields a debtor's interest from 'process' sufficiently to enable . . . property to qualify as exempt . . . ."). This case seems to have been forgotten. Subsequent Rhode Island cases assume that the tenancy by the entirety *is* exempt. *See In re* Ryan 282 B.R. 742, 748 (D.R.I. 2002) ("In bankruptcy, the protection afforded to the estate during the tenancy prevents the debtor's interests from being alienated from the estate without the non-debtor spouse's consent."); *In re* Strandberg, 253 B.R. 584, 588 (Bankr. D.R.I. 2000) (questioning whether a debtor would have any present interest in a property held by tenants by the entirety).

Assuming *Smithers* is correct, lien avoidance in Massachusetts becomes inscrutable. Assuming that Massachusetts residents can only choose the federal or state homestead exemption (in lieu of the tenancy by the entirety), there is still the fact that, under state law, the tenancy by the entirety continues to exist.[1126] Any lien on it is embargoed. Even though the *Smithers* exemption was based on the *homestead*, the lien surviving the bankruptcy is still limited with respect to the entireties.[1127] In a sense, the debtor has the best of both worlds—avoidance in the bankruptcy proceeding (where the debtor chooses the monetary homestead exemption) and the continuing embargo after bankruptcy, because under state law the debtor owns a tenancy by the entirety after all.[1128]

13. Divorce and Death

According to Bankruptcy Code § 522(b)(3), a debtor may exempt "any interest in property in which the debtor had, *immediately before the commencement of the case*, an interest as a tenancy by the entirety . . . to the extent such interest . . . is exempt from process under applicable nonbankruptcy law."[1129] The meaning of this provision is that the exemptibility is assessed as the matter stands on the day of the bankruptcy petition.[1130]

1126. *See* MASS. GEN. LAWS ch. 209, § 1 ("The interest of a debtor spouse in property held as tenants by the entirety shall not be subject to seizure or execution by a creditor of such debtor spouse so long as such property is the principal residence of the nondebtor spouse . . . .").

1127. *See In re Patenaude*, 259 B.R. at 483 ("[I]n Massachusetts . . . the creditor may attach (but not execute upon) one owner's interest in property held as a tenancy by the entirety." (citing *Peebles*, 521 B.R. at 1372)).

1128. *See* Vukowich, *supra* note 561, at 808 (criticizing the invitation to a "double exemption").

1129. 11 U.S.C. § 522(b)(3)(B) (2012) (emphasis added).

1130. *See* Pasquina v. Cunningham (*In re* Cunningham), 513 F.3d 318, 324 (1st Cir. 2008) ("[I]t is a basic principle of bankruptcy law that exemptions are determined when a petition is filed."); *see also* 11 U.S.C. § 522(a)(2) ("'[V]alue' means fair market value as of the date of the filing of the petition or, with respect to property that becomes property of the estate after such date, as of the date such property becomes property of the estate."). This instruction to value as of the day of bankruptcy suggests that post-bankruptcy events are not to be considered. By way of confession, I have argued that the Supreme Court, in *Schwab*, has read § 522(a)(2) out of the Bankruptcy Code. Carlson, *Role of Valuation*, *supra* note

Exempt property is expelled from the bankruptcy estate when the debtor files Schedule C and no one objects.[1131] After expulsion, § 522(c) applies, "[u]nless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose . . . before the commencement of the case."[1132] Once the exempt property is out of the bankruptcy estate, nothing in the Bankruptcy Code brings it back in.[1133] Nevertheless, when it comes to the tenancy by the entirety, courts have illegitimately considered post-bankruptcy events.

Cordova v. Mayer (In re Cordova)[1134] bursts the dam in case of divorce. In *Cordova*, a debtor claimed the entireties as exempt.[1135] Five months later, divorce terminated the entireties and made the ex-spouses tenants in common.[1136] The divorce decree awarded the debtor a fee simple absolute in the house, and the ex-husband had a "monetary lien" on the house for 25% of its value.[1137] The court ruled the house, at first exempt, was exempt no longer.[1138] Back into the estate it went.

517, at 476–81.

1131. *See* 11 U.S.C. § 522(*l*) ("Unless a party in interest objects, the property claimed as exempt on such list [of property that the debtor claims as exempt] is exempt.").

1132. *Id.* § 522(c). There are three exceptions for certain sacred debts as to which a creditor is permitted to pursue the exempt property. Most important of these are debts secured by an unavoidable lien on the exempt item. *Id.* § 522(c)(2).

1133. *See* Taylor v. Freeland & Kronz, 503 U.S. 638, 643–44 (1992) (rejecting an argument that exempt property could be included in the bankruptcy estate after the period for appeals had passed); Birney v. Smith (*In re* Birney), 200 F.3d 225, 228 (4th Cir. 1999) ("There must also be some applicable statutory mechanism by which the estate 'captures' the post-petition property."); *In re* Hamacher, 535 B.R. 180, 183 (Bankr. E.D. Mich. 2015) (noting in a tenancy by the entirety case that no provision of the Bankruptcy Code could properly bring back exempt property into the estate (citing *In re* Alderton, 179 B.R. 63, 66 (Bankr. E.D. Mich. 1995))).

1134. 73 F.3d 38 (4th Cir. 1996).

1135. *Id.* at 39.

1136. *Id.*

1137. *See id.* ("Moreover, the divorce decree awarded Cordova sole ownership of the fee simple interest in the marital home; her ex-husband received a monetary lien on the home representing twenty-five percent of the equity.").

1138. *See id.* at 43 (noting that the property became a part of the bankruptcy estate because it was received as a result of divorce within 180 days of filing the bankruptcy petition).

This result is half-wrong. With regard to the debtor's tenancy by the entirety, the debtor had successfully claimed her 50% share of the tenancy by the entirety as exempt. Once exempt, the expulsion of this 50% could not be recaptured for the bankruptcy estate. After bankruptcy, divorce converted her 50% into a tenancy in common. But, although the exempted 50% converted in its form, the debtor did not receive a new estate.[1139] So, 50% of the debtor's real property should have been considered exempt. The 50% received from the nondebtor husband is postpetition property conveyed to the debtor by the divorce decree, but it *does* enter the bankruptcy estate, nevertheless, under Bankruptcy Code § 541(a)(5), which states that "property of the estate" includes:

> Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires . . . within 180 days of such date—
>
> . . .
>
> (B) as a result of a . . . final divorce decree . . . .[1140]

The court also implied that the 100% result it reached turned on the divorce occurring within six months of the bankruptcy petition.[1141] Properly, the debtor was entitled to exempt "any interest in property in which the debtor had, *immediately before the commencement of the case*, an interest as a tenant by the entirety."[1142] Furthermore, "*[n]otwithstanding section 541* . . . an individual debtor may exempt from property of the estate the

1139. *See In re* Bradby, 455 B.R. 476, 484 (Bankr. E.D. Va. 2011) (noting that the debtor "did not acquire any new interest that she did not possess upon commencement of the case"); Zebley v. Davis (*In re* Davis), 356 B.R. 385, 387–88 (Bankr. W.D. Pa. 2006) (holding that the debtor only owned the property that he already owned as of the bankruptcy filing); *In re* Martin, 269 B.R. 119, 122–23 (Bankr. M.D. Pa. 2001) ("The majority of courts . . . hold that a postpetition change in the character of property properly claimed as exempt will not change the status of that property, . . . once property is exempt, it is exempt forever and nothing occurring postpetition can change that fact."); *In re* Lowery, 203 B.R. 587, 588 (Bankr. D. Md. 1996) (noting that the severance of a tenancy by the entirety does not create any new property interest).

1140. 11 U.S.C. § 541(a)(5) (2012).

1141. *See Cordova*, 73 F.3d at 43 ("Because she acquired the fee simple interest as a result of the entry of a divorce decree within 180 days of the filing of her petition, it became part of the bankruptcy estate.").

1142. 11 U.S.C. § 522(b)(3)(B) (emphasis added).

property listed in . . . paragraph (3) of this subsection."[1143] Therefore, the debtor was entitled to exempt the tenancy by the entirety *notwithstanding* anything found in § 541(a)(5).[1144] The wife's 50% share of the tenancy by the entirety should have continued on as exempt property. It was successfully expelled from the estate and should *not* have been dragged back into the estate under § 541(a)(5).

The Fourth Circuit itself had previously used this "notwithstanding" language from § 522(b)(1) to hold that a post-bankruptcy change in the predicates of exempt property could not be considered. In *BancOhio National Bank v. Walters (In re Walters)*,[1145] a debtor had life insurance policies on his son.[1146] These he could exempt under Bankruptcy Code § 522(d)(7).[1147] Within 180 days, his son died and the insurance policies paid out.[1148] The debtor was permitted to keep the proceeds "notwithstanding" § 541(a)(5), which brings in property received within 180 days after the bankruptcy petition "as a beneficiary of a life insurance policy."[1149] Under *Walters*, post-bankruptcy events

---

1143. *Id.* § 522(b)(1) (emphasis added).

1144. *See In re Martin*, 269 B.R. at 123 (reading the statute as stating that § 522 trumps § 541).

1145. 724 F.2d 1081 (4th Cir. 1984).

1146. *See id.* at 1082 (noting that the original joint petition did not disclose several of the debtor's life insurance policies, including eleven policies on the life of his son).

1147. *Id.* at 1083.

1148. *Id.* at 1082.

1149. 11 U.S.C. § 541(a)(5)(C) (2012). The *Cordova* court was disingenuous in distinguishing *Walters*:

> Contrary to Cordova's reading of *In re Walters*, our holding in that case was not a sweeping statement that subsequent events never affect the applicability of exemptions under the bankruptcy code. Rather, we stated that "[t]he proceeds derived from [life insurance] policies 'owned by the debtor and claimed by him as exempt . . . flow as an incident of ownership of the *contract* to the debtor rather than to the estate.'"

Cordova v. Mayer (*In re* Cordova), 73 F.3d 38, 40–41 (4th Cir. 1996) (citations omitted). Here, the court troubled to add emphasis to the word "contract," which was not emphasized in the original. In other words, the law supposedly is that exemptions are "notwithstanding" § 541(a)(5) only when the debtor is paying under a contract, but where there is no contract, we are to ignore "notwithstanding" and apply § 541(a)(5) straight out. This overlooks the fact that Cordova presumably *paid* for a tenancy by the entirety granted by some vendor and (if so) was just as much enjoying something that flowed from the avails of a cannot alter the exemptibility of property that qualified on the day of the bankruptcy petition.[1150] This was a point the *Cordova* court ignored.

In applying § 541(a)(5), the *Cordova* court also supposed that the debtor obtained a fee simple absolute upon divorce, which then came into the estate via § 541(a)(5). A comparison of what the debtor had at the time of the bankruptcy petition and at the time of the divorce shows that, *as a matter of Virginia law*, the debtor had *nothing* on bankruptcy day. Rather, the marital entity had property and the debtor had none. On divorce day, the debtor had fee simple absolute minus a lien for a cash award to her ex-husband.[1151] So conceived, the *Cordova* court followed Virginia law.[1152] But, Virginia law had already been preempted by the Bankruptcy Code on this score.[1153] Section 541(a)(1) assumes that

---

real estate contract.

1150. *Accord* Dioguardi v. Curran (*In re* Dioguardi), 35 F.2d 431, 431 (4th Cir. 1929) (noting that, when the nondebtor spouse died two days after bankruptcy petition, the tenancy by the entirety never came into the estate and the trustee could not claim the debtor's fee simple absolute). Congress would later add § 70(a)(3):

> All property, wherever located, except insofar as it is property which is held to be exempt, in which the bankrupt has at the date of bankruptcy an estate or interest by the entirety and which within six months after bankruptcy becomes transferable in whole or in part solely by the bankrupt shall, to the extent it becomes so transferable, vest in the trustee . . . as of the date of bankruptcy.

Bankruptcy Act of 1898, ch. 541, § 70(a)(8), 30 Stat. 544, *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95–598, 82 Stat. 2549. The meaning of this sentence is that the tenancy by the entirety did not come into the estate, but, if a post-bankruptcy event occurred within six months to make the debtor fee simple absolute owner, such fee simple absolute (unless exempt) would become property of the bankruptcy estate. *See* Craig, *supra* note 606, at 264 (detailing the effect of § 703(a)(3) on post-bankruptcy events and exemptions); Richard G. Huber, *Creditors' Rights in Tenancies by the Entireties*, 1 B.C. L. REV. 197, 205 (1960) ("The virtually complete immunity from claims of creditors given to tenants by the entireties in a majority of states retaining the tenancy is an expression of policy generally favoring marital property and property interests over commercial and creditor interests.").

1151. *See Cordova*, 73 F.3d at 39 ("Under Virginia law, the [divorce] decree automatically extinguished the tenancy by the entirety and all contingent rights in the home, including the right of survivorship, by operation of law.").

1152. *See id.* (noting that the tenancy by the entirety was extinguished upon divorce under Virginia law (citing VA. CODE ANN. § 20-111 (West 2017)).

1153. *Compare* VA. CODE ANN. § 20-111 (West 2017) (providing that a tenancy by the entirety is converted into a tenancy in common upon divorce), *with* 11 the debtor had a 50% individual interest,[1154] the same assumption that the *Craft* Court made.[1155] Thereafter, this individual interest was exempted out of the bankruptcy estate. So, as far as the Bankruptcy Code is concerned, the debtor already had an exempt 50% fee simple absolute estate at the time of divorce. What she acquired by the divorce was an extra encumbered 50% share.[1156] Therefore, the *Cordova* court should have laid claim to the encumbered 50% cotenancy, not the whole thing, if we are to follow the logic of § 541(a)(5).

Divorce within 180 days of bankruptcy should be compared to *death* of the nondebtor spouse within 180 days of bankruptcy. Different rules apply, depending on whether the jurisdiction follows the Michigan or the Tennessee pattern.

In Michigan, where the nondebtor spouse dies, "the survivor does not take as a new acquisition, but under the original limitation, his estate being simply freed from participation by the other."[1157] Accordingly, survivorship does not fall within the scope

---

U.S.C. § 541(a)(1) (providing that "all legal or equitable interests of the debtor in property" are included in the bankruptcy estate).

1154. *In re* Bradby, 455 B.R. 476, 479 (Bankr. E.D. Va. 2011).

1155. *Craft V*, 535 U.S. 274, 282 (2002).

1156. The "new" *vs.* half-new controversy arose in *Farrey v. Sanderfoot*, 500 U.S. 291, 299–300 (1991). In that case, a husband and wife owned real property as cotenants. *Id.* at 292. The couple divorced, and at the end of that proceeding, the husband owned fee simple absolute and the wife had a lien on the fee for a cash award designed to balance out the division of marital property. *Id.* at 293. The husband then sought to avoid the wife's "judicial lien" under Bankruptcy Code § 522(f)(1) because it impaired his homestead exemption. *Id.* at 293–94. This the Supreme Court would not allow, for reasons beyond the scope of our present inquiry. *See generally* Laura B. Bartell, *Extinguishment and Creation of Property Interests Encumbered by Liens—The Strange Legacy of* Farrey v. Sanderfoot, 87 AM. BANKR. L.J. 375 (2013). In *Farrey*, the Supreme Court assumed that the divorce terminated the cotenancy and created a fee simple absolute that was disjoint and separate from the husband's prior cotenancy. *Farrey*, 500 U.S. at 299–300. As a result, the fee simple absolute was entirely new. *Id.* But, the Supreme Court had accepted the debtor's own reading of the divorce decree as accomplishing this result. *See id.* at 299 ("[S]he concludes, the decree created new interests . . . for Sanderfoot, ownership in fee simple of the house and real estate; for Farrey, various assets and a debt . . . secured by a lien on Sanderfoot's new fee simple interest. . . . *Sanderfoot agreed on each point*." (emphasis added)); *see also id.* at 303 (Kennedy, J., concurring) (noting that half of the debtor's property was not "new"). Professor Bartell argues, convincingly, that a reading of the divorce record does not support the debtor's disastrous concession and that, in fact, the husband's acquisition was only half-new. Bartell, *supra*, at 392.

1157. Lang v. Commissioner, 289 U.S. 109, 111 (1933); *accord* Birney v. Smith and compass of § 541(a)(5).[1158] A postpetition death of the nondebtor spouse does not turn the previously exempt tenancy by the entirety into non-exempt fee simple absolute.[1159]

This is so even in Chapter 13 cases, where § 1306(a) expands the bankruptcy estate to include "all property . . . that the debtor acquires after commencement of the case."[1160] In *In re Bradby*,[1161] the court explained that, because the debtor takes by survivorship,

---

(*In re* Birney), 200 F.3d 225, 229 (4th Cir. 1999) ("A tenant by the entireties . . . does not 'inherit' his co-tenant's interest in the property. Rather, he continues his full ownership of the property alone."); *In re* Alderton, 179 B.R. 63, 65 (Bankr. E.D. Mich. 1995) ("When parties own property as tenants by the entirety and one of the tenants dies, 'title falls to the survivor, but by operation of law, not by the statutes of descent.'" (citations omitted)). Writing of joint tenancies (which, like tenancies by the entirety, imply the right of survivorship), Professor Laura Bartell writes:

> When spouses hold property in joint tenancy, upon the death of one spouse, the estate automatically vests in the survivor by operation of law. The interest of the decedent does not pass to the surviving tenant; rather, the interest of the decedent is extinguished, and the survivor's interest spreads to encompass the entire fee simple interest in the property. The survivor's interest is deemed to be "a continuation, or extension, of his/her existing interest." This means that the decedent's interest is not subject to probate.

Bartell, *supra* note 1156, at 395–96 (quoting Toma v. Toma, 163 P.3d 540, 544 (Okla. 2007)).

1158. *See In re* Hamacher, 535 B.R. 180, 183 (Bankr. E.D. Mich. 2015); *accord In re* Buckley, No. 16-17946-JS, 2016 Bankr. LEXIS 4502, at *4 (Bankr. D. Md. Dec. 29, 2016) (noting that property of the estate is determined as of the petition date, unless provided for elsewhere in the Code), *aff'd sub nom.* Bellinger v. Buckley, 577 B.R. 193 (D. Md. 2017). The matter was otherwise under the 1898 Act. According to Bankruptcy Act § 70(a)(8):

> All property . . . in which the bankrupt has at the date of bankruptcy an estate . . . by the entirety and which within six months after bankruptcy becomes transferable in whole or in part solely by the bankrupt shall, to the extent it becomes so transferable, vest in the trustee and his successor . . . upon his . . . appointment and qualification, as of the date of bankruptcy.

Bankruptcy Act of 1898, ch. 541, §70(a)(8), 30 Stat. 544, *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95–598, 82 Stat. 2549. According to an old commentary, this rule "destroys the accuracy of the debtor's calculations [of the spouse's death] and removes the possibilities of a possible [sic] 'racket.'" Note, *Effect of Bankruptcy on Estates by Entireties*, *supra* note 606, at 1077.

1159. *See In re Hamacher*, 535 B.R. at 182 (finding that a tenancy by the entireties exemption is determined as of the petition date).

1160. 11 U.S.C. § 1306(a)(1) (2012).

1161. 455 B.R. 476 (Bankr. E.D. Va. 2011).

no "new" property is "acquired" when the nondebtor spouse dies.[1162] The Chapter 13 trustee also objected that the debtor was not paying the unsecured creditors at least as much as they would have received in a Chapter 7 case, as required by § 1325(a)(4).[1163] The trustee reasoned that the hypothetical "liquidation test" of § 1325(a)(4) had to be performed on the day of the confirmation hearing.[1164] By that time, the nondebtor spouse had already died and, the trustee reasoned, the debtor owned a fee simple interest that was part of the bankruptcy estate.[1165] In fact, the entireties had been expelled from the estate as exempt and never comes back in due to the death of the nondebtor spouse.[1166]

In Tennessee, however, the contingent remainder is property of the estate. The debtor is able to exempt only the present possessory interest. When the nondebtor spouse does, the fee simple absolute *does* enter the bankruptcy estate for the benefit of the debtor's unsecured creditors.[1167]

A deceptive case indeed is *Fairfield v. United States (In re Ballard)*.[1168] There, two spouses owned a Virginia tenancy by the entirety.[1169] They filed a joint (unconsolidated) bankruptcy petition

---

1162. *Id.* at 484.

1163. *See id.* at 479–80 ("The value of the property that a Chapter 13 trustee distributes . . . cannot be less than the amount that a Chapter 7 trustee would distribute if the estate were to be liquidated.").

1164. *Id.* at 483–84.

1165. *Id.* at 484.

1166. *See id.* at 483 (noting that, once the property is exempt from the bankruptcy estate, "upon the death of the non-debtor spouse, the property maintains its exempted status because § 522(b)(3)(B) provides that the property that is exempt is the interest that the debtor had 'immediately before the commencement of the case.'"). For this reason, § 541(a)(7) ("Any interest in property that the estate acquires after commencement of the case.") did not apply. 11 U.S.C. § 541(a)(7) (2012).

1167. For cases ruling that death of the nondebtor spouse *does* bring the Michigan-style entireties into the bankruptcy estate, see *In re* Tharp, 237 B.R. 213, 216 (Bankr. M.D. Fla. 1999) (noting that courts have uniformly held that "when the debtor's spouse died post-petition, the deceased spouse's interest in the property was extinguished, and the bankruptcy estate became the owner of the property in fee simple"); *In re* Taylor, No. 6:10-bk-11111-ABB, 2011 Bankr. LEXIS 14, at *5 (Bankr. M.D. Fla. Jan. 3, 2011) (same). Such holdings illegitimately presuppose a Kentucky-style tenancy by the entirety where the debtor's contingent remainder is part of the bankruptcy estate.

1168. Fairfield v. United States (*In re* Ballard), 65 F.3d 367 (4th Cir. 1995).

1169. *Id.* at 368.

in Chapter 11.[1170] Significantly, the debtors did *not* claim that the tenancy by the entirety was exempt.[1171] As such, *Craft* applies: each bankruptcy estate obtained a 50% non-entireties share of the property.[1172]

The spouses, as debtors-in-possession, obtained bankruptcy court permission to sell the house.[1173] The majority held that this sale did not terminate the entireties because, under Virginia law, absent contrary intent, proceeds of a tenancy by the entirety are themselves held by the entirety.[1174]

Later, however, the wife died.[1175] The majority of the panel held that, as a result, *all* of the money went to the husband's estate where joint and individual creditors shared *pro rata*.[1176] The individual creditors of the wife lost out.[1177] In short, death of the wife brought 50% of the cash into the estate of the husband.

This was doubly incorrect. First, the couple never claimed an exemption for the entireties.[1178] Therefore, as a matter of federal property law, the property, while in the bankruptcy estate, was subject to the trustee's power to sell a tenancy in common to a buyer. Sale by the trustee *severs* the entireties.[1179] The surviving husband had no interest at all in the cash proceeds of his wife's

---

1170. *Id.*

1171. *Id.* at 373 n.2.

1172. *Supra* notes 518–542 and accompanying text.

1173. *See Ballard*, 65 F.3d at 369 ("On December 28, 1990, the bankruptcy court entered an order authorizing the debtors to sell their residential real property."); *see also* 11 U.S.C. § 362(b) (2012) (requiring court permission for use, sale or lease of estate property out of the ordinary course of business).

1174. *See Ballard*, 65 F.3d at 370 ("[L]ooking to Virginia law, absent 'an agreement or understanding to the contrary, the proceeds derived from a voluntary sale of real estate held by the entireties are likewise held by the entireties.'" (quoting Oliver v. Givens, 129 S.E.2d 661, 663 (Va. 1963))). For a similar dictum under District of Columbia law, see Ross v. Maryland (*In re* Ross), 475 B.R. 279, 286 (Bankr. D.D.C. 2012) ("In the District of Columbia, proceeds of a sale of entirety real property retain that entirety character (unless both spouses agree otherwise).").

1175. *Ballard*, 65 F.3d at 369.

1176. *See id.* at 372 ("Although no doubt disappointing to the Trustee and the joint creditors . . . it should come as no surprise that upon the destruction of the tenancy by the entireties . . . their status as joint creditors would accord them no greater priority than that enjoyed by any non-point creditor.").

1177. *Id.*

1178. *Id.* at 373 n.2.

1179. *Supra* notes 534–559 and accompanying text.

share.[1180] At best, the husband had a monetary homestead charge on his 50% share. Furthermore, if Virginia entireties law *did* apply, the court erred in assuming that a post-bankruptcy event could bring back into the husband's bankruptcy estate property that had been (for the sake of argument) expelled.[1181]

And even if the debtor spouses had relied on Virginia entireties exemption, they cannot have sold with the selfish intent to perpetuate the entireties in cash form. They were selling as debtors-in-possession—fiduciaries for their creditors. Any such private intent to perpetuate the tenancy into cash form positively impoverishes the creditors for whom the spouses were fiduciaries. Had the case been a Chapter 7 liquidation and a sale by an independent trustee had occurred, can there be any doubt that the cash would have instantly gone into the separate estates of each spouse?[1182] The dissent in *Ballard* was well justified in noting that "the majority [lost] sight of the bankruptcy context in which the sale took place."[1183]

Ballard should not be read to mean that, where the entireties is claimed as exempt, a postpetition death of the nondebtor spouse brings the fee simple absolute into the bankruptcy estate. In such a case, the tenancy by the entirety had been expelled from the bankruptcy estate. When the tenancy ends with the death of a spouse, the survivor owns the fee simple free and clear of any claim by a bankruptcy trustee.

1180. The Fourth Circuit would later read *Ballard* in an incomprehensible way: "In *In re Ballard*, we found that the bankruptcy estate acquired the property 'after the commencement of the case' under 11 U.S.C. § 541(a)(7)." Cordova v. Mayer (*In re* Cordova), 73 F.3d 38, 41 n.3 (4th Cir. 1996). According to § 541(a)(7), the bankruptcy estate includes "[a]ny interest in property that the estate acquires after the commencement of the case." 11 U.S.C. § 541(a)(7) (2012). But this announces the result rather than explaining it. What section of the Bankruptcy Code provides that the husband's bankruptcy estate obtains cash from the wife's bankruptcy estate when the husband had renounced the tenancy by the entirety?

1181. Recall that § 522(b)(3) exempts a tenancy by the entirety "in which the debtor had, *immediately before the commencement of the case*, . . . to the extent such interest . . . is exempt from process under applicable nonbankruptcy law." 11 U.S.C. § 522(b)(3)(B) (emphasis added).

1182. *See In re* Raynard, 327 B.R. 623, 637 (Bankr. W.D. Mich. 2005) ("As for the remainder of the proceeds, it is clear that the trustee would distribute the remainder to all creditors, not just joint creditors."), *rev'd sub nom.* Raynard v. Rogers (*In re* Raynard), 354 B.R. 834 (B.A.P. 6th Cir. 2006).

1183. Fairfield v. United States (*In re* Ballard), 65 F.3d 367, 373 (4th Cir. 1995) (Hall, J., dissenting).

Any contrary interpretation raises the specter that the exemption lasts only so long as the spouses survive without divorcing. Suppose a debtor spouse exempts a Michigan-style tenancy by the entirety. The case is closed. Forty years later, the non-debtor spouse dies. May the bankruptcy trustee reopen the closed case to recapture the fee simple absolute estate that the debtor spouse takes by survivorship? According to § 350(b), "[a] case may be reopened in the court in which such case was closed to administer assets."[1184] Such a result is precluded by the proposition that exemptability is to be computed as of the day of the bankruptcy petition; postpetition events may not be considered.

To summarize, because *Ballard* involved non-exempt property, it cannot be read as permitting postpetition events to determine exemptibility. Exemptibility must be decided on criteria that existed on the day of the bankruptcy petition.[1185]

1184. 11 U.S.C. § 350(b). There is no time limit on the ability to reopen a case, though courts are apt to apply the concept of *laches*—prejudicial delay as a reason for equity to deny relief. *See In re* Bianucci, 4 F.3d 526, 528 (7th Cir. 1993) ("The leading approach is permissive but incorporates an equitable defense akin to laches, so that a debtor may reopen the bankruptcy case at any time to avoid a lien absent a finding of prejudice to the creditor. Passage of time in itself does not constitute prejudice." (citations omitted)); Albuquerque Chem. Co. v. Arneson Prods., Inc., No. 98-2336, 1999 U.S. App. LEXIS 30733, at *6 (10th Cir. Nov. 30, 1999) (noting that an eleven-year delay was not prejudicial); Waldschmidt v. Shaw (*In re* Shaw), 5 B.R. 107, 112 (Bankr. M.D. Tenn. 1980) (noting that, "[a]lthough the staggered filings of bankruptcy petitions that are calculated to frustrate the interest of creditors of both spouses is troublesome," it was not prejudicial).

1185. Incidentally, the *Cordova* court illegitimately cited *Ballard* for the proposition that, when a tenancy by the entirety terminates, the exemption is lost. *See Cordova*, 73 F.3d at 41 ("[In *Ballard,*] [w]e announced that once a tenancy by the entirety terminates, the debtor—and the bankruptcy estate—are released 'from all conditions of the tenancy conceived to preserve the unity of entireties property' . . . ." (quoting *Ballard*, 65 F.3d at 371–72)). A rather different approach was taken in *Tamecki v. Frank (In re Tamecki)*, 229 F.3d 205 (3d Cir. 2000). In that case, a debtor owned a 50% interest in a tenancy by the entirety, which dwarfed the amount of debt he owed. *Id.* at 207. The court dismissed the case altogether for bad faith under § 707(a) because the debtor's divorce was "right around the corner," to mix a spatial and temporal metaphor. *Id. Tamecki* implies that, in *Cordova*, the court might dismiss the bankruptcy *after* the divorce (if bad faith is found), thereby allowing for creditors to obtain the full value of the debtor's real property in light of the divorce.

Ballard has been overruled in *Birney v. Smith (In re Birney)*,[1186] where the nondebtor spouse died within six months of bankruptcy.[1187] Subsequently, the debtor received a general discharge.[1188] The trustee did not claim that the exemption was terminated.[1189] A prepetition creditor, however, had the bankruptcy case reopened to claim that he had a judicial lien from a prepetition judgment that attached to the debtor's fee simple upon the death of the nondebtor spouse.[1190] The court held that bankruptcy's automatic stay prevented this during the bankruptcy case[1191] and the discharge injunction[1192] prevented this after the case was closed. Therefore, the creditor had no lien.[1193] In addition, the court ruled that § 541(a)(5) did not apply: "A tenant by the entireties . . . does not 'inherit' his co-tenant's interest in the property. Rather, he continues his full ownership of the property alone."[1194] The case, therefore, affirms that postpetition death of the nondebtor spouse cannot be considered in assessing the validity of the exemption.

The premises of *Birney* are inconsistent with the premises of *Ballard*. As a result, it is fair to consider *Ballard* overruled. *Birney* reinstates the rule that the predicates of exemptibility must be assessed from the perspective of the day on which the bankruptcy petition was filed. Any subsequent sale, death, or divorce does not bring the exempt property back into the bankruptcy estate.

1186. 200 F.3d 225 (4th Cir. 1999).

1187. *Id.* at 227.

1188. *Id.*

1189. *Id.*

1190. *See id.* (noting that the creditor attempted to foreclose on the property following the debtor's wife's death, claiming a judicial lien).

1191. *See* 11 U.S.C. § 362(a)(5) (2012) (barring "any act to create . . . against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case").

1192. *Id.* § 524(a)(2) (stating that discharge "operates as [an] . . . injunction against . . . an act to collect any [discharged] debt . . . .").

1193. *See Birney*, 200 F.3d at 228 ("Smith's lien could not attach from the time Birney filed his bankruptcy petition until the time he was granted a discharge.").

1194. *Id.* at 229; *see also In re* Alderton, 179 B.R. 63, 66 (Bankr. E.D. Mich. 1995) ("The debtor did not acquire his wife's interest in the property by way of inheritance, devise, or descent. Therefore, section 541(a)(5)(A) does not apply to bring the property into the estate.").

14. Joint Cases

Heretofore, we usually have assumed that only one spouse files for bankruptcy (though joint cases have been cited, where the jointness of the filing was immaterial to the point at hand). We now consider the tenancy by the entirety in cases where both spouses file jointly under Bankruptcy Code § 302.[1195]

Joint cases in ancient times operated on a different basis than they do today. Under the 1898 Act, joint cases by spouses were substantively consolidated, which meant that all creditors were joint creditors. The spouses therefore lost any ability to exempt the tenancy by the entirety. According to a practitioner under the 1898 Act:

> If . . . both spouses were in bankruptcy, then their proceedings were consolidated for purposes of administering the tenancy by the entirety property; thus, the trustee took the spouses' aggregate interest in the entirety property into the joint estate. In such a consolidated case, three estates were created: the husband's, the wife's, and the joint estate. The trustee then would sell the entirety property and the proceeds from the sale would be placed into the joint estate to pay the joint creditors.[1196]

Where the joint claims exceeded the value of the equity in the tenancy by the entirety, the joint creditors received no priority under this system. It is not clear, however, what happened to the proceeds where the joint creditors were "fully secured."[1197]

1195. According to that provision:

> A joint case . . . is commenced by the filing with the bankruptcy court of a single petition . . . by an individual that may be a debtor . . . and such individual's spouse. The commencement of a joint case . . . constitutes an order for relief . . . .

11 U.S.C. § 302(a).

1196. Ackerly, *supra* note 640, at 705–06; *see also* Craig, *supra* note 606, at 267; Note, *Effect of Bankruptcy on Estates by Entireties*, *supra* note 606, at 1074 ("From a logical point of view, this appears to be an inevitable conclusion.").

1197. The cases cited by Ackerly are opaque. In *In re Reid*, we get the statement: "[T]he property in question [should be] sold for the benefit of the joint creditors." 198 F. Supp. 689, 691 (W.D. Va. 1961), *aff'd sub nom.* Reid v. Richardson, 304 F.2d 351 (4th Cir. 1962). No further details are given as to the fate of surplus proceeds once the joint creditors were paid out. In *In re Pennell*, 15 F. Supp. 743, 744 (W.D. Pa. 1935), and *In re Utz*, 7 F. Supp. 612, 612 (D. Md. 1934), a joint creditor with a voidable judicial lien had commenced an execution sale of the tenancy by the entirety. Where the lien was voidable in the bankruptcy, the court enjoined the execution sale so that the property could be administered in a consolidated bankruptcy. *See Pennell*, 15 F. Supp. at 744 ("[W]hen the estate of the husband and wife came into court on separate adjudications in bankruptcy, the trustee takes the estate held by them by entireties, but for convenience in administration, the two bankruptcy estates should be consolidated."); *Utz*, 7 F. Supp. at 613 (noting that "the judgment obtained by the petitioning creditor within four months of the adjudications in bankruptcy and the consolidation of the proceedings is void as against the trustee").

In re Hallenbeck was what we would call an "automatic stay" case: So long as the husband was the only bankrupt, the referee could not prevent a mortgage foreclosure under state law (as the tenancy by the entirety was not property of the bankruptcy estate). 211 F. Supp. 604, 604 (W.D. Va. 1962), *rev'd on other grounds sub nom.* Hallenbeck v. Penn Mut. Life Ins. Co., 323 F.2d 566 (4th Cir. 1963). But, the wife had since also filed. *Id.* at 605. "Since my decision on that point Mrs. Hallenbeck has filed a petition in bankruptcy and her case has been consolidated with that of her husband so that under well settled principles the tenancy by the entirety has become an asset of the joint estates in bankruptcy." *Id.* (citing Roberts v. Henry V. Dick & Co., 275 F.2d 943 (4th Cir. 1960)). Concluding that the apparently undersecured creditor had no "claim" within the meaning of old Chapter XIII, the court continued to maintain that the mortgage foreclosure sale should continue without federal interference. *Id.* at 607. No information is given as to creditor priorities.

In *Wetteroff v. Grand*, the issue was whether a tax refund was held by the entireties. 453 F.2d 544, 545 (8th Cir. 1972), *cert. denied sub nom.* Wetteroff v. Grand, 409 U.S. 934 (1972). The answer being no, the court had no occasion to consider administration. *Id.* at 547–48.

In *Roberts v. Henry V. Dick & Co., Inc.*, spouses conveyed away their tenancy by the entirety and soon thereafter each filed a bankruptcy petition. 275 F.2d 943, 944 (4th Cir. 1960). In those days, there was no such thing as a joint petition as there is today under Bankruptcy Code § 302(a). *See id.* at 945 ("It would be unreasonable to attach . . . significance . . . to the fact that the husband and wife filed separate petitions, since the Bankruptcy Act . . . does not provide ordinarily for joint petitions or discharges of husband and wife."). A creditor objected to the discharge because the conveyance was fraudulent and within a year of the bankruptcy petition. *Id.*; *cf.* 11 U.S.C. § 727(a)(2) (2012) (stating that a court should grant a discharge unless the debtor has transferred property within one year of the date of filing with the intent to hinder or delay). The debtors responded that none of the creditors was truly a joint creditor and so, under the "no harm no foul" rule, the conveyance was not fraudulent. *Roberts*, 275 F.2d at 945. The court thought that, *if* there were joint creditors, the conveyance was fraudulent, and it remanded for further findings. *Id.* The case did not have occasion to visit the procedural niceties of property administration. *Roberts* thus follows the advice of: Recent Case, *Bankruptcy—Fraudulent Conveyances—Conveyance by Husband and Wife of Land Held As Tenants by the Entirety*, 43 HARV. L. REV. 312, 312 (1929) ("Where a creditor holds a joint claim, there would seem to be no reason why the trustee of both spouses should not be deemed vested with the rights of a joint-judgment creditor.").

It will be recalled that the courts viewed the individual case as a "legal fraud."[1198] This was because the individual debtor's discharge transformed the unsecured joint claim into an individual claim against the nonbankrupt spouse, thereby depriving the joint creditor of the ability to put a judicial lien on the tenancy by the entirety. One reaction to this was for the joint creditor to petition the nondebtor spouse into bankruptcy. The cases were then consolidated and the exemption disappeared.[1199]

Thus, in *Reid v. Richardson*,[1200] a husband with a tenancy by the entirety and with joint creditors filed a bankruptcy petition.[1201] The tenancy did not enter the bankruptcy estate,[1202] as it later would under the Bankruptcy Code. The husband obtained a discharge.[1203] One of the joint creditors brought suit against the wife.[1204] Actually, the joint creditor was now an individual creditor by virtue of the husband's discharge.[1205] Its suit had no merit. The wife unwisely filed for bankruptcy.[1206] The referee (as bankruptcy judges were then called) granted a motion to reopen the husband's case and to consolidate the husband's bankruptcy with the wife's bankruptcy, thus depriving the couple of their home.[1207] On appeal, the Fourth Circuit ruled, "in view of the 'legal fraud' that would occur if this estate were not re-opened, we cannot say that the Court below abused its discretion in re-opening the estate."[1208]

1198. *Supra* notes 609–616 and accompanying text.

1199. Some older cases assumed that pre-Code practice in joint cases survived the enactment of the Bankruptcy Code. *See In re* Blum, 39 B.R. 897, 900 (Bankr. S.D. Fla. 1984) (holding that "11 U.S.C. § 522(2)(B) does not exempt non-homestead entireties property in a joint case, at least where there are joint obligations of the debtors exceeding the value of the non-homestead entireties property").

1200. 304 F.2d 351 (4th Cir. 1962).

1201. *See id.* at 352 (noting that the petition listed the property at issue as the only realty interest, and that at the time of filing the property did not accrue as an asset of the estate).

1202. *Id.* at 353.

1203. *Id.* at 352.

1204. *Id.*

1205. *Supra* notes 585–593 and accompanying text.

1206. *Reid,* 304 F.2d at 352.

1207. *Id.* at 353.

1208. *Id.* at 355.

The Bankruptcy Code completely obliterates this practice. Today, the exemption exists in joint cases, even if the cases are substantively consolidated.[1209]

The Bankruptcy Code invites spouses to file a single bankruptcy petition that commences a joint case.[1210] The two cases imply separate administrations of the two estates. This, in turn, implies that all the rules in the individual cases apply to the two estates in the joint case without revision.[1211] Section 302(b), however, provides that "[a]fter the commencement of a joint case, the court shall determine the extent, if any, to which the debtors' estates shall be consolidated."[1212] There is:

> [A] dramatic difference between the joint administration contemplated by Rule 1015(b) and substantive consolidation. Joint administration is a creature of procedural convenience. It is justified by the laudable desire to avoid the wasting of resources, which would result through the duplication of effort if cases involving related debtors were to proceed entirely separately. Thus, rather than having two of everything, there need only be one trustee, one docket, and duplicate pleadings or claims can be avoided. The estates of each debtor, however, remain separate. In this way, the desire for administrative efficiency can be fulfilled without altering the substantive rights of the parties.
>
> Unlike joint administration, substantive consolidation has a dramatic impact on the rights of the parties to a bankruptcy proceeding. When cases are substantively consolidated, the debtors loose [sic] their separateness and are treated as one entity. Their individual estates are combined to create a single pool, out of which the claims of all creditors can be paid. The ultimate result is the same as if there were only one debtor.[1213]

1209. *See* Bunker v. Peyton (*In re* Bunker), 312 F.3d 145, 148–49 (4th Cir. 2002) ("The [two] spouses may take the exemption notwithstanding the joint administration or substantive consolidation of their individual bankruptcy estates.").

1210. *See* 11 U.S.C. § 302(a) (2012) (noting the procedure for commencing a joint bankruptcy case); FED. R. BANKR. P. 1015 (same).

1211. *See In re* Brannon, 476 F.3d 170, 175 (3d Cir. 2007) ("[A] joint filing in bankruptcy does not sever a tenancy by the entireties so as to make the property available to creditors of either husband or wife individually.").

1212. 11 U.S.C. § 302(b).

1213. *In re* Steury, 94 B.R. 553, 553–54 (Bankr. N.D. Ind. 1988).

The grounds for consolidating the bankruptcy estates of spouses is the same for the substantive consolidation of bankruptcy estates in the corporate context. Basically, if it is too complicated to account for the assets and claims, consolidation is justified.[1214] But, consolidation is not justified if its purpose is to affect the politics of distribution.[1215] Translated to the context of spouses, the desire to deprive the spouses of their exemption in the tenancy by the entirety should never justify the consolidation.[1216]

If the case is consolidated, the creditors of the wife are creditors of the husband and vice versa. Given consolidation, it would appear logical that the exemption disappears, because every creditor is a joint creditor.[1217] But it is only the federal law of consolidation that makes them joint creditors. The exemption itself is governed by § 522(b)(3)(B), which, once again, provides that the debtors may exempt:

> [A]ny interest in property in which the debtor had, *immediately before the commencement of the case*, an interest as a tenancy by the entirety . . . to the extent such interest as a tenant by the entirety . . . is exempt from process under *applicable nonbankruptcy law* . . . .[1218]

Because jointness is established by *bankruptcy* law (not by nonbankruptcy law), such jointness cannot serve to destroy the exemption, even in a consolidated case.[1219] For good measure, the

---

1214. *See In re* Owens Corning, 419 F.3d 195, 211 (3d Cir. 2005) (permitting substantive consolidation when "assets and liabilities are so scrambled that separating them is prohibitive and hurts all creditors").

1215. *See* Thomas v. Peyton, 274 B.R. 450, 455–56 (E.D. Va. 2001) (ruling that a joint case does not justify the the override of the debtors' exemption right), *aff'd sub nom. In re Bunker*, 312 F.3d at 145.

1216. *See* Reider v. Fed. Deposit Ins. Corp. (*In re* Reider), 31 F.3d 1102, 1109–10 (11th Cir. 1994) (holding that substantive consolidation is inappropriate where creditors of one spouse gain at the expense of the creditors of the other spouse).

1217. *See Steury*, 94 B.R. at 556 ("Given the restrictions surrounding the exemption in question, if the estates are consolidated, it will be lost. . . . [A]ll creditors, regardless of the nature of their claim, would become joint creditors."). The *Steury* court thought that substantive consolidation was needed in any case where unsecured joint creditors could exist. But where the concept of the shadow bankruptcy is recognized, a sale can be conducted in an individual case as well as in a joint case, and consolidation is then superfluous.

1218. 11 U.S.C. § 522(b)(3)(B) (2012) (emphasis added).

1219. *See Thomas*, 274 B.R. at 456 (noting that a trustee's status as a hypothetical judicial lien creditor cannot override debtor's exemption right under predicates of exemption are established as of the day of the bankruptcy petition. An order for substantive consolidation is a postpetition event that may not be considered. Thus, substantive consolidation may not serve to deprive the individual spouses of their right to exempt the tenancy by the entirety from the individual creditors.

A recent case to the contrary is *In re Stewart*,[1220] where the court held that jointness of the case destroys the entireties exemption. According to the court, "when the spouses file a joint bankruptcy petition, 'they, in essence, 'convey' the property to the trustee, which destroys the unities and makes it [the property] held as tenants in common and subject to division and sale by the trustee.'"[1221] In other words, the *Stewart* court viewed the spouses as having voluntarily conveyed their entireties to a bankruptcy trustee. In fact, they have *separately* and *individually* conveyed their shares to *different* bankruptcy estates. Under state law, each of these individual transfers is incapable of conveying any part of the Florida entireties.[1222] Their individual shares initially go into their individual estates, but each spouse is entitled to exempt entireties as existent "*immediately before the commencement of the case*."[1223] In other words, the *Stewart* court inappropriately considered the bankruptcy petition a joint conveyance when it should have considered the state of affairs as it existed "'*immediately before*'" this conveyance.[1224] Whereas other courts have been guilty of considering postpetition events in assessing exemptibity,[1225] the *Stewart* court considered the *bankruptcy petition itself* as the reason why the exemption was forfeited.[1226]

"applicable nonbankruptcy law").

1220. 373 B.R. 736 (Bankr. M.D. Fla. 2007).

1221. *Id.* at 740 (quoting Grant v. Himmelstein (*In re* Himmelstein), 203 B.R. 1009, 1014 n.6 (Bankr. M.D. Fla. 1996)).

1222. *See In re* Pyatte, 440 B.R. 893, 900 (Bankr. M.D. Fla. 2010) (noting that "[u]nder Florida law, each spouse's interest in entireties property consists of the whole of the property, and not a divisible part," and, in the event of bankruptcy, the debtors "are not required to allocate their interests . . . equally").

1223. 11 U.S.C. § 522(b)(3)(B) (emphasis added).

1224. *Stewart*, 373 B.R. at 740 (emphasis added) (quoting 11 U.S.C. § 522(b)(3)(B) (2012)).

1225. *Supra* notes 1138–1159 and accompanying text.

1226. For similarly wrongly decided cases, see generally *Nunley v. Paty Co. (In re Nunley)*, 109 B.R. 784 (Bankr. E.D. Tenn. 1990) and *Dickenson v. Penland (In*

To be distinguished are cases like *In re Shelton*,[1227] where a husband filed for bankruptcy and the trustee somehow never administered the entireties on behalf of the joint creditors.[1228] Later, the wife filed for bankruptcy.[1229] The court permitted the husband's case to be reopened[1230] so that the shadow bankruptcy could be pursued for the joint creditors.[1231] Although the *Shelton* court made much of the wife's bankruptcy being so close to the husband's petition that it should be considered a joint proceeding, in fact, the wife's petition is a red herring. Even if the wife *never* filed for bankruptcy, the husband's bankruptcy could be reopened to administer an asset. The issue has nothing to do with the jointness of the bankruptcy petitions. The power to administer the joint asset in an individual case justifies reopening a closed case to achieve this end.

IV. Conclusion

This Article has argued that there is a federal common law of property that preempts state law whenever a federal statute uses the word "property." Tax law contains two prominent examples in which the United States Supreme Court has smashed the fictions proffered by state law. The first example, *Drye v. United States*,[1232] had to do with the power of an heir to renounce the inheritance.

---

re Penland), 34 B.R. 536 (Bankr. E.D. Tenn. 1983). In *In re Smith*, 200 B.R. 213, 214 (Bankr. E.D. Mo. 1996), a husband and wife filed separate Chapter 13 petitions and then claimed a tenancy by the entirety exemption against individual creditors. The court seemed to think that, had they filed a joint petition, the exemption would be forfeit. *Id.* at 215. Therefore, their separate Chapter 13 plans were rejected as being filed in bad faith under § 1325(a)(3). *Id.* at 214.

1227. 201 B.R. 147 (Bankr. E.D. Va. 1996).

1228. *Id.* at 149–50; *see also In re* Tyler, 27 B.R. 289, 293 (Bankr. E.D. Va. 1983) (finding, in a case with similar facts, that the debtors would be allowed to retain any equity in their real estate that they had claimed as exempt).

1229. *Shelton*, 201 B.R. at 150.

1230. *See id.* at 156–57 (finding that it was permissible to reopen the husband's case in order to investigate any potential joint debts); 11 U.S.C. § 350(b) (2012) ("A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause.").

1231. *Shelton*, 201 B.R. at 153.

1232. *See* Drye v. United States, 528 U.S. 49, 61 (1999) (holding that the control rein that the heir held under state law "rendered the inheritance 'property' or 'rights to property' belonging to him within the meaning of § 6321").

The second, *United States v. Craft*,[1233] concerned the tenancy by the entirety, which, in many states, is owned by a separate marital entity, not by the debtor.

Although many would say that the Supreme Court tax opinions are monsters which cannot be permitted to escape the confines of tax law, I have argued that these same principles that inspired the Supreme Court in the tax context already inhabit federal bankruptcy law.

In the case of inheritance disclaimers, courts have denied that federal law preempts state law when the disclaimer is made prior to the bankruptcy petition. But courts also admit that the Bankruptcy Code prevents a postpetition disclaimer. The logic of this admission directly undercuts the logic of the denial. If logic is to have any purchase, we must acknowledge that the Bankruptcy Code in general preempts state inheritance disclaimer law.

In the case of the tenancy by the entirety, the Bankruptcy Code has *always* preempted the state law of the entireties, in anticipation of *Craft*. Although, in many states, the marital entity owns the entireties, the Bankruptcy Code anticipates the *Craft* holding in tax. It pierces the marital veil and brings the tenancy into the debtor's bankruptcy estate, even though the debtor supposedly owns nothing, according to state law. The only difference between tax law and bankruptcy law is that, the Internal Revenue Code does not invite exemption of the entireties. The Bankruptcy Code invites it without requiring it.

Meanwhile, this federal preemption has made the law of administering the entireties extraordinarily complex—as complex as any bankruptcy issue I have ever encountered. This Article has contained a thorough review of the administrative problems that this strange property form has engendered. Most notably, administration of the entireties engenders a strange "bankruptcy within a bankruptcy" for the benefit of joint creditors against whom the Michigan-style entireties is not exempt.

1233. *See Craft V*, 535 U.S. 274, 276 (2002) (concluding that each tenant by the entirety has individual rights in the "estate sufficient to constitute 'property' or 'rights to property' for the purpose of [the] lien").