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The Good, the Bad, and the Ugly in Post-*Drye* Tax Lien Analysis

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I. INTRODUCTION

The general federal tax lien[1] attaches to "all property and rights to property, whether real or personal" which belong to the delinquent taxpayer.[2] In most cases in which the IRS takes enforced collection action based on its lien, there is little doubt that the property the IRS is pursuing constitutes "property [or] rights to property." The easiest cases, of course, are those in which the tax delinquent is the fee simple owner of realty or personalty. The IRS typically goes after such assets first because the tax lien obviously attaches to them and they are relatively easy to convert into cash to pay the liability.

If such assets are unavailable or have been exhausted, the IRS may pursue items involving less than fee simple ownership. As it does so, the question may arise whether the items constitute property or property rights. The Supreme Court has repeatedly stressed that the language of section 6321 "is broad and reveals on its face that Congress meant to reach every interest in property a taxpayer might have."[3] Despite this expansive construction, controversies as to the reach of the general lien are perennial. Whether a given interest constitutes "property [or] rights to property" for section 6321 purposes has been litigated in hundreds of cases.

The most challenging of these controversies involve one or more of three situations. First, the taxpayer's interest may not yet have ripened (and may never ripen) into full possession or control of the underlying property. A continuum exists from mere hope, to expectancy, to contingent interest, to present possessory interest. Second, the taxpayer's interest may be shared with others. It may be undivided not individual, joint not single, or fractional. Third, restrictions may exist, under the instrument governing the property or under state law, on the taxpayer's ability to use or dispose of the property or on the ability of the taxpayer's creditors to reach the property or the taxpayer's interest in it. The more the taxpayer's interest diverges from fee simple ownership, because of one or more of these situations, the more likely is an argument that the tax lien does not attach to the interest because it is not "property [or] rights to property."

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1. The general lien authorized by IRC § 6321 is by far the most important tax lien. Special federal tax liens also exist as to estate taxes, see IRC §§ 6324(a), 6324A and 6324B, gift taxes, see IRC § 6324(b), and taxes on distilled spirits, see IRC § 5004.

2. IRC § 6321. This lien arises upon assessment of the tax by the IRS (followed by notice and demand for payment, and failure to pay) and relates back to the date of assessment. See IRC §§ 6201(a), 6203 and 6303(a). See also United States v. Tempelman, 111 F. Supp. 2d 85, 90 (D.N.H. 2000).

3. United States v. National Bank of Commerce, 472 U.S. 713, 719-20 (1985); see also Glass City Bank v. United States, 326 U.S. 265, 267 (1945) ("Stronger language could hardly have been selected to reveal a purpose to assure the collection of taxes.").

Judicial decisions in such cases sometimes have been inconsistent or simply wrong.[4] In December 1999, however, the Supreme Court decided *Drye v. United States*.[5] The Court's unanimous opinion should infuse tax lien litigation with greater clarity and precision.

This article explores whether this promise is being realized. Although *Drye* was decided only fairly recently, several dozen lower court cases have applied it. Have they done so well? Part II of this article describes *Drye* and contemporary tax lien analysis in light of it. Part III assesses whether *Drye* changed the law or just clarified what had been the law but often was misunderstood. Although ammunition exists to fight for either interpretation, I conclude that the latter is the case. Part III is not purely historical. It demonstrates that loose language in several pre-*Drye* decisions by the Court created confusion, indeed error, for decades thereafter. That fact places courts and counsel now under a burden to state *Drye* precisely, to avert new rounds of confusion and error.

Parts IV, V, and VI examine post-*Drye* decisions, assessing whether they have met this burden and displayed fidelity to the Supreme Court's teaching.[6] These Parts describe, respectively, the good, the bad, and the ugly.

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4. The specific issue resolved by the *Drye* case discussed herein is an example. Before the Supreme Court's resolution of the issue, two circuits–the Fifth and the Ninth–held that state law disclaimers can defeat attachment of the federal tax lien to inherited property, while two others–the Second and the Eighth–held that they cannot. Compare Leggett v. United States, 120 F.3d 592 (5th Cir. 1997), and Mapes v. United States, 15 F.3d 138 (9th Cir. 1994), with United States v. Comparato, 22 F.3d 455 (2d Cir. 1994), and Drye Family 1995 Trust v. United States, 152 F.3d 892 (8th Cir. 1998), *aff'd sub nom,* Drye v. United States, 528 U.S. 49 (1999).

A number of other courts also had weighed in on the issue, again disagreeing. Compare United States v. Davidson, 55 F. Supp. 2d 1152 (D. Colo. 1999), and United States v. McCrackin, 189 F. Supp. 632 (S. D. Ohio 1960) (both holding against the IRS on this issue), with Tinari v. United States. 96-2 U.S. Tax Cas. ¶ 50,460, 78 A.F.T.R. 2d (RIA) 638 (E.D. Pa. 1996), and *In re Spruance*, 95 TNT 111-24 (Pa. Ct. Common Pleas 1994), *aff'd without published opinion,* 660 A.2d 661 (Pa. Super. Ct. 1995) (both holding for the IRS).

5. 528 U.S. 49 (1999).

6. The cases considered in Parts IV, V, and VI are tax lien cases only. *Drye* also has been invoked in a variety of civil and criminal non-tax contexts. Whether such "extra-territorial" applications are appropriate is an interesting and important question, which would profit from deeper exploration by courts and commentators.

Among the non-tax areas in which *Drye* has been cited are: (1) mail fraud, see Cleveland v. United States, 121 U.S. 12 (2000); (2) criminal restitution, see United States v. Allen, 247 F.3d 741 (8th Cir. 2001); and (3) bankruptcy, compare *In re Kloubec*, 247 B.R. 246 (Bankr. N.D. Iowa 2000) to *In re Nistler*, 259 B.R. 723 (Bankr. D. Or. 2001) (disagreeing as to whether *Drye* affects disclaimers made shortly before bankruptcy filing). The bankruptcy disclaimer issue is likely to remain controversial for some time. The district court affirmed *Kloubec* on other grounds, stating that it did not need to resolve the applicability of *Drye* to bankruptcy disclaimers but also calling the Bankruptcy Court's analysis "apt[ ]." *In re Kloubec*, 2001 WL 1222197, at *3 (N.D. Iowa 2001). Other courts, though, seem unconvinced. See, e.g., Cassel v. Kolb, 2001 WL 1181025, at *5 (N.D. Cal. 2001) (seeming to disagree with *Kloubec* although not mentioning that case by name). For discussion of the bankruptcy cases, see *In re*

That is, good: cases which recognize the importance of *Drye* and apply it properly; bad: cases which misapply *Drye* and reach results inconsistent with *Drye*'s teaching; ugly: cases which understand or describe *Drye* imprecisely but, by the grace of providence or because of strong facts, nonetheless reach the correct result.

The conclusion that will emerge from this examination is that, despite mostly encouraging results, greater care will be required in future cases, both in the statement of doctrine and in its application, if the full promise of *Drye* is to be realized. In addition to providing a critical examination of the cases, this article will comment on matters remaining unsettled after *Drye*, suggesting desirable directions for future elaboration of tax lien doctrine.

II. TAX LIEN ANALYSIS AFTER *DRYE*

A. *Facts of* Drye

Narrowly put, the issue in *Drye* was whether the federal tax lien attaches to disclaimed inheritances. Rohn F. Drye, Jr. had unpaid federal tax assessments of approximately $325,000. The IRS had filed liens against him. It had little prospect of being paid, though, because Mr. Drye was insolvent.

Thereafter, Drye's mother died intestate, leaving an estate worth over $230,000. He was her sole heir and the administrator of her estate. Six months later, Drye disclaimed any interest in his mother's estate. The disclaimer was effective under state (Arkansas) law. Two days after that, Drye resigned as administrator – to be succeeded by his daughter.

The effect of the disclaimer was to cause Drye's mother's estate to pass to Drye's daughter. In short order, the daughter established the Drye Family 1995 Trust. She used the proceeds of the estate to fund the trust. The daughter and her parents (including Mr. Drye) were the beneficiaries of the trust. Mr. Drye's attorney was the trustee. He had discretion to make distributions to the beneficiaries for their health, maintenance, and support. The trust was a spendthrift trust, its assets shielded under state law from creditors of the trust's beneficiaries.

The IRS filed a notice of tax lien against the trust, asserting that the trust was Drye's nominee. The IRS also served a notice of levy on accounts held in the trust's name by an investment bank. In response, the trust filed a wrongful levy suit under section 7426(a) in federal district court. The IRS

Popkin & Stern, 223 F.3d 764, 769 n.12 (8th Cir. 2000) (noting the disagreement but expressing no position); Steve R. Johnson, The IRS as Super Creditor, 92 Tax Notes 655, 659-60 (2001); William P. LaPiana, Recent Non-Tax Developments, Estate Planning in Depth, SE90 ALI-ABA 117, 121-22 (2000); David B. Young, Preferences and Fraudulent Transfers, 23rd Annual Current Developments in Bankruptcy and Reorganizations, 819 PLI/Comm 881, 906-09 (2001).

counterclaimed against the trust, its trustees, and its beneficiaries. The IRS sought to reduce to judgement its assessments against Drye, to confirm its right to levy on the trust assets in order to satisfy the assessments, to foreclose on the liens, and to sell the trust property.

As is the rule in most states,[7] Arkansas law provides that an effective disclaimer "relates back for all purposes to the date of death of the decedent,"[8] creating the legal fiction that the disclaimant predeceased the decedent. Thus, Drye maintained that, as a result of his disclaimer, he never had a property interest in his mother's estate. As a result, there was nothing to which the tax liens against him could attach.

In response, the IRS contended that its liens attached to Drye's interest in the estate as of the date of his mother's death and that Drye's subsequent disclaimer could not remove them. The IRS relied on the primacy of substance over legal fictions in tax matters[9] and the settled principle that, once the tax lien attaches, it remains on the property until released by the IRS, satisfied by payment, or extinguished by expiration of the collection statute of limitations.[10]

Both parties moved for summary judgement. The district court held for the IRS, and the Eighth Circuit affirmed. The Supreme Court granted certiorari to resolve conflict among the circuits.[11] The Court, in an opinion authored by Justice Ginsburg, held unanimously for the IRS.

B. *Teaching of* Drye

Three aspects of *Drye* are of principal significance: its clarification of the roles of state law and federal law in defining property and property rights, its discussion of the criteria or elements of property, and its confirmation of the body of law governing post-lien attachment issues.

1. *Roles of state and federal law in defining property.*—The Court saw the case principally as an opportunity to clarify the role of state law in federal tax lien analysis.[12] It was right to do so. Too often, pre-*Drye* pronouncements by the Supreme Court were loosely worded, sending conflicting signals.[13]

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7. See, e.g., Unif. Probate Code § 2-801(c) (amended 1993).

8. Ark. Code Ann. § 28-2-108(a)(3) (Michie 1997).

9. See, e.g., United States v. Irvine, 511 U.S. 224, 239-40 (1994) (observing that the tax law is not "struck blind by a disclaimer"). See also cases cited in infra note 287.

10. IRC § 6322.

11. See supra note 4 and accompanying text.

12. The first sentence of *Drye* identified what the Court perceived to be the heart of the case: "This case concerns the respective provinces of state and federal law in determining what is property for purpose of federal tax lien legislation." 528 U.S. at 52.

13. See infra Part III.

Is it state law or federal law that defines whether a given interest rises to the level of being "property [or] rights to property"?

That question was answered decisively by *Drye*. The Supreme Court instructed: "The Internal Revenue Code's prescriptions are most sensibly read to look to state law for delineation of the taxpayer's rights or interests, but to leave to federal law the determination whether those rights or interests constitute 'property' or 'rights to property' within the meaning of § 6321."[14]

Thus, now it is clear that there are two separate analytical stages in determining whether the federal tax lien attaches to a particular interest.[15] The first stage is: what powers or privileges does the delinquent taxpayer have as to the underlying property? Can the taxpayer receive, use, or benefit from the property, or prevent others from doing so? If so, in what ways? One answers the questions at this stage by consulting state law. The second stage is: do those powers or privileges rise to the level of "property" or "rights to property" for purposes of section 6321? This characterization is purely a question of federal law, and any characterization of the powers or privileges as "property" or "not property" under state law is entirely irrelevant to the characterization.[16]

2. *Criteria or elements of property.*—As we have seen, whether the interest in question is or is not "property [or] rights to property" is now firmly established as a federal law question. Yet, neither the Code nor the Regulations define these terms. Thus, the criteria for the second stage determination, the characterization of the interest, emerge from the case law.

Drye did not propound a general or comprehensive definition of section 6321 property and property rights. Nonetheless, in three respects, the case contains worthwhile discussion of the point. First, the Court quoted approvingly earlier cases holding that the reach of section 6321 should be construed expansively.[17]

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14. 528 U.S. at 52.

15. After it is determined that the lien does attach to the interest, analysis of the collection controversy shifts to a third stage: what actions the IRS can take against the property and what the taxpayer and others can do against those actions. See subpart II.B.3.

16. One commentator has argued that this aspect of *Drye* traduces the principle of federalism. Note, Drye v. United States: Limiting the Traditional State Right To Define Property, 69 U.M.K.C. L. Rev. 909 (2001). This is incorrect. Congress used the word "property" in § 6321 as part of a federal statute to govern federal revenue collection. It is not corrosive of federalism for one sovereign to define a word in a particular way for purposes entirely internal to its operations, or for that sovereign to define the word in a way different from how other sovereigns define it for their own, separate purposes. The federal definition of property under § 6321 in no way interferes with how states define property for their own non-federal-tax purposes. See Steve R. Johnson, After *Drye*: The Likely Attachment of the Federal Tax Lien to Tenancy-by-the Entireties Interests, 75 Ind. L.J. 1163, 1186-87 (2000). It is worth noting that the *Drye* decision was unanimous. None of the justices on a Court highly protective of federalism suggested that *Drye* contravened that principle or was a retreat from its recent protection.

17. 528 U.S. at 56; see cases cited in supra note 3.

Second, the Court addressed the "property" status of Mr. Drye's interest in his mother's estate. In concluding that his interest did constitute a section 6321 property right, the Court emphasized the element of control. "Arkansas law primarily gave Drye a right of considerable value–the right either to inherit or to channel the inheritance to a close family member (the next lineal descendant)," who would take as a result of Drye's disclaimer.[18] If Drye did nothing, *i.e.*, did not disclaim, his mother's estate would come to him. He could deflect that only by taking the affirmative act of filing a disclaimer. Even then, the result of his affirmative act would be the passage of the estate to his daughter. Whether by taking the affirmative act or by refraining from it, "the heir inevitably exercises dominion over the property."[19] This "power to channel" the underlying property, this "control rein" over it "warrants the conclusion that Drye held 'property' or a 'righ[t] to property' subject to the Government's liens."[20]

Third, without committing itself to them, the Court reprised criteria of "property" advanced in prior cases. The Court rehearsed the following definitions or criteria:

–"'every species of right or interest protected by law and having an exchangeable value,'"[21]

–a right to gain possession of an item, even if such possession does not amount to ownership,[22]

–items available to the taxpayer, " 'within [her] reach to enjoy,' "[23]

–"any beneficial interest, as opposed to 'bare legal title,' in the [asset] at issue,"[24]

–"a valuable, transferable, legally protected right to the property at issue,"[25]

–"rights or interests that have pecuniary value and are transferable,"[26] and

–more than a mere expectancy, even if valuable and transferable.[27]

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18. 528 U.S. at 60.

19. Id. at 61.

20. Id. (alteration in original).

21. Id. at 56 (quoting Jewett v. Commissioner, 455 U.S. 305, 309 (1982) (quoting 1932 legislative history)).

22. See id. at 58; see also United States v. National Bank of Commerce, 472 U.S. 713, 723-27 (1985) (holding that the right to withdraw money from a joint bank account is a § 6321 property right even though it was not established that it was the taxpayer (as opposed to his codepositors) who owned the money in the account).

23. 528 U.S. at 59 (quoting Bess v. United States, 357 U.S. 51, 56 (1958)).

24. Id. at 59 n.6 (quoting Aquilino v. United States, 363 U.S. 509, 515-16 (1960)).

25. Id. at 60 (citing Drye Family 1995 Trust v. United States, 152 F.3d 892, 895 (8th Cir. 1998)).

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

27. See id. at 60 n.7 (commenting on *Drye Family 1995 Trust*).

It should be emphasized, however, that the Court embraced none of these formulations absolutely. None is intended as a litmus test or a hard-and-fast rule. For example, several of the formulations include the transferability of the asset or interest. Yet the Court cautioned: "[W]e do not mean to suggest that transferability is essential to the existence of 'property' or 'rights to property' under [§ 6321]."[28]

Other inclusions in the formulations also may require refinement. For instance, it may be too confining to say that expectancies can never be property for section 6321 purposes. A non-tax case[29] decided less than two months after *Drye* is suggestive. Rubylien Badouh executed a will in 1990 bequeathing her home to her daughter, Elaine. In 1992, Elaine's brother Edward obtained a $150,000 judgement against her. In 1994, Elaine executed a promissory note in favor of her attorney for legal services he rendered to her in an unrelated matter. Elaine secured that note by a deed of trust pledging her expectancy in her mother's home. The attorney filed the deed of trust in the county records. In 1996, Rubylien died, and her will was filed for probate. Edward applied for a turnover order to satisfy his judgement against Elaine's interest in Rubylien's estate, whereupon Elaine filed a disclaimer of her interest in the estate. The attorney (who still hadn't been paid by Elaine) intervened in the probate proceedings to assert his lien claims against Elaine's interest in the estate. The Texas Supreme Court held the disclaimer invalid since, by pledging the expectancy as security for the deed of trust, Elaine had exercised dominion and control over her expectancy in the house prior to making the disclaimer.[30] When an expectancy is treated as having the significance and substance that it was accorded by the actors in this Texas case, it probably should be seen as rising to the level of being a property right,[31] particularly since, as we have seen, both *Drye* and prior Supreme Court cases have emphasized the extremely broad reach of section 6321.[32]

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28. Id. at 60 n.7.

29. Badouh v. Hale, 22 S.W.3d 392 (Tex. 2000).

30. Id. at 395-98.

31. See Fouts v. United States, 197 F. Supp. 2d 815, 817 (W.D. Mich. 2000) (finding that a taxpayer had "a present interest in property, although it is an expectant interest" and holding, based on *Drye*, that the interest was subject to the federal tax lien).

32. See text accompanying supra notes 3 & 17. Of course, the IRS would have no greater interest than the possessor of the expectancy had. See, e.g., United States v. Durham Lumber Co., 363 U.S. 522, 525-26 (1958); Boris I. Bittker & Martin J. McMahon, Jr., Federal Income Taxation of Individuals ¶ 44.5[4][a] (2d ed. 2001) ("the tax collector not only steps into the taxpayer's shoes but must go barefoot if the shoes wear out"). Thus, for instance, had Elaine been a tax debtor against whom tax liens had been filed and had Rubylien, before her death, disinherited Elaine, the tax lien would have died with the expectancy.

An interesting question is whether more testators will disinherit tax-delinquent devisees and legatees, since *Drye* removes the disclaimer technique. See Edward Kessel & Steven R. Klammer, Supreme Court Finds Disclaimer Ineffective To Avoid Federal Tax Lien, 92 J. Tax'n 118, 121 (2000) ("Unfortunately, most estate planners probably have not inquired into the

These and other matters will have to be handled in future cases, their resolution to be informed by the particular facts of those cases. Thus, we may take the stage two remarks of the *Drye* Court as starting points, but it would be a mistake to rush to judgement as to the eventual contours of a federal definition of property and property rights.

3. *Law governing post-lien attachment issues.*—Attachment of the federal tax lien is by no means the end of the collection road. The lien "is not self-executing. Affirmative action by the IRS is required to enforce collection of the unpaid taxes."[33] Which body of law will govern post-lien attachment matters? Although the relationship of federal law and state law at earlier stages was, before *Drye*, either controversial or confused,[34] the relationship between these bodies of law after lien attachment has long been clear.

The Supreme Court repeatedly held that "the consequences that attach [after it has been ascertained that a given item of property is amenable to the tax lien] is a matter left to federal law."[35] Unsurprisingly, *Drye* confirmed that rule.[36] Concretely, what does it mean that post-lien attachment consequences are controlled by federal, not state, law? Consider these examples:

–The ways in which the IRS may proceed against the property burdened by the tax lien are controlled by federal law.[37]

–The safeguards or protections available to taxpayers and third parties against the IRS's "formidable arsenal of collection tools"[38] are set out by federal law.[39]

–State exemptions or immunities for debtors do not limit the federal tax lien.[40]

–State renunciation and disclaimer rules do not affect the federal tax lien.[41]

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delinquent tax status of their clients' beneficiaries, and now must do so.").

33. United States v. National Bank of Commerce, 472 U.S. 713, 720 (1985).

34. See infra Part III.

35. United States v. Rodgers, 461 U.S. 677, 683 (1983); see also United States v. National Bank of Commerce, 472 U.S. 713, 722-23 (1985); Aquilino v. United States, 363 U.S. 509, 513-14 (1960); United States v. Bess, 357 U.S. 51, 56-57 (1958).

36. See 528 U.S. at 52 (quoting *Bess*).

37. E.g., *National Bank of Commerce*, 472 U.S. at 720.

38. *Rodgers*, 461 U.S. at 683.

39. E.g., Fried v. New York Life Ins. Co., 241 F.2d 504, 506 (2d Cir. 1957), cert. denied, 354 U.S. 922 (1957).

40. E.g., United States v. Wagner, 235 F. Supp. 854, 855 (S.D.N.Y. 1964); Treas. Reg. § 301.6334-1(c).

41. E.g., United States v. Mitchell, 403 U.S. 190, 205 (1971).

–State rules do not govern the relative priorities of the federal tax lien and any other liens competing with it as to the same property.[42]

–State filing requirements do not control federal tax liens.[43]

–State law does not govern how property seized by the IRS may be sold.[44]

III. CHANGE OR CLARIFICATION?

Drye is a case of fundamental significance. In my estimation, it is the most important tax lien decision ever handed down.[45] Even those taking a more restrained view surely would agree that *Drye* is the most important case in the area since the early to mid 1980's.[46] But, is *Drye* significant because it announces new law or because it clarifies old, but sometimes misunderstood, law? As to what I have called the second and third aspects–the contents of the federal definition of property and procedures applicable after lien attachment–the answer clearly is the clarification function. As to the first aspect–the relation between federal and state law in defining property–there is room for debate. Again, though, I believe the correct answer is clarification, not change.

A. *Second and Third Aspects*

Drye focused mainly on whether the tax lien attached to the property at issue, not on post-attachment consequences. It did reaffirm that such later

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42. E.g., United States v. Acri, 348 U.S. 211, 213 (1955); United States v. City of New Britain, 347 U.S. 81, 86 (1954); United States v. Security Trust & Savings Bank, 340 U.S. 47, 50-51 (1950).

43. E.g., United States v. Union Central Life Ins. Co., 368 U.S. 291, 293-95 (1961).

44. E.g., Springer v. United States, 102 U.S. 586, 594 (1881).

45. *Drye* may also have significance outside tax lien law. In an excellent recent article, Professor Thomas Merrill sought "to make sense of the landscape of" the concept of property under the Due Process and Takings Clauses in light of recent decisions. Thomas W. Merrill, The Landscape of Constitutional Property, 86 Va. L. Rev. 885, 890 (2000). In addition to three constitutional cases, Merrill considers *Drye* at length. Combined with the non-tax cases looking to *Drye*, see supra note 6, the article may betoken extension of *Drye*'s beneficial influence beyond the tax law. Parenthetically, I note that, like me, Merrill thinks highly of *Drye*. He remarks:

> *Drye* comes as a breadth of fresh air after the three previous [constitutional] decisions. It articulates a clear conception of the relationship between federal and state law in determining the existence of property, it sets forth a reasonably clear federal criterion for the identification of property, and it applies this criterion to the facts in a way that seems persuasive. If only constitutional law were that simple.

Id. at 916.

46. When the Supreme Court decided United States v. Rodgers, 461 U.S. 677 (1983), and United States v. National Bank of Commerce, 472 U.S. 713 (1985).

consequences are governed by federal law, not state law. However, that principle had been widely understood for generations.[47] The third aspect of *Drye*, thus, did not change or add to the law.

As to the second aspect of its teaching, *Drye* confirmed that "property and rights to property" has a very broad meaning for section 6321 purposes, but we knew that already.[48] No change. *Drye* also listed indicia of property suggested in prior cases.[49] It did so only illustratively, though, and elevated none of them to authoritative, exclusive, and comprehensive definitional status. No change. *Drye* also stated, with specific reference to transferability, that the non-existence of any of various listed indicia need not be fatal, in the context of particular cases, to classification of an interest as a section 6321 property right.[50] But again, that had been generally understood.[51] No change. Finally, *Drye* discussed at length the aspect of control: the taxpayer's control over the items on which the IRS seeks to impress its liens. Some have read *Drye* to stand for the position that control is the most important element in the federal definition of property, but, as discussed later, I believe that reading is wrong.[52] Thus, again, no change.

B. *First Aspect*

It is a closer question whether the first aspect of *Drye*'s teaching–the relationship between state law and federal law in defining section 6321 property–is a change or clarification in the law. Forthrightly, the Court conceded in *Drye* that its prior decisions had "not been phrased so meticulously as to preclude" the argument that state law, not federal law, defines property for section 6321 purposes.[53] Sad, but true, as the following history shows.

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47. See supra note 35.

48. See supra note 3 and accompanying text.

49. See supra notes 18-27 and accompanying text.

50. See supra note 28 and accompanying text.

51. For example, interests in spendthrift trusts which are transferable only in the sense that they can be renounced or disclaimed, have long been held to be amenable to the federal tax lien. E.g., *In re Orr*, 180 F.3d 656, 661-63 (5th Cir. 1999); Bank One Ohio Trust Co. v. United States, 80 F.3d 173, 176 (6th Cir. 1996); Leuschner v. First W. Bank & Trust Co., 261 F.2d 705, 708 (9th Cir. 1958); United States v. Dallas Nat'l Bank, 152 F.2d 582 (5th Cir. 1945), further opinion, 164 F.2d 489 (5th Cir. 1947), further opinion, 167 F.2d 468 (5th Cir. 1948); First of America Trust Co. v. United States, 1993 U.S. Dist. LEXIS 4694; 93-2 U.S. Tax Cas. (CCH) PSO, 507; 72 A.F.T.R. 2d (RIA) 5296 (citing cases); *In re Rosenberg's Will*, 199 N.E. 206 (N.Y. App. 1935), *cert. denied sub nom.* Rosenberg v. United States, 298 U.S. 669 (1936).

52. See infra subpart VI.B.2.

53. 528 U.S. at 57.

1. *Pre-*Drye *history.*—The Supreme Court has discussed in many cases the role of state law in federal tax analysis.[54] Early, the primacy of federal over state law in federal tax collection seemed a settled proposition. In 1893, the Supreme Court stated that "remedies for [the collection of federal taxes] has always been conceded to be independent of the legislative action of the states."[55] The reasons for this are rooted in both the federal government's constitutional powers and the policy of uniform application of the tax laws. As the Court said in a 1932 case:

> Here we are concerned only with the meaning and application of a statute enacted by Congress, in the exercise of its plenary power under the Constitution, to tax income. The exertion of that power is not subject to state control. It is the will of Congress which controls [and its legislation] is to be interpreted so as to give a uniform application to a nation-wide scheme of taxation. . . . State law may control only when the federal taxing act, by express language or necessary implication, makes its own operation dependent upon state law.[56]

Nearly half a century later, though, the 1940 decision *Morgan v. Commissioner*[57] confused matters. First it declared:

> State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed. . . . If it is found in a given case that an interest or right created by local law was the object to be taxed, the federal law must prevail no matter what name is given to the interest or right by state law.[58]

This first statement is fully consistent with the 1893 case and with *Drye*'s later teaching. Shortly thereafter, however, the *Morgan* Court said: "in the application of a federal revenue act, state law controls in determining the nature of the legal interest which the taxpayer had in the property or income to be reached by the statute."[59]

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54. Some of the cases involved pre-assessment determination of liability while others concerned post-assessment collection. The Court has freely commingled the two types of cases in its various discussions, as it did in *Drye*, see 528 U.S. at 56-61.

55. United States v. Snyder, 149 U.S. 210, 214 (1893).

56. Burnet v. Harmel, 287 U.S. 103, 110 (1932).

57. 309 U.S. 78 (1940).

58. Id. at 80-81.

59. Id. at 82.

How to read this second passage: state law determines the "nature" of the interest? Does "nature" include classification of the interest as property or not property for section 6321 purposes? Such a reading would be possible on the bare term itself. However, that reading would, comparing the two passages, make *Morgan* inconsistent with itself. It also would place *Morgan* in tension with the 1893 decision. Thus, a less embracing construction of the second passage is more plausible. That is, "nature" should be limited to the content of the interest–what the taxpayer could do as to the property or prevent others from doing–and should not also include the classification or definition of the interest as section 6321 property or not. This more modest interpretation received further support in the next several years. In 1941, the Court reiterated the policy of uniform nationwide application of the tax laws and the consequently limited role of state law.[60] In 1942, the Court stated: "Once rights are obtained by local law, whatever they may be called, these rights are subject to federal definition of taxability."[61] Then, in 1945, the Court stated that whether "future earning capacity" constituted property or a property right was "not to be determined by resorting to the local law of Pennsylvania."[62]

But some decisions in the late 1950's and early 1960's muddied the waters. In *United States v. Bess*, the Court phrased the analysis thusly: "[O]nce it has been determined that state law creates sufficient interests in the [taxpayer] to satisfy the requirements of [what is now section 6321]," recourse to state law ends.[63] This presents a similar ambiguity to the "nature" language of *Morgan.*

The *bete noire* of this chronicle is the 1960 decision *Aquilino v. United States*.[64] There, the Court stated:

> The threshold question . . . is whether and to what extent the taxpayer had "property" or "rights to property" to which the federal tax lien could attach. In answering that question, both federal and state courts must look to state law . . . . The application of state law in ascertaining the taxpayer's property rights and of federal law in reconciling the claims of competing lienors is based upon logic and sound legal principles. This approach strikes a proper balance between the legitimate and traditional interest which the state has in creating and defining the property interest of its citizens and

60. United States v. Pelzer, 312 U.S. 399, 402 (1941).

61. Helvering v. Stuart, 317 U.S. 154, 162 (1942).

62. Glass City Bank v. United States, 326 U.S. 265, 268 (1945).

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

64. 363 U.S. 509 (1960). The holding of *Aquilino* is that § 6321 property includes beneficial interests, not bare legal title. Id. at 515-16. I am not troubled by that holding, only by *Aquilino*'s phrasing of the relationship between federal and state law.

> the necessity for a uniform administration of the federal revenue statutes.[65]

This is the formulation most nearly at odds with *Drye*'s explication of tax lien doctrine.[66] Yet even it can be argued to be reconcilable. To say that state law must be looked to in making the property status determination is not to say that state law is the only thing to be considered. Tunnel vision is not required. *Drye* too requires that state law be looked to, but only up to a certain point and not exclusively. *Aquilino* is not terminally incompatible with that approach. Moreover, this reconciliation gains force from the fact that the Supreme Court, just one year after *Aquilino* and seemingly not thinking it at odds with *Aquilino*, quoted with approval the language of the 1893 decision.[67]

There the matter lay for a decade. Then, in 1971, the Court repeated that "state law creates legal interests but the federal statute determines when and how they shall be taxed," and it called these principles "long established in the law of taxation."[68] In 1985, the Court again stated the rule in a manner consonant with the later teaching of *Drye*. In *National Bank of Commerce*, the Court stated: "The question whether a state-law right constitutes 'property' or 'rights to property' is a matter of federal law."[69] Finally, in the *Irvine* case in 1994, the Court referred to "the general and longstanding rule in federal tax cases that although state law creates legal interests and rights in property,

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65. Id. at 512-14. *Aquilino* had a companion case, United States v. Durham Lumber Co., 363 U.S. 522 (1960), which spoke in similar terms, including the "nature" language. The Supreme Court noted that the court of appeals below "stated that the nature and extent of the [taxpayer's] property rights, to which the tax lien attached, must be ascertained under state law." Id. at 524. The Supreme Court affirmed. Id. at 526 ("The Court of Appeals was correct in asserting that the Government's tax lien attached to the taxpayers' property interests in the fund as defined by North Carolina law.") and n.4 ("what constitutes the taxpayer's property in the first place is a question of state law"). *Durham Lumber* is cited far less frequently than *Aquilino.*

66. For an argument that *Aquilino* and *Drye* are inconsistent, see Note, supra note16, at 912-17.

67. See United States v. Union Central Life Ins. Co., 368 U.S. 291, 293-94 (1961). On the other hand, two more years later, the Court remarked: "our recent cases . . . [hold] that state law controls the determination of what is included within . . . 'property or right to property.'" Meyer v. United States, 375 U.S. 233, 322 (1963). Also, shortly before *Aquilino* was decided, the Court, in another little cited tax collection case, had expressed concern about "the severe dislocation to local property relationships which would result from our disregarding state procedures." United States v. Brosnan, 363 U.S. 237, 242 (1960). In *Brosnan*, though, the Court strangely failed to employ the customary several stages of analysis that the main cases discussed herein used.

68. United States v. Mitchell, 403 U.S. 190, 197 (1971) (citing cases previously described) (internal quotation marks omitted); cf. Butner v. United States, 440 U.S. 48, 55 (1979) (stating that, for bankruptcy purposes, "Property interests are created and defined by state law. Unless some federal interest requires a different result. . . . ").

69. United States v. National Bank of Commerce, 472 U.S. 713, 727 (1985) (citing United States v. Bess, 357 U.S. at 56-57).

federal law determines whether and to what extent those interests will be taxed."[70] And that was the High Court's last treatment of the issue until *Drye*.

2. *Evaluation.*—With this background, we return to the question whether *Drye* changed or merely clarified the law when it held that state law is confined to stage one and federal law governs stage two of contemporary tax lien analysis. At least three views have been put forward as to when this relationship between federal and state law became the rule.

(1) One view is that this has been the true rule throughout. This view sees cases like *Morgan*, *Bess*, and *Aquilino* as being doctrinally consistent with the other pre-*Drye* cases described above, just less cautiously phrased. If this view is correct, then *Drye* only clarifies.[71] I have previously expressed my support of this view,[72] and I remain of that conviction. A number of other commentators have shared this view,[73] as have a number of courts.[74]

(2) At least sometimes, the Department of Justice Trial or Appellate Sections appear to have argued that state-law definition of section 6321 property rights had once been the rule, but that *National Bank of Commerce* changed the rule.[75]

(3) In one recent case, the Trial or Appellate Sections appear to have

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70. United States v. Irvine, 511 U.S. 224, 238 (1994) (citing cases discussed previously).

71. This does not diminish the importance of *Drye*. The imprecise formulations in previous decisions by the Court made such clarification most desirable.

72. See Johnson, supra note 16, at 1174-77.

73. See, e.g., William D. Elliott, Tax Liens and Levies Involving Partners: Will a Partnership's Assets Be Attached?, 4 J. Partnership Tax'n 320, 324 (1998) (pre-*Drye* piece summarizing cases in manner consistent with eventual *Drye* holding); Robert E. Madden & Lisa H.R. Hayes, Uncle Sam No Longer Struck Blind by Heir's Disclaimer To Defeat Tax Liens, Estate Planning, May 2000, at 168, 169 (calling *Drye* "consistent[ ] with past rulings on similar issues"); Merrill, supra note 45, at 889 (stating that *Drye* "at least seems to have some continuity with the conventional method [used by the Court to define property for non-tax, constitutional purposes] and with prior decisions in the tax area"); Note, "Property Subject to the Federal Tax Lien," 77 Harv. L. Rev. 1485, 1486-91 (1964) (pre-*Drye* piece summarizing cases in manner consistent with eventual *Drye* holding).

74. This is the necessary inference from the many pre-*Drye* decisions taking the view that the property classification determination is a matter of federal law. See, e.g., *In re Orr*, 180 F.3d 656, 660 (5th Cir. 1999); Randall v. H. Nakashima & Co., Ltd., 542 F.2d 270, 273 (5th Cir. 1976); United States v. Citizens & Southern Nat'l Bank, 538 F.2d 1101, 1105 (5th Cir. 1976); Fidelity & Deposit Co. v. New York Housing Auth., 241 F.2d 142, 144-45 (2d Cir. 1957).

75. See Magavern v. United States, 550 F.2d 797, 800 (2d Cir. 1977) (pre-*National Bank of Commerce* case in which the court stated that the Government conceded that "in asserting its Federal Tax Lien, the Government must look to state law for a determination of what legal rights and interests, if any, comprise 'property and rights to property' to be attached"); id. (citing Aquilino v. United States, 363 U.S. 509 (1960); United States v. Durham Lumber Co. 363 U.S. 522 (1960); United States v. Bess, 357 U.S. 51 (1958)); United States v. Davidson, 55 F. Supp. 2d 1152, 1154 (D. Colo. 1999).

advanced as an alternative argument the idea that state-law definition of section 6321 property rights had once been the rule, but that *Drye* had changed the rule.[76] This position apparently was taken to avoid a "law of the case" issue unique to that case.[77]

The case for the first of these views rests on the textual analysis set forth above, both within particular decisions and in reconciliation of the several decisions. That case is fortified by *Drye* itself. Were *Drye* announcing a new rule, one would have expected the Court to have said so in its opinion, particularly if state determination of property status had been a rule of long standing (sixty years going back to *Morgan* or forty years going back to *Aquilino*). No such acknowledgment appears in the Court's unanimous opinion, and none of the nine Justices wrote separately to explain that *Drye* changed the law.

Even more significant is what the *Drye* Court affirmatively said about the prior cases. In two paragraphs and a footnote, the Court discussed *Morgan*, *Aquilino*, and *National Bank of Commerce*, and it found them "[i]n line with" and "compatibl[e]" with *Drye*'s own teaching as to the "division of competence" between federal and state law.[78] Specifically, the Court read *Aquilino* as "reaffirm[ing] that federal law determines whether the taxpayer's interests are sufficient to constitute 'property' or 'rights to property' subject to the Government's lien,"[79] and it quoted with approval a commentator's conclusion that "*Aquilino* supports the view that the Court has chosen to apply a federal test of classification" of property interests.[80] Thus, the evidence internal to *Drye*–both what it did not say and what it did say–suggests two things: first, that the Court did not see *Drye* as changing the law and, second, that the Court saw the pre-*Drye* law as mandating federal, not state, classification of property at stage two of tax collection analysis.

3. *Tenacity of the old, wrong understanding.*—As stated above, I believe that *Drye* clarifies, not changes, tax lien law because that view best accounts for language in pertinent Supreme Court cases before *Drye*, and is the only alternative to concluding that the Court changed its mind on the issue not once but several times over generations, without acknowledging even once that it had done so. Still, not everyone has read the historical record in the same fashion. Some remarks in that direction are appropriate, if only to underline the

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76. See Craft v. United States, 233 F.3d 358, 366 (6th Cir. 2000) ("At oral argument, the IRS added that *Drye* stands for the 'new' legal rule that a federal tax lien attaches to a taxpayer's right to inherit property."). Id.

77. See infra notes 198 & 201 and accompanying text.

78. See *Drye*, 528 U.S. at 58-59 & n.6.

79. Id. at 59 n.6 (citing *Aquilino*, 363 U.S. at 513-14).

80. Id. (quoting Note, Property Subject to the Federal Tax Lien, 77 Harv. L. Rev. 1485, 1491 (1964)).

importance of clear statement of the correct rule now.

Even *National Bank of Commerce* in 1985[81] did not convince some courts that federal law, not state law, controls the section 6321 property characterization. For example, in *United States v. Davidson*,[82] a federal district court, although not recounting the full history given above, discussed at length the relationship among *Bess*, *Aquilino*, and *National Bank of Commerce*, noting that the Court had "struggled" with the issue.[83] The *Davidson* court concluded that (1) the law pre-*National Bank of Commerce* was that state, not federal, law controlled the classification question[84] and (2) *National Bank of Commerce* supported, not displaced, that rule.[85]

Even in the 1990's, a number of federal circuit court,[86] district court,[87] and bankruptcy court[88] cases applied state law to section 6321 property classification. As late as several months before *Drye* was handed down, a lower court pronounced it "well-settled" that "the definition of underlying property interests is left to state law. . . . Thus, the court looks to state law to determine the character of any property right [the taxpayer] may have had. . . ."[89] Presumably, it was on the basis of such cases that one commentator stated that *Drye* "reversed the long held belief that state law defines property."[90]

Although the above is founded, I believe, on misunderstanding, enough has been said to show that, in some soils, the roots of error were sunk deeply. Since human beings tend to resist change, those roots may prove hard to extract. This fact is indexed by the bad and ugly cases described in Parts V and VI. Recognition of this tenacity imposes a considerable burden of precision on courts and commentators. To state the instruction of *Drye* haphazardly or to apply it in an analytically sloppy fashion risks sliding back into the error often committed before *Drye*, the error as to the proper roles of federal law and state law that *Drye* sought to correct.

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81. See supra note 69 and accompanying text.

82. 55 F. Supp. 2d 1152 (D. Colo. 1999).

83. Id. at 1154.

84. Id.

85. Id. at 1154-55.

86. E.g., Leggett v. United States, 120 F.3d 592, 597 (5th Cir. 1997); Mapes v. United States, 15 F.3d 138, 140 (9th Cir. 1994).

87. E.g., Foust v. Foust, 1998 U.S. Dist. LEXIS 1806, at *14 (S.D. Ind. July 9, 1997); United States v. Dusterberg, 1997 WL 327395, at *2 (S.D. Ohio March 12, 1997); United States v. Klimek, 952 F. Supp. 1100, 1114-15 (E.D. Pa. 1997); Talbot v. United States, 850 F. Supp. 969, 972 (D. Wyo. 1994).

88. E.g., *In re Pletz*, 225 B.R. 206, 208 (Bankr. D. Or. 1997), *aff'd on other grounds*, 234 B.R. 800 (D. Or. 1998), aff'd, 221 F.3d 1114 (9th Cir. 2000).

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

90. Note, Cases, Statutes, and Recent Developments: Property Law, 33 Urb. Law. 221, 221 (2001).

IV. THE GOOD

Below, I consider cases properly applying *Drye*, discussing them under the three aspects of *Drye*'s teaching described in Part II.

A. *Federal Law Versus State Law in Defining Property*

In *United States v. Stolle,* a California district court summarized post–*Drye* lien analysis thusly: "Having determined whether a taxpayer could have a right to the property under state law, the Court then applies federal law to determine whether such a right constitutes property or a right to property under § 6321."[91] Here is how the court applied that standard. The case involved whether the general tax lien against one spouse attaches to community property held by a revocable trust on behalf of the taxpayer and the other spouse. At stage one, the court noted that the trust instrument gave the spouses a right to withdraw all of the underlying property (four parcels of real estate) from the trust, the absolute right to dissolve the trust at any time, and the right to dispossess any other beneficial interest in the trust. Thus, the court had "little difficulty" concluding that the spouses owned the four parcels.[92] The IRS was permitted to reach all of the parcels to satisfy the lien against the taxpayer since, under California law, community property is available to satisfy a debt from either spouse, even if the other spouse is not responsible for the debt.[93]

A First Circuit case, *United States v. Murray,*[94] involved both stage one and stage two of post-*Drye* tax lien analysis. The issue was whether the IRS's lien against Michael Murray attached to a house in Massachusetts. The house was purchased in 1976 by Michael and his then-wife Judith. In 1980, they deeded it to themselves and Judith's stepbrother as trustees of the M & J Murray Family Trust. The trust was to be managed by majority vote of the three trustees. In September 1988, as part of a separation agreement, Michael agreed to convey his interest in the property to Judith, but he did not carry out this promise. In November 1988, the IRS made an assessment against Michael. In March 1989, when the divorce became final, the three trustees deeded the property to Judith. In March 1997, the IRS filed an action in federal district court. It asserted that its lien reached one-half of the value of the property. The district court held for the IRS, and the First Circuit affirmed.

Opposing the IRS, Judith had stressed that, under the terms of the trust, Michael's interest in the property was subject to being terminated by the other trustees (Judith and her stepbrother) acting together. This gave rise to two

91. United States v. Stolle, 2000 WL 1202087, at *5 (C.D. Cal. Feb. 14, 2000).
92. Id.
93. Id. at *6.
94. 217 F.3d 59 (1st Cir. 2000).

arguments. First, under the First Circuit's decision in *Markham,*[95] a prior case, she argued that a power in a person other than the taxpayer to cut off the taxpayer's interest in the trust corpus "means that such an interest is not 'vested' under Massachusetts law and is therefore not 'property' to which a federal lien may attach."[96] Second, Judith maintained that the possibility of termination by the two other trustees rendered Michael's interest "so contingent, uncertain or speculative that it did not constitute 'property' or 'rights to property' under [section 6321]."[97]

The circuit court rejected Judith's first argument on the basis of *Drye*'s teaching as to the relationship of federal and state law. Under *Drye*, the court observed,

> [T]he "bundle of rights" that Michael had vis-a-vis the trust income and corpus, including the Juliette Road house, depends on Massachusetts law; but regardless of what label Massachusetts law may attach to that bundle, federal law determines whether this interest rises to the level of "property" or "rights to property" for purposes of the federal tax lien statute.[98]

The circuit court questioned Judith's reading of the earlier *Markham* case.[99] But, even had she read it right, *Markham* was displaced by *Drye* in the respect relevant to the case.

> *Markham*'s holding on this point depended on its assumption that the federal tax lien issue turned on whether "under Massachusetts law . . . a right in a trust has vested. . . ."
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> . . . .
>
> What *Drye* now makes clear is that labels like "vesting" and "nonvesting" under Massachusetts law are not determinative, and that federal law determines whether an interest that exists under state law is sufficiently substantial that it should be treated as "property" or "rights to property" for purposes of the federal tax lien statute.[100]

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95. Markham v. Fay, 74 F.3d 1347 (1st Cir. 1996).
96. *Murray,* 217 F.3d at 64.
97. Id. at 63.
98. Id.
99. See id. at 63-64.
100. Id. at 64.

In rejecting Judith's second argument, the circuit court entertained *Drye*'s illustrative remarks about what characterizes property or property rights under the federal definition. The court remarked: "Perhaps the situations are too numerous and varied to permit a single comprehensive definition, and such elements–transferability, pecuniary value, control, enjoyment–should be treated as among the relevant considerations in a highly fact-specific inquiry."[101]

The "possibility of termination" urged by Judith would be one factor considered in the inquiry, but it was insufficient to remove Michael's interest from the category of property or property rights. In this, the court was particularly influenced by *National Bank of Commerce*.[102] Under that decision, the general tax lien attached to one co-depositor's right to withdraw money from a joint bank account, even though the other depositors (who did not owe tax) had the same withdrawal rights and it was not known which of the persons on the account was the owner of the money in it. The taxpayer's interest in *National Bank of Commerce* was "equally subject to divestiture at the control of a third party, namely, [by withdrawal of all the money by one of the other depositors]" as Michael's interest was by act of the other two trustees.[103] The possibility of divestiture, then, cannot remove an interest from property status under section 6321.

B. *Contents of Federal Definition of Property*

In re Herraras[104] addressed mainly the second stage of tax collection analysis: when a power or interest rises to the status of a section 6321 property right. The taxpayer was an attorney who owed taxes. After filing a Chapter 7 bankruptcy petition, he surrendered to the bankruptcy trustee the assets of his law practice, including his work-in-progress as of the bankruptcy filing date. Thereafter, he repurchased those assets from the trustee. The IRS filed a proof of claim to enforce its liens against the proceeds in the trustee's hands. The trustee objected to the application of the liens to the portion of the proceeds attributable to the work-in-progress. The bankruptcy court sustained the objection, holding that the taxpayer did not have an unqualified right to receive fees from the work-in-progress at the time the petition was filed.[105]

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101. Id. at 63.

102. United States v. National Bank of Commerce, 472 U.S. 713, 724-26 (1985).

103. *Murray*, 217 F.3d at 65.

104. 257 B.R. 1 (Bankr. C.D. Cal. 2000).

105. That was the crucial measuring point. Although the tax lien usually applies to after-acquired property, e.g., Glass City Bank v. United States, 326 U.S. 265 (1945), several cases have held that it does not attach to property acquired after the taxpayer files a bankruptcy petition, e.g., *In re Connor*, 27 F.3d 365, 366 (9th Cir. 1994); *In re Braund*, 423 F.2d 718, 719 (9th Cir. 1970).

The IRS appealed to the district court. That court quoted *Drye* for the broad reach of section 6321 property,[106] then explored the work-in-progress. Two principal points emerge from the court's treatment of the issue. First, the court invoked one of the illustrative descriptions of section 6321 property mentioned by *Drye*: interests protected by law and having exchangeable value.[107] The attorney-taxpayer's rights were "protected by law in that they are enforceable upon the happening of the condition and are treated as valuable assets in such contexts as that of marital property division; and it is clear that they had an exchangeable value because Herreras purchased them from the trustee."[108]

Second, the court acknowledged the caution in *Drye* that "[i]n recognizing that state-law rights that have pecuniary value and are transferable fall within § 6321, we do not mean to suggest that . . . . an expectancy that has pecuniary value and is transferrable under state law would fall within § 6321 prior to the time it ripens into a present estate."[109] The *Herraras* court noted, though, that the attorney-taxpayer's work-in-progress was a present estate before the bankruptcy petition was filed, not a mere expectancy.

The court was right. As it observed, "interests of uncertain status have often been held to be 'property' for purposes of a § 6321 tax lien."[110] For example, the tax lien presently attaches to contract rights even though the right to payment thereunder will mature in the future or depends upon subsequent performance.[111] And it attaches to claims and choses in action even before suit is brought or concluded.[112] The *Herraras* court rightly noted: "[E]ven if all were contingent fee cases, Herraras had a right to be paid contingent on a future event, and this is sufficient."[113]

In re Jeffrey[114] also involved a stage two issue, specifically the extent to which the IRS's claims against the taxpayer-debtor had secured status. The Bankruptcy Code provides that a claim "secured by a lien on property in which the [bankruptcy] estate has an interest . . . is a secured claim to the extent of the

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106. Id. at 5 (quoting *Drye*, 528 U.S. at 56).

107. See *Drye*, 528 U.S. at 56 ("When Congress so broadly uses the term 'property,' we recognize . . . that the Legislature aims to reach every species of right or interest protected by law. . . .").

108. *Herraras*, 257 B.R. at 6.

109. *Drye*, 528 U.S. at 60 n.7.

110. *Herraras*, 257 B.R. at 5.

111. See, e.g., Plymouth Saving Bank v. United States, 187 F.3d 203 (1st Cir. 1999); Atlantic Nat'l Bank v. United States, 536 F.2d 1354 (Ct. Cl. 1976); *In re Nevada Envtl. Landfill*, 81 B.R. 55 (Bankr. D. Nev. 1987).

112. See, e.g., United States v. Hubbell, 323 F.2d 197 (5th Cir. 1963); *In re Weninger*, 119 B.R. 238 (Bankr. D. Colo. 1990).

113. *Herraras*, 257 B.R. at 6.

114. 261 B.R. 396 (Bankr. W.D. Pa. 2001).

value of [the] creditor's interest in the estate's interest in such property."[115] Since the IRS had made assessments against the debtor, had made notice and demand for payment, and had not received payment, the IRS had a lien against the taxpayer, which attached to all his property and property rights under section 6321.

The issue in *Jeffery* was whether the tax lien attached to an unliquidated medical malpractice claim of the debtor's, which was valued at $10,000. This claim was an asset of the bankruptcy estate since, like the Internal Revenue Code,[116] the Bankruptcy Code has "an extremely broad definition of property" which includes "interests in causes of action."[117]

The debtor sought to deny the IRS secured status as to the malpractice claim, arguing in part that the claim "is not property under applicable Pennsylvania law and, therefore, the IRS cannot attach a tax lien."[118] The court rejected this argument, holding that the tax lien attached to the cause of action and any proceeds thereof. It relied in part on *Drye*, citing it for the proposition that "although state law governs the nature of the interest which a taxpayer has in property, whether the right or interest created under state law constitutes 'property' or a 'right to property' subject to a § 6321 tax lien is a matter of federal law."[119]

In this regard, the court applied *Drye* correctly. Moreover, its holding is consistent with case law concluding that the federal tax lien attaches to unliquidated tort [120] or contract [121] claims.[122]

C. *Post-Lien Attachment Consequences*

The final stage of contemporary tax lien analysis involves what the IRS may do by way of enforced collection once the lien is established to attach to the property in question. *Drye* confirmed that this stage is governed by federal

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115. 11 U.S.C. § 506(a). Apart from exemptions not here applicable, the debtor's property becomes property of the bankruptcy estate upon the filing of the bankruptcy petition. 11 U.S.C. § 541(a).

116. See supra note 3 and accompanying text.

117. *Jeffrey*, 261 B.R. at 401.

118. Id. at 400.

119. Id. at 401.

120. E.g., Hubbell v. United States, 323 F.2d 197 (5th Cir. 1963); Simon v. Playboy Elsinore Assocs., 91-1 U.S. Tax Cas. ¶ 50,231 (E.D. Pa. 1991); *In re Walton's Estate*, 247 N.Y.S. 2d 21 (N.Y. App. Div. 1964).

121. E.g., United States v. Walker, 92-1 U.S. Tax Cas. ¶ 50,065 (W.D. Ky. 1991); Bensinger v. Davidson, 147 F. Supp. 240, 245 (S.D. Cal. 1956).

122. The luster of *Jeffrey* is dulled in one respect. Before the discussion described above, in a boilerplate paragraph, the court cited the long troublesome *Aquilino* case for the proposition that the extent to which "a taxpayer has 'property' or 'rights to property' to which a tax lien can attach is determined by state law." 261 B.R. at 398 (citing *Aquilino*, 363 U.S. at 512-13).

law. A recent case at this level is the Sixth Circuit's decision in *Blachy v. Butcher*.[123] This was a multi-party case involving numerous layers.[124] The Butchers owned land in Michigan as tenants by the entireties. However, they falsely represented that the land was owned by corporations they controlled. From 1981 to 1985, the corporations sold pieces of the land and condominiums developed on them to a number of unrelated buyers. In 1988, the IRS made assessments against the Butchers for unpaid income taxes for the 1986 tax year and the IRS filed notices of tax lien against the Butchers' property, including the land. In 1991, the Butchers asserted ownership of the land, stating correctly that the corporations had not owned it, and therefore the 1981 through 1985 sales were void.

Litigation proceeded in several courts. In 1998, a federal district court in Michigan imposed a constructive trust on the property. On account of their fraudulent representations, the court ruled that the Butchers held the property in constructive trust for the buyers. The court also ruled that the constructive trust related back to before 1981, and therefore the 1988 federal tax lien was subordinate to the buyers' interests in the property and so was ineffective against them. On appeal, the Sixth Circuit affirmed the imposition of the constructive trust but, relying on *Drye* and other cases, held that the tax lien was superior to the constructive trust.

The circuit court was right, and the district court was wrong. This can be understood through the following steps:

(1) The federal tax lien attached to the land at issue in *Blachy*. The IRS made assessment against the Butchers, and the Butchers failed to pay after notice and demand. That means a federal tax lien arose.[125] That lien attached to all the Butchers' "property and rights to property,"[126] thus to their land.

(2) The claim competing with the federal tax lien was the constructive trust imposed by the district court in favor of the buyers. The priority of competing claims is a post-lien attachment issue, a stage three issue. As we have seen, stage three is entirely a function of federal law; state law is inapposite at stage three.[127]

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123. 221 F.3d 896 (6th Cir. 2000), cert. denied, 121 S. Ct. 1653 (2001).

124. The first paragraph of the opinion is a cry-from-the-judicial-heart: "Even a *diabolical* bar examiner would be reluctant to impose this case's complex mixture of subject matter jurisdiction, fraud, real estate, marital property, bankruptcy, tax liens, contributory negligence, equitable remedies, and civil procedure upon hapless law school graduates. Because reality often marches in where creators of hypotheticals fear to tread, however, we are the 'hapless' appellate court judges obliged to struggle with this twisted tale of true-life conflict." Id. at 900 (emphasis in original).

125. IRC §§ 6321 & 6322.

126. IRC § 6321.

127. See, e.g., United States v. Dishman Indep. Oil, Inc., 46 F.3d 523, 526 (6th Cir. 1995) ("It is undisputed that when a federal [tax] lien is involved, the relative priority between competing liens is a question of federal law.").

(3) Under federal law, the basic rule[128] for determining the priority of the tax lien relative to competing liens and interests is "that the first in time is the first in right."[129] The tax lien against the Butchers arose in 1988, when the assessment was made.[130] That date must be compared to the date the constructive trust became choate.

(4) A constructive trust is a remedy. Thus, it does not arise until a judicial decision imposing the trust is obtained.[131] The constructive trust against the Butchers arose in 1998 when it was imposed by the district court. Since this is after the 1988 tax lien date, the tax lien would have priority over the constructive trust under the general priority rule.

(5) The constructive trust would have priority over the lien if it related back before the 1988 assessment date. Under the applicable state law, it would. However, state law does not control stage three, and federal law (which does control) has no comparable "relation back" rule for constructive trusts.[132] Here's how the *Blachy* court put it:

> Even if Michigan law allows the doctrine of "relation back" to give the beneficiary of a constructive trust priority over private intervening interests, this would not be determinative as to the IRS. Federal law . . . makes no provision for the subordination of a tax lien through the use of the "relation back" doctrine.[133]

The court cited *Drye* in support. The Michigan "relation back" rule as to constructive trusts should be no more effective against the federal tax lien than was the Arkansas "relation back" rule for disclaimed inheritances.[134]

V. THE BAD

But there are weeds as well as flowers in the post-*Drye* garden. The most redolent involve an old issue: the extent to which the federal tax lien attaches to tenancy by the entireties interests when only one spouse owes the taxes in question. After providing background on the issue, I will examine two post-*Drye* cases in the area–one bad, the other excusable.

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128. Congress has created special rules as to priorities of the tax lien against certain classes of competing lienholders, see IRC § 6322, but those special rules did not come into play in *Blachy*.

129. E.g., United States v. McDermott, 507 U.S. 447, 449 (1993); United States v. City of New Britain, 347 U.S. 81, 85 (1954).

130. IRC § 6322.

131. E.g., *In re Omegas Group, Inc.*, 16 F.3d 1443, 1451 (6th Cir. 1994).

132. E.g, United States v. Security Trust & Savings Bank, 340 U.S. 47, 50 (1950).

133. *Blachy*, 221 F.3d at 905 (citations omitted).

134. See *Blachy*, 221 F.3d at 905.

A. *Background*

1. *Tenancy by the entireties generally.*—Tenancy by the entireties is a form of joint ownership available only between wife and husband. It originated in England in the Middle Ages to serve several objectives: feudal military organization,[135] male supremacy,[136] and scriptural literalism.[137] As those objectives lost luster, England[138] and some U.S. jurisdictions[139] abolished entireties tenancies. The device has been assailed by numerous judges and commentators who have called it, among other things, "repugnant to modern views of the status of married women,"[140] supported by "no reason,"[141] based on an "absurd theory,"[142] and "quite incomprehensible."[143]

Be that as it may, under our constitutional arrangement, the states have the undoubted authority to prescribe the forms of property legally recognized for their citizens. By legislation or court decision, many states have chosen to retain tenancies by the entireties in some form.[144] Although generalizations are hazardous in this area, the following are among the frequently noted attributes of entireties regimes:

–In most states, personal property as well as real property can be owned by the entireties.[145]

–As originally conceived, and sometimes still described, the entireties form was based on the idea that neither the husband nor the wife owned the underlying property, that instead it was owned by a fictive, metaphysical entity: the marital union.[146] Rather than saying that neither spouse has any personal interest, however, it is more common for modern courts to speak of each spouse

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135. See, e.g., Fernande R.V. Duffly, The Effect of the State Equal Rights Amendment on Tenancy by the Entirety, 64 Mass. L. Rev. 205, 206 (1979).

136. See, e.g., Oval A. Phipps, Tenancy by Entireties, 25 Temp. L.Q. 24, 24 (1951).

137. See, e.g, United States v. Gurley, 415 F.2d 144, 149 (5th Cir. 1969) (the entireties form developed from the *Genesis* pronouncement that husband and wife "shall be of one flesh").

138. See Law of Property Act, 1925, 15 & 16 Geo. 5, c. 20, § 37 (Eng.).

139. See Richard R. Powell, 4 A Powell on Real Property ¶ 620[3] (Patrick J. Rohan rev. ed. 1993).

140. Cornelius J. Moynihan, Introduction to the Law of Real Property 219 (2d ed. 1988).

141. Kerner v. McDonald, 84 N.W. 92 (Neb. 1900).

142. Phipps, supra note 136, at 26.

143. King v. Greene, 153 A.2d 49, 60 (N.J. 1959) (Weintraub, C.J., dissenting).

144. See, e.g., Swada v. Endo, 561 P.2d 1291 (Haw. 1977) (discussing tenancies by the entireties in various jurisdictions); Richard R. Powell, 7 Powell on Real Property 52-11 to 52-12 (Shelby D. Green rev. ed. 1998).

145. See Roger A. Cunningham, William B. Stoebuck & Dale A. Whitman, The Law of Property 208 (2d ed. 1993).

146. See, e.g., 2 Wiliam Blackstone, Commentaries on the Law of England 182 (5th ed. 1773).

"own[ing] and control[ling] the whole" property,[147] each spouse owning "an undivided half interest in the whole,"[148] or, in the most sophisticated rendition, the entireties estate not being the separate property of either spouse but the interest each spouse has in that estate being that spouse's "separate property."[149]

–Each spouse is often said to possess two principal interests in the entireties property: (1) a present right to use it[150] and (2) a survivorship right, *i.e*, automatic succession of the survivor spouse to fee simple ownership of the property upon the death of the other spouse.[151]

–The entireties tenancy can end in any of several ways: (1) A spouse can convey his interest in the entireties estate to the other spouse, making her the fee simple owner of the property.[152] (2) The spouses can terminate the entireties estate by agreement, dividing the property between them in any way they choose.[153] (3) As noted above, the death of one spouse vests the survivor with fee simple ownership of the property. (4) If the spouses divorce, the tenancy by the entireties is converted into a tenancy in common by operation of law, each of the ex-spouses becoming half owner of the property.[154] (5) Although there is a split of authority,[155] some courts treat the filing of a bankruptcy petition by only one of the spouses as, in effect, a severance of the entireties estate.[156] The filing spouse's interest in the property becomes an asset of the bankruptcy estate; the whole of the formerly entireties property may be sold; the sale proceeds are divided between the bankruptcy estate and the non-filing spouse; and the proceeds allocable to the bankruptcy estate may be used to pay any of the filing spouse's debts—separate debts of hers as well as joint debts of hers and her spouse's.[157]

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147. Quick v. Leatherman, 96 So. 2d 136, 138 (Fla. 1957).

148. Lapp v. United States, 316 F. Supp. 386, 389 (S.D. Fla. 1970); see also Wife (L.R) v. Husband (N.G.), 406 A.2d 34, 35 (Del. 1979).

149. Newman v. Equitable Life Assurance Soc'y, 160 So. 745, 747 (Fla. 1935).

150. E.g., Yarde v. Yarde, 71 N.E.2d 625, 625 (Ind. App. 1947).

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

152. E.g., Craft v. United States, 140 F.3d 638, 645 (Ryan, J., concurring).

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

154. E.g., Sebold v. Sebold, 444 F.2d 864, 871 (D.C. Cir. 1971); Smith v. Smith, 107 S.E.2d 530, 534 (N.C. 1959); Mich. Comp. Laws Ann. § 552.102 (West 1988).

155. See, e.g., *In re Daughtry*, 221 B.R. 889, 890-91 (Bankr. M.D. Fla. 1977); Paul C. Wilson, "Fresh Start" or "Head Start": Missouri Courts Rethink the Role of Tenancies by the Entireties in Bankruptcy, 56 Mo. L. Rev. 817 (1991).

156. See Young, supra note 6, at 911-13.

157. *In re Vander Heide*, 164 F.3d 1183, 1184-86 (8th Cir. 1999); *In re Blair*, 151 B.R. 849 (Bankr. S.D. Ohio 1992), aff'd, 33 F.3d 54 (6th Cir. 1994).

–It is universally acknowledged that joint creditors of the spouses can go against entireties property to enforce payment.[158] The jurisdictions recognizing the entireties form of ownership are divided, however, as to the collection rights of separate creditors of only one of the spouses. (1) In some jurisdictions, separate creditors can proceed against the present life interest of the debtor spouse but subject to the survivorship interest of the other spouse.[159] (2) In other jurisdictions, separate creditors may reach only the debtor spouse's survivorship interest.[160] (3) In yet other jurisdictions, entireties property is wholly beyond the reach of separate creditors.[161]

2. *Application to federal tax lien.*—As seen above, the laws of the various states limit the ability of ordinary creditors to proceed against entireties property to satisfy separate debts. Do these laws similarly limit the ability of the IRS? The courts have said "yes." The foundational cases of this line[162] were decided during the period when language in *Morgan*, *Bess*, and *Aquilino* led some to think that state law governs section 6321 property classification.[163]

Since that time, the Supreme Court has made it clear that tax collection by the IRS "does not arise out of [the IRS's] privileges as an ordinary creditor" and "is not the act of an ordinary creditor, but the exercise of a sovereign prerogative" grounded in the Constitution.[164] Nonetheless, the weed sprouted from the early cases has proved hardy, and later decisions have continued to hold that the amenability of entireties interests and entireties property to the federal tax lien depends upon the terms of state law.[165] Hereafter, this view is called the "entireties bar to collection" or the "entireties bar."

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158. See, e.g., Whittaker v. Kavanagh, 100 F. Supp. 918, 920 (E.D., Mich. 1951).

159. E.g., *In re Persky*, 893 F.2d 15, 19-20 (2d Cir. 1989) (New York law).

160. E.g., *In re Arango*, 992 F.2d 611, 613 (6th Cir. 1993) (Tennessee law).

161. E.g., *In re Garner*, 952 F.2d 232, 234-35 (8th Cir. 1992) (Missouri law); *In re Carroll*, 237 B.R. 872, 874 (Bankr. D. Md. 1999). Hereafter, jurisdictions of this third group are called "full bar jurisdictions."

162. E.g., United States v. American Nat'l Bank, 255 F.2d 504 (5th Cir. 1958), *cert. denied as to another issue*, 358 U.S. 835 (1959); Raffaele v. Granger, 196 F.2d 620 (3d Cir. 1952); United States v. Hutcherson, 188 F.2d 326 (8th Cir. 1951); Pettengill v. United States, 205 F. Supp. 10 (D. Vt. 1962); United States v. Nathanson, 60 F. Supp. 193 (E.D. Mich. 1945).

163. See supra Subpart III.A.

164. United States v. Rodgers, 461 U.S. 677, 697 (1983); see also United States v. National Bank of Commerce, 472 U.S. 713, 727 (1985); Randall v. H. Nakashima & Co., 542 F.2d 270, 274 n.8 (5th Cir. 1976) (criticizing a position which would "compare the [IRS] to a class of creditors to which it is superior"); Johnson, supra note 6, at 655-57.

165. E.g., IRS v. Gaster, 42 F.3d 787, 791 (3d Cir. 1994); United States v. Waltman, 98-1 U.S. Tax Cas. (CCH) ¶ 50,487, 81 A.F.T.R. 2d (RIA) 1054 (S.D. Ind. 1998); Theo. H. Davies & Co. v. Long & Melone Escrow, 876 F. Supp. 230 (D. Haw. 1995).

Despite such judicial endorsement, the entireties bar has been criticized on a number of doctrinal and policy grounds.[166] These need not be rehashed here in detail. Instead our present focus is on entireties cases decided after *Drye*. Are they faithful to the Supreme Court's teaching in that case? It is to such cases and to that question that we now turn.

B. *Green*

Several states in the Third Circuit are full bar jurisdictions, including Pennsylvania.[167] At an early date–during the period of confusion between *Morgan* and *National Bank of Commerce*[168] –the Third Circuit accepted that the federal tax lien is limited by Pennsylvania entireties law, that is, that the lien does not attach to entireties property when only one spouse owes the taxes in question.[169]

It was against that background that the Third Circuit considered *United States v. Green.*[170] The facts were nicely framed by the opinion's introductory paragraph:

> This case stems from Howard Green's efforts to stay one step ahead of his creditors, including the [IRS]. During several years of financial struggle, bankruptcy filings, flight from Federal prosecution and ultimately jail time, Green underestimated his federal tax liabilities . . . . The IRS eventually caught up with Green and in 1992 attempted to foreclose against all of his property, including property in Huntington Valley, Pennsylvania. Green responded that he had conveyed the Huntington Valley property to his wife . . . thus insulating it from foreclosure.[171]

The underpayments were of income taxes for 1979, 1980, and 1981. These underpayments were assessed in 1991.[172] The transfer of the Huntington

166. E.g., William D. Elliott, Federal Tax Collections, Liens & Levies 9-92 (2d ed. 1995); Johnson, supra note 16, at 1171-80; 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); Comment, Federal Tax Liens and State Homestead Exemptions: The Aftermath of United States v. Rodgers, 34 Buff. L. Rev. 297, 323 (1985).

167. See Stauffer v. Stauffer, 465 Pa. 558, 576, 351 A.2d 236 (1976).

168. See supra notes 57-70 and accompanying text.

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

170. 201 F.3d 251 (3d Cir. 2000).

171. Id. at 252.

172. Id. at 253. Green filed income tax returns for these years. Normally, the IRS must assess deficiencies within three years after the filing of the return. IRC § 6501(a). However, Green's returns were false or fraudulent, creating an unlimited period for assessment. IRC § 6501(c)(2).

Valley property (a residence) occurred in 1981, when Howard conveyed it from himself individually to his wife and himself as tenants by the entireties. The essence of the scheme was that Howard had filed returns in his individual status; none of the returns for the years at issue were joint with his wife. Thus, the assessments were against Howard only, not against both of the spouses.[173]

Nonetheless, the Government claimed that it should be able to proceed against the property, asserting that its transfer was a fraudulent conveyance which the court should set aside. The trial court agreed; Green appealed; the Third Circuit affirmed.

The portion of the Third Circuit's opinion of direct concern here is as follows: "Courts look to state law to determine what rights a taxpayer has in the property the government seeks to reach. See *Drye v. United States* .... Under Pennsylvania law, property owned by tenants by the entirety is not subject to the debts of either spouse."[174]

This suggests that, in the eyes of the *Green* court, state law restrictions on creditors' remedies are incorporated into federal tax lien analysis under *Drye*. But of course they are not. Under *Drye*, one would look to Pennsylvania law to ascertain what powers as to the underlying property each entireties tenant (each spouse) has. That is stage one, and that is where recourse to Pennsylvania law would end. Federal law would control stages two and three, *i.e.*, whether the powers rise to the level of section 6321 property rights and what the IRS could or could not do against the underlying property owned by the entireties estate. The *Green* court misapplied *Drye*.

However, this lapse is mitigated by the circumstances. *Green* was decided only about five weeks after *Drye* was handed down. Perhaps insufficient time was available to fully assess the impact of *Drye* on the old bar cases. Moreover, the case did not compel such assessment in order to hold for the right party. It long has been recognized that property fraudulently conveyed into entireties status is not protected by the entireties bar.[175] Since that exception applied in *Green*, the case did not necessitate a searching reexamination of the bar cases in light of the then quite new *Drye*.

For these reasons *Green* is more an ugly case than a bad one. The circumstances of the case made it unnecessary to engage in the scrutiny that

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173. Even the bar cases acknowledge that the federal tax lien attaches to entireties property if the IRS has a joint assessment against the spouses. E.g., Tony Thornton Auction Service, Inc. v. United States, 791 F.2d 635, 637-38 (8th Cir. 1986) (Missouri law); United States v. Eglinton, 90-1 U.S. Tax Cas. (CCH) ¶ 50,322 at 84,127, 71A A.F.T.R. 2d (RIA) 93-3689 at 93-3692 (E.D. Pa. 1990) (Pennsylvania law).

174. 201 F.3d at 253. This is the only reference to *Drye* in the *Green* opinion.

175. E.g., Craft v. United States, 140 F.3d 638, 644 (6th Cir. 1998); Philips v. Commissioner, 61 T.C. Memo (CCH) 1883, 1885 (1991), T.C. Memo (RIA) ¶ 91,056, 91-273, *aff'd without opinion*, 978 F.2d 719 (11th Cir. 1992); Alonso v. Commissioner, 78 T.C. 577, 581 (1982).

could have caused the Third Circuit to properly overthrow the bar in light of *Drye* or to improperly reaffirm it despite *Drye*.

C. *Craft*

1. *Facts and opinions.*—A case that *did* squarely reconsider the entireties bar in light of *Drye*–and, unfortunately, reaffirmed it–is the Sixth Circuit's 2000 decision *Craft v. United States*.[176] Wheels within wheels. *Craft* is a saga within the larger sagas of Sixth Circuit and national entireties bar litigation.

In 1972, Sandra and Don Craft, spouses, purchased real property in Michigan (the Berwyck Property) as tenants by the entireties. Don failed to file federal income tax returns for 1979 through 1986; in 1988, the IRS made an assessment against him exceeding $480,000. Don did not pay; indeed, he was insolvent from April 1980 through August 1989. In late August 1989, Don and Sandra transferred the property to Sandra by a quitclaim deed, in exchange for one dollar.[177] In 1992, Sandra sold the Berwyck Property to a third party for almost $120,000. The IRS asserted that it was entitled to half of the sale proceeds because its lien attached to Don's interest in the property. It also claimed that Don had fraudulently conveyed his interest in the property to Sandra.

The district court[178] noted the Sixth Circuit's 1971 *Cole v. Cardoza* decision, which concluded that, under Michigan law, entireties tenants hold property under a single title and that a tax lien against only one spouse does not attach to the property.[179] However, the district court saw that case as having been eroded by subsequent statutory[180] and case law[181] developments. That

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176. 233 F.3d 358 (6th Cir. 2000), *cert. granted* 150 L.Ed. 2d 804 (U.S. 2001).

177. This transfer was "most likely intend[ed] to defeat the IRS lien." Craft v. United States, 140 F.3d 638, 645 (1998) (Ryan, J., concurring).

178. Craft v. United States, 94-2, U.S. Tax Cas. (CCH) ¶ 50,493, 74 A.F.T.R. 2d (RIA) 94-6362 (W.D. Mich. 1995).

179. 441 F.2d 1337 (6th Cir. 1971).

180. 1975 Michigan legislation to equalize women's rights in entireties property provided that "husband and wife shall be equally entitled to rents, products, income, or profits, and to the control and management of real or personal property held by them as tenants by the entirety." M.C.L.A. § 557. 71, Mich. Stat. Ann. § 26.210 (1)(1975), quoted by 94-2 U.S. Tax Cas. (CCH) ¶ 50,493 at 85,817, 74 A.F.T.R. 2d (RIA) 94-6362 at 94-6363.

181. For Sixth Circuit decisions permitting seizure of entireties property under the drug forfeiture laws, see United States v. Certain Real Property Located at 2525 Leroy Lane, 910 F.2d 343 (6th Cir. 1990), *cert. denied sub nom.* Marks v. United States, 499 U.S. 947 (1991), *further decision*, 972 F.2d 136 (6th Cir. 1992), as well as the district court's previous *Fischre* decision. In *Fischre*, the United States had obtained a judgement against one Michigan spouse individually. The court held that the Government's judgement lien attached to the debtor spouse's individual survivorship interest in property he owned with his spouse as tenants by the entireties. Fischre v. United States, 852 F. Supp. 628, 630 (W.D. Mich. 1994).

court held that the August 1989 conveyance terminated the entireties estate. "At that point, each spouse took an equal half interest in the estate and the government's lien attached to Mr. Craft's interest."[182]

On appeal, a panel of the Sixth Circuit reversed, in a decision commonly called *Craft I*.[183] The court acknowledged that "the government's tax liens attach to every interest in property a taxpayer might have, regardless of whether that interest is less than full ownership or is only one among several claims of ownership"[184] and that "a federal tax lien can attach to a future or contingent interest in property."[185] Nonetheless, the court cited *Bess*, *Aquilino*, and *Morgan*[186] and concluded that more recent cases "do not support the proposition that federal law can be used to trump a state's definition of a property interest."[187]

The court found that, under Michigan law, "it is well established that one spouse does not possess a separate interest in an entireties property. [As a result,] a federal tax lien against one spouse cannot attach to property held by that spouse as an entireties estate."[188] However, there remained the factual issue—unaddressed by the district court—as to whether the transfer of the Berwyck Property was a fraudulent conveyance. "If the conveyance was fraudulent and therefore set aside, the IRS could be entitled to half the [sale] proceeds."[189] The Sixth Circuit remanded for consideration of this issue.

Worth noting is Judge Ryan's opinion in *Craft I*. He concurred with the desirability of remanding to further develop factual issues, but he disagreed with his two panel colleagues as to the current viability of the entireties bar to collection. In his view, "binding cases decided since 1971 clearly state a different doctrine" from that of *Cole v. Cardoza*.[190] Judge Ryan agreed that tax liens attach only to a taxpayer's "exclusive rights in property."[191] Don Craft's present possessory interest in the Berwyck Property was not an exclusive right, but his "future interests–the right to share in future proceeds [in the event of sale of the property] and right of survivorship [if Sandra predeceased Don]" were exclusive rights.[192] Thus, the federal tax lien could attach to those future interests if the transfer of the property to Sandra was set aside as fraudulent.

182. *Craft*, 94-2 U.S. Tax Cas. (CCH) ¶ 50,493 at 85,818, 74 A.F.T.R. 2d (RIA) 94-6362 at 94-6364.

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

184. Id. at 641 (citing United States v. Safeco Ins. Co. of America, 870 F.2d 338, 341 (6th Cir. 1989)).

185. 140 F.3d at 644 (citing *Safeco*, 870 F.2d at 341).

186. Id.

187. Id. at 643.

188. Id.

189. Id. at 644.

190. Id. at 645 (relying on *National Bank of Commerce, Irvine*, and other cases).

191. Id. at 646.

192. Id.

On remand, the district court held that the transfer of the Berwyck Property to Sandra by quitclaim deed "did not, by itself, constitute a fraudulent conveyance."[193] This was based on the conclusion that, before the transfer, the property would have been unreachable by Don's creditors, so its transfer to Sandra could not have prejudiced them.[194] However, the court found that Don, while insolvent, had used nearly $7000 of his funds to enhance the Berwyck Property. That conveyance was fraudulent, and the IRS was entitled to recover to that extent.[195]

Both parties appealed. The Government also petitioned for *en banc* review by the Sixth Circuit, which was denied. In a decision known as *Craft II*, a panel of the circuit[196] affirmed the district court's decision on remand.[197] The court observed: "At this juncture, this case is not really about federal tax liens. Nor is it about state law property rights."[198] The court held that the Government was precluded from relitigating the bar issue because of the "law of the case" doctrine[199] and the "law of the circuit" doctrine.[200]

However, these doctrines are not absolute. Both can be avoided if a Supreme Court decision subsequent to the first panel decision is contrary to it.[201] *Drye*, the Government argued, was such a subsequent decision. Thus, the Sixth Circuit was compelled to examine *Drye*. In its discussion, the circuit court did relent at times on its earlier, uncompromising assertion of the entireties bar. Specifically:

–"[W]e acknowledge that there are colorable arguments on both sides of the question whether a federal tax lien . . . attaches to a tenancy by the entirety."[202]

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193. Craft v. United States, 65 F. Supp. 2d 651, 658 (W.D. Mich. 1999).

194. Id. at 657 (Michigan cases "have consistently held that creditors have no right to complain of a debtor's disposition of exempt property because such property could not be reached to satisfy debts had it remained in the debtor's hands.").

195. Id. at 659.

196. One of the three judges on this panel also was part of the *Craft I* panel.

197. Craft v. United States, 233 F.3d 358 (6th Cir. 2000).

198. Id. at 363.

199. Id. at 363-69. Under that doctrine, a court should not reopen issues decided at an earlier phase in the same litigation. E.g., Agostini v. Felton, 521 U.S. 203, 236 (1997).

200. *Craft*, 233 F.3d at 369. Under that doctrine, one panel of the circuit should not overturn the decision of another panel; only an en banc decision may accomplish that result. E.g., Pollard v. E.I. Dupont de Nemours Co., 213 F.3d 933, 945 (6th Cir. 2000) rev'd, 532 U.S. 843 (2001).

201. See, e.g., Hanover Ins. Co. v. American Eng'g Co., 105 F.3d 306, 312 (6th Cir. 1997) (law of the case); Smith v. United States Postal Service, 766 F.2d 205, 207 (6th Cir. 1985) (law of the circuit).

202. *Craft*, 233 F.2d at 365 (recognizing Judge Ryan's concurrence in *Craft I* and Judge Gilman's concurrence in *Craft II*). The panel took away much of that concession, though, by adding: "There are colorable arguments in virtually every case we hear." Id.

–"We further recognize that this court has held that federal law supersedes state property law in other circumstances."[203]

–The panel also agreed that, under *Drye* and prior cases, "a court must look to federal law to determine whether something constitutes 'property' or 'rights to property' for purposes of section 6321."[204]

–The panel also repudiated some of the more aggressive "state law controls" language of *Craft I*, admitting: "We note that, upon careful review, some of the language we used in *Craft I* was not 'phrased so meticulously' as we would have liked."[205]

Nonetheless, the *Craft II* panel reaffirmed its support of the entireties bar. "Upon careful review, we find that *Craft I* is essentially consistent with the *Drye* Court's reasoning."[206] Why so?

> The *Craft I* court first looked to Michigan law and found that: 1) Michigan law holds that an individual spouse possesses no separate interest in entireties property . . . and 2) Michigan law holds that an individual spouse possesses no future interest in entireties property. . . . [B]ecause state law delineated no individual interest or right held by Don, there was nothing for federal tax law to deem to be "property" or "rights to property" for purpose of I.R.C. § 6321.[207]

Like the *Craft I* panel, the *Craft II* panel contained a member who believes the old entireties bar is no longer viable in light of *Drye*. Judge Gilmore concurred in the *Craft II* result because of the "law of the case" and "law of the circuit" doctrine. But on the underlying substantive issue, he was quite clear. He believed that "the legal landscape has changed considerably

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203. Id. The court cited two cases in this regard: Bank One Ohio Trust Co., N.A. v. United States, 80 F.3d 173, 176 (6th Cir. 1996) (tax lien attaches to spendthrift trust interest despite state law restraint on alienation), and *In re Grosslight*, 757 F.2d 773, 775 (6th Cir. 1985) (entireties property is part of bankruptcy estate).

204. Id. at 366-67 (citing *Drye*, *Irvine*, and *National Bank of Commerce*).

205. Id. at 367 n.13 (mirroring the admission in *Drye*, 528 U.S. at 57).

206. Id. at 366; see also id. at 367.

207. Id. at 367. The panel also invoked the Supreme Court's *Rodgers* decision, saying: "[C]ases which have found that a federal tax lien does not attach to a tenancy by the entirety 'because neither spouse possessed an independent interest in the property . . . do no more than illustrate the proposition that, in the tax enforcement context, federal law governs the consequences that attach to property interests, but state law governs whether any property interests exist in the first place.'" Id. at 368 (*Rodgers*, 461 U.S. at 702-03 n.31) (citing early bar cases).

However, *Craft II*'s statement of *Rodgers* is incomplete. The same footnote 31 in *Rodgers* contains the following language not quoted by the *Craft II* panel: "Thus, *if* the tenancy by the entirety cases are correct . . . ." The emphasis on "if" was the Court's. Thus, the *Rodgers* Court clearly stopped short of endorsing the old bar cases, indeed cast doubt on them.

since" *Cole v. Cardoza* [208] and that "*Craft I* reached the wrong result, and the IRS ought to have had the right to attach Don Craft's valuable interest in the tenancy by the entirety."[209]

2. *Evaluation.—Craft II* is wrong as to the substantive issue: whether the federal tax lien can attach to entireties property and interests even when only one spouse owes taxes.[210] As described above, *Craft II's* conclusion that the entireties bar is consistent with *Drye* turns on its finding that, under Michigan law, neither spouse has a separate or individual interest in entireties property. There are two problems with this: (1) section 6321 says the tax lien attaches to "all" property rights, not just separate or individual property rights and (2) under *Drye,* the stage one analysis looks to the powers created by state law, not to how state law characterizes those powers.

a. *Embracing nature of section 6321.*—This point should be dear to the heart of a statutory literalist. The language of section 6321 is that the federal tax lien attaches to "all" the taxpayer's property and property rights, not that it attaches only to taxpayer's "separate" property and property rights. The statutory language embraces all undivided property rights as surely as it does all separate property rights. Bare legal title is excluded from section 6321 because of the fundamental rule that federal taxation turns on substance, not form.[211] Apart from that, the statute should be taken at its face–"all" means "all."[212] Reading an exception into the statute for undivided property rights runs contrary to *Drye*'s reaffirmation of the expansive reach of section 6321.[213]

Significantly, it has often been held that the tax lien attaches to undivided rights, not just to separate rights. Thus, undivided homestead

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208. Id. at 376.

209. Id. at 377.

210. Whether *Craft II* is right as to law of the case or law of the circuit is a matter beyond the scope of this article. Those matters will depend in part on one's view of whether *Drye* changed the law or merely clarified the law. See supra Part III.

211. See infra note 264 and accompanying text.

212. See, e.g., *In re Voelker,* 42 F.3d 1050, 1051 (7th Cir. 1994) ("The language of [§ 6321] shows that the federal tax lien attaches to all of a debtor's property, without exception.").

213. See 528 U.S. at 56. In a non-entireties case, a Michigan district court noted this aspect of *Drye*, then added: "The fact that a taxpayer's right to property may be restricted will not prevent attachment of a federal tax lien. A tax lien can also attach to future and contingent interests in property. . . . Therefore, if the taxpayer has any interest at all in the property, a tax lien may attach to that interest." Fouts v. United States, 107 F. Supp. 2d 815, 817 (W.D. Mich. 2000) (emphasis added).

interests,[214] community property interests,[215] and trust interests[216] all have been held amenable to the federal tax lien even when only one of the interest holders owed taxes. We saw in the various *Craft* opinions disagreement over whether Michigan entireties tenants have only undivided interests. But it doesn't matter. Even if the *Craft II* majority was right that such tenants have only undivided interests, the cases underline the clear statutory language: section 6321 is not confined to only separate or individual property rights.

It may be that the Sixth Circuit's focus on separate rights related to the aspect of transferability, *i.e.*, a cotenant with only an undivided interest lacks the ability to unilaterally convey the property. Transferability is among factors identified by *Drye* as being relevant to the stage two classification.[217]

However, entireties interests are unilaterally transferable, albeit to only one person (by quitclaim to the other spouse), and they are transferable to anyone with the consent of the other spouse. More importantly, *Drye* suggested that transferability may not be essential to "property" status under section 6321.[218] This suggestion is consistent with prior case law, including that of the Sixth Circuit itself. For example, in the *Bank One* case[219] the IRS sought to attach its lien to the taxpayer's interest in a spendthrift trust. The interest was neither alienable nor encumberable under state law. Indeed–in contrast to Michigan law which recognizes (at least) an undivided interest in an entireties spouse–state law in *Bank One* declared that a spendthrift trust beneficiary "does not have any interest in the trust."[220] Nonetheless, the court upheld the attachment of the lien, declaring:

> When Congress says, as it has done in § 6321, that an unpaid tax "shall" constitute a lien upon "all" of a delinquent taxpayer's property or rights to property, it follows that the tax is a lien both on property that is alienable under state law and on property that is not.[221]

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214. E.g., United States v. Rodgers, 461 U.S. 677, 684-85 (1983); Broday v. United States, 455 F.2d 1097, 1100 (5th Cir. 1972).

215. E.g., United States v. Overman, 424 F.2d 1142, 1146-47 (9th Cir. 1970).

216. E.g., Dallas Nat'l Bank v. United States, 167 F.2d 468, 469 (5th Cir. 1948) (Holmes, J., specially concurring).

217. See 528 U.S. at 56-60.

218. Id. at 60 n.7; cf. Robert B. Chapman, Coverture and Cooperation; The Firm, the Market, and the Substantive Consolidation of Married Debtors, 17 Bankr. Dev. J. 105, 127 (2000) ("Rights which are not ordinarily exchanged or exchangeable are included in the [bankruptcy] estate.").

219. Bank One Ohio Trust Co, N.A. v. United States, 80 F.3d 173 (6th Cir. 1996).

220. Domo v. McCarthy, 612 N.E.2d 706, 709 (Ohio 1993).

221. *Bank One Ohio Trust Co.*, 80 F.3d at 176.

b. *Irrelevance of state characterizations.—Craft II* took reliance on state law too far. Under *Drye*, state law is properly used to ascertain what powers or controls the taxpayer has as to the underlying property. But it should not also be used to characterize the interest. Characterization is a matter for stage two, which is governed exclusively by federal law.[222]

In other words, *Craft II* should not have taken as determinative Michigan's characterization of Don Craft's entireties rights as separate or not. Instead, it should have focused on what Don could have done with the Berwyck Property, and what he could have prevented others from doing with it. Judges Ryan and Gilman provided this focus in their concurrences.[223]

> First, Don Craft had the right to enter and enjoy the property to the exclusion of all others, except for Sandra Craft. . . . If the Crafts had decided to rent or sell the property, Don Craft would have received half of the proceeds. . . . He further possessed a contingent future interest, because he would have taken the entire estate in fee simple if Sandra had predeceased him. . . . Finally, if the Crafts had divorced, they would have become tenants in common, and Don Craft would have had the right to bring an action for partition and sale.[224]

Those powers having been established under state law under stage one of tax collection analysis, the matter moves to stage two to ascertain whether the powers rise to the level of property rights. The case is strong that they do. I will not argue the matter at length here, for four points should suffice:

(1) The taxpayer has an absolute right to occupy and use the entireties property. Not even the other spouse can oust him from possession. The Supreme Court stated in a landmark gift tax case: "We have little difficulty accepting the theory that the use of valuable property . . . is itself a legally protectible property interest."[225]

(2) The taxpayer can exclude all the world save one (her spouse) from the entireties property. This power to exclude has been recognized as an attribute of property by tax cases.[226] Moreover, in a major case (decided the

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222. Judge Gilman's concurrence captured the distinction: "[T]he *Craft I* majority committed a subtle but critical error in accepting at face value Michigan's *description* of the property interests held by a tenant by the entirety, rather than looking past that description to the *actual substance* of those interests under Michigan law." 233 F.3d at 377 (emphases in original).

223. In fact, their descriptions of the powers of entireties spouses may be underinclusive. See Johnson, supra note 166, at 860-61, for enumeration of such powers.

224. *Craft II*, 233 F.3d at 377 (Gilman, J., concurring); see also *Craft I*, 140 F.3d at 645 (Ryan, J., concurring). Don Craft's contingent interest also might have been activated had either he or Sandra filed a bankruptcy petition. See supra text accompanying notes 155-57.

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

226. E.g., Kimura v. Battley, 969 F.2d 806, 810 (9th Cir. 1992).

same year as *Drye*) defining property for constitutional purposes, the Supreme Court stated that the right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[227]

(3) The taxpayer's contingent rights–the right to all the property should the other spouse die first, the right to half the property in the event of divorce, and perhaps the right to half the property in the event of bankruptcy–are substantial. Even *Craft I* acknowledged that "a federal tax lien can attach to a future or contingent interest in property."[228]

(4) At the end of the day, after drinking the brew of legal doctrine and legal fictions, a sobering draught of common sense and common practice is perhaps beneficial. What sort of reaction would one get if he told an entireties husband or wife, "You know, that's not your house (or car or bank account or stock or vacation home), and it's not your spouse's. Neither of you have any ownership interest in it." One who said that would be viewed as unstable or detached from reality. People think of entireties property as theirs; they use it as such; and they respond with law suits or worse if they think people are trying to deprive them of it.[229] The vision of tax lien law put forth in *Drye* accords with practical reason. That put forth in *Craft II* does not.

VI. THE UGLY

Cases in this class are of two types. First, some decisions leave the reader with the impression that the court may have understood *Drye* but was less than desirably exacting in the terms used to describe it. Second, more seriously, other decisions, while they ultimately hold for the right party (distinguishing them from a "bad" case), apply the wrong analysis, not just the wrong words, suggesting that the meaning of *Drye* was not understood by the court authoring the decision.

A. *Verbally Imprecise Cases*

Decisions of this type are less problematic than those of the second type, of course. Indeed, one accustomed to the pitfalls of written expression and sympathetic to the press of business under which our courts labor is at first inclined to let decisions of this type pass without critical remark. Unfortunately,

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227. College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 673 (1999). Thus, a leading commentator has said: "The hallmark of a protected property interest is the right to exclude others." Merrill, supra note 45, at 910.

228. 140 F.3d at 644.

229. See, e.g., Myers v. United States, 145 F.3d 1332 (table disposition), 1998 WL 246370, at *4 (6th Cir. 1998) (non-tax case in which aggrieved entireties spouse argues that she has "significant property rights in the residential estate, including her interest as a tenant by the entirety").

that indulgence would be misplaced. We have seen the confusion and error created by loose language in some pre-*Drye* decisions.[230] Today's verbal lapse can metastasize into tomorrow's erroneous holding. For this reason, turning the spotlight on unfortunate formulations in early post-*Drye* cases is an act neither of mean-spiritedness nor idle pedantry.

As a first example, consider *Knight v. Commissioner*,[231] an *en banc* decision of the Tax Court. Cases in that court typically involve pre-assessment determination of correct liability, not post-assessment application of the federal tax lien,[232] so *Drye*–related matters would be expected to arise there only indirectly. Thus it was in *Knight*.

Knight was another of the spate of cases in which taxpayers attempted to minimize transfer tax liability by creating family trusts and limited partnerships. Among other contentions, the IRS argued that the family limited partnership lacked economic substance, so should be disregarded for gift tax purposes. The majority opinion began its analysis of this issue by stating: "State law determines the nature of property rights, and Federal law determines the appropriate tax treatment of those rights."[233] The majority cited three pre-*Drye* cases for this proposition: *National Bank of Commerce*, *Rodgers*, and *Aquilino*.[234]

Language in support of this formulation can be found in those cases, but the formulation remains ambiguous. Readers of *Knight*, including future attorneys and judges, might read "the nature of property rights" to include the definitional question of whether the interest at issue rises to the level of being property or rights to property. They would then conclude–erroneously– from *Knight*'s formulation that state law controls the definitional question. To avert such possible misunderstanding, it would have been preferable for the *Knight* majority to have quoted or paraphrased *Drye* rather than the pre–*Drye* cases. Indeed, since *Drye* is the clearest and the most recent controlling case, the failure of the *Knight* majority to even cite it is striking.

Also regrettable is Judge Foley's concurring opinion in *Knight*. He wrote: "A fundamental premise of transfer taxation is that State law defines and Federal tax law then determines the tax treatment of property rights and interest. See *Drye v. United States*, 528 U.S. 49 (1999); *Morgan v. Commissioner*, 309 U.S. 78 (1940)."[235] To say that "State law defines . . .

230. See supra Part III.

231. 115 T.C. 506 (2000).

232. Although its jurisdiction has grown in recent decades, the Tax Court's core responsibility remains deficiency actions. See IRC §§ 6213(a), 7442.

233. 115 T.C. at 513.

234. Id. (citing United States v. National Bank of Commerce, 472 U.S. 713, 722 (1985); United States v. Rodgers, 461 U.S. 677, 683 (1983); Aquilino v. United States. 363 U.S. 509, 513 (1960)).

235. 115 T.C. at 522 (Foley, J., concurring in result, joined by Wells, C.J.).

property rights and interests" presents an even greater risk of misunderstanding than does the majority's formulation.

Another case of this type is *In re Strate*.[236] An adversary proceeding was brought in a bankruptcy case for determination of the rights of various parties, including Ray and April Wishman, in a forty-acre tract of real property. The IRS claimed an interest, based on its tax liens against Ray and April. The *Strate* court correctly observed that the lien attached only to Ray and April's property.[237] It then quoted as "instructive" the following passage drawn from a 1977 circuit court case: "It is long-established, and conceded by both parties to this case, that in asserting its Federal tax lien, the Government must look to state law for a determination of what legal rights and interests, if any, comprise 'property and rights to property' to be attached."[238]

The *Magavern* court's conclusion was based principally on the Supreme Court's *Aquilino* decision, which was quoted at length.[239]

Strate's invocation of the 1977 circuit court case and, indirectly, of the 1960 Supreme Court case disserves clear understanding of contemporary tax lien doctrine. Whatever might have been thought "long-established" and conceded by the parties in 1977,[240] now after *Drye* it is emphatically *not* the case that state law determines "what legal rights and interests, if any, comprise 'property and rights to property' to be attached."

Indeed, the *Strate* court itself knew that. It immediately followed the above by quoting *Drye* for the proposition that one looks to state law to see "what rights the taxpayer has in the property the Government seeks to reach" but 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."[241]

It is extraordinary that the *Strate* court, knowing what the Supreme Court held in *Drye* in 1999, should continue to quote earlier cases inconsistent with *Drye*, or at least so ambiguously or imprecisely phrased as to suggest, contrary for *Drye*, that the stage two inquiry is controlled by state law.

What can explain cases like *Knight* and *Strate*? More than we like to admit, the greater things in life often turn on the lesser–habit, for example–and I suspect that habit looms large here. Attorneys who handled tax lien cases in the past continue to cite the old cases. If they handled many of them, they may have boilerplate citations to those cases in their word processors; if they

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236. 259 B.R. 711 (Bankr. D. Mont. 2001).

237. Id. at 720.

238. Id. at 720 (quoting Magavern v. United States, 550 F.2d 797, 800 (2d Cir. 1977), cert. denied, 434 U.S. 826 (1977)).

239. *Strate*, 259 B.R. at 720 (quoting *Magavern*, 550 F.2d at 800, quoting Aquilino v. United States, 363 U.S. 509, 512-13 (1960)).

240. I disagree that this was true even in 1977. See supra Part III.

241. *Strate*, 259 B.R. at 721 (quoting *Drye*, 528 U.S. at 58).

handled only a few, at least they likely retain file copies of their old briefs citing the old cases. As an exercise of habit or convenience, the attorney continues to plug that old material into new briefs, even after *Drye*. Judges and their clerks similarly borrow from their word processor boilerplate or their previous opinions, or borrow from the parties' briefs in the current cases, which themselves contain the old citations.

In short, habit. Once a case, especially a Supreme Court case, is put into common citational circulation in briefs and opinions, it often displays a pertinacity outliving its doctrinal relevance. So it likely is with the pre-*Drye* cases.[242] While one must concede, as a practical matter, the power of habit, lawyers and judges should escape its tyranny. The clarity of the law would be well served if bar and bench in future cases, recognizing the importance of *Drye*, get into a new habit: citing only *Drye* as to general principles, eschewing citation of prior cases.[243]

A muddling of a different sort occurred in *United States v. Jepsen*. *Jepsen* has been a saga, involving (so far) four district court and one circuit court decisions. For our purposes, three of the five decisions are relevant: the district court's May 2000 opinion denying motions for cross-judgement,[244] the district court's June 2000 opinion holding for the Government after trial,[245] and the Eighth Circuit's opinion affirming that holding.[246]

The case involved the following facts. In 1989, the taxpayer (Jack) executed a deed conveying a vacation house and two acres of land to his two children. In return, the children executed in Jack's favor a promissory note for $95,000, payment of which was secured by a mortgage on the property. In 1994, the IRS made a $214,000 assessment against Jack, the bulk of which remained unpaid. In 1995, Jack executed a release of the mortgage. Jack received no payments on the note from his children and no consideration for the

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242. For example, I earlier criticized the otherwise good *Jeffrey* decision for resurrecting *Aquilino*. See supra note 122. A subsequent case extended the error by citing *Jeffrey* citing *Aquilino* and also *Craft* citing *Aquilino* and *Morgan*. See *In re Ready*, 2001 WL 1191157, at *4 (M.D. Fla. 2001).

243. In particular, one may hope to see far less of *Aquilino*, the prior case whose statement of general tax lien principles contrasts most starkly with *Drye*'s. The suggestion that one "must look to state law" to determine "whether and to what extent the taxpayer had 'property' or 'rights to property' to which the tax lien could attach," *Aquilino*, 363 U.S. at 512-13, should be banished from future briefs and decisions.

244. 131 F. Supp. 2d 1076 (W.D. Ark. 2000).

245. 105 F. Supp. 2d 1031 (W.D. Ark. 2000).

246. 268 F.3d 582 (8th Cir. 2001). The other two district court opinions granted partial summary judgement to the Government allowing it to reduce to judgement its assessment against the taxpayer, 2000 WL 637341 (W.D. Ark. 2000), and denied the taxpayer's motion to stay the IRS's sale of the property involved, 2000 WL 1367888 (W.D. Ark. 2000).

release of the mortgage. The United States brought suit seeking to reduce to judgement its assessment against Jack, to foreclose on its tax lien against him, and to set aside as a fraudulent conveyance the release of the mortgage.

Among the many issues in the case, two are relevant here. One is a stage two issue as to whether the interest Jack possessed was a section 6321 property right. The other is a stage three issue as to the IRS's collection options in light of the release. The courts correctly resolved the issues although the district court muddled the first of them.

1. *Stage two issue.*—The first relevant aspect of *Jepsen* was whether Jack's right to sue on the note constituted property subject to the lien. The district court held that it was.[247] The court correctly described *Drye*'s teaching that state law identifies what powers or interests the taxpayer has, but that federal law determines whether those powers or interests constitute property or property rights under section 6321.[248] Then, the court concluded that Jack's right to sue on the mortgage was a section 6321 property right. Why? First, citing a state case, the court found that "Illinois [the state of residence] attaches property rights to choses in action."[249] Second, quoting one federal case and citing another, the court found that "[i]t has been held that so long as the state law interest is an economic asset in the sense that it has pecuniary worth and is transferrable, then it is subject to the federal tax lien."[250]

It was unnecessary, indeed irrelevant, for the court to cite the state case or to discuss the property or non-property status of choses in action under state law. Once state law established that Jack had a chose in action (stage one), it then became a matter exclusively of federal law whether that chose in action constituted a section 6321 property right (stage two). The status of choses in action as property for Illinois purposes would neither add to, nor detract from, the case for their classification as section 6321 property rights.

Plainly, *Jepsen* is explicable by the "make weight" instinct, the tendency of judges (and, one must admit, commentators) to "throw in something more" to bolster a conclusion already reached on the basis of, or solidly grounded in, some other genuinely dispositive factor. This is far from a sin. Still, the invocation of a state characterization in *Jepsen* might lead an uncareful reader to think–contrary to *Drye*–that state law is pertinent to the stage two characterization.

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247. 131 F. Supp. 2d 1076 (W.D. Ark. 2000). The circuit court did not discuss this conclusion since, on appeal, the taxpayer pursued other arguments, not challenging this conclusion directly.

248. See id. at 1081-82. The circuit court also noted this teaching. See 268 F.3d at 585.

249. Id. at 1085 (citing Kaiser-Ducett Corp. v. Chicago-Joliet Livestock Mktg. Ctr., Inc., 407 N.E.2d 1149 (1980)).

250. 131 F. Supp. 2d at 1085 (quoting United States v. Stonehill, 83 F.3d 1156, 1159 (9th Cir. 1996), and citing United States v. Goldberg, 362 F.2d 575, 577 (3d Cir. 1966)).

2. *Stage three issue.*—The district court found it unnecessary to determine whether the release was a fraudulent conveyance. It took this view because "once a tax lien has attached the taxpayer cannot avoid or defeat liability by disclaiming or renouncing interest in the property or transferring, conveying, or releasing the interest."[251] This is a stage three issue: post-lien attachment consequences, including IRS's collection options and taxpayer defenses thereto. The district court resolved it correctly, on the basis of *Drye*[252] and other cases.[253]

On appeal, Jack tried to reframe the IRS options/taxpayer defenses issue as a matter of defining his property interest. He argued that, as a result of the release, the only right the IRS acquired, stepping into his shoes as the tax debtor, was a right to reinstate the released mortgage. The Eighth Circuit rejected this attempt. It noted that "the survival of a federal tax lien is a question of federal law [and it found] no authority for the proposition that a taxpayer may defeat an existing [tax] lien by releasing a mortgage."[254] Indeed, it cited its decision in *Drye* for authority contrary to Jack's proposition.[255]

B. *Analytically Wrong Cases*

Cases examined here are distinct from the cases discussed immediately above because they reflect actual misunderstanding of *Drye*, not merely loose expression of an accurate understanding. They also are distinct from the bad cases examined in Part V because, despite their analytical errors, they held for the right party. We consider two groups of cases, dealing with land sale contracts and nominee liens.

1. *Land sale contracts.*—Two recent cases–*Orme*[256] and *Ready*[257]–involved attachment of the federal tax lien to purchasers' interests under land sales contracts. The contracts were governed by Montana and Florida law, respectively.

In *Orme*, the Ormes had transferred real property to the Burgesses pursuant to a land sale contract. During the term of the contact, the IRS made

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251. 105 F. Supp. 2d at 1037.

252. *Drye* was cited for the preopsition that the "tax lien could not be defeated by disclaiming interest in an estate." Id. (citing *Drye*, 120 S. Ct. at 482-83).

253. See also United States v. Rodgers, 461 U.S. 677, 691 n.16 (1983); United States v. Goldberg, 362 F.2d 575, 577 (3rd Cir. 1966).

254. 268 F.3d at 587.

255. Id. (quoting Drye Family 1995 Trust v. United States, 152 F.3d 892, 899 (8th Cir. 1998) ("Congress did not intend that taxpayers have the prerogative to relinquish rights in property in favor of avoiding tax liability."), aff'd, 528 U.S. 49 (1999)).

256. Orme v. United States, 2001 WL 1242297 (9th Cir., Oct. 18, 2001).

257. *In re Ready*, 2001 WL 1191157 (M.D. Fla., Sept. 7, 2001).

an assessment and filed a tax lien against the Burgesses. Thereafter, the Burgesses forfeited the contract and title to the property returned to the Ormes. The Ormes then brought suit to quiet title to the property. The Government argued that the forfeiture was a nonjudicial sale of the property[258] subject to a notice requirement and that, since notice had not been given to the IRS, the tax lien against the Burgesses' property remained on the land after it reverted to the Ormes.[259] Reversing the district court, the Ninth Circuit agreed with the Government.

In *Ready*, the Readys owned a home on Luce Road and the Livelys owned a home on Laurel Lane, both located in Lakeland, Florida. In July 1984, they entered into an agreement to execute warranty deeds, each couple transferring their home to the other couple. They agreed that these deeds would be held in escrow and not be recorded until both parties qualified to assume the respective mortgages on the properties. The warranty deeds were executed, and in August, 1984, the Readys obtained possession of the Laurel Lane property. They lived there for the next sixteen years as their home.[260] They paid the mortgage payments, property taxes, and insurance premiums on the property during that time, and they deducted the mortgage interest payments on their tax returns. In December, 1999, the Livelys signed a quitclaim deed transferring the Laurel Lane property to the Readys, and that deed was recorded in March, 2000.

In 1992, the IRS made an assessment and filed a notice of tax lien against the Readys with respect to the 1990 income taxes. In 1995, it made an additional assessment and filed a notice of an additional lien against the Readys with respect to 1991 income taxes. In June, 1999 (that is, six months before the quitclaim deed conveying the Laurel Lane property to them), the Readys filed a Chapter 7 bankruptcy petition. They received a discharge, including discharge as to their 1990 and 1991 income tax liabilities. However, the Bankruptcy Court's final judgement provided that any properly filed tax liens "shall remain in full force and effect as to any property, and any rights to property, belonging to the [Readys] as of the filing of [their] bankruptcy petition."[261] After the IRS

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258. See IRC § 7425(c)(4) ("For purposes of subsection (b), a sale of property includes any forfeiture of a land sales contract."); H.R. Conf. Rep. No. 99-841, at II-818 (1986), reprinted at 1986 U.S. Code Cong. & Ad. News 4075, 4906.

259. Under IRC § 7425(b), a nonjudicial sale of property to which the federal tax lien attaches is effected "subject to and without disturbing" that lien as long as notice of the lien has been properly filed and the IRS is not given notice of the sale in a prescribed fashion. Both conditions were present in *Orme*.

260. The Readys never did qualify to assume the mortgage, and the warranty deed in their favor was never recorded. 2001 WL 1191157, at *2. However, the Livelys allowed the Readys to make the payments on the mortgage. Id. at *3.

261. Id.; see, e.g., Dewsnup v. Timm, 502 U.S. 410 (1992) (a pre-existing lien on property remains enforceable against that property even after the personal liability of the property's owner has been discharged in bankruptcy).

refused to release the Laurel Lane property from its tax liens, the Readys asserted that the IRS violated the final bankruptcy judgement. Holding that the tax liens properly attached to the Laurel Lane property, the Bankruptcy Court rejected the Readys' assertion.

Orme and *Ready* turned on a common question of law. Neither the Readys nor the Burgesses were the legal owners of the properties at issue.[262] Did they nonetheless possess sufficient rights to property, as purchasers under their land sale contracts, that the section 6321 lien could attach to their rights? Both courts said "yes" on similar, but flawed, reasoning.

Both courts identified *Drye* as among the controlling cases,[263] and the *Ready* court noted the broad reach of the section 6321 lien under *Drye*.[264] However, they both took state law further than *Drye* permits. The *Orme* court stated: "Montana law makes clear that the purchaser under a land sales contract holds an equitable interest in real property, although legal title remains in the seller."[265] Similarly, the *Ready* court found: "Under Florida law, a contract for the purchase and sale of real property creates an equitable interest in the purchaser, and the purchasers become the beneficial owners of the property."[266]

The quoted material reveals the error. Whether something is or is not an "equitable interest" is a matter of characterization, and both courts adverted to state law to make that characterization. That improperly conflates stages one and two of *Drye*. State law should be used only to identify what powers the taxpayer has as to the property. The subsequent characterization of those powers should be reserved for federal law.

The slip here was one of analysis, though not of result. The same result, decision for the Government, as was reached by the *Orme* and *Ready* courts, also would be reached on a properly reconstructed analysis. Applying stage one of *Drye*, the courts in those cases would have asked what powers or strings Montana or Florida law conferred on purchasers under land sales contracts. The main such power or string is the ability to live on, occupy, or use the properties, as the taxpayers did in both cases. Secondary powers exist as well. As the *Ready* court noted: "The beneficial interest acquired by a purchaser, for example, would be subject to sale on execution, could be made the subject of a trust, would pass to the purchaser's heirs upon his death, and would entitle the purchaser to recover damages for any trespass to the property."[267]

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262. The Burgesses never obtained record ownership. The Readys obtained record ownership six months after the relevant, measuring moment; the June, 1999, filing of their bankruptcy petition. See 2001 WL 1191157, at *4.

263. *Orme*, 2001 WL 1242297, at *2 n.4; *Ready*, 2001 WL 1191157, at *4-5.

264. 2001 WL 1191157, at *4.

265. 2001 WL 1242297, at *2 n.4 (citing a Montana case).

266. 2001 WL 1191157, at *5 (citing Florida cases).

267. Id. (citing a Florida case).

There–at the recitation of powers possessed–is where recourse to Florida and Montana law should have ceased, where stage one of *Drye* ceased. Thereafter, at stage two, it would be necessary to characterize those powers, to declare whether those powers, taken together, rise to the level of section 6321 property rights under federal, not state, law. There is little doubt that they would under the illustrative criteria of property rights set out by *Drye*.[268]

2. *Nominee liens.*—Our focus here is on a 2001 district court case, *Nantucket Village Development Co. v. Alex*.[269] Jordan Alex was a shareholder, director, and officer of five companies, including Car Lot, Inc. and Nantucket Village Development Company. There were unpaid income tax assessments against Car Lot exceeding $1,600,000 and against Jordan exceeding $50,000. The IRS believed that these taxpayers were using others, both individuals and related entities, to hold property for them in order to defeat collection of the assessments. As particularly relevant to this case, the IRS believed that Nantucket was holding property (the Summit Property) as a nominee of Car Lot. The IRS filed a nominee lien against the Summit Property on this basis.[270]

Nantucket brought an action to quiet title to the Summit Property. Along with its answer, the Government filed counterclaims against Nantucket and cross-claims against other defendants, a total of eighteen counts. Several parties moved for partial summary judgement, asserting that Ohio law does not recognize a nominee cause of action. The court identified the primary issue as whether Car Lot had an interest in the Summit Property "sufficient to constitute property or a right to property."[271] Analyzing the matter, the court proceeded through the following steps:

(1) The court noted (correctly) that the courts "have interpreted the statutory language of section 6321 broadly and held that it reveals Congress's intent 'to reach every interest in property that a taxpayer might have.'"[272]

(2) Summarizing *Drye* and other cases, the court defined stage one and stage two of the analysis thusly:

> [T]his Court's initial task is to understand and define the bundle of rights and privileges that Ohio law has created under

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268. See subpart II.B.2 supra. Pre-*Drye* case law also reached the conclusion that the federal tax lien attaches to interests acquired under purchase contracts. E.g., United States v. Big Value Supermarkets, Inc. 898 F.2d 493 (6th Cir. 1990); Crough v. Scheets, 1994 WL 409628, at *2 (D. Kan. 1994); Cardinal v. United States, 817 F. Supp. 647, 652 (E.D. Mich. 1993).

269. 2001-1 U.S. Tax Cas. (CCH) ¶ 50,202, 87 A.F.T.R 2d (RIA) 743 (N.D. Ohio 2001).

270. For description of nominee liens and related collection devices, see Elliott, supra note 166, ¶ 9.10.

271. 2001 WL 169316 at *4.

272. 2001 WL 169316 at *4 (quoting United States v. National Bank of Commerce, 472 U.S. 713, 720 (1985)).

> the nominee lien doctrine for the "true" owner of the properties allegedly held by the nominees. . . . The second step is to determine, as a matter of federal law, whether the interest created by Ohio law is property or a right to property to which the federal income tax liens can attach.[273]

(3) The court found that "[t]here is a split among the district courts of Ohio regarding whether Ohio law recognizes the nominee doctrine."[274] After several pages of dissection of prior cases, the court concluded that Ohio law does not recognize the nominee doctrine,[275] but that Ohio does recognize the alter ego doctrine under which "the concept of equitable ownership is, essentially, a recognition of the nominee doctrine by another name."[276]

(4) The court found that the Government's counter and cross claims asserted sufficient facts which, if proved at trial, would establish that Jordan Alex and Car Lot are alter egos of each other, and that the related individuals and entities had been used to hold property of theirs, including that Nantucket held the Summit Property for Car Lot, and that Car Lot was the equitable owner of the Summit Property.[277] Thus, the court denied the motion for partial summary judgement and allowed the Government to proceed with its claims.

The court reached the correct conclusion, but it misapplied *Drye*. The errors in *Nantucket Village* involved all three stages of the three-stage analysis governing federal tax collection controversies.

a. *Error as to stages one and three.*—The first and principal error made by *Nantucket Village* involves the court's conclusion that it was compelled to ascertain "the bundle of rights and privileges that Ohio law has created under the nominee doctrine for the 'true' owner of the properties allegedly held by the nominees."[278] The court confused stages one and three of the analysis. The nominee lien doctrine is a stage three collection option or remedy available to the IRS.[279] Thus, it is a function of federal law.

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273. 2001 WL 169316 at *5 (omitting internal citations).

274. Id.

275. Id. at *7.

276. Id. at *8; see also id. at *9 ("[I]t is clear that Ohio law recognizes the concept of equitable ownership, despite the fact that the term 'nominee doctrine' is not used.").

277. Id. at *11-12.

278. 2001 WL 169316 at *5 (omitting internal citations).

279. See Stophel v. United States, 81-2 U.S. Tax Cas. (CCH) ¶ 9,669, 88,257 (E.D. Tenn. 1981). The tax lien already has arisen as to the taxpayer, and it already applies to all of the taxpayer's property and property rights. The nominee lien and alter ego lien techniques merely counter the taxpayer's tactic of lodging her property in the hands of others, nominally different from her, but related to her or under her control. In this regard, these techniques are similar to transferee liability assessments under § 6901 and fraudulent conveyance suits.

As the *Nantucket Village* court recognized,[280] the nominee lien remedy is amply recognized under federal law.[281]

Application of that remedy depends upon the taxpayer being the true or beneficial owner of the property which is held by another. It had been well pled, and was accepted for summary judgement purposes, that Car Lot was the true or beneficial owner of the Summit Property. Once that was established or accepted, stage one–and therefore recourse to state law–should have ended. It was wrong to go further and ask what remedies state law accorded to the true or beneficial owner, or to creditors of that owner.[282] Remedies is a stage three matter controlled by federal law, not state law.[283]

b. *Error as to stage two.*—The other error committed by the *Nantucket Village* court involved stage two of contemporary tax collection analysis. Although not central to its analysis, the court discussed what constitutes "property" for section 6321 purposes. In the course thereof, it cited *Drye* for the following proposition: "In determining whether a taxpayer's state-law rights constitute 'property' or the 'right to property,' the important consideration is the breadth of control the taxpayer can exercise over the property."[284] Some commentators also have read *Drye* as making "control" the key factor in the federal definition of property.[285]

I believe this conclusion is incorrect. It wrongly elevates the particular to the universal. Control *was* the key consideration on the facts at issue in *Drye,*

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280. See 2001 WL 169316 at * 7-8.

281. See, e.g., United States v. Letscher, 83 F. Supp. 2d 367, 375 (S.D.N.Y. 1999); Hill v. United States, 844 F. Supp. 263, 270 (W.D.N.C. 1993); Stophel v. United States, 81-2 U.S. Tax Cas. (CCH) ¶ 9,669, 88,257 (E.D. Tenn. 1981); see also Baldassari v. United States, 144 Cal. Rptr. 741, 742-43 (Cal. Ct. App. 1978) (state case finding that nominee liens are well recognized under federal law).

282. See, e.g., United States v. Tempelman, 111 F. Supp. 2d 85, 93 n.18 (D.N.H. 2000) (since it was established that the taxpayers were the owners of the property at issue, the court "need not engage in a state law analysis of their rights in the property").

283. My criticism here is not just doctrinal. In its microscopic dissection of state law cases as to equitable ownership, the *Nantucket Village* court risked forgetting the purpose and flexibility that characterize equity. Better is the awareness that informed a circuit court nominee lien opinion: "we must avoid an over-rigid 'preoccupation with questions of structure' . . . and 'apply the preexisting and overarching principle that liability is imposed to reach an equitable result.'" LiButti v. United States, 107 F.3d 110, 119 (2d Cir. 1997) (quoting William Wrigley Jr. Co. v. Waters, 890 F.2d 594, 601 (2d Cir. 1989) and Brunswick Corp. v. Waxman, 599 F.2d 34, 36 (2d Cir. 1979)).

284. See 2001 WL 169316 at * 5.

285. See, e.g., Madden & Hayes, supra note 73, at 170 ("the Supreme Court held that in determining whether a taxpayer's state-law rights constitute 'property' or 'rights to property,' the important consideration is the breadth of control the taxpayer could exercise over the property").

but that does not mean that it need always be. Other cases with other facts may well hinge on other considerations.[286]

Consider some examples. It is fundamental that, in general, substance controls over form in federal taxation.[287] Reflecting this, it long has been held that the tax lien attaches to beneficial interests in property, not mere legal title to it.[288] Yet, legal title holders may exercise a great deal of control over the property. For instance, depending on the terms of a trust, the trustee may have substantial discretion as to which of the various beneficiaries will receive distributions of corpus and/or income, how much those distributions will be, and (almost as important) when the beneficiaries will get those amounts. Similarly, depending on the terms of the power, the holder of a special power of appointment may have vast control indeed: the ability to confer the underlying property perhaps on anyone in the world, except only herself, her estate, her creditors, and creditors of her estate.[289]

Assume that the trustee or holder of the appointment power in our examples owe federal taxes. Any tax liens against them would not, under current law, attach to the trust property or the property subject to the power of appointment,[290] despite the very great control they exercise over the property. It is clear that the *Drye* Court did not intend to change that outcome.[291] Thus, it is too broad to say, as *Nantucket Village* did and some commentators have, that *Drye* made control the critical criterion at stage two of tax collection analysis.[292]

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286. See, e.g., United States v. Murray, 217 F.3d 59, 63 (1st Cir. 2000) (suggesting that control and other particular factors need not be decisive under *Drye* but only be "among the relevant considerations in a highly fact-specific inquiry").

287. E.g., Commissioner v. Sunnen, 333 U.S. 591, 604-05 (1948); Gregory v. Helvering, 293 U.S. 465, 470 (1935); Corliss v. Bowers, 281 U.S. 376, 378 (1930); Speca v. Commissioner, 630 F.2d 554, 557 (7th Cir. 1980); Kohn v. Commissioner, 197 F.2d. 480, 482 (2d Cir. 1952).

288. See, e.g., Aquilino v. United States, 363 U.S. 509, 515-16 (1960) (remanding for determination whether the taxpayer had a beneficial interest, as opposed to bare legal title, in the property at issue); United States v. Johnson, 200 F. Supp. 589, 592 (D. Ariz. 1961) (taxpayer held bare legal title to property as security for repayment of a loan; held: tax lien does not attach).

289. See IRC §§ 2041(b)(1) & 2514(c) (defining powers of appointment).

290. E.g.,Walwyn v. United States, 51 F. Supp. 2d 320 (E.D.N.Y. 1999) (trust); Chamberlain v. Conley, 64-2 U.S. Tax Cas. (CCH) ¶ 9663 (D. Conn. 1964), 14 A.F.T.R. 2d (RIA) 5588 (trust); cf. 11 U.S.C. § 541(b)(1) (a power which the debtor can exercise only for the benefit of others is not included in the property of the bankruptcy estate).

291. In its recounting of prior stage two decisions, the Court cited with apparent favor the rule that a beneficial interest, not mere legal title, is required for attachment of the tax lien. See 528 U.S. at 59 n.6.

292. What distinguished the disclaimer situation in *Drye* from the bare legal title situation is the possibility of personal benefit. Mr. Drye had control over his mother's estate and could personally benefit from how he chose to exercise that control. The trustee and the holder of the special power of appointment cannot benefit from how they exercise their control; only others can benefit.

VII. CONCLUSION

Drye is a landmark case in federal tax collection analysis. It offers the opportunity to undo confusion of generations-long duration and provides a foundation on which to build future doctrine. The fulfillment of this promise depends on keeping *Drye*'s teaching in clear focus, unobstructed by the discarded undergrowth of previous error or imprecise statement.

On balance, at this early time in the *Drye* era, one may feel encouraged by the treatment of *Drye* by the lower courts. Most decisions reflect correct understanding of *Drye* and satisfactory expression of that understanding. Of the cases that are less than fully satisfying, more suggest a want of sufficient care than actual error. The power of history and habit most plausibly explains both the bad cases and many of the ugly ones. The antidote is rigor: unstinting recollection of what *Drye* teaches, and uncompromising excision of thinking incompatible with it. At this point in the evolution of tax lien law, the two most pressing items on the agenda are (1) establishing that stage one of the analysis involves only what powers state law creates, not what characterizations it attaches to them–to uproot the error of *Craft II*–and (2) clarifying that control may be situationally important, but it is not universally predominant–to move past an imprecision of *Nantucket Village*.