SUPREME COURT OF THE UNITED STATES

No. 00–1831

UNITED STATES, PETITIONER *v.* SANDRA L. CRAFT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[April 17, 2002]

JUSTICE THOMAS, with whom JUSTICE STEVENS and JUSTICE SCALIA join, dissenting.

The Court today allows the Internal Revenue Service (IRS) to reach proceeds from the sale of real property that did not belong to the taxpayer, respondent's husband, Don Craft,[1] because, in the Court's view, he "possesse[d] individual rights in the [tenancy by the entirety] estate sufficient to constitute 'property and rights to property' for the purposes of the lien" created by 26 U. S. C. §6321. *Ante*, at 1. The Court does not contest that the tax liability the

[1] The Grand Rapids property was tenancy by the entirety property owned by Mr. and Mrs. Craft when the tax lien attached, but was conveyed by the Crafts to Mrs. Craft by quitclaim deed in 1989. That conveyance terminated the entirety estate. Mich. Comp. Laws Ann. §557.101 (West 1988); see also *United States* v. *Certain Real Property Located at 2525 Leroy Lane*, 910 F. 2d 343, 351 (CA6 1990). The District Court and Court of Appeals both held that the transfer did not constitute a fraudulent conveyance, a ruling the Government has not appealed. The IRS is undoubtedly entitled to any proceeds that Mr. Craft received or to which he was entitled from *the 1989 conveyance* of the tenancy by the entirety property for $1.00; at that point the tenancy by the entirety estate was destroyed and at least half of the proceeds, or 50 cents, was "property" or "rights to property" "belonging to" Mr. Craft. By contrast, the proceeds that the IRS claims here are from *Mrs. Craft's 1992 sale* of the property to a third party. At the time of the sale, she owned the property in fee simple, and accordingly Mr. Craft neither received nor was entitled to these funds.

IRS seeks to satisfy is Mr. Craft's alone, and does not claim that, under Michigan law, real property held as a tenancy by the entirety belongs to either spouse individually. Nor does the Court suggest that the federal tax lien attaches to particular "rights to property" held individually by Mr. Craft. Rather, borrowing the metaphor of "property as a 'bundle of sticks'—a collection of individual rights which, in certain combinations constitute property," *ante*, at 4, the Court proposes that so long as sufficient "sticks" in the bundle of "rights to property" "belong to" a delinquent taxpayer, the lien can attach as if the property itself belonged to the taxpayer. *Ante*, at 11.

This amorphous construct ignores the primacy of state law in defining property interests, eviscerates the statutory distinction between "property" and "rights to property" drawn by §6321, and conflicts with an unbroken line of authority from this Court, the lower courts, and the IRS. Its application is all the more unsupportable in this case because, in my view, it is highly unlikely that the limited individual "rights to property" recognized in a tenancy by the entirety under Michigan law are themselves subject to lien. I would affirm the Court of Appeals and hold that Mr. Craft did not have "property" or "rights to property" to which the federal tax lien could attach.

I

Title 26 U. S. C. §6321 provides that a federal tax lien attaches to "all property and rights to property, whether real or personal, belonging to" a delinquent taxpayer. It is uncontested that a federal tax lien itself "creates no property rights but merely attaches consequences, federally defined, to rights created under state law." *United States* v. *Bess*, 357 U. S. 51, 55 (1958) (construing the 1939 version of the federal tax lien statute). Consequently, the Government's lien under §6321 "cannot extend beyond the property interests held by the delinquent taxpayer,"

United States v. *Rodgers*, 461 U. S. 677, 690–691 (1983), under state law. Before today, no one disputed that the IRS, by operation of §6321, "steps into the taxpayer's shoes," and has the same rights as the taxpayer in property or rights to property subject to the lien. B. Bittker & M. McMahon, Federal Income Taxation of Individuals ¶44.5[4][a] (2d ed. 1995 and 2000 Cum. Supp.) (hereinafter Bittker). I would not expand "'the nature of the legal interest'" the taxpayer has in the property beyond those interests recognized under state law. *Aquilino* v. *United States,* 363 U. S. 509, 513 (1960) (citing *Morgan* v. *Commissioner*, 309 U. S. 78, 82 (1940)).

A

If the Grand Rapids property "belong[ed] to" Mr. Craft under state law prior to the termination of the tenancy by the entirety, the federal tax lien would have attached to the Grand Rapids property. But that is not this case. As the Court recognizes, pursuant to Michigan law, as under English common law, property held as a tenancy by the entirety does not belong to either spouse, but to a single entity composed of the married persons. See *ante*, at 6–7. Neither spouse has "any separate interest in such an estate." *Sanford* v. *Bertrau*, 204 Mich. 244, 249, 169 N. W. 880, 882 (1918); see also *Long* v. *Earle*, 277 Mich. 505, 517, 269 N. W. 577, 581 (1936) ("Each [spouse] is vested with an entire title and, as against the one who attempts alone to convey or incumber such real estate, the other has an absolute title"). An entireties estate constitutes an indivisible "sole tenancy." See *Budwit* v. *Herr*, 339 Mich. 265, 272, 63 N. W. 2d 841, 844 (1954); see also *Tyler* v. *United States*, 281 U. S. 497, 501 (1930) ("[T]he tenants constitute a unit; neither can dispose of any part of the estate without the consent of the other; and the whole continues in the survivor"). Because Michigan does not recognize a separate spousal interest in the Grand Rapids property, it

did not "belong" to either respondent or her husband individually when the IRS asserted its lien for Mr. Craft's individual tax liability. Thus, the property was not property to which the federal tax lien could attach for Mr. Craft's tax liability.

The Court does not dispute this characterization of Michigan's law with respect to the essential attributes of the tenancy by the entirety estate. However, relying on *Drye* v. *United States*, 528 U. S. 49, 59 (1999), which in turn relied upon *United States* v. *Irvine*, 511 U. S. 224 (1994), and *United States* v. *Mitchell*, 403 U. S. 190 (1971), the Court suggests that Michigan's definition of the tenancy by the entirety estate should be overlooked because federal tax law is not controlled by state legal fictions concerning property ownership. *Ante*, at 4. But the Court misapprehends the application of *Drye* to this case.

Drye, like *Irvine* and *Mitchell* before it, was concerned not with whether state law recognized "property" as belonging to the taxpayer in the first place, but rather with whether state laws could disclaim or exempt such property from federal tax liability after the property interest was created. *Drye* held only that a state-law disclaimer could not retroactively undo a vested right in an estate that the taxpayer already held, and that a federal lien therefore attached to the taxpayer's interest in the estate. 528 U. S., at 61 (recognizing that a disclaimer does not restore the *status quo ante* because the heir "determines who will receive the property—himself if he does not disclaim, a known other if he does"). Similarly, in *Irvine*, the Court held that a state law allowing an individual to disclaim a gift could not force the Court to be "struck blind" to the fact that the transfer of "property" or "property rights" for which the gift tax was due had already occurred; "*state property transfer rules* do not transfer into federal taxation rules." 511 U. S., at 239–240 (emphasis added). See also *Mitchell*, *supra,* at 204 (holding that right to renounce a

marital interest under state law does not indicate that the taxpayer had no right to property before the renunciation).

Extending this Court's "state law fiction" jurisprudence to determine whether property or rights to property *exist* under state law in the first place works a sea change in the role States have traditionally played in "creating and defining" property interests. By erasing the careful line between state laws that purport to disclaim or exempt property interests after the fact, which the federal tax lien does not respect, and state laws' definition of property and property rights, which the federal tax lien does respect, the Court does not follow *Drye*, but rather creates a new federal common law of property. This contravenes the previously settled rule that the definition and scope of property is left to the States. See *Aquilino*, *supra,* at 513, n. 3 (recognizing unsoundness of leaving the definition of property interests to a nebulous body of federal law, "because it ignores the long-established role that the States have played in creating property interests and places upon the courts the task of attempting to ascertain a taxpayer's property rights under an undefined rule of federal law").

B

That the Grand Rapids property does not belong to Mr. Craft under Michigan law does not end the inquiry, however, since the federal tax lien attaches not only to "property" but also to any "rights to property" belonging to the taxpayer. While the Court concludes that a laundry list of "rights to property" belonged to Mr. Craft as a tenant by the entirety,[2] it does not suggest that the tax lien attached

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[2]The parties disagree as to whether Michigan law recognizes the "rights to property" identified by the Court as *individual* rights "belonging to" each tenant in entireties property. Without deciding a question better resolved by the Michigan courts, for the purposes of this case I will assume, *arguendo,* that Michigan law recognizes separate

to any of these particular rights.[3] Instead, the Court gathers these rights together and opines that there were sufficient sticks to form a bundle, so that "respondent's husband's interest in the entireties property constituted 'property' or 'rights to property' for the purposes of the federal tax lien statute." *Ante*, at 11, 13.

But the Court's "sticks in a bundle" metaphor collapses precisely because of the distinction expressly drawn by the statute, which distinguishes between "property" and "rights to property." The Court refrains from ever stating whether this case involves "property" or "rights to property" even though §6321 specifically provides that the federal tax lien attaches to "property" and "rights to property" "belonging to" the delinquent taxpayer, and not to an imprecise construct of "individual rights in the estate sufficient to constitute 'property and rights to property' for the purposes of the lien." *Ante*, at 1.[4]

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interests in these "rights to property."

[3] Nor does the Court explain how such "rights to property" survived the destruction of the tenancy by the entirety, although, for all intents and purposes, it acknowledges that such rights as it identifies exist by virtue of the tenancy by the entirety estate. Even Judge Ryan's concurrence in the Sixth Circuit's first ruling in this matter is best read as making the Federal Government's right to execute its lien dependent upon the factual finding that the conveyance was a fraudulent transaction. See 140 F. 3d 638, 648–649 (1998).

[4] The Court's reasoning that because a taxpayer has rights to property a federal tax lien can attach not only to those rights but also to the property itself could have far-reaching consequences. As illustration, in the partnership setting as elsewhere, the Government's lien under §6321 places the Government in no better position than the taxpayer to whom the property belonged: "[F]or example, the lien for a partner's unpaid income taxes attaches to his interest in the firm, not to the firm's assets." Bittker ¶44.5[4][a]. Though partnership property currently is "not subject to attachment or execution, except on a claim against the partnership," Rev. Rul. 73–24, 1973–1 Cum. Bull. 602; cf. *United States* v. *Kaufman*, 267 U. S. 408 (1925), under the logic of the Court's opinion partnership property could be attached for the tax

Rather than adopt the majority's approach, I would ask specifically, as the statute does, whether Mr. Craft had any particular "rights to property" to which the federal tax lien could attach. He did not.[5] Such "rights to property" that have been subject to the §6321 lien are valuable and "pecuniary," *i.e.*, they can be attached, and levied upon or sold by the Government.[6] *Drye*, 528 U. S., at 58–60, and n. 7. With such rights subject to lien, the taxpayer's interest has "ripen[ed] into a present estate" of some form and is more than a mere expectancy, *id.,* at 60, n. 7, and thus

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liability of an individual partner. Like a tenant in a tenancy by the entirety, the partner has significant rights to use, enjoy, and control the partnership property in conjunction with his partners. I see no principled way to distinguish between the propriety of attaching the federal tax lien to partnership property to satisfy the tax liability of a partner, in contravention of current practice, and the propriety of attaching the federal tax lien to tenancy by the entirety property in order to satisfy the tax liability of one spouse, also in contravention of current practice. I do not doubt that a tax lien may attach to a partner's partnership interest to satisfy his individual tax liability, but it is well settled that the lien does not, thereby, attach to property belonging to the partnership. The problem for the IRS in this case is that, unlike a partnership interest, such limited rights that Mr. Craft had in the Grand Rapids property are not the kind of rights to property to which a lien can attach, and the Grand Rapids property itself never "belong[ed] to" him under Michigan law.

[5] Even such rights as Mr. Craft arguably had in the Grand Rapids property bear no resemblance to those to which a federal tax lien has ever attached. See W. Elliott, Federal Tax Collections, Liens, and Levies ¶¶9.09[3][a]–[f] (1995 and 2000 Cum. Supp.) (hereinafter Elliott) (listing examples of rights to property to which a federal tax lien attaches, such as the right to compel payment; the right to withdraw money from a bank account, or to receive money from accounts receivable; wages earned but not paid; installment payments under a contract of sale of real estate; annuity payments; a beneficiary's rights to payment under a spendthrift trust; a liquor license; an easement; the taxpayer's interest in a timeshare; options; the taxpayer's interest in an employee benefit plan or individual retirement account).

[6] See 26 U. S. C. §§6331, 6335–6336.

the taxpayer has an apparent right "to channel that value to [another]," *id.*, at 61.

In contrast, a tenant in a tenancy by the entirety not only lacks a present divisible vested interest in the property and control with respect to the sale, encumbrance, and transfer of the property, but also does not possess the ability to devise any portion of the property because it is subject to the other's indestructible right of survivorship. *Rogers* v. *Rogers*, 136 Mich. App. 125, 135–137, 356 N. W. 2d 288, 293–294 (1984). This latter fact makes the property significantly different from community property, where each spouse has a present one-half vested interest in the whole, which may be devised by will or otherwise to a person other than the spouse. See 4 G. Thompson, Real Property §37.14(a) (D. Thomas ed. 1994) (noting that a married person's power to devise one-half of the community property is "consistent with the fundamental characteristic of community property": "community ownership means that each spouse owns 50% of each community asset").[7] See also *Drye*, 528 U. S., at 61 ("[I]n determining whether a federal taxpayer's state-law rights constitute 'property' or 'rights to property,' the *important consideration is the breadth of the control the taxpayer could exercise over the property*" (emphasis added, citation and brackets omitted).

It is clear that some of the individual rights of a tenant in entireties property are primarily personal, dependent

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[7] And it is similarly different from the situation in *United States* v. *Rodgers*, 461 U. S. 677 (1983), where the question was not whether a vested property interest in the family home to which the federal tax lien could attach "belong[ed] to" the taxpayer. Rather, in *Rodgers*, the only question was whether the federal tax lien for the husband's tax liability could be *foreclosed* against the property under 26 U. S. C. §7403, despite his wife's homestead right under state law. See 461 U. S., at 701–703, and n. 31.

upon the taxpayer's status as a spouse, and similarly not susceptible to a tax lien. For example, the right to use the property in conjunction with one's spouse and to exclude all others appears particularly ill suited to being transferred to another, see *ibid.,* and to lack "exchangeable value," *id*., at 56.

Nor do other identified rights rise to the level of "rights to property" to which a §6321 lien can attach, because they represent, at most, a contingent future interest, or an "expectancy" that has not "ripen[ed] into a present estate." *Id.,* at 60, n. 7 ("Nor do we mean to suggest that an expectancy that has pecuniary value and is transferable under state law would fall within §6321 prior to the time it ripens into a present estate"). Cf. *Bess*, 357 U. S., at 55–56 (holding that no federal tax lien could attach to proceeds of the taxpayer's life insurance policy because "[i]t would be anomalous to view as 'property' subject to lien proceeds never within the insured's reach to enjoy"). By way of example, the survivorship right wholly depends upon one spouse outliving the other, at which time the survivor gains "substantial rights, in respect of the property, theretofore never enjoyed by [the] survivor." *Tyler*, 281 U. S., at 503. While the Court explains that it is "not necessary to decide whether the right to survivorship alone would qualify as 'property' or 'rights to property'" under §6321, *ante*, at 11, the facts of this case demonstrate that it would not. Even assuming both that the right of survivability continued after the demise of the tenancy estate and that the tax lien could attach to such a contingent future right, creating a lienable interest upon the death of the nonliable spouse, it would not help the IRS here; respondent's husband predeceased her in 1998, and there is no right of survivorship at issue in this case.

Similarly, while one spouse might escape the absolute limitations on individual action with respect to tenancy by the entirety property by obtaining the right to one-half of

the property upon divorce, or by agreeing with the other spouse to sever the tenancy by the entirety, neither instance is an event of sufficient certainty to constitute a "right to property" for purposes of §6321. Finally, while the federal tax lien could arguably have attached to a tenant's right to any "rents, products, income, or profits" of real property held as tenants by the entirety, Mich. Comp. Laws Ann. §557.71 (West 1988), the Grand Rapids property created no rents, products, income, or profits for the tax lien to attach to.

In any event, all such rights to property, dependent as they are upon the existence of the tenancy by the entirety estate, were likely destroyed by the quitclaim deed that severed the tenancy. See n. 1, *supra*. Unlike a lien attached to the property itself, which would survive a conveyance, a lien attached to a "right to property" falls squarely within the maxim that "the tax collector not only steps into the taxpayer's shoes but must go barefoot if the shoes wear out." Bittker ¶44.5[4][a] (noting that "a state judgment terminating the taxpayer's rights to an asset also extinguishes the federal tax lien attached thereto"). See also Elliott ¶9.09[3][d][i] (explaining that while a tax lien may attach to a taxpayer's option on property, if the option terminates, the Government's lien rights would terminate as well).

Accordingly, I conclude that Mr. Craft had neither "property" nor "rights to property" to which the federal tax lien could attach.

II

That the federal tax lien did not attach to the Grand Rapids property is further supported by the consensus among the lower courts. For more than 50 years, every federal court reviewing tenancies by the entirety in States with a similar understanding of tenancy by the entirety as Michigan has concluded that a federal tax lien cannot

attach to such property to satisfy an individual spouse's tax liability.[8] This consensus is supported by the IRS' consistent recognition, arguably against its own interest, that a federal tax lien against one spouse cannot attach to property or rights to property held as a tenancy by the entirety.[9]

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[8] See *IRS* v. *Gaster*, 42 F. 3d 787, 791 (CA3 1994) (concluding that the IRS is not entitled to a lien on property owned as a tenancy by the entirety to satisfy the tax obligations of one spouse); *Pitts* v. *United States*, 946 F. 2d 1569, 1571–1572 (CA4 1991) (same); *United States* v. *American Nat. Bank of Jacksonville*, 255 F. 2d 504, 507 (CA5), cert. denied, 358 U. S. 835 (1958) (same); *Raffaele* v. *Granger*, 196 F. 2d 620, 622–623 (CA3 1952) (same); *United States* v. *Hutcherson*, 188 F. 2d 326, 331 (CA8 1951) (explaining that the interest of one spouse in tenancy by the entirety property "is not a right to property or property in any sense"); *United States* v. *Nathanson,* 60 F. Supp. 193, 194 (ED Mich. 1945) (finding no designation in the Federal Revenue Act for imposing tax upon property held by the entirety for taxes due from one person alone); *Shaw* v. *United States*, 94 F. Supp. 245, 246 (WD Mich. 1939) (recognizing that the nature of the estate under Michigan law precludes the tax lien from attaching to tenancy by the entirety property for the tax liability of one spouse). See also *Benson* v. *United States*, 442 F. 2d 1221, 1223 (CADC 1971) (recognizing the Government's concession that property owned by the parties as tenants by the entirety cannot be subjected to a tax lien for the debt of one tenant); *Cole* v. *Cardoza*, 441 F. 2d 1337, 1343 (CA6 1971) (noting Government concession that, under Michigan law, it had no valid claim against real property held by tenancy by the entirety).

[9] See, *e.g.,* Internal Revenue Manual §5.8.4.2.3 (RIA 2002), available at WESTLAW, RIA–IRM database (Mar. 29, 2002) (listing "property owned as tenants by the entirety" as among the assets beyond the reach of the Government's tax lien); *id.,* §5.6.1.2.3 (recognizing that a *consensual* lien may be appropriate "when the federal tax lien does not attach to the property in question. For example, an assessment exists against only one spouse and the federal tax lien does not attach to real property held as tenants by the entirety."); IRS Chief Counsel Advisory (Aug. 17, 2001) (noting that consensual liens, or mortgages, are to be used "as a means of securing the Government's right to collect from property the assessment lien does not attach to, *such as real property held as a tenancy by the entirety"* (emphasis added)); IRS Litigation

That the Court fails to so much as mention this consensus, let alone address it or give any reason for overruling it, is puzzling. While the positions of the lower courts and the IRS do not bind this Court, one would be hard pressed to explain why the combined weight of these judicial and administrative sources—including the IRS' instructions to its own employees—do not constitute relevant authority.

III

Finally, while the majority characterizes Michigan's view that the tenancy by the entirety property does not belong to the individual spouses as a "state law fiction," *ante*, at 1, our precedents, including *Drye*, 528 U. S., at 58–60, hold that state, not federal, law defines property interests. Ownership by "the marriage" is admittedly a fiction of sorts, but so is a partnership or corporation. There is no basis for ignoring this fiction so long as federal law does not define property, particularly since the tenancy by the entirety property remains subject to lien for the tax liability of *both* tenants.

Nor do I accept the Court's unsupported assumption that its holding today is necessary because a contrary result would "facilitat[e] abuse of the federal tax system." *Ante*, at 11. The Government created this straw man, Brief for United States 30–32, suggesting that the prop-

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Bulletin No. 407 (Aug. 1994) ("Traditionally, the government has taken the view that a federal tax lien against a single debtor-spouse does not attach to property or rights to property held by both spouses as tenants by the entirety."); IRS Litigation Bulletin No. 388 (Jan. 1993) (explaining that neither the Department of Justice nor IRS chief counsel interpreted *United States* v. *Rodgers*, 461 U. S. 677 (1983), to mean that a federal tax lien against one spouse encumbers his or her interest in entireties property, and noting that it "do[es] not believe the Department will again argue the broader interpretation of *Rodgers*," which would extend the reach of the federal tax lien to property held by the entireties); *Benson*, *supra,* at 1223; *Cardoza*, *supra,* at 1343.

erty transfer from the tenancy by the entirety to respondent was somehow improper, see *id.,* at 30–31, n. 20 (characterizing scope of "[t]he tax avoidance scheme sanctioned by the court of appeals in this case"), even though it chose *not* to appeal the lower court's contrary assessment. But the longstanding consensus in the lower courts that tenancy by the entirety property is *not* subject to lien for the tax liability of one spouse, combined with the Government's failure to adduce any evidence that this has led to wholesale tax fraud by married individuals, suggests that the Court's policy rationale for its holding is simply unsound.

Just as I am unwilling to overturn this Court's longstanding precedent that States define and create property rights and forms of ownership, *Aquilino*, 363 U. S., at 513, n. 3, I am equally unwilling to redefine or dismiss as fictional forms of property ownership that the State has recognized in favor of an amorphous federal common-law definition of property. I respectfully dissent.