

# Disclaimers and Federalism

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*The beneficiary of an inheritance has the right to disclaim (i.e., decline) it, within limits ordinarily set by state law. This Article examines situations where a beneficiary's right to disclaim might instead be governed by federal law, as a matter of both existing doctrine and public policy. Issues of federalism arise with regard to disclaimers in several contexts: (1) when a disclaimer would function to defeat a federal tax lien; (2) when a disclaimer could affect a beneficiary's eligibility for Medicaid assistance; (3) when a beneficiary disclaims ERISA pension benefits; and (4) when a beneficiary executes a disclaimer prior to declaring bankruptcy or in the midst of a federal bankruptcy proceeding. The Article begins by developing a theoretical model of the potential costs and benefits of federal preemption, jumping off from prior scholarly discussions of this problem. The Article then addresses, from the perspective of the model, each of the four situations where a disclaimer raises federal concerns. The Article concludes that different policy considerations arise in each situation, depending upon how a disclaimer relates to federal affairs—viz., whether a disclaimer would threaten the financial interests of the federal government, whether those financial interests can be safely delegated to states, whether federal law regulates the kind of property disclaimed, and whether the disclaimer occurs in anticipation of, or within, a specialized federal proceedings. Hence, the four situations addressed in this Article call for no synchronized response from the perspective of federalism but instead demand distinct treatment.*

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## I. INTRODUCTION

Most beneficiaries accept inheritances with open arms; other ones prefer, for whatever reason, to reject them.<sup>1</sup> Under most circumstances today, beneficiaries are free to accept or reject an inheritance as they see fit. Nevertheless, if they wait too long to decide, beneficiaries may forfeit their power to decline an inheritance. The same is true if they bind themselves by contract to accept, or if they initially accept and subsequently change their mind, or—perhaps—if they are insolvent at the time when they inherit. These qualifications on beneficiaries’ freedom, and other elements of the law of “disclaimers,” as rejections of an inheritance are technically known, traditionally come within the ambit of state law. Every state today has a statute, overlaid upon an older body of common law, establishing the applicable rules of disclaimer. These rules determine who, apart from the beneficiary, can carry out a disclaimer on his or her behalf, how one must be formalized, who receives the inheritance in lieu of the intended beneficiary, what sorts of interests a beneficiary can disclaim, and under what conditions a disclaimer is allowed or disallowed.<sup>2</sup> The Internal Revenue Code includes a parallel set of rules as a matter of federal law, but these rules govern only the effectiveness of disclaimers for tax purposes, not their substantive validity.<sup>3</sup> If the applicable state substantive law and federal tax law conflict, a disclaimer can take effect in substance but remain a taxable transfer—or the reverse.<sup>4</sup>

Federal courts must also sometimes assess the substantive effectiveness of a disclaimer and not merely its taxability. In such instances, federal lawmakers must decide whether to defer to state

1. On the possible objectives of this sort of “postmortem estate planning,” see MARY MOERS WENIG, *DISCLAIMERS A–4 to A–20* (Tax Management BNA, No. 848, 2000).

2. The last two states to codify their laws of disclaimer were Mississippi and New Hampshire in the 1990s. MISS. CODE ANN. § 89-21-1 (2014) (enacted in 1994); N.H. REV. STAT. ANN. § 563-B:1–B:2 (2014) (enacted in 1996). For an overview of the substantive law of disclaimers, see RONALD A. BRAND & WILLIAM P. LAPIANA, *DISCLAIMERS IN ESTATE PLANNING 4–32* (1990).

3. I.R.C. § 2518 (2012). A disclaimer deemed effective for tax purposes is called a “qualified” disclaimer. *Id.*

4. A disclaimer effective for tax purposes but not for substantive purposes under state law is called a “transfer disclaimer,” and it is provided for expressly under the tax code. *Id.* § 2518(c)(3).

rules of disclaimer or to replace them with federal substantive rules. Which route should lawmakers choose?

To assay this question, we must examine the characteristics of disclaimer law from a perspective rarely associated with the minutiae of inheritance doctrine—namely, the vantage of political theory.<sup>5</sup> But even then, no simple, consistent response may resonate. Different disclaimers could raise different federal concerns. And each, in turn, could call for different treatment within the theoretical framework of federalism.

To be more exact: A disclaiming beneficiary (sometimes called a “disclaimant”) might have federal tax liabilities or seek means-tested federal benefits, which a disclaimer would render (respectively) more difficult or easy to satisfy. Such cases implicate a federal *interest*. Alternatively, the disclaimer might affect only private interests, but where the property the beneficiary seeks to disclaim takes a form otherwise subject to federal *regulation*. Then again, the disclaimer might affect private interests exclusively, concerning property ordinarily regulated by state law, but where the disclaimer is adjudicated within a specialized federal *proceeding*. The thesis of this Article is that each of these federal concerns weighs differently upon the problem and could prompt federal lawmakers to defer to their state counterparts some of the time, but not all of the time.

The analysis that follows will unfold in stages. In Part II, I survey the theory of federalism as a structural context for disclaimer doctrine. In the next three Parts, I proceed seriatim to consider each of the core circumstances under which a disclaimer might implicate federal law and to explore how each fits into the framework of political theory. I will address the state of the law in these areas, as well as its wisdom in the light of theory. Finally, in the Conclusion, I review the themes that emerge from this structural excursion.

## II. PROLEGOMENON: WHY FEDERALISM?

Greek republics were sufficiently small that each required only a single lawmaking authority and a single tribunal to make and

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5. Historically, political theory has helped to shape a number of other inheritance doctrines—the abolition of primogeniture and fee tails, among other rules—following the American Revolution. See Adam J. Hirsch, *Incomplete Wills*, 111 MICH. L. REV. 1423, 1466–67 (2013); Stanley N. Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 MICH. L. REV. 1, 14–25 (1977). And again, late in the nineteenth century, the emerging doctrine validating spendthrift trusts came under attack as “undemocratic,” bound to give rise to a “contemptible aristocracy,” and hence as incompatible with “Americanism,” see JOHN CHIPMAN GRAY, *RESTRAINTS ON THE ALIENATION OF PROPERTY* 246–47 (2d ed. 1895), although the doctrine survived this political onslaught.

implement rules for its citizens. The legal systems of these city-states could be, and were, quite simple.<sup>6</sup> Larger nations today need to construct more complex legal systems, incorporating multiple authorities and tribunals to service different segments of the population. The structural alternatives open to founders in these nations are without limit. In theory, founders could install a perfectly communitarian system, each local community devising its own corpus of law with its own court, coequal with all others. Or they could set in place a perfectly regional system, under which each region has a coequal representative assembly to make laws, with local courts answering to a higher one within the region, but with no opportunity for appeal beyond that region.<sup>7</sup> Or they could construct a perfectly centralized system, with a single representative assembly and a single hierarchy of courts, culminating in a supreme court, for the nation as a whole.

Of course, our Framers preferred to introduce a system of federalism that follows one of the myriad of alternatives in between—constructing dual assemblies (federal and state), coupled with a dual hierarchy of courts, dividing up patches of the legal landscape in some instances, and sharing power over the same patches in others.<sup>8</sup> Dual structures of federalism also exist today in a number of other countries.<sup>9</sup> The virtues of such a system absorbed the Framers and have continued to engage political theorists ever since.

### A. Federal Rules

Federal rules, formulated and applied uniformly throughout the United States by Congress and federal courts, can afford citizens a number of benefits. Legal actors may prove able to comply with federal rules cheaply. To the extent actors must incur costs to learn rules and engage in activities governed by those rules in different locations

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6. See ADRIAAN LANNI, *LAW AND JUSTICE IN THE COURTS OF CLASSICAL ATHENS* 33, 39 (2006).

7. Such a system operated briefly in the United States under the Articles of Confederation between 1781 and 1787. The Confederation included no system of national courts and no supreme court for the nation. Although the government did include a national Congress, which could resolve disputes between states and had authority over maritime and other political affairs, Congress under the Articles of Confederation made no internal laws for the states. EDMUND S. MORGAN, *THE BIRTH OF THE REPUBLIC, 1763–89*, at 106–07 (2d ed. 1977).

8. For a classic structural discussion, see Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954).

9. Canada is one example. See PETER W. HOGG, *CONSTITUTIONAL LAW OF CANADA* § 5.1 (3d ed. 1992).

simultaneously, federal rules minimize law's information costs.<sup>10</sup> And to the extent actors must incur costs to comply with law, federal rules allow actors to standardize their behavior, another potential saving.<sup>11</sup> In two further ways, federal rules may reduce litigation costs. Federal rules avert legal uncertainty stemming from conflicts of laws.<sup>12</sup> What is more, a centralized legal system has the capacity to fill gaps in the law more rapidly than a decentralized one, again mitigating uncertainty.<sup>13</sup> To see why, assume that an unresolved issue of law exists throughout the nation. In a decentralized system, a statute or decision by the high court in *each* state must fill the gap before the rule crystalizes everywhere. But in a centralized system, the issue has only to come before Congress or rise to the United States Supreme Court *once*. Thereafter, lawmakers achieve certainty throughout the nation. And the fewer steps this process requires, the less actors must spend on litigation to clarify law.

In another dimension, federal statutory rules could prove better designed than regional ones. Congress can draw on the resources at its disposal to fashion rules on the basis of in-depth studies, undertaking independent analyses that many state legislatures would skip in light of the expense.<sup>14</sup> Put otherwise, when dealing with the costs of

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10. See Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131, 138 (1996) (exploring the virtues and vices of uniform acts, by analogy).

11. *Id.*

12. *Id.*

13. The point is often asserted without analysis. See, e.g., *In re Peregrine Entm't, Ltd.*, 116 B.R. 194, 199 (C.D. Cal. 1990) (“[F]ederal copyright laws ensure ‘predictability and certainty of copyright ownership’ . . .”) (quoting *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 749 (1989)).

14. See Ribstein & Kobayashi, *supra* note 10, at 140, 169, 171 (suggesting that a “part-time . . . legislature lacks the time and expertise to innovate”). Proposing statutes at the state level, the Uniform Law Commissioners promote themselves as “highly qualified” drafters, see Homer Kripke, *Reflections of a Drafter*, 43 OHIO ST. L.J. 577, 584 (1982), offering model legislation that “tends to be especially well drafted, on account of the Commission’s resources and procedures,” see John H. Langbein, *Why Did Trust Law Become Statute Law in the United States?*, 58 ALA. L. REV. 1069, 1080 (2007), hence offering an attractive alternative to federal law. See Ribstein & Kobayashi, *supra* note 10, at 175 (“[S]ome advocates of uniform state laws view uniform laws as a way of averting the great evil of federal law.”). Still, neither the Uniform Law Commission nor the American Law Institute has the means to fund empirical research for its drafting projects. Lawrence W. Waggoner, *The Uniform Probate Code Extends Antilapse-Type Protection to Poorly Drafted Trusts*, 94 MICH. L. REV. 2309, 2337 (1996). Consequently, as one disaffected Commissioner averred, drafters of uniform acts “will frequently be ‘shooting in the dark.’” Richard E. Speidel, *Revising U.C.C. Article 2: A View from the Trenches*, 52 HASTINGS L.J. 607, 609 (2001). State bar association committees and model lawmaking committees alike are staffed by talented attorneys and academics. Whether uniform acts manifestly “outperform” the products of local drafting committees is open to doubt. For one example of uniform act failure, universally avoided by local drafters of nonuniform legislation, see *infra* notes 317–30 and accompanying text.

lawmaking, Congress can take advantage of economies of scale. Public choice theory suggests that Congress could also prove less susceptible to capture by special interest groups when formulating rules. The teeming diversity of interests represented before a national forum will tend to counteract each other in a manner not reproduced at the state level,<sup>15</sup> although the point remains controversial among scholars.<sup>16</sup> Finally, Congress as a whole has no temptation to exploit negative externalities, as state legislatures do. A state legislature might enact rules that benefit citizens of the state at the cost of greater harm to citizens of other states, which over time can spiral down into a proverbial “race to the bottom.”<sup>17</sup> This phenomenon, incidentally, is not confined to the United States; it can arise within any political organization with a decentralized legal structure. Instances have been observed within the Commonwealth of Australia,<sup>18</sup> as well as within the community of nations, where individual nation states sometimes compete to attract transnational business entities or expatriated wealth.<sup>19</sup>

As for judge-made law, we have some reason to anticipate that federal courts will produce common-law rules based on more impartial policy judgments than rules generated by state courts. Considered dynamically, case law should sustain equivalent evolutionary pressures irrespective of its geographical reach.<sup>20</sup> Nevertheless, many state

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15. Jim Rossi, *The Electronic Deregulation Fiasco: Looking to Regulatory Federalism to Promote a Balance Between Markets and the Provision of Public Goods*, 100 MICH. L. REV. 1768, 1782 (2002) (book review) (observing the Madisonian roots of the argument); Adam Winkler, *Free Speech Federalism*, 108 MICH. L. REV. 153, 160–61 (2009) (same). The model laws offer no assurances against capture. For discussions, see, for example, Keith N. Hylton, *The Economics of the Restatement and of the Common Law*, 79 BROOK. L. REV. 595, 604 (2014); Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83 (1993).

16. See Richard B. Stewart, *Federalism and Rights*, 19 GA. L. REV. 917, 921 (1985) (arguing that the Congressional committee and subcommittee process restores a form of “micropolitics” at the federal level, which the author dubs “Madison’s Nightmare”). We might speculate further that the incentives to capture “national” law will often exceed those of capturing individual geographical regions, and that the duplication of costs of lobbying fifty state legislatures might make singular investments in Congressional lobbying more cost-effective for special interest groups.

17. Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1494–95, 1499–1500 (1987) (book review). For the classic discussion coining the phrase, see William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 666 (1974), and see also Adam J. Hirsch, *Fear Not the Asset Protection Trust*, 27 CARDOZO L. REV. 2685, 2710–11 (2006) (suggesting the presence of political forces limiting the depth of the descent).

18. David G. Duff, *The Abolition of Wealth Transfer Taxes: Lessons from Canada, Australia, and New Zealand*, 3 PITT. TAX REV. 71, 117–18 (2005).

19. Hirsch, *supra* note 17, at 2710–11.

20. See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 21.7 (8th ed. 2011) (summarizing evolutionary theories of the common law). For criticism of some of those

judges have local ties, potentially disposing them (like legislators) to favor local interests over those of other states.<sup>21</sup> Moreover, in some thirty-nine states today, judges are elected. Notwithstanding rules against ex parte communication in individual cases, state judges (again like legislators) may be vulnerable to capture by special interest groups that contribute to judicial campaigns.<sup>22</sup>

Finally, in still another dimension, federal rules help to build national cohesion. Because rules not only reflect but also affect norms, legal uniformity serves to homogenize culture and thereby inhibits states from growing so disparate as to threaten the union. Our national history demonstrates as well as any the potential of legal disuniformity to polarize society and politics along regional lines.

### B. State Rules

Decentralized lawmaking has its own virtues. States may display characteristics sufficiently different from each other as to benefit from different rules. Rules tailored for urban, industrial states, for instance, might poorly serve rural, agrarian ones.<sup>23</sup> In addition, as a counterpoint to the aim of national indivisibility stands appreciation of local particularity: the populations of different states may adhere to distinct values, which local rules can respect. Hence, citizens of a drug-tolerant state, or of a munitions-tolerant state, might wish to license activities that residents of their intolerant counterparts would prefer to prohibit. And, however well fitted, economically or culturally, to the

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evolutionary theories, see Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 68–87 (1991) (suggesting that the common law is susceptible to interest-group politics without distinguishing the susceptibility of state and federal common law), and Adam J. Hirsch, *Evolutionary Theories of Common Law Efficiency: Reasons for (Cognitive) Skepticism*, 32 FLA. ST. U. L. REV. 425 *passim* (2005) (suggesting that behavioral law and economics undermines evolutionary theories of the common law premised on classical law and economics).

21. Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 627–30 (2006).

22. *Judicial Elections: Torts and Courts*, ECONOMIST, Apr. 12, 2008, at 36; see also Keith R. Fisher, *The Higher Calling: Regulation of Lawyers Post-Enron*, 37 U. MICH. J.L. REFORM 1017, 1113 (2004) (suggesting that elected judges are “extremely susceptible to regulatory capture”); F. Andrew Hanssen, *Learning About Judicial Independence: Institutional Change in the State Courts*, 33 J. LEGAL STUD. 431, 450 (2004) (“[A]n elected court, instead of being rendered independent of incumbent politicians, simply became responsive to the same political forces that dominated legislatures.”).

23. See Jacques LeBoeuf, *The Economics of Federalism and the Proper Scope of the Federal Commerce Power*, 31 SAN DIEGO L. REV. 555, 558–59 (1994) (again tracing the argument to the Federalist–Anti-federalist debates); McConnell, *supra* note 17, at 1493–94 (same); see also Duff’s Estate, 4 Pa. D. & C. 315, 316–17 (Orphans’ Ct. 1924) (offering a judicial defense of local lawmaking); Hart, *supra* note 8, at 540 (identifying a system of purely national lawmaking as “Procrustean”). See generally REGIONALISM IN AMERICA (Merrill Jensen ed., 1965).

states in which they subsist, alternative rules in different states offer citizens the opportunity (albeit at significant cost) to relocate to a domicile whose laws suit their individual tastes and interests. When such selective migration occurs, it raises the utility of the citizenry.<sup>24</sup> By the same token, state competition for citizens and businesses can create incentives to enhance the desirability of rules that federal lawmakers, exercising “monopoly” power over lawmaking, lack.<sup>25</sup>

Perhaps most importantly, decentralized lawmaking facilitates the development of rules by (so to say) trial and error. Lawmakers can test alternative rules but confine their experiments to a single part of the country, where any damage that a rule might cause will remain limited.<sup>26</sup> Over time, such a process may not lead rules to diversify. A successful innovation within one state can spread to the rest of the nation, a phenomenon common enough in American legal history.<sup>27</sup>

### C. Our Federalism

Given these competing considerations, a scheme of federalism could deliver the best of both worlds through a sort of division of labor among lawmakers, sometimes referred to in the United States (a trifle grandly) as “Our Federalism.”<sup>28</sup> Where the Constitution permits or provides, Congress or the federal judiciary can take charge of those

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24. This idea traces to the economist Charles Tiebout. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). For a recent discussion, see Nestor M. Davidson & Sheila R. Foster, *The Mobility Case for Regionalism*, 47 U.C. DAVIS L. REV. 63 (2013). We may question, however, how commonly the allure of out-of-state law prompts population migration in practice. Evidence of the phenomenon in the context of welfare migration is controversial. For a recent study, see Terra McKinnish, *Welfare-Induced Migration at State Borders: New Evidence from Micro-Data*, 91 J. PUB. ECON. 437 (2007).

25. See Richard A. Epstein, *Exit Rights Under Federalism*, 55 LAW & CONTEMP. PROBS. 147, 147–54 (1992) (arguing that the right of citizens and businesses to relocate from one state to another creates incentives to optimize state law).

26. LeBoeuf, *supra* note 23, at 561–63; Ribstein & Kobayashi, *supra* note 10, at 140–41. For a recent discussion advocating more legal experimentation and suggesting that states currently have insufficient incentives to innovate, see Michael Abramowicz et al., *Randomizing Law*, 159 U. PA. L. REV. 929, 946–48 (2011). Occasionally, federal lawmakers have also been able to conduct limited experiments, at least in the tax realm, via pilot projects. Susan Cleary Morse et al., *Cash Businesses and Tax Evasion*, 20 STAN. L. & POL’Y REV. 37, 54–55 (2009).

27. Within inheritance law, for example, the British no-residue-upon-a-residue rule (reallocating lapsed residuary bequests to the testator’s heirs) once prevailed in every American state. Breaking out on its own, Rhode Island replaced this doctrine with the remain-in-the-residue rule (reallocating lapsed residuary bequests to surviving residuary legatees in proportional shares) in 1896 and, little by little, this innovation has spread to all but seven states today. See IOWA CODE ANN. § 633.273A(2) (West 2013) (switching to the remain-in-the-residue rule, becoming the most recent state to do so); *Woodward v. Congdon*, 83 A. 433, 434–35 (R.I. 1912) (noting the statutory history); *In re Estate of McFarland*, 167 S.W.3d 299, 304 n.6 (Tenn. 2005) (tallying state law).

28. *Younger v. Harris*, 401 U.S. 37, 44–45 (1971).



rules better poured into a common mold. Simultaneously, those rules better crafted pluralistically can disperse to state lawmakers for local development. Under this system of federalism, our nation need not—and does not—treat the problem of legal uniformity uniformly.

Still, structural choices remain. Rules in an area of the legal landscape may become the exclusive domain of either federal or state lawmakers—known as “field preemption” when ordained by Congress, translating into “negative” or “dormant” lawmaking authority when mandated by the Constitution. Alternatively, federal or state lawmakers may compose the primary rule but then incorporate subordinate rules from the other lawmaking body to fill in details. Scholars who have remarked the practice dub it “interstitial lawmaking.”<sup>29</sup>

One might assume that if a primary rule is more efficiently treated centrally *vel non*, the same should hold true of subordinate rules. Yet, on reflection, exceptions appear. Interstitial lawmaking could prove efficient where the entity that provides subordinate rules—be it a federal or state lawmaking authority—already has a head start in developing them. In that event, lawmakers taking primary responsibility for a rule can appropriate the work product of other lawmakers, “draw[ing] on [a] ready-made body of . . . law”<sup>30</sup> as a sort of public good. Federal lawmakers can thereby clarify the law of an area in which they wish to interpose a federal rule more quickly.<sup>31</sup> And state

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29. William Baude, *Beyond DOMA: Choice of State Law in Federal Statutes*, 64 STAN. L. REV. 1371, 1423–27 (2012); Hart, *supra* note 8, at 498.

30. *De Sylva v. Ballentine*, 351 U.S. 570, 581 (1956).

31. See Michael C. Dorf, *Dynamic Incorporation of Foreign Law*, 157 U. PA. L. REV. 103, 133–36 (2008) (suggesting that a lawmaking authority might efficiently “free-ride on work done” by a foreign lawmaking body, given that “[l]awmaking is often costly”); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 958–59 (1986) (observing that in assessing the value of the uniformity provided by federal law, “it can be important that state law in an area is highly developed and federal law is not”); Paul J. Mishkin, *The Variousness of “Federal Law”: Competence and Discretion in the Choice of National and State Rules For Decision*, 105 U. PA. L. REV. 797, 832 (1957) (pointing out that in those fields where “local law . . . is fairly well developed, predictability would seem more easily realized” via interstitial lawmaking); see also *Reconstruction Fin. Corp. v. Beaver Cnty.*, 328 U.S. 204, 210 (1946) (“We think the Congressional purpose can best be accomplished by application of settled state rules . . .”). Only when federal and state lawmakers begin to make law *simultaneously* would we expect federal lawmakers to fill in the gaps of rules more expeditiously. See *supra* text accompanying note 13. Notice that, beyond the realm of federalism, interstitial lawmaking bears a structural resemblance to a common-law code, which likewise fills in its lacunae with preexisting case law, see, e.g., U.C.C. § 1-103(b) (2001), and which thereby offers the advantage of enhanced legal certainty in comparison to civil-law codes, which preempt precode case law.

lawmakers, too, can sometimes pull off the same trick in reverse, incorporating settled bodies of federal precedents.<sup>32</sup>

More fundamentally, the proposition that ideals of (de)centralization will apply by extension from primary to subordinate rules fails to consider that different policies may underlie related rules. These differences could dictate distinct treatment under federalism. For instance, subordinate rules of taxation may call for uniform treatment even if a primary rule of substantive law does not, by virtue of the independent tax policy in favor of horizontal equity.<sup>33</sup>

Another way to mix centralized and decentralized lawmaking is not to share responsibility, but rather to duplicate it. Both a federal and state court could have overlapping authority to make law judicially. Citizens can then pick and choose the rules that they prefer by bringing their suit before one tribunal or the other, so long as each has concurrent jurisdiction to try the case. In the United States, of course, this sort of forum shopping (or, less pejoratively, “forum selection”) largely disappeared in the wake of *Erie*.<sup>34</sup> Our Federalism no longer countenances the practice. Residual forms of federal-versus-state forum selection continue, though, in connection with specialized adjudication—in the realm of bankruptcy, for instance, a matter to which we shall return.<sup>35</sup>

Of late, a number of scholars have called into question the inequities and disharmonies traditionally associated with forum selection.<sup>36</sup> At the same time, scholars have offered no affirmative justifications for engaging in parallel lawmaking as an approach to federalism. Do any such justifications exist?

On first glance, none is manifest. If federal lawmakers perceive a reason for creating a centralized rule, then that fact in itself suggests

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32. The Uniform Probate Code’s sections covering disclaimers afford an example. Under the Uniform Probate Code, any “qualified disclaimer” under the federal tax code is deemed a valid disclaimer under substantive law. See UNIF. PROBATE CODE § 2-1114 (amended 2010), 8 pt. 1 U.L.A. 409 (2013). The Reporter for these sections justified the doctrine, in effect, as an exercise in interstitial lawmaking, noting that federal tax case law exploring whether a beneficiary had carried out acts sufficient to constitute “acceptance” of an inheritance, and hence to preclude a disclaimer for tax purposes, “is more highly developed than [the case law] of most of the States. [This section of the uniform act] should reduce uncertainty in this area.” William P. LaPiana, Material for the ABA Meeting, at 20, July 6–12, 2000 (on file with author).

33. See Field, *supra* note 31, at 970 (“[R]ecognizing a category in which federal and state law can intermix allows for a sensitive balance of the factors involved, with the federal courts interposing only as much federal law as federal interests require.”).

34. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

35. See *infra* Part V.

36. Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333, 360–63, 387–88 (2006); Markus Petsche, *What’s Wrong with Forum Shopping? An Attempt to Identify and Assess the Real Issues of a Controversial Practice*, 45 INT’L LAW. 1005, 1010–15, 1017–19 (2011).

the need to remove competing pluralistic rules. Perhaps in those areas of law where state lawmakers are accustomed to holding sway, a parallel federal rule could appear less intrusive than outright displacement of state law. So long as federal lawmakers could open their forum to all, or at least most, parties, and perhaps convince state lawmakers to duplicate the federal rule, the outcome of the exercise would be the same.<sup>37</sup> This move, though, would speak primarily to the cosmetics of federalism.

At the same time, if federal lawmakers wish to make available an alternative remedial apparatus, featuring a different set of legal procedures, then an alternative body of substantive rules might be singularly appropriate to that apparatus.<sup>38</sup> Such a dual regime would not create a pure forum selection opportunity, in that litigants would have to choose between alternative clusters of rules and procedures associated with one apparatus or the other. As a legal process, “remedy selection” (as we might call it) offers litigants the benefit of choosing between different mechanisms of dispute resolution, which might prove more effective or efficient in some circumstances than in others.

### III. DISCLAIMERS AND FEDERAL INTERESTS

Having thus surveyed the theory of federalism, we proceed to apply it to the law of disclaimers. A disclaimer becomes a matter of federal law whenever Congress exercises its right of federal preemption. One area where we might expect Congress to do so is in connection with measures serving to bring in national revenue or programs paying out national benefits based on citizens’ means. In either instance, disclaimers that leave citizens impecunious could damage the financial interests of the federal government. These disclaimers appear candidates for federal intervention, although the issue (as always) requires analysis.

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37. Professor Field suggests that in deciding *Swift v. Tyson*, 41 U.S. 1 (1842), establishing overlapping authority between federal and state courts to make law prior to *Erie*, “[Justice] Story apparently had believed that the Supreme Court would lead by persuasive force, . . . [and that] the states would choose to follow the Court’s precedents because of the quality of Supreme Court reasoning and because of the Justices’ prestige.” Martha A. Field, *Removal Reform: A Solution for Federal Question Jurisdiction, Forum Shopping, and Duplicative State-Federal Litigation*, 88 IND. L.J. 611, 647 (2013).

38. See Samuel L. Bray, *The Chancellor Rides Again 48–52* (2013) (unpublished manuscript) (on file with author) (arguing that the rules and procedures of equity, when “bundled” together, form an effective “subsystem” of law).

### A. Tax Claims

Suppose an insolvent beneficiary who wishes to disclaim his or her inheritance owes a tax debt or other obligation to federal authorities that the government seeks to collect. Federal lawmakers can reasonably claim control over disclaimer law in such a case.<sup>39</sup> Assuming a state is home to both debtors and creditors, the decision to allow or disallow an insolvent disclaimer will yield local winners and losers. State legislators have no mercenary incentive to favor one over the other. But when the creditor in question is the federal government, those same legislators know that allowing an insolvent disclaimer may benefit, but can only indirectly harm, state citizens. If local law governed, states might be tempted to favor their citizens, exploiting a negative externality—here imposing costs on the national treasury that are dispersed throughout the country. State lawmakers could accomplish that result by carving out exceptions for discrete categories of creditors from a general rule governing insolvent disclaimers. Federal lawmakers do not share this perverse incentive because, viewed objectively, federal interests and the interests of citizens throughout the country are coextensive.

Two qualifications are in order. First of all, the argument for a federal rule of insolvent disclaimer applicable to federal creditors fails to carry over to other elements of disclaimer law. Rules covering the formalization and validation of a disclaimer, the devolution of disclaimed property, and so on, create no opportunity to preserve assets for the benefit of local citizens. Accordingly, federal lawmakers have no need to reserve an *exclusive* power to make law over disclaimers in order to thwart those ones that threaten federal interests. Here, federal lawmakers can more efficiently create interstitial law, allowing most of the corpus of state disclaimer law, accumulated over many decades, to supplement a federal rule of insolvent disclaimer.

Second, the choice of rulemaking body remains distinct from the choice of rule. Federal lawmakers have no cause to prefer federal interests per se over all competing ones.<sup>40</sup> The issue demands an objective judgment of public policy.

What, then, does policy analysis suggest a federal rule of insolvent disclaimer should look like? To begin with, the law of insolvent disclaimer need not be the same for all classes of creditors.

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39. For prior related discussions, see Field, *supra* note 31, at 953–58 (addressing the problem of federalism when the United States is a party to a dispute), and Tidmarsh & Murray, *supra* note 21, at 630–31 (same).

40. See Field, *supra* note 31, at 955–57 (advocating this principle).

Just as so-called exception creditors can garnish a spendthrift trust, whereas general creditors cannot,<sup>41</sup> so could defined creditors, or even defined *federal* creditors, have the right to prevent an insolvent disclaimer, up to the value of their claims.<sup>42</sup> As of now, six states single out classes of creditors for special treatment under the law of disclaimers.<sup>43</sup> For federal law to establish a distinct rule of insolvent disclaimer for the tax commissioner would extend the structural principle established in those states.

The case for such variations hinges on the equities and economics of different sorts of creditors' claims. Commercial lenders are *voluntary* creditors. They extend credit to borrowers or offer purchase-money credit fully aware of the risk of incidental default—but by maintaining a portfolio of debt, voluntary creditors can spread risk. The interest rates they charge reflect the risk of default, ensuring (within an acceptable margin of error) that they will profit in the aggregate.<sup>44</sup> And in this connection, voluntary lenders seldom rely on debtors' prospects of inheritance when they set the price of credit.<sup>45</sup> In those rare instances where expectancies contribute to creditors' assessments of a debtor's creditworthiness, lenders can protect themselves by securing an enforceable waiver of the debtor's right to disclaim.<sup>46</sup>

By comparison, tort, alimony, and child support claimants are *involuntary* creditors. Victims of negligence or circumstance, these creditors cannot pick and choose their debtors and so have a stronger moral claim to satisfaction. Economic considerations also argue in favor of denying debtors the opportunity to thwart involuntary creditors' claims by recourse to a disclaimer. A right to disclaim effective against tort claimants would aggravate moral hazard—persons who are judgment-proof have less incentive to eschew risk.<sup>47</sup> And a right to disclaim effective against alimony and child support claimants would

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41. *E.g.*, UNIF. TRUST CODE § 503 (amended 2010), 7C U.L.A. 524 (2006).

42. Such a rule would result in a partial disclaimer, which is allowed universally under state law. *E.g.*, UNIF. PROBATE CODE § 2-1105(a) (amended 2010), 8 pt. 1 U.L.A. 390 (2013).

43. *See, e.g.*, TEX. ESTATES CODE ANN. § 122.107 (West 2014) (protecting exception creditors in a non-uniform disclaimer statute); Adam J. Hirsch, *The Code Breakers: How States Are Modifying the Uniform Disclaimer of Property Interests Act*, 46 REAL PROP. TR. & EST. L.J. 325, 368 n.223 (2011) (identifying the five other state statutes that have modified uniform disclaimer legislation to protect exception creditors).

44. Adam J. Hirsch, *The Problem of the Insolvent Heir*, 74 CORNELL L. REV. 587, 611 (1989) (citing to studies).

45. *Id.* at 614 (citing to studies and judicial recognitions).

46. Waivers of the right to disclaim are enforceable in every state. *E.g.*, UNIF. PROBATE CODE § 2-1113(a), 8 pt. 1 U.L.A. 406.

47. Hirsch, *supra* note 44, at 618–19.

shift the costs of divorce or separation to parties who are less able (as judged by the issuers of support orders) to bear those costs.<sup>48</sup>

Within this framework, tax claims appear a sort of hybrid. On the one hand, like a voluntary creditor, the Internal Revenue Service has a large enough “portfolio” of taxpayers to allow it to spread risk. The federal Joint Committee on Taxation takes the incidence of expected tax delinquency into account when estimating revenues from a given tax and its rate structure,<sup>49</sup> allowing Congress to meet its revenue goals regardless of delinquency. On the other hand, like an involuntary creditor, the IRS does not agree to extend credit for unpaid taxes to selected citizens. All share the same moral responsibility to satisfy tax claims, and there seems no reason in policy to differentiate inheritors from wage earners in this regard.<sup>50</sup>

From another perspective, though, we can question any and all creditors’ rights to prevent an insolvent disclaimer: the disclaimer fulfills the implicit intent of the benefactor, at least in those instances where the amount of the inheritance does not dwarf the debt.<sup>51</sup> Few benefactors would want their savings to go a beneficiary’s creditors, given that the beneficiary can seek a discharge of his or her debts in bankruptcy, extinguishing them otherwise.<sup>52</sup> Those who plan their estates properly take beneficiaries’ liabilities into account. As a form of postmortem estate planning, disclaimers preserve for poorly advised benefactors opportunities that their better-advised counterparts already enjoy, effectively correcting the will retroactively.<sup>53</sup> A number of courts granting insolvent beneficiaries leave to disclaim have

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48. *Id.* at 619–20.

49. JOINT COMMITTEE ON TAXATION, ABOUT THE JOINT COMMITTEE ON TAXATION 10 (n.d.), available at [www.jct.gov/about-us/revenue-estimating.html](http://www.jct.gov/about-us/revenue-estimating.html), archived at <http://perma.cc/7E7T-3NRY> (last visited Sept. 11, 2014).

50. Certain private creditors exhibit this same hybrid quality and raise an equivalent problem. By law, private hospitals must provide emergency care to all patients irrespective of their ability to pay. 42 U.S.C. § 1395dd (2012). Accordingly, hospitals often become involuntary creditors. But hospitals can pass on at least part of the cost of default by charging higher fees to their “portfolio” of patients.

51. For academic discussions, see William F. Fratcher, *Toward Uniform Succession Legislation*, 41 N.Y.U. L. REV. 1037, 1077 (1966); Adam J. Hirsch, *Inheritance and Bankruptcy: The Meaning of the “Fresh Start,”* 45 HASTINGS L.J. 175, 219–20, 235–38 (1994); and Hirsch, *supra* note 44, at 632–38.

52. Some federal tax debts are nondischargeable and hence remain invulnerable to a bankruptcy petition. See 11 U.S.C. § 523(a)(1) (rendering nondischargeable, *inter alia*, income tax liabilities due within three years of bankruptcy). Nevertheless, the IRS can compromise nondischargeable tax debts where there is “doubt as to collectability,” namely “where the taxpayer’s assets and income are less than the full amount of the liability.” Treas. Reg. § 301.7122-1(a)(1), (b)(2) (2002).

53. For a further discussion, see Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031, 1039 (2004).

justified the rule on this basis.<sup>54</sup> The same principle informs various other modern rules whereby courts can modify estate plans *ex post facto* on the basis of probable intent, for instance to accomplish the testator's tax objectives.<sup>55</sup> A right of insolvent disclaimer fits neatly into this paradigm.

Theory aside, the U.S. Supreme Court settled the issue with respect to federal tax claims—or so it might appear<sup>56</sup>—in *Drye v. United States*, decided in 1999.<sup>57</sup> The opinion, announced by Justice Ginsburg for a unanimous Court, leaves much to be desired. But it was, if nothing else, a revealing exercise.<sup>58</sup>

In *Drye*, Rohn Drye owed the federal government some \$325,000 in unpaid taxes, rendering him insolvent. Under the Internal Revenue Code, the existence of a tax liability creates a statutory tax lien in favor of the United States that attaches to “all property and rights to property” belonging to the delinquent taxpayer.<sup>59</sup> Subsequently, Drye's mother died intestate. As sole heir, Drye inherited her entire estate, valued at \$233,000. Drye proceeded to disclaim the entire inheritance,<sup>60</sup> which next devolved to his daughter. Thereafter, she placed this sum in an inalienable discretionary trust from which she, Rohn Drye, and his

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54. See *In re Scrivani's Estate*, 455 N.Y.S.2d 505, 509 (Sup. Ct. 1982) (“To hold [an insolvent disclaimer invalid] . . . may frustrate the intent of the deceased, who sought to benefit the distributee and not a private or public creditor.”); *In re Estate of Oot*, 408 N.Y.S.2d 303, 306 (Sur. Ct. 1978) (“If the probable intent of the testatrix is to be considered at all, it is unlikely that she would have insisted on paying off said debt over the legatee's protest.”); *Ohio Nat'l Bank of Columbus v. Miller*, 57 N.E.2d 717, 720 (Ohio Ct. App. 1943) (“The most cogent reason, in our judgment, why the defendant should have the unqualified right to reject [a bequest] . . . is that it carries out the manifest intention of the testator.”); see also UNIF. PROBATE CODE § 2-801 cmt. (pre-1990 art. 2), 8 pt. 1 U.L.A. 619–20 (2013) (“This Section is designed to facilitate renunciation in order to aid postmortem planning. . . . Renunciation may be made for a variety of reasons, including carrying out the decedent's wishes not expressed in a properly executed will.”).

55. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 12.2 & reporter's note (2003).

56. But see *infra* text accompanying notes 109–13.

57. 528 U.S. 49 (1999).

58. For prior academic discussions of *Drye*, see William H. Baker, *Drye and Craft: How Two Wrongs Can Make a Property Right*, 64 U. PITT. L. REV. 745 *passim* (2003); Brian T. Camp, *Protecting Trust Assets from the Federal Tax Lien*, 1 EST. PLAN. & COMMUNITY PROP. L.J. 295, 303–07 (2009); Steve R. Johnson, *The Good, The Bad, and the Ugly in Post-Drye Tax Lien Analysis*, 5 FLA. TAX REV. 415, 418–32 (2002).

59. I.R.C. § 6321 (2012). The government had perfected this statutory lien by filing. *Drye*, 528 U.S. at 52.

60. Although state law varies as to whether or not it allows insolvent beneficiaries to disclaim an inheritance, the state in which the benefactor died in the instant case (Arkansas) permitted insolvent disclaimers. *Drye*, 528 U.S. at 53. For a discussion of the doctrinal treatment of this issue among the states, see Hirsch, *supra* note 44, at 592–601; for updates, see Adam J. Hirsch, *Revisions in Need of Revising: The Uniform Disclaimer of Property Interests Act*, 29 FLA. ST. U. L. REV. 109, 154–55 (2001) [hereinafter Hirsch, *Revisions*]; Hirsch, *supra* note 43, at 367–68.

spouse could all benefit. After learning of this chain of events, the government sought to foreclose on its lien and sell the trust's assets.<sup>61</sup> In previous cases, circuit courts had divided on the question of whether a disclaimer could defeat a federal tax lien.<sup>62</sup> The Supreme Court in *Drye* resolved the conflict in favor of the government, holding that the disclaimer failed to defeat the lien as a matter of federal law.<sup>63</sup>

The Court based this holding on its construction of the provision of the tax code authorizing statutory tax liens and delineating their scope. The provision is notable for its brevity: it states that the lien attaches to all of the taxpayer's "property and rights to property"<sup>64</sup> but without defining those terms or explaining where to look for their meaning.<sup>65</sup> The provision makes no mention whatsoever of disclaimers.<sup>66</sup>

In light of this fact, one can question the Court's core assumption that the point at issue was one of construction. State courts have evaluated creditors' rights to prevent a disclaimer from defeating an execution lien upon an inheritance by developing the law of disclaimers rather than by construing the law of liens.<sup>67</sup> Arguably, the Court in *Drye* should have made federal common law for disclaimers on the basis of implied preemption, rather than grope for substance in a tax-lien statute that in truth contained none. In other instances, rules of federal common law have filled in lacunae of the tax code.<sup>68</sup>

Be that as it may, earlier opinions by the Supreme Court had found that the tax-lien statute allowed state law to "determin[e] the nature of the legal interest which the taxpayer had in the property."<sup>69</sup> The statute "create[d] no property rights but merely attache[d] consequences . . . to rights created under state law."<sup>70</sup> At the same time,

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61. *Drye*, 528 U.S. at 53–54.

62. *See id.* at 54–55 (citing to cases); *see also* United States v. McCrackin, 189 F. Supp. 632, 638 (S.D. Ohio 1960) (holding that a disclaimer defeated a tax lien, but not cited by the Court).

63. *Drye*, 528 U.S. at 52.

64. I.R.C. § 6321.

65. *See id.*

66. *See id.* The tax code's general section validating disclaimers does not pertain to tax liens. *See id.* § 2518; *Drye*, 528 U.S. at 57.

67. *See* Lehr v. Switzer, 239 N.W. 564, 565–66 (Iowa 1931); Schoonover v. Osborne, 187 N.W. 20, 22–23 (Iowa 1922).

68. Jasper L. Cummings, *Nationwide Uniformity and the Common Law of Federal Taxation*, 66 TAX LAW. 1 (2012). Implied preemption arises "from an inference that Congress intended to oust state law in order to achieve its objective," even in the absence of a direct conflict with a state statute. *Kinley Corp. v. Iowa Utils. Bd.*, 999 F.2d 354, 358 n.3 (8th Cir. 1993) (citing *Hines v. Davidowitz*, 312 U.S. 52, 70 (1941)).

69. *Aquilino v. United States*, 363 U.S. 509, 513 (1960) (quoting *Morgan v. Comm'r*, 309 U.S. 78, 82 (1940)) (internal quotation marks omitted).

70. *Bess v. United States*, 357 U.S. 51, 55 (1958).



“federal law must prevail no matter what name is given to the interest or right by state law.”<sup>71</sup> The state’s label, be it “property” or something else, was irrelevant. Furthermore, once the government identified a taxpayer’s interest in property, state law could no longer determine the effectiveness of a tax lien to reach that interest, in priority to other claims or rights. Here federal law took precedence by virtue of federal supremacy.<sup>72</sup>

The Court in *Drye* reiterated these precepts. Opined the Court: “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 [the tax lien provision].”<sup>73</sup> Thereafter, “state law is inoperative to prevent the attachment of [federal] liens.”<sup>74</sup> In the instant case, Rohn Drye’s “unqualified right to receive the entire value of his mother’s estate . . . rendered the inheritance ‘property’ or a ‘right to property’ ” against which the tax lien could attach, irrespective of the dictates of state law.<sup>75</sup>

Left unexplored for the most part by the Court, both in *Drye* and in previous opinions, was what made this interpretation “sensibl[e].”<sup>76</sup> As a matter of policy, why should the federal tax code defer to the configuration of substantive rights of ownership created by the states, even as the tax code reconfigures states’ ordering of creditors’ rights to reach those same rights of ownership? The Court in *Drye* asserted both principles as axiomatic.<sup>77</sup> In a prior case, the Court did speak to the matter, albeit in the most general terms:

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 both 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 the necessity for a uniform administration of the federal revenue statutes.<sup>78</sup>

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71. *Morgan*, 309 U.S. at 81.

72. *Bess*, 357 U.S. at 56–57.

73. *Drye v. United States*, 528 U.S. 49, 52 (1999); *see also id.* at 58 (“We look initially to state law to determine what rights the taxpayer has in the property the Government seeks to reach, then to federal law to determine whether the taxpayer’s state-delineated rights qualify as ‘property’ or ‘rights to property’ . . .”).

74. *Id.* at 52 (quoting *Bess*, 357 U.S. at 56–57) (internal quotation marks omitted).

75. *Id.* at 61.

76. *Id.* at 52; *see supra* text accompanying note 73.

77. *See Drye*, 528 U.S. at 52.

78. *Aquilino v. United States*, 363 U.S. 509, 514 (1960).

The passage is inscrutable, as well as somewhat off target. Of course, the states do have a “traditional”<sup>79</sup> interest in structuring property, but what makes that interest “legitimate”<sup>80</sup> insofar as federal claims are concerned? And why does enforcement of tax liens need to be “uniform”?<sup>81</sup> The real concern at this juncture should be state discrimination against federal interests,<sup>82</sup> but perhaps the Justices preferred to cloak that concern (insinuating the potential for local self-seeking) beneath the more diplomatic mantle of uniformity. A lower court put the case more forthrightly: “If federal law [were] not determinative of the [classification] of the state-created interest, states could defeat the federal tax lien by declaring an interest not to be property, even though the beneficial incidents of property belie its classification.”<sup>83</sup> By the same token, deference to state law concerning the potency of a tax lien would place the federal government at the mercy of local lawmakers, whose fidelity to the national interest cannot be assumed.

With regard to the first question, as a matter of tax policy, we can posit a justification for federal acquiescence in the configuration of ownership interests at state law: doing so serves to avoid arbitrary taxation.<sup>84</sup> A federal right to reconfigure ownership interests retroactively would allow the government to impose a tax lien—and hence, in effect, a tax—on third parties who have only incidental ties to the delinquent taxpayer.

Consider an example. Suppose a taxpayer opened a joint bank account with a third party. Suppose further (as is typical<sup>85</sup>) that state law granted to depositors a proprietary interest in the joint account amounting to their varying, individual contributions to the account. If federal law instead defined depositors’ interests in a joint account as divided equally between them for purposes of enforcement of a tax lien, then the “innocent” depositor would be subject to tax liability, despite having no economic connection to the liability (and possibly no

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79. *Id.*

80. *Id.*

81. *Id.*

82. *See supra* text accompanying notes 17, 39.

83. *In re Kimura*, 969 F.2d 806, 810 (9th Cir. 1992).

84. On the primacy of this policy, see for example *Brushaber v. Union Pac. R.R.*, 240 U.S. 1, 24–25 (1916) (asserting in dicta that a tax could prove so arbitrary as to amount to “a confiscation of property” that would violate the due process clause of the Fifth Amendment). *See generally* DAN THROOP SMITH, FEDERAL TAX REFORM 9–17 (1961) (addressing the “fairness” objective of tax policy).

85. *See* 2 THOMPSON ON REAL PROPERTY § 13.10(a), at 445–46 (David A. Thompson ed., 1994) (indicating that state law respects depositors’ express and implied intent concerning how to structure joint accounts).

knowledge of it), apart from the happenstance of familial or social association with the taxpayer.<sup>86</sup>

Or consider another example, bringing us a step closer to the issue raised in *Drye*. Suppose a testator named a taxpayer as a beneficiary under a will. Under universal state law, bequests appearing in a will are ambulatory—a testator can revoke them whenever he or she pleases.<sup>87</sup> Accordingly, bequests made by living testators substantively comprise expectancies, not property interests, as a matter of state law. But if federal law instead rendered a bequest under the will of a living testator irrevocable once a tax lien attaches to property of a beneficiary, thereby allowing the government to foreclose on a bequest as if it were a vested future interest, then “innocent” testators would again be subject to tax liability without having incurred it themselves. And again, that liability would hinge on the mere happenstance of association with the beneficiary, unrelated to his or her tax delinquency.

Now, assuming that my elaboration of public policy is well grounded and accurately reflects the Court’s implicit understanding of what lay at stake in *Drye*, how might the Court have assessed the nature of a rule of disclaimer? Does this rule delineate an attribute of property, appropriately left to state law, or does the rule stipulate creditors’ rights, appropriately superseded by federal law? The answer is yes and yes—it is *both*. Any rule of disclaimer, creating a *right to decline gratuitous transfers of property*, represents a structural characteristic of property. Simultaneously, though, that characteristic can function to thwart creditors’ claims, no less effectively than an express right of exemption from levy. In fact, this dual nature appears responsible for the split of the circuit courts in the first place, with one group of courts seizing on the first characteristic as dispositive, and the other on the second.<sup>88</sup>

In light of this tension, the principled course—the course the Court ought to have taken in *Drye*—is to step back. Whenever two (or more) values compete to resolve an issue of law, we need to examine the rationales underlying each, lest we choose between them

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86. *Cf.* *United States v. Nat’l Bank of Commerce*, 472 U.S. 713, 720–33 (1985) (validating an administrative levy upon an entire joint account in order to satisfy a tax lien, but only as a provisional remedy, prior to determining the taxpayer’s and third party’s proprietary interest in the account at state law).

87. *E.g.*, UNIF. PROBATE CODE § 2-507 (amended 2010), 8 pt. 1 U.L.A. 222 (2013).

88. *Compare, e.g.*, *Leggett v. United States*, 120 F.3d 592, 596 (5th Cir. 1997) (“Under Texas law . . . [the taxpayer] had the right to reject [the] intended gift by filing a valid disclaimer. . . .”), with *Drye Family 1995 Trust v. United States*, 152 F.3d 892, 898 (8th Cir. 1998) (“[W]e hold that the state law *consequences* of [the taxpayer’s] right . . . created through [his] disclaimer under [state law] is ‘of no concern to the operation of the federal tax law.’” (emphasis added)).

indiscriminately. One or the other may prove inapplicable to the issue at hand, making resolution of the tension easy. At the very least, comparative analysis should allow us to assess the relative strength of competing values in an ordinal (if not cardinal) manner.

Here, on the one hand, incentives to favor local citizens could move a state to manipulate rules of disclaimer in order to nullify tax liens. Federalism can serve to abrogate state rules that exploit negative externalities, as earlier discussed.<sup>89</sup> On the other hand, respect for state delineations of property rights is unnecessary to avoid arbitrary taxation in this instance. Once a bequest matures upon the testator's death, the only relevant state-created right—the right to decline the inheritance—lies exclusively with the taxpayer. If federal lawmakers trample upon that right, interests of no “innocent” third parties are compromised. Arguably, we might identify alternative beneficiaries who would have taken an inheritance in lieu of a disclaimant as the “innocent” victims of a federal rule forestalling an insolvent disclaimer. In effect, the government is taxing their state-created interest in the estate. Yet, this tax does not qualify as arbitrary. Alternative beneficiaries have an interest in the inheritance subordinate to the taxpayer's, and they do not forfeit their rights as a consequence of any choices they made to involve themselves with the affairs of the taxpayer. Indeed, as a practical matter, their interests only materialize because of the taxpayer's liability: but for the taxpayer's predicament, he or she would not be seeking to disclaim at all. Hence, the property interest held by alternative beneficiaries proves a mirage. They lose nothing that they would have had in the absence of the taxpayer's delinquency.

And so, upon analysis, the tension stemming from the ambiguous characteristics of a disclaimer resolves itself easily here, without even the need for balancing. Whereas the concern to avoid state discrimination against the federal government merits attention, the concern to protect the interests of third parties from arbitrary taxation fails to arise. Federal lawmakers can reasonably rework state-created incidents of ownership in this instance because no one other than the taxpayer suffers as a consequence. And, of course, his or her tax liability is anything but arbitrary.

The Court in *Drye* arrived at this result. The Justices failed, however, to arrive at it through analysis. Because the Court put forward the principles it articulated superficially, neglecting to ferret out the rationales underlying them, it had nothing at its disposal to analyze. Of course, it remains possible that the Court thought through

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89. See *supra* text accompanying notes 17, 39.

all of this in camera and preferred to leave its reasoning unspoken. If that is so, then the Court did a disservice to later courts, which will have no analytical foundation to build on when presented with tax liens covering other sorts of ambiguous interests.<sup>90</sup>

What federal rule the Court should have imposed in *Drye* remains a separate question. As earlier observed, the mere fact that federal law governs does not imply *eo ipso* that the government should triumph.<sup>91</sup> Here, the Justices did posit a brief policy analysis, coupled with a textual analysis. Neither aspect of the opinion is unproblematic.

As a textual matter, the Court emphasized the breadth of the language of the tax lien statute: “Stronger language could hardly have been selected to reveal a purpose to assure the collection of taxes.”<sup>92</sup> At the same time, in a separate section of the tax code, Congress did carve out an exception for various specified (and value-limited) types of property, designated as exempt from levy.<sup>93</sup> “The enumeration contained in [this section] . . . is exclusive,”<sup>94</sup> the Court observed, hence “corroborati[ng]”<sup>95</sup> its conclusion that Congress intended to reach property subject to a disclaimer. To be sure, this section of the Code does expressly provide that “no property . . . shall be exempt . . . other than” the items listed therein.<sup>96</sup> A disclaimer differs from an exemption, however: a debtor gets to retain exempt property; a disclaimant does not. The Court itself went on to distinguish the two concepts later in the opinion.<sup>97</sup> Although it does preclude judicial additions to the litany of exempt property, this section does not foreclose judicial development of a rule of disclaimer, either as a matter of federal common law or by construing other sections of the tax code.

For his part, Rohn Drye had characterized the right to decline an inheritance in his brief as an inalienable “personal right.”<sup>98</sup> In oral argument, Drye’s attorney laid out the case extravagantly, comparing a beneficiary’s right to disclaim with the “free will” of Adam and Eve to

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90. Such cases will continue to arise. For one that already has, see *United States v. Craft*, 535 U.S. 274 (2002) (addressing whether a federal tax lien could attach to a tenancy by the entirety created by state law).

91. See *supra* note 40 and accompanying text.

92. *Drye v. United States*, 528 U.S. 49, 56 (1999) (quoting *Glass City Bank v. United States*, 326 U.S. 265, 267 (1945)) (internal quotation marks omitted).

93. I.R.C. § 6334(a) (2012).

94. *Drye*, 528 U.S. at 56.

95. *Id.*

96. I.R.C. § 6334(c).

97. See *Drye*, 528 U.S. at 59 (“Just as ‘exempt status under state law does not bind the federal collector’ . . . so federal tax law ‘is not struck blind by a disclaimer’ . . .”) (citations omitted).

98. Brief for the Petitioners, *Drye v. United States*, 528 U.S. 49 (1999) (No. 98-1101), 1999 WL 374573, at \*13.

reject the serpent's offer of a gift of forbidden fruit.<sup>99</sup> The Justices found the presentation amusing at first.<sup>100</sup> But in a classic blunder of oral advocacy, the attorney kept hammering away at this one metaphor over and over, beating a dead horse, to the irritation of the Justices.<sup>101</sup> In its opinion, the Court shot down the argument:

In pressing the analogy to a rejected gift, Drye overlooks this crucial distinction. A donee who declines an *inter vivos* gift . . . leave[s] the donor to do with the gift what she will. The disclaiming heir or devisee, in contrast . . . inevitably exercises dominion over the property. He determines who will receive the property—himself if he does not disclaim, a known other if he does. . . . This power to channel the estate's assets warrants the conclusion that Drye held . . . a "right to property" subject to the Government's liens.<sup>102</sup>

It was, the Court added, "a right of considerable value—the right either to inherit or to channel the inheritance to a close family member (the next lineal descendant). That right simply cannot be written off as a mere 'personal right . . . to accept or reject [a] gift.'"<sup>103</sup>

Neither Drye's argument nor the Court's response moves us in a helpful direction analytically.<sup>104</sup> Several alternative gradations of "dominion" are conceivable. At the moment when a gift offer occurs, a donee has the opportunity to capture the benefits of an *inter vivos* gift—but if he or she rejects it, the donee cannot know or decide whom the donor might benefit next. By comparison, after consulting the will or intestacy statute, a disclaiming beneficiary knows who the alternative beneficiary would be, but the disclaimant does not make the choice. And again by comparison, if a beneficiary assigns (rather than disclaims) an inheritance, the beneficiary both knows and decides who the alternative beneficiary is. The Court here ruled that knowing without deciding represents a sufficient "control rein"<sup>105</sup> for a tax lien to attach. But why

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99. Transcript of Oral Argument, *Drye v. United States*, 528 U.S. 49 (1999) (No. 98-1101), 1999 WL 1050103, at \*3. The attorney's first words set the tone: "For our Socratic dialogue I am armed with a borrowed Gideon and the fruit. . . . [T]hese aids go right to the jugular of this case, and the genesis of the case, which is chapter 3 of Genesis." *Id.*

100. Justice Kennedy quipped, eliciting laughter, "Well, of course, the IRS was not in Paradise." *Id.*

101. Chief Justice Rehnquist eventually snapped at the attorney: "[D]on't tell me about the bite of the apple any more." *Id.* at \*12.

102. *Drye*, 528 U.S. at 60–61 (citation omitted).

103. *Id.* at 60 (quoting Brief for the Petitioners, *supra* note 98, at \*13).

104. At this juncture of the opinion, the Court cited to an early article of mine, Hirsch, *supra* note 44, at 607–08. *Drye*, 528 U.S. at 61. Nevertheless, as I had argued in that article—in the pages directly following the ones cited by the Court—"dominion theory," as I called it, in and of itself, is unenlightening as a tool of policy analysis. Hirsch, *supra* note 44, at 609–10.

105. *Drye*, 528 U.S. at 61.

draw the line there—why, for example, does not any opportunity to capture benefits, including an offer of a gift, suffice?<sup>106</sup>

One could, indeed, make a case that the Court’s determination that knowing without deciding constitutes the “crucial”<sup>107</sup> element of dominion proves too much. On this standard, *all* disclaimers would comprise taxable transfers since all share this same structural attribute. But, of course, that is not and has never been the rule. Under our law, disclaimers (unlike assignments of an inheritance) do not qualify as taxable events.<sup>108</sup> Why, then, does the disclaimant’s degree of dominion applicable to the collection of back taxes differ from the degree of dominion applicable to the assessment of *front* taxes? The Court failed both to explicate how the public policies pertaining to the two standards are distinguishable and to articulate any substantive reason why the point along the spectrum of alternative degrees of dominion where the Court drew its line should qualify as the decisive one.

And that is not all. By further lighting on the “considerable value”<sup>109</sup> of *Drye*’s right as significant, the Court raised implicit questions, nowhere explored in the opinion, about the scope of its judgment.<sup>110</sup> For the Court failed to remark that the opportunity to “channel the inheritance to a close family member (the next lineal descendant),”<sup>111</sup> although present in *Drye*, depends upon the facts of each case. Wills can provide expressly for the contingency of disclaimer, and they might name alternative takers who have no blood relationship to the primary beneficiary.<sup>112</sup> Even in the event of intestacy, a disclaimed inheritance could go to a collateral relative in the absence of a surviving lineal descendant.<sup>113</sup> Does the attachment of a tax lien depend on the existence of a family relationship between the disclaimant and the alternative beneficiary, as *Drye* could be read to

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106. Although it did not rule explicitly that a tax lien fails to cover an offered gift that the taxpayer declined, the Court implied so by remarking the “crucial distinction” between the degree of dominion exercised by a declining donee and a disclaiming beneficiary. *Id.* at 60. In oral argument, the Justice Department attorney also drew the distinction, asserting that “an offeree doesn’t have any legal rights in the proposed gift. He can’t enforce the offer.” Transcript of Oral Argument, *supra* note 99, at \*17. But an offeree can *accept* the offer. In theory, a tax lien could attach *eo instanti* at the time when a gift offer occurs.

107. *Drye*, 528 U.S. at 60.

108. I.R.C. § 2518 (2012).

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

110. Academic discussions have missed the potential doctrinal significance of this aspect of the opinion in *Drye*. See *supra* note 58.

111. *Drye*, 528 U.S. at 60.

112. *E.g.*, UNIF. PROBATE CODE § 2-1106(b)(2) (amended 2010), 8 pt. 1 U.L.A. 393 (2013).

113. *E.g.*, *id.* § 2-103, 8 pt. 1 U.L.A. 104.

imply? And if so, how close does that relationship have to be? For the Court unwittingly to leave such a fundamental matter of law unsettled is—well—unsettling.

It happens that the facts of *Drye* illustrated in an unusually poignant way another public policy, noted earlier,<sup>114</sup> that might have figured in the Court's analysis, had it been prepared to establish a federal common law of disclaimer. Toward the end of the oral argument, Justice Ginsburg commented to *Drye*'s attorney: "I'm just curious about why the taxpayer, . . . being in this situation, . . . didn't have his mother write a will leaving the estate to the daughter."<sup>115</sup> Here, Ginsburg adverted to the issue of testamentary intent, which pertains to any and all disclaimers, including those confounding federal creditors. The attorney responded:

We had an appointment with her *on the day of her death* to execute a will. . . . I mean, that was what was to happen, and it's just one of those things in life that, in fact, Mr. *Drye* did not want to go talk to his mamma and tell her— . . . [she] was almost 92, I believe, at that time. He didn't want to go tell his mother, sign this piece of paper so that we don't have to be up here today.<sup>116</sup>

The Court made no direct response, and the debate meandered on.<sup>117</sup> Yet, plainly enough, *Drye*'s mother is spinning in her grave at the outcome of this case. What is more, she came within a hair's breadth of effectuating the outcome she would have preferred.<sup>118</sup> This argument might have proven the most potent one in *Drye*'s arsenal, and he should have led with it.<sup>119</sup>

But the government, too, left an unspent arrow in its quiver. For, even if state law applied, the daughter's subsequent disposition of the disclaimed inheritance, placing it in a trust from which the taxpayer could continue to benefit, was too clever by half. Under state common law supplementing local statutes, collusive disclaimers are invalid.<sup>120</sup> The Court in *Drye* concluded that Rohn *Drye* had the "undoubted

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114. See *supra* text accompanying notes 51–55.

115. Transcript of Oral Argument, *supra* note 99, at \*14.

116. *Id.* (emphasis added).

117. See *id.*

118. Such a "near miss" of legality adds pathos to a case and can influence courts. Adam J. Hirsch & Gregory Mitchell, *Law and Proximity*, 2008 ILL. L. REV. 557, 587–89. On the psychology of near misses, see *id.* at 561–70.

119. Neither the argument, nor a statement of the pertinent facts, appeared in the taxpayer's brief. See Brief for the Petitioners, *supra* note 98.

120. See Hirsch, *supra* note 44, at 594 (reviewing the case law). For a recognition of the potential application of this doctrine in a case deciding the validity of a disclaimer in a federal bankruptcy proceeding, addressed *infra* Part V, see *Mickelson v. Detlefsen (In re Detlefsen)*, 610 F.2d 512, 520 n.22 (8th Cir. 1979). For a discussion of the doctrine in connection with determining whether a disclaimer is qualified for tax purposes, see *Estate of Monroe v. Comm'r*, 124 F.3d 699, 708-14 (5th Cir. 1997).



right . . . to disclaim the inheritance” under state law,<sup>121</sup> which would ordinarily have been true, but not if the disclaimer was found to be collusive. In that event, the Court could have held the troublesome issue of federalism moot. But the government failed to press the point,<sup>122</sup> even though the Eighth Circuit had hinted at the issue in its holding below. Observed the judges, “[W]e would be remiss in setting forth our analysis, if we failed to note that [the taxpayer’s] retention of a life estate in the Trust, . . . [containing] the disclaimed property, gives us considerable pause.”<sup>123</sup>

Both of these arguments are conspicuously absent from the Supreme Court’s analysis in *Drye*. Because neither had found its way into the advocates’ briefs,<sup>124</sup> one can understand the Court’s failure to raise either *sua sponte*. Doubtless, the thinness of the Court’s analysis in *Drye* traces in part to the shortcomings of the arguments with which it was presented.<sup>125</sup> But there may be more to it than that. As a number of commentators have now observed, the diligence of the Justices often appears to flag when they depart from the lofty issues of constitutional law upon which they lavish so much effort.<sup>126</sup> The odds and ends that remain—the tax cases, the TANF cases, the securities regulation cases—although no less important in their own way, seem regularly to receive short shrift. In a word, the Justices find cases like *Drye* too dry. They bore the Justices. The instant opinion offers a stark reminder that judicial attention is a scarce resource, which courts may or may not allocate optimally.<sup>127</sup>

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121. *Drye v. United States*, 528 U.S. 49, 60 (1999).

122. See Brief for the Respondent, *Drye v. United States*, 528 U.S. 49 (1999) (No. 98-1101), 1999 WL 33510170 (omitting any mention of the issue).

123. *Drye Family 1995 Trust v. United States*, 152 F.3d 892, 900 (8th Cir. 1998).

124. See *supra* notes 119, 122.

125. In particular, *Drye*’s attorney appears to have been out of his depth. His naïve analysis of one issue of construction of the tax code elicited laughter (apparently from the Justices), and he conceded that “I’m not a tax expert.” Transcript of Oral Argument, *supra* note 99, at \*8. Inaugurating the oral argument, Chief Justice Rehnquist had appeared to sense trouble: “Mr. Traylor. You’re the only lawyer to come by himself we’ve seen in a long time.” *Id.* at \*3. Later, when the Justice Department attorney rose to respond to the unconventional presentation, Justice Scalia interrupted: “Mr. Jones, you don’t have a stick that you’re going to turn into a snake or anything like that, do you?” *Id.* at \*16.

126. *E.g.*, John H. Langbein, *The Supreme Court Flunks Trusts*, 1990 SUP. CT. REV. 207, 217–19 (discussing an ERISA case); Frederick Schauer, *Statutory Construction and the Coordination Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 247–48. For references to additional observations, see Adam J. Hirsch, *Cognitive Jurisprudence*, 76 S. CAL. L. REV. 1331, 1348 n.76 (2003).

127. Possibly, it did not help that in *Drye* Justice Ginsburg wrote for a unanimous Court. *Drye*, 528 U.S. at 51. Unanimity might have reflected indifference on the part of some Justices to the outcome of this case. But unanimity could also have diminished Justice Ginsburg’s incentive

*B. Medicaid*

Medicaid provides medical benefits to citizens in financial distress. An inheritance relieves that distress and can cause a citizen to become ineligible for Medicaid. In turn, a beneficiary might disclaim an inheritance in an effort to maintain his or her eligibility. This scenario resembles the problem of disclaimers thwarting the tax commissioner, in that they can function to create (as opposed to leave unsatisfied) a government liability. Either way, disclaimers would take a toll on the public fisc.

In short, disclaimers motivated by Medicaid planning again implicate a federal interest. But at the same time, Congress insists on sharing the cost of funding the Medicaid program with the states.<sup>128</sup> Although the primary motivation for this decision doubtless was budgetary, it has implications for federalism in that Congress succeeded in aligning national interests with those of local jurisdictions in this instance. Medicaid planning threatens both, and states cannot disaggregate one set of interests from the other.

Accordingly, Congress can delegate without fear in this area. Far from acting to preempt state law, Congress expressly authorizes states to establish their own rules of eligibility, subject to loose federal guidelines, such as a requirement of “reasonab[ility].”<sup>129</sup> Under the Omnibus Budget Reconciliation Act (“OBRA”) of 1993<sup>130</sup> and the Deficit Reduction Act of 2005,<sup>131</sup> Congress did impinge on states’ freedom to set those rules, but only selectively, foreclosing discrete estate planning strategies.<sup>132</sup> OBRA can be read to preclude eligibility created by disclaimers, although the legislation does not refer to disclaimers expressly. The Act requires states to treat as an asset relevant to determining eligibility any “resources which the individual . . . is entitled to but does not receive because of action” taken by that

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to craft an effortful opinion. After all, nothing concentrates the mind like the immediate prospect of criticism and contradiction.

128. The fraction of the program paid for by the federal government varies from state to state on the basis of each state’s per capita income. The federal contribution ranges between 50% for the richest states and 83% for the poorest states. See 2 HARVEY L. MCCORMICK, MEDICARE AND MEDICAID CLAIMS AND PROCEDURES § 25:2, at 336 (4th ed. 2005).

129. 42 U.S.C. § 1396a(a)(17) (2012). For preemption analysis with regard to Medicaid legislation, see *Pharm. Research & Mfrs. of America v. Concannon*, 249 F.3d 66, 74–79 (1st Cir. 2001), *aff’d sub nom. Pharm. Research & Mfrs. of America v. Walsh*, 538 U.S. 644 (2003); *In re Estate of Barg*, 752 N.W.2d 52, 63–68 (Minn. 2008).

130. Pub. L. No. 103-66, 107 Stat. 312 (1993).

131. Pub. L. No. 109-171, 120 Stat. 4 (2006).

132. Thomas D. Begley, Jr. & Andrew H. Hook, *Medicaid Planning Is More Challenging After Recent Reforms*, EST. PLAN., May, 2006, at 3.

individual (or by a party acting on his or her behalf).<sup>133</sup> Nevertheless, Congress failed to spell out the implications of this requirement.

With few exceptions, state courts testing the issue, both before and since 1993, have judged disclaimers ineffective to render beneficiaries eligible for Medicaid.<sup>134</sup> Wherever courts have allowed them, state legislators have reacted promptly to overturn the decisions.<sup>135</sup> No federal court has yet spoken to the matter.<sup>136</sup> The best reason to federalize the rule, either through an amendment or judicial construction of OBRA, is simply to resolve the question more

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133. 42 U.S.C. § 1396p(h)(1).

134. See *State v. Murtha*, 427 A.2d 807, 808–10 (Conn. 1980) (construing a state statute requiring permission from the state commissioner to transfer property received while the beneficiary is a Medicaid recipient to bar a disclaimer, and observing in dicta that the state can reassess Medicaid eligibility on the basis of the inheritance); *State v. Culligan*, No. CV-94-070568S, 1995 WL 470255, at \*1–2 (Conn. Super. Ct. July 28, 1995) (same); *Troy v. Hart*, 697 A.2d 113, 117–19 (Md. Ct. Spec. App. 1997) (holding that a disclaimer was allowed but disqualified the beneficiary for Medicaid without discussing OBRA); *Hoesly v. Neb. Dep’t Soc. Servs.*, 498 N.W.2d 571, 575–76 (Neb. 1993) (holding that the disclaimer of an inheritance that would disqualify the beneficiary for Medicaid is valid but results in disqualification only if the disclaimer was carried out for the purpose of maintaining eligibility, applying a state statute); *Molloy v. Bane*, 631 N.Y.S.2d 910, 913–15 (App. Div. 1995) (holding that a disclaimer was allowed but disqualified the beneficiary for Medicaid, without discussing OBRA); *Keuning v. Perales*, 593 N.Y.S.2d 653, 654 (App. Div. 1993) (same); *In re Baird*, 634 N.Y.S.2d 971, 973–75 (Sup. Ct. 1995) (same, and allowing a fiduciary to disclaim on behalf of an incompetent beneficiary under these conditions); *In re Scrivani’s Estate*, 455 N.Y.S.2d 505, 509–11 (Sup. Ct. 1982) (same, but refusing to ratify a fiduciary’s disclaimer on behalf of an incompetent beneficiary under these conditions); *Hinschberger ex rel. Olson v. Griggs Cnty. Soc. Servs.*, 499 N.W.2d 876, 880 (N.D. 1993) (concluding in dicta that a disclaimer is allowed but can disqualify the disclaimant for Medicaid, applying an amended state statute); *Schell v. Dep’t of Pub. Welfare*, 80 A.3d 844, 848–53 (Pa. Commw. Ct. 2013) (holding that a disclaimer was allowed but disqualified the disclaimant for Medicaid, citing to OBRA and applying a state statute amended to parrot the relevant language in OBRA); *Tannler v. Wis. Dep’t of Health & Soc. Servs.*, 564 N.W.2d 735, 737, 739–41 (Wis. 1997) (concluding in dicta that OBRA, which is incorporated by reference into the state statute, allows a disclaimer but disqualifies the disclaimant from Medicaid). *But see In re Estate of Kirk*, 591 N.W.2d 630, 634 (Iowa 1999) (concluding in dicta that “a disclaimer cannot be viewed as a scheme to circumvent the Medicaid eligibility provisions,” without discussing OBRA); *In re Estate of Schiffman*, 430 N.Y.S.2d 229, 230–31 (Sur. Ct. 1980) (allowing a disclaimer by a decedent’s estate that might thwart a claim against the estate for reimbursement of improper Medicaid payments); *Nielsen v. Cass Cnty. Soc. Servs. Bd.*, 395 N.W.2d 157, 159–60 (N.D. 1986) (holding that a disclaimer was allowed and did not disqualify the disclaimant for Medicaid, applying a state statute prior to its amendment).

135. In North Dakota, a holding by the state supreme court in 1986 that a disclaimer would not affect the disclaiming beneficiary’s eligibility for Medicaid, see *Nielsen*, 395 N.W.2d at 159–60, provoked the legislature in 1987 to amend the relevant state statute expressly to the contrary. See N.D. CENT. CODE § 50-24.1-02(1) (2013). A decade later in Iowa, a mere dictum by the state supreme court in 1999 that a disclaimer would not affect the disclaiming beneficiary’s eligibility for Medicaid, see *Kirk*, 591 N.W.2d at 634, sufficed to prompt the legislature in 2000 to adopt a parallel amendment. See IOWA CODE §§ 249A.3(11)(c), 633E.15 (2013).

136. A federal court would of course have jurisdiction to construe OBRA. See 2 MCCORMICK, *supra* note 128, § 31:1, at 523–25.

expeditiously, as previously discussed.<sup>137</sup> Thus far, only four states have enacted legislation explicitly addressing disclaimers as a means of Medicaid planning,<sup>138</sup> and holdings by a high court in only two other states speak to the practice.<sup>139</sup> Federal law would thus replace *no law* in a large majority of jurisdictions.

In crafting that law, the rationale for suppression of Medicaid planning is clear. The program exists to benefit the “truly needy,” not those who “created their own need,” as one court has put it.<sup>140</sup> If allowed to determine Medicaid eligibility, disclaimers would impose an “unnecessar[y] . . . burden” on taxpayers.<sup>141</sup>

One might nevertheless ground a more liberal rule on implicit testamentary intent.<sup>142</sup> But the point appears less clear here than in connection with taxation, where only financial well-being is involved, and where taxpayers have other means to improve their well-being—to wit, bankruptcy or a compromise agreement.<sup>143</sup> Ideally, a benefactor wishing to care for a Medicaid recipient would establish a discretionary “supplemental needs trust” that contributes benefits to him or her only above and beyond those that the state provides, which current law accepts as not disqualifying the recipient from state aid.<sup>144</sup> In the absence of such planning, a disclaimer that thwarts Medicaid authorities might appear a Pyrrhic victory, leaving the recipient to make do with the minimal support that government provides. Suggested one judge, “I am not yet willing to concede that our society, at least in North Dakota, is at a place where we should assume that decedents would cast their relatives on the welfare rolls to reserve their

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137. See *supra* text accompanying note 13.

138. IOWA CODE §§ 249A.3(11)(c), 633E.15 (2013); KAN. STAT. ANN. § 39-709(e)(1) (2013); N.D. CENT. CODE § 50-24.1-02(1) (2013); VA. CODE ANN. § 32.1-325.02(B) (2014).

139. Both opinions predate OBRA. See *Murtha*, 427 A.2d at 808–10 (establishing Connecticut law); *Hoesly*, 498 N.W.2d at 575–76 (establishing Nebraska law).

140. *Molloy v. Bane*, 631 N.Y.S.2d 910, 913 (App. Div. 1995); see also, e.g., *Tannler v. Wis. Dep’t of Health & Soc. Servs.*, 564 N.W.2d 735, 741 (Wis. 1997) (similar statement).

141. *Tannler*, 564 N.W.2d at 741; see also *Troy v. Hart*, 697 A.2d 113, 117–18 (Md. Ct. Spec. App. 1997) (rejecting a rule allowing disclaimants to qualify for Medicaid as “ludicrous”); *Hoesly*, 498 N.W.2d at 575 (asserting a public policy “to prevent citizens from raiding the public purse when they possess sufficient resources to care for themselves”); *In re Baird*, 634 N.Y.S.2d 971, 973–74 (Sup. Ct. 1995) (urging the legislature to strengthen the rules limiting the right of disclaimants to receive Medicaid as a matter of “[r]esponsible public policy”); *In re Scrivani’s Estate*, 455 N.Y.S.2d 505, 510 (Sup. Ct. 1982) (asserting that a rule disqualifying disclaimants from Medicaid follows from “common sense”).

142. See *supra* text accompanying notes 51–55.

143. See *supra* note 52 and accompanying text.

144. 2 MCCORMICK, *supra* note 128, § 27:8, at 433.

estate for other family members.”<sup>145</sup> But the matter might hinge on the size of the bequest relative to the Medicaid support obligation.

Be this as it may, we can distinguish tax-inspired disclaimers from Medicaid-inspired disclaimers at another level. The would-be disclaimant in a Medicaid case *retains the right to disclaim*. The question instead concerns the consequences of his or her disclaimer. Lawmakers can concede the right to disclaim on the basis of testators’ intent but at the same time insist that the scope of government obligations—in which testators have no property interest—is instead up to the will of the people.<sup>146</sup>

#### IV. DISCLAIMERS AND FEDERAL REGULATION

Suppose a participant accumulates wealth within an ERISA pension plan. The plan will pay the participant an annuity upon retirement; but in case he or she dies while still employed, and hence prior to annuitizing the pension, the participant can designate a beneficiary to inherit undistributed pension benefits. Does a beneficiary who wishes to decline those benefits do so under the rules of disclaimer established by state or by federal law?

Disputes concerning this question arise between private parties, not between a citizen and an agency of government. The nature of the parties might suggest that state law governs; but at the same time, the federal ERISA statute serves to regulate employee benefit plans. And although the statute fails to address disclaimers, it could be read to cover them implicitly. For ERISA mandates that “the provisions of this title . . . shall supersede any and all State laws insofar as they may . . . relate to any employee benefit plan.”<sup>147</sup>

Whether this language, “conspicuous for its breadth,”<sup>148</sup> brings disclaimers of ERISA benefits within the ambit of federal law remains unclear. The legislative history of ERISA suggests that Congress intended to impose traditional field preemption in this instance.<sup>149</sup>

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145. *Nielsen v. Cass Cnty. Soc. Servs. Bd.*, 395 N.W.2d 157, 162 (N.D. 1986) (Vande Walle, J., dissenting).

146. If they wished to compensate for poor estate planning by testators, however, lawmakers could do so by implying supplemental needs trusts whenever testators bequeath to Medicaid recipients.

147. Employee Retirement Income Security Act of 1974 § 514(a), 29 U.S.C. § 1144(a) (2012) (emphasis added).

148. *FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990).

149. ERISA would “preempt the field for Federal regulations.” 120 Cong. Rec. 29,933 (1974) (statement of Sen. Williams); *see also id.* at 29,197 (statement of Rep. Dent) (suggesting that ERISA reserves for the federal government “the sole power to regulate the field of employee benefit plans”).

Early U.S. Supreme Court opinions on point nevertheless construed the express grant of preemption within ERISA more comprehensively, raising questions about whether Congress “intend[ed] [the ERISA preemption section] to cut nearly so broad a swath in the field of State laws as the Court’s expansive construction will create,”<sup>150</sup> and possibly implicating concerns over “process federalism.”<sup>151</sup> More recent opinions by the Court have relented, however, calling for a more restrained reading of ERISA preemption lest it “never run its course.”<sup>152</sup>

In the only case yet to address the issue directly, *Nickel v. Estate of Estes*,<sup>153</sup> a federal district court ruled in 1997 that state disclaimer law is “‘peripheral’ to [an employee benefit] plan and thus would not be preempted under ERISA.”<sup>154</sup> The district court applied the state disclaimer statute to give effect to a disclaimer of pension benefits submitted by the executor of a decedent beneficiary, which only some states allow.<sup>155</sup> On appeal, however, the circuit court ruled that “the district court erred by reaching the preemption issue in the first place”<sup>156</sup> because the employee benefit plan itself set out the terms for an effective disclaimer, superseding state law.<sup>157</sup> The court went on to invalidate the disclaimer because the court construed the plan to allow only beneficiaries themselves to disclaim—hence holding, in effect, that a plan’s rule of disclaimer could narrow a generally applicable legal rule of disclaimer.<sup>158</sup> The court further suggested in dicta that the legal rule

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150. *Holliday*, 498 U.S. at 66 (Stevens, J., dissenting); see also *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 154 (2001) (Breyer, J., dissenting) (warning that a broad reading of ERISA preemption would “threaten[] results that Congress could not have intended”); *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 335–36 (Scalia, J., concurring) (warning likewise that such a broad reading would create “a degree of pre-emption that no sensible person could have intended”).

151. See Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349 (2001) (addressing the contention by propounders of process federalism that institutional safeguards operate to check the expansion of federal authority).

152. *Egelhoff*, 532 U.S. at 146 (quoting N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995), the case which marked the sea change) (internal quotation marks omitted); see also *Egelhoff*, 532 U.S. at 153 (Scalia, J., concurring) (“[W]e . . . can give the statute both a plausible and precise content, only by interpreting the ‘relate to’ clause as a reference to our ordinary pre-emption jurisprudence.”); *id.* at 153–54 (Breyer, J., dissenting) (observing the trend in ERISA preemption case law).

153. 122 F.3d 294 (5th Cir. 1997).

154. *Id.* at 297 (quoting the unpublished district court opinion).

155. *Id.* at 298. For discussions of disclaimers by executors (or other fiduciaries) on behalf of deceased (or other) beneficiaries, see sources cited *infra* note 202.

156. *Nickel*, 122 F.3d at 298.

157. *Id.*

158. *Id.* at 298–99. The dissent disputed the majority’s construction of the plan, arguing that an executor could, in fact, disclaim on behalf of a decedent beneficiary under the terms of the plan. *Id.* at 301–03 (Garza, J., dissenting).

would have been federal, because disclaimer “law would ‘relate’ to the plan and thus be preempted.”<sup>159</sup>

Twelve years later, in *Kennedy v. Plan Administrator*,<sup>160</sup> the U.S. Supreme Court addressed the effectiveness of a waiver during the plan participant’s lifetime (which the Court treated as a type of disclaimer) of pension benefits, included in a divorce decree, that failed to conform to the execution requirements for a disclaimer mandated by the terms of the employee benefit plan.<sup>161</sup> The Court confirmed in dicta that had it met the terms of the plan, the disclaimer would have taken effect.<sup>162</sup> Because it did not, however, the beneficiary was not bound by it. The plan’s rule of disclaimer superseded the generally applicable law of disclaimer, the Court again ruled.<sup>163</sup>

Once more, though, the Court failed to reach the issue of what the generally applicable rule was. Although the opinion referred repeatedly to that rule as “federal common law,”<sup>164</sup> the Court in *Kennedy* never carried out a preemption analysis. Nor should the Court’s references to federal common law even qualify as dicta, because the Court framed the issue in hypothetical terms: “[T]he argument is that the waiver should be treated as a creature of federal common law,”<sup>165</sup> but that the plan’s terms overrode it. The Court declined to offer guidance on a case where “the plan documents provide no means for a beneficiary to renounce an interest in benefits.”<sup>166</sup> Subsequent cases have tested the limits of the ruling in *Kennedy*, but without revisiting the preemption issue.<sup>167</sup>

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159. *Id.* at 300 (majority opinion).

160. 555 U.S. 285 (2009).

161. *Id.* at 288–90.

162. *Id.* at 303. The Court also observed in dicta that a properly executed disclaimer of pension benefits would not run afoul of a provision of ERISA forbidding a beneficiary from “assign[ing] or alienat[ing]” benefits under a plan, *see* Employee Retirement Income Security Act (ERISA) of 1974 § 206(d)(1), 29 U.S.C. § 1056(d)(1) (2012), looking by analogy to the traditional rule that beneficiaries of an interest in an inalienable spendthrift trust are free to disclaim the interest initially. *Kennedy*, 555 U.S. at 294–95.

163. *Kennedy*, 555 U.S. at 303. The Court called this the “plan documents rule.” *Id.*

164. *Id.* at 288, 290–91, 299, 302–03; *see also* Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown, 897 F.2d 275, 281 (7th Cir. 1990) (holding, without analysis, that federal common law governs the effectiveness under ERISA of waivers tied to divorce decrees but without analogizing such waivers to disclaimers), *abrogated by Kennedy*, 555 U.S. 285.

165. *Kennedy*, 555 U.S. at 299 (emphasis added).

166. *Id.* at 303 n.13. *Kennedy* nowhere cited to *Nickel*. *See Kennedy*, 555 U.S. 285.

167. *See Matschiner v. Hartford Life & Accident Ins. Co.*, 622 F.3d 885, 887–88 (8th Cir. 2010) (holding that the plan documents rule forecloses an anticipatory waiver of plan benefits if the plan itself contained no “formal procedures” for carrying out such waivers); *see also* Boyd v. Metro. Life Ins. Co., 636 F.3d 138, 142–44 (4th Cir. 2011) (same holding, further distinguishing the absence of a procedure for executing anticipatory waivers under a plan from the absence of a procedure for executing *disclaimers* under a plan, in which event “strict application of the plan documents rule

Considering the question in the abstract, several options present themselves. Lawmakers could leave disclaimers of qualified benefit plans to state law. From the standpoint of legal process, lawmakers could accomplish that result in several alternative ways. Congress could expressly incorporate by reference the state law of disclaimers into ERISA,<sup>168</sup> although that has not occurred—ERISA never mentions disclaimers. Courts could rule that, given ERISA’s silence, federal common law “borrows” (to use the term of art found in the cases) the individual state’s law, in this instance disclaimer law.<sup>169</sup> Finally, courts could instead hold that ERISA preemption fails to extend to the law of disclaimers, hence leaving state law in place. All of these means would achieve the same result and therefore coincide from the perspective of policy.

A second possibility is that lawmakers could deem the law of disclaimers to come within ERISA preemption. That still leaves several alternatives, however. On the one hand, ERISA could, either by virtue of its current silence or by express amendment, be construed to preclude any disclaimer not expressly permitted by plan documents. On the other hand, courts could create a uniform, federal common law of disclaimers of pension benefits to fill the statutory silence, coming into play if and when plan documents fail to provide for disclaimers. Finally, Congress could amend ERISA to install a federal statutory law of disclaimers.

In contemplating these choices, we need have no fear that state lawmakers would discriminate for or against an ERISA beneficiary in some way. They would have no reason to do so—no negative externality appears in this situation. Those state disclaimer statutes that speak expressly to ERISA pension benefits as a category include the reference to amalgamate them unequivocally with other inherited property covered by the statutes.<sup>170</sup>

One rationale for federally imposed uniformity is avoidance of conflicts-of-law litigation.<sup>171</sup> The U.S. Supreme Court has emphasized this concern in connection with ERISA preemption of state laws that

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would create the absurd result of forcing the beneficiary to take benefits that he would not want,” but without exploring whether state or federal law would otherwise control disclaimers of plan benefits).

168. A provision of the Bankruptcy Code operates in this way, *see* 11 U.S.C. § 522(b)(3)(A) (2012) (determining what comprises exempt property in bankruptcy by reference to state law), as do other federal statutes. Mishkin, *supra* note 31, at 802 n.22.

169. *E.g.*, *Schadel v. Iowa Interstate R.R.*, 381 F.3d 671, 674 (7th Cir. 2004); *Cadle v. Shelton*, No. 2:11-CV-00787, 2013 WL 1282372, at \*5 (S.D. Ohio Mar. 26, 2013).

170. *E.g.*, CAL. PROB. CODE § 267(b)(12) (West 2014); N.Y. EST. POWERS & TRUSTS LAW § 2-1.11(b)(1) (McKinney 2014); TEX. EST. CODE ANN. § 122.001(1)(G) (West 2013).

171. *See supra* note 12 and accompanying text.



revoke by implication beneficiary designations upon a divorce.<sup>172</sup> In connection with disclaimers, however, conflicts of law present no danger. The plan documents might themselves contain a choice-of-law provision (in which event, the problem should not arise in connection with implied revocation either).<sup>173</sup> Otherwise, under state law, the applicable rule is simple and clear: The domicile of the decedent governs disclaimers.<sup>174</sup> The fact that the decedent might have migrated from one state to another is irrelevant and so is the possibility that the decedent and beneficiaries reside in different states.

The congressional debates over ERISA suggest that its preemption provision stemmed from a related concern: achieving administrative efficiency. Faced with divergent state regulations, plan administrators for a national company would have to “master the relevant laws of 50 States”<sup>175</sup> requiring them to “keep certain records in some States but not in others; . . . to process claims in a certain way in some States but not in others; and to comply with certain fiduciary standards in some States but not in others.”<sup>176</sup> By allowing plan administrators to follow “a set of standard procedures” instead, federal lawmakers can alleviate that “burden,” which employers might otherwise “offset by lowering benefit levels.”<sup>177</sup> This desideratum, we may recall, corresponds with another one of the theoretical justifications for federalizing rules—to wit, minimizing the information costs of compliance with law by the citizenry.<sup>178</sup>

Now, the most radical means of simplifying a plan administrator’s responsibilities would be to confine them to those enumerated by plan documents. A court could read ERISA’s current silence on the subject of disclaimers as intended to bar any disclaimer not expressly authorized by the plan itself.

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172. *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 149 (2001); *cf. id.* at 158 (Breyer, J., dissenting) (wondering how serious this concern is “in practice”).

173. Baude, *supra* note 29, at 1420.

174. *In re Laughlin*, 602 F.3d 417, 426 (5th Cir. 2010); *Gen. Fin. Corp. v. Hansen (In re Estate of Hansen)*, 248 N.E.2d 709, 711, 713 (Ill. App. Ct. 1969); *Lehr v. Switzer*, 239 N.W. 564, 565–66 (Iowa 1931); *In re Estate of Horowitz*, 531 A.2d 1364, 1365–66 (N.J. Super. Ct. Law Div. 1987); *Estate of Gilbert*, 592 N.Y.S.2d 224, 224–26 (Sur. Ct. 1992); *John Deere Credit Co. v. Goldammer (In re Estate of Goldammer)*, 405 N.W.2d 693, 693, 695 (Wis. Ct. App. 1987); I.R.S. Tech. Adv. Mem. 79-37-011 (May 31, 1979). No contrary precedents have ever appeared. *But cf. Kaufman v. Richmond*, 811 N.E.2d 987, 989 (Mass. 2004) (raising the possibility that disclaimers of real property are governed by the law of the situs).

175. *Egelhoff*, 532 U.S. at 149–50.

176. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987).

177. *Id.* at 9–10. The Court supported this analysis with quotations from the Congressional Record. *Id.* at 9, 11 (quoting 120 Cong. Rec. 29,197, 29,993 (1974) (statements of Rep. Dent and Sen. Williams); H.R. Rep. No. 93-533, 1974 U.S.C.C.A.N. 4650).

178. *See supra* note 10 and accompanying text.

The U.S. Supreme Court shrank from such a ruling in *Kennedy*. Although it stressed the importance of “hewing to the directives of the plan documents,”<sup>179</sup> the Court in dicta asserted “[t]he improbability that a statute [ERISA] written with an eye on the old law would effectively force a beneficiary to take an interest willy-nilly.”<sup>180</sup> Added the Court: “Common sense and common law both say that ‘the law certainly is not so absurd as to force a man to take an estate against his will.’ ”<sup>181</sup> Historically, though, that is exactly what the common law (if not common sense) declared in connection with intestate estates. Intestate property was “cast” upon the heir and could not be disclaimed under the common law,<sup>182</sup> a rule that persisted in several American states as late as the 1990s but that is now superseded everywhere by statute.<sup>183</sup>

Given that beneficiaries can gift unwanted pension wealth on to third parties, the loss of a right to disclaim in this instance would at most implicate tax inefficiencies. That result might make bad tax policy by taxing pension wealth arbitrarily, but it hardly amounts to an absurdity. The efficiencies that result when a plan administrator can rely exclusively on plan documents might outweigh the damage caused by plans that fail to provide any mechanism for disclaiming.<sup>184</sup> But if we eschew this possibility and accept that ERISA should implicitly incorporate some law of disclaimer *dehors* plan documents, even if plan documents can substitute their own, then the assumption that plan administrators would prefer to observe federal common law rather than to follow the fifty state laws of disclaimer is scarcely self-evident.

Obviously, the downside of state laws is that they offer administrators no single prototype to follow. What is more, state laws of disclaimer have steadily fragmented over time. The reasons are structural. In the nineteenth century, only a few discrete areas of inheritance law—the rules of intestacy, the formalizing rules for wills, the rights of a surviving spouse—were codified. Disclaimer law was not. Because it was largely composed of standards serving as persuasive authority across state lines, the common law tended to vary little from jurisdiction to jurisdiction.<sup>185</sup> The subsequent “orgy of statute

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179. *Kennedy v. Plan Adm’r for DuPont Sav. and Inv. Plan*, 555 U.S. 285, 300 (2009).

180. *Id.* at 294–95.

181. *Id.* at 295 (quoting *Townson v. Tickell*, (1819) 106 Eng. Rep. 575 (K.B.) 576–77).

182. Hirsch, *supra* note 44, at 591.

183. *E.g.*, *Bradley v. State*, 123 A.2d 148, 151 (N.H. 1956) (dicta). The last two states to abolish the common-law prohibition on disclaimers of intestate inheritance were Mississippi and New Hampshire, in 1994 and 1996 respectively. *See supra* note 2.

184. Taxation is not inescapable in this scenario, since the transfer could qualify as a “transfer disclaimer” under the tax code. *See supra* note 4.

185. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 74 (1982) (“The common law had a substantial degree of uniformity.”).

making”<sup>186</sup> in the United States swept up inheritance law.<sup>187</sup> Today every state has its own probate code and its own disclaimer statute, augmented by common law where gaps remain but covering large swaths of the legal landscape previously governed by judge-made law. This trend encouraged pluralism by sharpening standards into more variable rules, by freeing statutory law from prior case-based precedent, and by weakening the gravitational pull of a legal system no longer premised on commonality.<sup>188</sup> Ironically, the uniform acts for inheritance and disclaimer law, first promulgated in 1969,<sup>189</sup> have, if anything, exacerbated the tropism toward diversity. Unlike the Uniform Commercial Code, the Uniform Probate Code and related products have never gained anything close to universal adoption, but they did succeed in stirring things up, encouraging more states to codify and to reexamine and fiddle with statutes already in place. Even those jurisdictions that adopted uniform acts covering disclaimer law have insisted on tinkering with them. As of today, some seventeen states have enacted the latest version of the Uniform Probate Code’s provisions on disclaimer (grafted into that code from a freestanding uniform act<sup>190</sup>)—and these have proliferated into seventeen different variations of state law.<sup>191</sup>

So, the state laws of disclaimer are variegated. A federal common law of disclaimers would function to reduce this potpourri to a consolidated body of law for plan administrators to follow. But consolidation in this instance would come at a price: for no federal common law of disclaimers comparable to the “federal law merchant”<sup>192</sup> yet exists. Of course, courts developing such a law would not have to make a clean sweep of the subject. Federal common law can draw on preexisting state statutes, state common law, and other federal law.<sup>193</sup> Doubtless, the federal statute governing the validity of disclaimers for

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186. *Id.* at 73.

187. *See generally* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 302–08 (3d ed. 2005) (surveying the American codification movement).

188. Judge Calabresi hinted at the phenomenon. *See* CALABRESI, *supra* note 185, at 74, 76–77. *See generally* Giacomo A.M. Ponzetto & Patricio A. Fernandez, *Case Law Versus Statute Law: An Evolutionary Comparison*, 37 J. LEGAL STUD. 379 (2008).

189. UNIF. PROBATE CODE historical notes (amended 2010), 8 pt. 1 U.L.A. 23 (2013).

190. *Id.* §§ 2-1102 to -1117, 8 pt. 1 U.L.A. 386–412; UNIF. DISCLAIMER OF PROP. INTERESTS ACT §§ 1–21 (amended 2010), 8A U.L.A. 159–89 (2003).

191. Hirsch, *supra* note 43, at 370.

192. *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943). This body of doctrine “stands as a convenient source of reference for fashioning federal rules.” *Id.*

193. *See, e.g., City of Evansville, Ind. v. Ky. Liquid Recycling, Inc.*, 604 F.2d 1008, 1021 n.43 (7th Cir. 1979) (“Although federal common law controls, federal statutes as well as state statutory and common law are nonetheless highly relevant.”).

tax purposes,<sup>194</sup> as elaborated by federal regulations and case law, would prove influential.<sup>195</sup> But all of this would take time—quite a lot of time, in fact, if splits developed between circuits over what the federal common law should be.<sup>196</sup> In the meantime, plan administrators would face *consolidated uncertainty*. They are likely to regard that sort of consolidation as a mixed blessing. Courts have highlighted the value of certainty in connection with ERISA.<sup>197</sup>

Consider a few of the issues that might arise. ERISA pension plans often name alternative beneficiaries in the event that a primary beneficiary predeceases the plan participant. If the primary beneficiary instead disclaims the inheritance, plan administrators must apply a rule of construction to plan documents: Should the term “predeceasing” be construed broadly to include disclaiming, so that the alternative beneficiary takes the inheritance in place of the disclaimant?<sup>198</sup> In some states, the disclaimer statute answers this question; in others, case law fills the gap. At any rate, the rule varies from state to state.<sup>199</sup> What would the federal common law rule be?<sup>200</sup> Or consider the issue presented in *Nickel*.<sup>201</sup> Some type of fiduciary of a beneficiary might seek to disclaim on his or her behalf. Should the plan administrator now operate on the assumption that the disclaimer is valid and final? State statutes often feature detailed but varying rules as to who, other than beneficiaries themselves, has authority to execute a disclaimer.<sup>202</sup>

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194. I.R.C. § 2518 (2012).

195. See I.R.S. Gen. Couns. Mem. 39,858 (Sept. 9, 1991) (concluding that a disclaimer is valid under ERISA “if the disclaimer satisfies (1) the four requirements of section 2518(b) and (2) the requirements of applicable state law”).

196. Mishkin, *supra* note 31, at 813, 819; *supra* text accompanying notes 30–32.

197. See *Kennedy v. Plan Adm’r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 301 (2009) (suggesting that “the cost of less certain rules would be too plain. . . . [They] would destroy a plan administrator’s ability . . . to get clear distribution instructions, without going into court”); *Egelhoff v. Egelhoff ex. rel. Breiner*, 532 U.S. 141, 149 n.3 (2001) (adding that even if the plan administrator can “[pass on] the costs of delay and uncertainty . . . to beneficiaries,” by “let[ting] courts or parties settle the matter,” uncertainty still “thwart[s] ERISA’s objective of efficient plan administration”).

198. Ideally, as is sometimes the case, plan documents establish alternative beneficiaries in the express event of a disclaimer, thereby resolving the ambiguity. Harvey B. Wallace, II, *Retirement Benefits Planning Update*, PROB. & PROP., May–June 2002, at 45, 48.

199. Hirsch, *Revisions*, *supra* note 60, at 163 n.263, 169 n.288.

200. This issue has arisen in connection with federal common law barring inheritance by slayers, by analogy. See *Ahmed v. Ahmed*, 817 N.E.2d 424, 432–33 (Ohio Ct. App. 2004) (holding irrelevant a plan document naming an alternative beneficiary where the primary beneficiary slays and thus *constructively* predeceases the plan participant); see also *Box v. Goodyear Tire & Rubber Co.*, No. 4:11-CV-0829-MHH, 2014 WL 4926285, at \*5 n.3 (N.D. Ala. Oct. 1, 2014) (observing, upon a review, that the U.S. Supreme Court has yet to resolve whether ERISA preempts state law governing inheritance by slayers).

201. *Nickel v. Estate of Estes*, 122 F.3d 294 (5th Cir. 1997).

202. E. DIANE THOMPSON, DISCLAIMERS: WHEN, WHY & HOW TO SAY NO TO AN INHERITANCE 37–41 (2000); WENIG, *supra* note 1, at A–53 to A–54; Hirsch, *Revisions*, *supra* note 60, at 132–38.

Federal common law would now have to emerge on this question. Or consider the issue raised in *Drye*.<sup>203</sup> Can the beneficiary of a defined benefit plan disclaim despite the fact that he or she is insolvent? Once more, state statutes and case law appear on point, and the rule again varies.<sup>204</sup> Federal common law on the subject has yet to materialize.<sup>205</sup> And so on, and so on.

To be sure, state laws of disclaimer sometimes exhibit uncertainty, too. At present, only around half the states have announced a clear rule governing the validity of insolvent disclaimers, for example.<sup>206</sup> Parties might have to iron out issues of law in court either way. Nevertheless, state lawmakers have a centuries-long lead over federal ones in this field. In such circumstances, interstitial lawmaking holds considerable appeal.<sup>207</sup>

If minded to do so, Congress could curtail the uncertainty of federal law by amending ERISA to provide express rules of disclaimer, at least as a default regime where plan documents are silent. But even then, other costs could potentially arise. From the perspective of plan administrators, recourse to state disclaimer law would cause indistinguishable plans to become subject to different rules of disclaimer, marginally increasing the costs of plan administration. That inconsistency, and cost, disappears if we shift to a consolidated body of federal law. But from the perspective of beneficiaries, introducing a federal law for qualified pension plans means that different forms of property will come under separate rules of disclaimer. Beneficiaries who receive property under both a will and a pension plan would have to follow two inconsistent rules of disclaimer, raising *their* information costs (which, unlike costs borne by plan administrators, are incurred individually, perhaps in the form of marginally higher attorneys' fees, affording no economies of scale). If state disclaimer law holds sway over all forms of property, we avoid that complication. In other words, we

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

204. Hirsch, *supra* note 44, at 592–601; Hirsch, *Revisions*, *supra* note 60, at 154–55; Hirsch, *supra* note 43, at 367–68. For the most recent case to address this issue, see *Gallaher v. Riddle*, 850 A.2d 748, 751 (Pa. 2004) (holding invalid an insolvent disclaimer).

205. On federal law applicable to insolvent disclaimers of property of all sorts in a bankruptcy proceeding, see *infra* Part V.

206. Hirsch, *Revisions*, *supra* note 60, at 155. The current version of the Uniform Probate Code does not help matters. It was intended to incorporate prior state common law on insolvent disclaimer, but a section of the Code has the unintended consequence of permitting insolvent disclaimer, a result the Reporter for this section of the Code now acknowledges, but which the comments accompanying the Code nowhere explicate. Adam J. Hirsch, *Disclaimer Law and UDPIA's Unintended Consequences*, EST. PLAN., Apr. 2009, at 34, 39–40; Hirsch, *supra* note 43, at 367–68.

207. See *supra* text accompanying notes 30–32; cf. *supra* text accompanying note 13.

face a trade-off: Either alternative implicates inconsistency (and costs) of one kind or another. We can avoid both inconsistencies only by federalizing disclaimer law *in toto*—but no such proposal is on the table, even assuming it could pass constitutional muster.

If we accept the logic of applying existing state disclaimer law to ERISA, federal lawmakers could still find reason to carve out one or more exceptions. For disclaimers of benefits under qualified benefit plans do raise problems that, if not unique to ERISA, differ from the problems generated by disclaimers of property in general. In particular, plan administrators ought to receive notice of a disclaimer, if only to clarify their responsibilities. Some state disclaimer statutes anticipate the issue; the Uniform Probate Code establishes special notice requirements for all “interests created by a beneficiary designation,” which would include interests in a qualified benefit plan.<sup>208</sup> If it covers personal property, as a pension plan would, the disclaimer “must be delivered to the person obligated to distribute the interest.”<sup>209</sup> Nonetheless, many states fail to carve out this exception from the general laws of disclaimer.<sup>210</sup> Along the same lines, federal lawmakers might wish to exonerate plan administrators who act in good faith on the assumption that a disclaimer is valid or who make a distribution to a beneficiary who has disclaimed without their knowledge. Courts have identified “avoid[ance of] double liability” as one of ERISA’s values.<sup>211</sup> Although several states include exoneration provisions applicable to plan administrators (among others) in their disclaimer statutes, the Uniform Probate Code does not.<sup>212</sup> Federal common or statutory law focused on the distinct characteristics of pension wealth does appear warranted, but it need cover only a few stitches in the fabric of disclaimer law.

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208. UNIF. PROBATE CODE § 2-1112(a)(4), (g) (amended 2010), 8 pt. 1 U.L.A. 404 (2013). *See, e.g.*, NEV. REV. STAT. ANN. § 120.290 (6), (12)(d) (LexisNexis 2013).

209. UNIF. PROBATE CODE § 2-1112(g)(1), 8 pt. 1 U.L.A. 404. A comparable rule exists under some non-uniform disclaimer statutes. *E.g.*, N.Y. EST. POWERS & TRUSTS LAW § 2-1.11(c)(2) (McKinney 2014).

210. *See, e.g.*, CAL. PROB. CODE § 280(a) (West 2014) (permitting, but not requiring, a disclaimer to be filed with the “person responsible for distributing the interest to the beneficiary”).

211. *Kennedy v. Plan Adm’r for DuPont Sav. and Inv. Plan*, 555 U.S. 285, 301 (2009) (quoting *Fox Valley & Vicinity Const. Workers Pension Fund v. Brown*, 897 F.2d 275, 283 (7th Cir. 1990) (Easterbrook, J., dissenting)) (internal quotation marks omitted).

212. Hirsch, *supra* note 43, at 366.

## V. DISCLAIMERS AND FEDERAL PROCEEDINGS

We come finally to the problem of disclaimers of inheritances adjudicated within a federal bankruptcy proceeding.<sup>213</sup> Here, the issue of creditors' claims retakes center stage, as in connection with tax liens.<sup>214</sup> Now, though, the context of the issue widens from federal creditors to general creditors. The federal government's connection stems not from its mercenary interests but from its exclusive role in providing a forum and a process as mandated by congressional legislation.<sup>215</sup>

The temporal dimension of the problem adds a further complication. A disclaimer judged in bankruptcy could arise at different moments in time. An insolvent debtor might both come into an inheritance and disclaim it prior to bankruptcy—a prepetition disclaimer. Alternatively, an insolvent debtor could succeed to an inheritance, then enter bankruptcy, and subsequently seek to disclaim—a postpetition disclaimer of a prepetition inheritance. Finally, an insolvent debtor could enter bankruptcy and subsequently both inherit and seek to disclaim—a postpetition disclaimer of a postpetition inheritance. Although the petition for relief in bankruptcy ordinarily marks the “line of cleavage” between prepetition accumulations of property that the debtor must surrender to creditors and postpetition accumulations that a discharged debtor gets to keep as his or her “fresh start,” the Bankruptcy Code makes an exception for inherited assets. Any right to an inheritance arising within 180 days of a petition for relief in Chapter 7 (liquidation), or before the case is closed in Chapters 12 or 13 (rehabilitation), flows back into the bankruptcy estate to satisfy creditors under section 541(a)(5) and related sections of the Bankruptcy Code.<sup>216</sup> Accordingly, postpetition inheritances remain potential points of contention within a federal bankruptcy proceeding.

The U.S. Supreme Court has yet to resolve whether, and under what circumstances, a disclaimer in bankruptcy comes under federal common law. Thus far, the Court has declined to hear cases raising this

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213. For prior academic discussions of the problem, see Stephen E. Parker, *Can Debtors Disclaim Inheritances to the Detriment of Their Creditors?*, 25 LOY. U. CHI. L.J. 31 (1993); David B. Young, *The Intersection of Bankruptcy and Probate*, 49 S. TEX. L. REV. 351, 381–92 (2007).

214. See *supra* Part III.A.

215. Although the federal Bankruptcy Code fails to include an express preemption provision analogous to the one contained in ERISA, see *supra* note 147 and accompanying text, case law concludes that field preemption applies in bankruptcy. For a recent discussion, see Jeffrey B. Ellman & Brett J. Berlin, *Bankruptcy Code Preemption of State Law*, 21 NORTON J. BANKR. L. & PRAC. 241 (2012).

216. 11 U.S.C. §§ 541(a)(5), 1207(a)(1), 1306(a)(1) (2012).

issue.<sup>217</sup> Quite a few such cases have come before lower federal courts, however. Although we cannot reconcile this mass of decisions *sic et non*, they cumulatively suggest that timing plays a crucial role in the outcome of such cases.

If an insolvent debtor disclaims an inheritance prior to a petition for relief, the trustee in bankruptcy could challenge the disclaimer's validity, seeking to recover the inheritance for the bankruptcy estate. The trustee might do so by recourse to either of two avoiding powers. To begin with, under section 544(b) of the Bankruptcy Code, the trustee can exercise any right that an actual unsecured creditor would have had to "avoid any transfer" at state law.<sup>218</sup> Here, the trustee must rely on state law, imported into bankruptcy, so the usefulness of this avoiding power will turn on whether the domicile of the benefactor treats an insolvent disclaimer as a fraudulent transfer. Some states do as a matter of common law, although most do not.<sup>219</sup>

If a state alternatively regulates insolvent disclaimer by statute, as five currently do, the problem grows a mite more complicated.<sup>220</sup> In two of these states, the statutes indicate that fraudulent conveyance law applies to insolvent disclaimers without stating explicitly that it has the effect of avoiding them.<sup>221</sup> Assuming it does have that effect, as the statutes imply, then insolvent disclaimers are again vulnerable to section 544(b). In the remaining three states, the statutes specify that an insolvent disclaimer is "ineffective," or "annulled."<sup>222</sup> Courts should construe this terminology to render the disclaimer a void transfer, still subject to section 544(b) by virtue of synonymous language,<sup>223</sup> although the issue has yet to arise in a published case.<sup>224</sup>

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217. *See Jones v. Atchison (In re Atchison)*, 101 B.R. 556 (Bankr. S.D. Ill. 1989), *aff'd*, 925 F.2d 209 (7th Cir. 1991), *cert. denied*, 502 U.S. 860 (1991).

218. 11 U.S.C. § 544(b)(1).

219. Hirsch, *supra* note 44, at 592–601; Hirsch, *Revisions*, *supra* note 60, at 154–55.

220. In a sixth state, the issue is left expressly to common law. 20 PA. CONS. STAT. ANN. § 6205(d) (West 2014).

221. MASS. GEN. LAWS ANN. ch. 190B, § 2-801(h)(2) (West 2014); OKLA. STAT. tit. 60, § 756 (2014).

222. FLA. STAT. ANN. § 739.402(2)(d) & (5) (West 2013); LA. CIV. CODE ANN. art. 967 (2014); MINN. STAT. ANN. § 524.2-1106(b)(4) & (f) (West 2014).

223. *See supra* text accompanying note 218.

224. *See Pastimes Publ'g Co. v. Adver. Displays*, 286 N.E.2d 19, 22 (Ill. App. Ct. 1972) ("Ineffective [under the pre-1989 version of U.C.C. art. 6] means voidable at the instance of a creditor of the transferor."); U.C.C. § 6-107 cmt. (1989) (observing in connection with the section of U.C.C. art. 6 that had formerly deemed bulk sales "ineffective" against a creditor who was not notified of the sale, *see* U.C.C. § 6-105 (pre-1989 art. 6), 2C U.L.A. 88 (2005) (revised in 1989 to give the non-notified creditor instead a cause of action for damages), that, following this revision, "[b]ecause no creditor has the right to avoid the transaction or to assert a remedy that is the functional equivalent of avoidance, the seller's bankruptcy trustee likewise should be unable to do so [under § 544(b)]" (emphasis added)).



Recall also that by statute in several states today, only designated exception creditors can avoid an insolvent disclaimer, up to the value of their claims.<sup>225</sup> If such a creditor holding a limited claim exists, then section 544(b) again could apply. Yet in connection with these statutes, the right to avoid the transfer is potentially enhanced or, we might say, federalized, by the gloss of *Moore v. Bay*.<sup>226</sup> In that famous case, the U.S. Supreme Court construed section 544(b) to give the trustee in bankruptcy power to avoid any transfer *in its entirety, irrespective of the size of the actual creditor's claim*, and, on top of that, to do so for the benefit not of the actual creditor, *but for the bankruptcy estate as a whole*—an avoiding power that distorts the result that would have obtained outside of bankruptcy, under state law.<sup>227</sup> *Moore v. Bay* appears applicable in this scenario, although no published case testing that proposition has yet materialized.<sup>228</sup>

Alternatively, the trustee in bankruptcy can seek to avoid a prepetition disclaimer under section 548 of the Bankruptcy Code, which grants the trustee an independent power to avoid fraudulent transfers, albeit with a shorter reachback period than under section 544(b).<sup>229</sup> Federal law establishes the substantive scope of this avoiding power.<sup>230</sup>

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225. ALASKA STAT. § 13.70.110(f)(1) (2014) (child support creditors); COLO. REV. STAT. § 15-11-1213(6) & (7)(b) (2014) (medical assistance benefits creditors of a deceased beneficiary); IND. CODE ANN. §§ 32-17.5-8-2.5, 32-17.5-8-6 (West 2014) (child support creditors); OR. REV. STAT. ANN. §§ 105.643(6) & (7), 105.648, 411.620 (West 2014) (restitution judgment and public assistance creditors); TEX. EST. CODE ANN. § 122.107(a) (West 2013) (child support creditors); *see supra* text accompanying note 43.

226. 284 U.S. 4 (1931).

227. *Id.* at 5. Although the decision has drawn considerable criticism, *Moore v. Bay* remains good law today; the decision successfully leaped from the interstices of the former Bankruptcy Act to the interstices of the current Bankruptcy Code. For discussions, see THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 79–83 (1986); CHARLES J. TABB, *THE LAW OF BANKRUPTCY* § 6.6 (3d ed. 2014).

228. One might argue that section 544(b) should not apply to exception creditors, because the *exclusive* rights to avoid disclaimers created under these state statutes constitute lien-like rights, even if they do not technically comprise statutory liens. On this theory, one could argue that exception creditors do not qualify as “unsecured creditors” for purposes of section 544(b). *See* 11 U.S.C. § 544(b)(1) (2012) (“[T]he trustee may avoid any transfer of an interest . . . by a creditor holding an unsecured claim . . .”). In that event, the exception creditor would become the only interested party, and the bankruptcy court could then lift the automatic stay to allow the exception creditor to exercise his or her lien-like right to reach the disclaimed inheritance for his or her own benefit up to the value of the claim, thereby reproducing the result that would have prevailed outside of bankruptcy. *See id.* § 362(a) & (d).

229. *Id.* § 548. This section applies to any transfer made within two years of the bankruptcy petition. *Id.* § 548(a)(1). By comparison, section 544(b) follows whatever statute of limitations applies at state law, which typically runs to four years. *Id.* § 544(b); UNIF. VOIDABLE TRANSACTIONS ACT (amended 2014) § 9, 7A pt. 2 U.L.A. 194 (2006) (originally UNIF. FRAUDULENT TRANSFER ACT (1984) § 9).

230. *See* James Angell McLaughlin, *Aspects of the Chandler Bill to Amend the Bankruptcy Act*, 4 U. CHI. L. REV. 369, 385 (1937) (stating, in the author’s capacity as one of the drafters of the

Nevertheless, most courts have ruled that section 548 allows the trustee to avoid insolvent disclaimers only if creditors could have avoided them under state law.<sup>231</sup>

The reasoning in these opinions echoes premises articulated in the tax lien cases that we unpacked earlier.<sup>232</sup> Under section 548, the bankruptcy trustee can “avoid any transfer . . . of an interest of the debtor in property” made either with intent to hinder creditors or in exchange for less than reasonably equivalent value while the debtor was insolvent.<sup>233</sup> The federal Bankruptcy Code defines the term “transfer” broadly to include “each mode, direct or indirect, . . . of disposing of or parting with property[,] or an interest in property,”<sup>234</sup> which could surely include a disclaimer. But, like the Internal Revenue Code, the Bankruptcy Code fails to define the term “property.”<sup>235</sup> In lieu of a federal definition, property takes its meaning—and its attributes—from state law. And as specified in many state disclaimer statutes, codifying common law, a disclaimer “relates back for all purposes” to the time when the benefactor died.<sup>236</sup> In other words, state law may deem beneficiaries never to have owned an interest in the property they disclaimed, and “a ‘transfer’ cannot occur without ‘property’ or an ‘interest in property,’ ” as one court put the logic succinctly.<sup>237</sup>

Some states, though, reject the notion of a retroactive displacement of title and regard insolvent disclaimers as fraudulent transfers.<sup>238</sup> “[T]he legatee obtains power, in itself a limited right of ownership . . . to determine the ultimate disposition of the property,” one court reasoned typically.<sup>239</sup> “If he chooses to [disclaim], he

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antecedent of section 548 in the former Bankruptcy Act, that the section “provides . . . for a federal law of fraudulent conveyances”).

231. See *infra* notes 237, 244, 247, and accompanying text.

232. See *supra* notes 69–75 and accompanying text.

233. 11 U.S.C. § 548(a)(1)(A), (B)(i)–(ii)(I).

234. *Id.* § 101(54) (subsection symbol omitted).

235. See *id.* § 101.

236. Hirsch, *supra* note 44, at 595. This or similar language is today codified in nineteen states. *E.g.*, VT. STAT. ANN. tit. 14, § 1954(a) (2011). The other eighteen are Alabama, California, Georgia, Idaho, Kentucky, Maine, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Texas, Utah, and West Virginia.

237. Gaughan v. The Edward Dittlof Revocable Trust (*In re Costas*), 555 F.3d 790, 793–94, 798 (9th Cir. 2009); see also Simpson v. Penner (*In re Simpson*), 36 F.3d 450, 452–53 (5th Cir. 1994) (similar analysis); Jones v. Atchison (*In re Atchison*), 925 F.2d 209, 210–11 (7th Cir. 1991) (same); Wood v. Bright (*In re Bright*), 241 B.R. 664, 666–68, 672 (B.A.P. 9th Cir. 1999) (same); Cassell v. Kolb, 267 B.R. 861, 867 (N.D. Cal. 2001) (same), *rev'd on other grounds*, 326 F.3d 1030 (9th Cir. 2003); Garrett v. Bank of Okla. (*In re Faulk*), 281 B.R. 15, 18–21 (Bankr. W.D. Okla. 2002) (same); Grassmueck v. Nistler (*In re Nistler*), 259 B.R. 723, 725–27 (Bankr. D. Or. 2001) (same); *In re Jessen*, 82 B.R. 490, 495 (Bankr. S.D. Iowa 1988) (without analysis).

238. Hirsch, *supra* note 44, at 595–98; Hirsch, *supra* note 43, at 368.

239. Kalt v. Youngworth (*In re Kalt's Estate*), 108 P.2d 401, 403 (Cal. 1940).

determines by that action that the title will pass on to some other heir or legatee.”<sup>240</sup> In these states, the trustee in bankruptcy could avoid insolvent disclaimers as fraudulent transfers by virtue of either section 548 or section 544(b).<sup>241</sup>

This reasoning, of course, resembles part of the U.S. Supreme Court’s analysis in *Drye*.<sup>242</sup> There, too, the Court took the view that the “power to channel the estate’s assets” by way of a disclaimer comprises a form of “dominion” and “warrants the conclusion that [the debtor-beneficiary] held ‘property’ or ‘a right to property,’ subject to the Government’s liens” under the tax code.<sup>243</sup> One bankruptcy court has taken the view that this aspect of the analysis in *Drye* controls “in all contexts,” rendering insolvent disclaimers fraudulent transfers under section 548.<sup>244</sup> But several subsequent courts, including appellate courts, reject this analysis, concluding that *Drye* is doctrinally confined to “the particularities and structure of the Internal Revenue Code.”<sup>245</sup> This conclusion appears technically sound: Although the relevant provisions of the Bankruptcy Code and the tax code display linguistic similarities, the two cover separate problems and hence can support conflicting outcomes.<sup>246</sup>

But even without applying *Drye* directly, courts could make an argument similar to the one that appeared in that opinion. To wit, a right of disclaimer is both an attribute of property *and* a species of transfer. This duality frees courts to consider—or demands that they consider—the policy implications of focusing on one or the other feature of a disclaimer when applying section 548. At least one bankruptcy court antedating *Drye* pursued this stream of analysis to avoid a

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240. *Id.*

241. See *Garrett v. Vaughan (In re Vaughan)*, 261 B.R. 700, 704, 707 (Bankr. W.D. Okla. 2001) (holding a prepetition disclaimer ineffective in bankruptcy because it was improperly executed at state law); *McGraw v. Betz (In re Betz)*, 84 B.R. 470, 472 (Bankr. N.D. Ohio 1987) (concerning a postpetition disclaimer rendered invalid by state law); see also *Bostian v. Milens*, 193 S.W.2d 797, 801 (Mo. Ct. App. 1946) (holding a prepetition disclaimer ineffective because disclaimers of intestate inheritances were at that time impermissible under state law) (decided under the former Bankruptcy Act).

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

243. *Id.* at 61.

244. *In re Kloubec*, 247 B.R. 246, 255–56 (Bankr. N.D. Iowa 2000).

245. *Laughlin v. Nouveau Body and Tan, L.L.C. (In re Laughlin)*, 602 F.3d 417, 424–26 (5th Cir. 2010) (dicta); *Gaughan v. Edward Dittlof Revocable Trust (In re Costas)*, 555 F.3d 790, 795–96 (9th Cir. 2009); *Cassell v. Kolb*, 267 B.R. 861, 866 (N.D. Cal. 2001), *rev’d on other grounds*, 326 F.3d 1030 (9th Cir. 2003); *Garrett v. Bank of Oklahoma (In re Faulk)*, 281 B.R. 15, 20 (Bankr. W.D. Okla. 2002); *Grassmueck v. Nistler (In re Nistler)*, 259 B.R. 723, 726–27 (Bankr. D. Or. 2001).

246. Compare 11 U.S.C. § 101(54) (2012) (defining “transfer” for the purposes of bankruptcy as “each mode, direct or indirect, . . . of disposing of or parting with (i) property; or (ii) an interest in property”), with I.R.C. § 6321 (2012) (extending a federal tax lien to “all property and rights to property” belonging to a delinquent taxpayer).

prepetition disclaimer under section 548, even though it would have been valid at state law.<sup>247</sup>

As a doctrinal matter, the effectiveness of prepetition disclaimers becomes especially murky in states that have adopted the Uniform Probate Code. Whereas previous versions of its disclaimer section had included the traditional phrasing that a disclaimer “relates back for all purposes,”<sup>248</sup> the current version omits this language, providing simply that “[a] disclaimer . . . is not a transfer.”<sup>249</sup> The accompanying comment suggests that the drafters considered and intended this novel phrasing as doctrinally equivalent to prior law.<sup>250</sup> And, in fact, the change has no consequences from the standpoint of state law: at common law, if a disclaimer is not a transfer, then it cannot comprise a fraudulent transfer.<sup>251</sup> But in bankruptcy, this subtle difference could make all the difference. For section 548 follows the expansive *federal* definition of transfer found in the Bankruptcy Code, preempting the Uniform Probate Code’s definition of transfer.<sup>252</sup> Without a retroactive displacement of title from the disclaiming beneficiary, a disclaimer under the Uniform Probate Code should become vulnerable to section 548. The only way around this logic is for a court to find retroactive displacement of title as implicit within Uniform Probate Code by recourse to purposive rather than textual construction. Whether courts prove willing to make this move remains to be seen; what *is* clear is that the drafters of the Uniform Probate

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247. See *Lowe v. Brajkovic (In re Brajkovic)*, 151 B.R. 402, 409–12 (Bankr. W.D. Tex. 1993), *overruled by Simpson v. Penner (In re Simpson)*, 36 F.3d 450, 453 (5th Cir. 1994) (observing that whereas the Seventh Circuit, in a previous opinion, “says that the relation back feature merely defines an interest in property, that court actually *applies* the doctrine to also eliminate the transfer . . . . [B]y doing so, state law would operate to define the transfer out of existence.” (emphasis in original)); see also *Agristor Leasing v. Dinsdale (In re Dinsdale)*, No. L-92-00669C, 1993 WL 1112064, at \*6–7 (Bankr. N.D. Iowa Sept. 19, 1993) (observing in a case not contesting the validity of a disclaimer, but instead challenging the discharge because of the disclaimer, that since “the doctrine of relation-back has one foot in the camp of ‘transfer’ and one foot in the camp of ‘property’[, t]here can be no clear resolution simply through the use of legal analysis. Policy considerations must be included in the analysis.”); *Casciato v. Stevens (In re Stevens)*, 112 B.R. 175, 176–77 (Bankr. S.D. Tex. 1989) (reaching the same result as *Lowe v. Brajkovic* and observing that “although state law is applied to determine the existence of an interest in property, federal bankruptcy law is applicable to determine if a transfer of that interest has occurred”). For another opinion recognizing the duality, in a case decided under the former Bankruptcy Act, see *Hoecker v. U.S. Bank of Boulder*, 476 F.2d 838, 842 (10th Cir. 1973) (Halloway, J., dissenting).

248. UNIF. PROBATE CODE § 2-801(c) (pre-1990 art. 2), 8 pt. 1 U.L.A. 617 (2013).

249. *Id.* § 2-1105(f) (amended 2010), 8 pt. 1 U.L.A. 391 (2013). Compare the statutory law of California, which states that a disclaimer is “not a fraudulent transfer” and also indicates that the disclaimer “relates back for all purposes.” CAL. PROB. CODE §§ 282(a)(1), 283 (West 2014).

250. UNIF. PROBATE CODE § 1105 cmt., 8 pt. 1 U.L.A. 392 (“This subsection states the effect and meaning of the traditional ‘relation back’ doctrine of prior Acts.”).

251. Hirsch, *supra* note 43, at 367–68.

252. See 11 U.S.C. § 101(54) (2012), quoted *supra* note 246.

Code failed to anticipate this ramification of their text, producing needless uncertainty—and raising the prospect of costly litigation—if and when a bankruptcy proceeding ensues.

In sum, most of the cases tried thus far suggest that state law governs prepetition disclaimers. Although the Bankruptcy Code affords the trustee a brace of weapons with which to attack fraudulent transfers—killing one bird with two stones—both hinge on the validity of an insolvent disclaimer outside of bankruptcy, in the judgment of most courts.

Most, but not all, of the cases concerning attempted postpetition disclaimers have come to a different conclusion. Irrespective of whether the postpetition disclaimer concerned pre- or postpetition inheritances, the weight of authority, including appellate authority, holds postpetition disclaimers subject to federal law, which courts read to foreclose disclaimers by debtors in bankruptcy.<sup>253</sup>

At first sight, this result appears surprising. Although neither section 544(b) nor section 548 applies to transfers that follow the petition, section 549, which becomes operative after that point, imposes equivalent restrictions on the debtor.<sup>254</sup> Under section 549, the trustee can “avoid a transfer of property of the estate that occurs after the commencement of the case.”<sup>255</sup> Courts justify a different outcome by focusing on the distinct language of section 541(a)(5), drawing postpetition inheritances back into the bankruptcy estate.<sup>256</sup> The

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253. See *Alford v. Reed*, No. 3:04-CV-0152-B, 2005 U.S. Dist. LEXIS 19024, at \*6–10 (N.D. Tex. Sept. 2, 2005) (postpetition inheritance); *In re Johnson*, No. 10-91970, 2011 WL 1884584, at \*1–2 (Bankr. CD. Ill. 2011) (postpetition disclaimer of prepetition inheritance, in Chapter 13); *In re Scott*, 385 B.R. 709, 710–12 (Bankr. D. Neb. 2008) (postpetition inheritance); *Lowe v. Sanflippo (In re Schmidt)*, 362 B.R. 318, 319–26 (Bankr. W.D. Tex. 2007) (postpetition disclaimer of prepetition inheritance); *Wolfe v. Farrior (In re Farrior)*, 344 B.R. 483, 485–86 (Bankr. W.D. Va. 2006) (postpetition inheritance); *Yellin v. Gilroy (In re Gilroy)*, 235 B.R. 512, 515–18 (Bankr. D. Mass. 1999) (postpetition inheritance) (dicta); *Williams v. Chenoweth (In re Chenoweth)*, 132 B.R. 161, 164–66 (Bankr. S.D. Ill. 1991), *aff'd*, 143 B.R. 527, 532–35 (S.D. Ill. 1992), *aff'd*, 3 F.3d 1111, 1112–13 (7th Cir. 1993) (postpetition inheritance); *Cornelius v. Cornell (In re Cornell)*, 95 B.R. 219, 220–22 (Bankr. W.D. Okla. 1989) (postpetition inheritance); *Geekie v. Watson (In re Watson)*, 65 B.R. 9, 11–12 (Bankr. C.D. Ill. 1986) (postpetition disclaimer of prepetition inheritance); *Flanigan v. Lewis (In re Lewis)*, 45 B.R. 27, 29–30 (Bankr. W.D. Mo. 1984) (postpetition inheritance). *But see Barmann v. Wood (In re Wood)*, 291 B.R. 829, 830–31 (Bankr. C.D. Ill. 2003) (holding that debtor could disclaim by virtue of state law where the disclaimer occurred postpetition, without identifying the date of the inheritance); *cf. McGraw v. Betz (In re Betz)*, 84 B.R. 470, 471–72 (Bankr. N.D. Ohio 1987) (invalidating a disclaimer of a postpetition inheritance under state law, so not needing to decide whether federal law would supersede a state law allowing the disclaimer). For cases decided under the former Bankruptcy Act, see *Mickelson v. Detlefsen (In re Detlefsen)*, 610 F.2d 512, 514–20 (8th Cir. 1979); *In re Champion*, 5 Collier Bankr. Cas. 645, 647–52 (N.D. Ga. 1975); *In re Estate of Dankner*, 384 N.Y.S.2d 683, 683–85 (Sur. Ct. 1976).

254. 11 U.S.C. § 549.

255. *Id.* § 549(a).

256. *Id.* § 541(a)(5).

provision applies to inheritances “that the debtor acquires *or becomes entitled to acquire* within 180 days” of the petition.<sup>257</sup> This language forecloses a disclaimer, courts have held, emphasizing the difference between the provision’s current phrasing and that of its analogue under the former Bankruptcy Act, which applied to any inheritance “which vests in the bankrupt.”<sup>258</sup> The fewer cases concerning postpetition disclaimers of prepetition inheritances either argue that *Drye* controls<sup>259</sup> (a doubtful proposition that other courts reject<sup>260</sup>), or assume that section 541(a)(5) also applies to prepetition inheritances which become payable postpetition<sup>261</sup> (an even more doubtful proposition, also rejected by other courts).<sup>262</sup>

The textual history of section 541(a)(5) fails to support the substantive inference that the provision precludes disclaimers. Courts have remarked that the analogous provision under the former Bankruptcy Act “does not expand the property which passes to the trustee, nor does it diminish it, it merely extends the time for which the title to property may vest in the trustee.”<sup>263</sup> The inclusion within the bankruptcy estate of inheritances the debtor becomes “entitled to acquire” as well as those that he or she “acquires,” as the current version of the provision mandates,<sup>264</sup> would not appear to modify this formula. Rather, the new language clarifies that inheritances need not become possessory within the 180-day window in order for the provision to take effect.<sup>265</sup> The words “entitled to acquire,” followed immediately

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257. *Id.* (emphasis added).

258. Bankruptcy Act § 70(a) (second paragraph) (1898) (emphasis added). For cases drawing this textual conclusion, see *Detlefsen*, 610 F.2d at 518–20 (dicta); *Scott*, 385 B.R. at 712; *Chenoweth*, 132 B.R. at 164, 166; *Jones v. Atchison* (*In re Atchison*), 101 B.R. 556, 558 (Bankr. S.D. Ill. 1989) (dicta), *aff'd*, 925 F.2d 209 (7th Cir. 1991), *cert. denied*, 502 U.S. 860 (1991); *Watson*, 65 B.R. at 12; *Lewis*, 45 B.R. at 29–30; *cf. Farrior*, 344 B.R. at 486 (asserting that the debtor “lost any right to exercise [a] disclaimer under [state] law because 11 U.S.C. § 704(a)(1), gives the trustee the duty to ‘collect and reduce to money the property of the estate,’” although that provision does not appear to affect the scope of property of the estate, and specifies a duty that must be limited thereto).

259. *Lowe v. Sanflippo* (*In re Schmidt*), 362 B.R. 318, 322–25 (Bankr. W.D. Tex. 2007).

260. See *supra* notes 245–46 and accompanying text.

261. See *Watson*, 65 B.R. at 10–11 (concerning life insurance); see also *Atchison*, 101 B.R. at 558 (deeming as “correct[ ]” the holding in *Watson*) (dicta).

262. For cases almost uniformly rejecting this theory in other contexts, see Hirsch, *supra* note 51, at 178 n.14, 180 n.17.

263. *Thornton v. Scarborough*, 348 F.2d 17, 20 (5th Cir. 1965).

264. 11 U.S.C. § 541(a)(5) (2012).

265. For a case construing the language “entitled to acquire” as crucial to resolving that a bequest made to the debtor under the will of a testator who died during the 180-day window, but where the will was not probated until after the 180-day period had expired, still flowed back into the bankruptcy estate, see *Chenoweth*, 132 B.R. at 164, *aff'd* 143 B.R. at 533, *aff'd* 3 F.3d at 1113 (observing that “[a] different interpretation . . . would gut the provision”).

by a deadline,<sup>266</sup> suggest a meaning that relates to timing, not to substance. The section nowhere mentions disclaimers.<sup>267</sup>

Congress's decision to strike the reference to *vesting* likewise carried in its train no substantive implications. The term had also appeared in several more parts of the analogous section of the former Bankruptcy Act of 1898 setting out the scope of the bankruptcy estate, and all usages of the word disappeared simultaneously from the modern section 541.<sup>268</sup> The word *vest* admits of multiple meanings: it could be read to refer to property vested in interest (in contrast to a contingent interest), or vested in possession (in contrast to a future interest), or vested in title.<sup>269</sup> By eliminating the term, Congress might have aimed to avoid ambiguity. In connection with another use of the term in the same section, the Bankruptcy Commission Report to Congress proposing the draft version of the modern Bankruptcy Code recommended striking the word *vested* “[a]s a matter of style.”<sup>270</sup> Once again, the Report never referred to disclaimers.<sup>271</sup> In its turn, the legislative history fails to explain the removal of the word *vested* and never suggests that changes in the language of section 541(a)(5) were intended to affect disclaimers. On the contrary, the legislative history indicates that section 541(a)(5) “*continues over* [from the former Bankruptcy Act] the inclusion in property of the estate of certain property acquired by the debtor within six months [of the petition], but expands the categories of covered property to include life insurance benefits and divorce or alimony settlements.”<sup>272</sup> Notably absent from this statement is any mention of disclaimed inheritances as part of the “expand[ed]” coverage of section 541(a)(5).<sup>273</sup>

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266. See *supra* text accompanying note 257.

267. See 11 U.S.C. § 541(a)(5).

268. Compare Bankruptcy Act § 70(a), 11 U.S.C. § 110(a) (1976) (repealed 1978) (first three paragraphs), with 11 U.S.C. § 541 (2012).

269. The last of these choices appears the likeliest candidate for the intended meaning of the word “vested.” An earlier part of this section of the former Bankruptcy Act refers to the trustee as “vested by operation of law with the title of the bankrupt.” Bankruptcy Act § 70(a), 11 U.S.C. § 110(a) (1976) (repealed 1978) (first paragraph); see also *id.* § 70(a)(7) (referring to “contingent remainders . . . which, within six months thereafter, become assignable interests,” not “become *vested* interests,” thereby suggesting that when the term *was* used, it was not intended to draw this distinction); *Thornton v. Scarborough*, 348 F.2d 17, 19 (5th Cir. 1965) (“We conclude that the word ‘vests’ used here [in the Bankruptcy Act] is not a word of art used in determining what kind of property interest the bankrupt acquired upon the death of his father. We think the words ‘vests in’ are synonymous with ‘is acquired by’ or ‘passes to.’”).

270. COMM’N ON THE BANKRUPTCY LAWS OF THE U.S., REPORT OF THE COMM’N ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt. II, at 149 (1973).

271. See *id.* at 147–52; see also *id.*, pt. I, at 192–95.

272. HOUSE COMM. ON THE JUDICIARY, BANKRUPTCY LAW REVISION, H.R. REP. NO. 95-595, at 176 (1977), as reprinted in 1978 U.S.C.C.A.N. 5963, 6136 (emphasis added).

273. See *id.*

In other respects, courts have failed to construe section 541(a)(5) as strengthening the trustee's powers to reach property unavailable to the trustee prior to the petition. The corpus of a testamentary spendthrift trust, for example, remains outside the bankruptcy estate, whether the trust came into existence prior to the petition or within 180 days thereafter.<sup>274</sup> To distinguish the treatment of disclaimers of property in this regard would create an anomaly within the general framework of section 541(a)(5).

Putting aside the text of the Bankruptcy Code and considering public policy in the ideal, how should we come down on the matter at hand? The first point to make here is that, although we might find cause to distinguish the treatment of disclaimers executed by a beneficiary who never enters bankruptcy from those executed by one who does, we have no reason to distinguish disclaimers by a beneficiary who enters bankruptcy on the basis of when they were executed. If bankruptcy policy dictates that federal law should apply to insolvent disclaimers (the main issue, which we have yet to entertain), then that policy is equally pertinent to all disclaimers assessed in a bankruptcy proceeding, including those executed before the petition for relief. If insolvent beneficiaries can affect the outcome by strategically timing their petitions, then they have an opportunity to thwart bankruptcy policy. What is more, strategic manipulation in itself can appear inconsistent with the equities of bankruptcy relief.

It was these concerns that prompted enactment of the 180-day window in the first place. Prior to 1938, a strict line of cleavage separated the treatment of pre- and postpetition inheritances. Any inheritance that matured after the bankruptcy petition was covered by the discharge, immune to the claims of prepetition creditors. As a result, insolvent beneficiaries could improve their position by competing in a "race with death."<sup>275</sup> They sprinted to the courthouse to file their petitions even while their loved ones were breathing their last, sometimes winning—or losing—that race by a matter of days, hours, or, in one reported instance, 75 minutes.<sup>276</sup>

Lawmakers and commentators criticized this behavior both as undermining bankruptcy policy and as an expression of bad faith.<sup>277</sup> In

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274. See 11 U.S.C. § 541(c)(1), (c)(2) (2012); *Mann v. Kreiss (In re Kreiss)*, 72 B.R. 933, 935–36, 940–42 (Bankr. E.D.N.Y. 1987).

275. William F. Adler, *Some Effects of the Chandler Act on Other Branches of the Law*, 15 U. CIN. L. REV. 429, 430 (1941).

276. *In re McKenna*, 137 F. 611, 611 (N.D.N.Y. 1905). For more such cases, see Hirsch, *supra* note 51, at 177 n.8.

277. See, e.g., HOUSE COMM. ON THE JUDICIARY, 74TH CONG., ANALYSIS OF H.R. 12889, 226 n.4 (Comm. Print 1936) (describing accelerated petitions by inheriting debtors as "an abuse" and



response, Congress amended the Bankruptcy Act in 1938 to capture postpetition inheritances.<sup>278</sup> Yet, the emerging rule distinguishing disclaimers of inheritances that arrive pre- and postpetition is today restoring just such an opportunity for manipulative timing. Now, however, the strategy operates in reverse: after becoming hopelessly insolvent, beneficiaries must stave off bankruptcy until *after* the death of their benefactor. If the death occurs before bankruptcy, beneficiaries can take advantage of state rules of disclaimer that cease to operate if the death follows bankruptcy. Of course, creditors can force debtors into bankruptcy sooner than they would like by bringing an involuntary petition.<sup>279</sup> In theory, at least, manipulative timing is a game that two can play. But in practice, few creditors possess the knowledge necessary to manipulate the date of a petition relative to an anticipated inheritance, about which they are likely to remain ignorant.

Evidence of manipulative timing is already beginning to emerge in the published cases.<sup>280</sup> In at least four instances since the turn of this century, petitions for bankruptcy relief have followed within days of disclaimers by the petitioning debtors.<sup>281</sup> Although arguably less shameful than the old “race with death,”<sup>282</sup> artful postponement of petitions until after the coast is clear appears equally objectionable for the same reasons.<sup>283</sup> Yet bankruptcy law is ultimately to blame for creating the opportunity. Were lawmakers to reinterpret or revise the Bankruptcy Code to apply a single, consistent rule to insolvent disclaimer irrespective of when one occurs, procrastination by debtors would become pointless. To accomplish this result, lawmakers need to

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“virtually a fraud upon the [Bankruptcy] Act” which “should be discouraged”); *Woodson v. Fireman’s Fund Ins. Co.* (*In re Woodson*), 839 F.2d 610, 619 (9th Cir. 1988) (indicating that the 180-day window served to “[prevent] debtors from manipulating the bankruptcy date so as to deprive creditors of certain assets”); *Bank of Elberton v. Swift*, 268 F. 305, 307–08 (5th Cir. 1920) (condemning accelerated petitions as “an attempt to violate [the Bankruptcy Act’s] spirit and to use the process of the court to perpetrate a fraud”); Louis D. Gage, Jr., Note, 1947 WIS. L. REV. 398, 399 (describing the 180-day window as thwarting debtors who were “acting in bad faith” to “use the bankruptcy act as a means of evading payment of debts”). For a further discussion, see Hirsch, *supra* note 51, at 223–35.

278. This change, along with a number of other bankruptcy reforms, was ushered in by the Chandler Act of 1938. See Hirsch, *supra* note 51, at 177 nn.10–11.

279. 11 U.S.C. § 303.

280. One court anticipated the strategy. See *Mickelson v. Detlefsen* (*In re Detlefsen*), 610 F.2d 512, 517 n.15 (8th Cir. 1979).

281. *Simpson v. Penner* (*In re Simpson*), 36 F.3d 450, 451 (5th Cir. 1994) (petition followed one day after disclaimer); *Cassel v. Kolb*, 267 B.R. 861, 863 (N.D. Cal. 2001), *rev’d sub nom.* *In re Kolb*, 326 F.3d 1030, 1034 (9th Cir. 2003) (petition followed three days after disclaimer); *Faulk v. Bank of Okla.* (*In re Faulk*), 281 B.R. 15, 17 (Bankr. W.D. Okla. 2002) (petition followed one day after disclaimer); *In re Kloubec*, 247 B.R. 246, 250 (Bankr. N.D. Iowa 2000) (same).

282. See *supra* note 275.

283. See *supra* note 277 and accompanying text.

coordinate sections 548 and 541(a)(5) so that they operate seamlessly, observing either state law or a federal rule of insolvent disclaimer. If federal lawmakers choose to bar insolvent disclaimers, then the two-year reachback of section 548<sup>284</sup> would leave creditors ample time either to discover a disclaimer and bring an involuntary petition or simply to threaten one in the ordinary course of enforcing their claims. Debtors who saw the handwriting on the wall would have no reason to persist in seeking to delay bankruptcy.

The question remains: Should the rules of insolvent disclaimer (whenever executed) change in a federal bankruptcy proceeding and, assuming so, what should those rules become?

In exploring this problem, we begin with the general proposition that rights of debtors and creditors at state law should extend into bankruptcy. This principle has crystallized into an interpretive presumption for provisions of the Bankruptcy Code.<sup>285</sup> It follows from the understanding that either creditors' individual remedies at state law or their collective remedies in bankruptcy may prove more efficient in any given case; accordingly, lawmakers seek to encourage parties to choose bankruptcy only when it will minimize the total cost of winding up a particular debtor's affairs. Parties have that incentive if the value of their rights in or out of bankruptcy remains unaltered. But if the values of those rights change in bankruptcy, parties gain an incentive either to enter, or to avoid entering, bankruptcy in order to take advantage of rule disparities, even if the costs of legal process rise as a consequence.<sup>286</sup>

Nevertheless, this principle has limits. Courts are careful to add that, if sufficient reason exists, entitlements in bankruptcy can deviate from those created by state law, even though bankruptcy will thereby become a greener doctrinal pasture either for the debtor or for creditors (or for particular classes of creditors, competing inter se). "[T]here is no reason why . . . interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding," the U.S. Supreme Court has opined, "[u]nless some federal interest requires a different result."<sup>287</sup> That interest must be something concrete, the Court continued, not just "undefined considerations of equity."<sup>288</sup>

Do any federal interests appear in connection with the law of insolvent disclaimers in bankruptcy? Here, the entitlements of federal

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284. 11 U.S.C. § 548(a)(1).

285. *Patterson v. Shumate*, 504 U.S. 753, 764 (1992); *Butner v. United States*, 440 U.S. 48, 55 (1979).

286. For a discussion, see JACKSON, *supra* note 227, at 21–27, 57–67.

287. *Butner*, 440 U.S. at 55 (emphasis added).

288. *Id.* at 56.

creditors are not at stake—we have already dealt with those entitlements.<sup>289</sup> Conceivably, the distinctive remedial apparatus of bankruptcy might suggest the utility of a federal rule of disclaimers as concomitant to that apparatus. Alternatively, lawmakers might perceive a federal interest in law reform, grounded either in some structural infirmity of decentralized rules of insolvent disclaimer or in some specific, concrete failure of state rules of disclaimer to do justice. Let us consider each of these possibilities in turn, in search of a viable candidate for federal intervention.

So far as the distinctive remedy of bankruptcy is concerned, it is not enough to say, as one court has, that the “philosophical premises” of bankruptcy make an insolvent disclaimer’s “admitted effect of thwarting creditors . . . completely contrary to the spirit and philosophy of the Bankruptcy Code.”<sup>290</sup> Bankruptcy’s *raison d’être* is not to enhance creditors’ rights; in fact, the U.S. Supreme Court prefers to construe the Bankruptcy Code “to minimize[ ] the possibility” that creditors will use its provisions “to gain access to otherwise inaccessible funds” at state law.<sup>291</sup>

At the same time, the discharge in bankruptcy creates a substantial asymmetry between state and federal law, advancing the interests of debtors by granting them a “fresh start.”<sup>292</sup> Lawmakers could judge a debtor’s opportunity to disclaim inheritances as inconsistent with the policy underlying the discharge. Were they to draw that conclusion, federal lawmakers would have reason to “bundle” a rule avoiding insolvent disclaimers together with the rule of discharge.<sup>293</sup> Debtors selecting between the remedies available in bankruptcy and at state law could choose either to take both rules together or to make do with neither.<sup>294</sup>

In order to evaluate this hypothesis, we have to consider what function the discharge serves. Economic theory holds that the discharge operates to mitigate the social costs of insolvency. Without a fresh start,

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289. *See supra* Part III.A.

290. *Agristor Leasing v. Dinsdale (In re Dinsdale)*, No. L-92-00669C, 1993 WL 1112064, at \*8 (Bankr. N.D. Iowa Sept. 19, 1993) (denying a discharge to a disclaiming debtor, rather than avoiding the debtor’s disclaimer).

291. *Patterson v. Shumate*, 504 U.S. 753, 764 (1992).

292. 11 U.S.C. § 524 (2012).

293. *See supra* note 38.

294. Alternatively, debtors’ insolvent disclaimers could stand, but a bankruptcy court could deny them a discharge by virtue of their conduct. *See* 11 U.S.C. § 727(a)(2). On petition of trustees, several courts have taken this approach. *In re Dinsdale*, 1993 WL 1112064, at \*11; *Nashville City Bank & Trust Co. v. Peery (In re Peery)*, 40 B.R. 811, 816 (Bankr. M.D. Tenn. 1984). *But see Laughlin v. Nouveau Body & Tan, L.L.C. (In re Laughlin)*, 602 F.3d 417, 430 (5th Cir. 2010) (granting a discharge despite a prepetition disclaimer).

debtors who become hopelessly insolvent would lose their incentive to produce, preferring instead to consume leisure and state-supplied welfare benefits (which are exempt from levy), knowing that creditors would seize funds a debtor earned to satisfy their claims. That harms both debtors' families and society at large.<sup>295</sup> The public interest in avoiding that injury justifies the discharge of debts in bankruptcy.

On first glance, debtors who might wish to exercise a right of insolvent disclaimer appear in less need of a discharge. If their inheritances are large enough to lift them out of insolvency, debtors will regain their incentive to seek gainful employment. By avoiding insolvent disclaimers in bankruptcy, lawmakers could ostensibly minimize the number of cases where a discharge becomes necessary. But this analysis ignores the *ex ante* implications of such a rule; lawmakers must bear in mind that everything is tentative where expectancies are concerned. If a benefactor realizes that an insolvent beneficiary will have no right to disclaim in bankruptcy, then ordinarily the benefactor will revoke whatever bequest he or she had planned to make to that beneficiary.<sup>296</sup> The upshot is that the debtor will still need a fresh start to become productive. At the same time, if lawmakers allowed an insolvent beneficiary to disclaim in bankruptcy, prompting the benefactor to leave a bequest unchanged, and if the beneficiary thereafter exercised a right of disclaimer, then he or she would again need a fresh start. In other words, a debtor's need for a discharge proves, on reflection, to be independent of the rules of insolvent disclaimer. On that basis, lawmakers can reasonably decouple those rules from access to the discharge. Those few courts that have spoken to this issue of policy have drawn the same conclusion.<sup>297</sup>

Considered in structural terms, resort to state rules of disclaimer in bankruptcy could comprise an affirmative virtue. By drawing on an already developed body of rules, federal lawmakers could potentially spare themselves the effort of crafting rules on their own

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295. For references to judicial and scholarly discussions, and to instances noted in the case law where insolvent debtors have quit their jobs, see Hirsch, *supra* note 51, at 206–10.

296. See *supra* text accompanying note 53. This assumption depends, obviously, on knowledge and vigilance, which is not always present. See *supra* text accompanying notes 115–16. But a rule barring insolvent disclaimer creates an incentive for benefactors to check on their beneficiaries' financial health and to update their estate plans diligently.

297. See *In re Laughlin*, 602 F.3d at 426 n.9 (concluding without analysis that no “generic ‘federal interests’ in bankruptcy or discharge preclude deference to state property law here”); *Mickelson v. Detlefsen (In re Detlefsen)*, 610 F.2d 512, 519–20 (8th Cir. 1979) (observing that where a disclaiming debtor “is in any case *himself* kept from benefiting[,]” no “fraud upon the act [i.e., upon the grant of discharge]” occurs, and noting further that if a disclaimer is collusive, then it is void under state law and hence also in bankruptcy (internal quotation marks omitted) (emphasis in original)).

and, in the bargain, clarify this area of federal law more rapidly.<sup>298</sup> In bankruptcy, as in connection with tax liens, the efficiency of interstitial lawmaking with respect to the *general* rules of disclaimer is clear.<sup>299</sup> But as concerns the key issue of insolvent disclaimer, *one single element* of the law of disclaimers, the benefits of free riding become insignificant. As of now, in fact, many states lack a clear rule of insolvent disclaimer.<sup>300</sup> It is entirely possible that federal lawmakers could clarify this pocket of law more rapidly by making rules on their own than by borrowing them<sup>301</sup>—although that outcome remains uncertain and hardly qualifies as a compelling justification for federalizing the law of insolvent disclaimers in bankruptcy.

Still another consideration is that rules developed at the state level might betray some structural infirmity that federal bankruptcy law ought to be concerned about. State rules in this segment of disclaimer law—as in many others—vary from jurisdiction to jurisdiction. It could happen that the respective rules in effect in the state of the benefactor, the beneficiary, and the several creditors could differ from one another. But this fact causes no conflicts problem in connection with disclaimer law. As we have already observed, the universal conflicts rule is that the law of the domicile of the benefactor at the time of his or her death governs disclaimers of property distributed out of the benefactor's probate estate.<sup>302</sup> Accordingly, no choice-of-law issue can arise if lawmakers import state laws of disclaimer into bankruptcy proceedings.

Another danger is that special interest groups might seek to capture local laws of insolvent disclaimer.<sup>303</sup> Although better-organized creditors could have that opportunity, evidence fails to indicate that they have exerted influence over these laws: insolvent disclaimer remains possible in a majority of states where the rule is clear.<sup>304</sup> As a matter of political *vérité*, this fact might suggest that creditors care little about these rules—perhaps because they do not rely on prospects of inheritance when they extend credit to debtors.<sup>305</sup>

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298. See *supra* text accompanying notes 30–32.

299. See *supra* p. 1882.

300. Hirsch, *Revisions*, *supra* note 60, at 155.

301. See *Milens v. Bostian*, 139 F.2d 282, 284 (8th Cir. 1943) (finding the validity of a disclaimer in bankruptcy to be unclear because the issue was governed by state law and the state law of insolvent disclaimer was unsettled). See also *supra* text accompanying notes 13, 30–32.

302. See *supra* note 174.

303. See *supra* notes 15–16, 22, and accompanying text.

304. See Hirsch, *supra* note 44, at 592–601; Hirsch, *Revisions*, *supra* note 60, at 154–55.

305. See *supra* note 45.

In the absence of lobbying by creditors, state lawmakers might be tempted to make their jurisdictions friendly to debtors as a means of attracting debtors' assets to their states.<sup>306</sup> That has happened before: it is no coincidence that Delaware was one of the first states to give effect to self-settled spendthrift trusts,<sup>307</sup> and Delawareans have been remarkably frank about their ambitions to transform their state into a trust haven.<sup>308</sup> Nor is Delaware the first state to veer down such a path. Long before Delaware got into the game, Rhode Island was known to citizens of other states as "Rogue's Island."<sup>309</sup> But no race to the bottom can unfold in connection with disclaimer law because debtor-beneficiaries do not control the choice of law. The applicable law depends on the domicile of the benefactor, and the benefactor does not need to rely on disclaimer law to protect his or her assets. If he or she knows that an insolvent beneficiary will be unable to disclaim a bequest, then the benefactor can disinherit the beneficiary altogether.

That leaves the possibility of using bankruptcy law simply to exercise quality control over state law, which may lack the technical virtuosity of federal law.<sup>310</sup> Such an exercise should not be, and is not, a customary practice in a system where lawmakers wish to maintain a rough parity of entitlements between state and federal law so that parties have an incentive to enter bankruptcy only because it is the more efficient means of winding up a debtor's affairs.<sup>311</sup> But in some other areas of bankruptcy law, where federal lawmakers have found state entitlements so ill-considered as fairly to cry out for reform, lawmakers have gone ahead and modified them.<sup>312</sup> Federal bankruptcy law respects state entitlements only so long as they are "reasonable," in

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306. See *supra* note 17 and accompanying text.

307. See Hirsch, *supra* note 17, at 2685 n.1.

308. The legislative history of Delaware's self-settled spendthrift trust statute submits that the rationale for this item of legislation was "to maintain Delaware's role as the most favored domestic jurisdiction for the establishment of trusts." H.B. 356, 139th Gen. Assemb., 1st Sess. (Del. 1997) (synopsis).

309. The sobriquet derived from the state's "unorthodox views toward government, which held that government existed to facilitate (by fraudulent means if necessary) the business activities of its citizens." FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 175 (1985). And six jurisdictions today—Delaware not among them—have established themselves as homestead havens, with an unlimited homestead deduction. Robert J. Landry, III, *An Empirical Analysis of the Causes of Consumer Bankruptcy: Will Bankruptcy Reform Really Change Anything?*, 3 *RUTGERS BUS. L.J.* 2, 6 n.41 (2006).

310. See *supra* note 14 and accompanying text.

311. See *supra* text accompanying notes 285–86.

312. See, e.g., 11 U.S.C. § 544(a) (2012) (invalidating, in bankruptcy, unrecorded liens that are effective at state law). This provision, known appropriately as the strong arm clause, "is motivated by an antipathy towards secret liens." TABB, *supra* note 227, § 6.3, at 472. See also 11 U.S.C. § 548(e) (extending to ten years the reachback period for challenging self-settled spendthrift trusts as fraudulent transfers in bankruptcy).

the words of one court.<sup>313</sup> The same is true of other areas of federal law that import state rules into their interstices.<sup>314</sup>

Do state rules of insolvent disclaimer offend the standards of reasonability? For the most part, they do not. The varying rules appear responsive neither to local socioeconomic needs nor to local cultural values.<sup>315</sup> What the rules do reflect is a good-faith effort to make sound policy where the better approach is unclear and remains a point of academic debate.<sup>316</sup>

But in one instance, with regard to one discrete problem, a state rule of insolvent disclaimer has become unreasonable. Dangerously, the rule in question is embedded within the uniform acts, where—like a defective gene—it can spread unthinkingly to a growing number of states.

The problem arises in connection with disclaimers of joint interests. The traditional rule found in every non-uniform jurisdiction, as well as in all previous iterations of the Uniform Probate Code, and in the federal tax code, is that when a joint tenant dies, the survivor can disclaim his or her accretive share of the joint interest.<sup>317</sup> This rule make obvious sense: the accretive share is what the survivor gains, that is, the part of the joint tenancy in which the survivor now holds a proprietary interest, which he or she did not hold prior to the decedent joint tenant's death. "Disclaimer only applies to property which passes upon death to the disclaimant, not to property owned by the disclaimant prior to the death."<sup>318</sup>

As revised in 2002, however, the Uniform Probate Code adopts a rule all its own for disclaimers of joint interests. Under this rule, in a two-party joint interest the survivor can disclaim either the accretive share or one half of the joint interest, *whichever is greater*.<sup>319</sup> Thus,

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313. *Glosband v. Watts Detective Agency, Inc.*, 21 B.R. 963, 971 (D. Mass. 1981).

314. *See, e.g., De Sylva v. Ballentine*, 351 U.S. 570, 580–81 (1956) (observing, in connection with the incorporation of state law definitions into the text of the federal Copyright Act, "This does not mean that a State would be entitled to use the word 'children' in a way entirely strange to those familiar with its ordinary usage").

315. *See supra* text accompanying notes 23–24.

316. *See generally* Hirsch, *supra* note 44. The issue was much debated by the Uniform Law Commissioners when they most recently revised their treatment of disclaimers within the uniform acts. *See* Hirsch, *Revisions, supra* note 60, at 158–61 (citing to the plenary discussions of the Uniform Disclaimer of Property Interests Act of 1999).

317. *E.g.,* WIS. STAT. § 854.13(2)(b) (2014); *In re Estate of Kirk*, 591 N.W.2d 630, 635 (Iowa 1999). The tax code makes one exception, noted hereinafter. *See infra* note 321 and accompanying text.

318. *Kirk*, 591 N.W.2d at 635.

319. UNIF. PROBATE CODE § 2-1107(a) (amended 2010), 8 pt. 1, U.L.A. 398 (2013). This rule was first promulgated under the freestanding Uniform Disclaimer of Property Interests Act of

under the Uniform Probate Code, a surviving joint tenant is not limited to disclaiming his or her accretive share—the survivor can potentially disclaim property that he or she owned already.<sup>320</sup> As the legislative history makes clear, the commissioners added this wrinkle in order to take account of a tax opportunity open only to surviving joint tenants of *real property* who happen also to be *noncitizen spouses*, carving out an exception from the usual tax rule that a surviving joint tenant can make a qualified disclaimer limited to his or her accretive share.<sup>321</sup> For simplicity's sake, the drafters decided to turn what could have appeared as a special exception into a general rule,<sup>322</sup> not realizing that another section of the Uniform Probate Code functioned to make the intended exception,<sup>323</sup> and also without considering the section's implications for the rights of debtors and creditors.<sup>324</sup>

From the perspective of debtor-creditor law, the rule creates an undesirable planning opportunity.<sup>325</sup> An insolvent debtor residing in any state can conspire with a terminally ill person who is domiciled in a state where the Uniform Probate Code rule operates, and who can receive a fee for his or her services, to effect what is functionally a fraudulent transfer. The two begin by opening a joint bank account. The terminally ill person deposits nothing into it, while the insolvent debtor deposits all of his or her remaining liquidated wealth.<sup>326</sup> The terminally

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1999, which was grafted in its entirety into the Uniform Probate Code in 2002. UNIF. DISCLAIMER OF PROP. INTERESTS ACT § 7(a) (amended 2010), 8A U.L.A. 174 (2003).

320. When the joint interest is held by more than two persons, the distortion becomes even greater under the formula set out in the Uniform Probate Code. In this respect, the Uniform Probate Code's formula resulted from an eleventh-hour amendment that had stemmed from an interpretive error made during the plenary debates over the provision and initiated from the floor rather than by the drafters. For a discussion of this aspect of the provision and its legislative history, see Hirsch, *supra* note 206, at 38.

321. For the tax rule and a discussion of the legislative history and policy underlying this provision of the Uniform Probate Code, see Hirsch, *supra* note 43, at 339–41.

322. *See id.* at 341 (quoting the Reporter's defense of the provision).

323. *See* UNIF. PROBATE CODE § 2-1114, 8 pt. 1, U.L.A. 409 (giving substantive effect to any disclaimer that is "qualified" under the federal tax code). For a further discussion, see Hirsch, *supra* note 43, at 340–41. Possibly the drafters' failure to perceive the redundancy of the joint-interest provision stemmed from the fact that it was formulated *before* section 2-1114 was added to the draft. *See id.* The legislative history contains no evidence that the drafters ever doubled back to assess the interconnection between the two sections. Sometimes, the order in which rules materialize matters!

324. Those rights were never mentioned, let alone examined, anywhere in the legislative history. *See* Hirsch, *supra* note 43, at 341–42.

325. For a fuller discussion, see Adam J. Hirsch, *The Uniform Acts' Loophole in Fraudulent Conveyance Law*, EST. PLAN., Dec. 2007, at 20.

326. The debtor's deposit to the bank account should not qualify as a transfer because the depositor continues to hold a proprietary interest in the deposited funds. *See* Crawford v. Crawford (*In re* Crawford), 172 B.R. 365, 367 (Bankr. M.D. Fla. 1994) ("[T]he term 'transfer' . . . is intended to cover any transaction whereby a transferee [sic] divested himself or herself . . . [of]



ill person executes a will leaving his or her interest in the joint account (which is zero<sup>327</sup>) to beneficiaries selected by the insolvent debtor. When the terminally ill person dies soon thereafter, the insolvent debtor can disclaim half of the joint account as a surviving joint tenant, *even though he or she had a proprietary interest in all of those funds prior to the death of the decedent joint tenant*. Although the gimmick itself is collusive, the disclaimer is not.<sup>328</sup> And under the Uniform Probate Code a disclaimer is never a “transfer.”<sup>329</sup> Creditors cannot undo the disclaimer, even though they could otherwise avoid any transfer of the debtor’s own funds as a simple case of constructive fraud.<sup>330</sup>

That the drafters allowed such a glitch to creep into the Uniform Probate Code is not so surprising. Legal expertise tends to be narrow; when uniform trusts-and-estates acts have ramifications that spill over into other fields, such as creditors’ rights, the risk of error rises.<sup>331</sup>

property . . .”); *Bascom/Magnotta, Inc. v. Magnotta*, No. X04CV044034706S, 2008 WL 283264, at \*12 (Conn. Super. Ct. Jan. 17, 2008) (noting but not addressing the proposition that “there was no transfer, fraudulent or otherwise, . . . because the ownership interest is retained in the owner of an account”); *Brodzinski v. Pulek*, 174 A.2d 907, 912 (N.J. Super. Ct. Ch. Div. 1961) (observing that “the creation of the joint tenancy was not a ‘conveyance’ within the purview of [fraudulent conveyance law]”). By comparison, where a debtor deposits individual funds into an entireties account, which creditors cannot reach under state law, a court can hold the deposit fraudulent. *Corbett v. Hunter*, 436 A.2d 1036, 1037–38 (Pa. Super. Ct. 1981).

327. *See supra* note 85 and accompanying text.

328. *See supra* note 120 and accompanying text.

329. UNIF. PROBATE CODE § 2-1105(f) (amended 2010), 8 pt. 1 U.L.A. 391 (2013).

330. *See* UNIF. VOIDABLE TRANSACTIONS ACT (amended 2014) § 5(a), 7A pt. 2 U.L.A. 129 (2006) (originally UNIF. FRAUDULENT TRANSFER ACT (1984) § 5(a)).

331. Less pardonable has been the studied indifference of the Joint Editorial Board for Uniform Trusts and Estates Acts, which is charged with monitoring these products and with recommending revisions as the need arises—or becomes apparent *ex post facto*. The Joint Editorial Board has acknowledged the glitch (brought to light in a previous publication, *see Hirsch, supra* note 325) but has declined to correct it, concluding—on a wing and a prayer—that the likelihood of its exploitation, although “possible,” is “extremely remote.” Memorandum from Thomas Gallanis to the Joint Editorial Bd. for Unif. Trusts and Estate Acts 4 (Mar. 31, 2007) (on file with author) (minutes of the Joint Editorial Board spring meeting, 2007). On this basis, the Joint Editorial Board concluded that “the topic should be kept on file for consideration when, at a future time, the Act is ready for a comprehensive revision.” *Id.* This decision comes despite the fact that the provision furthers no public policy. *See Hirsch, supra* note 43, at 340–42, 344–45. But again, the Joint Editorial Board’s position may simply reflect a poor understanding of debtor-creditor law—as if the scope of activities that comprise fraudulent transfers should depend upon the probability that such activities will occur! Nor is the Board’s optimism about debtors’ propensities to exploit the glitch warranted: history shows that debtors often go to heroic lengths to avoid satisfying creditors’ claims. *See, e.g., SEC v. Solow*, 682 F. Supp. 2d 1312, 1315–18, 1327–35 (S.D. Fla. 2010) (ordering the incarceration for civil contempt of a debtor who deposited assets into a foreign trust and self-created conditions making repatriation of those assets impossible). By comparison, commentators anticipate that some taxpayers will exploit an opportunity (which Congress had sought imperfectly to thwart) to avoid gratuitous transfer taxes under new portability rules by serially marrying terminally ill individuals, which commentators have dubbed the “black-widow” strategy. *See, e.g., Paul A. Silver, Minimizing the Costs of the Client’s Testamentary Goals:*

Surely, though, a state rule (currently found in eleven jurisdictions<sup>332</sup>) that upends over four-hundred years of fraudulent transfer law qualifies as “[un]reasonable.”<sup>333</sup> So long as federal courts override the Uniform Probate Code’s reconceptualization of state-law rights in jointly held property upon disclaimer, creditors will have the wherewithal to defeat the gimmick by bringing involuntary petitions against debtors and then by challenging prepetition disclaimers as *federally defined* fraudulent transfers within the forum of a bankruptcy proceeding. This issue has yet to arise, however, and it remains unresolved even by lower bankruptcy courts.

In fact, under the circumstances, federal lawmakers might consider going further: Congress could enact legislation to override this provision of the Uniform Probate Code both in and out of bankruptcy.<sup>334</sup> The difference is largely cosmetic because creditors would be able to avoid these disclaimers in any event by bringing debtors who execute them into bankruptcy involuntarily.<sup>335</sup> And this less intrusive alternative might better suit the sensitivities of local lawmakers, who might resent a direct incursion upon “the legitimate and traditional interest which the State has in creating and defining the property interest of its citizens.”<sup>336</sup> Under these conditions, *indirect* preemption by dint of a forum selection opportunity holds some appeal.<sup>337</sup>

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*Incorporating Flexibility and Savings into Your Estate Planning Strategies*, in BEST PRACTICES FOR STRUCTURING TRUSTS AND ESTATES 7, 10 (2014). Should we expect debtors to have greater qualms about (merely) establishing joint bank accounts with terminally ill persons? Over a third of the states that enacted the revised Uniform Probate Code sections on disclaimers have prudently modified the flawed provision to eliminate the glitch. See *infra* note 332 and accompanying text. The risk remains that insolvent debtors *anywhere* can still exploit the glitch by locating a willing collaborator in one of the remaining eleven states that has adopted the flawed provision without modification, because the rules of disclaimer that apply are those of the domicile of the decedent joint interest holder. See *supra* note 174 and accompanying text.

332. These are: Alaska, Arizona, Arkansas, Hawaii, Maryland, Nevada, New Mexico, North Dakota, Oregon, Virginia, and West Virginia. Six other jurisdictions that have adopted the Uniform Probate Code’s provisions on disclaimers have corrected the glitch by substituting either formulas or language that confine surviving joint tenants to disclaiming their accretive shares: Colorado, Delaware, Florida, Indiana, Iowa, and Minnesota. See Hirsch, *supra* note 43, at 327, 344–45.

333. See *supra* note 313 and accompanying text. Modern fraudulent conveyances law took shape as early as 1571, with the passage of the British Fraudulent Conveyances Act of 13 Elizabeth. 1571, 13 Eliz., c. 5 (Eng.).

334. See Theodore Eisenberg, *Bankruptcy Law in Perspective*, 28 UCLA L. REV. 953, 971–76 (1981) (arguing that Congress should take this approach to issues of law reform that do not relate exclusively to bankruptcy proceedings). Such legislation would almost certainly pass constitutional muster; Congress already regulates other aspects of debtor-creditor law. *E.g.*, Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692, 1692a–o (2012).

335. 11 U.S.C. § 303.

336. *Aquilino v. United States*, 363 U.S. 509, 514 (1960).

337. See *supra* text accompanying note 37.

## VI. CONCLUSION

All told, the federal law of disclaimers remains unsettled. In only one of the four spheres that we have reviewed has the U.S. Supreme Court undertaken to clarify congressional silence or ambiguity on the matter. And even in that instance—where the Court weighed the effectiveness of a disclaimer against a federal tax lien in *Drye*—the Court’s opinion is poorly structured, leaving matters that the Justices sought to resolve unresolved.<sup>338</sup> Upon inspection, as we have observed, there is less to that opinion than meets the eye.<sup>339</sup>

Grant Gilmore once described “the preponderant role played by the states as architects of our private law” as giving way to “[t]he federal giant . . . just beginning to stir: with his long-delayed entrance, we are, it may be,” Gilmore speculated, “at last catching sight of the principal character.”<sup>340</sup> At least within the arena of trusts and estates, that giant has slumbered for a long time, and he has yet to throw his weight around in a big way, so to speak. Within the still narrower arena of disclaimers, he is also just starting to make his presence felt, and he has not picked the occasion to put his foot down. Federal law can play a constructive role in the realm of disclaimers, although the problems presented are not monolithic, as this Article has endeavored to show. In fact, a reflective giant zeroing in on disclaimers will need to put his foot down not once, but three times.

Where a direct federal interest is involved, federal lawmakers have reason to protect that interest. They cannot count on state lawmakers to do so on their behalf, *except* where institutions have been structured to make federal and state interests coincide. By comparison, where federal regulation over a particular species of property is involved, federal lawmakers need to integrate disclaimer law into that regulatory scheme so far as necessity requires. Finally, where a federal proceeding covers all kinds of property, federal lawmakers can take the opportunity to compensate for the failings of state law, offering an improved version of the rules of disclaimer made available to parties within the federal forum. The calculus underlying each of these exercises in lawmaking is distinct and demands no synchronized response; federal lawmakers must take care not to confuse one problem with another.

The federal *laws* of disclaimer is not an oxymoron.

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

339. *See supra* text accompanying notes 109–13.

340. Grant Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037, 1046 (1961).