Yours, Mine, or Ours: A Proposal for Sensible Reform of the Massachusetts Tenancy-by-the-Entirety Statute

“They were born at a time when the Renaissance was barely gestating, when a flat earth was the center of the universe, and when kings were divine . . . . Yet the relics of property law persist.”

I. INTRODUCTION

Modern concepts of property ownership are deeply rooted in centuries of Anglo-American jurisprudence. The earliest form of concurrent property ownership—joint tenancy—dates back to the early thirteenth century; from the first references, joint tenancy included the hallmarks of the modern estate: undivided interest in the entire estate and the right of survivorship. By the fourteenth century, English law recognized that husbands and wives could hold property in a special manner—distinct from a joint tenancy—while still including the right of survivorship and an undivided interest in the whole.

Early Massachusetts case law held that a tenancy by the entirety was distinct from a joint tenancy, because of the unity of husband and wife as one legal person. While both husband and wife held legal title to the property, the husband had almost complete control over the land, save for the wife’s indestructible right of survivorship. In the latter part of the nineteenth century, a paradigm shift in the United States brought about the enactment of Married

2. See WILLIAM F. WALSH, A HISTORY OF ANGLO-AMERICAN LAW § 115, at 211 (2d. ed. 1932) (chronicling origin and development of joint tenancies).
3. See Carrozzo, supra note 1, at 432-33 (discussing early history and attributes of joint tenancies).
4. See id. at 436-37 (chronicling early references to marital property). The first English case to reference property owned by a married couple as being something distinct occurred in 1327. See id. at 435-36. It was not until 1783 that Blackstone used the word “entirety” to describe the marital estate. See id. at 437 nn.153-54. See generally John D. Johnston, Jr., Sex and Property: The Common Law Tradition, the Law School Curriculum, and Developments Toward Equality, 47 N.Y.U. L. REV. 1033, 1083-89 (1972) (discussing history concerning gender inequality of tenancies by the entirety).
5. See Shaw v. Hearsey, 5 Mass. 521, 522-23 (1809) (distinguishing tenancies by the entirety from joint tenancies).
6. See J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 395-96 (2d ed. 1979) (describing unity of person in marriage at common law). At common law, husbands had superior rights over their wives due to the unification of husband and wife that occurred upon marriage. See id. This legal fiction arose from women’s societal inferiority, and while not completely accurate, the husband did have sole control of the property. See id. at 395.
Women’s Property Acts in all common-law jurisdictions. 7 In 1886, the
Massachusetts Supreme Judicial Court (SJC) held that the new rights granted to
women under the Massachusetts Married Women’s Property Act did not apply
to property held as tenants by the entirety. 8 As late as 1976, courts in
Massachusetts recognized the superior rights of the husband in controlling
marital property. 9

Massachusetts has since removed the gendered language from the tenancy-
by-the-entirety statute. 10 While Massachusetts granted greater rights to the
wife, it failed to offer the protections that other reforms of the same period did—the protection of one spouse from encumbrances entered into by the other
spouse without his or her consent. 11 While the statutory language is silent as to
whether spousal consent is required for mortgages, the SJC has held that either
spouse can grant a mortgage on property held as tenants by the entirety. 12 In
the case of default, protection for the nondebtor spouse is limited to a
prohibition on forced partition and sale, so long as the property in question
remains his or her principal residence. 13

Part II.A of this Note will discuss the development of concurrent
ownership. 14 Part II.B will cover the early rise of women’s property rights and
the effect of the Married Women’s Property Acts. 15 Part II.C will discuss
tenancy by the entirety in Massachusetts in the latter half of the twentieth
century. 16 Part II.D will explore the revisions to tenancy-by-the-entirety
statutes in the second half of the twentieth century in Massachusetts. 17 Part II.E

7. See Jesse Dukeminier et al., Property 361 (7th ed. 2010) (discussing Married Women’s Property
Acts). Mississippi set precedent by becoming the first state to pass a Married Women’s Property Act in 1839.
See id. These acts allowed married women to retain the rights of property ownership that they had while
single; however, women generally did not have substantial earnings during this period. See id.
8. See Pray v. Stebbin, 4 N.E. 824, 825 (Mass. 1886) (holding Married Women’s Property Act had no
effect on tenancy by the entirety).
lifetime has paramount rights in the property.”). The court found that because the state did not force married
couples to hold property in a tenancy by the entirety, the inherent gender inequalities in the statute were not a
violation of the wife’s Fourteenth Amendment rights to equal protection and due process. See id. at 1382.
Massachusetts law). The new statute became effective in 1980 and was a significant departure from the prior
statutory change). The appeals court also held that the new statute did not apply to tenancies by the entirety
created prior to February 11, 1980. See id.
Ann. § 39-13.6 (West 2013) (prohibiting granting of mortgage without both spouses’ consent).
1, does not prohibit one spouse from encumbering his or her interest in entitleies property”).
13. See id. at 654 (stating principal-residence exception).
14. See infra Part II.A (discussing history and development of tenancy by the entirety).
15. See infra Part II.B.
16. See infra Part II.C.
17. See infra Part II.D.
will explore the federally imposed limits on tenancies by the entirety. Part II.F will discuss the approaches taken by other states. Part III will propose statutory changes aimed at protecting the nondebtor spouse.

II. HISTORY

A. The Rise of Concurrent Ownership

From at least the thirteenth century, multiple people could have concurrent interests in the same piece of real property. Joint tenancy, with a right of survivorship, appeared as the first form of concurrent ownership. Tenancy in common was the result of failed joint tenancies. While the term “tenancy by the entirety” developed much later, the courts treated property owned by married couples differently from other cotenancies.

1. Joint Tenancy

The English courts recognized the concept of joint tenancy at least as early as the 1230s. Henry de Bracton, in his seminal treatise on English law and
customs, described the duality of joint tenancy, existing where the joint tenants own equal, individual shares of the property and yet, simultaneously own the entire property. Joint tenancy has always included the right of survivorship, which at the death of one of the tenants allowed the property to pass to the other joint tenants, rather than to the decedent’s heirs. It served as a mechanism to defeat the lord’s right to relief and wardship. Joint tenancy defeated wardship and relief because the tenant could hold the land together with his heir, and thus the tenant did not need to pay the incidents to the lord at the death of the tenant.

In order to create a joint tenancy, the joint tenants must possess the four unities: interest, title, time, and possession. Destruction of any of the unities, through sale or transfer of the property, destroyed the joint tenancy and thus the right of survivorship. The four unities, present from the earliest descriptions of joint tenancies, persist in modern law.

Prior to the end of the thirteenth century, tenants could not freely mortgage their lands; however, during the latter half of the thirteenth century, the freedom to mortgage developed. At common law, the mortgagor granted title of the property to the mortgagee. American jurisdictions differ on whether

26. See id. In the 1220s or 1230s, Henry de Bracton wrote De Legibus Consuetudinibus Angliae based on the current plea rolls of the King’s Bench. See id. at 432. Bracton wrote of joint tenants being seised “per my et per tout,” commonly translated as “by half and by whole.” See id.; see also 48A C.J.S. Joint Tenancy § 24 (2013) (offering translation).

27. See WALSH, supra note 2, § 115, at 212 (describing right of survivorship).

28. See DUKEMINIER, supra note 7, at 204 (discussing feudal incidents); Carrozzo, supra note 1, at 425 (noting presence of survivorship from beginning of joint tenancy). Feudal incidents included relief and wardship. See Carrozzo, supra note 1, at 433. Relief was a payment made to the lord by the heir of a tenant to permit the heir to receive his inheritance. See DUKEMINIER, supra note 7, at 203. If a tenant in a military tenure left an heir under the age of twenty-one, the lord would have received a wardship. See id. Under a wardship, the lord maintained possession of the tenant’s land, including any rents and profits, until the heir reached twenty-one. See id. The lord’s only responsibilities were to provide subsistence to the heir and not to commit waste of the land. See id.

29. See WALSH, supra note 2, § 115, at 211 (explaining joint tenancy as way around wardship and relief).

30. See 2 WILLIAM BLACKSTONE, COMMENTARIES *180 (defining four unities). For the unity of interest, each joint tenant had to possess the same right to the land, with his or her rights encompassing the same period of years and the same type of estate. See id. at 230. The unity of title required that all joint tenants receive title through the same instrument. See id. The unity of time required the joint tenants’ interests to vest at the same time. See id. at 230-31. The final unity, possession, required all joint tenants to own the entire property and for each to have the same rights to the land. See id. at 231.

31. See WALSH, supra note 2, § 115, at 212-13 (discussing destructibility of joint tenancies). In some jurisdictions, a joint tenant’s sole action of mortgaging the property will destroy the joint tenancy. See infra Part II.C. But see Harms v. Sprague, 473 N.E.2d 930, 933 (Ill. 1984) (holding mortgaging property by one tenant does not sever joint tenancy in lien-theory states).


33. See Ann M. Burkhart, Freeing Mortgages of Merger, 40 VAND. L. REV. 283, 303-05 (1987) (chronicling history of mortgages on land in England). The passage of the Quia Emptores in 1290 also assisted in the development of the rights of landowners to mortgage their property. See id. at 305 n.69.

34. See Burkhart, supra note 33, at 322 (describing common law of title passage with mortgaging).
they follow the common law: title-theory states do, whereas lien-theory states pass only a lien to the mortgagee.\textsuperscript{35} In a title-theory state, a mortgage granted to one joint tenant destroys the joint tenancy by severing the unity of title.\textsuperscript{36} Only a few title-theory states remain; however, Massachusetts is among them.\textsuperscript{37}

2. Tenancy in Common

Tenancy in common developed in England in the early fourteenth century.\textsuperscript{38} Originally, this property scheme arose out of actions for partition, in which a court severed a joint tenancy.\textsuperscript{39} Tenancies in common developed as the natural consequence of the stringent unity requirements for joint tenancies; if a transfer of property lacked one or more of the unities required for a joint tenancy, a tenancy in common could form.\textsuperscript{40} The only unity required for a tenancy in common is possession.\textsuperscript{41} Tenancies in common are distinguishable from joint tenancies because tenants in common may own different proportions of the property; additionally, tenants in common have no right of survivorship—a hallmark of joint tenancies.\textsuperscript{42}

\textsuperscript{35} See Harms, 473 N.E.2d at 933 (discussing title and lien theories). Illinois was a title-theory state through the nineteenth and early twentieth centuries, but now follows lien theory. See id.

\textsuperscript{36} See id. (showing effect of joint tenants mortgaging under title theory). In contrast, this severance does not occur in a lien-theory state, such as Illinois. See id.

\textsuperscript{37} See Burkhart, supra note 33, at 322-24 (listing remaining title-theory states). The other states that still adhere to title theory are Alabama, Georgia, Maine, Maryland, New Hampshire, and Rhode Island. See id. Given the lax practices of lenders during the mortgage crisis with respect to title checks, joint tenancies may now have unilateral mortgages on them. See Aruna Viswanatha, Illinois Accuses Mortgage Firm of Robosigning, REUTERS (Feb. 2, 2012, 2:24 PM), http://www.reuters.com/article/2012/02/02/us-foreclosure-lawsuit-idUSTRE81121H20120202 (discussing errors in production of mortgage documents).

\textsuperscript{38} See Carrozzo, supra note 1, at 434 (discussing origins of tenancy in common). Tenancy in common developed during the reign of Edward I. See id.

\textsuperscript{39} See Carrozzo, supra note 1, at 434, 435 n.129 (noting early occurrence of tenancy in common); see also 2 William Cruise, A Digest of the Laws of England Respecting Real Property 525-26 (2d ed. 1818) (addressing creation of tenancies in common after partition of joint tenancies and coparcenary). In 1304, a court held that the right of survivorship, a key feature of a joint tenancy, did not exist after a partition because it denied the lord his feudal incidence. See Carrozzo, supra note 1, at 434, 435 n.129. If one joint tenant granted his or her share in the property, the grantee and the other remaining tenants would become tenants in common. See Cruise, supra.

\textsuperscript{40} See Walsh, supra note 2, § 115, at 215 (discussing creation of tenancies in common).

\textsuperscript{41} See Cruise, supra note 38, at 525 (describing unities with respect to tenancy in common). A tenancy in common lacks the unity of interest, and therefore one tenant may own the property in fee simple, whereas another can own it as a life estate. See id. Without the unity of title, one tenant may receive the property through descent, and another could have purchased the property. See id. As there is no unity of time, it is irrelevant whether the tenants received the property at the same time. See id. Indeed, it is even possible to be a tenant in common with oneself—if the grantor conveys a portion of the property to a person in his or her individual capacity, and another portion to the same person in his or her official capacity, the person becomes a tenant in common with himself or herself. See id. at 526.

\textsuperscript{42} See 2 Alvin L. Arnold, Real Estate Transactions: Structure and Analysis with Forms § 16:8 (2006) (providing overview of differences between tenancies in common and joint tenancies). Unlike in joint tenancies, where each joint tenant must own an equal share in the property, tenants in common may own any percentage of the property. See id. While their shares may be different, each tenant in common owns an undivided share and has the right to use the entire property. See id. At the death of one tenant in common, the
3. Tenancy by the Entirety

At common law, when a man and woman married, they merged into one person before the law, with the majority of rights and privileges vested in the husband.\(^{43}\) As first discussed in a case from 1327, in which the court held the Crown could not defeat the wife’s interest in jointly held real property—even when her husband committed treason—the oneness of husband and wife profoundly affected marital property rights.\(^{44}\) While the courts gave deference to marital property, the term “tenancy by the entirety” would not exist for another 450 years.\(^{45}\) From this history, the early modern concept of tenancy by the entirety developed, requiring the four unities of joint tenancy, as well as a legal marriage between the tenants.\(^{46}\)

As with much of property law, English common law on tenancies by the entirety became the basis for American common and statutory law relating to marital property.\(^{47}\) Any conveyance of land to husband and wife was a conveyance in tenancy by the entirety.\(^{48}\) Prior to the expansion of women’s property passes to his or her heirs, rather than to the other tenants, because there is no right of survivorship. See id.\(^{43}\) See DUKEMINIER ET AL., supra note 7, at 359-61 (providing overview of history of marital property). Once married, a woman was no longer a distinct, legal person. See id. She moved under her husband’s cover, or protection, and lost the right to own personal property beyond her paraphernalia—her clothing and ornaments. See id. This was true for the personality the woman owned prior to marriage, as well as any earnings and personal property she received after marriage. See id. While a wife retained legal title to real property she owned, her husband had the right to full use and possession of the property, and could alienate it freely. See id. The husband’s creditors could also reach the wife’s real property. See id.\(^{44}\) See Carrozzo, supra note 1, at 435-36 (recounting case of William and Joan Ocle). William Ocle and his wife Joan owed property, which they purchased “to them two and their heirs.” Id. at 435 (internal quotation marks omitted). William committed high treason by participating in the assassination of Edward II in 1327. See id. After his execution, his property escheated to King Edward III. See id. at 435-36. The Ocles’ son, and Joan’s heir, John Hawkins, petitioned the King for a return of his parents’ land; the King granted the petition, due to the oneness of husband and wife in the ownership of property. See id. at 436.\(^{45}\) See BLACKSTONE, supra note 30, at 179-194 (discussing co-ownership). Blackstone titled the section on co-ownership “of Estates in Severalty, Joint-Tenancy, Coparcenary, and Common.” Id. at 179. Notably missing is the word “entirety.” Id. He did discuss the effect of marriage on property with respect to a relaxation of the unity of time; however, this was in reference to joint tenancies. See id. at 182. It was not until the ninth edition of BLACKSTONE’S COMMENTARIES, published posthumously in 1783, that he used the term “entirety” to describe the marital estate. See id. See Carrozzo, supra note 1, at 437 n.154 (describing evolution of marital property ownership in BLACKSTONE’S COMMENTARIES).\(^{46}\) See Damaris Rosich-Schwartz, Tenancy by the Entirety: The Traditional Version of the Tenancy Is the Best Alternative for Married Couples, Common Law Marriages, and Same-Sex Partnerships, 84 N.D. L. REV. 23, 30 (2008) (discussing unities required to create tenancy by the entirety). Traditionally, a tenancy by the entirety only applied to legal marriage, but some jurisdictions extended it to common-law marriages. See id. at 31. Unlike joint tenants, tenants by the entirety are seized \textit{per tout et not per my}, that is, together, but not individually. See DUKEMINIER ET AL., supra note 7, at 321 (describing moieties in relation to joint tenancy and tenancy by the entirety).\(^{47}\) See GREGORY S. ALEXANDER, COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970, at 161 (1997) (discussing incoherency in American adoption of oneness of spouses and American republicanism); see also WALSH, supra note 2, § 117, at 219-22 (discussing tenancy by the entirety in United States).\(^{48}\) See Oval A. Phipps, Tenancy by Entireties, 25 TEMP. L.Q. 24, 24 (1951) (stating absolute preference
rights in the mid-nineteenth century, the husband had many superior rights in property held in a tenancy by the entirety. Neither spouse had the right to determine the disposition of the property post mortem, should one predecease the other.

B. The Growth of Married Women’s Property Rights

1. In England

As early as the seventeenth century, English equity courts began to relax the restriction on married women owning property. The catalyst for this deviation from traditional common-law property concepts was the desire of the upper class, including jurists, to protect their daughters and their familial wealth. By the end of the eighteenth century, courts accepted antenuptial agreements that gave women property rights outright, rather than in trust.

2. Married Women’s Property Acts

The first grants of statutory property rights for married women came from the enactment of Married Women’s Property Acts, at the end of the antebellum period. Several factors brought about the Married Women’s Property Acts in the mid-nineteenth century; the most important was the cultural impact of the...
Panic of 1837, which led to greater debtor protection. At the same time, republicanism advanced a pervasive desire to depart from the English common law. Finally, this period saw the beginning of the women’s suffrage movement.

While there is some debate, the traditional view is that Mississippi, in 1839, was the first state to pass a Married Women’s Property Act. Regardless of which statute came first, these early Married Women’s Property Acts served as a form of debtor-protection legislation. The early period of reform brought little continuity insofar as what protections relating to property states extended to women. Courts resisted these grants of protections and construed the acts narrowly.

Some states refused to pass these reforms out of fear that the reforms would

55. See Richard H. Chused, Married Women’s Property Law: 1800-1850, 71 GEO. L.J. 1359, 1361 (1983) (stating impact of economic turmoil in mid-1840s on Married Women’s Property Acts). The primary motivation for these early Married Women’s Property Acts was debtor protection, not the expansion of women’s rights. See id. The basis of these laws was in protecting family assets, and legislatures passed them without significant lobbying from women. See id. But see Ellen Dannin, Marriage and Law Reform: Lesson from the Nineteenth-Century Michigan Married Women’s Property Acts, 20 TEX. J. WOMEN & L. 1, 23-25 (2010) (analyzing traditional and alternative theories behind passage of Michigan’s Married Women’s Property Act). In Michigan, both the language of the statute and the tenor of the debate at the time of passage suggest that debtor relief was the primary motivation, but it is unclear how successful the statute was at debtor protection. See id.

56. See ALEXANDER, supra note 47, at 169 (describing impact of republican ideals on married women’s property). From the time of Jefferson through Jackson, American legal theory sought to differentiate itself from its English heritage. See id.; DUKEMINIER ET AL., supra note 7, at 200 (discussing departure from fee tail and primogeniture beginning with Jefferson as movement against hereditary aristocracy).

57. See ALEXANDER, supra note 47, at 168-69 (describing impact of women’s rights on property law). Changes in this period included not just Married Women’s Property Acts, but also reforms to debtor’s prisons, land grants, and probate codes. See id.


59. See Dougan, supra note 58, at 13 (quoting Arkansas’s Married Woman’s Property Law from 1835). Passed in the fall of 1835, the Arkansas Married Woman’s Property Law covered both real and personal property. See id. It did not allow women separate ownership, but rather shielded them from their husbands’ creditors. See id. The statute provided that the property

possessed by any woman, or to which she may in any manner be entitled at the time of her marriage, or which may be decreed to, willed to, or be given to her, before or after her marriage, shall not be subjected to the payment of the debts or damages, contracted or incurred by the husband at any time before marriage.

Id.

60. See Chused, supra note 55, at 1399-1400 (comparing different Married Women’s Property Acts from first wave of reform). Some of the statutes, like Arkansas’s, protected both real and personal property, while others protected only realty. See id. at 1399. Many of the statutes contained generalized language allowing married women to hold property independently. See id. at 1399-1400.

61. See id. at 1400 (discussing judicial hostility). Courts during this period were very reluctant to grant women independent property rights and thus construed any language permitting women to own property narrowly. See id.
destabilize society and harm women, rather than protect them. Many early women’s suffrage leaders, including Elizabeth Cady Stanton, attempted to combat these fears and advocated for more far-reaching statutory reform. In 1848, spurned forward by the women’s suffrage movement, New York passed its Married Women’s Property Act, which granted significantly more rights to married women than the previous acts.

At the end of the nineteenth century, state legislatures passed the final wave of reforms, albeit with different goals than the previous waves. Women had made significant strides into the commercial sphere by the late-nineteenth century, and their growing financial power led to a reduction in protective measures. Rather than focusing on the protection of assets, these newer statutes equalized financial rights and responsibilities between spouses. The primary motivation for these reforms was not equality, but rather protections of creditors and clarification of previous statutes.

62. See Joseph A. Ranney, Anglicans, Merchants, and Feminists: A Comparative Study of the Evolution of Married Women’s Rights in Virginia, New York, and Wisconsin, 6 WM. & MARY J. WOMEN & L. 493, 508 (2000) (discussing early fears about Married Women’s Property Acts). In New York, the first proposed Married Women’s Property Act was in 1836. See id. Resistance based on the fear of societal destabilization came from both men and women, and the New York legislature did not enact the bill at that point. See id. at 508-09. At the 1846 constitutional convention, there was an attempt to amend the New York Constitution to include property rights for married women, based on Jacksonian ideals. See id. at 509. The convention voted to add the language, but subsequently removed it three days later. See id.

63. See Alexandra Murray, Note, Marriage—The Peculiar Institution: An Exploration of Marriage and the Women’s Rights Movement in the 19th Century, 16 UCLA WOMEN’S L.J. 137, 148 (2007) (describing lobbying by Stanton and others advocating comprehensive women’s property reform). Stanton and others based their arguments on both debtor issues of the earlier reforms and the idea of the cult of true womanhood. See Ranney, supra note 62, at 509 (analyzing arguments for Married Women’s Property Acts). The “cult of true womanhood” portrayed women as noble and fragile beings who needed protection from their husbands, and were far more likely to succumb to vice. See id.

64. See Ranney, supra note 62, at 509-10 (describing enactment of New York’s Married Women’s Property Act). At the time of its passage, it was the broadest grant of rights to married women; however, it did not contain the power to enforce, nor did it allow married women to enter into contracts. See id. at 510. The statute covered real and personal property, allowed women to keep the rents accrued from their personal land as a single female could, and established the right to give and receive gifts. See Act of Apr. 7, 1848, ch. 200, §§ 1-3, 1848 N.Y. LAWS 307. While the statute did not provide general contracting rights, it did permit antenuptial agreements to be enforceable after marriage. See id. § 4.

65. See ALEXANDER, supra note 47, at 170 (discussing motivations for married women’s property reform in the late nineteenth century).

66. See Richard H. Chused, Late Nineteenth Century Married Women’s Property Law: Reception of the Early Married Women’s Property Acts by Courts and Legislatures, 29 AM. J. LEGAL HIST. 3, 5 (1985) (comparing reasons for mid- to late-nineteenth century reforms). Oregon passed a Married Women’s Property Act in 1852 to protect women from their debtors husbands. See id. The Oregon Constitution further protected women by allowing them to retain property held before, and acquired after, marriage. See Brummet v. Weaver, 2 Or. 168, 173 (1866) (holding women suffered no pecuniary loss at marriage).

67. See Chused, supra note 66, at 35 (concluding reform based in desire to equalize availability of property to creditors). During the period between the first Married Women’s Property Acts and the later ones, husbands transferred property to their wives to shield it from creditors. See id. The case law from that period was confusing and often conflicting, which served as one of the motivations for further reform. See id.

68. See Suzanne D. Lebsock, Radical Reconstruction and the Property Rights of Southern Women, 43 J.S. HIST. 195, 213 (1977) (discussing amendment to South Carolina’s constitution in 1895).
3. Effect of Married Women’s Property Acts on Tenancies by the Entirety

Following the widespread enactment of Married Women’s Property Acts, the courts of several states invalidated tenancy-by-the-entirety statutes.69 In Alabama—as in the rest of the country—in the absence of statutory intervention, the common law applied.70 When the legislature granted property rights to married women statutorily, it destroyed the common-law concept of unity between husband and wife and thus destroyed the tenancy by the entirety.71 The Alabama Supreme Court did not interpret the state’s Married Women’s Property Act as removing all common-law disabilities related to marriage, but rather only that the husband and wife could take separate moieties.72 The New Hampshire Supreme Court held that the Married Women’s Property Act removed the legal fiction of merger of the wife into the legal person of her husband, and thus allowed her to hold property separately as a married woman.73

The majority of states equalized the rights between husband and wife, while maintaining some form of tenancy by the entirety.74 In New York, the court held that none of the legislation passed between the 1840s and the 1860s, which granted rights to married women, destroyed the tenancy by the entirety.75 Some states increased the rights of wives to equal that of their husbands, whereas other states reduced the rights of husbands to equal that of their originally included constitutional protections for married women’s property in 1868. See id. at 200. The delegates argued that the amendment was necessary to protect women from their spendthrift husbands; however, the crushing postwar debt likely motivated them. See id. at 200-01.

69. See Phipps, supra note 48, at 29 (listing states finding tenancy by the entirety incompatible with Married Women’s Property Acts). At least nine states abandoned the tenancy by the entirety because of the passage of Married Women’s Property Acts, including: Alabama, Colorado, Illinois, Iowa, Maine, Minnesota, New Hampshire, South Carolina, and Wisconsin. See id.

70. See Walthall v. Goree, 36 Ala. 728, 733 (1860).

71. See id. at 735 (holding tenancy by the entirety cannot exist while Married Women’s Property Act in force). The Alabama Supreme Court took a very traditional view of the concept of unity in marriage, stating that husband and wife became one legal person, and therefore could not hold property separately, absent statutory modification of the common law. See id. at 732-33. Because the Married Women’s Property Act allowed women to hold property in a tenancy by the entirety, it was in direct opposition to the common-law ideal of oneness. See id. at 735.

72. See id. at 736 (holding estate of husband and wife not completely equivalent to joint tenancy or tenancy in common). The Alabama Married Women’s Property Act did not give spouses the power to contract with each other or to sue each other. See id. While the wife could take a separate estate, she needed her husband’s permission to convey it. See id.

73. See Clark v. Clark, 56 N.H. 105, 110 (1875) (opinion of Cushing, C.J.) (stating merger no longer occurred). The New Hampshire Supreme Court held that in the absence of clear language in the deed, any conveyance of property to husband and wife would now result in a tenancy in common. See id. With the introduction of specific language at the time of transfer, they could hold the property as joint tenants. See id.

74. See Phipps, supra note 48, at 31-32 (listing states maintaining tenancy by the entirety after Married Women’s Property Acts).

75. See Bertles v. Nunan, 92 N.Y. 152, 161 (1883) (holding tenancy by the entirety still exists after Married Women’s Property Act). The New York Court of Appeals held that the legislative intent was the preservation of tenancies by the entirety. See id. at 157.
wives.76

A small minority of jurisdictions took another approach, holding that unless the Married Women’s Property Acts specifically addressed tenancy by the entirety, the acts did not affect it.77 In Massachusetts, statutory reform in 1885 made it possible to convey property to spouses as tenants by the entirety, joint tenants, or tenants in common.78 The SJC held that the various statutes passed to provide married women property rights did not apply to property held in a tenancy by the entirety.79 As late as 1943, Michigan adopted the SJC’s view, perpetuating the existence of the common-law version of tenancy by the entirety.80 Michigan elected not to follow the SJC’s approach on the rights of creditors, which allowed creditors of a husband to take immediate possession of the estate, with title vesting if the husband survived the wife.81

C. Tenancy by the Entirety in Massachusetts in the Latter Half of the Twentieth Century

Throughout most of the twentieth century, the traditional, gendered view of tenancy by the entirety persisted in Massachusetts, granting greater rights to the husband.82 In the 1976 D’Ercole case, a woman brought an action against her husband in federal court claiming the then-current view of tenancy by the entirety violated her Fifth and Fourteenth Amendment rights.83 The D’Ercole court ruled the statute did not deprive women of either due process or equal

76. See Phipps, supra note 48, at 31-32 (comparing approaches to tenancy by the entirety after Married Women’s Property Acts).

77. See id. at 29-31 (discussing “Massachusetts view” on tenancy by the entirety). This group of states, including Michigan and North Carolina, held that the common-law version of the tenancy by the entirety persisted after the enactment of the Married Women’s Property Acts. See id. at 29.


79. See Pray v. Stebbins, 4 N.E. 824, 825 (Mass. 1886) (holding then-recent statutory reforms had no effect on tenancy by the entirety). The SJC held that the common law applied to tenancies by the entirety. See id. at 826.

80. See Arrand v. Graham, 298 N.W. 281, 282-83 (Mich. 1941) (adopting Massachusetts view of tenancy by the entirety from Pray v. Stebbins). The Michigan Supreme Court expressly rejected the New York view, instead favoring the continuation of the common-law structure for tenancies by the entirety. See id.

81. See Phipps, supra note 48, at 30 (describing Michigan’s and Massachusetts’s approaches to rights of husbands’ creditors). North Carolina, a third state to adopt the SJC’s view in regard to the continuation of common-law tenancies by the entirety, chose, like Michigan, not to allow creditors of the husband to reach the property during the wife’s lifetime. See id. at 30-31.

82. See D’Ercole, 407 F. Supp. at 1380 (stating male privilege in tenancy by the entirety). The other common-law vestiges of the inability to alienate or partition also remained. See id. Upon divorce, the former spouses became tenants in common unless otherwise specified. See id.

83. See id. at 1378-79 (stating cause of action under Fifth and Fourteenth Amendments). The wife brought suit under 42 U.S.C § 1983, claiming the tenancy by the entirety deprived her of due process and equal protection. See id. at 1380.
protection under the law, because married couples had the option of not holding property as tenants by the entirety.84

In 1979, the Massachusetts legislature adopted a new statute on tenancy by the entirety, removing all aspects of male dominance.85 The statute contained some of the debtor protections of the earlier eras, stating:

The interest of a debtor spouse in property held as tenants by the entirety shall not be subject to seizure or execution by a creditor of such debtor spouse so long as such property is the principal residence of the nondebtor spouse; provided, however, both spouses shall be liable jointly or severally for debts incurred on account of necessaries furnished to either spouse or to a member of their family.86

The statutory changes to tenancies by the entirety were strictly prospective, only affecting such tenancies created after February 11, 1980.87

A creditor of one spouse cannot seize the primary residence of the nondebtor spouse, held in a tenancy by the entirety created after February 11, 1980; however, the creditors may attach that property.88 While the couple holds property as tenants by the entirety, creditors may only reach the property if it is not the principal residence of the nondebtor spouse, or if both spouses are

84. See D’Ercole v. D’Ercole, 407 F. Supp. 1377, 1382 (D. Mass. 1976). The federal court ruled that it was a volitional choice to hold the property as tenants by the entirety, and if the requirements were “too onerous or inequitable,” the wife was free to seek relief in a court of equity. See id. at 1382-83. The court also said that some women might choose to grant their husbands greater rights to preserve family unity during periods of marital strife. See id. at 1382.

85. See Act of Nov. 13, 1979, ch. 727, § 1, 1979 Mass. Acts. 768 (current version at MASS. GEN. LAWS ANN. ch. 209, § 1 (West 2013)) (providing gender-neutral tenancy by the entirety). The statute provided that husband and wife had equal rights to “rents, products, income or profits and to the control, management and possession of property held by them as tenants by the entirety.” Id.


The term “necessaries” in this connection is not confined to articles of food or clothing required to sustain life, but has a much broader meaning and includes such articles for use by a wife as are suitable to maintain her according to the property and condition in life of her husband.

Cohen, 136 N.E. at 351.

87. See Shwachman v. Meagher, 699 N.E.2d 16, 18 n.4 (Mass. App. Ct. 1998) (stating statutory changes only applicable to tenancies by the entirety created after February 11, 1980). Any tenancy by the entirety created prior to that date still has the elements of male dominance present since common law. See id. Couples who continue to hold deeds as tenants by the entirety from prior to the enactment of the new statute may elect, in writing, to have the new statute apply. See ch. 209, § 1A.

88. See Peebles v. Minnis, 521 N.E.2d 1372, 1373 (Mass. 1988) (holding attachment of property permissible after tort judgment against one spouse). The SJC held that because an attachment is a device to secure property and nothing more; creditors may attach property held in a tenancy by the entirety. See id.
indebted to the creditors. If the tenancy terminates through divorce or joint sale of the property, the creditors of one spouse may then reach the indebted spouse’s interest.

In 1993, the SJC held that one spouse could unilaterally encumber his or her interest in property held as tenants by the entirety. The court in Coraccio found the statute was silent on the matter and, barring legislative action, nothing prevented such an encumbrance. Based on the facts of this case, the statute would protect the nondebtor spouse from seizure of the property so long as the property remained her principal residence; however, the court explicitly remained silent on the issue of seizure of nonprincipal residences.

The Massachusetts Appeals Court reaffirmed the ability of a judgment creditor to attach to an interest held as tenants by the entirety. Furthermore,
the court conjectured that creditors of one spouse could seize any property that was not the principal residence of the nondebtor spouse. The court also held that while each spouse’s interest as tenants by the entirety has value, it is less than if the couple owned the property as tenants in common.

D. Other States’ Approaches to Encumbrances and Tenancies by the Entirety

Approximately half of the jurisdictions in the United States retain tenancies by the entirety in some form. A small number of jurisdictions have explicitly prohibited encumbrances by one spouse by statute. The common law in a consisted of the principal residence of both spouses as well as investment property. See id. During a bankruptcy proceeding, one of the debtor-spouse’s creditors argued the conveyance was fraudulent. See id. at 108.

95. See id. at 109 (discussing when creditors may seize property). When the property is the principal residence of the nondebtor spouse, creditors are statutorily prohibited from seizing the property during the lifetime of the nondebtor spouse, and should he or she survive the debtor spouse, the creditor’s rights are extinguished completely. See id.; see also MASS. GEN. LAWS ANN. ch. 209, § 1 (West 2013). If the property is not the principal residence of the nondebtor spouse, creditors may seize the property, subject to complete defeasement if the nondebtor spouse survives the debtor spouse. See Inns, 854 N.E.2d at 109; see also ch. 209, § 1.

96. See Inns, 854 N.E.2d at 108-10 (discussing diminution in value of property after transfer to tenancy by the entirety). The principal argument of the debtor-spouse was the property held in a tenancy by the entirety remained as valuable as it was prior to the transfer. See id. at 108-09. The appeals court held that while the property still had value when held in a tenancy by the entirety, it was less than when held in a tenancy in common, due to the restrictions imposed on the ability of creditors to seize the property. See id. at 109-10.

97. See Carrozzo, supra note 1, at 445-46 (discussing modern status of tenancy by the entirety in United States). In nineteen states, statutes explicitly permit tenancies by the entirety. See id. at 445. Another six states have statutes that mention tenancy by the entirety, showing the implied legislative consent for tenancies by the entirety. See id. Case law permits tenancies by the entirety in six more states. See id. at 446. In seven states, however, the status of tenancies by the entirety is unclear. See id. In the remaining thirteen states, either the court system or the legislature has abolished the tenancy by the entirety. See id.; see also GA. CODE ANN. § 19-3-9 (West 2013) (providing each spouse holds property separately). In some jurisdictions, a tenancy by the entirety is available for both real and personal property, whereas in other jurisdictions, it is only available for real property. Fred Franke, Asset Protection and Tenancy by the Entirety, 34 ACTEC J. 210 app. (2009) (listing states with tenancy by the entirety).

98. See 765 ILL. COMP. STAT. ANN. 1005/1c (West 2013) (prohibiting unilateral mortgages on homestead property held as tenants by the entirety), discussed in Richard F. Bales, Tenancy by the Entirety, CBA REC., Nov. 18, 2004, at 36 (discussing ramifications of tenancy by the entirety in Illinois); N.J. STAT. ANN. § 46-3-17.4 (West 2013) (“Neither spouse may sever, alienate, or otherwise affect their interest in the tenancy by the entirety during marriage or upon separation without the written consent of both spouses.”), discussed in Freda v. Commercial Trust Co. of New Jersey, 570 A.2d 409, 411 (N.J. 1990) (holding statute only prospective), and Vander Weert v. Vander Weert, 700 A.2d 894, 897 (N.J. Super. Ct. App. Div. 1997) (stating mortgagee responsible for consequences of mortgages granted without other spouse’s permission); N.C. GEN. STAT. ANN. § 39-13.6(a) (West 2013) (“Neither spouse may mortgage, sell, lease, mortgage, transfer, convey or in any manner encumber any property so held without written joinder of the other spouse.”), discussed in Perry v. Perry, 341 S.E.2d 53, 56 (N.C. Ct. App. 1986) (discussing legislative intent and history). As noted above, South Carolina no longer recognizes tenancy by the entirety; however, joint tenants may not unilaterally encumber property. See S.C. CODE ANN. § 27-7-40(a)(iii) (West 2013) (“The fee interest in real estate held in joint tenancy may not be encumbered by a joint tenant acting alone without the joinder of the other joint tenant or tenants in the encumbrance.”); supra note 69 and accompanying text (recognizing South Carolina invalidated tenancy by the entirety following enactment of Married Women’s Property Acts).
large number of jurisdictions prohibits unilateral mortgages or encumbrances. Finally, some states take the same approach as Massachusetts, as mentioned above, and permit unilateral mortgages. The tenancy by the entirety statutes in Illinois, New Jersey, and North Carolina specifically prohibit unilateral encumbrances on property held as a tenancy by the entirety. In Illinois, a deed, mortgage, or lease for property held by tenants by the entirety is only valid if both spouses sign it.
Jersey, prior to 1988, a spouse could encumber his or her rights in property held as a tenancy by the entirety, and the creditors could seek partition, subject to a balancing test. 103 The new statute, which has only a prospective effect, prohibits unilateral encumbrances. 104 The traditional common-law tenancy by the entirety existed in North Carolina until 1983, when the legislature amended the statute to equalize spousal rights and prohibit unilateral mortgages. 105

The common law in the District of Columbia, Florida, Hawaii, Indiana, Maryland, Michigan, Missouri, Tennessee, Vermont, Virginia, and Wyoming prohibits unilateral encumbrances of property held in a tenancy by the entirety. 106 Several jurisdictions, including the District of Columbia, Florida, and Missouri, permit one spouse to act as the other spouse’s agent in procuring a mortgage, which can weaken the protection afforded by tenancy by the entirety because of an implied agency argument on behalf of a mortgagee. 107 In Tennessee, any mortgagee that grants a mortgage to one tenant by the entirety does so “at his peril.” 108 In 1916, the Maryland Court of Appeals, the highest court in Maryland, held unilateral encumbrances impermissible under the Maryland Constitution and the Married Women’s Property Act. 109

103. See Newman v. Chase, 359 A.2d 474, 480 (N.J. 1976) (requiring balancing of creditors’ rights against public policy of familial homes); Vander Weert v. Vander Weert, 700 A.2d 894, 897 (N.J. Super. Ct. App. Div. 1997) (stating statute prohibiting unilateral encumbrances only applicable to tenancies created after 1988). In Vander Weert, the New Jersey Superior Court Appellate Division suggested that the mortgagee would be responsible for the consequences of a unilateral mortgage because a title search would easily indicate if the property was a tenancy by the entirety. See Vander Weert, 700 A.2d at 897.

104. See N.J. STAT. ANN. § 46:3-17.4 (West 2013) (prohibiting unilateral encumbrances). The statute states: “Neither spouse may sever, alienate, or otherwise affect their interest in the tenancy by the entirety during the marriage or upon separation without the written consent of both spouses.” Id. Prior to the enactment of the statute, one spouse could obtain an order preventing the other spouse from engaging in such actions during the pendency of a divorce proceeding. See Vander Weert, 700 A.2d at 899.

105. See N.C. GEN. STAT. ANN. § 39-13.6 (West 2013) (prohibiting unilateral encumbrances); Perry v. Perry, 341 S.E.2d 53, 55 (N.C. Ct. App. 1986) (discussing tenancies by the entirety in North Carolina before statutory amendment). Prior to 1983, when a married couple owned property as tenants by the entirety, the husband had complete control over the property during the marriage, and he had the sole right to income from, and possession of, that property. See Perry, 341 S.E.2d at 55. The North Carolina Court of Appeals held that the legislative intent was for the statute to apply to all tenancies, and that this did not constitute a taking, under either the North Carolina Constitution or the Federal Constitution. See id. The statute states: “Neither spouse may bargain, sell, lease, mortgage, transfer, convey or in any manner encumber any property so held without the written joinder of the other spouse.” § 39-13.6.

106. See supra note 99 (providing common-law references for each state).

107. See Allen v. Schultheiss, 981 A.2d 610, 615 n.4 (D.C. 2009) (stating unilateral encumbrances impermissible unless established via agency); Kenny’s Tile & Floor Covering, Inc. v. Curry, 681 S.W.2d 461, 467 (Mo. Ct. App. 1984) (prohibiting one spouse from encumbering property without other spouse’s assent); Douglass v. Jones, 422 So. 2d 352, 354-55 (Fla. Dist. Ct. App. 1982) (holding prohibition of unilateral encumbrances well established, except through agency); In Missouri, the court of appeals specifically stated that an implied-agency argument could permit valid unilateral encumbrances. See Curry, 681 S.W.2d at 467.

108. See Robinson v. Trousdale Cnty., 516 S.W.2d 626, 632 ( Tenn. 1974) (prohibiting any unilateral action on property held in tenancy by the entirety). If one spouse attempted to take any unilateral action, that action would be “wholly and utterly void at the instance of the aggrieved tenant and any prospective purchaser, transferee, lessee, mortgagee and the like will act at his peril.” Id.

109. See Masterman v. Masterman, 98 A. 537, 540 (Md. 1916) (holding unilateral encumbrances invalid
Arkansas, Delaware, Kentucky, Massachusetts, New York, Oregon, and Pennsylvania permit unilateral encumbrance on property held in a tenancy by the entirety; however, significant variation exists in the level of creditor protection the jurisdictions provide. Delaware offers very little creditor protection, as tenants by the entirety can defeat a creditor’s interest by transferring the property during the tenancy. Other states, like Arkansas, allow for the partition and sale of the one-half interest in the property, subject to the indefeasible right of survivorship of the nondebtor spouse. New York and Massachusetts take a more balanced approach.

E. Federally Imposed Limits on Tenancies by the Entirety

The federal government has the right to attach liens to any property or property rights owned by a delinquent taxpayer. In the latter half of the twentieth century, the Internal Revenue Service (IRS) attempted to reach property held in tenancies by the entirety. Then, in 1999, the Supreme Court unanimously held that an expectancy interest was enough of a property interest for a tax lien to attach to it, preventing disclaimer. In 2002, the Supreme Court held that a federal tax lien could attach to property held as tenants by the entirety. The Court in Craft allowed the states to determine what rights a person had in property, but the federal government had the right to determine whether something was property.

on constitutional grounds).

110. See supra note 100 (providing case citations for Arkansas, Delaware, Kentucky, New York, Oregon, and Pennsylvania); supra notes 91-96 and accompanying text (describing Massachusetts case law on unilateral encumbrances).

111. See Mitchell v. Wilmington Trust Co., 449 A.2d 1055, 1057-58 (Del. Ch. 1982) (permitting inchoate unilateral liens, while forbidding unilateral encumbrances that vest during joint lifetime). Tenancies by the entirety in Delaware maintain most of the common-law hallmark, modulated by the Married Women’s Property Act, which reduced the husband’s control over the property. See id.

112. See Morris v. Solesbee, 892 S.W.2d 281, 282 (Ark. Ct. App. 1995) (permitting unilateral encumbrances, partition and foreclosure, but not ouster). While one spouse may convey or encumber his or her interest in the property, that spouse cannot defeat the other spouse’s right of survivorship, nor can that spouse fundamentally change the nature of the tenancy. See id. The creditors of the debtor spouse may not oust the nondebtor spouse, but they can compel the nondebtor spouse to divide rents and income from the property. See id.

113. See V.R.W., Inc. v. Klein, 503 N.E.2d 496, 499 (N.Y. 1986) (permitting unilateral encumbrances, yet prohibiting foreclosure while ownership remains as tenants by the entirety); see also supra notes 91-96 and accompanying text (discussing Massachusetts law).

114. See 26 U.S.C. § 6321 (2006) (stating United States may place lien on all property and property rights of delinquent taxpayers). This right applies to both real and personal property and also covers tax debt, along with associated interest and penalties. See id.

115. See David S. De Jong, Craft v. United States—Is Tenancy by the Entirety Antiquated?, Md. B.J., Nov.-Dec. 2006, at 14, 16 (describing attempt to reach property in tenancies by the entirety). By 1991, five circuit courts had held that the IRS could not reach these tenancies by the entirety. See id.


118. See id. at 278-79 (describing different powers of state and federal governments). The Supreme Court
F. The Modern Marital Relationship

The majority of marriages exhibit some degree of income disparity.119 According to a 2001 study, thirty percent of marriages had a sole income-earner.120 One spouse earned more than sixty percent of the familial income in another forty-six percent of marriages.121 Income equality exists in only twenty-four percent of married couples.122 Over the past four decades, married women’s incomes have increased more than their husbands’ incomes have in the majority of marriages; however, husbands are still the primary income-earners.123

Courts consider some relationships, called confidential relationships, to have a higher degree of trust than other relationships, and in Massachusetts, all marriages are confidential relationships.124 The hallmarks of a confidential relationship are trust, reliance, and in many jurisdictions, a power differential between the parties.125 In Massachusetts, there is an assumption of open communication between spouses, and that the spouses do not act at arm’s length with each other in regards to financial matters.126

Many marriages fall short of the aspirational definition of a confidential relationship declared: “State law determines only which sticks are in a person’s bundle. Whether those sticks qualify as ‘property’ for purposes of the federal tax lien statute is a question of federal law.” Id.


120. See Sara B. Raley et al., How Dual Are Dual-Income Couples? Documenting Change from 1970 to 2001, 68 J. MARRIAGE & FAM. 11, 18 (2006) (stating income distribution between spouses). In twenty-five percent of marriages, the husband was the sole income-earner. See id. In five percent of marriages, the wife was the sole income-earner. See id.

121. See id. at 18 (providing percentages of couples with one primary breadwinner). In thirty-nine percent of married couples, the husband is the primary breadwinner; conversely, the wife of the married couple is the breadwinner only nine percent of the time. See id.

122. See id. (listing percentage of equal-income couples). Raley defines a couple as equal providers if both spouses are employed and each spouse contributes at least forty percent, but not more than sixty percent, of the couple’s total income. See id. at 15.

123. See id. at 18 (discussing changes in couples’ income disparity from 1970 to 2001). In 1970, husbands were the sole providers in fifty-six percent of couples, compared to just twenty-five percent in 2001. See id. Wives that were sole providers made up just two percent of couples in 1970, which more than doubled to five percent in 2001. See id. Equal-income couples increased from nine percent to twenty-four percent between 1970 and 2001. See id. Wives that contributed more than sixty percent of the income rose from two percent of couples in 1970 to seven percent of couples in 2001. See id.


relationship, and in these cases the nondebtor spouse may only learn of the encumbrances on property held as a tenancy by the entirety during a divorce proceeding, when the financial repercussions may be dire. If the nondebtor spouse becomes aware of the mortgage, but does not disclose it to the judge during the property division, he or she may become liable for a mortgage, even if the mortgage was for the debtor spouse’s attorney’s fees. A lease granted by one spouse, without the other spouse’s consent or knowledge, may also be enforceable after divorce and property division.

III. ANALYSIS

The current Massachusetts tenancy-by-the-entirety statute has distorted the common law, producing a perilous situation where debtors can unilaterally encumber the property, but only joint action, divorce, or death can free either spouse from the property. The fragmented remnants of this relic of nearly seven centuries of property law jurisprudence should no longer exist in the Commonwealth of Massachusetts. Only two options remain: repeal the statute, foreclosing forever the ideal of the sanctity of marital property; or amend the statute, and thus restore the protections that tenancy by the entirety sought to achieve.
A. The Inherent Power and Privilege of Tenancy by the Entirety

The singular existence of a married couple as one unit gave rise to the enhanced protections for marital property at common law. Tenancy by the entirety is not simply joint tenancy for married couples. While male legal superiority granted husbands significantly greater rights to control property, their wives had indefeasible rights of survivorship. One of the benefits of tenancy by the entirety in this period was the indisputable right of women to continue to benefit from such property throughout their widowhoods because the rights granted by tenancy by the entirety were significantly greater than the rights provided under either dower or early intestacy statutes.

The gradual erosion of the legal nonexistence of married women—particularly concerning property rights—was not the result of a desire for gender equality, but rather a desire to protect familial wealth. Legislatures granted more property rights to married women than they ever had before because the advocates for reform believed that women were more likely to act in the best interest of society by preserving familial property, rather than squandering it on vice. In a majority of jurisdictions, the courts held that the Married Women’s Property Acts did not destroy tenancies by the entirety. The newfound gender equality did not result in husband and wife simply becoming joint tenants, but rather there was still something inherently different about property held in a tenancy by the entirety as opposed to in a joint tenancy.

133. See Carrozzo, supra note 1, at 436-37 (stating gendered history and male superiority genesis of tenancy by the entirety). The necessity of men to bear arms also influenced the creation of the estate that would become the tenancy by the entirety. See id.

134. Compare supra Part II.A.1 (outlining joint tenancy), with supra Part II.A.4 (describing common-law tenancy by the entirety). A tenancy by the entirety requires the unities present in a joint tenancy, as well a valid marriage between the tenants; however, this does not make the two forms of tenancies analogous. See supra notes 30-32, 46 and accompanying text (discussing unities in tenancy by the entirety). A tenancy by the entirety has always conveyed more rights and privileges than a joint tenancy does. Compare supra notes 49-50 and accompanying text (listing privileges and limitations to tenancies by the entirety at common law), with supra notes 27-29 and accompanying text (discussing privileges of joint tenancy).

135. See supra notes 48-49 and accompanying text (discussing rights and privileges of each spouse regarding tenancies by the entirety).

136. See Johnston, Jr., supra note 4, at 1084 (describing right of survivorship). While a husband had the sole privilege to use the land for credit and income, as well as the right of occupation, his wife had the absolute right to survivorship, which he could not defeat without her consent. See id.

137. See supra notes 51-53 and accompanying text (noting expansion of married women’s property rights in seventeenth-century England motivated by familial wealth); supra notes 54-64 and accompanying text (discussing motivations for passage of Married Women’s Property Acts throughout nineteenth century).

138. See supra note 64 and accompanying text (discussing motivation for statutory change). Ultimately, many viewed the granting of additional property rights to married women as a protective measure—that is, one that safeguarded women from their husbands’ potential drunkenness and poor decisions. See supra note 64 and accompanying text. Social change in the mid-nineteenth century led many to believe that men were more likely than women to succumb to vice, and women were more likely than men to be noble and virtuous. See supra note 58 (describing cult of true womanhood and societal views on men and women).

139. See supra notes 74-81 and accompanying text (comparing approaches to tenancy by the entirety following enactment of Married Women’s Property Acts).
In large part, the history of tenancy by the entirety is a history of outdated and outmoded concepts of gender. While the legal system has progressed away from the presumption of the inferiority of women and from the separate-spheres concept of women as the virtuous—yet fragile—protectors of society, tenancy by the entirety remains the law in approximately half of the U.S. jurisdictions. At its core, it endures because tenancy by the entirety stands for the proposition that a married couple holds property in a unique way—a way that exists for the benefit of the couple, not for the benefit of an individual spouse.

B. Issues with the Current Tenancy-by-the-Entirety Statute in Massachusetts

Property held as tenants by the entirety deserves special protection, due to the nature of the relationship that exists between the couple. While the SJC extended some protections to nondebtor spouses in Coraccio, these protections do not go far enough due to the income disparity still present in many marriages and the risks to nondebtor spouses that persist. The holding in Coraccio also seems to contradict Massachusetts’s history as a title-theory state.

1. Justifications for Statutory Amendment Based on the Marital Relationship

The SJC did not err in holding the Massachusetts tenancy-by-the-entirety statute permitted one spouse to mortgage property held as a tenancy by the entirety. At common law in Massachusetts, the husband had the right to

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140. See supra notes 74-76 (discussing preservation of tenancy by the entirety while achieving gender equality).
141. See supra notes 43-50 and accompanying text (chronicling gender bias in history of tenancy by entirety). As late as 1976, a federal court in Massachusetts ruled the inferior rights of wives in a tenancy by the entirety did not violate the Fifth and Fourteenth Amendments. See supra notes 83-84 and accompanying text (examining D’Ercole v. D’Ercole). Until the statutory reform enacted in the early 1980s, husbands in North Carolina maintained complete control over property held in tenancies by the entirety. See supra note 105 and accompanying text (analyzing history of tenancy by the entirety in North Carolina).
142. See supra note 97 and accompanying text (discussing prevalence of tenancy by the entirety in modern era); see supra note 58 and accompanying text (discussing nineteenth-century views on women).
143. See supra note 99 and accompanying text (providing list of jurisdictions where common law prevents unilateral mortgages or encumbrances).
144. See supra note 124 and accompanying text (discussing marriage as confidential relationship in Massachusetts).
145. See supra note 93 and accompanying text (discussing holding in Coraccio); supra notes 119-123 and accompanying text (providing statistics on income disparity in married couples); supra notes 127-129 (describing effects of unilateral action on property held as tenancy by the entirety).
146. See supra notes 33-37 and accompanying text (comparing title theory to lien theory).
147. See Coraccio v. Lowell Five Cents Sav. Bank, 612 N.E.2d 650, 655 (Mass. 1993) (holding chapter 209, section 1 did not prohibit unilateral encumbrances). The statute provides that both spouses have the right to share equally in the possession and control of the property; however, there is no reference to any requirement of joint consent. See MASS. GEN. LAWS ANN. ch. 209, § 1 (West 2013) (leaving open question of unilateral
mortgage property held as tenants by the entirety without the consent of his wife, subject to the wife’s survivorship interest. The SJC’s decision to permit unilateral mortgages in effect increased the rights of wives to that of their husbands; this is similar to the holdings of many courts regarding tenancies by the entirety after the passage of Married Women’s Property Acts. The court stated, “[t]he statute did not, however, alter the characteristics of the estate itself.”

The statute fundamentally alters the common-law concept of tenancy by the entirety because it permits unilateral action on behalf of either spouse, which destroys the unity concept at the core of tenancy by the entirety. At common law, the reason a husband could act unilaterally with respect to a tenancy by the entirety was because husband and wife were as one, and that one was the husband. At common law, a unilateral act on the part of the husband was an act for both members of the couple, whereas now either spouse can act on his or her own, without regard to the other spouse. Legal merger of husband and wife no longer occurs as it did at common law; however, Massachusetts does recognize the unique aspect of marriage with regard to antenuptial and postnuptial agreements.

2. Public Policy Reasons for Statutory Amendment

The current state of the law regarding tenancies by the entirety in Massachusetts allows for one spouse, potentially the higher-wage-earning encumbrances).


149. See supra note 76 and accompanying text (contrasting different approaches state courts took after passage of Married Women’s Property Acts).

150. See Coraccio, 612 N.E.2d at 654 (discussing effects of statutory changes on common-law estate of tenancy by the entirety).

151. See supra note 43 and accompanying text (describing oneness of husband and wife at common law).

152. See supra notes 43-46 and accompanying text (indicating rights of each spouse assumed under tenancy by the entirety).


154. See supra notes 124-126 (describing marriage as confidential relationship).

155. See DeMatteo v. DeMatteo, 762 N.E.2d 797, 807 (Mass. 2002) (discussing antenuptial agreements). In order for a court to enforce an antenuptial agreement, there must be full and fair financial disclosure because of the confidential relationship the couple is about to enter. See id. Without such information, the agreement is void. See id. In the case of the nondebtor spouse in Coraccio, the court offered no such protection. See generally Coraccio, 612 N.E.2d 650.
spouse, to obtain a mortgage without the consent of the other spouse.\textsuperscript{156} This is problematic from a public policy standpoint, in part due to the income disparity that exists in seventy-six percent of couples.\textsuperscript{157} When one spouse has significantly more control over financial matters, he or she may mortgage marital property without the knowledge or consent of the other spouse.\textsuperscript{158} Should the couple then divorce, the nondebtor spouse may be entirely unaware of the precarious position that now exists.\textsuperscript{159}

The holding in \textit{Coraccio} does offer some protections, but it fails to protect the innocent nondebtor spouse sufficiently in several plausible scenarios.\textsuperscript{160} The SJC expressly declined to address what would occur if the property were not the principal residence of both spouses, as the statutory language explicitly protects from seizure only the principal residence of the nondebtor spouse.\textsuperscript{161} Should the property not be the principal residence of the nondebtor spouse, or should the nondebtor spouse move, the mortgagee could foreclose on the nondebtor spouse’s interest.\textsuperscript{162}

While the right of survivorship of the nondebtor spouse reduces the risk of foreclosure, the mere fact that one spouse could withdraw equity from the marital property reduces the value of the joint assets, which—in the case of a divorce or separation—could leave the nondebtor spouse in a significantly worse financial position than he or she believed existed.\textsuperscript{163} The nondebtor spouse could lose his or her interest in the property entirely if the debtor spouse spent the money on necessaries for either spouse or a family member.\textsuperscript{164}

\textsuperscript{156} See supra notes 91-93 and accompanying text (discussing state of law in Massachusetts).

\textsuperscript{157} See supra notes 119-123 and accompanying text (discussing income disparity in couples). In most couples with disparate incomes, the husband is the higher wage-earner. See supra notes 120-121 (discussing gender breakdown of income disparity). In twelve percent of couples, the wife is the higher wage-earner; therefore, this suggested statutory reform is not based on gender lines, but rather on a desire to protect the lower wage-earner, regardless of gender. See supra notes 120-21.

\textsuperscript{158} See supra note 127 and accompanying text (discussing unilateral mortgages in divorce proceedings).

\textsuperscript{159} See supra note 91 and accompanying text (noting in \textit{Coraccio}, wife did not know of mortgage prior to reading about foreclosure in newspaper).

\textsuperscript{160} See supra notes 92-93 and accompanying text (explaining holding in \textit{Coraccio}).

\textsuperscript{161} See supra note 92 (stating SJC’s refusal to rule on issue of nonprincipal residences). The statute states that “[t]he interest of a debtor spouse in property held as tenants by the entirety shall not be subject to seizure or execution by a creditor of such debtor spouse so long as such property is the principal resident of the nondebtor spouse . . . .” See MASS. GEN. LAWS ANN. ch. 209, § 1 (West 2013).

\textsuperscript{162} See ch. 209, § 1 (stating when seizure can occur). The interest that the bank could seize would be subject to the nondebtor spouse’s indefeasible right of survivorship. See supra note 93 and accompanying text (discussing scope of debtor spouse’s rights).

\textsuperscript{163} See supra note 127 (stating removal of equity through unilateral mortgages places lower-wage-earner spouse in jeopardy).

\textsuperscript{164} See supra note 86 and accompanying text (providing text of statute). This portion of the statute is particularly troubling because Massachusetts defines necessities broadly. See Jordan Marsh Co. v. Cohen, 136 N.E. 350, 351 (Mass. 1922) (defining necessities). Necessaries are not only the requirements to sustain life, but also anything needed to maintain a standard of living. See \textit{id}. Given this broad definition, it is easy to imagine a situation in which one spouse mortgages the property without the other spouse’s consent and then spends the money to provide for either himself or herself (or for the nondebtor spouse), leading to the
Furthermore, if the couple divorced, ownership would shift to a tenancy in common, and the bank could seek a forced partition and sale, as the divorce would extinguish the nondebtor spouse’s right of survivorship.165

3. Massachusetts Is a Title-Theory State, Which Should Preclude Unilateral Mortgages

Massachusetts is a title-theory state, which means that if a joint tenant unilaterally mortgages the joint tenancy property, the property becomes a tenancy in common, because it destroys the unity of title.166 Massachusetts is the only title-theory state that permits unilateral encumbrances on property held as tenants by the entirety.167 It is illogical to allow unilateral mortgaging of a tenancy by the entirety because the requirement of unity of title exists for a tenancy by the entirety, just as it does for a joint tenancy.168

4. Why the Statute Should Be Amended

The Massachusetts legislature reformed its tenancy-by-the-entirety statute in 1979 to remove the vestiges of gender discrimination; however, in doing so, it also removed the traditional common-law protections recognized in many other jurisdictions.169 The marital relationship, a necessity for the formation of a tenancy by the entirety, is different from any other relationship between cotenants, as there is an inherent aspect of trust.170 When one member of the mortgagee foreclosing on the entire property, regardless of whether the property was the principal residence of the nondebtor spouse. Cf ch. 209, § 1.

165. See Coraccio v. Lowell Five Cents Sav. Bank 612 N.E.2d 650, 653 n.4 (Mass. 1993) (discussing effect of divorce on tenancies by the entirety). The court in Coraccio stated that divorce would convert a tenancy by the entirety into a tenancy in common; however, there was no evidence before the court that the Coraccios were in the process of getting divorced. See id. Given the current state of the housing market, a forced partition and sale due to the foreclosure of the debtor spouse’s interest could be very disadvantageous for the nondebtor spouse. See supra note 127 (discussing effects of housing prices and home sales related to divorce).

166. See supra notes 34-37 and accompanying text (explaining title theory and effects of unilateral mortgages).

167. See supra note 37 (listing title-theory states). Several of the title-theory states decided that tenancies by the entirety were incompatible with their respective Married Women’s Property Acts. See supra note 69 (listing states that prohibited tenancies by the entirety after passage of Married Women’s Property Acts). Georgia does not recognize tenancies by the entirety. See supra note 97. Maryland does not allow unilateral mortgages on constitutional grounds. See supra note 109 and accompanying text (citing Maryland Constitution as grounds for prohibition of unilateral mortgages).

168. See supra note 30 and accompanying text (describing unity of title for joint tenancies); supra note 46 and accompanying text (noting unities required for tenancy by the entirety as well).

169. See supra note 86 and accompanying text (providing text of Massachusetts statute); supra notes 91-93 and accompanying text (discussing SJC’s interpretation of tenancy-by-the-entirety statute); supra note 99 (providing references to jurisdictions prohibiting unilateral encumbrances under common law); supra notes 107-109 and accompanying text (discussing jurisdictional variation in common-law ban on unilateral mortgages and encumbrances). At common law, the husband could mortgage the entire property, subject to the wife’s survivorship, but the wife could not. See supra note 49 and accompanying text.

170. See supra notes 124-126 and accompanying text (describing marital relationship as confidential
couple violates this inherent trust by unilaterally mortgaging or encumbering property held as tenants by the entirety, it can have significant consequences for the other spouse.\textsuperscript{171} Furthermore, given that Massachusetts remains a title-theory jurisdiction, it is antithetical to permit unilateral mortgages while maintaining tenancies by the entirety.\textsuperscript{172} As the SJC did not err in its interpretation under \textit{Coraccio}, the only options are either to repeal the statute in its entirety, or to amend it to provide the protections offered in other jurisdictions.\textsuperscript{173}

Perhaps the simplest option would be to repeal the statute, as approximately half of U.S. jurisdictions do not recognize tenancies by the entirety, without any apparent adverse effect.\textsuperscript{174} It is not invalid to view tenancies by the entirety as a relic of a foregone time, when male privilege reigned supreme; however, this view is incomplete, because it ignores the importance of the marital relationship.\textsuperscript{175} If the genesis of the evolution of tenancies by the entirety was simply the notion that husband and wife were one, and that one was the husband, then the Crown could have seized Joan Ocle’s property in 1327, because her husband’s treason would have been her own.\textsuperscript{176} From its earliest conception, marital property rights have been about more than supreme male privilege: they have been about governmental recognition of the confidential relationship that exists in marriage.\textsuperscript{177} While repealing the Massachusetts statute would solve some of the problems addressed above, it is an unacceptable solution because it does not give proper recognition to the unique relationship that exists between spouses.\textsuperscript{178}

\textbf{C. A Proposal for Sensible Reform}

Illinois, New Jersey, and North Carolina have statutory prohibitions against unilateral mortgages on property held as tenants by the entirety.\textsuperscript{179} Massachusetts can adopt and modify these statutes—to the benefit of nondebtor spouses—without significantly impinging upon the rights of lenders and mortgagees.\textsuperscript{180} As addressed in North Carolina, there are potential relationship).  

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{171} See supra notes 127-129 and accompanying text (listing potential consequences of unilateral actions by one spouse on other spouse).
\item\textsuperscript{172} See supra notes 34-37 and accompanying text (describing title theory and lien theory).
\item\textsuperscript{173} See supra note 86 and accompanying text (providing tenancy-by-the-entirety statute); supra notes 91-93 and accompanying text (discussing SJC’s holding in \textit{Coraccio}).
\item\textsuperscript{174} See supra note 97 (providing information about other states’ treatment of marital property).
\item\textsuperscript{175} See supra Part II.A.3 (chronicling common-law origins of tenancy by the entirety).
\item\textsuperscript{176} See supra note 44 (recounting case of William and Joan Ocle).
\item\textsuperscript{177} See supra notes 124-126 and accompanying text (discussing marriage as confidential relationship).
\item\textsuperscript{178} See supra Part II.C (discussing state of tenancy by the entirety in Massachusetts).
\item\textsuperscript{179} See supra notes 102-105 and accompanying text (describing legislation in states with statutory prohibitions).
\item\textsuperscript{180} See supra note 103 (explaining dicta in \textit{Vander Weert} opinion). Even if a statute voided unilateral
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constitutional concerns if the legislature or courts chose to make the statute retroactive.181 Recent United States Supreme Court cases limit the protections that exist under state tenancy-by-the-entirety statues; however, they do not prohibit the suggested reform.182

1. Statutory Changes Massachusetts Should Enact

The Massachusetts legislature can draw upon the statutes of Illinois, New Jersey, and North Carolina, as well as how courts interpreted the statutes in the decades since enactment.183 The language in both the Illinois and North Carolina statutes would be preferable for Massachusetts to adopt, because it specifically enumerates the prohibited unilateral transactions.184 A court could interpret a statute, like New Jersey’s, as only applying during the joint lifetime of the spouses, which would permit mortgages of one spouse’s survivorship interest.185 This would defeat the unity concept inherent in tenancies by the entirety.186

Each statute requires the written consent of both spouses.187 This language should appear in the Massachusetts statute, because it likely forecloses the implied-agency argument present in some jurisdictions that recognize a common-law prohibition on unilateral mortgages.188 To prevent ambiguity in

181. See supra note 105 (discussing holding in Perry). Due to the legislative reform that occurred, retroactive application of the prohibition on unilateral mortgages did not constitute a taking under either the North Carolina or U.S. Constitutions. See supra note 105.

182. See supra Part II.E (discussing Supreme Court cases’ limitations on tenancy by the entirety).


184. Compare N.I. STAT. ANN. § 46:3-17.4 (West 2013) (“Neither spouse may sever, alienate, or otherwise affect their interest in the tenancy by the entirety during the marriage or upon separation without the written consent of both spouses.”), with 765 ILL. COMP. STAT. ANN. 1005/1c (West 2013) (“No deed, contract for deed, mortgage, or lease of homestead property held in a tenancy by the entirety shall be effective unless signed by both tenants.”), and N.C. GEN. STAT. ANN. § 39-13.6 (West 2013) (“Neither spouse may bargain, sell, lease, mortgage, transfer, convey or in any manner encumber any property so held without the written joinder of the other spouse.”).


186. See supra Part III.B.1 (discussing importance of unity to tenancy by the entirety).

187. See 1005/1c (requiring both spouses to sign mortgages); § 46:3-17.4 (requiring written consent); § 39-13.6 (requiring written joinder).

188. See supra note 107 and accompanying text (discussing agency argument). Actual agency does not pose a danger to the nondebtor spouse, but implied agency does, particularly if the court construes the common law to presume agency in a marital relationship. See supra note 107 and accompanying text.
the statute, the legislature could include an explicit ban on the implied-agency concept, although the statutes in Illinois, New Jersey, and North Carolina do not include such language.\footnote{189}

In Illinois, tenancy by the entirety, and thus the protections of the statute, applies only to the homestead, or principal residence, of the couple.\footnote{190} The current Massachusetts statute is not limited to either principal residences or homestead property, although it does offer enhanced protection to principal residences.\footnote{191} As the current Massachusetts statute extends to all real property held by married couples, and the purpose of this statutory reform is to restore the concept of unity—albeit without the outmoded gender roles—the proposed statute should apply to all real property.\footnote{192}

None of the statutes enumerate what would occur should a mortgagee grant a unilateral mortgage on a tenancy by the entirety.\footnote{193} In New Jersey, the court suggested that due to the ease of performing a title search, a mortgage would be invalid and the mortgagee would be liable for the debt.\footnote{194} While the statutory prohibition should be sufficient to prevent mortgagees from granting unilateral mortgages, evidence from the recent mortgage crisis suggests mortgagees may not be conducting proper title searches; therefore, the proposed Massachusetts statute should include language voiding any mortgage granted without the consent of both spouses.\footnote{195}

2. Limitations on Statutory Reform

It is likely that any attempt to require retrospective application of these proposed statutory changes in Massachusetts would not succeed, unlike the changes enacted in North Carolina.\footnote{196} North Carolina included the prohibition

\begin{footnotes}
\item[189] See 1005/1c (stating nothing about agency); \S\ 46:3-17.4 (omitting agency from statute); \S\ 39-13.6 (stating nothing about agency).
\item[190] See 765 ILL. COMP. STAT. ANN. 1005/1c (West 2013) (protecting property “maintained or intended for maintenance as a homestead by both husband and wife”). The common law does allow some flexibility if a couple is moving from one property to another. See Bales, supra note 98, at 39 (discussing homestead and Illinois tenancy-by-the-entirety statute).
\item[191] See supra note 86 and accompanying text (discussing Massachusetts statute). In Coraccio, the SJC offered some protection to the nondebtor spouse while the property remained her principal residence, but explicitly chose not to reach the issue of what would occur if the property had not been her principal residence. See supra note 93 and accompanying text (discussing limits of SJC’s holding in Coraccio).
\item[192] See supra Part III.B.1 (discussing importance of unity to tenancy by the entirety).
\item[193] See supra note 184 and accompanying text (providing statutory language). The consequences to the mortgagee or the debtor spouse are absent from the statutes. See id.
\item[194] See supra note 103 (discussing court’s reasoning in Vander Weert). This is only dicta because the current statute did not apply to the tenancy in Vander Weert. See id. Vander Weert was a trial court opinion, and the highest court in New Jersey has not ruled on this particular issue. See id. Tennessee recognizes a common-law ban on unilateral mortgages. See supra note 108 (discussing Tennessee law). In Robinson, the Tennessee Supreme Court stated that a mortgagee who granted a unilateral mortgage on a tenancy by the entirety did so “at his peril.” See supra note 108.
\item[195] See supra note 37 (discussing lax title-search practices during mortgage crisis).
\item[196] See supra note 105 (discussing holding in Perry).
\end{footnotes}
against unilateral mortgages contemporaneously with the removal of the gendered language from the statute, and therefore the diminishment of husbands’ rights was not a taking under the U.S. Constitution.\textsuperscript{197} As the proposed statutory changes would not be part of a comprehensive legislative overhaul, a court could find the amendment to be a taking if retroactively applied.\textsuperscript{198} The statute could allow for an election for application to previously created tenancies by the entirety.\textsuperscript{199}

Many have suggested the holding in \textit{Craft} undermined the concept of tenancy by the entirety by allowing attachment of tax liens to tenancies by the entirety.\textsuperscript{200} While \textit{Craft} does limit the protection of a tenancy by the entirety regarding the federal government, it does not destroy the concept.\textsuperscript{201} The effect of \textit{Craft} is limited to tax liens and therefore is irrelevant to the proposed statutory reforms in Massachusetts seeking to prevent voluntary, unilateral mortgages.\textsuperscript{202}

\section*{IV. Conclusion}

The current state of the Massachusetts tenancy-by-the-entirety statute permits unilateral mortgaging of property held in a tenancy by the entirety. If the modern legal system continues to recognize tenancies by the entirety, it must include the common-law protections that are the hallmark of the estate. Otherwise, an election to hold property as tenants by the entirety is an election to restrict freedom without many protections that were once inherent in the estate. This reform would protect the nondebtor spouse without any significant increase in cost to the lending institution, and the lending institution would know the consequences of granting such a mortgage. While this Note focused on the Massachusetts statute, this language should be included in the statute of any state that maintains tenancies by the entirety.

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\begin{itemize}
  \item \textsuperscript{197} See Perry v. Perry, 341 S.E.2d 53, 55 (N.C. Ct. App. 1986) (holding restriction of husband’s freedoms did not constitute taking).
  \item \textsuperscript{198} Compare supra Part II.D (discussing reform in Massachusetts to remove gender discrimination in tenancy-by-the-entirety statute), with supra note 105 (discussing North Carolina’s reform process). The North Carolina Court of Appeals found sufficient legislative intent for the statute to apply to all tenancies by the entirety. See supra note 105. The legislative intent, coupled with the comprehensiveness of the reform, meant the statute did not constitute a taking. See supra note 105.
  \item \textsuperscript{199} See supra note 87 and accompanying text (describing prospective effect of tenancy-by-the-entirety statute without written approval of both spouses). If the statute has only prospective application without additional written consent, it will limit the protective aspects of the statute as it is unlikely that the majority of couples will know that the statute has changed, and even if they do, they may not elect in writing to follow the new statute. See supra note 87 and accompanying text.
  \item \textsuperscript{200} See supra notes 117-18 (discussing \textit{Craft} holding and effect on IRS ability to reach property held as tenancy by the entirety).
  \item \textsuperscript{201} See supra notes 117-18 and accompanying text (describing holding in \textit{Craft}).
  \item \textsuperscript{202} Compare supra Part II.E (analyzing effects of \textit{Craft}), with supra Part III.C.1 (proposing statutory reform in Massachusetts).
\end{itemize}