LAST RITES AND LICIT RESURRECTIONS: THE PROBLEMATIC PILLARS OF SECTION 546(A)'S OFT-PRESUMED PREEMPTION OF NON-BANKRUPTCY STATUTES OF REPOSE

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"*At that hour when all things have repose. . . .*"[1]

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[1] JAMES JOYCE, *Chamber Music*, *in* COLLECTED POEMS (Read Books Ltd., 2016).

INTRODUCTION

Eighty years before the Bankruptcy Code ("Code")[2] took effect, a century of temporary "physic[s]" ended,[3] and an epoch of fitful incorporation, protean and partial, opened.[4] Though clause four of Article I's eighth section (the "Bankruptcy Clause") had always empowered the federal government to enact "uniform Laws on

[2] In this article, unless otherwise noted, all references to "Chapter," "chapter," "Section," or "section," whether as a word or symbol, are to provisions of the Code, as amended and set forth in 11 U.S.C. §§ 101–1532 inclusive. Subject to the same qualifiers, all "Rule" references are to the Federal Rules of Bankruptcy Procedure, and all "Civil Rule" references are to the Federal Rules of Civil Procedure.

[3] Samuel Wagner, *The Advantages of a National Bankrupt Law*, 1881 A.B.A. 4TH ANNUAL MEETING REP. 223, 228 (1881). As used by Wagner, "physic" meant "medicine," a now archaic definition. OXFORD DICTIONARY OF ENGLISH 1340 (Angus Stevenson ed., 3d ed. 2010).

[4] *See* Stephen J. Lubben, *A New Understanding of the Bankruptcy Clause*, 64 CASE W. RES. L. REV. 319, 344–48, 355–61, 365–72, 379–83 (2013) (recapping history).

the subject of Bankruptcies throughout the United States,"[5] Congress had passed only three relatively short-lived federal bankruptcy statutes in its first fifty-four sessions.[6] The discomforting pall cast over societies heavily reliant on credit for working capital by such predominant somnolence and intermittent regulation, combined with persistent local agitation for forms of debt relief neither as destructive nor as punitive as early theories and laws of "bankruptcy" countenanced,[7] prompted many states to assemble and amend distinctive insolvency regimes,[8] with the Court's early—but conditional—blessing, even if the constitutional interdiction on impairing the obligation of contracts forever constricted their creativity to some degree.[9] This "era of state insolvency laws came to an end,"[10] finally and emphatically, on July 1, 1898, the effective date of the Bankruptcy Act of 1898 (the "1898 Act").[11]

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[5] U.S. CONST. art. I, § 8, cl. 4; Richardson v. Schafer (*In re* Schafer), 689 F.3d 601, 603 (6th Cir. 2012). In this article, unless otherwise noted, any reference to "Constitution" is the United States Constitution, and "Article" to a subpart.

[6] *See* CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 15–22, 32–37, 56–87, 109–128 (Leonard W. Levy ed., 1935) (assimilating all congressional debates on bankruptcy from the late 1700s to the early 1900s into an impressively spartan treatise). Only the last of these laws even survived past its fifth birthday. *See* Act of Mar. 2, 1867, ch. 176, 14 Stat. 517. Though it weathered the passage of a bill for its repeal on January 20, 1873, CONG. GLOBE, 42d Cong., 3d Sess. 723–24 (1873), and undergone substantial amendments in 1874, Act of June 22, 1874, ch. 390, 18 Stat. 178, this law did not celebrate a twelfth, *see* Act of June 7, 1878, ch. 160, 20 Stat. 99.

[7] *See, e.g.*, LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 416–17 (1985) (synopsizing developments at the state and federal levels from 1841 through 1898); H. H. Shelton, *Bankruptcy Law, Its History and Purpose*, 44 AM. L. REV. 394, 395, 396–402 (1910) (elaborating as to the history and purpose of early British and American bankruptcy law). The common law could be as cruel to the unfortunate debtor as the recalcitrant one, and technical and political difficulties hampered the utility of early American bankruptcy laws. For more, see *infra* Part II.B.

[8] *See, e.g.*, FRIEDMAN, *supra* note 7, at 416 ("Between 1841 and 1867, there was no federal bankruptcy law. The states filled in with insolvency laws, stay laws, and exemption laws."); James W. Ely, *The Marshall Court and Property Rights: A Reappraisal*, 33 JOHN MARSHALL L. REV. 1023, 1040 (2000) ("In the absence of federal legislation, many states continued their time-honored practice of enacting debtor-relief measures."). While federal courts, scholars, and lawyers often used "bankruptcy" and "insolvency" interchangeably in the nineteenth century, such references have become less frequent in the twentieth and twenty-first centuries. Accordingly, this article designates any law passed pursuant to the Bankruptcy Clause as a "federal bankruptcy" statute if, and only if, the context is unclear. For more, see *infra* Part II.B.

[9] *See* Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 254–70 (Washington, J.), 271–92 (Johnson, J.), 292–313 (Thompson, J.) 313–31 (Trimble, J.) (1827) (deeming state insolvency laws to be constitutional to the extent that the discharge offered is prospective and confined to the boundaries of the enacting state); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 192–97, 202–03, 206–07 (1819) (holding that states may enact bankruptcy laws so long as Congress has not done so, but that retroactive discharge of debt pursuant to such a law contravenes the Constitution's Contracts Clause); Samuel Williston, *The Effect of a National Bankruptcy Law Upon State Laws*, 8 HARV. L. REV. 547, 547–48, 551–63 (1909) (opining that the powers of the states when Congress has passed a bankruptcy law were "by no means so clear" and arguing that "national bankruptcy acts do not suspend all right on the part of the states to deal with insolvent estates"). For more on this judicial past, including the seriatim opinions that constituted the majority in *Ogden v. Saunders*, see *infra* Part II.B.

[10] Lubben, *supra* note 4, at 385.

[11] Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549; *see generally* William H. Lake, *Conflict: The Bankruptcy Act v. State Statutes*, 10 LOY. L.A. L. REV. 753 (1977) (wading through pre-Code decisional law as to three areas to illustrate the problems endemic to judicial attempts to reconcile conflicts between state statutory schemes and the federal bankruptcy law).

The influence of decades of dominant state regulation of creditor-debtor relationships and bundles of property interests did not fully recede with this epoch's closing, then or later. Instead, scarred by centuries of political warfare over the Bankruptcy Clause's import and national legislation's necessity and, sensible to the states' jealously guarded interests and pre-existing schemes, Congress accorded a pivotal place for state law in the operation of the 1898 Act, as originally enacted and subsequently amended. As much as it could and did revolutionize as the product of an age in which federal financial regulation aroused far less organized animus, the same predisposition informed vast swathes of the Code. While it plainly preempted many state laws,[12] its text left numerous consequential matters at the mercy of these non-federal jurisdictions' idiosyncrasies.[13] Apart from such literal elements, a second source further fed this incorporative propensity. Pre-Code jurisprudence had devised and cultivated precepts, never codified, anchored in—and intended to expedite the realization of—this dualistic vision and drew upon state practices, its fidelity wildly dependent on the area of law affected and the quality of congressional draftsmanship.[14] Wherever the Code has not furnished direction, post-Code jurisprudence has not just perpetuated many of these rules but also bolstered the case for deference to the states' varied views on state-created rights, especially as to real property and contracts.[15] By virtue of congressional choice, therefore, the measures of two sovereigns often demand the solicitous regard of this nation's bankruptcy

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[12] *See* Lawrence Ponoroff, *Constitutional Limitations on State-Enacted Bankruptcy Exemption Legislation and the Long Overdue Case for Uniformity*, 88 AM. BANKR. L.J. 353, 355 (2014) [hereinafter Ponoroff, *Limitations*] ("[W]hen Congress choses to legislate in the field, it does so to the exclusion of state law."); Thomas E. Plank, *Bankruptcy and Federalism*, 71 FORDHAM L. REV. 1063, 1064 (2002) [hereinafter Plank, *Federalism*] ("Many provisions of the Code incorporate state law. On the other hand, many other provisions of the Code overrule state law."); *cf.* Anthony J. Casey & Aziz Z. Huq, *The Article III Problem in Bankruptcy*, 82 U. CHI. L. REV. 1155, 1192–93 (2015) ("As the Court has long recognized (albeit not in a case raising Article III questions), bankruptcy is centrally about '[p]roperty interests [] created and defined by state law.'" (alteration in original)).

[13] *See* Thomas E. Plank, *The* Erie *Doctrine and Bankruptcy*, 79 NOTRE DAME L. REV. 633, 644 (2004) [hereinafter Plank, *Erie*] ("[W]hen facing an issue that is beyond the scope of the Bankruptcy Clause, federal courts in bankruptcy must find and apply state law and may not rely on a notion of federal bankruptcy common law.").

[14] *See* Butner v. United States, 440 U.S. 48, 55 (1979) (holding that property rights in post-petition rents should be determined by looking to state law under the 1898 Act), *superseded by statute*, *as recognized in In re* White Plains Dev. Corp., 137 B.R. 139, 141–42 (Bankr. S.D.N.Y. 1992); Vern Countryman, *The Use of State Law in Bankruptcy Cases (Part I)*, 47 N.Y.U. L. REV. 407, 437–75 (1972) (discussing the use of state law under the 1898 Act and some of the difficulties that resulted from this limitation). For more, see *infra* Parts II.B, III.

[15] *See, e.g.*, Indian Motocycle Assocs. III Ltd. P'ship v. Mass. Hous. Fin. Agency, 66 F.3d 1246, 1252 n.10 (1st Cir. 1995) ("*Butner*, a Bankruptcy Act case, remains viable precedent under the Bankruptcy Code."); Wolters Vill., Ltd. v. Vill. Props., Ltd. (*In re* Vill. Props., Ltd.), 723 F.2d 441, 445 (5th Cir. 1984); *see also* Rodriguez v. F.D.I.C., 140 S. Ct. 713, 717–18 (2020) (rejecting the continued application of a pre-Code common law rule regarding the ownership of federal tax refunds for bankruptcy purposes); Raleigh v. Ill. Dep't of Revenue, 530 U.S. 15, 20 (2000) ("Creditors' entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the debtor's obligation, subject to any qualifying or contrary provisions of the Bankruptcy Code."); *In re* Fam. Pharm., Inc., 614 B.R. 58, 66–67 (B.A.P. 8th Cir. 2020) (relying on *Rodriguez* to justify rejecting the prevalent equitable approach to allowance of interest under section 506(b)).

courts,[16] the potential for conflict and the certainty of tension innate to the system they administer.

In this regard, section 546(a) at first exudes a bewitching simplicity, ascertainable with a basic legal understanding of such terms as "pre-emption" (or "preemption"), "statute of limitations," and "statute of repose." Employing somewhat plain prose, this subsection prescribes the deadline for any action under five substantive sections—sections 544, 545, 547, 548, and 553 (collectively, "Avoidance Provisions" or "Avoidance Powers")—by a trustee or debtor-in-possession ("DIP")[17] as the earlier of: (1) "[two] years after the entry of the order for relief" or "[one] year after the appointment or election of" a trustee "if such appointment or election" takes place before this two-year period's expiration, whichever is later; or (2) "the time the case is closed or dismissed."[18] As the Code necessarily preempts subordinate state law restrictions that would otherwise "impermissibly interfere with the federal purpose underlying the avoiding powers of a trustee . . . ,"[19] this single subsection clearly overrides any period of time imposed by a state statute of limitation[20] bearing on such

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[16] In this article, unless otherwise noted, all references to "bankruptcy court," "district court," and "circuit court" or "circuit" are to United States Bankruptcy Courts or Bankruptcy Appellate Panels, United States District Courts, and United States Courts of Appeals, respectively, and the term "federal court" subsumes all these tribunals. When in lower case, the term "court," in turn, refers to any state or federal court. Conversely, if capitalized but not the first word in a sentence, the term "Court" stands for the Supreme Court of the United States in accordance with the relevant academic rules. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 92–93 (Columbia Law Review Ass'n et al. eds., 21st ed. 2020). Technically, pursuant to the Bankruptcy Amendments and Federal Judgeship Act of 1984, each district court possesses original and exclusive jurisdictions in bankruptcy cases, that federal judicial district's bankruptcy court statutorily designated as "a unit of the district court," but may refer any or all cases, as well as any or all proceedings arising in or related to a case under the Code, to the bankruptcy judges for that district. Pub. L. No. 98-353, §§ 101(a), 104(a), 98 Stat. 333, 333, 336, 340 (1984). At present, every district court has a standing order automatically doing so, though Delaware's district court has previously withdrawn its reference order. For this reason, subject to certain exceptions, this article treats bankruptcy courts as the operative masters of the bankruptcy scheme despite the derivative nature of and any other constraints on their authority.

[17] Upon the commencement of a voluntary chapter 11 case, a debtor becomes a DIP and thereafter, unless or until a trustee is appointed or a bankruptcy court orders otherwise, operates its own business and remains in possession of its assets and property. 11 U.S.C. §§ 1101(1), 1107(a) (2018). "In this sense, the Chapter 11 debtor is a separate and distinct entity from the pre-bankruptcy debtor." *In re* Pease, 195 B.R. 431, 433 (Bankr. D. Neb. 1996). Subject to any statutory or judicial limitations, a DIP exercises the same avoiding powers as a trustee. 11 U.S.C. §§ 103(a), 323, 544–545, 547–548, 553, 1106(a), 1107(a). Bankruptcy courts uniformly hold the same as to debtors in chapter 12 cases, also known as "debtors-in-possession." *See id.* § 1203; *In re* Dawson, 411 B.R. 1, 22 n.1 (Bankr. D.D.C. 2008). Most bankruptcy courts treat chapter 13 debtors similarly. *See In re* Cecil, 488 B.R. 200, 202–04 (Bankr. M.D. Fla. 2013) (canvassing this split of authority and rejecting the contrary arguments). Due to this overlap, unless otherwise noted, any references to "trustee" in this article should be understood to encompass a DIP in a chapter 11 or 12 case and a debtor in a chapter 13 case, to the extent such persons may sue under one or more of the Avoidance Provisions.

[18] 11 U.S.C. § 546(a); Singer v. Kimberly Clark Corp. (*In re* Am. Pad & Paper Co.), 478 F.3d 546, 549 (3d Cir. 2007); *see also* Fid. Fin. Servs. v. Fink, 522 U.S. 211, 216–17 (1998) (citing to section 546(a) as an example of a "related provision" that "raises a negative implication that Congress did not intend state relation-back provisions or grace periods to control a trustee's power to avoid preferences"). In a voluntary bankruptcy case, the commencement of the case constitutes an "order for relief." 11 U.S.C. § 301(b).

[19] *In re* Mahoney, Trocki & Assocs., Inc., 111 B.R. 914, 918 (Bankr. S.D. Cal. 1990); *accord In re* Princeton-N.Y. Invs., Inc., 219 B.R. 55, 64 (D.N.J. 1998).

[20] As commonly used, the term "statute of limitations" can refer to an actual legislative enactment, whether a standalone statute or a provision of one, specifying the period in which the covered suit must be commenced,

actions with a new federal timetable.[21] In conformity with this logic, as long as the relevant state law claim exists on the date of the petition or order for relief (when the two diverge), the applicable limitations period lacks "any continued effect," and the timeliness of any action under sections 544, 545, 547, 548, and 553 now lies outside the purview of any other statute of limitations.[22] Invoking this same ratiocination, bankruptcy and district courts have read section 546(a) to preempt time windows instituted by *statutes of repose*, related yet distinct bars normally applicable to state substantive causes of action, prosecuted post-petition by a trustee per section 544 or section 545 or available as defenses to certain creditors under section 553, routinely without more than perfunctory focus on this prohibition's quiddity.[23] According to these jurists, assuming neither a statute of repose nor a statute of limitations (collectively, "limitations statute" or "limitations provision") expired pre-petition, section 546(a) nullifies either temporal constraint, if not both, so as to allow a trustee "sufficient time to investigate for the existence of facts that would support actions under . . . [the] enumerated Code sections."[24] The statutory text, aptly perused, and preemption doctrine, correctly applied, support no other exegesis, a "general consensus" now maintains,[25] though only few have probed the matter.[26] In these

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i.e. section 546(a)(1)(A), (2); the period of time set within the statute itself, *i.e.* "two years"; or even the calculated deadline, *i.e.* "November 1983." *Cf.* Regents of Univ. of Cal. v. Super. Ct., 976 P.2d 808, 822 (Cal. 1999) ("'Statute of limitations' is the 'collective term . . . commonly applied to a great number of acts,' or parts of acts, that 'prescribe the periods beyond which' actions 'may not be brought.'"). Throughout this article, unless otherwise noted, a "statute of limitations" is a federal or state law, whether codified as a dependent clause, subsection, or independent statute by a duly constituted legislative authority or, as more commonly seen in the nineteenth century, pronounced in case law, establishing the temporal interval during which a suit must be commenced, an interval separately denoted as a "limitations period" or a "prescriptive period." For more, see *infra* Part II.A.

[21] *In re* Dry Wall Supply, Inc., 111 B.R. 933, 935 (D. Colo. 1990).

[22] *See* Acequia, Inc. v. Clinton (*In re* Acequia, Inc.), 34 F.3d 800, 807 (9th Cir. 1994) (discussing section 544(b)); *In re* Bernard L. Madoff Inv. Sec. LLC, 445 B.R. 206, 231 (Bankr. S.D.N.Y. 2011) (referring to state statutes of limitations generally).

[23] *See In re* EPD Inv. Co., LLC, 523 B.R. 680, 686 (B.A.P. 9th Cir. 2015) (seeing no reason to distinguish between statutes of repose and limitations for purposes of section 546(a)); *see also* Betancourt v. Ballmer (*In re* Betancourt), 756 F. App'x 741, 742 (9th Cir. 2019) (citing *In re* EPD Inv. Co. LLC, 523 B.R. at 686, for support). In this article, unless otherwise noted, a "statute of repose" is a law, whether codified as a dependent clause, subsection, or independent statute by a duly constituted legislative authority, that designates a period of time at whose end the right to obtain relief expires, a period separately denoted as a "repose period" or a "proscriptive period." For more, see *infra* Part II.A.

[24] *See In re* Mi Lor Corp., 233 B.R. 608, 619 (Bankr. D. Mass. 1999) (citing, as evidence of this agreement, *In re* Dry Wall Supply, Inc., 111 B.R. 933, and *In re* Mahoney, Trocki & Assocs., Inc., 111 B.R. 914); *accord, e.g.*, *In re* Bayou Steel BD Holdings, LLC, Bankr. Case No. 19-12153 (KBO), Adv. Pro. No. 21-51013 (KBO), 2022 WL 3079861, at *4–8 (Bankr. D. Del. Aug. 3, 2022); Smith v. Am. Founders Fin., Corp., 365 B.R. 647, 677–79 (S.D. Tex. 2007); *In re* Princeton-N.Y. Invs., Inc., 199 B.R. 285, 298 (Bankr. D.N.J. 1996).

[25] *In re* Am. Hous. Found., 543 B.R. 245, 254 n.10 (Bankr. N.D. Tex. 2015); *see also Betancourt*, 756 F. App'x at 742; Kelley v. Safe Harbor Managed Acct. 101, Ltd., No. 20-642 (JRT), 2020 WL 5913523, at *5 n.8 (D. Minn. Oct. 6, 2020) (concurring with this purported agreement), *rev'd in part on other grounds*, 31 F.4th 1058 (8th Cir. 2022); Forman v. Willix, Nos. 13-5291, 13-5293 (CCC), 2014 WL 1877628, at *4 (D.N.J. Apr. 30, 2014); *see also* Cotter v. Gwyn, No. 15-4823, 2016 WL 4479510, at *13 (E.D. La. Aug. 25, 2016) (concluding that section 546(a) preempts Louisiana's applicable statute of repose).

[26] *See, e.g., In re* Genter, No. 3:19-CV-01951-E, 2020 WL 3129637, at *2 (N.D. Tex. June 12, 2020) (pointing out that "circuit courts have not directly addressed the interplay between a state uniform fraudulent

opinions, the fact that sections 547 and 548, on the one hand, and sections 544, 545, and 553, on the other, draw their substance from different headwaters matters not a whit.[27]

In four substantive parts, this article challenges the ramshackle foundations of this seemingly broad accord, as epitomized by the highest federal court—the U.S. Bankruptcy Appellate Panel of the Ninth Circuit ("BAP") in *Rund v. Bank of America Corp. (In re EPD Inv. Co., LLC)* ("*Rund*")[28]—to confront this oddly underexplored issue in a published opinion. Part I recounts the facts behind two cases in which the bankruptcy courts' ultimate decisions severely impacted one or more stakeholders. Reviewing the relevant legal regimes, Part II précises the history and nature of non-bankruptcy law's statutes of limitations and the Code's Avoidance Provisions and canvasses precedent regarding the interplay between section 546(a) and statutory limitations and repose periods, a motley neither as unambiguous nor as unanimous as many intone. Part III starts with a summation of the interpretive tenets applicable to the Code and proceeds to demonstrate how the modern consensus has failed to account fully for both the remarkably unremarkable prose of section 546(a) and the essential yet imprecise character of the manifold limitations provisions that are inscribed into state and federal tomes. As this final part illustrates, too many bankruptcy courts have forgotten a hoary axiom, one invigorated by older notions' inchoate retreat, when wading into this doctrinal row: As to some issues, the states[29] retain their crowns. Their domains trimmed, their writ still runs where equity no longer rambles, even if doubt cannot quite be quenched by interpretive artistry alone.

I. SNAPSHOTS: AVOIDANCE PROVISIONS AND STATUTES OF REPOSE

A. Pressman's Alleged Con

In the telling of one possibly tendentious narrator, upon its reincarnation, the machinations had started. As 2010 dawned, Jerrold S. Pressman had "operated over 150 different entities" for more than fifty years.[30] In 1973, Pressman had inaugurated

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transfer act statute of repose . . . and section 546(a)"); *Smith*, 365 B.R. at 677–78 (observing that, of the "[s]everal case discuss[ing] the application of section 546(a) and state limitations statutes," only a "few . . . have dealt with the interplay between section 546(a) and a state statute of repose" (citing cases cited *supra* note 25)). A recent decision adopting the majority position from the U.S. Bankruptcy Court for the District of Delaware attests to this stubborn truth by citing to the same handful of cases upon which this piece focuses. *In re* Bayou Steel BD Holdings, LLC, 2022 WL 3079861, at *4–8 (citing cases cited *supra* notes 25–26); *see also* infra Part II.C.2.

[27] *See In re* Giant Gray, Inc., 629 B.R. 814, 837–38 (Bankr. S.D. Tex. 2020) (concluding that section 546 extends a state statute of repose); *Smith*, 365 B.R. at 677–79.

[28] 523 B.R. 680, 686 (B.A.P. 9th Cir. 2015).

[29] Although a few federal statutes of repose exist, this article focuses entirely on state iterations. Practically speaking, this distinction means little, for the same analytical framework, with only minor adjustments, governs the relevance of all generally applicable non-bankruptcy laws. Still, a federal non-bankruptcy statute of repose would necessitate a structurally different preemption analysis, if not, as this article contends, a different result.

[30] Declaration of Jerrold S. Pressman in Opposition to Plaintiff's Motions for Summary Adjudication at 2,

EPD Investment Company as a sole proprietorship;[31] for the next thirty-seven years, this entity drew revenue from miscellaneous channels, including the sale and delivery of "compressed . . . and cryogenic gases," the leasing of vehicles and other equipment, the operation of ice-skating rinks, and more.[32] On June 27, 2003, its legal substance, but little else, changed when Pressman converted this business into a limited liability company, named EPD Investment Company LLC ("EPD"), under California law "to provide corporate protection and satisfy . . . [his] goal of retirement."[33] Driven by this ambition, Pressman transferred the sole proprietorship's every asset to EPD; he and his son were named, and would remain, EPD's only managers and members.[34] As some later maintained, a new operational ethos accompanied this conversion: The vehicle for a Ponzi scheme,[35] EPD spent its brief lifetime repaying existing creditors by using funds from new creditors, having plunged into balance sheet insolvency no later than December 2003, and trumpeting its supposed ownership of substantial real property throughout the United States.[36] By mid-2009, EPD could no longer pay its creditors,[37] the inevitable consequence of a con run too long, the protestations of another "media mogul"[38] be damned. So chapter 7 Trustee, Jason M. Rund, for Pressman's individual estate ("Rund") first alleged,[39] so the United States Bankruptcy Court for the Central District of California ("*Rund* Bankruptcy Court") later reckoned.[40]

EPD's defaults triggered a cavalcade of papers. On December 7, 2010, creditors commenced an involuntary chapter 7 petition against EPD;[41] the *Rund* Bankruptcy Court entered an order for relief on February 9, 2011.[42] Nearly a year into this involuntary proceeding, on February 1, 2012, Pressman filed a voluntary chapter 7

Rund v. Kirkland (*In re* EPD Inv. Co., LLC), Bankr. Case No. 10-62208-ER, Adv. Pro. No. 12-2424-ER (Bankr. C.D. Cal. Jan. 3, 2018), ECF No. 306 [hereinafter Pressman Decl.].

[31] Complaint to Avoid and Recover Fraudulent Transfers at 4, Rund v. Bank of Am. Corp. (*In re* EPD Inv. Co., LLC), Bankr. Case No. 10-62208-ER, Adv. Pro. No. 12-2596-ER (Bankr. C.D. Cal. Dec. 2, 2012), ECF No. 1 [hereinafter *Rund-BOA Complaint*]; Complaint to Avoid and Recover Fraudulent Transfers at 3, Rund v. Countrywide Home Loans, Inc. (*In re* EPD Inv. Co., LLC), Bankr. Case No. 10-62208-ER, Adv. Pro. No. 12-2576-ER (Bankr. C.D. Cal. Nov. 30, 2012), ECF No. 1 [hereinafter *Rund-Countrywide Complaint*].

[32] Pressman Decl., *supra* note 30, at 3–4.

[33] *Rund-BOA Complaint*, *supra* note 31, at 4; *Rund-Countrywide Complaint*, *supra* note 31, at 3.

[34] *Rund-BOA Complaint*, *supra* note 31, at 4*; Rund-Countrywide Complaint*, *supra* note 31, at 3.

[35] *Rund-BOA Complaint*, *supra* note 31, at 4–8; *Rund-Countrywide Complaint*, *supra* note 31, at 3–8.

[36] *Rund-BOA Complaint*, *supra* note 31, at 4–8; *Rund-Countrywide Complaint*, *supra* note 31, at 3–8.

[37] *Rund-BOA Complaint*, *supra* note 31, at 7; *Rund-BOA Complaint*, *supra* note 31, at 5.

[38] *Inglehame Plaintiff Files Contempt Motion Against Inman, Franklin Financial*, NASHVILLE POST, Sept. 18, 2002, https://www.nashvillepost.com/home/inglehame-plaintiff-files-contempt-motion-against-inman-franklin-financial/article_017a6b98-3cd4-5326-ac97-8b35b075bcd9.html.

[39] *Rund-BOA Complaint*, *supra* note 31, at 4–8; *Rund-Countrywide Complaint*, *supra* note 31, at 3–8.

[40] *See generally* Hearing on Motion to Dismiss Adversary Proceeding, Rund v. Bank of Am. Corp. (*In re* EPD Inv. Co., LLC), Bankr. Case No. 10-62208-ER, Adv. Pro. No. 12-2596 (Bankr. C.D. Cal. Aug. 2, 2013), ECF No. 42 (transcribing the parties' arguments).

[41] Chapter 7 Petition, *In re* EPD Inv. Co., LLC, Bankr. Case No. 10-62208-ER (Bankr. C.D. Cal. Dec. 7, 2010), ECF No. 1.

[42] Order for Relief and Order to File Schedules, Statements and Lists, *In re* EPD Inv. Co., LLC, Bankr. Case. No. 10-62208-ER (Bankr. C.D. Cal. Feb. 9, 2011), ECF No. 29.

petition,[43] followed, on March 5, 2012, by the voluntary opening of a chapter 11 case by Sidecreek Development, Inc., a company owned 54% by Pressman.[44] A season later, upon motion by Rund,[45] the *Rund* Bankruptcy Court substantively consolidated the first two cases.[46] Eventually, this same officer launched an adversary proceeding seeking to avoid Pressman-orchestrated transfers (and recover the affected funds) to Bank of America between December 24, 2003, and December 18, 2009, and thousands more to Countrywide Homes Loan, Inc., between December 15, 2003, and June 11, 2009, under sections 544(b), 548(a)(1), and 550(a) and section 3439 of the California Civil Code.[47] Any reclamation by Rund, Pressman and his allies retorted, should be limited to the value of only those transfers made in the four years preceding February 9, 2011, the day on which the *Rund* Bankruptcy Court had entered the order for relief in EPD's involuntary case.[48] In their view, as section 544(b) only licenses the avoidance of "any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law . . . ,"[49] California's statute of repose should apply, regardless of section 546(a).[50]

B. Monus' Documented Scheme

For a brief moment, the ill-matched pair bestrode the Midwest at the head of their fabrication. Viewed in the kindest light, the prep-school graduate had simply dreamed big, far too big, in his bid to reclaim a landscape dotted with ruined smokestacks and torpid furnaces,[51] no less daring than the four brothers who had moved from the city's Smoky Hollow neighborhood into cinematic history decades earlier.[52] The child of a marriage that joined two of the toniest families of Youngstown, Ohio, the "[s]hy and ungainly" Michael I. Monus ("Monus") had

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[43] Chapter 7 Petition, *In re* Jerrold S. Pressman, Bankr. Case. No. 12-13760-ER (Bankr. C.D. Cal. Feb. 1, 2012), ECF No. 1.

[44] Chapter 11 Petition, *In re* Sidecreek Dev. Inc., Bankr. Case. No. 12-17787-ER (Bankr. C.D. Cal. Mar. 5, 2012), ECF No. 1.

[45] Chapter 7 Trustee's Motion for Substantive Consolidation of the Bankruptcy Estates of Debtors EPD Investment Co., LLC & Jerrold S. Pressman, *In re* EPD Inv. Co., LLC, Bankr. Case No. 2:10-62208 (Bankr. C.D. Cal. Apr. 27, 2012), ECF No. 200.

[46] Order Granting Chapter 7 Trustee's Motion for Substantive Consolidation of the Bankruptcy Estates of Debtors EPD Investment Co., LLC & Jerrold S. Pressman, *In re* EPD Inv. Co., LLC, Bankr. Case No. 10-62208 (Bankr. C.D. Cal. June 4, 2012), ECF No. 227.

[47] *Rund-BOA Complaint*, *supra* note 31, at 8–11; *Rund-Countrywide Complaint*, *supra* note 31, at 8–10.

[48] *In re* EPD Inv. Co., 523 B.R. 680, 682–84 (B.A.P. 9th Cir. 2015).

[49] 11 U.S.C. § 544(b) (2018); *accord In re* Webster, 629 B.R. 654, 673, 674 n.17 (Bankr. N.D. Ga. 2021).

[50] *See In re* EPD Inv. Co., 523 B.R. at 682–84 (summarizing the *Rund* Bankruptcy Court's opinion); *cf. In re* Supplement Spot, LLC, 409 B.R. 187, 197–98 (Bankr. S.D. Tex. 2009) (declining to conduct a preemption analysis but still theorizing that, if it had done so, it would have required the trustee to comply with both the state and federal limitations periods).

[51] *See generally* STEVEN HIGH & DAVID W. LEWIS, CORPORATE WASTELAND: THE LANDSCAPE AND MEMORY OF DEINDUSTRIALIZATION (Cornell Univ. Press 2007); Bruce Springsteen, *Youngstown*, *on* The Ghost of Tom Joad (Columbia Records 1995).

[52] Cass W. Sperling, Cork Millner & Jack Warner Jr., Hollywood Be Thy Name: The Warner Brothers Story 24–28 (Univ. Press of Ky., 1st ed. 1998).

apparently lacked any "natural grace"; still, he grew brash and bombastic.[53] In contrast, David S. Shapira ("Shapira"), struck some observers as a staid "member of Pittsburgh's establishment," then just the heir to the Pittsburgh-based supermarket chain Giant Eagle, Inc. ("Giant-Eagle").[54] One year later, having visited a cut-rate drugstore in Cleveland, Ohio, Monus and Shapira joined together to found Phar-Mor, Inc. ("Phar-Mor"), a deep discount drugstore chain.[55] Within six years, Phar-Mor had opened eighty-one stores that generated $1.5 billion in annual sales; within ten, 300 stores and 25,000 employees located in thirty states generated gross revenues in excess of $2.8 billion under its banner.[56] Witnessing this ascent, Wal-Mart founder Samuel M. Walton acknowledged Phar-Mor as the greatest threat to his retail empire,[57] while "[o]ther discount retailers . . . wonder[ed] how Phar-Mor was able to simultaneously undercut prices, rapidly expand and still turn a profit."[58]

A decade after Phar-Mor's formation, answers came. In July 1992, "Phar-Mor fired Monus and two other executives."[59] Within a month, the once high-flying entity publicly revealed that Monus, aided by Patrick Finn ("Finn"), and Phar-Mor's Chief Financial Officer, had artfully hidden both company losses and unauthorized Phar-Mor checks written to Monus or for his direct benefit and moved at least $8.8 million from Phar-Mor to Monus' pet project, the World Basketball League, between 1988 and 1992.[60] As Phar-Mor now contended, such creativity had painted "a false picture of the profitability of the company and artificially inflated the value of Phar-Mor stock by concealing substantial operating losses and grossly overstating income."[61] Unaware of this data's falsity, but convinced of its accuracy, Phar-Mor as a whole had borrowed millions it, in truth, could never possibly repay.[62] Shortly after these

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[53] Jolie Solomon, Bruce Shenitz & Daniel McGinn, *Mickey's Secret Life*, NEWSWEEK, Aug. 30, 1993, at 70, EBSCOhost 0028-9604.

[54] Michael Schroeder & Zachary Schiller, *A Scandal Waiting to Happen*, BLOOMBERG, (Aug. 24, 1992), https://www.bloomberg.com/news/articles/1992-08-23/a-scandal-waiting-to-happen.

[55] *See* Michael Abramowitz, *A Pillar's Fall Shakes Ohio Town*, WASH. POST, Aug. 7, 1992.

[56] United States v. Monus, 128 F.3d 376, 381 (6th Cir. 1997); *Phar-Mar Can Pay Its Employees*, FREE-LANCE STAR, Aug. 19, 1992, at B6.

[57] *See* Don Shilling, *Corporate Scandal, Rise of Larger Chains Doom Once-Promising Phar-Mor*, VINDICATOR, July 19, 2002, at 1, ProQuest (outlining allegations and recounting Phar-Mor's history); Cristina Rouvalis, *Monus Jury Deadlocks Phar-Mor Fraud Case Ends in Mistrial, May Be Retried*, PITTSBURGH-POST GAZETTE, June 24, 1994, at a-1 (discussing Monus' first mistrial and his Phar-Mor shenanigans).

[58] Eric Heyl, *Phar-Mor Led the Way for Failure*, TRIBLIVE, July 20, 2002, https://archive.triblive.com/news/phar-mor-led-the-way-for-failure/.

[59] *Former Phar-Mor President Monus Pleads Innocent to New Indictment*, ASSOCIATED PRESS (Aug. 4, 1994), https://apnews.com/article/1e2e06dacc6bdec822ca0962432d3819.

[60] *See, e.g., Monus*, 128 F.3d at 381–82 (summarizing the results of earlier judicial proceedings); Zachary Schiller, *Wait a Minute--Phar-Mor Is Still Kicking*, BUSINESS WEEK, Mar. 8, 1993, at 60–61 (detailing the scandal); Milt Freudenheim, *Phar-Mor Says Profit Was Faked*, N.Y. TIMES, Aug. 5, 1992, at D1.

[61] *In re* Phar-Mor, Inc. Secs. Litig., 900 F. Supp. 777, 779 (W.D. Pa. 1994); *see also* Kenneth N. Gilpin, *Phar-Mor Fraud Estimate*, N.Y. TIMES, Jan. 23, 1993, at 39 (providing updated statistics regarding the schemes of Monus and Finn).

[62] *See* Kenneth N. Gilpin, *Ex-Officers of Phar-Mor Are Accused*, N.Y. TIMES, Jan. 30, 1993, at 37. Shapira's contribution to this mess was, and will likely stay, unclear. *Compare* Kenneth N. Gilpin, *Memo About Phar-Mor Destroyed, Report Says*, N.Y. TIMES, Jan. 20, 1994, at D4, *with* Kenneth N. Gilpin, *Coopers & Lybrand Sues Phar-Mor Executives*, N.Y. TIMES, Aug. 21, 1992, at D3.

disclosures unleashed a dismaying firestorm,[63] Phar-Mor filed a voluntary chapter 11 petition in the United States Bankruptcy Court for the Northern District of Ohio.[64]

Among the many lawsuits that followed this filing was an action for the avoidance of certain transfers under sections 548 and 550 and Ohio's fraudulent transfer statute under section 544(b) by the Official Committee of Unsecured Creditors of Phar-Mor, Inc. and Fifteen Affiliated Companies ("Committee").[65] In this suit, the Committee named as defendants various Phar-Mor shareholders who had accepted Phar-Mor's 1992 tender offer for their shares of its stock for approximately $72 million.[66] As fortune incidentally decreed, Stanley Rothenfeld ("Rothenfeld"), the cagey leader of a string of Cuyahoga County-based companies[67] who somehow ended up on President Richard M. Nixon's Enemies List,[68] appeared within this assemblage, having exchanged 6,274 shares of stock for a payment of $153,336.56.[69] On February 18, 1993, approximately six months after Phar-Mor's filing, this "big man" died at Mount Sinai Medical Center.[70] Unfortunately, the Committee first received notice of Rothenfeld's death when his executor moved for summary judgment, and it neither presented nor mentioned its claim to Rothenfeld's estate until a complaint was filed on August 16, 1994, eighteen months later.[71] In his motion, Rothenfeld's executor proffered one reason for his entreaty: Having run uninterruptedly during Phar-Mor's bankruptcy, Ohio's one-year statute of repose now abrogated the Committee's claim.[72] The Committee challenged the invocation of this state stricture as a violation of its due process rights—and on the basis of its "conflict" with section 546.[73]

II. LEGAL BACKGROUND: PROSE AND PRECEDENT

By virtue of its text and the statutory compendium of which it is a part and the body of law to which it belongs, section 546(a) implicates distinct legislative schemes and legal traditions. Under the Code, this single subsection fixes the deadline for a trustee's initiation of certain actions, and its apt construction therefore requires a clear

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[63] *See* Glenn Collins, *Ousted Phar-Mor President Found Guilty in $1 Billion Fraud*, N.Y. TIMES, May 26, 1995, at D3; Blair S. Walker, *Phar-Mor Still Under FBI Review*, USA TODAY, Aug. 6, 1992, at 2B.

[64] *See In re* Phar-Mor, Inc., 152 B.R. 924, 925 (N.D. Ohio 1993).

[65] *In re* Phar-Mor, Inc. Secs. Litig., 178 B.R. 692, 693–94 (W.D. Pa. 1995); *see also* Cristina Rouvalis, *Phar-Mor Lawsuits Name Monus Allies*, PITTSBURGH POST-GAZETTE, Aug. 18, 1994, at B-8 (chronicling this and other lawsuits).

[66] *In re* Phar-Mor, Inc. Secs. Litig., 178 B.R. at 693–94.

[67] *See* John Fuller, *Mintz Plans New S&L in Beachwood*, PLAIN DEALER, Mar. 17, 1984, at 3-B; John E. Bryan, *Loans Rescue Building Systems*, PLAIN DEALER, June 21, 1973, at 3-C; *Earnings Fall Sharply, Building Systems Reports*, PLAIN DEALER, Nov. 1, 1972, at 3-H.

[68] *Eighteen Ohioans on Enemies List*, COLUMBUS DISPATCH, Dec. 21, 1973, at 4A.

[69] *In re* Phar-Mor, Inc. Secs. Litig., 178 B.R. at 693–94.

[70] *See Obituary: Stanley Rothenfeld, Tireless Worker for Jewish Welfare Fund*, PLAIN DEALER, Feb. 20, 1993.

[71] *See In re* Phar-Mor, Inc. Secs. Litig., 178 B.R. at 694.

[72] *Id.*

[73] *Id.*

understanding of the Avoidance Provisions cross-referenced in its opening clause.[74] Whatever ambiguity they enthrone and incorporation they effectuate, these constructs carry the unmistakable stamp of distinctly federal authority. State limitations provisions can generally be said to embody the varied legislative judgments of their own constitutionally distinct enacting authorities, each the deliberative product of an entirely separate non-federal potentate.[75] Still, two legal verities likely bear responsibility for the tectonically complex relationship between true state statutes of repose and section 546(a), an oft-claimed, but analytically flimsy "general consensus" notwithstanding:[76] these edicts' complex ancestry and anomalistic treatment under generally applicable state law and the dualistic configuration of U.S. bankruptcy law, as epitomized by the eponymous "*Butner* Rule," a mandate extrapolated from the Court's pre-Code decision in *Butner v. United States* ("*Butner*")[77] by its extensive progeny.[78]

A. Non-Bankruptcy Law: Limitations Provisions

1. Terminology: "limitations," "repose," "tolling," and "accrual"

Whether state or federal in origin or civil or criminal in design, limitations provisions represent distinct but related "legislative policy decisions that dictate when the courthouse doors close for particular litigants."[79] For centuries, only statutes of limitations existed, with ideas of "repose" constituting one of the more common justifications for enactment of such statutes; the latter first appeared in consistently recognizable form in the second half of the twentieth century.[80] Unsurprisingly, therefore, the same excoriations can be lodged against both statutes,[81] while broadly

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[74] *See* 11 U.S.C. § 546(a) (2018); *In re* Rodriguez, 283 B.R. 112, 116 (Bankr. E.D.N.Y. 2001).

[75] *See, e.g.*, Lujan v. Regents of the Univ. of Cal., 69 F.3d 1511, 1521–22 (10th Cir. 1995) ("Statutes of limitations represent a policy judgment about the proper balance to be struck between competing considerations—the plaintiff's interest in vindicating her rights and the defendant's interest in repose and in not having to defend stale claims."); Francis E. McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 AM. U. L. REV. 579, 589–600 (1981) (sifting through the usual arguments made in favor of statutes of repose).

[76] *In re* Am. Hous. Found., 543 B.R. 245, 254 n.10 (Bankr. N.D. Tex. 2015).

[77] *See* 440 U.S. 48, 54–55 (1979) ("Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law."), *superseded by statute*, *as recognized in In re* White Plains Dev. Corp., 137 B.R. 139, 141–42 (Bankr. S.D.N.Y. 1992). For more, see *infra* Part III.

[78] *See* Rodriguez v. FDIC, 140 S. Ct. 713, 718 (2020) (citing *Butner*, 440 U.S. at 54, to justify reliance on state corporate law for the determination of corporate property rights in the context of a federal bankruptcy and a tax dispute). Though outside the scope of this article, this understanding of *Butner* likely overlooks its palpable limitations. *See generally* Randolph J. Haines, Rodriguez*: Supreme Court Misses the Point But Beware the Point It Makes*, NORTON BANKR. L. ADVISER, May 2020, at 1. Even so, for the purposes of this piece, this perception remains sufficiently widespread to merit interpretive accommodation.

[79] Aicher *ex rel.* LaBarge v. Wis. Patients Comp. Fund, 613 N.W.2d 849, 859–60 (Wis. 2000).

[80] *See, e.g.*, Pillow v. Roberts, 54 U.S. (1 How.) 472, 477 (1852) ("Statutes of limitation are . . . statutes of repose, and should not be evaded by a forced construction."); Reynolds v. Porter, 760 P.2d 816, 819–20 (Okla. 1988) ("Early treatise writers and judges considered time bars created by statutes of limitations, escheat and adverse possession as periods of repose."). For more, see *infra* Part II.A.2–3.

[81] Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 476 (1897).

similar purposes account for their ongoing perpetration.[82] The two, in fact, "are often confused" by the federal and state courts charged with their application due to such convergences.[83] Though this persistent conflation is thus explicable,[84] each limitations provision now claims—and, by the 1970s, already possessed—a materially significant delineation.[85]

In practice, the term "statute of limitations" is defined by reference to the "accrual" and the "tolling" of a cause of action. Broadly speaking, "[a] statute of limitations is a procedural device that operates as a defense to limit the remedy available from an existing cause of action"[86] by ordaining the limitations period for the commencement of a suit on a given claim that is triggered, or begins to run, when the cause of injury "accrues."[87] Nearly all such limitations provisions conform to the same osteology: "they classify claims into groups, [] assign each group of claims a limitation period of fixed duration," and forbid the prosecution of claims not filed before the circumscribed period has completed "running," i.e. passing, and thereupon

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[82] *See In re* Exxon Mobil Corp. Secs. Litig., 500 F.3d 189, 199–200 (3d Cir. 2007) ("It might be said that statutes of repose pursue similar goals as do statutes of limitations (protecting defendants from defending against stale claims). . . ."); *see also* John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 133 (2008) ("Most statutes of limitations seek primarily to protect defendants against stale or unduly delayed claims."); Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68, 73–82 (2005) (collecting many of the policies cited in support of statutes of limitations by federal courts).

[83] Ma v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 597 F.3d 84, 88 n.4 (2d Cir. 2010); *see also, e.g.*, United States v. $515,060.42 in U.S. Currency, 152 F.3d 491, 503 (6th Cir. 1998) (quipping that "statutes of limitation are statutes of repose"); Hart v. United States, 910 F.2d 815, 818, (Fed. Cir. 1990) (referring to the statute of limitations in 28 U.S.C. § 2501 "[a]s a statute of repose . . . intended both to limit the opportunity to file suits, and to limit the obligation to defend against them"); *In re* Aguilar, 470 B.R. 606, 613–16 (Bankr. D.N.M. 2012) (quoting *Ma*, 597 F.3d at 88 n.4); Landis v. Physicians Ins. Co. of Wis., Inc., 628 N.W.2d 893, 907 n.16 (lamenting that "the terms 'statute of repose' and 'statute of limitations' have long been two of the most confusing and interchangeably used terms in the law"). The Court is not immune to this tic. *See* Rotella v. Wood, 528 U.S. 549, 555 (2000) (describing "repose" as a purpose of all limitations statutes); John R. Sand & Gravel Co., 552 U.S. at 133–34 (citing to prior cases that branded certain limitations provisions that "seek not so much to protect a defendant's case-specific interest in timeliness as to achieve a broader system-related goal," with "the time limits of these statutes" read "as more absolute" and "sometimes referred to . . . as 'jurisdictional,'" as "statutes of limitations," though such provisions are more accurately classified as statutes of repose).

[84] *See* Nat'l Credit Union Admin. Bd. v. Barclays Cap. Inc., 785 F.3d 387, 393 (10th Cir. 2015) (acknowledging that "[i]t is sometimes difficult to distinguish statutes of limitations from statutes of repose").

[85] *See, e.g.*, Serafin v. Seith, 672 N.E.2d 302, 310 (Ill. App. Ct. 1996) ("The period of repose gives effect to a policy different from that advanced by a period of limitations."); Josephine H. Hicks, Note, *The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 VAND. L. REV. 627, 628–29 (1985) ("[I]mportant differences exist between statutes of limitations and statutes of repose."). For more, see *infra* Part II.A.2–3, III.B.2–3.

[86] First United Methodist Church v. U.S. Gypsum Co., 882 F.2d 862, 865 (4th Cir. 1989); *accord, e.g.*, Amoco Prod. Co. v. Newton Sheep Co., 85 F.3d 1464, 1472 (10th Cir. 1996); City of Willmar v. Short-Elliott-Hendrickson, Inc., 512 N.W.2d 872, 875 (Minn. 1994); Brennan v. Edward D. Jones & Co., 626 N.W.2d 917, 919 (Mich. Ct. App. 2001).

[87] *See, e.g.*, Aryeh v. Canon Bus. Sols., Inc., 292 P.3d 871, 875 (Cal. 2013); Gefre v. Davis Wright Tremaine, LLP, 306 P.3d 1264, 1273 (Alaska 2013); Am. Family Ins. & Prairie W. Apts. I, v. Waupaca Elevator Co., 809 N.W.2d 337, 343 (N.D. 2012); Giest v. Sequoia Ventures, Inc., 99 Cal. Rptr. 2d 476, 479 (Cal. Ct. App. 2000).

has "run," i.e. expired.[88] For much of U.S. legal history, "accrual" took place upon the occurrence of "the last element essential to the [pleaded] cause of action,"[89] usually an apparent injury, and the date of this final prerequisite's manifestation was thus the same as the day upon which any relevant limitations period opened,[90] subject to rare exclusions.[91] Nowadays, in nearly every one of this nation's presently governing legal schemes, a precept variously known as the "awareness doctrine," "rule of discovery," or "discovery rule" (the "Discovery Rule") provides that the accrual date of a cause of action is delayed until the plaintiff is (or should have been) aware of her injury and its cause, with certain exceptions.[92] As a result, the transpiration of the last component essential for the inception of an actionable harm can, and often does, take place before the date upon which the pertinent statute of limitations starts its run in nearly every American jurisdiction.[93] The term "accrue" still means "[t]o come into existence as an enforceable claim or right" and is tantamount to "originate" or "arise," as it has since the fifteenth century, but "accrual" of a cognizable right to sue now usually only takes place once a plaintiff knows, or with due diligence should know, of facts sufficient to form the basis of a cause of action,[94] the historical connection between an action's customary accrual and its final predicate's occurrence now severed. Synonymous with "abate" or "stop," the word "toll," in turn, refers to the lapse in time between the relevant wrong's infliction and this actual or constructive revelation, and "tolling" to the legal doctrine that allows for the pausing of an already running limitations period or the delaying of the moment

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[88] Andrew J. Wistrich, *Procrastination, Deadlines, and Statutes of Limitation*, 50 WM. & MARY L. REV. 607, 611 (2008); *see also* Hunter-Boykin v. Geo. Wash. Univ., 132 F.3d 77. 84 (D.C. Cir. 1998).

[89] Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 491 P.2d 421, 428 (Cal. 1971); *see also Aryeh*, 292 P.3d at 875 (dubbing this to be the "'last element' accrual rule"); *cf. In re* Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 980 F. Supp. 2d 425, 450–51 (S.D.N.Y. 2013) ("Like most jurisdictions, California applies the common law 'last element accrual rule: ordinarily, the statute of limitations runs from the occurrence of the last element essential to the cause of action.'").

[90] Adam Bain & Ugo Colella, *Interpreting Federal Statutes of Limitations*, 37 CREIGHTON. L. REV. 493, 513 (2004); *accord* Beauchamp v. Amedio, 751 A.2d 1047, 1050 (N.J. 2000).

[91] *See* Bailey v. Glover, 88 U.S. (21 Wall.) 342, 349–50 (1874) (incorporating the doctrine of fraudulent concealment into federal common law).

[92] *See e.g.*, Geo. Knight & Co. v. Watson Wyatt & Co., 170 F.3d 210, 213 (1st Cir. 1999); State *ex rel.* Wilson v. Ortho-McNeil-Janssen Pharms., 777 S.E.2d 176, 198 (S.C. 2015); Jolly v. Eli Lilly & Co., 751 P.2d 923, 926–27 (Cal. 1988); Lopez v. Swyer, 300 A.2d 563, 566–67 (N.J. 1973); Brown v. Drake-Willock Int'l, 530 N.W.2d 510, 513 (Mich. Ct. App. 1995). The Discovery Rule does not always operate in the same way in every state. For example, Texas' version "technically extends the limitations period by postponing the accrual date—*not* by recognizing accrual and then applying what [some sources describe or] define as tolling." Smith v. Travelers Cas. Ins. Co. of Am., 932 F.3d 302, 312 (5th Cir. 2019). Nonetheless, "[t]he principle is essentially the same regardless of the terminology used to describe it." Silo Rest. Inc. v. Allied Prop. & Cas. Ins. Co., 420 F. Supp. 3d 562, 583 (W.D. Tex. 2019). Whatever its form, the Discovery Rule is only one of several recognizable exceptions to the "last element" rule of accrual recognized by at least one U.S. jurisdiction. *Aryeh*, 292 P.3d at 875–76.

[93] For more, see *infra* Part II.A.2.

[94] BLACK'S LAW DICTIONARY 25 (10th ed. 2014); Smith v. Travelers Cas. Ins. Co. of Am., 932 F.3d 302, 311 (5th Cir. 2019); Nixon v. State, 704 N.W.2d 643, 659 (Iowa 2005); *see, also e.g.*, Wallace v. Kato, 549 U.S. 384, 388 (2007) (observing that, per "the standard rule," accrual occurs "when the plaintiff has 'a complete and present cause of action'"); United States v. Lindsay, 346 U.S. 568, 569 (1954) ("In common parlance a right accrues when it comes into existence. . . .").

of an action's accrual; stated differently, per the relevant jurisdiction's Discovery Rule, lack of discovery may "toll" the "running" of any statute of limitations.[95] In today's legal parlance, upon "accrual," as now defined, of a cause of action, the limitations period within which a claim must be initiated opens in accordance with tolling notions and the relevant statute of limitations, a remedial and procedural legislative contraption.[96]

As a matter of legal lexicography, the term "statute of repose" denotes a statute different in purpose and implementation from a stereotypical statute of limitations.[97] Directly impacting the accrual of a cause of action in the first instance, this kind of limitations provision takes the form of "a substantive right to be free from liability after a given period of time has elapsed from a defined event"[98] that "has nothing to do with the date of injury."[99] By design, this "initiating" predicate occurs independently of, and "unrelated" to, the moment in time upon which a cause of action accrues or a conceivable injury was suffered;[100] "usually," it is the "conduct of the defendant that is related to the claim" itself.[101] Consequently, repose periods run whether or not an injury has occurred or been discovered,[102] this unyielding and absolute barrier independent of any one litigant's action or inaction. So understood, these relatively newfangled statutes may not affirmatively grant prerogatives in the traditional sense, yet not one is any "less substantive because it imposes a disability upon potential claimants" and grants a defendant "a right to immunity from suit under the circumstances set out in the statute."[103] However denominated, then, a statute of repose always marks the outer time boundary for judicial enforcement of a substantive right, even if equitable considerations would warrant tolling or even if the plaintiff has not, or could not have, yet discovered the advent of a cause of action or suffered a resulting injury.[104]

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[95] BLACK'S, *supra* note 94, at 1716; *Smith*, 932 F.3d at 311; Anderson v. Sentinel Offender Servs., LLC, 784 S.E.2d 791, 793 (Ga. 2019).

[96] BLACK'S, *supra* note 94, at 1636; Smith v. Westinghouse Elec. Corp., 732 P.2d 466, 468 n.11 (Okla. 1987); Dunn v. Dunn, 281 P.3d 540, 548 (Kan. Ct. App. 2012).

[97] BLACK'S, *supra* note 94, at 1637; Anderson v. United States, 46 A.3d 426, 437–38 (Md. 2012).

[98] Adam Bain, *Determining the Preemptive Effect of Federal Law on State Statutes of Repose*, 43 U. BALT. L. REV. 119, 125 (2014).

[99] Inco Dev. Corp. v. Super. Ct., 31 Cal. Rptr. 3d 872, 875 (Cal. Ct. App. 2014).

[100] Roksam Baking Co. v. Lanham Mach. Co., 288 F.3d 895, 903 (6th Cir. 2002); *accord Anderson*, 46 A.3d at 438; Wuliger v. Christie, 310 F. Supp. 2d 897, 911–12 (N.D. Ohio 2004).

[101] Bain, *supra* note 98, at 125.

[102] *See, e.g.*, Wong v. Beebe, 732 F.3d 1030, 1048 (9th Cir. 2013) (en banc); Albrecht v. Gen. Motors Corp., 648 N.W.2d 87, 90–91 (Iowa 2002); Landis v. Physicians Ins. Co. of Wis., Inc., 628 N.W.2d 893, 900–01 (Wis. 2001); PGA W. Residential Ass'n, Inc. v. Hulven Int'l, Inc., 221 Cal. Rptr. 3d 353, 371 (Cal. Ct. App. 2017).

[103] Nesladek v. Ford Motor Co., 46 F.3d 734, 737 (8th Cir. 1995).

[104] *See* BLACK'S, *supra* note 94, at 1637; P. Stolz Fam. P'ship L.P. v. Daum, 355 F.3d 92, 102–03 (2d Cir. 2004) (citing Jackson Nat'l Life Ins. Co. v. Merrill Lynch & Co., 32 F.3d 697, 704 (2d Cir. 1994)); *accord* Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc., 137 S. Ct. 2042, 2049–50, 2052 (2017); *In re* Teva Sec. Litig., 512 F. Supp. 3d 321, 332 (D. Conn. 2021).

2. Statutes of limitations

a. Developmental account: history and purpose

In the year in which the First Folio cropped up in London's bookshops,[105] the British parliament enacted the Limitations Act of 1623 ("Act of 1623" or "Statute of James"),[106] the foundation for all subsequent time limits on legal actions and exemptions for minority and mental incompetency imposed in the United Kingdom[107] and the United States.[108] Stamped with the ancients' imprimatur,[109] temporal limitations on criminal and real property actions had actually surfaced within the United Kingdom long before this law's promulgation.[110] Historically, these statutes' time periods "were first reckoned from some well-known date, such as the first year of the reign of a certain king."[111] Thus, under the Statute of Merton, passed by the Parliament of England in 1235, a writ of right "[t]ouching Conveyance of Descent . . . from any Ancestor from the time of King Henry the elder, the Year and Day" could not refer back to any time before the coronation of Henry Curtmantle as Henry II, King of England, in 1154, but certain probate-like cases could not be tried without the claimant first proving that the litigant's decedent was living at the time John Lackland, King of England from 1199 until his death in 1216, returned to England from Ireland in 1210,[112] later substituted to the year of the coronation of Henry III in 1216 by the 1275 Statute of Westminster I.[113] While more general time-based curbs on real property actions appeared in recognizable form by 1487,[114] the first statute to classify actions into categories and base the period on the character of the right emerged in 1540.[115] Though British courts were likely "strict about the

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[105] STEPHEN H. GRANT, COLLECTING SHAKESPEARE: THE STORY OF HENRY AND EMILY FOLGER 95 (2014).

[106] Limitation of Actions Act 1623 21 Jac. 1, c. 16 (Eng.); Gaines v. New York, 109 N.E. 594, 595–96 (N.Y. 1915) (Cardozo, J.); Harry B. Littell, *A Comparison of the Statutes of Limitations*, 21 IND. L.J. 23, 23 (1945). In light of the antiquity of this and other non-U.S. laws, this article formats such sources in the fashion that its author finds least confounding but that complies with prevailing citation rules to the greatest possible extent.

[107] United States v. Expl. Co., 203 F. 387, 390 (8th Cir. 1913); Littell, *supra* note 106, at 23.

[108] Wood v. Carpenter, 101 U.S. 135, 139 (1879); William M. Schrier, *The Guardian or the Ward: For Whom Does the Statute Toll?*, 71 B.U. L. REV. 575, 576–77 (1991).

[109] *See, e.g.*, WILLIAM D. FERGUSON, THE STATUTE OF LIMITATIONS SAVINGS STATUTE 7 (1978) ("Statutes of limitations relating to real property may be traced to ancient Greece or beyond."); RUDOLPH SOHM, THE INSTITUTES: A TEXTBOOK OF THE HISTORY AND SYSTEM OF ROMAN PRIVATE LAW 283 (Ledlie trans., 3d ed. 1970) ("Emperors Honorius and Theodosius . . . moved by obvious considerations of convenience, enacted in 424 A.D. that all actions should be barred within a certain period.").

[110] *See* William B. Stoebuck, *The Fiction of Presumed Grant*, 15 U. KAN. L. REV. 17, 26–27 (1966); Thomas E. Atkinson, *Some Procedural Aspects of the Statute of Limitations*, 27 COLUM. L. REV. 157, 157 (1927).

[111] Littell, *supra* note 106, at 24.

[112] Statute of Merton Act 1235 20 Hen. 3, c. 8 (Eng.); *see* Stoebuck, *supra* note 110, at 26 n.61.

[113] Wistrich, *supra* note 88, at 611 n.12; Atkinson, *supra* note 110, at 160.

[114] Fines Act 1488 4 Hen. 7, c. 24 (Eng.); Stowell v. Lord Zouch (1569) 75 Eng. Rep. 536 (CP).

[115] *See* Limitation of Prescription Act 1540, 32 Hen. 8, c. 2 (Eng.); FERGUSON, *supra* note 109, at 7–8; *see also* Mitchell A. Lowenthal, Brian E. Pastuszenski & Mark E. Greenwald, *Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations*, 65 CORNELL L. REV. 1012, 1022 n.62 (1980) (comparing 32 Hen. 8, c. 2, and 4 Hen. 7, c. 24); *cf.* H. G. WOOD, A TREATISE ON THE

timeliness of . . . proceeding[s] and in general the burden was on . . . appell[ants] to show this," such limitations provisions were rare, and not one affected in personam actions until the Limitations Act of 1623.[116] Thereafter, these statutory creatures became fixtures within the legal systems of not just the British Isles but also Colonial America.[117]

Over time, British and U.S. jurisprudence repeated and refined the defenses of these periods' perpetration introduced in the early seventeenth century. British law targeted a claimant who had been "negligent for a long and unreasonable time" in actions for the recovery of realty, Sir William Blackstone insisted, "to punish his neglect" and "because it . . . presumed that the supposed wrongdoer has in such a length of time procured legal title," as "otherwise he would sooner have been sued."[118] Even when the action did not involve property, judges emphasized these two notions.[119] To a British judge nearly two centuries later, the Act of 1623 was "an act of peace," as "[l]ong dormant claims have often more of cruelty than of justice in them," and "Christianity forbids . . . attempt[s] [to] enforce[] the payment of a debt which time and misfortune have rendered the debtor unable to discharge."[120] Changes in points of emphasis came, as "[t]he old presumption of payment, satisfaction[,] or release" was discarded as outdated, and British courts placed "the desire to compel settlement of claims within a reasonable time while the evidence is still fresh and both evidence and witnesses are obtainable" at the center of their defense of prescriptive periods.[121] Within the United States, statutes of limitations grossed the same defensive encomia from the point of their appearance, as exemplified by the Court's oft-cited laudation of such legislative writs in 1879's *Wood v. Carpenter* ("*Wood*") for (1) "promot[ing] repose by giving security and stability to human affairs," (2) "stimulat[ing] to activity and punish negligence," and (3) "[w]hile time is constantly destroying the evidence of rights, . . . supply[ing] its place by a presumption which renders proof unnecessary."[122] If the second rationale can be read

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LIMITATIONS OF ACTIONS 4 (2d ed. 1893) (stating that the common law imposed no time limitations on contract actions).

[116] Limitation of Actions Act 1623 21 Jac. 1, c. 16 (Eng.); Lowenthal et al., *supra* note 115, at 1021–22; Atkinson, *supra* note 110, at 157, 165; *see also* HENRY JICKLING, A PRACTICAL TREATISE ON THE ANALOGY BETWEEN LEGAL AND EQUITABLE ESTATES AND MODES OF ALIENATION 510–11 (1829) (comparing early English statutes).

[117] *See, e.g.*, McDonald v. Hovey, 110 U.S. 619, 621–22 (1884); Wood v. Carpenter, 101 U.S. 135, 139 (1879); *see also* Shepherd v. Thompson, 122 U.S. 231, 234 (1887) ("The statute of limitations in force in the District of Columbia is the statute of Maryland, which, so far as applicable to this case, closely follows the language of the English St. 21 Jac. I, c. 16, § 3."); Bell v. Morrison, 26 U.S. (1 Pet.) 351, 359 (1828) ("The statute of limitations of Kentucky, is substantially the same with the statute of 21 of James, ch. 16, with the exception, that it substitutes the term of five years instead of six."); Lowenthal et al., *supra* note 115, at 1022–23 ("The American colonies adopted this concept of limitations and continued to apply it after independence."); *cf.* M'Cluny v. Silliman, 28 U.S. (3 Pet.) 270, 277–78 (1830) (construing an early Ohio statute of limitations).

[118] 3 WILLIAM BLACKSTONE, COMMENTARIES *188.

[119] Littell, *supra* note 106, at 23.

[120] A'Court v. Cross (1825) 130 Eng. Rep. 540, 541–42 (KB).

[121] Littell, *supra* note 106, at 23–24.

[122] *Wood*, 101 U.S. at 139; *accord* Fogle v. Slack, 419 F. App'x 860, 865–66 (10th Cir. 2011); Devine v.

to assimilate the judicial and prosecutorial economy that it simultaneously promotes, then nearly all conceptual bases for modern statutes of limitations can be traced to *Wood*'s triad and thus its British progenitors.[123] In point of fact, the Court would fume at the contention that a defense predicated on the expiration of the applicable limitations period was "a technical" rather than a "substantial and meritorious" one for these same reasons nearly forty-three years later,[124] a portrayal destined to be reiterated by dozens of state and federal courts,[125] and identify "the primary purposes of limitations statutes [as] 'preventing surprises' to defendants and 'barring a plaintiff who has slept on his rights,'" subsuming *Wood*'s third rationale into the second, in opinion after opinion over the next century.[126] True, some observers discern "a variety of overlapping and inconsistent policies" behind many such limitations provisions.[127] Nevertheless, long understood as "the product[s] of a balancing of the individual person's right to seek redress for past grievances against the need of society and the judicial system for finality—for a closing of the books,"[128] these bulwarks of civil litigation retain their luster,[129] finding validation, as *Wood* perorated and its posterity has averred, in "considerations of fairness to defendants"[130] and both "necessity and convenience, rather than in logic."[131]

Hutt, 863 A.2d 1160, 1167 (Pa. Super. Ct. 2004).

[123] *See, e.g.*, United States v. Kubrick, 444 U.S. 111, 117 (1979) ("These enactments are statutes of repose[] . . . [that] protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise."); Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945) (describing statutes of limitations as "practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost"); Order of R.R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342, 348–49 (1944) ("Statutes of limitation . . . in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."); Ryan v. Roman Cath. Bishop, 941 A.2d 174, 180 (R.I. 2008) (quoting *Wood*, 101 U.S. at 139).

[124] United States v. Or. Lumber Co., 260 U.S. 290, 299 (1922).

[125] *See, e.g.*, Bd. of Regents of Univ. of State of N.Y. v. Tomanio, 446 U.S. 478, 487 (1980) ("Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system."), *abrogated on other grounds, as recognized by* Farrell v. McDonough, 966 F.2d 279, 280 (7th Cir. 1992); Andrew v. Schlumberger Tech. Corp., 808 F. Supp. 2d 1288, 1292 (D.N.M. 2011) (quoting *Tomanio*, 446 U.S. at 487); Schmucker v. Naugle, 231 A.2d 121, 123 (Pa. 1967) (quoting *Or. Lumber Co.*, 260 U.S. at 299–300).

[126] Artis v. District of Columbia, 138 S. Ct. 594, 607–08 (2018) (quoting Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554–55 (1974)).

[127] Tyler T. Ochoa & Andrew Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 514 (1997); *accord* Michael J. Kaufman & John M. Wunderlich, *Toward a Just Measure of Repose: The Statute of Limitations for Securities Fraud*, 52 WM. & MARY L. REV. 1547, 1547 (2011); *see also Chase Sec. Corp.*, 325 U.S. at 313 ("Statutes of limitations always have vexed the philosophical mind, for it is difficult to fit them into a completely logical and symmetrical system of law.").

[128] Ryan v. Roman Cath. Bishop of Providence, 941 A.2d 174, 180–81 (R.I. 2008).

[129] Wood v. Carpenter, 101 U.S. 135, 139 (1879).

[130] First United Methodist Church v. U.S. Gypsum Co., 882 F.2d 862, 865–66 (4th Cir. 1989).

[131] *Chase Sec. Corp.*, 325 U.S. at 314; *see also* Eli J. Richardson, *Eliminating the Limitations of Limitations Law*, 29 ARIZ. ST. L.J. 1015, 1015 (1997) ("According to the conventional wisdom, statutes of limitations operate like clockwork, producing predictable, inevitable results. They do this, supposedly, by prescribing a fixed, definite time limit within which a plaintiff must pursue a claim.").

b. Modern status: prevalent form and familiar exceptions

As dictated by archetypical state legislation, a statute of limitations "operates as a defense to limit the remedy available from an existing cause of action,"[132] but may be tolled for certain circumstances, the statutory clock stopped until an impediment's removal or an event's consummation.[133] For instance, California statutorily allows for such suspension to take place during a defendant's absence from the state, insanity, minority, or imprisonment and whenever an injunction barring the bringing of the relevant action has been imposed.[134] Other U.S. jurisdictions have codified some, if not all, of the same exceptions,[135] with those for mental incompetence or minority dating to 1623,[136] while certain equitable notions can toll a statute when a plaintiff fails to timely file due to their reliance on a defendant's promise under the common and statutory law of sundry states.[137] On the national level, though seemingly less hospitable to equity's invocation than their state counterparts, equitable tolling has been read into every statute of limitations applicable to a "federal question case[] (even when those are borrowed from state law) in the absence of a contrary directive from Congress,"[138] and federal courts have applied equitable tolling when "the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period,"[139] "the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass,"[140] wartime foreclosed timely filing,[141] and more.[142] Perhaps most significantly, these same

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[132] *First United Methodist Church*, 882 F.2d at 865; *accord* Goad v. Celotex Corp. 831 F.2d 508, 511 (4th Cir. 1987); Bolick v. Am. Barmag Corp., 293 S.E.2d 415, 418 (N.C. 1982); Baltimore Cnty. v. Churchill, Ltd., 313 A.2d 829, 835 (Md. 1974).

[133] *Cf., e.g.*, Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946) (applying fraudulent concealment exception); Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389, 394 (6th Cir. 1975).

[134] CAL. CIV. PROC. CODE §§ 351–352, 352.1, 356 (2022).

[135] *See, e.g.*, ALA. CODE § 6-2-8; ALASKA STAT. § 09.10.140; N.M. STAT. ANN. § 37-1-10; 42 PA. CONS. STAT. ANN. § 5533(b)(1)(i)–(ii); WASH. REV. CODE § 4.16.170.

[136] *See* Limitation of Actions Act 1623 21 Jac. 1, c. 16 (Eng.).

[137] *E.g.*, Thimjon Farms P'ship v. First Int'l Bank & Trust, 837 N.W.2d 327, 335–36 (N.D. 2013); Lantzy v. Centex Homes, 73 P.3d 517, 531–32 (Cal. 2003); Porter v. Spader, 239 P.3d 743, 747 (Ariz. Ct. App. 2010). "The taxonomy of tolling, in the context of avoiding a statute of limitations, includes at least three phrases: equitable tolling, fraudulent concealment of a cause of action, and equitable estoppel." Pearl v. City of Long Beach, 296 F.3d 76, 81 (2d Cir. 2002). Unsurprisingly, not all courts distinguish amongst this trio or define one or more similarly. *Cf.* Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450–51 (7th Cir. 1990) (Posner, J.) (acknowledging only two: equitable estoppel and equitable tolling).

[138] *Cada*, 920 F.2d at 450; *accord Holmberg*, 327 U.S. at 396–97; *cf.* Rotkiske v. Klemm, 140 S. Ct. 355, 362 (2019) (Sotomayor, J., concurring) (defending the historical basis of this equitable exception).

[139] Irwin v. U.S. Dep't of Veterans Aff., 498 U.S. 89, 96 (1990); *see also* Goldsmith v. City of Atmore, 996 F.2d 1155, 1161 (11th Cir. 1993) (giving examples).

[140] *Irwin*, 498 U.S. at 96; *see also* Iavorski v. INS., 232 F.3d 124, 129 (2d Cir. 2000) ("If . . . [a] time limit is contained in an ordinary statute of limitations, however, it is assumed that it is subject to equitable tolling.").

[141] *E.g.*, Amy v. City of Watertown (No. 2), 130 U.S. 320, 325–26 (1888); The Protector, 76 U.S. (9 Wall.) 687, 689 (1869); Hangar v. Abbott, 73 U.S. (6 Wall.) 532, 540–41 (1867).

[142] *Cf., e.g.*, Lake v. Arnold, 232 F.3d 360, 370–71 (3d Cir. 2000) ("[W]here a guardian conspires to deprive a mentally incompetent person of her constitutional and civil rights, equitable tolling might be appropriate."); Boos v. Runyon, 201 F.3d 178, 184 (2d Cir. 2000) ("[T]he question of whether a person is sufficiently mentally

federal tribunals have adhered to this path even though many federal statutes of limitations do not explicitly allude to such events.[143] Ultimately, regardless of their opacity[144] and the state of their codification,[145] these carve-outs now enjoy an established place in the legal mainframe of every U.S. jurisdiction.

Within this coterie, the Discovery Rule, a rarely encoded[146] rule of equity[147] often amalgamated with other tolling doctrines,[148] looms large. Historically, many state legislatures and courts had set the date of accrual of a particular cause of action as the first day on which the period to obtain relief established by a governing statute of limitations, if one existed, opened even if "the injured person had no knowledge or reason to know of "that pivotal occurrence "in the absence of fraud or concealment of the cause of action."[149] Relaxation of this reflexive practice began in 1949, when the Court engrafted a general discovery rule onto the statute of limitations in the Federal Employers' Liability Act.[150] In 1950, an unsigned note in the *Harvard Law*

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disabled to justify tolling of a limitation period is, under the law of this Circuit, highly case-specific.").

[143] *See, e.g.*, United States v. Beggerly, 524 U.S. 38, 48 (1998) (concluding that a statute of limitations "effectively allowed for equitable tolling" because, under language in the statute, the limitations period did not begin to run until the plaintiff "knew or should have known of the claim of the United States"); Chakonas v. City of Chicago, 42 F.3d 1132, 1135 (7th Cir. 1994) ("Equitable tolling is appropriate when the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his claim.").

[144] *See* Wolin v. Smith Barney, Inc., 83 F.3d 847, 849 (7th Cir. 1996) (Posner, J.) ("Though rarely the subject of sustained scholarly attention, the law concerning statutes of limitations fairly bristles with subtle, intricate, often misunderstood issues. . . .").

[145] *See, e.g.*, MONT. CODE ANN. § 27-2-205 (codifying an originally equitable constructive fraud exception to the statute of limitations on certain medical malpractice actions); N.Y. GEN. OBLIG. LAW § 17-103(4)(b) (incorporating the equitable estoppel exception to limitations provisions applicable to all covered actions into New York statutory law).

[146] *See* Grunwald v. Bronkesh, 621 A.2d 459, 492 (N.J. 1993) ("Under special circumstances and in the interest of justice, we have adopted the discovery rule. . . ."). *But see* N.Y. C.P.L.R. § 214-c (setting limitations of time for "[c]ertain actions to be commenced within three years of discovery").

[147] *See, e.g.*, Owens v. White, 342 F.2d 817, 819–20 (9th Cir. 1965); Lopez v. Swyer, 300 A.2d 563, 566 (N.J. 1973).

[148] *See, e.g.*, Santos v. United States, 559 F.3d 189, 199 (3d Cir. 2009) ("[T]he discovery rule, which governs a claim's accrual date for statute of limitations purposes, is distinct from equitable tolling, which applies where circumstances unfairly prevent a plaintiff from asserting her claim."); Valdez v. United States, 518 F.3d 173, 182 (2d Cir. 2008) ("Equitable tolling is frequently confused both with fraudulent concealment on the one hand and with the discovery rule—governing . . . accrual—on the other.").

[149] RESTATEMENT OF TORTS § 899 cmt. e (AM. L. INST. 1939); *accord* RESTATEMENT (SECOND) OF TORTS § 899 cmt. e (AM. L. INST. 1979). In relevant part, the same rules from the *Restatement of Torts* have been carried forward in the *Restatement (Second) of Torts*. *E.g.,* Nixon v. State, 704 N.W.2d 643, 658–59 (Iowa 2005); Toyo Tire N. Am. Mfg., Inc. v. Davis, 775 S.E.2d 796, 799 (Ga. Ct. App. 2015).

[150] *See* Urie v. Thompson, 337 U.S. 163, 169–71 (1949) (refusing to endorse the strict application of this statute's statute of limitations, as that would leave Tom Urie, the plaintiff, with only "a delusive remedy," Urie thereby "charged" with "at some past moment in time, unknown and inherently unknowable even in retrospect, . . . knowledge of the slow and tragic disintegration of his lungs"); Bain & Colella, *supra* note 90, at 553–56 (tracing "[t]he genesis of the discovery rule of accrual for federal statutes of limitations" to *Urie v. Thompson* but critiquing its reasoning). Arguably, the Court had already telegraphed its willingness to effect such a construction in dicta written by Justice Felix Frankfurter in a 1946 opinion. *See* Holmberg v. Armbrecht, 327 U.S. 392, 396–97 (1946) ("If the Federal Farm Loan Act had an explicit statute of limitation for bringing suit under § 16, the time would not have begun to run until after petitioners had discovered, or had failed in reasonable diligence to discover, the alleged deception."). A later Court would question whether a general discovery rule was so well-established in the law to justify presuming Congress intended to incorporate into

Review first concluded the irrelevance of discovery to the commencement of any limitations period but thereupon recommended an exception to this "convenient rule" in "situations where the plaintiff is generally unlikely to learn of the harm before the remedy expires."[151] By 1979, statutes of limitations, as "a wave of recent decisions" signaled, were regularly construed "to start to run" only once a "plaintiff ha[d] in fact discovered the fact that he ha[d] suffered injury or by the exercise of reasonable diligence should have discovered it."[152] In short order, this new "discovery rule of accrual" representing "a significant change in limitations law, particularly with respect to latent injuries," wove itself into the very fabric of American federal and state law.[153] At present, under the version of this regnant axiom most commonly applied to torts under state law, a cause of action only accrues, and the statutory clock thus only starts to run, when the claimant knows, or has reason to know, of an injury and its cause.[154] To wit, "as long as a putative plaintiff did not know or have reason to know of an injury," the Discovery Rule prevents the running of any applicable statute of limitations "no matter how long in the past the injury may have occurred."[155]

3. Statutes of repose

a. Prelapsarian state: an original justification for traditional statutes of limitations

As mentioned above, the term "statute of limitations" incorporated the concept of "repose" at its conception.[156] For example, though some characterized the Statute of James as a "bar to the remedy" and the Statute of Henry as a "bar to the right," the modern dividing line between statutes of limitations and repose, both prescriptive periods were labeled "statutes of limitations" by courts and scholars on either side of the Atlantic Ocean.[157] In the United States, beginning in the waning days of the Marshall Court (1801–1835), successive majorities championed traditional statutes of limitations as bulwarks against "stale" claims and as "statute[s] of repose."[158]

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every federal statute of limitations, TRW Inc. v. Andrews, 534 U.S. 19, 27 (2001), though Congress overrode the Court's specific holding by subsequently adding such a discovery rule to the Fair Credit Reporting Act. *See* Vasquez v. Bank of Am., N.A., No. 15-cv-04072-RS, 2015 WL 7075628 (N.D. Cal. Nov. 13, 2015).

[151] Note, *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177, 1203 (1950).

[152] RESTATEMENT (SECOND) OF TORTS § 899 cmt. e.

[153] Bain, *supra* note 98, at 127.

[154] Bain & Colella, *supra* note 90, at 496.

[155] Bain, *supra* note 98, at 127.

[156] *See* Charles C. Callahan, *Statutes of Limitation–Background*, 16 OHIO ST. L.J. 130, 133–35 (1955); *see also* Amalgamated Indus. Ltd. v. Tressa, Inc., 69 F. App'x 255, 263 (6th Cir. 2003) (defending the court's holding as "entirely in keeping with the purpose of statutes of limitations, which are statutes of repose that preclude the presentation of stale claims and encourage diligence on the part of those whose rights have been infringed upon"); Lopardo v. Lehman Bros., Inc., 548 F. Supp. 2d 450, 459–60 (N.D. Ohio 2008) ("Historically, under federal law, 'statutes of limitations' were considered to be a subset of or alternative term for 'statutes of repose.'").

[157] JICKLING, *supra* note 116, at 511–12.

[158] Bell v. Morrison, 26 U.S. (1 Pet.) 351, 360 (1828); *see also* Wilson v. Iseminger, 185 U.S. 55, 61–62 (1902) (quoting *Bell*, 26 U.S. at 360, indirectly, by citing to a treatise directly doing so); Croxall v. Shererd, 72 U.S. (5 Wall.) 268, 289 (1866) (observing that statutes of limitations "are now favorably regarded in all

Occasionally trumpeted in the same opinion,[159] the latter policy appeared independently in "a very large number" of others,[160] its primacy "clearly settled" by several nineteenth century decisions.[161] By 1831, statutes of limitations had "been emphatically and justly denominated statutes of repose";[162] by 1895, the belief that statutes of limitations "are to be treated as statutes of repose" had been recast into "a cardinal principle of modern law and of th[e] Court,"[163] a construal echoed by countless later judges.[164] Lawyerly logic arguably impelled such characterization, for by affording relief to individuals "from worry over past events" and "run[ning] regardless of the knowledge of the potential defendant," statutes of limitations did "assure the repose of an individual, even as against just claims,"[165] making "ordinary statutes of limitation" functionally indistinguishable from, and thus properly denominated as, "statutes of repose."[166] Whatever the precise cause, for multiple generations of jurists and legislators, the provision of "repose" once constituted the principal rationale consistently advanced to support the ratification of statutes of limitations, "the policy of protecting a defendant from a failure of evidence and the policy which favors his 'repose'" much the same as to presumptively "bad," but not purportedly "good," claims.[167]

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courts" and "are 'statutes of repose'" that "are to be construed and applied in a liberal spirit").

[159] *See, e.g.*, Guaranty Tr. Co. v. United States, 304 U.S. 126, 136, 143 (1937) ("The statute of limitations is a statute of repose, designed to protect the citizens from stale and vexatious claims."); United States v. Or. Lumber Co., 260 U.S. 290, 299 (1922) ("Such statutes are not only statutes of repose, but they supply the place of evidence lost or impaired by lapse of time by raising a presumption which renders proof unnecessary.").

[160] Callahan, *supra* note 156, at 134.

[161] Shepherd v. Thompson, 122 U.S. 231, 234 (1887); *see also* Ft. Scott v. Hickman, 112 U.S. 150, 163 (1884) ("The settled doctrine in Kansas, and the weight of authority elsewhere, is, that statutes of limitation are statutes of repose"); Rahilly v. O'Laughlin, 1 F.2d 1, 3 (8th Cir. 1924) ("[I]t should ever be remembered that statutes of limitation are not now considered by the courts generally as based upon the presumption of payment from lapse of time, but are regarded as statutes of repose, for the peace, good order, and welfare of society.").

[162] LEWIS V. MARSHALL, 30 U.S. (5 PET.) 470, 477 (1831); *ACCORD RAHILLY*, 1 F.2D AT 3; SPRING V. GRAY, 22 F. CAS. 978, 984–85 (C.C.D. ME. 1830) (NO. 13,259).

[163] Campbell v. Haverhill, 155 U.S. 610, 617 (1895); *accord* Bullion & Exch. Bank v. Hegler, 93 F. 890, 894 (C.C.N.D. Cal. 1899).

[164] *See, e.g., Or. Lumber Co.*, 260 U.S. at 299; Eclipse Lumber Co. v. Iowa Loan & Tr. Co., 38 F.2d 608, 610 (8th Cir. 1930) ("[T]he general rule is that statutes of limitation are to be given a liberal construction as statutes of repose."); Summers v. Connolly, 112 N.E.2d 391, 394 (Ohio 1953) ("A fair approximation of accord has been reached among our courts that basically such statutes are statutes of repose and not of presumption."); Newhall v. Field, 79 P. 711, 712 (N.M. 1905) ("The statute of limitations is a statute of repose."); McCormick v. Brown, 36 Cal. 180, 184 (Cal. 1868) (explaining that a limitations provision that "only bars the remedy[] . . . thus becomes a statute of repose").

[165] Callahan, *supra* note 156, at 136.

[166] Bolick v. Am. Barmag Corp., 293 S.E.2d 415, 417–18, 417 n.3 (N.C. 1982); *see also* Nagle v. Herold, 30 F. Supp. 905, 908 (W.D.N.Y. 1939) (quoting *Shepherd*, 122 U.S. at 234–35) ("The statute of limitations is to be upheld and enforced, not as resting only on a presumption of payment from lapse of time, but, according to its intent and object, as a statute of repose."); THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION *365, 365 n.1 (1868) ("[A] statute [of limitations] is a statute of repose.").

[167] Callahan, *supra* note 156, at 135; *see also* The Gates Rubber Co. v. USM Corp., 508 F.2d 603, 611 (7th Cir. 1975) (explaining that the interest in finality, one of the two "quite different policies" effectuated by a statute of limitations, "underlies the description of a limitations act as a 'statutes of repose'").

b. Distinct emergence

Statutes of repose only acquired a distinct identity in response to the rapid adoption of the Discovery Rule.[168] By its very nature, this principle enlarged the universe of persons theoretically liable for conduct that had occurred in the distant past;[169] consequently, traditional statutes of limitations stopped providing any measure of repose to an exponentially exploding cast of varied defendants in, among others, medical malpractice actions.[170] As their advocates maintained, this "long-tail" effect reduced the ability of insurance companies to predict future liabilities, and this purported decline resulted in a perceived insurance crisis because insurance companies were reluctant to write certain policies or, alternatively, required very high premiums for any issued policies, which professionals were now obligated to maintain indefinitely, throughout the 1970s.[171] "The abrogation of . . . privity requirement[s] . . . and the advent of strict liability" only amplified the financial threat, if not immediately quantifiable impact, of the Discovery Rule's fervid proliferation.[172] A handful of state legislatures responded by enacting statutes of repose, apart from and in addition to any pre-existing statutes of limitations, that could consistently "prevent indefinite potential liability for a particular act or omission" and "afford defendants (and insurance companies) greater certainty in predicting liability."[173] For substantively similar reasons, dozens of states soon enacted such limitations provisions,[174] and statutes of repose were quickly extended

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[168] Bain, *supra* note 98, at 126; *cf.* Andrew R. Turner, *The Counter-Attack to Retake the Citadel Continues: An Analysis of the Constitutionality of Statutes of Repose in Products Liability*, 46 J. AIR L. & COM. 449, 451–55 (1981) (discussing the evolution of products liability law).

[169] *See* Hill v. Fitzgerald, 501 A.2d 27, 32–33 (Md. 1985).

[170] *See* Anderson v. Wagner, 402 N.E.2d 560, 562–63, 564–67 (Ill. 1979) (recounting relevant history); AMERICAN BAR ASSOCIATION, REPORT OF THE COMMISSION ON MEDICAL PROFESSIONAL LIABILITY 140–43 (1977) (same).

[171] Bain, *supra* note 98, at 128; *see* James K. Cooper & Sharman K. Stephens, *The Malpractice Crisis—What Was It All About?*, 14 INQUIRY 240, 240–41 (1977); Gerald Kroll, Comment, *The "Claims Made" Dilemma in Professional Liability Insurance*, 22 UCLA L. REV. 925, 931–34 (1975). This perception was not unfounded. *See, e.g.*, Green v. Volkswagen of Am., 485 F.2d 430 (6th Cir. 1973) (pertaining to an action brought concerning defect in sixteen-year-old Volkswagen van); Wittkamp v. United States, 343 F. Supp. 1075 (E.D. Mich. 1972) (concerning a claim based on the malfunction of fifty-year-old rifle).

[172] Hicks, *supra* note 84, at 627; *cf.* Robert A. Van Kirk, Note, *The Evolution of Useful Life Statutes in the Products Liability Reform Effort*, 1989 DUKE L.J. 1689, 1697–1702 (connecting strict liability and the Discovery Rule to the insurance crisis).

[173] Hinkle *ex rel.* Hinkle v. Henderson, 85 F.3d 298, 301–02 (7th Cir. 1996); *see also* Methodist Healthcare Sys. of San Antonio v. Rankin, 307 S.W.3d 283, 286–87 (Tex. 2010) (adumbrating the origins of Texas' general statute of repose, codified in TEX. CIV. PRAC. & REM. CODE § 74.251(b)); Van Kirk, *supra* note 172, at 1705–08 (providing a general overview as to the emergence of state statutes of repose for product liability actions).

[174] *See, e.g.*, ALA. CODE § 6-5-502(c); CONN. GEN. STAT. § 52-577a(a); GA. CODE ANN. § 51-1-11; KY. REV. STAT. ANN. § 411.310(1).

to such fields as construction,[175] product liability,[176] and finance.[177] Currently, though often imperfectly drafted,[178] these "surgical strikes . . . against the discovery rule"[179] function as "substantive grants of immunity based on a legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which liability no longer exists."[180]

B. Bankruptcy Law

As enacted and amended, the Code "alter[ed] the legal rules governing the debtors' pre-bankruptcy debts"[181] by first granting a gaggle of powers to a trustee through the Avoidance Provisions[182] and then checking their exercise via section 546.[183] In practice, trustees tend to invoke section 547, which regulates preferences, and section 544 or section 548, which govern fraudulent transfer liability, in tandem, as the theories underpinning preference and fraudulent transfer doctrines may justify the same transaction's invalidation.[184] While such conflation can obscure structural differences amongst these Avoidance Provisions,[185] each member of this motley aspires to facilitate the effective acquisition of more assets on behalf of a debtor's estate.[186] If prudently exercised, these tools "permit[] more of the creditors' claims to

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[175] *See, e.g.*, ALA. CODE § 6-5-221; ALASKA STAT. § 09.10.055; ARK. CODE ANN. § 16-56-112; CAL. CIV. PROC. CODE § 337.15; COLO. REV. STAT. § 13-80-104; CONN. GEN. STAT. ANN. § 52-584a; D.C. CODE. § 12-310; FLA. STAT. ANN. § 95.11; HAW. REV. STAT. § 657-8; IDAHO CODE § 5-241; IND. CODE § 32-30-1-5; KAN. REV. STAT. § 413.135(1); *see also* Whiting-Turner Contracting Co. v. Coupard, 499 A.2d 178, 183–90 (Md. 1985) (discussing the passage of such laws by a multitude of states and their construction by sundry state courts).

[176] *See, e.g.*, COLO. REV. STAT. § 13-80-107(1); CONN. GEN. STAT. ANN. § 52-577(a); FLA. STAT. ANN. § 95.031; IDAHO CODE § 6-1403(3); IND. CODE § 34-20-3-1; KAN. REV. STAT. § 411.310. For more on the relevant history, see Turner, *supra* note 168.

[177] *See* N.Y. U.C.C. LAW § 4-A-505; Miguel v. Country Funding Corp., 309 F.3d 1161 (9th Cir. 2002).

[178] *Cf., e.g., Rankin*, 307 S.W.3d at 286–87 ("The term 'statute of repose' may not submit to a simple, universal definition," even when used in an explicit state statute.); Jones v. Methodist Healthcare, 83 S.W.3d 739, 743–44 (Tenn. App. 2001) (musing over legislative intent).

[179] Hinkle *ex rel*. Hinkle v. Henderson, 85 F.3d 298, 302 (7th Cir. 1996).

[180] First United Methodist Church v. U.S. Gypsum, 882 F.2d 862, 866 (4th Cir. 1989); *accord* Robert I. Stevenson, *Products Liability and the Virginia Statute of Limitations–A Call for the Legislative Rescue Squad*, 16 U. RICH. L. REV. 323, 334 n.38 (1982).

[181] John T. Cross, *Viewing Federal Jurisdiction Through the Looking Glass of Bankruptcy*, 23 SETON HALL L. REV. 530, 534 (1993).

[182] *See* 11 U.S.C. §§ 544, 545, 547, 548, 553 (2018); *In re* Mi-Lor Corp., 233 B.R. 608, 618 (Bankr. D. Mass. 1999).

[183] *See* 11 U.S.C. § 546; *see also* H.R. REP. NO. 95-595, at 371 (1977) ("The trustee's rights and powers under certain of the avoiding powers are limited by section 546."); *cf. In re* Lancelot Invs. Fund, L.P., 467 B.R. 643, 647 (Bankr. N.D. III. 2012) (discoursing as to the relationship between these sections).

[184] *See, e.g.*, Dean v. Davis, 242 U.S. 438, 444 (1917); *In re* Hertzler Halstead Hosp., 334 B.R. 276 (Bankr. D. Kan. 2005); *In re* Terrific Seafoods, Inc., 197 B.R. 724, 732 (Bankr. D. Mass. 1996).

[185] *See* Bear, Stearns Sec. Corp. v. Gredd, 275 B.R. 190, 194 (S.D.N.Y. 2002) (observing "that the purpose of § 547 is to ensure fair distribution between creditors, while the purpose of § 548 is to protect the estate itself for the benefit of all creditors").

[186] *See, e.g.*, Citicorp Acceptance Co. v. Robison (*In re* Sweetwater), 884 F.2d 1323, 1329 (10th Cir. 1989); Delgado Oil Co. v. Torres, 785 F.2d 857, 861–62 (10th Cir. 1986); *In re* Tex. Gen. Petroleum Corp., 58 B.R. 357, 358 (Bankr. S.D. Tex. 1986).

be paid" and "provide[] a more even distribution of assets among . . . [them]"[187] because "[t]he proceeds from avoidance actions are preserved for the estate,"[188] which itself "exists for the benefit of the creditors" collectively.[189] More narrowly, whether attained by suit or deal, such procurement "benefit[s] th[ose] unsecured creditors who do not have a lien to secure their claims in bankruptcy and ordinarily get paid pennies on the dollar."[190] As expected, the extent of the Avoidance Provisions invites exploitation. Emboldened by their possession of such "great powers," any trustee may be easily tempted to move "to set aside what might otherwise be a valid transfer or security interest simply because the transferor has filed a petition for reorganization [or for liquidation]," each one bearing "the potential for great abuse."[191] Cognizant of this complexity, in the creation and revision of sections 544, 545, 547, 548, and 553, Congress has consistently sought "to balance the competing interest of maximizing creditor returns in bankruptcy with protecting the greater market from the adverse effects of avoidance actions. . . ."[192]

1. A brief history of federal bankruptcy law

Though always empowered to do so, before 1898, Congress only haphazardly exercised its right to enact a national bankruptcy law.[193] In his first national incarnation, James Madison favored enabling the federal government, as planned by the men who met and compromised in Philadelphia from May 25 to September 17, 1787, during what many contemporary sources then dubbed "the Federal Convention," among other titles, but later generations more grandly christened "the Constitutional Convention" as well, to enact "uniform Laws on the subject of Bankruptcies throughout the United States" both as a prophylactic measure against debtors possibly inclined to hide themselves or their assets in other states and as a

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[187] Bryan D. Hull, *A Void in Avoidance Powers? The Bankruptcy Trustee's Inability to Assert Damages Claims on Behalf of Creditors against Third Parties*, 46 U. MIAMI L. REV. 263, 282 (1991); *see also* Zachary S. McKay, Comment, *A Dramatic Misconception: Why the Trademark Licensee Must Be Granted the Power to Overcome the Trustee in Bankruptcy's 11 U.S.C. § 365 Rejection*, 54 S. TEX. L. REV. 747, 754 (2013) (similarly describing the objectives of "most" of the trustee's avoidance powers).

[188] Irvina V. Fox, *Settlement Payment Exception to Avoidance Powers in Bankruptcy: An Unsettling Method of Avoiding Recovery from Shareholders of Failed Closely Held Company LBOs*, 84 AM. BANKR. L.J. 571, 575 (2010).

[189] Paul F. Kirgis, *Arbitration, Bankruptcy, and Public Policy: A Contractarian Analysis*, 17 AM. BANKR. INST. L. REV. 503, 506 (2009).

[190] Fox, *supra* note 188, at 575.

[191] *In re* Sweetwater, 55 B.R. 724, 734 (D. Utah 1985). On appeal, the United States Court of Appeals for the Tenth Circuit adopted certain portions of the district court's opinion and rejected others. *In re* Sweetwater, 884 F.2d at 1326–29. The panel disagreed with the district court as to whether the plaintiff was a proper representative of the estate, but it did not take issue with the latter's characterization of the relevant avoiding powers. *Id.*

[192] Christopher J. Rubino, Note, *The Ever Expanding Scope of Securities and Commodities Safe Harbors in Bankruptcy*, 20 AM. BANKR. INST. L. REV. 423, 423 (2012).

[193] *See* WARREN, *supra* note 6, at 15–22, 32–37, 56–87, 109–28; *see also* Amir Shachmurove, *The Consequences of a Relic's Codification: The Dubious Case for Bad Faith Dismissals of Involuntary Bankruptcy Petitions*, 26 AM. BANKR. INST. L. REV. 115, 118–26 (2018).

natural complement to the proposed federal government's general regulation of commerce.[194] Yet, the Constitutional Convention had approved the Bankruptcy Clause, first proposed by Charles Pinckney, with little debate, and though concerns over trade and commerce and the lack of any unifying authority to reconcile conflicting state laws created much of the uneasiness which produced the Constitutional Convention and informed the Bankruptcy Clause, Madison opted to shoehorn his defense of this specific constitutional stricture into a few sentences in one of eighty-five essays that make up the *Federalist Papers*.[195] Opponents responded in kind. However much they may have known about Madison's disdain for mutable state laws involving paper emissions and affecting contracts, only a meager handful riposted to his "light[]" justification for the Bankruptcy Clause during the ratification debates of 1787–88; though proportionally smaller, these polemicists detected an elusive malevolence in this one clause.[196] While these men failed to defeat the Constitution's adoption, however, their ideas did not fade into oblivion. Madison, for one, jettisoned the vision of activist republican government he had assiduously promoted between 1787 and 1790 by the second half of George Washington's first term.[197] For Thomas Jefferson, whose influence over Madison grew in the decades after the Constitutional Convention met, the idea of a federal bankruptcy law emitted a malodorous odor, as any such legislation threatened to deprive the "husbandman" of his land and stunk of a commercialism unbefitting an "agricultural" nation-state.[198] In time, these somewhat recondite ideas, not the expansive vision of federal bankruptcy clout first pressed by Madison, evolved into the orthodoxy of the Democratic-Republican Party and its successor, the Democratic Party.[199] Consequently, until the last decade of the nineteenth century, if not later, broad swathes of this coalition, the dominant political organization of pre-Civil War America, treated as gospel the suspicions of the Bankruptcy Clause espoused by the few Anti-Federalists who had spoken on the matter to no avail during the debates

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[194] U.S. CONST. art. I, § 8, cl. 4; *see also* THE FEDERALIST NO. 42, at 267 (James Madison) (Clinton Rossiter ed., Signet Classics 2003) ("The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question."). The same suspicion of debtors contributed to this era's hostility to federal bankruptcy law. *See* Shachmurove, *supra* note 193, at 118–20 (exploring these statutes' origins).

[195] *See* Randolph J. Haines, *The Uniformity Power: Why Bankruptcy Is Different*, 77 AM. BANKR. L.J. 129, 152–53 168–69 (2003); *see also* MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 74–88 (Oxford Univ. Press 2016); THE FEDERALIST NO. 42, at 267 (in which Madison makes his case).

[196] *See* BRUCE H. MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE 182–83, 185–88 (Harvard Univ. Press 2002).

[197] *See* NOAH FELDMAN, THE THREE LIVES OF JAMES MADISON 348–57 (Random House 2017); RON CHERNOW, WASHINGTON: A LIFE 742, 744, 756 (Penguin Press 2010).

[198] WARREN, *supra* note 6, at 16–17.

[199] *See* STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 263–70 (Oxford Univ. Press 1993); *see also* DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848 593 (Oxford Univ. Press 2007) (as to the second federal bankruptcy act); *cf.* FELDMAN, *supra* note 197, at 35–241 (taking up Madison's political views from this period).

over ratification.[200]

The short lifespans of this nation's first three bankruptcy acts and the failure of four other reform efforts evidenced this opposition's fervor and effectiveness. Although the Federalist Party managed to pass a bankruptcy law despite the hostility of anti-Federalist southerners and agricultural sympathizers during its brief heyday,[201] its creation—the Bankruptcy Act of 1800 (the "1800 Act")—perished before adolescence.[202] The Bankruptcy Act of 1841 (the "1841 Act"), the creation of the American Whig Party, enjoyed an even shorter existence;[203] the same Congress which passed was the 1841 Act was the one that repealed it.[204] The Bankruptcy Act of 1867 (the "1867 Act") did endure for eleven years,[205] but a resurgent alliance of the same interests responsible for its predecessors' unceremonious scrapping ensured its obsolescence soon afterwards.[206] Deep economic depressions spawned bankruptcy bills, but no party could marshal enough political support to pass and preserve "a permanent bankruptcy law," one operating on a continental scale, once any such crisis receded.[207] In short, while concern with unduly generous debtor-oriented state policies had factored into the calling of the Constitutional Convention,[208] fierce multi-decade opposition during the entirety of the nineteenth century explained this congenital evanescence, not only ensuring these enactments' truncated cessation but also foiling other proposals' consideration on the federal level.[209]

With the federal government mostly stymied, the states filled in the gap with their insolvency, stay, and exemption laws.[210] Debatably, Chief Justice John Marshall's Court blessed these efforts in *Sturges v. Crowninshield*.[211] "For the most part, these

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[200] *E.g.*, Amir Shachmurove, *Escape from Pandemonium: Reconciling § 363 and § 365 in* Qualitech*'s Shadow and* Spanish Peaks*' Wake*, 27 AM. BANKR. INST. L. REV. 181, 215–16 n.273 (2019) (narrating history); Richard C. Sauer, *Bankruptcy Law and the Maturing of American Capitalism*, 55 OHIO ST. L.J. 291, 291–98 (1994).

[201] *See* WARREN, *supra* note 6, at 12–13; *cf.* SUSAN DUNN, DOMINIONS OF MEMORIES: JEFFERSON, MADISON AND THE DECLINE OF VIRGINIA 22–23 (Basic Books 2007) (noting that Virginians, such as Thomas Jefferson and John Randolph, "would keep a national bankruptcy act at bay for another thirty-eight years").

[202] *See* Bankruptcy Act of 1800, ch. 19, 2 Stat. 19, *repealed by* Act of Dec. 19, 1803, ch. 6, 2 Stat. 248; *see also* David A. Skeel, Jr., *The Genius of the 1898 Bankruptcy Act*, 15 BANKR. DEV. J. 321, 323–24 (1999) ("Once the first three acts had done their initial work and economic conditions improved, Congress repealed the federal legislation and left insolvency law to the states").

[203] *See* Bankruptcy Act of 1841, ch. 9, 5 Stat. 440, *repealed by* Act of Mar. 3, 1843, ch. 82, 5 Stat. 614. Only weakly linked to the defunct Federalist Party, the Whig Party was led by men once aligned with the Democratic-Republican Party; still, like many Federalist luminaries, Whig leaders generally favored national bankruptcy legislation. *Cf.* Rafael I. Pardo, *Federally Funded Slaving*, 93 TUL. L. REV. 787, 821–24 (2019) (canvassing debates over the 1841 Act).

[204] MICHAEL F. HOLT, THE RISE AND FALL OF THE AMERICAN WHIG PARTY: JACKSONIAN POLITICS AND THE ONSET OF THE CIVIL WAR 135 (Oxford Univ. Press 1999).

[205] Bankruptcy Act of 1867, ch. 176, 14 Stat. 517, *repealed by* Act of June 7, 1878, ch. 160, 20 Stat. 99.

[206] *See* Shachmurove, *supra* note 193, at 119–22.

[207] Skeel, *supra* note 202, at 322.

[208] *See* Steven R. Boyd, *The Contract Clause and the Evolution of American Federalism, 1789-1815*, 44 WM. & MARY Q. 529, 530 (1987).

[209] *See* WARREN, *supra* note 6, at 15–22, 87, 109, 120–21.

[210] *See, e.g.*, FRIEDMAN, *supra* note 7, at 549; Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 14–16, 18 (1995).

[211] *See* 17 U.S. (4 Wheat.) 122, 191, 199 (1819). With its four "majority" opinions, *Ogden v. Saunders*

state-created 'insolvency laws' (so called to distinguish them from creditor-oriented bankruptcy statutes) had their origins in the widespread movement to abolish or severely limit the availability of civil imprisonment as a means of debt collection."[212] Many such measures did no more than limit a debtor's relief to discharge from imprisonment and proscribe future imprisonment for debt owed at the time of such release;[213] others afforded opportunities to attain a permanent reprieve from imprisonment as well as other means of collection.[214] Technical divergences aside, for all but sixteen years between 1788 and 1898, the states solely determined the contours of much of the debtor-creditor principles later encompassed by the amorphous term "bankruptcy,"[215] thusly "establish[ing] the framework of modern debtor-creditor and collections law."[216]

Though the heyday of state insolvency laws ended in 1898, the 1898 Act exhibited, and the Code still bespeaks, the outsized state role in the formation of bankruptcy law's underpinnings, a prominence imputed by a history of federal inaction in the face of once febrile state-level opposition to any kind of federal bankruptcy regime and longstanding state regulation of debtor-creditor relationships and such related fields as contract and property law. As originally enacted, and through its every amendment, the 1898 Act incorporated and deferred to state law in certain crucial particulars.[217] Meanwhile, in a bevy of sections,[218] "[t]he Code explicitly and implicitly recognizes its dependence on state law in altering the relationship between the debtor and its creditors";[219] in others,[220] it either defers to or directly incorporates "a much deeper body of nonbankruptcy law," most of which is

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confused matters. *See* 25 U.S. (12 Wheat.) 213, 254–70 (Washington, J.), 271–92 (Johnson, J.), 292–313 (Thompson, J.) 313–31 (Trimble, J.) (1827); *see also* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888, at 154–55 (Univ. of Chicago Press 1985) (critiquing the "mysterious cadenza" of Justice William Johnson Jr.).

[212] Charles G. Hallinan, *The "Fresh Start" Policy in Consumer Bankruptcy: A Historical Inventory and An Interpretive Theory*, 21 U. RICH. L. REV. 49, 55 (1986). Historically, however, the terms "bankruptcy" and "insolvency" were synonymous and commonly defined as "the condition of being unable to pay one's debts" in the latter half of the eighteenth century. Plank, *Federalism*, *supra* note 12, at 1077 & n.56.

[213] Act for the Relief of Insolvent Debtors, 22 Ohio Laws 326, 329–30 (1824).

[214] *See* PETER J. COLEMAN, DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1607–1900 51–52 (Beard Books 1999).

[215] *See* Edward H. Levi & James Wm. Moore, *Bankruptcy and Reorganization: A Survey of Changes*, 5 U. CHI. L. REV. 1, 3 (1937) ("As a result state insolvency laws became accepted, although in what respect they differ from legislation dealing with the 'subject of bankruptcies' has never been and can never be definitely stated, for any insolvency law is essentially within the power granted to the federal government.").

[216] *See* Hallinan, *supra* note 212, at 55 (discussing modern framework of debtor-creditor and collection laws coming from numerous other legislative developments attempting to improve creditors' remedies).

[217] *See* Ponoroff, *Limitations*, *supra* note 12, at 355 ("[E]ver since the first long-standing federal bankruptcy law was enacted in 1898, state law has continued to play a vital interstitial role. . . .").

[218] *See, e.g.*, 11 U.S.C. §§ 301, 501–502, 544(a), 547(b), 548, 704(1), 721, 726, 1121–1129, 1221–1225, 1321–1325 (2018).

[219] *See* Plank, *Federalism*, *supra* note 12, at 1064.

[220] *See, e.g.*, 11 U.S.C. §§ 101(1), 101(4), 101(9)(A)(ii), 101(11), 101(35A), 110(k), 363(f)(1), 365(c)(1)(A), 365(c)(3), 365(h)(1)(A), 502(b), 505(c), 507(a)(8), 541(a), 543(c), 544(a)–(b), 546(b)(1), 547(e)(1), 548(a), 723, 761.

state law.[221] Though the Code overrides many state enactments, this systematic decision has "create[d], at certain times and in certain places, an uneasy co-existence and division of authority between the two systems."[222]

2. Relevant Substantive Sections

a. Avoidance: section 544

Section 544(a) authorizes a trustee "to stand in the shoes of the debtor" and, via the exercise of "certain 'strong-arm' powers,"[223] nullify "unfiled, unrecorded, or secret liens,"[224] thereby furthering the doctrine of "ostensible ownership."[225] In so apportioning, this subsection reflects Congress' response to the Court's constrictive interpretation of certain parts of its statutory progenitor, section 70 of the 1898 Act,[226] in *York Manufacturing Company v. Cassell*.[227] The filing of a bankruptcy case, that seminal opinion held, did not equate to a judgment or attachment; consequently, such a matter's commencement could not affect the validity of a security interest between a creditor and a bankrupt.[228] Congress' statutory rejoinder, an amended section 47(a)(2),[229] reflected "two ideas, quite distinct": that the trustee "shall be considered to have the same title that a creditor holding an execution or other lien by legal or equitable proceedings levied upon [the] property would have under state law" as to "property in the custody of the bankruptcy court" and "should stand in the position of a judgment creditor holding an execution returned unsatisfied, thus entitling him to

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[221] Plank, *Federalism*, *supra* note 12, at 1064, 1070–76 & nn. 31–51. Federal law constitutes much of the non-state remainder; less frequently, the Code defers to local or territorial law, the common law, or the law merchant. *Id.* at 1070 n.30 & 1072 n.35.

[222] Ponoroff, *Limitations*, *supra* note 12, at 355.

[223] Kapila v. Atl. Mortg. & Inv. Corp. (*In re* Halabi), 184 F.3d 1335, 1337 (11th Cir. 1999); *see also* Schlossberg v. Barney, 380 F.3d 174, 177 (4th Cir. 2004) ("This [S]ection, often referred to as the 'strong arm clause,' accords to a trustee the rights and powers of a hypothetical 'creditor that extends credit to the debtor' on the date of the bankruptcy petition."); 11 U.S.C. § 544(a).

[224] Teerlink v. Lambert (*In re* Teerlink Ranch Ltd.), 886 F.2d 1233, 1235–36 (9th Cir. 1989); *see also, e.g.*, City Nat'l Bank of Miami v. Gen. Coffee Corp. (*In re* Gen. Coffee Corp.), 828 F.2d 699, 701 (11th Cir. 1987) ("Congress has resolved through § 544 that the debtor's creditors must at all costs be protected from secret liens." (quoting *In re* Gen. Coffee Corp., 41 B.R. 781, 784 (Bankr. S.D. Fla. 1984))); *In re* Granada, Inc., 92 B.R. 501, 507 (Bankr. D. Utah 1988) ("Section 544 is designed to set aside unrecorded interests and secret liens.").

[225] *In re* Great Plains W. Ranch Co., 38 B.R. 899, 904 (Bankr. C.D. Cal. 1984); *see also, e.g.*, Gaudet v. Babin (*In re* Zedda), 103 F.3d 1195, 1202 (5th Cir. 1997) ("Section 544 may be read as relying on the principle of ostensible ownership, which stands for the proposition that, other things being equal, what the creditor sees ought to be what the creditor gets."); *In re* Granada, Inc., 92 B.R. at 509 (quoting *In re* Great Plains W. Ranch Co., 38 B.R. at 903, 904–05).

[226] *See* Bankruptcy Act of 1898, Pub. L. No. 55-541, 30 Stat. 544, *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549.

[227] *See* 201 U.S. 344, 352 (1906); *see also* Carlos J. Cuevas, *Bankruptcy Code Section 544(a) and Constructive Trusts: The Trustee's Strong Arm Powers Should Prevail*, 21 SETON HALL L. REV. 679, 701–03 (1991) (appraising history of strong arm powers, and positing Congress disagreed with *York*, and as a result, amended section 47a(2)).

[228] *See York*, 201 U.S. at 352–53.

[229] *See* Act of June 25, 1910, ch. 412, 36 Stat. 838.

proceed precisely as an individual creditor might have done to subject assets," as to "property not in the custody of the bankruptcy court."[230] So as to realize this unambiguously averred intent, federal courts expansively read section 47(a)(2).[231]

Informed by this clarion past, this defunct provision's modern successor—section 544(a)—enjoys a more generous statutory domain. Under this subsection, "as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor," a trustee assumes "the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by" certain classes of creditors and purchasers.[232] Via this bequest of "rights and powers," no trustee mutates into these familiar legal figures; rather, "[e]nablement, not creation, is th[is] statute's purpose."[233] Two types of creditors fall into the former: those that "extend[] credit to the debtor at the time of the commencement of the case, and that obtain[], at such time and with respect to such credit," obtain either "a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists"[234] or "an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists."[235] Under either provision, a trustee may entirely avoid an inferior third-party's pertinent interest in the property, and the third-party is left with only an unsecured claim against the debtor's estate.[236] Per section 544(a)(3), the perquisites of "a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists" can also be brandished by a trustee.[237] Specifically, this subsection was framed so as "to give bankruptcy trustees the power to avoid mortgages and other improperly executed and/or unrecorded interests in real property."[238] As a whole, section 544(a) thusly "arm[s] the trustee with sufficient powers to gather in the property of the estate,"[239] as it explicitly authorizes this officer "to step into the shoes of a creditor for the purpose of asserting causes of action under state fraudulent conveyance laws" and assume "the status of a hypothetical creditor or bona fide purchaser as of the commencement of the case."[240]

Narrowly focused, section 544(b) grants a trustee "the rights of an unsecured

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[230] H.R. REP. NO. 61-511, at 6–7 (1910); *see also* S. REP. NO. 61-691 at 6–7 (1910) (concurring with and therefore quoting H.R. REP. NO. 61-511, at 6–7).

[231] *See* Albert Pick & Co. v. Wilson (*In re* Dean), 19 F.2d 18, 20 (8th Cir. 1927).

[232] 11 U.S.C. § 544(a) (2018); Fallon Family, L.P. v. Goodrich Petroleum Corp. (*In re* Goodrich Petroleum Corp.), 894 F.3d 192, 197 (5th Cir. 2018).

[233] *In re* Asher, 488 B.R. 58, 65 (Bankr. E.D.N.Y. 2013) (citation omitted).

[234] 11 U.S.C. § 544(a)(1); *In re* Caine, 462 B.R. 688, 693 (Bankr. W.D. Ark. 2011).

[235] 11 U.S.C. § 544(a)(2); Rupp v. Duffin, 457 B.R. 820, 825 (B.A.P. 10th Cir. 2011).

[236] *See In re* Bell, 194 B.R. 192, 195 (Bankr. S.D. Ill. 1996) (so concluding as to a trustee's rights under section 544(a)(1)).

[237] 11 U.S.C. § 544(a)(3); *In re* Reznikov, 548 B.R. 606, 613 n.3 (Bankr. D. Mass. 2016).

[238] *In re* Anderson, 266 B.R. 128, 136 (Bankr. N.D. Ohio 2001).

[239] Kapila v. Atl. Mortg. & Inv. Corp. (*In re* Halabi), 184 F.3d 1335, 1337 (11th Cir. 1999).

[240] Gaudet v. Babin (*In re* Zedda), 103 F.3d 1195, 1201 (5th Cir. 1997).

creditor to avoid transactions that can be avoided by such creditor under state law."[241] More precisely, per section 544(b)(1), a trustee may avoid "any transfer . . . or any obligation incurred by the debtor that is voidable under applicable law" by a creditor holding an unsecured claim "that is allowable under section 502 . . . or that is not allowable only under section 502(e). . . ."[242] Adopted "to protect charitable or religious contributions,"[243] section 544(b)(2) carves out an exception to this grant for "a transfer of a charitable contribution," as defined in section 548(d)(3), "that is not covered under section 548(a)(1)(B), by reason of section 548(a)(2)."[244] As this subsection's next sentence clarifies, however, "[a]ny claim by any person to recover a transferred contribution described in the preceding sentence under Federal or State law in a Federal or State court shall be preempted by the commencement of the case."[245] Initially, a trustee need not name an exact creditor "so long as the unsecured creditor exists,"[246] but decisive proof of "'the existence of a . . . creditor whose claim existed at the time of the alleged overpayments on the petition date'" must eventually be adduced for a trustee to successfully deploy section 544(b)(1).[247]

b. Statutory liens: section 545

Prior to 1938, the 1898 Act[248] effectively accorded presumptive validity to all statutory liens, as this nation's federal courts refused to allow bankruptcy trustees to avoid such encumbrances.[249] The Bankruptcy Act of 1938[250] (the "Chandler Act") abandoned this limitation as to certain judgment liens, yet recognized the general validity of state statutory liens;[251] by so codifying, Congress "deferred to policy decisions by the states to favor certain classes of creditors by creating property interests in their behalf."[252] Unfortunately, before and after the emendations

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[241] *In re* Roti, 271 B.R. 281, 300 (Bankr. N.D. Ill. 2002).

[242] 11 U.S.C. § 544(b)(1); *In re* Equip. Acquisition Res., Inc., 451 B.R. 454, 460–61 (Bankr. N.D. Ill. 2011) (citation omitted).

[243] *See* Educ. Credit Mgmt. Corp. v. Rhodes, 464 B.R. 918, 924 (Bankr. W.D. Wash. 2012).

[244] 11 U.S.C. § 544(b)(2); Onkyo Eur. Elecs. GMBH v. Glob. Technovations, Inc. (*In re* Glob. Technovations), 694 F.3d 705, 712 (6th Cir. 2012).

[245] 11 U.S.C. § 544(b)(2); *In re* Empire Towers Corp., 519 B.R. 624, 626 n.3 (Bankr. D. Md. 2014).

[246] Leibowitz v. Parkway Bank & Tr. Co. (*In re* Image Worldwide, Ltd.), 139 F.3d 574, 577 (7th Cir. 1998); *accord In re* Healthco Int'l, Inc., 195 B.R. 971, 980 (Bankr. D. Mass. 1996).

[247] *In re* Felt Mfg., 371 B.R. 589, 641 (Bankr. D.N.H. 2007) (quoting *In re* Healthco, 195 B.R. at 980); *accord In re* Lexington Healthcare Grp., Inc., 339 B.R. 570, 576 (Bankr. D. Del. 2006).

[248] Bankruptcy Act of 1898, Pub. L. No. 55-541, 30 Stat. 544, *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549.

[249] *See* Gene S. Schneyer, *Statutory Liens Under the New Bankruptcy Code—Some Problems Remain*, 55 AM. BANKR. L.J. 1, 1 (1981).

[250] Chandler Act, ch. 575, 52 Stat. 840, 849 (1938), *repealed by* Bankruptcy Reform Act of 1978, Pub. L. 95-598, 92 Stat. 2549.

[251] *See* S. REP. NO. 89-1159, at 2 (1966).

[252] Alfred M. Lewis, Inc. v. Holzman (*In re* Telemart Enters., Inc.), 524 F.2d 761, 764 (9th Cir. 1975); *see also, e.g., In re* Fed.'s, Inc., 553 F.2d 509, 517–18 (6th Cir. 1977) (dissenting from *In re* Telemart Enters. Inc., as to the nature of a seller's rights under section 2-702 of the Uniform Commercial Code, but agreeing that "the rights reserved to the defrauded seller under that section are the direct descendents [sic] of those historically preserved under the common law and so respected by the Bankruptcy Act"); Tuttle v. Smith (*In re*

effectuated by the Chandler Act, many creditors had successfully won state legislation that transformed their debts into liens, thereby gaining "a position superior not only to all other general creditors but to priority claimants as well," in defiance of the intended design of the 1898 Act's priority scheme.[253] "These spurious liens," Congress thundered, "were in reality disguised priorities and the effect of their recognition in bankruptcy would be to distort the federally ordered scheme of distribution by depressing the position of priority claimants."[254] Section 545 sought to address this problem, in a bid to stymie any future circumvention of Congress' preferred hierarchy of priorities.[255]

Accordingly, section 545 has always permitted a trustee to avoid the "fixing" of certain "statutory lien[s]."[256] As the Code's first substantive section circumscribes, the term "statutory lien" includes any "lien arising solely by force of a statute on specified circumstances or conditions, or lien of distress for rent, whether or not statutory,"[257] but excludes any "security interest or judicial lien, whether or not such interest or lien is provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute."[258] Undefined in the Code, "fixing" implies "the lien has not yet affixed and must be defined as a temporal event which has not yet occurred to fasten a liability into a present and definite liability, a secured status," such incompletion essential for the satisfaction of section 545's threshold criterion.[259] Under section 545, anchored to these definitions, a trustee can invalidate four broad classes of yet-unfixed statutory liens.[260] The first of this foursome includes any statutory encumbrance that "first" becomes effective against the debtor when: (1) a case under the Code concerning the debtor is commenced;[261] (2) "an insolvency proceeding other than one under [the Code] concerning the debtor is commenced;"[262] (3) "a custodian is appointed or authorized to take or takes possession;"[263] (4) the debtor becomes insolvent;[264] (5) "when the debtor's financial condition fails to meet

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Toms), 101 F.2d 617, 619 (6th Cir. 1939) ("The trustee takes such property not as an innocent purchaser, but subject to all valid claims, liens and equities enforceable against the bankrupt, except in cases where there has been a conveyance or encumbrance which is void or voidable as to the trustee by some positive provision of the bankruptcy act.").

[253] H.R. REP. NO. 89-686, at 2 (1965); *In re* Davis, 22 B.R. 523, 525 (Bankr. W.D. Pa. 1981).

[254] H.R. REP. NO. 89-686, at 2; *In re* Davis, 22 B.R. at 525.

[255] *See In re* Davis, 22 B.R. at 525.

[256] 11 U.S.C. § 545 (2018); *In re* Berg, 188 B.R. 615, 617–18 (B.A.P. 9th Cir. 1995).

[257] 11 U.S.C. § 101(53); H.R. REP. NO. 95-595, at 314 (1977).

[258] 11 U.S.C. § 101(53); *In re* Ramsey, 89 B.R. 680, 681 (Bankr. S.D. Ohio 1988). The Code recognizes three types of "liens": judicial liens, security interests, and statutory liens. *See* H.R. REP. NO. 95-595, at 312; *In re* Dunn, 109 B.R. 865, 867 (Bankr. N.D. Ind. 1988).

[259] *In re* Godley, 505 B.R. 192, 196–97 (Bankr. E.D.N.C. 2014) (citing *In re* Merchs. Grain, Inc., 93 F.3d 1347, 1356–57 (7th Cir. 1996)).

[260] *See* 11 U.S.C. § 545; *In re* Howard, 43 B.R. 135, 137–38 (Bankr. D. Md. 1983); *see also In re* Practical Inv. Corp., 95 B.R. 935, 939 (Bankr. E.D. Va. 1989).

[261] 11 U.S.C. § 545(1)(A); *In re* Janssen, 42 B.R. 294, 295 (Bankr. E.D. Va. 1984).

[262] 11 U.S.C. § 545(1)(B); *In re* B.J. Packing, 158 B.R. 988, 990 (Bankr. N.D. Ohio 1993).

[263] 11 U.S.C. § 545(1)(C); *In re* B.J. Packing, 158 B.R. at 990.

[264] 11 U.S.C. § 545(1)(D); *In re* Swafford, 160 B.R. 246, 247 (Bankr. N.D. Ga. 1993); *In re* Napco Graphic Arts, Inc., 51 B.R. 757, 764 (Bankr. E.D. Wis. 1985).

a specified standard;"[265] or (6) "at the time of an execution against property of the debtor levied at the instance of an entity other than the holder of such statutory lien."[266] For purposes of sections 545(1)(C) and (D), the Code's all-purpose definitions of "custodian" and "insolvent," respectively, control.[267] The second agglomeration covered by section 545 subsumes those liens "not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser that purchases such property at the time of the commencement of the case."[268] As set forth in its legislative history, this subsection renders "liens which are not enforceable or perfected on the date of the filing of the petition [as] voidable as against a bona fide purchaser," but if state law does "permit[] such perfection to relate back to a pre-bankruptcy date," then no such lien can "be defeated . . . under Section 545."[269] The third type of statutory liens avoidable under section 545 are those "for rent."[270] Section 545's fourth and final category comprehends those "lien[s] of distress for rent."[271]

c. Preferences: section 547

"[N]ot a part of the arsenal of rights and remedies between a debtor and its creditors" but rather "focuse[d] on relationships *among* creditors in light of the advantages of a collective proceeding,"[272] the doctrine of preference grew apart from fraudulent conveyance law.[273] For all its byzantine prose, England's first bankruptcy act featured no such concept,[274] and subsequent variants in the sixteenth and seventeenth centuries preserved this original silence.[275] Enacted in 1570, the Statute of Elizabeth, the first truly comprehensive English bankruptcy statute,[276] compelled a pro-rata distribution but said nothing as to preferences,[277] while the Act of 1604

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[265] 11 U.S.C. § 545(1)(E); *In re* Kittrell, 115 B.R. 873, 883 (Bankr. M.D.N.C. 1990).

[266] 11 U.S.C. § 545(1)(F); *In re* Madcat Two, Inc., 127 B.R. 206, 210 n.5 (Bankr. E.D. Ark. 1991).

[267] *See* 11 U.S.C. § 101(11), (32) (defining "custodian" and "insolvent" respectively); *see also, e.g.*, Europlast, Ltd. v. Oak Switch Sys., 10 F.3d 1266, 1271 (7th Cir. 1993) (referencing section 101(32)); *In re* Montemurro, 581 B.R. 565, 571–72 (Bankr. N.D. Ill. 2018) (dissecting the definition of "custodian").

[268] 11 U.S.C. § 545(2); *In re* Woods Farmers Coop Elevator Co., 107 B.R. 689, 693–94 (Bankr. D.N.D. 1989).

[269] *In re* Garden Inn Steak House, Inc., 22 B.R. 830, 832 (Bankr. N.D. Ohio 1982) (summarizing H.R. REP. NO. 95-595, at 371 (1977) and S. REP. NO. 95-989, at 85 (1978)).

[270] 11 U.S.C. § 545(3); *In re* KMM Corp., 14 B.R. 348, 349 (Bankr. S.D. Fla. 1981).

[271] 11 U.S.C. § 545(4); *see also In re* A & R Wholesale Distrib., Inc., 232 B.R. 616, 618 n.1 (Bankr. D.N.J. 1999) (distinguishing section 545(4) from section 545(3) with respect to whether a lien is "statutory in nature").

[272] THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 123–24 (Harvard Univ. Press 1986).

[273] *See* Stefan A. Riesenfeld, *The Evolution of Modern Bankruptcy Law: A Comparison of the Recent Bankruptcy Acts of Italy and the United States*, 31 MINN. L. REV. 401, 421–22 (1947) (distinguishing the origins of fraudulent conveyance law from preference law).

[274] *See* An Act Against Such Persons As Do Make Bankrupt 1542, 34 & 35 Hen. 8 c. 4 (Eng.).

[275] *See* Vern Countryman, *The Concept of a Voidable Preference in Bankruptcy*, 38 VAND. L. REV. 713, 715–16 (1985).

[276] *See* Charles J. Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 329 n.21 (1991) [hereinafter Tabb, *Historical Evolution*].

[277] *See* Charles J. Tabb, *Rethinking Preferences*, 43 S.C. L. REV. 981, 996 (1992) [hereinafter Tabb, *Rethinking*].

("1604 Act") memorably rendered fraudulent conveyances avoidable without faintly alluding to pre-bankruptcy preferential transfers.[278]

Not a parliament but one of Great Britain's most famed jurists originated and distilled this concept, its emergence "closely tied to the concept of fraud."[279] In 1584, Sir Edward Coke maintained that the commissioners who administered the 1604 Act must "make disposition 'amongst the creditors, . . . to every one a portion, rate and rate alike, according to the quantity of their debts'" per its explicit text, but pointedly added: "[I]f, after the debtor [became] a bankrupt, he may prefer one . . . and defeat and defraud many other poor men of their true debts . . . it would be . . . a great defect in the law. . . ."[280] Two subsequent laws—the Statute of 21 James I and Statute of 19 George 2—predicated the first recognizable iteration of the modern doctrine of voidable preferences on Coke's single remark.[281] Having presaged as much ten years earlier,[282] it was William Murray, 1st Earl of Mansfield, who formally recognized two types of conveyances as foreclosed by British law in 1768: those made "to defraud creditors" in violation of the Statute of Elizabeth, a category from which preferences were excluded, and those made "to defraud the public law of the land," a grouping into which preferences clearly fell.[283] For the first time in British history, a royal court thereupon proceeded to strike down a preferential transfer as void,[284] this "very basic" concept[285] later refined by a Scottish giant's frenzied pen,[286] until, by 1788, "the English had developed a doctrine of preferences that entailed not only recapture of prebankruptcy transfers but also a safe harbor for ordinary course transfers."[287] By this tortured route, the principle of equality, only intimated in 1584 and finally unfurled in 1758, had engendered contemporary preference law.[288]

In the United States, this transformation's arrival lagged, but its consolidation proved swift. Passed in the waning days of John Adams' sole presidential term, the 1800 Act ignored British jurists' more recent expositions and instead replicated their predecessors' taciturnity as to preferences.[289] As the abbreviated life of this first federal bankruptcy law and the repeated failure of subsequent attempts at a second's passage showed,[290] bitter ideological division likely explained this omission from the 1800 Act as well as its seeming precariousness throughout the antebellum period.

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[278] *See* Countryman, *supra* note 275, at 716.

[279] *See* John C. McCoid II, *Bankruptcy, Preferences, and Efficiency: An Expression of Doubt*, 67 VA. L. REV. 249, 250 (1981).

[280] The Case of the Bankrupts (1584) 76 Eng. Rep. 441, 473, 475 (KB).

[281] *See* Tabb, *Rethinking*, *supra* note 277, at 996–97.

[282] Worsley v. Demottas (1758) 96 Eng. Rep. 1160, 1160–61 (KB).

[283] *See* Alderson v. Temple (1768) 96 Eng. Rep. 384, 385 (KB).

[284] *See* Tabb, *Rethinking*, *supra* note 277, at 999.

[285] Lawrence Ponoroff, *Bankruptcy Preferences: Recalcitrant Passengers Aboard the Flight from Creditor Equality*, 90 AM. BANKR. L.J. 329, 337 (2016) [hereinafter Ponoroff, Passengers].

[286] *See, e.g.*, Thompson v. Freeman (1786) 99 Eng. Rep. 1026, 1028 (KB); Rust v. Cooper (1777) 98 Eng. Rep. 1277, 1280 (KB).

[287] Tabb, *Rethinking*, *supra* note 277, at 1000.

[288] *See* Riesenfeld, *supra* note 273, at 422.

[289] Bankruptcy Act of 1800, ch. 19, 1 Stat. 19, 28–29, *repealed by* 2 Stat. 248 (1803).

[290] *See* WARREN, *supra* note 6, at 3–49; *see also supra* Part II.B.1.

For decades, the Federalists, followed by the evanescent Whigs, did vociferously condemn preferences as inconsistent with true equality of treatment amongst a bankrupt's creditors.[291] But, for just as long, their more electorally successful opponents wedded their suspicion of federal ascendency to favoritism towards certain holders of claims exhibited by countless debtors in their attacks on national bankruptcy legislation.[292] In the meantime, "[a]s American business culture developed in the decades that followed independence, numerous participants in the credit system came to accept the proposition that all debts were not equal";[293] naturally, savvy political leaders refused to regard preferential payments as "inherently problematic."[294] In spite of this widely-held view, the 1800 Act's two immediate descendants—the Bankruptcy Acts of 1841 and 1867—deemed both fraudulent conveyances and preferential transfers as statutorily voidable,[295] precisely as Coke and Mansfield had adjudged[296] and as Daniel Webster had argued.[297] Under these laws, "preferences could be retrieved from creditors who received them, and a debtor that had made a preferential payment could be denied access to bankruptcy."[298] "The preference avoidance and recovery provisions" inputted into section 60 of the 1898 Act, as revised by the Chandler Act, "completed and carried forward many of the . . . ideas and innovations introduced" in 1867.[299] Accordingly, for the last forty or so years of the 1898 Act's duration, the debtor's and the creditor's state of mind held no significance to the establishment of a voidable preference.[300] In theory, if not

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[291] *See* COLEMAN, *supra* note 214, at 12–13 (describing the principal objectives of colonial bankruptcy laws as "halt[ing] the race to" the courthouse, policing fraud, ensuring an equitable division of assets, and providing relief to debtors); Locke v. Winning, 3 Mass. (1 Tyng) 325, 326 (Mass. 1807) ("A principal object of the bankrupt law is that the property of the bankrupt in all his estate, at the time of the act of bankruptcy, *by that act* shall cease; and at the same time, by relation, vest in the assignee; to be *equally* distributed among his creditors, in proportion to the sums respectively due to them.") (emphasis in original).

[292] *See* EDWARD J. BALLEISEN, NAVIGATING FAILURE: BANKRUPTCY AND COMMERCIAL SOCIETY IN ANTEBELLUM AMERICA 90–94 (Univ. of North Carolina Press 2001) (collecting the likely reasons behind preferences' persistence); *see also, e.g.*, GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815 416 (Oxford Univ. Press 2009) ("Equally important in strengthening the authority of the federal government were the Federalists' efforts to create a bankruptcy law for the nation."). For more on this combustible time, see Shachmurove, *supra* note 193, at 115, 119–22.

[293] BALLEISEN, *supra* note 292, at 92.

[294] David A. Skeel Jr., *The Empty Idea of "Equality of Creditors"*, 166 U. PA. L. REV. 699, 708 (2017).

[295] *See* Countryman, *supra* note 275, at 719–20.

[296] Skeel, *supra* note 294, for Mansfield see 704–05 ("[T]he policy of the bankrupt law . . . is to *level* all creditors. . . ."), for Coke see 704 n.21 ("Sir Edward Coke also had gestured at the equality objective. . . .").

[297] *See* James A. McLaughlin, *Aspects of the Chandler Bill to Amend the Bankruptcy Act*, 4 U. CHI. L. REV. 369, 370–71 (1937) (explicating Daniel Webster's defense of bankruptcy law as a means of doing equity between creditors).

[298] Skeel, *supra* note 294, at 703.

[299] Tabb, *Rethinking*, *supra* note 277, at 1007. But "the requirement that the debtor have an intent to prefer the creditor, present but often almost meaningless in the 1867 Act, was finally and formally abandoned in section 60, although not without confusion." *Id.* at 1007–08.

[300] Countryman, *supra* note 275, at 725; *see also* Lawrence Ponoroff, *Evil Intentions and an Irresolute Endorsement for Scientific Rationalism: Bankruptcy Preferences One More Time*, 1993 WIS. L. REV. 1439, 1477–78 (1993) (characterizing the elimination of preference law's mens rea test as "an evolutionary process, initially wending its way from the strict requirement that the debtor be shown to have *intended* to give a preference to the less demanding rule that the transferee have knowledge of the preferential result.").

in fact, the Code's drafters elected to "recast and broaden[]" the determination of a preferential transfer;[301] section 547 is but the culmination of this progression.[302]

While section 547 defines "inventory," "new value," "receivable," and "debt for a tax" for "this section" alone in its first lettered paragraph,[303] its second one empowers a trustee to "avoid" certain "transfer[s]" of the "interest[(s)] of the debtor in property"[304] that "unfairly prefer[] particular creditors,"[305] except as provided in section 547(c).[306] Divisible into five elements,[307] section 547(b) allows for the avoidance of any transfer of the debtor's property[308] (1) "to or for the benefit of a creditor"[309] and (2) "for or on account of an antecedent debt owed by the debtor before such transfer was made,"[310] (3) made by an insolvent debtor[311] either (4) "on or within 90 days before the date of the filing of the petition"[312] or "between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider,"[313] that (5) "enables such creditor to receive more than such creditor would receive" if a chapter 7 proceeding had been commenced,[314] the transfer had not been made,[315] and the Code's payment schematic had been followed.[316] Statutorily, a trustee bears the burden of proving each of these factors[317] by a preponderance of the evidence, a standard imputed into section 547(g)'s taciturn text.[318] While the first two components of any section 547(b) claim honor the same

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[301] Ponoroff, *Passengers*, *supra* note 285, at 338.

[302] 11 U.S.C. § 547(a) (2018).

[303] *Id.* Originally, section 527(a) defined just the first three terms. *See* S. REP. NO. 95-989, at 87 (1978).

[304] 11 U.S.C. § 547(b); *see* Celotex Corp. v. Edwards, 514 U.S. 300, 325 n.13 (1995).

[305] Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 978 (2017).

[306] 11 U.S.C. § 547(c); *see also, e.g.*, Union Bank v. Wolas, 502 U.S. 151, 152, 155–62 (1991) (adopting a "literal reading" of section 547(c)(2), as buttressed by one chapter of legislative history, but finding a second chapter to be unedifying and section 547's "basic policies" irrelevant); *In re* Stewart, 282 B.R. 871, 874–76 (B.A.P. 8th Cir. 2002) (construing sections 547(c)(1) and (2)).

[307] *E.g.*, Triad Int'l Maint. Corp. v. S. Air Transp., Inc. (*In re* S. Air Transp., Inc.), 511 F.3d 526, 534 (6th Cir. 2007); *In re* McNabb, 567 B.R. 326, 335 (Bankr. W.D. Tenn. 2017).

[308] *See* Begier v. IRS, 496 U.S. 53, 58 (1990).

[309] 11 U.S.C. § 547(b)(1); *In re* Grove Peacock Plaza, Ltd., 142 B.R. 506, 520–21 (Bankr. S.D. Fla. 1992).

[310] 11 U.S.C. § 547(b)(2); *In re* McNabb, 567 B.R. at 335.

[311] 11 U.S.C. § 547(b)(3); *In re* Braniff, Inc., 154 B.R. 773, 779 (Bankr. M.D. Fla. 1993).

[312] 11 U.S.C. § 547(b)(4)(A); *In re* Spinnaker Indus. Inc., 328 B.R. 755, 765 (Bankr. S.D. Ohio 2005).

[313] 11 U.S.C. § 547(b)(4)(B); Ray v. City Bank & Tr. Co. (*In re* C-L Cartage Co.), 899 F.2d 1490, 1492 (6th Cir. 1990).

[314] 11 U.S.C. § 547(b)(5)(A); *In re* Lenox Healthcare, Inc., 343 B.R. 96, 107 (Bankr. D. Del. 2006).

[315] 11 U.S.C. § 547(b)(5)(B); *In re* Electron Corp., 336 B.R. 809, 813 (B.A.P. 10th Cir. 2006); *In re* Rand Energy Co., 259 B.R. 274, 276 (Bankr. N.D. Tex. 2001).

[316] 11 U.S.C. § 547(b)(5)(C); Philips BTS v. Matthews Studio Equip. Grp. (*In re* Matthews Studio Equip. Grp.), 129 F. App'x 374, 378 (9th Cir. 2005).

[317] 11 U.S.C. § 547(g); Batlan v. TransAmerica Com. Fin. Corp. (*In re* Smith's Home Furnishings, Inc.), 265 F.3d 959, 963 (9th Cir. 2001); *In re* Allegheny Health, Educ. & Research Found., 292 B.R. 68, 76 (Bankr. W.D. Pa. 2003).

[318] *E.g.*, Lawson v. Ford Motor Co. (*In re* Roblin Indus.), 78 F.3d 30, 34 (2d Cir. 1996); *In re* Knee, 254 B.R. 710, 712 (Bankr. S.D. Ohio 2000); *see also* ABB Vecto Gray, Inc. v. First Nat'l Bank of Bethany, Okla. (*In re* Robinson Bros. Drilling Inc.), 9 F.3d 871, 874 (10th Cir. 1993). Conversely, once a trustee proves the elements of a preference under section 547(b), a defendant carries the burden of establishing that the payments qualify for one of the exceptions itemized in section 547(c). *E.g.*, J.P. Fyfe, Inc. v. Bradco Supply Corp., 891 F.2d 66, 69–70 (3d Cir. 1989) (as to section 547(c)(2)); *In re* Child World, Inc., 173 B.R. 473, 476 (Bankr.

principle[319]—no preference can be given absent a true debtor-creditor relationship[320]—section 547(b) as a whole endeavors to: (1) "foster[] equality of distribution among creditors";[321] (2) discourage creditors "from racing to the courthouse to dismember the debtor" pre-petition "by permitting the trustee to avoid prebankruptcy transfers that occur within a short period before bankruptcy";[322] and (3) "discourage[] secret liens upon the debtor's collateral which are not perfected until just before the debtor files for bankruptcy."[323] To a Congress that expressly dubbed the first two to be the "purpose of the preference section," the first outranked the second, distributive equality, "the prime bankruptcy policy."[324]

d. Fraudulent transfers: section 548

"[D]erived in large part from section 67d" of the 1898 Act, section 548 boasts a more ancient lineage than its numerical predecessor; by all accounts, the modern law of fraudulent conveyances finds its origins in the Statute of 13 Elizabeth, enrolled in 1571.[325] The succor of creditors constituted this statute's cynosure; indeed, it enabled them to avoid conveyances and transfers made with the intent and purpose to hinder, delay or defraud creditors.[326] Soon thereafter, English courts developed sundry "badges of fraud,"[327] "circumstantial evidence of a debtor's illicit intent."[328] As the 1898 Act "specifically adopted the language of the Statute of 13 Elizabeth,"[329] it too

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S.D.N.Y. 1994) (as to section 547(c) generally); *cf. In re* Jet Fla. Sys., Inc., 861 F.2d 1555, 1557–58 (11th Cir. 1988) (referring to section 547(c) as the source of "the statutory safe-harbors for otherwise voidable preferential transfers").

[319] *See In re* Dupuis, 265 B.R. 878, 882 (Bankr. N.D. Ohio 2001); *see also In re* Ogden, 243 B.R. 104, 116 (B.A.P. 10th Cir. 2000) (finding sufficient evidence in the record to establish the existence of a debtor/creditor relationship under sections 547(b)(1) and (2)).

[320] *In re* Evans Potato Co., 44 B.R. 191, 193 (Bankr. S.D. Ohio 1984) (holding there cannot be a preference where property of the debtor was not transferred to its creditor); *cf. In re* Galbreath, 207 B.R. 309, 324 (Bankr. M.D. Ga. 1997) (declining to treat a gift from one party to another as a preferential transfer).

[321] Chase Manhattan Mortg. Corp. v. Shapiro (*In re* Lee), 530 F.3d 458, 463 (6th Cir. 2008); *accord* Friedman's Liquidating Tr. v. Roth Staffing Cos. (*In re* Friedman's Inc.), 738 F.3d 547, 558 (3d Cir. 2013); Gill v. Winn (*In re* Perma Pac. Props.), 983 F.2d 964, 968 (10th Cir. 1992); *In re* Dupuis, 265 B.R. at 881; *see also* Begier v. IRS, 496 U.S. 53, 58 (1990) ("Equality of distribution among creditors is a central policy of the Bankruptcy Code . . . Section 547(b) furthers this policy by permitting a trustee in bankruptcy to avoid certain preferential payments made before the debtor files for bankruptcy.").

[322] Union Bank v. Wolas, 502 U.S. 151, 160–61 (1991) (citing H.R. REP. NO. 95-595, at 177–78 (1977)).

[323] *In re* Lee, 530 F.3d at 463 (internal quotation marks omitted) (quoting Grover v. Gulino (*In re* Gulino), 779 F.2d 546, 549 (9th Cir. 1985)); *accord* Ray v. Sec. Mut. Fin. Corp. (*In re* Arnett), 731 F.2d 358, 363 (6th Cir. 1984).

[324] H.R. REP. NO. 95-595, at 177–78; *see also In re* M & L Bus. Mach. Co., 184 B.R. 136, 140 (D. Colo. 1995) (stressing the "two basic policies" Congress intended section 547 to serve).

[325] BFP v. Resol. Tr. Corp., 511 U.S. 531, 540 (1994); *In re* Weisman, 112 B.R. 138, 140 (Bankr. E.D. Pa. 1990).

[326] *See, e.g.*, *BFP*, 511 U.S. at 540–41; Madrid v. Lawyers Title Ins. Corp. (*In re* Madrid), 725 F.2d 1197, 1199–1200 (9th Cir. 1984).

[327] *See* ORLANDO F. BUMP, FRAUDULENT CONVEYANCES: A TREATISE UPON CONVEYANCES MADE BY DEBTORS TO DEFRAUD CREDITORS 31–60 (3d ed. 1882).

[328] *In re* Adler, 494 B.R. 43, 65 (Bankr. E.D.N.Y. 2013).

[329] *BFP*, 511 U.S. at 541.

dealt solely with conveyances made with actual intent to defraud.[330] The notion of "constructive fraudulent conveyances" only entered American bankruptcy law with section 67(d) of the Chandler Act.[331]

The most recent version of this fraudulent conveyance statute now lies within section 548. "[P]ermit[ting] the trustee to avoid transfers by the debtor in fraud of his[, her, or its] creditors,"[332] this section's first subsections strive for the same intention's realization—"To permit all creditors to share ratably in the proceeds of the estate, notwithstanding pre-bankruptcy transfers that tend unfairly to favor one creditor over another"[333]—and grant familiar exceptions: those transfers in which "the debtor's net worth has been preserved, and the interests of the creditors will not have been injured by the transfer."[334] Viewed as a whole, "[section] 548 is a fraudulent-transfer provision in its own right, giving the trustee the authority to avoid fraudulent transfers without having to rely on [section] 544(b)'s incorporation of state law."[335]

For the circumscribed objectives of section 548, the Code encodes a slew of denotations in section 548(d), most especially of "transfer"[336] and "value."[337] As section 548(d)(1) states, "a transfer is made when . . . [it] is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee."[338] It pointedly adds, however, that "if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition."[339] A singular purpose—"to prevent fraudulent transfers from becoming impregnable to attack by keeping them secret until the limitation period has lapsed"—animates this dense definition.[340] Pursuant to section 548(d)(2)(A), "value," in turn, amounts to "property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of

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[330] *See, e.g., In re* Madrid, 725 F.2d at 1200; *In re* Wreyford, 505 B.R. 47, 55–56 (Bankr. D.N.M. 2014); *In re* Kelton Motors, Inc., 130 B.R. 170, 177 (Bankr. D. Vt. 1991).

[331] *See In re* Madrid, 725 F.2d at 1200.

[332] H.R. REP. NO. 95-595, at 375 (1977).

[333] *In re* Adler, 247 B.R. at 114 (Bankr. S.D.N.Y. 1999); *see also, e.g., In re* Murphy, 331 B.R. 107, 124 (Bankr. S.D.N.Y. 2005) ("The purpose of fraudulent conveyance law, whether state or federal, and of [s]ection 548 is to prevent harm to creditors by a transfer of property from the debtor.") (citation omitted); *cf. In re* Stephen Douglas, Ltd., 174 B.R. 16, 19 (Bankr. E.D.N.Y. 1994) (limning the objectives behind sections 544, 548, and 550).

[334] Gen. Elec. Credit Corp. v. Murphy (*In re* Duque Rodriguez), 895 F.2d 725, 727 (11th Cir. 1990) (internal quotation marks omitted).

[335] John D. Ayer, Michael Bernstein & Jonathan Friedland, *Overview of Avoidance Actions*, 2 AM. BANKR. INST. J. 23, 26–27, 57 (Mar. 2004).

[336] 11 U.S.C. § 548(d)(1) (2018); *In re* Dunbar, 313 B.R. 430, 435 n.3 (Bankr. C.D. Ill. 2004).

[337] 11 U.S.C. § 548(d)(2)(A); *In re* Ramirez Rodriguez, 209 B.R. 424, 434 (Bankr. S.D. Tex. 1997).

[338] 11 U.S.C. § 548(d)(1); *In re* Fibison, 474 B.R. 864, 870 (Bankr. W.D. Wis. 2011).

[339] 11 U.S.C. § 548(d)(1); *In re* French, 303 B.R. 774, 777 (Bankr. D. Md. 2004).

[340] *In re* Esquibel, Bankr. Case No. 17-10498, Adv. Pro. No. 17-1042-j, 2018 Bankr. LEXIS 2155, at *14 (Bankr. D.N.M. July 23, 2018); *see also* Butler v. Lomas & Nettleton Co., 862 F.2d 1015, 1019 (3d Cir. 1988) (characterizing its holding as "comport[ing] with the purpose underlying section 548(d) 'to prevent fraudulent transfers from becoming impregnable to attack by keeping them secret until the limitation period has lapsed'").

the debtor."[341] In general, courts are "chary of interpreting § 548 to regard promises of future support as 'valuable,'" because the absence of consideration invariably raises doubts as to the potentially (and fatally) "gratuitous" nature of the pertinent contractual exchange.[342] Although courts remain attentive to this possibility, jurisprudence nonetheless treats section 548(d)(2)(A)'s delineation of value as "easily encompass[ing] as 'value' the present exchange of cash for a right to buy or sell property at a future point in time"[343] as well as a range of "indirect benefits . . . , both tangible and intangible."[344] As such, "[a]n indirect economic benefit can suffice," albeit only "so long as it is fairly concrete,"[345] and "even a slight chance that a benefit (tangible or intangible) might be conferred upon a debtor is sufficient to show that *some* value has been conferred."[346]

Each of section 548(a)(1)'s two lettered paragraphs deals with a separate species of "fraudulent" transfers, whether "voluntarily or involuntarily" performed.[347] To be classified as intentionally fraudulent under section 548(a)(1)(A), the offending "transfer" must (1) be of "an interest of the debtor in property," and be made both (2) within two years of the pertinent petition date[348] and (3) with the "actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the

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[341] 11 U.S.C. § 548(d)(2)(A); *In re* Carbaat, 357 B.R. 553, 559 (Bankr. N.D. Cal. 2006).

[342] *See* Jimmy Swaggert Ministries v. Hayes (*In re* Hannover Corp.), 310 F.3d 796, 801 (5th Cir. 2002); *cf.* Janvey v. Golf Channel, Inc., 487 S.W.3d 560, 574 (Tex. 2016) (construing the term "value" under Texas' variant of the Uniform Fraudulent Transfer Act, one based on section 548(d)(2)(A), as covering any transfer that "confer[s] some direct or indirect economic benefit to the debtor, as opposed to benefits conferred solely on a third-party, transfers that are purely gratuitous, and transactions that merely hold subjective value to the debtor or transferee").

[343] *See In re* Hannover Corp., 310 F.3d at 801.

[344] *In re* TOUSA, Inc., 444 B.R. 613, 657 (S.D. Fla. 2011); *see, e.g.*, Cordes & Co. v. Mitchell Cos., 605 F. Supp. 2d 1015, 1022 (N.D. Ill. 2009) ("Indirect benefits can include a wide range of intangibles. . . ."); *see, e.g., In re* Jumer's Castle Lodge, Inc., 338 B.R. 344, 354 (C.D. Ill. 2006) ("[I]ndirect benefits constitute 'value' and can include a wide range of intangibles such as: corporation's goodwill or increased ability to borrow working capital; the general relationship between affiliates or 'synergy' within a corporate group as a whole; and a corporation's ability to retain an important source of supply or an important customer.").

[345] Senior Transeastern Lenders v. Off. Comm. of Unsecured Creditors (*In re* TOUSA, Inc.), 680 F.3d 1298, 1309 (11th Cir. 2012) (referencing 5 COLLIER ON BANKRUPTCY ¶ 548.05 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2006)) (internal quotation marks omitted).

[346] *In re* F-Squared Inv. Mgmt., 600 B.R. 294, 304 (Bankr. D. Del. 2019) (emphasis in original).

[347] 11 U.S.C. § 548(a)(1). To be clear, section 548(a)(1) targets any fraudulent "obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor," and "transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property." *Id.*; *see also In re* Omega Door Co., 399 B.R. 295, 303 (B.A.P. 6th Cir. 2009) (observing that section 548(a)(1) "is not restricted to an obligation incurred; it also allows the trustee to avoid transfers or obligations"). "In a metaphysical (and fuzzy logic) sense, every obligation is also an implicit transfer of property by the obligor; that is, the creation of an inchoate lien in the obligor's property to secure repayment." Jack F. Williams, *The Fallacies of Contemporary Fraudulent Transfer Models as Applied to Intercorporate Guaranties: Fraudulent Transfer Law as a Fuzzy System*, 15 CARDOZO L. REV. 1403, 1410 n.20 (1994). This article focuses on the latter, not the former, with the exception of those obligations secured by a transfer. *Cf.* Gerald K. Smith & Frank R. Kennedy, *Fraudulent Transfers and Obligations: Issues of Current Interest*, 43 S.C. L. REV. 709, 714 (1992) ("Equating obligations and transfers is appropriate only if an obligation is secured by a transfer.").

[348] 11 U.S.C. § 548(a)(1) (2018); Universal Church v. Geltzer, 463 F.3d 218, 222 n.1 (2d Cir. 2006).

date that such transfer was made."[349] Section 548(a)(1)(B) governs "constructively fraudulent" transfers; despite their wizened and menacing moniker, the transactions encompassed by this subsection entail neither fraudulent conduct nor improper intent.[350] Specifically, this provision voids any transfer (1) of "an interest of the debtor in property"; (2) that took place on or "within two years before the date of filing the bankruptcy petition";[351] and (3) "in exchange for" which the debtor "received less than a reasonably equivalent value,"[352] and (4) the debtor (a) "was insolvent on the date" of the transfer "or became insolvent as a result of such transfer or obligation"; (b) "was engaged in business or a transaction" as a result of which his, her, its, or their remaining capital was unreasonably small; (c) "intended to incur, or believed that the debtor would incur, debts" he would be unable to pay; or (d) "made such transfer to or for the benefit of an insider . . . under an employment contract and not in the ordinary course of business."[353] Ironically, although the term "reasonably equivalent value" confers vast powers upon a trustee, the Code conspicuously omits any workable denotation; "[o]f the three critical terms . . . , only the last is defined: 'value' means . . . 'property, or satisfaction or securing of a . . . debt of the debtor . . .'"[354] per section 548(d)(2)(A).[355] In fact, this one subdivision of section 548 contains multitudes: by rendering "a transfer is made in satisfaction of a 'claim,'" *i.e.* a "right to payment,"[356] into a trade of "reasonably equivalent value" due to the inclusion of "antecedent" debt in its definition of "value,"[357] and it does presume transfers of margin or settlement payments[358] or pursuant to "swap" or "master netting agreement[s]" to be "for *value* to the extent of such payment" or "to the extent of such transfer,"[359] its five paragraphs ascribe positive, if not necessarily *reasonably* equivalent, "value" to any covered transfer. But to ascertain whether there was a reasonably equivalent value requires not just one, but two, conclusions: an answer as to whether the debtor received any "value," and also an analysis of whether the value

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[349] 11 U.S.C. § 548(a)(1)(A); *In re* Advanced Modular Power Sys., 413 B.R. 643, 673 (Bankr. S.D. Tex. 2009).

[350] Off. Comm. of Unsecured Creditors v. Hancock Park Cap. II, L.P. (*In re* Fitness Holdings Int'l, Inc.), 714 F.3d 1141, 1145 (9th Cir. 2013).

[351] 11 U.S.C. § 548(a)(1); *In re* Trinsum Grp., 460 B.R. 379, 387–88 (Bankr. S.D.N.Y. 2011).

[352] 11 U.S.C. § 548(a)(1)(B)(i); *In re* Hydrogen, L.L.C., 431 B.R. 337, 352–53 (Bankr. S.D.N.Y. 2010).

[353] 11 U.S.C. § 548(a)(1)(B)(ii)(I)–(IV); *In re* M. Fabrikant & Sons, Inc., 394 B.R. 721, 735 (Bankr. S.D.N.Y. 2008).

[354] *See* BFP v. Resol. Tr. Corp., 511 U.S. 531, 535 (1994).

[355] 11 U.S.C. § 548(d)(2)(A); *In re* O'Neill, 550 B.R. 482, 502 (Bankr. D.N.D. 2016); *In re* Aphton Corp., 423 B.R. 76, 92–93 (Bankr. D. Del. 2010).

[356] 11 U.S.C. § 101(5)(A); *In re* Weaver, 579 B.R. 865, 903 (Bankr. D. Colo. 2017).

[357] Off. Comm. of Unsecured Creditors v. Hancock Park Cap. II, L.P. (*In re* Fitness Holdings Int'l, Inc.), 714 F.3d 1141, 1146 (9th Cir. 2013).

[358] 11 U.S.C. § 548(d)(2)(B)–(C); *In re* Witt, 231 B.R. 92, 95–96 n.3 (Bankr. N.D. Okla. 1999); *cf. In re* Enron Corp., 325 B.R. 671, 684–85 (Bankr. S.D.N.Y. 2005) (elaborating as to the relationship between section 546(e) and section 548(d)(2)(B)).

[359] 11 U.S.C. § 548(d)(2)(D)–(E) (emphasis added); *cf. In re* BT Prime Ltd., Bankr. Case No. 15-10745-FJB, Adv. Pro. No. 16-1178, 2021 WL 4005876, at *4 (Bankr. D. Mass. Sept. 1, 2021) (characterizing subsection 548(d)(2)(D) as an "affirmative defense to avoidance" that "requires proof of virtually the same elements as does" section 546(g)).

attained was "reasonably equivalent" to what was transferred.[360] While section 548(d)(2) resolves the former as to idiosyncratic transactions,[361] and precedent validates a handful of presumptions,[362] the latter requires judicial appraisement of "the realities of the situation" and "the true nature of all transactions" during the relevant temporal period[363] and consideration of "the totality of the circumstances,"[364]

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[360] Mellon Bank, N.A. v. Off. Comm, of Unsecured Creditors of R.M.L., Inc. (*In re* R.M.L., Inc.), 92 F.3d 139, 149, 154 (3d Cir. 1996). The requisite comparison of what was transferred with what was received by the debtor but does not demand "a precise dollar-for-dollar exchange." Advanced Telecomm. Network, Inc. v. Allen (*In re* Advanced Telecomm. Network, Inc.), 490 F.3d 1325, 1336 (11th Cir. 2007); *see also In re* Bos. Grand Prix, LLC, 624 B.R. 1, 18 (Bankr. D. Mass. 2020) ("[I]t is not necessary that there be an exact exchange . . . ."). What precisely it may require is a question for other papers.

[361] *See supra* text accompanying notes 336–346.

[362] *See* Atlanta Shipping Corp. v. Chem. Bank, 818 F.2d 240, 249 (2d Cir. 1987) ("In general, repayment of an antecedent debt constitutes fair consideration unless the transferee is an officer, director or major shareholder of the transferor."); *In re* Opus E., LLC, 528 B.R. 30, 83 (Bankr. D. Del. 2015) ("Payments made on account of valid antecedent debts are presumptively made for reasonably equivalent value."). As one court explained, "[p]ayment of an antecedent debt almost always constitutes reasonably equivalent value because it reduces the debtor's debt dollar-for-dollar." *In re* Fla. Eco-Safaris, Inc., Bankr. Case No. 12-11411-KSJ, Adv. Pro. No. 14-00014-KSJ, 2014 WL 7261514, at *2 (Bankr. M.D. Fla. Dec. 19, 2014).

[363] Gaudet v. Babin (*In re* Zedda), 103 F.3d 1195, 1204 (5th Cir. 1997); *see also* Bundles v. Baker, 856 F.2d 815, 824 (7th Cir. 1988) ("Reasonable equivalence should depend on all the facts of each case."); *accord In re* Tri-Star Techs. Co., 260 B.R. 319, 325 (Bankr. D. Mass. 2001); *cf. In re* Northgate Computer Sys., Inc., 240 B.R. 328 (Bankr. D. Minn. 1999) (noting that inquiry, in deciding whether debtor received reasonably equivalent value, is "fundamentally one of common sense, measured against market reality"). While bankruptcy courts have historically leaned on expert witness valuations offered by both sides, and still do, more objective evidence gleaned from public equity and debt markets has started appearing more consistently in recent cases. *See* VFB LLC v. Campbell Soup Co., 482 F.3d 624, 633 (3d Cir. 2007) (rejecting VFB's argument that the district court erred when it chose "to rely on the objective evidence from the public equity and debt markets" rather than "its expert witnesses' valuation"); *cf. In re* EBC I, Inc., 380 B.R. 348, 357–58 (Bankr. D. Del. 2008) (deeming an expert's valuation of assets partly based on such data in determining insolvency under section 548(a)(2)(B)(i) to be "appropriate").

[364] *In re* R.M.L., Inc., 92 F.3d at 148–49, 153; *see also* Jacoway v. Andersen (*In re* Ozark Rest. Equip. Co.), 850 F.2d 342, 345 (8th Cir. 1988) (reversing for clear error upon concluding "that the totality of the circumstances" had not been "fairly considered" by the bankruptcy court). Relevant circumstances include the good faith of the parties, the difference between the amount paid and the market value, and whether the transaction was at arm's length. Peltz v. Hatten, 279 B.R. 710, 736–37 (D. Del. 2002). Once, law was even more unconstrained. By the early 1990s, federal courts had developed at least three other standards for determining reasonable equivalence. According to one such method, drawn from the interpretation of an analogous provision from the 1898 Act in *Durrett v. Washington National Insurance Co.*, an amount that equaled or exceeded 70% of the fair market value of a debtor's property interest was reasonably equivalent value for purposes of foreclosure sales. 621 F.2d 201, 203–04 (5th Cir. 1980). Based on another line of cases, the actual consideration received at a non-collusive, regularly conducted real estate foreclosure sale always constituted a reasonably equivalent value. *In re* Winshall Settlor's Tr., 758 F.2d 1136, 1138–40 (7th Cir. 1985). In 1994, *BFP v. Resolution Trust Corp.* barred both exclusive reliance on any percentage of fair market value in the foreclosure context, as occurred in *Durrett*, and use of foreclosure sale price as a benchmark against which determination of reasonably equivalent value should be measured, as *Bundles v. Baker* had done. BFP v. Resol. Tr. Corp., 511 U.S. 531, 536–37 (1994); *see also* Laura B. Bartell, *Tax Foreclosures as Fraudulent Transfers – Are Auctions Really Necessary?*, 93 AM. BANKR. L.J. 681, 682–87 (2019) (summarizing pre-*BFP* case law and the *BFP* opinion itself). *BFP*, however, did not invalidate application of the circumstantial test in *Bundles* outside the foreclosure context. *See, e.g., BFP*, 511 U.S. at 537 n.3 ("We emphasize that our opinion today covers only mortgage foreclosures of real estate."); *In re* FBN Food Serv. Inc., 175 B.R. 671, 682 n.16 (Bankr. N.D. III. 1994) (noting that *BFP* did not disturb *Bundles*' "totality of circumstances" approach outside the mortgage foreclosure sale context); *see also In re* Prince Gardner Inc., 220 B.R. 63, 65–66 (Bankr. E.D. Mo. 1998) (concluding that *BFP* does not apply to a nonpublic, forced foreclosure sale of inventory, trade

"mindful constantly of the purpose of section 548's avoiding powers—to preserve the assets of the estate."[365]

As drafted and parsed, section 548 subjects partnership debtors and tainted trusts to more thorough scrutiny. Controlling in the former case, section 548(b) dispenses with any intent or knowledge of insolvency requirement, as section 548(a)(1)(A) demands, and does not require the estate representative to prove receipt of less than a reasonably equivalent value in exchange for the transfer or obligation, as section 548(a)(1)(B) compels.[366] Instead, "[t]he only factor that the trustee must prove, beyond the fact that a transfer was indeed made, or that an obligation was in fact incurred, is that the partnership was insolvent at the time of or as a result of the transfer."[367] Having received little juridical attention,[368] section 548(e)(1) permits a trustee to avoid, as a fraudulent conveyance, any transfer of assets made by a debtor into a "self-settled trust or similar device" within the ten years preceding a debtor's bankruptcy filing.[369] Operatively, this subsection employs a broader definition of "transfer" than applicable to sections 548(a), (b), and (c).[370] By permitting a bankruptcy trustee to seize these assets for the benefit of creditors, however, section 548(e) "restored the common-law rule allowing creditors to avoid pre-bankruptcy spendthrift trusts designed to shield assets from creditors of an insolvent debtor."[371]

Congress further curtailed these subsection's boundaries within the body of section 548. Construed as "[a]n affirmative defense to both actual and constructive fraudulent conveyance claims under the Code,[372] section 548(c) immunizes transfers in which "value" was provided to the debtor and which were received in good faith.[373] Thus, for a defendant-transferee who wishes to elude section 548(b), successful invocation of this defense generally "require[s] proof of two elements: first, innocence on the part of the transferee, and second, an exchange of value."[374] In a notable—and familiar—omission, this subsection appends no denotation for "value," but because "the definition of value, the term reasonably equivalent value and the good faith defense requiring a tender of value all appear in the same Code section,"

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names, customer relationships, accounts receivable and fixed asset).

[365] *Bundles*, 856 F.2d at 824; *accord* Gen. Elec. Credit Corp. of Tenn. v. Murphy (*In re* Rodriguez), 895 F.2d 725, 727 (11th Cir. 1990).

[366] 11 U.S.C. § 548(b); *In re* LTC Holdings, Inc., 597 B.R. 554, 560 (Bankr. D. Del. 2019).

[367] *In re* Dewey & LeBoeuf LLP, 518 B.R. 766, 775–76 n.4 (Bankr. S.D.N.Y. 2014).

[368] *In re* Castellano, 514 B.R. 555, 559 (Bankr. N.D. Ill. 2014).

[369] 11 U.S.C. § 548(e)(1); *In re* Cyr, 602 B.R. 315, 324 (Bankr. W.D. Tex. 2019).

[370] *See* 11 U.S.C. § 548(e)(2); *see also, e.g.*, Clements v. Apax Partners LLP, No. 2:20-cv-310-FtM-29MRM, 2021 U.S. Dist. LEXIS 49030, at *9, (M.D. Fla. Mar. 16, 2021).

[371] *In re* Castellano, 514 B.R. at 559–60 (Bankr. N.D. Ill. 2014); *see also In re* Porco, Inc., 447 B.R. 590, 595 (Bankr. S.D. Ill. 2011) (rehashing history behind the subsection's adoption).

[372] *In re* Dreier LLP, 452 B.R. 391, 426 (Bankr. S.D.N.Y. 2011) (citing *In re* MarketXT Holdings Corp., 426 B.R. 467, 476 (Bankr. S.D.N.Y. 2010)). Accordingly, defendants must prove this defense's requisite elements. *See In re* Actrade Fin. Techs. Ltd., 337 B.R. 791, 802 (Bankr. S.D.N.Y. 2005).

[373] 11 U.S.C. § 548(c); *In re* Grove-Merritt, 406 B.R. 778, 810–11 (Bankr. S.D. Ohio 2009); *see also, e.g.*, Jobin v. McKay (*In re* M & L Bus. Mach. Co.), 84 F.3d 1330, 1338 (10th Cir. 1996) (as to the burden of proof under section 548(c)); *In re* Actrade Fin. Techs. Ltd., 337 B.R. 791, 802 (Bankr. S.D.N.Y. 2005) (same).

[374] *In re* Hill, 342 B.R. 183, 203 (Bankr. D.N.J. 2006) (quoting *In re* Burry, 309 B.R. 130, 135 (Bankr. E.D. Pa. 2004)).

courts uniformly consult the patulous case law that section 548(a)(2)'s own "reasonably equivalent value" metric has sired.[375] More problematically, the Code maintains a similar silence as to section 548(c)'s "[g]ood faith" touchstone, "not an element of . . . [any] plaintiff's proof of 'reasonably equivalent value,'"[376] and "the legislative history related to [this] section . . . never defines, and scarcely addresses, good faith."[377] In response, bankruptcy courts have tended to coalesce behind a functional approach that examines "what the transferee objectively 'knew or should have known' instead of examining the transferee's actual knowledge from a subjective standpoint,"[378] "such that a transferee does not act in good faith when it has sufficient knowledge to place it on inquiry notice of the voidability of the transfer,"[379] with particular notice paid to whether targeted transaction "carrie[d] the earmarks of an arms-length bargain."[380]

e. Setoffs: section 553

While "[t]he doctrine of setoff dates back to Roman law and was recognized by

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[375] *In re* Burry, 309 B.R. at 136; *see also* Jimmy Swaggert Ministries v. Hayers (*In re* Hannover Corp.), 310 F.3d 796, 801 (5th Cir. 2002) (internal quotation marks omitted).

[376] *In re* M. Fabrikant & Sons, Inc., 394 B.R. 721, 735 (Bankr. S.D.N.Y. 2008) (internal quotation marks omitted).

[377] *In re* Burry, 309 B.R. at 135 n.6.

[378] Brown v. Third Nat'l Bank (*In re* Sherman), 67 F.3d 1348, 1355 (8th Cir. 1995) (quoting Hayes v. Palm Seedlings Partners-A (*In re* Agric. Rsch. & Tech. Grp.), 916 F.2d 528, 535–36 (9th Cir. 1990)). Due to this popular formulation's use of the disjunctive "or" between "knew" and "should have known," section 548(c)'s standard for inquiry notice "incorporates both objective and subjective components." Picard v. Citibank, N.A. (*In re* Bernard L. Madoff Inv. Secs. LLC), 12 F.4th 171, 191 (2d Cir. 2021). For further discussion, see *infra* note 379.

[379] *In re* Burry, 309 B.R. at 136. Based on 2021's *Picard v. Citibank, N.A. (In re Bernard L. Madoff Inv. Secs. LLC)*, this prevailing approach can be broken down into three steps. First, "a court must examine what facts the defendant knew; this is a subjective inquiry and not 'a theory of constructive notice.'" 12 F.4th at 191. Among the factors relevant to this first inquiry are the following three: (1) "an honest belief in the propriety of the activities in question"; (2) "no intent to take unconscionable advantage of others"; and (3) "no intent to, or knowledge of the fact that the activities in question will hinder, delay, or defraud others." *In re* Colonial Realty Co., 210 B.R. 921, 923 (Bankr. D. Conn. 1997) (quoting 5 COLLIER ON BANKRUPTCY ¶ 548.07[2][a] (15th ed. rev'd 1997)). Second, "a court determines whether these facts put the transferee on inquiry notice of the fraudulent purpose behind a transaction—that is, whether the facts the transferee knew would have led a reasonable person in the transferee's position to conduct further inquiry into a debtor-transferor's possible fraud." *In re* Bernard L. Madoff Inv. Secs. LLC, 12 F.4th at 191. Third, if inquiry notice had been given as a matter of law, "the court must inquire whether 'diligent inquiry [by the transferee] would have discovered the fraudulent purpose' of the transfer." *Id.* at 191–92 (alterations in original). "An objective 'reasonable person' standard applies in the second and third steps . . . ." *Id.* at 192. Of course, other versions of this test and different conceptions of "inquiry notice" and "good faith," of course, can be posited. Indeed, case law is replete with references to the objectivity of good faith under section 548(c). For its part, *Collier* has characterized the foregoing combination of "subject and objective elements" as "breaking somewhat with prior cases that had attempted to categorize the test as exclusively one or the other." 5 COLLIER ON BANKRUPTCY ¶ 548.09[2][b] (Alan N. Resnick & Henry J. Sommer eds.,16th ed. 2022).

[380] *In re* Robbins, 91 B.R. 879, 886 (Bankr. W.D. Mo. 1988). To some, this prong is merely an alternative variant of the inquiry notice test. *In re* Auxano, Inc., 96 B.R. 957, 961 (Bankr. W.D. Mo. 1989). For others, it seemingly stands apart. *See In re* Housey, 409 B.R. 611, 619 & n.18 (Bankr. D. Mass. 2009) (collecting cases and sources so doing).

the equity courts in England," setoffs only emerged as "a part of the English bankruptcy law in 1705, and . . . of American bankruptcy law in 1800."[381] Although this prerogative never escaped codification in 1841, 1867, and 1898, not one of the Code's predecessors provided for "an independent source of law governing setoff."[382] Instead, each such "legislative attempt" merely "preserve[d] the common-law right of setoff arising out of non-bankruptcy law"[383] in and outside of bankruptcy's domain, the extensive recognition and application of set-offs has traditionally aligned with "[l]ong standing practice and commercial expectancies."[384] Naturally, therefore, in construing section 68a of the 1898 Act, the most immediate statutory predecessor to section 553,[385] courts generally read its language as authorizing setoffs only to the extent "established in common law and equitable procedure"[386] and thus did not automatically permit its exercise.[387] More narrowly, this fluid jurisprudence weighed the propriety of any setoff in light of "mutual obligations existing between the debtor and a creditor," as dictated by the demands of "fairness" and the need "to prevent injustice";[388] essentially, vacuous equity determined a setoff's defensibility.[389] The statutory text seemingly compelled this result: Because section sixty-eight featured "permissive rather than mandatory" language, section 553's most recent progenitor did "not enlarge the doctrine of set-off," its employment impossible in cases where pre-existing "general principles" did "not justify it."[390]

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[381] *In re* Buckenmaier, 127 B.R. 233, 237 (B.A.P. 9th Cir. 1991); *accord* Bohack Corp. v. Borden, Inc. (*In re* Bohack Corp.), 599 F.2d 1160, 1164 (2d Cir. 1979); John C. McCoid II, *Setoff: Why Bankruptcy Priority?*, 75 VA. L. REV. 15, 25 n.43 (1989).

[382] U.S. *ex rel.* IRS v. Norton, 717 F.2d 767, 772 (3d Cir. 1983); *accord In re* Haffner, 12 B.R. 371, 373 (Bankr. M.D. Tenn. 1981).

[383] *Norton*, 717 F.2d at 772; *see also* Burton M. Freeman, *Setoff Under the New Bankruptcy Code: The Effect on Bankers*, 97 BANKING L.J. 484, 487–88 (1980) ("The preamble of [s]ection 553(a) . . . sets forth the general proposition that the right of setoff developed by the courts of equity and in certain state procedural codes and substantive statutes is preserved.").

[384] McLaughlin, *supra* note 297, at 399; *see also* William H. Loyd, *The Development of Set-Off*, 64 U. PA. L. REV. 541, 547–69 (1916) (providing a thorough account of this right's emergence).

[385] *See* Carolco Television, Inc. v. Nat'l Broad. Co. (*In re* De Laurentiis Entm't Grp., Inc.), 963 F.2d 1269, 1276 (9th Cir. 1992) (characterizing section 68 of the 1898 Act as closely tracking section 553); *see also* Rec. Club of Am., Inc. v. United Artists Recs., Inc., 80 B.R. 271, 278–79 (S.D.N.Y. 1987) (applying the setoff provision of the 1898 Act).

[386] Cumberland Glass Mfg. v. DeWitt, 237 U.S. 447, 455 (1915).

[387] *See, e.g., In re* De Laurentiis Entm't Grp., Inc., 963 F.2d at 1276–77 (acknowledging section 553 "merely allows setoffs in bankruptcy"); *In re* Pieri, 86 B.R. 208, 210 (B.A.P. 9th Cir. 1998) (stating the right of setoff was "generally favored" though not automatically permitted).

[388] *In re* Pieri, 86 B.R. at 210.

[389] *See* Melamed v. Lake Cnty. Nat'l Bank, 727 F.2d 1399, 1404 (6th Cir. 1984) ("The allowance of a set-off is within the discretion of the trial court. . . ."); Bohack Corp. v. Borden, Inc., 599 F.2d 1160, 1167–68 (2d Cir. 1979) (restating the applicability of the setoff rule is dependent upon "the equities of the situation"); Brunswick Corp. v. Clements, 424 F.2d 673, 675 (6th Cir. 1970) (referencing how justice and equity may dictate whether a setoff is denied); Susquehanna Chem. Corp. v. Producers Bank & Tr. Co., 174 F.2d 783, 787 (3d Cir. 1949) (finding broad discretion within the courts to determine whether the setoff rule of section 68 applies).

[390] *Cumberland Glass Mfg.*, 237 U.S. at 455. The 1898 Act's own setoff provision "was taken almost literally from § 20 of the act of 1867." *Id.*

In somewhat duller terms, the Code conserves this equitable tradition[391] with only "some changes."[392] As codified, section 553 conserves setoffs involving mutual claims that arise before the commencement of a bankruptcy case,[393] subject to the limitations imposed in its body, section 362, and section 363.[394] If its implicit and explicit prerequisites are met, a creditor's entitlement to offset a debtor's outstanding debt with any legal and equitable interests in property of that same bankrupt that is in their possession and that would otherwise be owned by (and owed to) their post-petition estate cannot be eliminated by the Code's other Avoidance Provisions.[395] Thus, section 553(a) is "an unadorned expression of the [c]ongressional intent sanctioning the exercise of setoff as a permissible preference under certain circumstances."[396] As did its precursors, the Code does not establish an independent right of setoff, but instead preserves any such prerogative that may exist under applicable non-bankruptcy law.[397] Assuming such a right can be proven under that relevant substantive law, section 553(a) posits three requirements for any such debt to be eligible for setoff that a defendant-creditor must establish, in fact or in theory: "(1) the amount owed by the debtor must be a prepetition debt; (2) the debtor's claim against the creditor must also be prepetition; and (3) the debtor's claim against the creditor and the debt owed the creditor must be mutual."[398] The first two may normally be reducible to an uncomplicated chronological question, the province of planners and calendars, but the fact that "dependency on a post-petition event does not prevent a debt from arising prepetition" invites potential mischief.[399] The requisite mutuality obtains when "the debts and credits are in the same right and are between

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[391] *See* U.S. *ex rel.* IRS v. Norton, 717 F.2d 767, 772 (3d Cir. 1983); Vernon O. Teofan & L. E. Creel III, *The Trustee's Avoiding Powers Under the Bankruptcy Act and the New Code: A Comparative Analysis*, 11 ST. MARY'S L. REV. 311, 335 (1979).

[392] H.R. REP. NO. 95-595, at 377 (1977); *see also* Teofan & Creel, *supra* note 391, at 336–37 (providing general discussion of some additional limitations of setoff under the Code).

[393] 11 U.S.C. § 553(a) (2018); *In re* Thompson, 182 B.R. 140, 152 (Bankr. E.D. Va. 1995).

[394] 11 U.S.C. § 553(a); *In re* Comm. Fin. Servs., 251 B.R. 397, 404 (Bankr. N.D. Okla. 2000). Other provisions of the Code affect section 553's operation. Section 506(a), for instance, converts any right to setoff to a secured claim in any monies owed to the debtor. 11 U.S.C. § 506(a)(1); *In re* Thompson, 182 B.R. at 154. Additionally, section 542 exempts funds subject to a setoff from turnover, but a debtor can still access any amount subject to a setoff as cash collateral, absent the relevant creditor's consent, if a bankruptcy court approves and adequate protection is given. 11 U.S.C. §§ 363(c)(2), 542(b).

[395] *See In re* Brooks Farms, 70 B.R. 368, 372 (Bankr. E.D. Wis. 1987) (holding that section 547 cannot be utilized to undo the effects of section 553 when applicable); *see also In re* Lott, 79 B.R. 869, 870 (Bankr. W.D. Mo. 1987) (declaring that section 547 cannot be used to avoid a setoff); *In re* Balducci Oil Co., Inc., 33 B.R. 847, 852 (Bankr. D. Colo. 1983). Under the 1898 Act, setoffs were generally not voidable as preferential transfers. Jensen v. State Bank of Allison, 518 F.2d 1, 4 (8th Cir. 1975); *In re* Carnell Constr. Co., 424 F.2d 296, 299 (3d Cir. 1970). Actually, an assertion of such a right was a valid defense to a preference action. Cissell v. First Nat'l Bank of Cincinnati, 476 F. Supp. 474, 495 (S.D. Ohio 1979).

[396] *In re* Brooks Farms, 70 B.R. at 372–73; *see also In re* Fox, 62 B.R. 432, 433 (Bankr. D.R.I. 1986) (stating the obverse), *cited in, e.g.*, Braniff Airways v. Exxon Co., 814 F.2d 1030, 1034 (5th Cir. 1987).

[397] *E.g.*, United States v. Arkison (*In re* Cascade Roads, Inc.), 34 F.3d 756, 763 (9th Cir. 1994); *In re* HAL, Inc., 196 B.R. 159, 161 (B.A.P. 9th Cir. 1996); *In re* Lehman Bros. Holdings, Inc., 433 B.R. 101, 107 (Bankr. S.D.N.Y. 2010).

[398] *In re* Lehman Bros. Holdings, Inc., 404 B.R. 752, 757 (Bankr. S.D.N.Y. 2009).

[399] United States v. Gerth, 991 F.2d 1428, 1433–34 (8th Cir. 1993).

the same parties, standing in the same capacity,"[400] each party "'own[ing] his claim in his own right severally, with the right to collect in his own name in his own right and severally.'"[401] In the views of many, this one constraint thwarts any "triangular" set-off, as in where the creditor attempts to set off its debt to the debtor with the latter's debt to a third party.[402] As the Code does elsewhere, section 553 presumes a debtor's insolvency "on and during the 90 days immediately preceding the date of the filing of the petition."[403]

Akin to "a miniature preference provision,"[404] section 553(b)(1) provides an exception to section 553(a). Per its explicit text, a trustee may recover from the creditor the amount so offset "to the extent that any insufficiency on the date of such setoff is less than the insufficiency on the later of" either "ninety days before the date of the filing of the petition"[405] or "the first date during the 90 days immediately preceding the date of the filing of the petition on which there is an insufficiency."[406] As set forth in section 553(b)(2), an "insufficiency" exists whenever "a claim against the debtor exceeds a mutual debt owing to the debtor by the holder of such a claim" by some "amount, if any."[407] In enacting section 553(b)(1), Congress seemingly aimed "to prevent an 'improvement in position' by one creditor at another's expense," but "not to prohibit a setoff of a mutual debt that arises during the pre-petition period."[408] Creditors that had mutual accounts with the debtor, Congress feared, would foresee the approach of bankruptcy and scramble to secure a better position for themselves by decreasing any "insufficiency," wholly to the detriment of the imminent debtor's other extant creditors.[409] So informed, rather than barring the creation of an insufficiency during the ninety-day pre-petition period, section 553(b)(1) instead enables a trustee to recover the setoff amount only if the insufficiency is less at the time of setoff than when it arose.[410]

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[400] *In re* Westchester Structures, Inc., 181 B.R. 730, 739 (Bankr. S.D.N.Y. 1995).

[401] *In re* V.N. Deprizio Constr. Co., 52 B.R. 283, 287 (Bankr. N.D. Ill. 1985) (quoting 4 COLLIER ON BANKRUPTCY, ¶ 553.30 (15th ed. 1985)), *cited in, e.g., Braniff Airways*, 814 F.2d at 1036; *In re* Garden Ridge Corp., 338 B.R. 627, 633–34 (Bankr. D. Del. 2006); *see also, e.g., In re* Orexigen Therapeutics, Inc., 990 F.3d 748, 755 (3d Cir. 2021) (quoting this same excerpt, *as cited in In re* Garden Ridge Corp., 338 B.R. at 633–34).

[402] *See* Elcona Homes Corp. v. Green Tree Acceptance, Inc., 863 F.2d 483, 486 (7th Cir. 1988) (explaining why and how mutuality precludes a triangular setoff).

[403] 11 U.S.C. § 553(c) (2018); *In re* U.S. Aeroteam, Inc., 327 B.R. 852, 868 (Bankr. S.D. Ohio 2005).

[404] *In re* Balducci Oil Co., 33 B.R. 847, 852 (Bankr. D. Colo. 1983).

[405] 11 U.S.C. § 553(b)(1)(A); *In re* Comer, 386 B.R. 607, 610 (Bankr. W.D. Va. 2008); *see also* 11 U.S.C. § 547(b) (codifying a similar presumption).

[406] 11 U.S.C. § 553(b)(1)(B); *In re* Porter, 562 B.R. 658, 662 (Bankr. E.D. Va. 2017).

[407] 11 U.S.C. § 553(b)(2); *In re* Norvergence, Inc., 405 B.R. 709, 736 (Bankr. D.N.J. 2009).

[408] *In re* Lopes, 211 B.R. 443, 449 (D.R.I. 1997), *cited in In re* Hurt, 579 B.R. 765, 771 (Bankr. W.D. Va. 2017).

[409] Lee v. Schweiker, 739 F.2d 870, 877 (3d Cir. 1984).

[410] *In re* Lopes, 211 B.R. at 449.

3. Relevant Constrictive Provisions

a. Deadlines: section 546(a)

Although U.S. law lacked any separate statute of limitations for a receiver's or trustee's avoiding powers prior to the adoption of section 546(a),[411] with the lone exception of the 1800 Act, each new bankruptcy statute imposed some temporal limitation on these privileges' operation.[412] Notably, section 2 of the 1867 Act explicitly forbade the maintenance, "at law or in equity," of any suit "by or against . . . [the] assignee [in bankruptcy], or by or against any person claiming an adverse interest, touching the property and rights of property aforesaid, in any court whatsoever, unless the same shall be brought within two years from the time the cause of action accrued, for or against such assignee."[413] Over its brief existence, federal courts applied this two-year limitation to actions by the trustee to recover preferences, set aside fraudulent transfers, and collect debts due to the estate.[414] In more spartan prose, the 1898 Act placed a similar statute of limitations upon suits by or against the trustee in its section 11(d): "Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed."[415] As a New York court noted, in fact, "[t]he only difference effected by the change to the present language in the Federal statute from the language in the corresponding prior Federal statute has been a change of the date from which the two-year period is to be computed."[416] Unfortunately, while a judicial consensus as to one reading—that this two-year limitation applied to all actions under the 1898 Act—quickly took hold, disputes festered over whether its reach extended to derivative actions arising under state law.[417] Cognizant of this juridical discord over the interpretation of the negatively phrased section 11(d), "Congress completely revamped the phraseology of th[is] section" and added a "positively phrased" fifth paragraph to section 11 via the Chandler Act,[418] aiming to thereby "extend to the trustee a fixed period within which he might file all suits which he . . . inherited from the debtor unless it were the policy of the state to give him even a longer time."[419] So informed, the new section 11(e) now read in relevant part: "A receiver or trustee may, within two years

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[411] *In re* Afco Dev. Corp., 65 B.R. 781, 783 (Bankr. D. Utah 1986).

[412] *See* Herget v. Cent. Nat'l Bank & Tr. Co., 324 U.S. 4, 5–7 (1945).

[413] Bankruptcy Act of 1867, ch. 176, § 2, 14 Stat. 517, 532, *repealed by* Bankruptcy Act of June 7, 1878, ch. 160, 20 Stat. 99.

[414] Sargent v. Helton, 115 U.S. 348, 352 (1885); Bailey v. Glover, 88 U.S. 342, 346 (1874).

[415] Bankruptcy Act of 1898, ch. 541, § 11(d), 30 Stat. 544, *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat, 2549.

[416] Devoy v. Superior Fire Ins. Co., 239 A.D. 28, 31 (N.Y. App. Div. 1933).

[417] *Compare* Meilke v. Drain (*In re* Fred Herrick Lumber Co.), 69 F.2d 290, 291 (9th Cir. 1934), *and* Davis v. Wiley (*In re* Wiley), 273 Fed. 397, 400–01 (9th Cir. 1921), *with* Isaacs v. Neeze, 75 F.2d 566, 568–69 (5th Cir. 1935), *and* Narin v. McCarthy, 120 F.2d 910, 912–13 (7th Cir. 1941).

[418] Gerald A. Flanagan, Recent Decisions, *Bankruptcy: Effect on State Statutes of Limitations*, 37 MARQ. L. REV. 61, 64 (1953).

[419] McBride v. Farrington, 60 F. Supp. 92, 96 (D. Or. 1945); *accord* Engstrom v. De Vos, 81 F. Supp. 854, 858 (E.D. Wash. 1949).

subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy."[420] The Chandler Act did even more with the 1898 Act's pre-existing limitations provisions: Section 261 of the newly engrafted chapter X suspended the operation of any state statute of limitations during the pendency and prior to the dismissal of a case under that chapter,[421] as did sections 391 of chapter XI[422] and 516 of chapter XII,[423] in the name of their distinct—and relatively novel—objectives.[424] Although the prior two-year period of limitations on suits against a trustee or receiver remained unchanged after 1938, substantial interpretive differences increasingly grew as a result of section 11's revised language[425] and the enactment of sections 261, 391, and 516.[426] As proposed by the Commission on the Bankruptcy Laws of the United States in 1973, the Code contained no such statute of limitations; as reported to the House Committee on the Judiciary in 1977, section 546 remained equally silent.[427] Instead, the Senate's separate bankruptcy bill introduced section 546(a), an addendum to which the House of Representatives assented.[428]

Always applicable to the Avoidance Provisions[429] and altered in 1984[430] and 1994,[431] section 546(a) presently sets forth the limitations period for the trustee's access to the Code's "avoiding powers" under this same quintet[432] in, like its non-bankruptcy analogues,[433] relatively "clear" language.[434] As currently fashioned, its

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[420] Chandler Act, ch. 575, § 11(e), 52 Stat. 840, 849 (1938), *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549; *Engstrom*, 81 F. Supp. at 858.

[421] *See* Chandler Act, ch. 575, § 261, 52 Stat. 840, 902. For an overview of the Chandler Act, see Thomas E. Plank, *The Creditor in Possession Under the Bankruptcy Code: History, Text, and Policy*, 59 MD. L. REV. 253, 268–72 (2000) [hereinafter Plank, *CIP*].

[422] Chandler Act, ch. 575, § 391, 52 Stat. at 914; Kamerman & Kamerman v. Seligson (*In re* Ira Haupt & Co.), 390 F.2d 251, 254 (2d Cir. 1968); *In re* Record Club of Am., Inc., 18 B.R. 459, 461 (Bankr. M.D. Pa. 1982)

[423] Chandler Act, ch. 575, § 516, 52 Stat. at 928; *see also* Van Kirk v. Super. Ct., 300 P.2d 706, 708–09 (Cal. Ct. App. 1956) (analyzing this section's fourth part).

[424] *See* Davis v. Sec. Nat'l Bank of Nev., 447 F.2d 1094, 1096–97 (9th Cir. 1971) (as to chapter X).

[425] *See* Recent Decision, *"Just Compensation" and the General Motors Case*, 31 VA. L. REV. 681, 682 (1945) (analyzing the statute of limitations).

[426] *See* Smith & Kennedy, *supra* note 347, at 736.

[427] *See In re* Afco Dev. Corp., 65 B.R. 781, 784 (Bankr. D. Utah 1986).

[428] *See* 124 CONG. REC. S17413–14 (daily ed. Oct. 6, 1978) (remarks of Sen. Dennis D. DeConcini); 124 CONG. REC. H11097 (daily ed. Sept. 28, 1978) (remarks of Rep. William D. Edwards).

[429] *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549; S. REP. NO. 95-989, at 87 (1978).

[430] *See* Bankruptcy Amendments and Federal Judgment Act of 1984, Pub. L. No. 98-353, § 461(a), 98 Stat. 333.

[431] *See* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 216, 108 Stat. 4106.

[432] *See* 11 U.S.C. § 546(a) (2018); *see also* David G. Carlson, *Bankruptcy's Organizing Principle*, 26 FLA. ST. U. L. REV. 549, 596 (1999). A distinct statute of limitations applies for actions or proceedings under section 550. 11 U.S.C. § 550(f).

[433] *Cf.* Ford v. Union Bank (*In re* San Joaquin Roast Beef), 7 F.3d 1413, 1415 (9th Cir. 1993) (backing one proposed interpretation of section 546(a) as "most logical" in light of "the policy that underlies all statutes of limitations: prevention of the bringing of overly stale claims").

[434] Jobin v. Boryla (*In re* M & L Bus. Mach. Co.), 75 F.3d 586, 590 (10th Cir. 1996).

text bars the commencement of any "action or proceeding" under the these five provisions "after the *earlier* of"[435] either "the time the case is closed or dismissed"[436] or "the *later* of . . . 2 years after the entry of the order for relief"[437] or "1 year after the appointment or election of the first trustee" in a chapter 7, 11, 12 or 13 case.[438] The latter may only be invoked if one of the two events mentioned in its opening clause—"such appointment or election"—"occurs *before*" section 546(a)(1)(A)'s two-year period ends.[439] Commonly, bankruptcy courts construe the word "closed," as used in section 546(a)(2), as equivalent to a case's "proper[] and final[]" denouement.[440] Meanwhile, in the context of section 546(a)(1), the issue comes down to the timing of a permanent trustee's appointment or election as a statutory matter,[441] but its application to DIPs continues to divide many courts.[442] If these provisions are construed collectively, the maximum limitations period under section 546(a)(1) is three years from the petition date, assuming a trustee is appointed on the last day of section 546(a)(1)(A)'s two-year period.

b. Substantive limitations: sections 546(b)–(j)

While section 546(a) enthrones a deadline,[443] section 546's nine other lettered paragraphs prescribe substantive restrictions on the multifarious contrivances bestowed unto a trustee elsewhere in the Code.[444] A trustee's prerogatives under sections 544, 545, and 549 yield to any perfection rights afforded under applicable non-bankruptcy law to entities with interests in the debtor's property under section 546(b),[445] and that officer's powers under sections 544(a), 545, 548, and 549 must

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[435] 11 U.S.C. § 546(a) (emphasis added); *In re* Art & Co., 179 B.R. 757, 760 n.1 (Bankr. D. Mass. 1995).

[436] 11 U.S.C. § 546(a)(2) (emphasis added); *In re* Livemercial Aviation Holding, LLC, 508 B.R. 58, 64 (Bankr. N.D. Ind. 2014).

[437] 11 U.S.C. § 546(a)(1)(A) (emphasis added); *In re* Gen. Creations, Inc., 343 B.R. 548, 550 (Bankr. W.D. Va. 2006).

[438] 11 U.S.C. § 546(a)(1)(B) (emphasis added); *In re* BH S & B Holdings, LLC, 439 B.R. 342, 349 (Bankr. S.D.N.Y. 2010).

[439] 11 U.S.C. § 546(a)(1)(B) (emphasis added); Singer v. Kimberly Clark Corp. (*In re* Am. Pad & Paper Co.), 478 F.3d 546, 552 (3d Cir. 2007).

[440] *E.g., In re* Petty, 93 B.R. 208, 212 (B.A.P. 9th Cir. 1988); *see also In re* Schroeder, 173 B.R. 93, 94–95 (Bankr. D. Md. 1994) (analyzing the effect of a case's reopening on section 546(a)'s limitations period), *rev'd on other grounds*, 182 B.R. 723 (D. Md. 1995).

[441] *In re* Livemercial Aviation Holding, LLC, 508 B.R. at 64.

[442] *Compare* Zilkha Energy Co. v. Leighton, 920 F.2d 1520 (10th Cir. 1990) (applicable to DIP); *In re* Sparmal Enters., Inc., 126 B.R. 559, 562–63 (S.D. Ind. 1991) (same), *with In re* Hunt, 136 B.R. 437, 446–50 (Bankr. N.D. Tex. 1991) (inapplicable to DIPs); *In re* Pullman Constr., 132 B.R. 359, 360–61 (Bankr. N.D. Ill. 1991) (same); *In re* Korvettes, Inc., 67 B.R. 730, 733–34 (Bankr. S.D.N.Y. 1986) (same). At one point, "[t]he overwhelming majority of cases . . . have held that debtors-in-possession are *not* governed by the two-year limitations period set out in § 546(a)(1)." *In re* Brin-Mont Chems., Inc., 154 B.R. 903, 907 (M.D.N.C. 1993) (emphasis added).

[443] 11 U.S.C. § 546(a); *In re* Wedtech Corp., 187 B.R. 105, 110 n.4 (S.D.N.Y. 1995).

[444] 11 U.S.C. § 546(b)–(j); *In re* Enron Creditors Recovery Corp., 422 B.R. 423, 425 (Bankr. S.D.N.Y. 2009).

[445] 11 U.S.C. § 546(b); *In re* Rios, 420 B.R. 57, 61 (Bankr. D.P.R. 2009).

retreat before similarly reaped reclamation rights per sections 546(c) and (d).[446] Section 546 further prohibits a trustee's reliance on sections 544, 545, 547, 548(a)(1)(B), and 548(b) in most cases of: (1) transfers that are margin or settlement payments made in connection with securities, commodity, or forward contracts;[447] (2) transfers made by, to, or for the benefit of a repo participant or financial participant in connection with a repurchase agreement;[448] (3) transfers made by, to, or for the benefit of a swap participant or financial participant under or in connection with a pre-petition swap agreement;[449] and (4) subject to certain exceptions, transfers made by, to, or for the benefit of a "master netting agreement participant" under certain circumstances.[450] Contingent on compliance with certain state statutes, section 546(i) blocks a trustee from avoiding a warehouseman's lien for storage, transportation, or other costs incidental to the storage and handling of goods under section 545(2) or (3).[451] Finally, notwithstanding sections 544(a), 545, 547, 549, and 553, a chapter 11 debtor may return goods shipped to it by a creditor pre-petition, with the creditor's consent and subject to the prior rights of holders of security interests in such goods or the proceeds of such goods, pursuant to section 546(h).[452] Of the Avoidance Provisions, including subsections, covered by section 546(a), neither section 544(b) nor section 548 appear within section 546(h).[453]

c. Form of limited tolling: section 108

As a practical matter, within the Code as a whole, section 108 tolls alone. Technically, it does not provide that a statute of limitations is tolled during the period of bankruptcy,[454] and it does not freeze a multitude of deadlines for the pendency of a bankruptcy case.[455] Rather, echoing the restrained language of section 546, section

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[446] 11 U.S.C. § 546(c)–(d); *see also In re* NE OPCO, Inc., 501 B.R. 233, 253–54 (Bankr. D. Del. 2013) (explicating section 546(c)); *In re* Esbon Grain Co., 55 B.R. 308, 310–11 (Bankr. D. Kan. 1985) (dissecting section 546(d)).

[447] 11 U.S.C. § 546(e); *In re* Lancelot Invs. Fund, L.P., 467 B.R. 643, 655 (Bankr. N.D. III. 2012).

[448] 11 U.S.C. § 546(f); Wyle v. Howard, Weil, Labouisse, Freidrichs Inc. (*In re* Hamilton Taft & Co.), 114 F.3d 991, 992 n.2 (9th Cir. 1997).

[449] 11 U.S.C. § 546(g); Hutson v. E.I. du Pont de Nemours & Co. (*In re* Nat'l Gas Distribs., LLC), 556 F.3d 247, 254 (4th Cir. 2009).

[450] 11 U.S.C. § 546(j); Stephen J. Lubben, *Repeal the Safe Harbors*, 18 AM. BANKR. INST. L. REV. 319, 325 n.31 (2010).

[451] 11 U.S.C. § 546(i); *see also In re* Childress, 182 B.R. 545, 549 n.1 (Bankr. W.D. Mo. 1995) (citing an earlier version of the Bankruptcy Code).

[452] 11 U.S.C. § 546(h); *In re* Century Elecs. Mfg., 263 B.R. 1, 2 n.1 (Bankr. D. Mass. 2001).

[453] 11 U.S.C. § 546(h). As at least one bankruptcy court has argued, the rights bequeathed by section 546(h) must be seen as contingent on a judicial determination, on a motion of the trustee made not later than 120 days after the date of the order for relief in a chapter 11 case and after notice and hearing, that a return of the goods is "in the best interests of the estate." *In re* Century Elecs. Mfg., 263 B.R. at 4–5.

[454] *E.g.*, Husmann v. Trans World Airlines, Inc., 169 F.3d 1151, 1153 (8th Cir. 1999); Aslanidis v. U.S. Lines, 7 F.3d 1067, 1072–73 (2d Cir. 1993); C.H. Robinson Co. v. Paris & Sons, Inc., 180 F. Supp. 2d 1002, 1019 (N.D. Iowa 2001).

[455] Goldberg v. Tynan (*In re* Tynan), 773 F.2d 177, 179–80 (7th Cir. 1985); Moody v. Amoco Oil Co., 734 F.2d 1200, 1213 (7th Cir. 1984).

108 grants an "[e]xtension of time" established by "an order entered in a nonbankruptcy proceeding," "an agreement . . . ," or "applicable non-bankruptcy law" for certain actions by a trustee, co-debtor, or creditor in three punctiliously circumscribed situations.[456]

Partly derived from the same source,[457] sections 108(a) and (b) were designed for the trustee's exploitation on behalf of the estate.[458] "If applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition," section 108(a) reads, a "trustee may commence such action only before the later of" two dates: "(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or (2) two years after the order for relief."[459] In such clunky prose, section 108(a) thus "provides for a temporary extension of statutes of limitations to allow the trustee or debtor additional time to regroup after bankruptcy has been filed," without "anticipat[ing] a permanent suspension of all statutes of limitations."[460] Linguistically similar to its statutory predecessor,[461] section 108(b) modifies the latter deadline from two years to sixty days whenever one of the same three sources—"applicable nonbankruptcy law, an order . . . , or an agreement . . ."—sets a pre-petition deadline for the filing of "any pleading, demand, notice, or proof of claim or loss, cur[ing] a default, or perform[ing] any other similar act" in a chapter 12 or 13 case.[462] In sum, section 108(a) covers pre-petition "action";[463] section 108(b) extends beyond just "actions," such as administrative claims, contract claims, right of redemption, insurance claims, and demand notices;[464] and both are animated by the same purpose.

Thematically distinct from its immediate predecessors, section 108(c) aims to

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[456] 11 U.S.C. § 108(a)–(c); *In re* Santa Fe Dev. & Mortg. Corp., 16 B.R. 165, 167 (B.A.P. 9th Cir. 1981); *see also Aslanidis*, 7 F.3d at 1072–73 (2d Cir. 1993) (reading section 108(c) to simply grants the specified extension where the statute of limitations expires during a bankruptcy stay).

[457] H.R. REP. No. 95-595, at 318 (1977).

[458] *See, e.g.*, Nat'l Env't Waste Corp. v. Stephens, Berg & Lasater (*In re* Nat'l Env't Waste Corp.), 200 F.3d 1266, 1267–68 (9th Cir. 2000) (as to section 108(a), based in part on Natco Indus. Inc. v. Fed. Ins. Co., 69 B.R. 418, 419 (S.D.N.Y. 1987)); *In re* Durability, Inc., 273 B.R. 647, 661 (Bankr. N.D. Okla. 2002) (as to section 108(b)); Seawinds, Ltd. v. Nedlloyd Lines, B.V., 80 B.R. 181, 189 (N.D. Cal. 1987) (as to section 108(a)).

[459] 11 U.S.C. § 108(a); Stanley v. Trinchard (*In re* Hale), 579 F.3d 515, 518 (5th Cir. 2009).

[460] United States v. Neary (*In re* Armstrong), 200 F.3d 465, 472 (5th Cir. 2000).

[461] Good Hopes Refineries, Inc. v. Benavides, 602 F.2d 998, 1003 (1st Cir. 1979); *In re* Santa Fe Dev. & Mortg. Corp., 16 B.R. 165, 167 (B.A.P. 9th Cir. 1981).

[462] 11 U.S.C. § 108(b); *In re* Pridham, 31 B.R. 497, 499 (Bankr. E.D. Cal. 1983). While section 108(b) appears on its face to apply only to a trustee, many courts have allowed a chapter 13 debtor, when in possession of property of the estate, to invoke it. *See, e.g., In re* Connors, 497 F.3d 314, 320 (3d Cir. 2007) (recognizing that a chapter 13 debtor had the right to redeem within sixty days from the filing of the petition by operation of section 108(b) where the redemption period had not expired prior to the date the petition was filed); *In re* Thorpe, 612 B.R. 463, 467 (Bankr. S.D. Ga. 2019) (finding that, if a chapter 13 debtor pawns a vehicle and files bankruptcy before redemption period has expired under state law, then section 108(b) extends the redemption period).

[463] 11 U.S.C. § 108(a); Ramming v. United States, 281 F.3d 158, 164–65 (5th Cir. 2001).

[464] 11 U.S.C. § 108(b); *In re* Milledge, 639 B.R. 334, 347–48 (Bankr. D.S.C. 2022).

assist creditors inconvenienced by the Code's automatic stay.[465] As to laws, orders, and agreements that "fix[] a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is" a chapter 12 or 13 debtor, this subsection sets the relevant period's expiration on the later of "the end of" its actual end or "30 days after notice of the termination or expiration of the stay" under sections 362, 922, 1201, or 1301 "with respect to such claim."[466] So written, section 108(c) "prevent[s] the 'catch-22' that would otherwise result" when both (1) "the automatic bankruptcy stay prevents taking necessary legal [action] against the debtor" and (2) "the statute of limitations … is running" already.[467] This language, however, does not "operate in itself to stop the running of a statute of limitations; rather, . . . [it] merely incorporates suspensions of deadlines that are expressly provided in other federal or state statutes,"[468] thereby "minimiz[ing] the administrative problems governmental tax authorities face, or may face, in collecting taxes" and "protect[ing] the right of governmental units (and other creditors) to collect debts which are not discharged" in bankruptcy proceedings.[469]

Even though parties occasionally cite it, section 108's prevalent construction forecloses the application of any one of its three paragraphs to a trustee's causes of action under sections 544, 545, 547, 548, and 553. As one court observed, section 108(a) has usually been held to apply "to pre-petition common law tort and contract claims created and defined by state law" and "other pre-petition actions where applicable *nonbankruptcy* law prescribes a statute of limitations,"[470] but "not to . . . cause[s] of action created by the . . . Code."[471] The same applies to section 108(b), which is only distinguished from subsection (a) in that it applies to matters other than litigation,[472] and section 108(c), which centers upon civil claims brought or that were or could have been brought against the debtor at the time of the bankruptcy filing by one or more creditors.[473] Written into sections 108(a)–(c), a single textual phrase—"applicable nonbankruptcy law"—compels this cabined construction, as nearly every court has so concluded.[474]

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[465] *In re* Brickley, 70 B.R. 113, 115 (B.A.P. 9th Cir. 1986), *cited in, e.g., In re* Taylor, 81 F.3d 20, 23 (3d Cir. 1996); *cf. In re* Harris, 167 B.R. 680, 682–83 (Bankr. M.D. Fla. 1994) (rejecting a literal application of sections 108 and 507(a) that would frustrate both provisions' statutory purpose).

[466] 11 U.S.C. § 108(c); Morgan v. United States (*In re* Morgan), 182 F.3d 775, 778 (11th Cir. 1999). This article does not address the apparent, but lukewarm, debate over section 108(c)(1)'s import. *Compare* Husmann v. Trans World Airlines, Inc., 169 F.3d 1151, 1153–54 (8th Cir. 1999), *and* Simon v. Navon, 116 F.3d 1, 4–5 (1st Cir. 1997), *with* Lawrenson v. Glob. Marine, Inc., 869 S.W.2d 519, 523–24 (Tex. App. 1993), *and* Major Lumber Co. v. G & B Remodeling, Inc., 817 S.W.2d 474, 476 (Mo. Ct. App. 1991).

[467] James N. Duca, The Interaction Between Mechanic's Lien Law and the Bankruptcy Code, BUS. LAW., 1283, 1293 (1998).

[468] Aslanidis v. U.S. Lines, Inc., 7 F.3d 1067, 1073 (2d Cir. 1993).

[469] S. REP. No. 95-989, at 14–15 (1978).

[470] *In re* Mahoney, Trocki & Assocs., Inc., 111 B.R. 914, 920 n.6 (Bankr. S.D. Cal. 1990).

[471] *In re* Downtown Inv. Club III, 89 B.R. 59, 65 (B.A.P. 9th Cir. 1988).

[472] 11 U.S.C. § 108(b) (2018); Cash Am. Pawn, L.P. v. Murph, 209 B.R. 419, 422 n. 3 (E.D. Tex. 1997).

[473] 11 U.S.C. § 108(c); H.R. REP. No. 95-595, at 318 (1977).

[474] COLLIER ON BANKRUPTCY, ¶¶ 108.01–02 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2009),

C. Precedential Patterns: Harmony and Disharmony

1. Areas of accord

a. Applicable analytical paradigm: principles of preemption

As both sides recognize, the well-trodden doctrine of preemption, with all its attendant limitations and nuances, constitutes this debate's intellectual battlefield.[475] Per the Bankruptcy Clause, Congress may pass "uniform Laws on the subject of Bankruptcies throughout the United States."[476] Whenever Congress legislates pursuant to such enabling provisions, the Supremacy Clause[477] invalidates discordant state regulation over that same substantive range,[478] for "state laws that conflict with federal law are 'without effect'" from their very moment of promulgation.[479] This one clause does not itself authorize Congress, or federal agencies through regulations, to preempt state statutes; instead, the Supremacy Clause contains a choice-of-law rule that favors federal law over state law in the event of a conflict.[480] Regardless of a conflict, however, Congress may wield the absolute power to establish the preemptive extent of any federal law constitutionally anchored in Article I,[481] as it may "displace state power" *in toto* or "even by silence indicate a purpose to let state regulation be imposed on the federal regime."[482] Not specific to the Bankruptcy Clause, this constitutional creed traces its roots to the landmark case of *Gibbons v. Ogden* from 1824.[483]

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available at LEXIS, 2-108 Collier on Bankruptcy P 108.01–02.

[475] *See In re* Princeton-N.Y. Invs., Inc., 199 B.R. 285, 295–96 (Bankr. D.N.J. 1996) (canvassing this debate).

[476] U.S. CONST. art. I, § 8, cl. 4; Hobbs v. Buffets, L.L.C. (*In re* Buffets, L.L.C.), 979 F.3d 366, 376 (5th Cir. 2020).

[477] *See* U.S. CONST. art VI, cl. 2; *see also* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 324 (Foundation Press 15th ed. 2004) ("When Congress exercises a granted power, the federal law may supersede the state law and preempt state authority, because of the operation of the Supremacy Clause of Art. VI.").

[478] *E.g.*, Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992); Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977); Perez v. Campbell, 402 U. S. 637, 651 (1971).

[479] Altria Grp., Inc. v. Good, 555 U.S. 70, 76 (2008) (quoting Maryland v. Louisiana, 451 U.S. 725, 746 (1981)); *accord, e.g.*, Ray v. Atl. Richfield Co., 435 U.S. 151, 157–58 (1978); Hines v. Davidowitz, 312 U.S. 52, 66, 68 (1941).

[480] *See* Stephen Gardbaum, *Congress's Power to Preempt the States*, 33 PEPP. L. REV. 39, 40–41 (2005) (distinguishing between "supremacy" and "preemption"). *But see* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 225 n.3 (2000) (stating that "in this Article, I use the term 'preemption' to refer to the displacement of state law by federal statutes (or by courts seeking to fill gaps in federal statutes)").

[481] *See Jones*, 430 U.S. at 525–26 ("Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict."); Charleston & W. Carolina Ry. v. Varnville Furniture Co., 237 U.S. 597, 604 (1915) (Holmes, J.) ("When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go.").

[482] Retail Clerks v. Schermerhorn, 375 U.S. 96, 103–04 (1963).

[483] 22 U.S. 1, 13–14; JEAN E. SMITH, JOHN MARSHALL: DEFINER OF A NATION 473, 481 (1996); CHARLES WARREN, HISTORY OF THE AMERICAN BAR 391–96 (1911); David B. Spence & Paula Murray, *The Law,*

Preemption doctrine is limited in reach but devastating in effect.[484] Generally speaking, it applies in six situations: (1) when Congress, in enacting a federal statute, expresses a clear intent to preempt state law;[485] (2) when there is outright or actual conflict between federal and state law;[486] (3) where compliance with both federal and state law is in effect physically impossible;[487] (4) where there is implicit in federal law a barrier to state regulation;[488] (5) where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the state to supplement federal law;[489] and (6) where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.[490] Such a neat presentation should not, however, be understood to suggest these doctrines' occasional overlap. Thus, the Court advised, in 2002: "Congress' inclusion of an express preemption clause 'does *not* bar the ordinary working of conflict pre-emption principles' that find implied preemption where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[491] In bankruptcy cases at least, state law has been consistently preempted when the former has conflicted and thwarted the operation of a federal bankruptcy law, both before and after 1978,[492] the leading case, *Perez v. Campbell*, predating the Code and, like *Butner*, relating to the 1898 Act.[493]

Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis, 87 CALIF. L. REV. 1125, 1131 (1999). This case is noteworthy for other reasons, including the fame of certain participants. Spence & Murray, *supra*, at 1130 n.13; *see also* SMITH, *supra*, at 473–81 (discussing case's background and impact).

[484] *See* La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 368 (1986); Carlos J. Cuevas, *Bankruptcy Code Section 105(a) Injunctions and State and Local Administrative and Civil Enforcement Proceedings*, 4 AM. BANKR. INST. L. REV. 365, 419 n.313 (1996). While this article makes no attempt to provide an exhaustive discourse into preemption law, for more directly relevant to its theme, see *infra* Part III.A.

[485] *E.g., La. Pub. Serv. Comm'n*, 476 U.S. at 368; *Jones*, 430 U.S. at 525; *In re* Welding Fume Prods. Liab. Litig., 364 F. Supp. 2d 669, 677 n.8 (N.D. Ohio 2005).

[486] *E.g., La. Pub. Serv. Comm'n*, 476 U.S. at 368; Free v. Bland, 369 U.S. 663, 666–68 (1962); Hyde Park Partners, L.P. v. Connolly, 839 F.2d 837, 848–49 (1st Cir. 1988).

[487] *E.g., La. Pub. Serv. Comm'n*, 476 U.S. at 368; Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963); United Transp. Union v. Foster, 205 F.3d 851, 859 (5th Cir. 2000).

[488] *E.g., La. Pub. Serv. Comm'n*, 476 U.S. at 368; Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95–96 (1983); Norfolk & W. Ry. Co. v. Pub. Utils. Comm'n, 926 F.2d 567, 569 (6th Cir. 1991).

[489] *E.g.*, Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan., 489 U.S. 493, 509 (1989); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230–31 (1947); Coal. for Competitive Elec. v. Zibelman, 906 F.3d 41, 49 (2d Cir. 2018).

[490] *E.g.*, Hines v. Davidowitz, 312 U.S. 52, 67–68 (1941); Villas at Parkside Partners v. City of Farmers Branch, Tex., 726 F.3d 524, 556 n.57 (5th Cir. 2013).

[491] Sprietsma v. Mercury Marine, 537 U.S. 51, 65 (2002); *see also* Hillman v. Maretta, 569 U.S. 483, 498 (2013) (quoting *Sprietsma*, 537 U.S. at 65).

[492] *See, e.g., In re* P.K.R. Convalescent Ctrs., Inc., 189 B.R. 90, 96 (Bankr. E.D. Va. 1995) (finding section 363(e) to preempt a conflicting Virginia statute); *In re* Shenango Grp., Inc., 186 B.R. 623, 627 (Bankr. W.D. Pa. 1995) (holding Code preempted Pennsylvania Wage Payment and Collection Law); *In re* Rancourt, 153 B.R. 380, 383 (Bankr. D.N.H. 1993) (holding any right of tenant of debtor under New Hampshire and Vermont statutes to be preempted by the Code).

[493] Perez v. Campbell, 402 U.S. 637, 637 (1971); Cuevas, *supra* note 484, at 419–20 (characterizing *Perez*).

b. A practically uniform rule: preemption of state statutes of limitations

Although few opinions directly deal with the application of section 546(a) to a statute of limitations imposed by state law,[494] "[n]early all" have reached the same conclusion: so long as the relevant "state statute of limitations has not yet expired" as of "the beginning of the bankruptcy proceeding," then section 546(a) "provides the trustee an additional two years from the time of his appointment to file a . . . claim" under sections 544, 545, 547, 548, or 553.[495] These bankruptcy courts' analysis may rarely overawe, but even cursory review evidences the numerical ascendancy of this particular approach. Two distinct rationales inform this decisional dribble.

First, bankruptcy courts distinguish between the operation of a state-sanctified limitation pre- and post-petition. As one such judicial partisan explained in an opinion focusing on section 544(b), "[t]he applicable *state* statute of limitations is only relevant to the first part of the test" imposed by this Avoidance Provision, "which requires the action to be maintainable under the state statute of limitations as of the commencement of the bankruptcy proceeding."[496] By its own terms, section 544(b) "confers upon the trustee no greater rights of avoidance than the creditor himself would have if he were asserting invalidity on his own behalf";[497] consequently, "if the creditor is deemed estopped to recover upon his claim" or cannot recover "because of the running of a statute of limitations *prior to the commencement of the case*, the trustee is likewise rendered impotent."[498] "Once the bankruptcy petition is filed," however, section 546 alone "governs the time for bringing the action."[499] Consistent with this two-part perspective, when a trustee seeks to "avoid any transfer of an interest of the debtor in property or any obligation incurred that is voidable under applicable law . . . " under section 544(b), the state limitations period is preeminent only in analyzing whether the underlying substantive claim was temporally viable on the petition date, but never after,[500] and it is thus "immaterial if the state limitations

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[494] *E.g., In re* Spatz, 222 B.R. 157, 164–65 (N.D. Ill. 1998); *In re* Dry Wall Supply, Inc., 111 B.R. 933, 936–37 (D. Colo. 1990); *In re* Gerardo Leasing, Inc., 173 B.R. 379, 386 (Bankr. N.D. Ill. 1994); *In re* Martin, 142 B.R. 260, 265 (Bankr. N.D. Ill. 1992); *In re* Topcor, Inc., 132 B.R. 119, 125–26 (Bankr. N.D. Tex. 1991).

[495] Smith v. Am. Founders Fin., Corp., 365 B.R. 647, 678 (S.D. Tex. 2007) (as to section 544(b)); *In re* Mahoney, Trocki & Assocs. Inc., 111 B.R. 914, 918 (Bankr. S.D. Cal. 1990) (as to section 548).

[496] *In re* Martin, 142 B.R. at 265 (emphasis added).

[497] *In re* Dry Wall Supply, Inc., 111 B.R. at 396; *accord In re* Ahead By A Length, Inc., 100 B.R. 157, 164 (Bankr. S.D.N.Y. 1989).

[498] *In re* Dry Wall Supply, Inc., 111 B.R. at 396 (emphasis added); *see also In re* Antex, Inc., 397 B.R. 168, 174 (B.A.P. 1st Cir. 2008) ("The majority of courts addressing the issue have held that as long as the applicable state's limitations period has not expired prior to the petition date, the trustee can bring a fraudulent conveyance action under § 544(b) within the time limitations set forth in § 546(a)."); *see also In re* Gregg, Bankr. Case No. 11-40125-JTL, Adv. Pro. No. 11-4047, 2013 WL 3989061, at *9 (Bankr. M.D. Ga. July 2, 2013) (quoting *In re* Antex, Inc., 397 B.R. at 174).

[499] *In re* Martin, 142 B.R. at 265; *accord In re* Palisades at W. Paces Imaging Ctr., LLC, Bankr. Case. No. 09-87600-WLH, Adv. Pro. No. 11-5183, 2011 WL 4459778, at *4 (Bankr. N.D. Ga. Sept. 13, 2011); *In re* Leach, 380 B.R. 25, 28–29 (Bankr. D.N.M. 2007); *In re* G-I Holdings, Inc., 313 B.R. 612, 646 (Bankr. D.N.J. 2004); *see also* Sears Petroleum & Transp. Corp. v. Burgess Constr. Servs., 417 F. Supp. 2d 212, 225–26 (D. Mass. 2006) (endorsing and applying the two-part analytical scheme outlined in *In re* Martin, 142 B.R. at 265).

[500] *In re* Topcor, Inc., 132 B.R. 119, 125 (Bankr. N.D. Tex. 1991); *see also, e.g., Smith*, 365 B.R. at 678

period accrues during the pendency of the bankruptcy case" pursuant to section 546(a)'s plain prose.[501] This inference logically applies to section 544(a), as much as section 544(b), both of which "utiliz[e] state substantive law," for section 546(a) "does not distinguish" between these two.[502] Pursuant to the same ratiocination, because the latter regulates the limitations period for each one of the other Avoidance Provisions, and none are therefore "available to the debtor-in-possession or trustee outside of a bankruptcy court," section 546(a) should be identically construed to determine when an action must be maintained under any one of its five explicitly catalogued provisions.[503]

Second, as preemption jurisprudence prioritizes, these bankruptcy courts invoke the presumed purposes of section 546(a)'s statute of limitations—and the primacy of the Code over all bankruptcy matters. By its operation, "Section 546(a) in essence gives the trustee some breathing room to determine what claims to assert. . . ."[504] In all likelihood, "[w]ithout this approximate two-year period, a trustee who does not immediately determine what potential claims are available for the recovery of assets may forever be barred from asserting those claims if the statute of limitations expires early in the bankruptcy, or potentially before the trustee is even appointed."[505] Fairly reckoned, such a result would "contravene the broad powers Congress has granted to the trustee under [sections] 544, 547, and 548 . . . to recover property for the benefit of the estate."[506] In essence, state laws limiting avoidance actions governed exclusively by their laws, rather initiated pursuant to any one of the Code's Avoidance Provisions, simply do not embody any "countervailing state interest which would

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(observing, of the "several cases" that discuss the application of section 546(a) to state limitations statutes, "[n]early all hold that if at the beginning of the bankruptcy proceeding, a state fraudulent-transfer claim is viable—because the state statute of limitations has not yet expired—then section 546(a) provides the trustee an additional two years from the time of his appointment to file a fraudulent-transfer action"); *In re* Gerardo Leasing, 173 B.R. 379, 386 (Bankr. N.D. Ill. 1994) (relying on its own reasoning from *In re* Martin, 142 B.R. at 265–66).

[501] *In re* Martin, 142 B.R. at 265; *see also, e.g., In re* Spatz, 222 B.R. 157, 164–65 (N.D. Ill. 1998) (citing *In re* Martin, 142 B.R. at 265); Ebert v. Gustin, No. 15-cv-00225-O, 2016 WL 11663136, at *5 (N.D. Tex. June 3, 2016) (indirectly quoting *In re* Martin, 142 B.R. at 265, by citing to *In re* Spatz, 222 B.R. at 164).

[502] *In re* Mahoney, Trocki & Assocs., Inc., 111 B.R. 914, 917–18 (Bankr. S.D. Cal. 1990); *see also In re* Princeton-N.Y. Invs., Inc., 219 B.R. 55, 64 (D.N.J. 1998) ("[W]hile § 544(b) does not explicitly preempt state law, inclusion of § 546(a) in the Code evidences Congress' intent to subordinate state law restrictions."); *cf. In re* Bldgs. By Jamie, Inc., 230 B.R. 36, 45 (Bankr. D.N.J. 1998) (deeming the analysis in *In re* Princeton-N.Y. Invs., Inc., 219 B.R. at 65–65, to be persuasive and describing it as follows: "[A]ctions brought under section 544 are subject to section 546(a) which expands the time during which the trustee can exercise avoidance rights, so long as the state statute of repose has not run prior to his appointment"); *In re* Dry Wall Supply, Inc., 111 B.R. 933, 936 (D. Colo. 1990) (so arguing as to a claim made pursuant to section 544(b)).

[503] *In re* Mahoney, Trocki & Assocs. Inc., 111 B.R. at 918; *accord In re* Com. Servs. Bldg., Inc., No. 8:16-cv-01260-ODW, 2017 WL 3836039, at *6 (C.D. Cal. Aug. 31, 2017) (citing, *inter alia*, *Smith*, 365 B.R. at 677–78; *Sears Petroleum & Transp. Corp.*, 417 F. Supp. 2d at 225; and *In re* Spatz, 222 B.R. at 164).

[504] *In re* Dry Wall Supply, Inc., 111 B.R. at 936–37; *see also In re* Com. Servs. Bldg., Inc., 2017 WL 3836039, at *6 (quoting *In re* Dry Wall Supply, Inc., 111 B.R. at 936–37).

[505] *In re* Dry Wall Supply, Inc., 111 B.R. at 937; *accord In re* Mi-Lor Corp., 233 B.R. 608, 619 (Bankr. D. Mass. 1999).

[506] *In re* Dry Wall Supply, Inc., 111 B.R. at 937.

outweigh the fulfillment of [this and other] Congressional goals."[507] In short, while sections 544, 545, 547, 548, and 553 do not explicitly preempt state law, the "inclusion of [section] 546(a) in the Code evidences Congress' intent to subordinate state law restrictions" as to these Avoidance Provisions so as to realize "the goals of the Code, namely for the [t]rustee to maximize the bankruptcy estate for the creditors' benefit. . . ."[508]

2. Source of discord: repose v. limitations

In the view of all federal courts, the order of primacy between section 546(a) and a state statute of repose can only be decided by the application of conflict preemption's second common formulation. Obviously, the possibility of express preemption is fanciful, as section 546(a)'s explicit text makes no mention to statutes of repose, and its title refers solely to "limitations."[509] Field preemption cannot be credibly applied, for while the Code "standardize[d] an expansive (and sometimes unruly) area of law"[510] and "include[s] provisions invalidating certain security interests as fraudulent[] or as improper preferences over general creditors," Congress "has generally left the determination of property rights in the assets of a bankrupt's estate to state law."[511] Pursuant to the *Butner* Rule, then, "absent a countervailing federal interest, 'the basic federal rule is that state law governs.'"[512] Therefore, "where the intent to override is doubtful, our federal system demands deference to long established traditions of state regulation."[513] Taking into account these antediluvian presumptions and statutory scheme, field preemption bears no relevance simply because Congress cannot be said to have occupied the domain of bankruptcy to such an extent as to completely oust the states from their historic perch.[514] Conflict preemption's first variant appears to be an equally unstable foundation. After all, so long as the statute of repose had not terminated pre-petition, a trustee could logically comply with both relevant statutes; within hours of their appointment, they could conceivably initiate a real, albeit rushed, avoidance action.[515] Having dismissed the utility of preemption's first three common forms, these bankruptcy courts turn to conflict preemption's second potential basis, negation of a state statute of repose

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[507] *In re* Princeton-N.Y. Invs., Inc., 199 B.R. 285, 297 (Bankr. D.N.J. 1996); *accord In re* Mahoney, Trocki & Assocs., Inc., 111 B.R. at 918.

[508] *In re* Princeton-N.Y. Invs., Inc., 219 B.R. 55, 64–66 (D.N.J. 1998).

[509] 11 U.S.C. § 546(a); *In re* Pope Logging, Inc., Bankr. Case. No. 11-30153, Adv. Pro. No. 15-03004, 2015 WL 5475777, at *6–7 (Bankr. S.D. Ga. Sept. 17, 2015).

[510] RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 649 (2012).

[511] Butner v. United States, 440 U.S. 48, 54 (1979), *superseded by statute*, *as recognized in In re* White Plains Dev. Corp., 137 B.R. 139, 141–42 (Bankr. S.D.N.Y. 1992).

[512] *In re* Roach, 824 F.2d 1370, 1374 (3d Cir. 1987) (quoting *Butner*, 440 U.S. at 55).

[513] BFP v. Resol. Tr. Corp., 511 U.S. 531, 546 (1994).

[514] *See* Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 281 (1987) (outlining the relevant standard); Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 249–49 (1984) ("If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted.").

[515] *Cf. In re* Princeton-N.Y. Invs., Inc., 199 B.R. 285, 297 (Bankr. D.N.J. 1996) (finding no impossibility when the trustee had just over one month after his appointment to bring the present action under state law).

compelled by section 546(a) so long as the former "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[516]

c. Majority

According to an apparent majority of federal courts, section 546(a) preempts the extension of statutes of limitations and repose to avoidance actions under sections 544, 545, 547, 548, and 553 for one reason: the presumptively substantial vitiation of congressional purpose likely to follow from these extrinsic deadlines' implementation. As one member of this cohort explained, Congress "expressed an intent to regulate bankruptcy and maximize the bankruptcy estate for the benefit of creditors" in the Code of 1978.[517] This second purpose animates the Code's array of avoidance powers; in fact, their "*sole* purpose of . . . is to benefit the estate."[518] Admittedly, the 1898 Act contained much reminiscent of today's Avoidance Provisions.[519] But rather than this language's recodification, the Code's versions "clarified, modernized and strengthened" many of these powers[520] so as to more decidedly ensure this result.[521]

Section 546(a) amounts to a crucial cog in this overall statutory machine. The reason is intuitively obvious: only this single subsection affords any trustee with the necessary "breathing room" to evaluate and bring such causes of action and thus secure the proceeds for distribution to a debtor's unsecured creditors,[522] "especially important where the management of a business, in the period immediately prior to bankruptcy, may not have adequate incentives to bring lawsuits in a timely fashion where the recovery is remote in either time or certainty or the prospective benefits would accrue to creditors rather than shareholders."[523] But for the reprieve that it imparts, a trustee would likely lack the time to evaluate all the possible claims held by an estate and "sort out . . . [its] affairs" in an orderly and productive "fashion."[524] More so than its antecedent, a statute of repose places this federal officer at the mercy of arbitrary deadlines that, unless paused, might pass before sufficient time to gauge all impacted claims' viability can be reasonably found, the opportunity to exercise reasonable discretion thusly reduced. Put differently, like the creditors of yesteryear, a trustee subject to a state statute of repose would be forced to undertake a race to the courthouse in the hope of preserving all possible claims, resulting in the kind of chaos

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[516] Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

[517] *In re* EPD Inv. Co., 523 B.R. 680, 691 (B.A.P. 9th Cir. 2015).

[518] *In re* Dunes Hotel Assocs., 194 B.R. 967, 985 (Bankr. D.S.C. 1995) (emphasis added).

[519] *See* Vintero Corp. v. Corporacion Venezolana de Fomento (*In re* Vintero Corp.), 735 F.2d 740, 741–42 (2d Cir. 1984).

[520] Teofan & Creel, *supra* note 391, at 347.

[521] *See* Hull, *supra* note 187, at 264.

[522] *In re* Dry Wall Supply, Inc., 111 B.R. 933, 936–37 (D. Colo. 1990).

[523] *In re* Princeton-N.Y. Invs., Inc., 199 B.R. 285, 297 (Bankr. D.N.J. 1996); *see also In re* Bernstein, 259 B.R. 555, 558 (Bankr. D.N.J. 2001) (quoting *In re* Princeton-N.Y. Invs., Inc., 199 B.R. at 297).

[524] *In re* Princeton-N.Y. Invs., Inc., 199 B.R. at 297; *see also In re* Halpert & Co., 254 B.R. 104, 124 (Bankr. D.N.J. 1999) (quoting its own *In re* Princeton-N.Y. Invs., Inc., 199 B.R. at 297).

blamed for many of the uneconomical distributions once characteristic of the United States' rickety bankruptcy regimes. As a practical matter, excepting statutes of repose from section 546(a)'s writ limits the utility of the Avoidance Provisions to such a degree as to endanger realization of its primary objective as to a debtor's unsecured creditors: the maximization of the estate on their collective behalf.

d. Minority

Having balanced the contending interests differently, the "[f]ar fewer cases" opining otherwise predicate their analysis on two jurisprudential verities.[525] *First*, these bankruptcy courts tend to stress the gravity imbued into the presumption against preemption by the Court's mottled precedent. In its latest incarnation and as applied to cases centering on the possibility of implied preemption, the former assumption—that "Congress does not cavalierly pre-empt state-law causes of action"—accounts "for the historic presence of state law but does not rely on the absence of federal regulation."[526] As a consequence of its operation, "[i]n an area that has been traditionally occupied by the states, . . . [a federal] court must assume that the prerogatives of the states was not to be superseded by a federal law unless it is the clear and manifest purpose of Congress."[527] *Second*, as a tortured history divulges, statutes of repose and limitations differ not in degree but in kind.[528] While the former serves merely to protect a party from stale claims and is not wrapped up in traditional state regulation, the latter implicates a state's traditional right to determine the capacity of its citizens to be sued.[529] By design, these statutes forever terminate a defendant's capacity to be sued, regardless of the timing of an injury's discovery or even their malfeasance.[530] Because "Congress did not, in enacting the Code, expressly or impliedly pre-empt state law,"[531] these two tenets dictate how courts are to determine how, if at all, conflict preemption's obstacle variant applies to the interplay between section 546(a) and the relevant state's statute of repose.

So engineered, this framework produces one victor. As much history attests, Congress may have "not provided . . . explicit alternative[s] to state law" in sundry

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[525] *In re* EPD Inv. Co., 523 B.R. 680, 690–91 (B.A.P. 9th Cir. 2015). Perhaps most problematically, according to a tribunal aligned with the majority, at least one of these cases expressly declined to undertake a preemption analysis, and its threadbare suggestion that a statute of repose would override section 546(a) cannot be described as anything but dicta. *In re* Supplement Spot, LLC, 409 B.R. 187, 197–98 (Bankr. S.D. Tex. 2009).

[526] Wyeth v. Levine, 555 U.S. 555, 565 n.3 (2009) (internal quotations omitted). *But see, e.g.*, United States v. Locke, 529 U.S. 89, 108 (2000) (refusing to apply presumption in favor of state laws bearing upon national and international maritime commerce); Ting v. AT&T, 319 F.3d 1126, 1136 (9th Cir. 2003) (refusing to apply presumption in favor of state contract and consumer protection laws with regard to preemption by the Telecommunications Act "because of the long history of federal presence in regulating long-distance telecommunications").

[527] Witco Corp. v. Beekhuis, 38 F.3d 682, 687 (3d Cir. 1994).

[528] *See supra* Part II.A.

[529] *In re* Phar-Mor, Inc. Secs. Litig., 178 B.R. 692, 694 (W.D. Pa. 1995).

[530] *See id.*

[531] *Id.*

sections, but the Code "was written in the shadow of state law," with this non-bankruptcy legal regimes designated "to fill the interstices."[532] In light of this intentional design, the fact that "[s]tatutes of repose are based on considerations of the economic best interests of the public as a whole and are substantive grants of immunity based on a legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which liability no longer exists"[533] merits utmost respect in the absence of "clear and manifest" indicia of congressional intent.[534] Because no such intent can be divined from the language or context of section 546(a), a trustee must "comply with both federal and state law," including the latter's statute of repose.[535]

III. A BETTER ANALYTICAL APPROACH: ANSWERS AND QUESTIONS

A. Interpretive Paradigm

1. General rules of construction: the Code

Interpretation always starts with the pertinent provision's enacted terms,[536] as a text's definite import, a singular congruence of denotation and connotation,[537] is pursued.[538] In the initial phase of the "holistic endeavor" that is statutory interpretation,[539] two discrete attributes—unambiguity and plainness[540]—are dissected with multifarious linguistic tools, reference made "to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."[541] As the Court once famously explained, elementary reasoning

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[532] *In re* Estate of Medcare HMO, 998 F.2d 436, 441 (7th Cir. 1993).

[533] First United Methodist Church v. U.S. Gypsum Co., 882 F.2d 862, 865–66 (4th Cir. 1989).

[534] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

[535] *In re* Supplement Spot, LLC, 409 B.R. 187, 197–98 (Bankr. S.D. Tex. 2009).

[536] Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 234–41 (2010). In the interest of full disclosure, this overview borrows from the author's prior work.

[537] *See In re* Asher, 488 B.R. 58, 64 (Bankr. E.D.N.Y. 2013) ("Ambiguity only exists so long as several plausible interpretations of the same statutory text, specific and different in substance, can be advanced."); *see also* United States v. Pacheco, 225 F.3d 148, 154 (2d Cir. 2000) ("[W]e must interpret a specific provision in a way that renders it consistent with the tenor and structure of the whole act or statutory scheme of which it is a part." (citation omitted) (internal quotation marks omitted)).

[538] *See* United States v. Ron Pair Enters., Inc., 489 U.S. 235, 240–41 (1989); Term Loan Holder Comm. v. Ozer Grp., L.L.C. (*In re* Caldor Corp.), 303 F.3d 161, 167 (2d Cir. 2002); *In re* Spookyworld, Inc., 318 B.R. 1, 4 (D. Mass. 2003) (discussing *Ron Pair Enters., Inc.*, 489 U.S. at 240–42).

[539] United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988).

[540] *See* Amir Shachmurove, *Sherlock's Admonition: Vindicatory Contempts as Criminal Actions for Purposes of Bankruptcy Code § 362*, 13 DEPAUL BUS. & COM. L.J. 67, 75 (2014) ("Analytically, plainness and ambiguity are thus disparate, albeit closely-related, concepts, and it is context that determines which of many plain denotations most impeccably fits the statutory scheme, the text thereby shown to be both plain and unambiguous.").

[541] Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997) (citations omitted); *see also* L.S. Starrett Co. v. FERC, 650 F.3d 19, 25 (1st Cir. 2011) (quoting Stornawaye Fin. Corp. v. Hill (*In re* Hill), 562 F.3d 29, 34 (1st Cir. 2009)) ("'In determining congressional intent, we employ the traditional tools of statutory construction, including a consideration of the language, structure, purpose, and history of the statute.'").

justifies this approach, for "[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear . . . or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."[542] Subject to the mutable precepts of English grammar, any interpreter must first rely on the familiar semantic rules[543] and syntactic canons[544] so as to apprehend not just the language of the relevant subsection but also the terms and the structure of the pertinent section and overall statute.[545] In this exegesis, "[t]he statutory text, including the [c]ongressional statement of purpose and other statutory provisions within the same regulatory scheme, are not extrinsic to the statute[,]"[546] the only material properly considered at first light.[547]

If a court confronts an ambiguous statute, however, "extrinsic data [may] be weighed."[548] In particular, such opacity entitles courts to consider, with the most painstaking care, "the purpose, the subject matter and the condition of affairs which led to its enactment, and so construe it as to effectuate and not destroy the spirit and force of the law and not to render it absurd."[549] Hence, reliable legislative history merits perusal whenever a "statute is susceptible to divergent understandings and, equally important, where there exists authoritative legislative history that assists in

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[542] *United Sav. Ass'n of Tex.*, 484 U.S. at 371 (citation omitted); *see also In re* Acevedo, 497 B.R. 112, 117 (Bankr. D.N.M. 2013) ("Accordingly, the meaning ascribed to a particular phrase must be consistent with the larger statutory context.").

[543] *See* Int'l Bhd. Of Elec. Workers, Local #111 v. Pub. Serv. Co. of Colo., 773 F.3d 1100, 1108 (10th Cir. 2014) ("Under . . . [the ordinary-meaning] canon, if context indicates that words bear a technical legal meaning, they are to be understood in that sense."); *see also* United States v. Porter, 745 F.3d 1035, 1042 (10th Cir. 2014) (alteration in original) (internal quotation marks omitted) (referring to "the so-called 'general-terms canon'" that holds that [g]eneral terms are to be given their general meaning); United States v. Curbelo, 726 F.3d 1260, 1277 (11th Cir. 2013) (internal quotation marks omitted) ("[T]he negative implication canon. . . . applies where items expressed are members of an associated group or series, justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence.").

[544] *See* United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241–42 (1989) (finding support in a statute's "grammatical structure").

[545] *See* Planned Parenthood Gulf Coast, Inc. v. Kliebert, 141 F. Supp. 3d 604, 638–40 (M.D. La. 2015) (employing this interpretive paradigm); *cf.* Amir Shachmurove, *Policing Boilerplate: Reckoning and Reforming Rule 34's Popular—yet Problematic—Construction*, 37 N. ILL. U. L. REV. 202, 247–72 (2017) (applying this framework to the Civil Rules); Amir Shachmurove, *Disruptions' Function: A Defense of (Some) Form Objections under the Federal Rules of Civil Procedure*, 12 SETON HALL CIR. REV. 161, 194–211 (2016) (same).

[546] Broderick v. 119TCBAY, LLC, 670 F. Supp. 2d 612, 616 (W.D. Mich. 2009).

[547] City of Cookeville v. Upper Cumberland Elec. Membership Corp., 484 F.3d 380, 390 n.6 (6th Cir. 2007).

[548] Shachmurove, *supra* note 200, at 230.

[549] Lambur v. Yates, 148 F.2d 137, 139 (8th Cir. 1945); *see also, e.g.*, United States v. McAllister, 225 F.3d 982, 986 (8th Cir. 2000) (quoting United States v. S.A., 129 F.3d 995, 998 (8th Cir. 1997)); United States v. Warren, 149 F.3d 825, 828 (8th Cir. 1998) (indicating that the rule of lenity applies only when, after examining everything from which aid can be derived (language, structure, legislative history, and motivating policies) the court must still guess as to what Congress intended); Citizens for Resp. & Ethics in Wash. v. Fed. Elections Comm'n, 316 F. Supp. 3d 349, 387 (D.D.C. 2018) (alteration in original) (marks omitted) ("Indeed, [t]he Supreme Court has stressed time and time again that [i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law."); Erik Ugland, *Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment*, 3 DUKE J. CONST. L. & PUB. POL'Y 113, 150–51 (2008) (outlining the analysis of statutory structure that precedent requires).

discerning what Congress actually meant."[550] In all other cases, such records are irrelevant,[551] courts unable to invoke any tenet extracted from a history unmoored to any statutory text.[552] By such means, a statutorily coherent approach, even if imperfect, can be divined.[553]

2. Required adjustments

a. Bankruptcy law's oddities

Bankruptcy is different from other bodies of federal law.[554] Pursuant to the Constitution's Bankruptcy and Supremacy Clauses,[555] Congress may "adjust the debtor-creditor relationship by curtailing the nonbankruptcy rights of a debtor for the benefit of the debtor's creditors and by curtailing the nonbankruptcy rights of those creditors against the debtor for the benefit of the debtor or other creditors."[556] As noted, however, though its power may be untrammeled, Congress has deliberately "left significant statutory gaps that implicate various core bankruptcy policies, including fresh-start and distributive policies, thereby enabling the courts to set policy while engaging in case-by-case dispute resolution."[557] As a result of this persistent

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[550] United States v. Gayle, 342 F.3d 89, 94 (2d Cir. 2003); *see also* Cashman v. Dolce Int'l/Hartford, Inc., 225 F.R.D. 73, 88 (D. Conn. 2004) (citing *Gayle*, 342 F.3d at 93–94).

[551] Ratzlaf v. United States, 510 U.S. 135, 146–48 (1994).

[552] *See* Shannon v. United States, 512 U.S. 573, 582 n.8 (1994).

[553] *Cf. In re* Austin Truck Rental, 177 B.R. 827, 836 (Bankr. E.D. Pa. 1995) (favoring an interpretation of section 546(a) seen to "provide[] the most balanced and equitable, albeit imperfect, approach to the competing policy interests at issue").

[554] Haines, *supra* note 195, at 197.

[555] U.S. CONST. art. I, § 8, cl. 4 ("The Congress shall have Power to . . . establish . . . uniform Laws on the subject of Bankruptcies throughout the United States. . . ."); *id.* art. VI, para. 2 ("This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . . ."); MSR Expl., Ltd. v. Meridian Oil, Inc., 74 F.3d 910, 915 (9th Cir. 1996) ("[T]he unique, historical, and even constitutional need for uniformity in the administration of the bankruptcy laws is another indication that Congress wished to leave the regulation of parties before the bankruptcy court in the hands of the federal courts alone."); Bondholder Comm. v. Williamson Cnty. (*In re* Brentwood Outpatient Ltd.), 43 F.3d 256, 264 (6th Cir. 1994) ("The Supremacy Clause mandates that these policy decisions by Congress pursuant to its bankruptcy power displace the normal operation of . . . [a state's] statutory provisions."), *cert. denied*, 514 U.S. 1096 (1995); *cf.* Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (noting even though state law may be displaced by federal legislation, courts will only allow historic state powers to be superseded when Congress' purpose is "clear and manifest" (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947))); Ponoroff, *Limitations*, *supra* note 12, at 355, 375–88 (arguing against the propriety of state law exemptions).

[556] Plank, *Federalism*, *supra* note 12, at 1129; N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 71 (1982) (plurality opinion) (emphasizing that "the restructuring of debtor-creditor relations . . . is at the core of the federal bankruptcy power" yet "must be distinguished from the adjudication of state-created private rights"), *superseded by statute*, Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353, 98 Stat. 333 (codified as amended in 28 U.S.C. § 157(a)); *cf. In re* Old Carco LLC, 406 B.R. 180, 190–91 (Bankr S.D.N.Y. 2009) (noting that "local laws designed to protect public health or safety, without imminent harm present, do not give rise to application of a heightened standard for contract rejection" pursuant to sections 365 and 525).

[557] Prado & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. REV. 384, 402, 409 (2012) (further arguing that bankruptcy courts resemble administrative agencies rather

ambiguity and the supposedly plenary authority over bankruptcy held by Congress, in the interest of diverse policies—(1) equality of distribution among similarly situated creditors; (2) discouraging a race to the courthouse by a debtor's creditors (3) discouraging secret liens; (4) favoring a debtor's fresh start; (5) maximizing the value of the bankruptcy estate; and (6) favoring business, farmer, railroad, or municipal regulations[558]—and in fealty to various equitable ideas,[559] a proclivity for liberal construction of bankruptcy statutes and rules, decidedly favorable to debtors, once held sway.[560]

In time, countervailing notions, old and new, exercised greater gravity over the pitter-patter of bankruptcy law's interpretive cast. The Code, obviously, "standardize[d] an expansive (and sometimes unruly) area of law,"[561] and much of bankruptcy law arose alongside and "coexists peaceably with, and often expressly incorporates, state laws regulating the rights and obligations of debtors (or their assignees) and creditors."[562] Reflecting recognition of this dueling standardization and incorporation, a stringent textualism distinguishes the Court's bankruptcy jurisprudence.[563] At the same time, however, a profound reluctance either to interpret ambiguous provisions in a manner that would cause disruptive ramifications outside of bankruptcy[564] or to set aside pre-Code practice or displace state law absent patent manifestation of such congressional intent tempers this formalism.[565] Application of

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than traditional courts).

[558] *See* KENNETH N. KLEE, BANKRUPTCY AND THE SUPREME COURT 193–95 (2009) (collecting cases so stating).

[559] *Compare* Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206 (1988) ("[W]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code."), *with* Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215, 219 (1941) ("The power of the bankruptcy court . . . to adjudicate equities arising out of the relationship between the several creditors is complete."); *see also* Adam J. Levitin, *Toward a Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime*, 80 AM. BANKR. L.J. 1, 6–7 (2006) (discussing the origins of "the court of equity maxim").

[560] *Cf.* 3A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 70:6 n.1–5 (7th ed. 2013) (citing early cases).

[561] RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 649 (2012).

[562] Sherwood Partners, v. Lycos, Inc., 394 F.3d 1198, 1200–01 (9th Cir. 2005) (quoting Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 203–04 (1983)) (adding "[t]here can be no doubt that federal bankruptcy law is 'pervasive' and involves a federal interest 'so dominant' as to 'preclude enforcement of state laws on the same subject'"); *see also, e.g.*, Pac. Gas & Elec. Co. v. California *ex rel*. Cal. Dep't of Toxic Substances Control, 350 F.3d 932, 943 (9th Cir. 2003) ("[T]he presumption against displacing state law by federal bankruptcy law is just as strong in bankruptcy as in other areas of federal legislative power."); Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 70 n.23 (1st Cir. 1999) (citing Court opinions establishing "disparate topics and fields of law as traditional areas of state concern"), *aff'd*, Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

[563] Peterson v. Somers Dublin Ltd., 729 F.3d 741, 749 (7th Cir. 2013) ("We apply the text . . . not themes from a history that was neither passed by a majority of either House nor signed into law."). *But see* Robert M. Lawless, *Legisprudence Through a Bankruptcy Lens: A Study in the Supreme Court's Bankruptcy Cases*, 47 SYRACUSE L. REV. 1, 107 (1996) ("[T]he Court's commitment to textualism in bankruptcy cases is quite inconsistent.").

[564] BFP v. Resol. Tr. Corp., 511 U.S. 531, 544–45 (1994); Union Bank v. Wolas, 502 U.S. 151, 162 (1991).

[565] Pa. Dep't of Pub. Welfare v. Davenport, 495 U.S. 552, 563–64 (1990); *accord, e.g.*, Cohen v. de la Cruz, 523 U.S. 213, 221–22 (1998); United States v. Reorganized CF&I Fabricators of Utah, Inc., 518 U.S. 213, 220–21 (1996); United States v. Ron Pair Enters., Inc., 489 U.S. 235, 244–45 (1989); United Sav. Ass'n v.

this strangely hybrid interpretive schematic is further complicated by bankruptcy courts' limited equitable jurisdiction despite bankruptcy law's eminently equitable past, a time in which so many still regnant doctrines were first forged, with equity as their foundation. No longer free to engage in "freewheeling consideration of every conceivable equity,"[566] section 105(a),[567] the subsection from which bankruptcy courts derive their remaining equitable authority,[568] grants no more than "the power to exercise equity in carrying out the *provisions* of the Bankruptcy Code, rather than to further the purposes of the Code generally, or otherwise to do the right thing."[569] So tapered, section 105(a) allows a bankruptcy court at first pass (and any federal appellate court) to weigh only those equitable considerations relevant to a debtor's rehabilitation, whether it takes the form of a liquidation or a reorganization, for which an explicit statutory basis can be found,[570] empowering it to "consider all salient factors pertaining to the proceeding and, accordingly, act to further the diverse interests of the debtor, creditors and equity holders, alike"[571] within these parameters.[572]

b. Preemption's default rules

Preemption's first form—"express"—carries a deceptively plain moniker. As more than a few enactments attest,[573] Congress can input an unambiguous pronouncement of preemptive intent into the relevant statutory scheme.[574] In such

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Timbers of Inwood Forest Assocs., 484 U.S. 365, 380 (1988); Kelly v. Robinson, 479 U.S. 36, 53 (1986).

[566] NLRB v. Bildisco & Bildisco, 465 U.S. 513, 527 (1984), *superseded by statute*, 11 U.S.C. § 1113 (2018).

[567] *See* 11 U.S.C. § 105(a).

[568] *See* FDIC v. Colonial Realty Co., 966 F.2d 57, 59 (2d Cir. 1992).

[569] New England Dairies, Inc. v. Dairy Mart Convenience Stores, Inc. (*In re* Dairy Mart Convenience Stores, Inc.), 351 F.3d 86, 92 (2d Cir. 2003) (emphasis in original); *see also, e.g.*, Law v. Siegel, 571 U.S. 415, 421 (2014) ("It is hornbook law that §105(a) 'does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code.'"); Noonan v. Sec'y of Health & Hum. Servs. (*In re* Ludlow Hosp. Soc'y), 124 F.3d 22, 27 (1st Cir. 1997) (quoting Chiasson v. J. Louis Matherne & Assocs. (*In re* Oxford Mgmt., Inc.), 4 F.3d 1329, 1334 (5th Cir. 1993)) ("Although expansively phrased, section 105(a) affords bankruptcy courts considerably less discretion than first meets the eye, and in no sense constitutes 'a roving commission to do equity.'").

[570] *Bildisco*, 465 U.S. at 527; *see also* Pac. Shores Dev., LLC v. At Home Corp. (*In re* At Home Corp.), 392 F.3d 1064, 1074–75 (9th Cir. 2004) (observing "in the context of § 365(d)(3)," "[n]othing in the statute, in the precedents, or in logic precludes the bankruptcy court from considering the practical effects of a tenant's lack of occupancy when balancing the equities" and "'eschew[ing] any attempt to spell out the range of circumstances that might justify the use of a bankruptcy court's equitable powers'").

[571] Comm. of Equity Sec. Holders v. Lionel Corp. (*In re* Lionel Corp.), 722 F.2d 1063, 1071 (2d Cir. 1983) (interpreting section 363); *see also, e.g.*, ASARCO, Inc. v. Elliott Mgmt. (*In re* ASARCO, L.L.C.), 650 F.3d 593, 601 (5th Cir. 2011) (citing *In re* Lionel Corp., 722 F.2d at 1071); A. Mechele Dickerson, *The Many Faces of Chapter 11: A Reply to Professor Baird*, 12 AM. BANKR. INST. L. REV. 109, 124 (2004) (summarizing all the interests that chapter 11 was designed to protect); Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 787 (1987) (same).

[572] Solow v. Kalikow (*In re* Kalikow), 602 F.3d 82, 97 (2d Cir. 2010); *cf.* Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991) (contending "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion").

[573] *See, e.g.*, 21 U.S.C. § 360k(a) (2018); 29 U.S.C. § 1144(a).

[574] *See, e.g.*, Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992); Cal. Fed. Sav. & Loan Ass'n

cases, a federal court must determine the scope of the preemption that Congress intended, an inquiry "govern[ed] entirely" by that statute's "express language."[575] While federal courts occasionally find language imbued by the requisite "explicit congressional intent," such clear indicia only rarely surface; more commonly, neither text nor context "directly answer[s] the question" at hand.[576] If a federal court encounters such a void, it may then—and only then—consult a statute's "structure and purpose" or "nonspecific statutory language" so as to divine the substantive contours of that enactment's ostensibly preemptive language.[577] In express preemption cases, then, while "Congress' intent . . . primarily is discerned from the language of the . . . statute and the statutory framework surrounding it," "the structure and purpose of the statute as a whole . . . as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law" tend to matter just as much, if not more.[578] Considering both the inherent imperfection of the English language[579] and the chaos typical of much legislative drafting,[580] this state of play is almost inevitable in such situations.

Unlike its more readily delineated kin, "implied" preemption takes at least four separate forms.[581] Oftentimes described as the singular form of "implied preemption," field preemption arises where "the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."[582] Meanwhile, conflict preemption occurs where "compliance with both federal and state regulations is a physical impossibility"[583] or "state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of

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v. Guerra, 479 U.S. 272, 280 (1987); Jones v. Rath Packing Co., 430 U.S. 519, 530–31 (1977).

[575] Cipollone v. Liggett Grp., 505 U.S. 504, 517 (1992) (plurality opinion); *see also* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 541–42 (2001) (explicating and applying relevant precepts); Medtronic, Inc. v. Lohr, 518 U.S. 470, 485–86 (1996) (same).

[576] Barnett Bank, N.A. v. Nelson, 517 U.S. 25, 31 (1996) (internal quotation marks omitted); *see also* Philip Morris Inc. v. Harshbarger, 122 F.3d 58, 67–68 (1st Cir. 1997) (quoting *Barnett Bank*, 517 U.S. at 31).

[577] *Barnett Bank*, 517 U.S. at 31 (quoting *Jones*, 430 U.S. at 525); *see also* Lussoro v. Ocean Fin. Fed. Credit Union, 456 F. Supp. 3d 474, 488 (E.D.N.Y. 2020) (summarizing relevant maxims); *cf.* Altria Grp., Inc. v. Good, 555 U.S. 70, 76 (2008) ("Congress may indicate pre-emptive intent through a statute's express language or through its structure and purpose.").

[578] *Medtronic, Inc*., 518 U.S. at 486 (internal quotation marks and citations omitted).

[579] *Cf.* Barbee v. United States, 392 F.2d 532, 535 n.4 (5th Cir. 1968) ("It could be contended perhaps that, because denotations and connotations in legal expression often defy the rules of logic and syntax, no statute has a 'plain meaning.'").

[580] *See* Anya Bernstein & Glen Staszewski, *Judicial Populism*, 106 MINN. L. REV. 283, 311–12 (2021) ("Producing a federal statute involves scores of people occupying a myriad of institutional roles and social positions. . . .").

[581] *See Barnett Bank*, 517 U.S. at 31.

[582] Fid. Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153 (1982) (internal quotation marks omitted); *see also* Exxon Corp. v. Eagerton, 462 U.S. 176, 181–82 (1983) (citing Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 203–04 (1983)); *accord* Burlington N. R.R. Co. v. Minnesota, 882 F.2d 1349, 1352 (8th Cir. 1989).

[583] Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963); *see also, e.g.*, Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (quoting *Fla. Lime & Avocado Growers, Inc.*, 373 U.S. at 142); Philip Morris Inc. v. Harshbarger, 122 F.3d 58, 68 (1st Cir. 1997) (same).

Congress.'"[584] Not always effortlessly defined[585] and arguably in retreat,[586] the latter even encompasses any state statute that "interferes with the methods" by which the federal statute was designed to reach these selfsame aims.[587] Lastly, in a notable, albeit somewhat spartan, series of cases, preemption has been implied from congressional inaction, "whereby courts will imply 'negative preemption' when they determine that Congress considered, but did not enact, detailed regulations in a specific area."[588] By such varied routes, implied preemption can be manifested.

Even though preemption will be found whenever "Congress has either explicitly or implicitly declared that the States are prohibited from regulating" the subject matter touched upon by the relevant state law,[589] two presumptions condition any such analytical undertaking, whether explicitly or implicitly, and especially in bankruptcy cases.[590] *First*, irrespective of the form of preemption invoked, whether such arrogation has taken place will always depend upon apparent legislative "intent."[591] Somewhat complicating any such venture is the fact that preemption may occur regardless of whether the conflicting laws come from constitutions, legislatures, administrative agencies, or courts.[592] *Second*, "[f]ederal preemption of state law is not favored," most assuredly "in areas of law traditionally dominated by the individual states,"[593] a background axiom that mirrors and hence reinforces the peremptory *Butner* Rule, as commonly configured.

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[584] *Gade*, 505 U.S. at 98 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)); English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990) (same).

[585] *See* Geier v. Am. Honda Motor Co., 529 U.S. 861, 907–08 (2000) (Stevens, J., dissenting) (arguing for obstacle preemption's elimination).

[586] *See* Pueblo of Pojoaque v. New Mexico, 233 F. Supp. 3d 1021, 1097–99 (D.N.M. 2017) (making this claim regarding post-2000 precedent).

[587] Int'l Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987); *see also, e.g., Gade*, 505 U.S. at 103 (quoting *Int'l Paper Co.*, 479 U.S. at 494); Mich. Canners & Freezers Ass'n v. Agric. Mktg. & Bargaining Bd., 467 U.S. 461, 477–78 (1984) (finding state statute establishing association to represent agricultural producers preempted even though it and the federal Agricultural Fair Practices Act "share the goal of augmenting the producer's bargaining power"); Wis. Dep't of Indus. v. Gould Inc., 475 U.S. 282, 286–87 (1986) (state statute preventing three-time violators of the National Labor Relations Act from doing business with the State is preempted even though state law was designed to reinforce requirements of the federal law); *accord* Chamber of Com. v. Edmondson, 594 F.3d 742, 769 (10th Cir. 2010).

[588] Susan J. Stabile, *Preemption of State Law by Federal Law: A Task for Congress or the Courts?*, 40 VILL. L. REV. 1, 6–7 (1995).

[589] Ray v. Atl. Richfield Co., 435 U.S. 151, 157 (1978).

[590] Cuevas, *supra* note 484, at 418–22.

[591] Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 280 (1987); *see also* Hughes v. Talen Energy Mktg., LLC, 578 U.S. 150, 167 (2016) (Sotomayor, J., concurring).

[592] *See* Joshua Hawkes & Mark Seidenfeld, *A Positive Defense of Administrative Preemption*, 22 GEO. MASON L. REV. 63 (2014).

[593] Witco Corp. v. Beekhuis, 38 F.3d 682, 687 (3d Cir. 1994).

B. Application

1. Plain language: text and texture

The analysis of whether a particular statutory period qualifies as a statute of limitations or repose begins, as it must, with the precise prose.[594] Of course, not all statutes precisely distinguish these purely procedural deadlines from equally temporal, but ineluctably substantive, intervals, such as statutes of repose.[595] Wisconsin affords one example, with "computer database searches of the [state's enacted] statutes show[ing] the legislature ha[d] not used the words 'repose,' 'statute of repose,' or 'statutes of repose' in the text of any statute in force" as of July 3, 2001, prompting that state's supreme court to conclude that "the phrase 'statute of repose' is judicial terminology and is not featured in legislative lingo."[596] For its part, "Congress rarely includes statutes of repose in federal legislation."[597] Two other factors compound the difficulty involved in distinguishing the latter from the former. Federal and state courts not infrequently diverge as to whether statutes of repose should be treated as substantive in various contexts;[598] their characterization often depends "on the nature of the underlying right that forms the basis of . . . the [pertinent] lawsuit."[599] "[A] substantial overlap between the policies of the two types of statute . . . " likely explains this jurisprudence's persistent murkiness,[600] as the Court has implicitly conceded no less than twice. Without question, the fact that even many uniformly identifiable statutes of limitations "lie on the cusp of the procedural/substantive distinction" can further complicate their ready identification, as they can (and often do) "create important reliance interests, govern whether or not an individual can vindicate a right, and prevent a court from deciding stale claims."[601]

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[594] *See, e.g.*, Landreth Timber Co. v. Landreth, 471 U.S. 681, 685 (1985); Robert Wood Johnson Univ. Hosp. v. Thompson, 297 F.3d 273, 284 (3d Cir. 2002); Maurice Sporting Goods v. Maxway Corp. (*In re* Maxway Corp.), 27 F.3d 980, 982 (4th Cir. 1994).

[595] *See* Spira v. J.P. Morgan Chase & Co., 466 F. App'x 20, 22–23 (2d Cir. 2012) ("[L]imitations periods generally do not modify underlying substantive rights."). Broadly speaking, "[p]rocedural law prescribes a method of enforcing rights or obtaining redress for their invasion; substantive law creates, defines and regulates rights." Wilkes v. Mo. Highway & Transp. Comm'n, 762 S.W.2d 27, 28 (Mo. 1988).

[596] Landis v. Physicians Ins. Co. of Wis., 628 N.W.2d 893, 907 (Wis. 2001).

[597] KEVIN M. LEWIS, CONG. RSCH. SERV., LSB10390, WHEN DOES THE CLOCK START TICKING? CONSIDERATIONS WHEN DRAFTING STATUTES OF LIMITATIONS 4 (2020).

[598] *Compare* Fields v. Legacy Health Sys., 413 F.3d 943, 952 n.8 (9th Cir. 2005) (observing that, in the choice-of-law context, "[t]he general weight of authority accepts the characterization of statutes of repose as substantive"), *with* Etheredge v. Genie Indus., 632 So. 2d 1324, 1327 (Ala. 1994) (concluding that North Carolina's statute of repose is a procedural statute of limitation because it is not so "inextricably bound up in [a] statute creating the right that it is deemed a portion of the substantive right itself").

[599] Baxter v. Sturm, Ruger & Co., 644 A.2d 1297, 1302 (Conn. 1994).

[600] CTS Corp. v. Waldburger, 573 U.S. 1, 8 (2014) (focusing upon the limitations period imposed by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980), *superseded by statute on other grounds*, An Act to Make Technical Corrections to Session Law 2014–17, S.L. 2014–44, § 1, 2014 N.C. Sess. Laws (focusing upon the limitations period imposed by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980), *as recognized in* Sutherland v. DCC Litig. Facility, Inc. (*In re* Dow Corning Corp.), 778 F.3d 545, 553 n.2 (6th Cir. 2015).

[601] Vernon v. Cassadaga Valley Cent. Sch. Dist., 49 F.3d 886, 892 (2d Cir. 1995) (Cabranes, J., concurring);

Recognition of these substantive ramifications has led federal courts to prohibit the "unfair[]" application of an amended statute of limitations to bar an action without providing fair notice and a reasonable time for potential plaintiffs to bring their claims,[602] and some state courts to reclassify a statute of limitations as substantive when it bars the right, not merely the remedy.[603]

Nonetheless, the customary features of a statute of limitations are neither disputed nor disputable, their appearance dating no later than 1540[604] and the purposes animating them already canon by the time of William Blackstone.[605] Admittedly, both statutes of limitations and repose "encourage plaintiffs to bring actions in a timely manner, and for many of the same reasons[,] [b]ut the rationale has a different emphasis."[606] "Conceptually, statutes of repose reflect legislative decisions that 'as a matter of policy there should be a specific time beyond which a defendant should no longer be subjected to protracted liability,'" while the "main thrust" of statutes of limitations "is to encourage a plaintiff to 'pursu[e] his rights diligently.'"[607] Accordingly, a statute of repose "is intended as a substantive definition of rights as distinguished" from a statute of limitations, "a procedural limitation on the remedy used to enforce rights."[608] In other words, as true rules of procedure, statutes of limitations "bear on the judicial process for enforcing the rights and duties recognized by the substantive law";[609] so animated, they govern "secondary conduct, [i].e., the

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cf. MBNA Am. V. Locke (*In re* Greene), 223 F.3d 1064, 1070 (9th Cir. 2000) ("A substantive element differs from a procedural requirement for an act to be done such as the filing of a complaint or a motion prior to a certain deadline.").

[602] *See* Wilson v. Iseminger, 185 U.S. 55, 62–63 (1902); United States v. Simmonds, 111 F.3d 737, 745 (10th Cir. 1997), *overruled on other grounds by* United States v. Hurst, 322 F.3d 1256 (10th Cir. 2003); *see also* Ochoa v. Hernandez & Morales, 230 U.S. 139, 161–62 (1913) ("[I]t is well-settled that [statutes of limitations] may be modified by shortening the time prescribed, but only if this be done while the time is still running, and so that a reasonable time still remains for the commencement of an action before the bar takes effect.") (citation omitted).

[603] *See* Lewis v. Taylor, 375 P.3d 1205, 1209–10 (Colo. 2016) (distinguishing between limitations provisions on this basis, but reading the relevant text's reference to "extinguished" to be ambiguous); Nathan v. Whittington, 408 S.W.3d 870, 873–76 (Tex. 2013) (classifying a "statute of limitations" from the same uniform act as a statute of repose for this reason); Slate v. Zitomer, 341 A.2d 789, 794 (Md. 1975) (characterizing a statute of limitations in Maryland's new wrongful death statute as "part of the substantive right of action"), *cert. denied sub nom.* Gasperich v. Church, 423 U.S. 1076 (1976); *see also* Pres. & Dirs. of Georgetown Coll. v. Madden, 505 F. Supp. 557, 571 (D. Md. 1980) (invoking *Slate*, 341 A.2d at 794). While the number of decisions highlighting this theorem in conflict-of-law cases has declined, RESTATEMENT (SECOND) OF CONFLICTS § 142 cmt. e (AM. L. INST. 1988), this conception retains its analytical significance as to the basic character of such limitations provisions.

[604] *See supra* Part II.A.2; *see also* William H. Page, *Statutes as Common Law Principles*, 1944 WIS. L. REV. 175, 190–91 (discussing the first "statute[s] of the modern type" to be enacted).

[605] BLACKSTONE, *supra* note 118.

[606] CTS Corp. v. Waldburger, 573 U.S. 1, 9 (2014), *superseded by statute on other grounds as noted in* Sutherland v. DCC Litig. Facility, Inc. (*In re* Dow Corning Corp.), 778 F.3d 545, 553 n.2 (6th Cir. 2015); *see also* Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc., 137 S. Ct. 2042, 2049 (2017) (citing this comparison in *CTS Corp.*, 573 U.S. at 9).

[607] Sch. Bd. of City of Norfolk v. U.S. Gypsum Co., 360 S.E.2d 325, 328 (Va. 1987); *CTS Corp.*, 573 U.S. at 10 (quoting Lozano v. Montoya Alvarez, 572 U.S. 1, 10 (2014)).

[608] *U.S. Gypsum Co*., 360 S.E.2d at 328 (quoting Stevenson, *supra* note 180, at 334 n.38).

[609] *In re* Pitt Penn Holding Co., Bankr. Case No. 09-11475, Adv. Pro. No. 11-51868, 2012 WL 204095

filing of a suit," but "not primary conduct, [i].e., the actions that [may] g[i]ve rise to [a] suit."[610] In contrast with a statute's conditions precedents, which do "affect[] the cause of action itself, the right of a party to obtain judicial relief, and not the time when suit must be filed," these provisions "do not affect the merits of the controversy or the underlying right to recover."[611] Rather, they restrict the time within which a party may institute proceedings in an appropriate court after a cause of action accrues,[612] usually when the final element of the required cause of action—the injury—has "occurred or was discovered."[613]

Based on its anodyne text alone, as multiple courts from the majority and minority camps concur, section 546(a) resembles a stereotypical statute of limitations, not of repose.[614] As written, it definitively fixes alternating deadlines: "the earlier of" either (1) "the later of . . . 2 years after the entry of the order for relief; or . . . 1 year after the appointment or election of the first trustee under section 702, 1104, 1163, 1202, or 1302 . . . if such appointment or such election occurs before the expiration" of the latter two-year period;[615] or (2) "the time the [underlying] case is closed or dismissed."[616] Section 546(a)(2) thus imposes an explicit time limit: the last moment to act is "the time the case is closed or dismissed."[617] After this deadline, section 546(a) reads, "an action or proceeding . . . may not be commenced. . . . "[618] Purely as a lexicographical matter, its language as to commencement of an action and its temporal windows is emblematic of the countless provisions constituting statutes of limitations.[619] As the Court opined in *Beach v. Ocwen Federal Bank*, "[t]he terms of a typical statute of limitation provide that a cause of action may or must be brought within a certain period of time."[620] While the language of these statutes has varied over time and amongst U.S. jurisdictions, most have provided either that "'all actions . . . shall be brought within' or 'no action . . . shall be brought more than' so many years after 'the cause thereof accrued.'"[621] Dating to 1950, this statement remains eminently accurate more than seven decades later, and the Court in *Beach* would cite it with approval to corroborate its observation regarding the nature of

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(Bankr. D. Del. Jan. 24, 2012).

[610] Steven I. v. Cent. Bucks Sch. Dist., 618 F.3d 411, 413 n.7 (3d Cir. 2010).

[611] United States v. Studivant, 529 F.2d 673, 675 (3d Cir. 1976).

[612] *CTS Corp.*, 573 U.S. at 7.

[613] BLACK'S, *supra* note 94, at 1636.

[614] *See* Wolff v. Katz, No. CV JFM-16-4035, 2017 WL 2590757, at *3 (D. Md. June 14, 2017).

[615] 11 U.S.C. § 546(a)(1)(A)–(B) (2018); *see also, e.g.*, Singer v. Kimberly Clark Corp. (*In re* Am. Pad & Paper Co.), 478 F.3d 546, 552 (3d Cir. 2007) (finding chapter 7 trustee's action to be time-barred under section 546(a)(1)(B)); *In re* G & G Invs., Inc., 458 B.R. 707, 713 (Bankr. W.D. Pa. 2011) (noting the lapse of the deadline set in section 546(a)(1)(A)).

[616] 11 U.S.C. § 546(a)(2); *In re* Livemercial Aviation Holding, LLC, 508 B.R. 58, 64 (Bankr. N.D. Ind. 2014).

[617] 11 U.S.C. § 546(a)(2); *see also* Gleischman Sumner Co. v. King, Weiser, Edelman & Bazar, 69 F.3d 799, 801 (7th Cir. 1995) (analyzing how the word "limitation" in section 1107(a) is applied to section 546(a)).

[618] 11 U.S.C. § 546(a); *In re* Arboleda, 224 B.R. 640, 649 (Bankr. N.D. Ill. 1998).

[619] *See In re* Outboard Marine Corp., 299 B.R. 488, 498 (Bankr. N.D. Ill. 2003) (expounding on the purpose of statutes of limitations and how the plain meaning of section 546 fits this purpose).

[620] 523 U.S. 410, 416 (1998).

[621] *Developments in the Law: Statutes of Limitations*, *supra* note 151, at 1179.

statutes of limitations.[622] Indeed, when Congress has chosen to enact statutes of limitations outside of bankruptcy law's purview, it has spoken "directly to the issue of timeliness and provides a rule for determining whether a claim is timely enough to permit relief,"[623] habitually relying on grammatical constructs—verbal phrases, i.e. "may not be commenced" or "unless it is commenced," and adverbials of degree, i.e. "later than"—similar, if not identical, to the ones that appear in section 546(a).[624] Simply put, because provisions that limit when an "action" or "right of action" may be brought are nearly always regarded as statutes of limitations,[625] section 546(a) is a banal manifestation of this longstanding pattern.

Other literal elements bolster this conclusion.

First, section 546(a) "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the bankruptcy courts";[626] its text is just as devoid of any substantive allusions.[627] Instead, it circumscribes causes of action created by separately codified provisions (sections 544–545, 547–548, and 553) whose jurisdictional viability depends on not only other sections within the Code, particularly section 541, but also the provisions of an entire corpus of federal substantive law, the U.S. Code's twenty-eighth title. Though by no means uniformly,[628] statutes of repose usually evidence jurisdictional markers,[629] and statutory omission of references to "jurisdiction" or variants of that term have prompted the Court to classify the limitations period set forth within title VII of the Civil Rights Act of 1964 as a statute of limitations in 1982's *Zipes v. Trans World Airlines, Inc.*,[630] and federal criminal law's general limitations period as a non-

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[622] *Beach*, 523 U.S. at 416; *see also* Pugh v. Brook (*In re* Pugh), 158 F.3d 530, 534 (11th Cir. 1998) (so observing).

[623] SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC, 137 S. Ct. 954, 960 (2017).

[624] *Compare* 28 U.S.C. § 1658(a) (2018) ("[M]ay not be commenced later than. . . ."), *and* 17 U.S.C. § 507(b) ("[U]nless it is commenced within . . . years after. . . ."), *with* 11 U.S.C. § 546(a) ("[M]ay not be commenced after the earlier of. . . .").

[625] *See* Musacchio v. United States, 577 U.S. 237, 246 (2016) (so concluding as to 18 U.S.C. § 3282(a)).

[626] *See* 11 U.S.C. § 546(a); *In re* Outboard Marine Corp., 299 B.R. 488, 498 (Bankr. N.D. Ill. 2003).

[627] 11 U.S.C. § 546(a); *cf.* Merit Mgmt. Grp., v. FTI Consulting, Inc., 138 S. Ct. 883, 893–95 (2018) (describing sections 544, 545, 547, 548(a)(1)(B), and 548(b) as "substantive avoidance provisions").

[628] *Cf.* SEPTA v. Orrstown Fin. Servs., 12 F.4th 337, 346 n.5 (3d Cir. 2021) (concluding that similar boilerplate language in 15 U.S.C. § 77m and 28 U.S.C. § 1658(b), two statutes of repose, is not jurisdictional). Recent precedent favors "a stricter distinction between truly jurisdictional rules, which govern 'a court's adjudicatory authority,' and nonjurisdictional 'claim processing rules,' which do not." Gonzalez v. Thaler, 565 U.S. 134, 141 (2012) (quoting Kontrick v. Ryan, 540 U.S. 443, 454–55 (2004)). Today, a rule can only be jurisdictional "[i]f the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional." Arbaugh v. Y & H Corp., 546 U.S. 500, 515 (2006). Yet, because statutes of repose are still overwhelmingly regarded as substantive and frequently seen as jurisdictional, past juridical practice remains analytically relevant.

[629] *See Musacchio*, 577 U.S. at 246 ("Statutes of limitations and other filing deadlines ordinarily are not jurisdictional.") (internal quotation marks omitted); *Gonzalez*, 565 U.S. at 142–43 (classifying 28 U.S.C. § 2253(c)(1) as jurisdictional, unlike 28 U.S.C. § 2253(c)(2) and (3)).

[630] 455 U.S. 385, 394 (1982) ("Although subsequent legislative history is not dispositive . . . the legislative history of the 1972 amendments also indicates that Congress intended the filing period to operate as a statute of limitations instead of a jurisdictional requirement.").

jurisdictional statute of limitations in 2016's *Musacchio v. United States*.[631] In addition to this telling absence, there are three others—that (1) another title squarely governs the federal courts' bankruptcy "jurisdiction" and procedures for "any and all" bankruptcy cases and related proceedings, in marked contrast to section 546(a);[632] (2) nothing in that compendium conditions its jurisdictional grant on compliance with section 546(a);[633] and (3) by its own terms, section 546(a) controls the timeliness, but not the substance, of separately classified and distinctly identified causes of action[634]—mark section 546(a) as a procedural statute of limitation devoid of the minimally substantive and occasionally jurisdictional affectations of traditional statutes of repose.[635] Revealingly, albeit in the context of its potential waiver, the weight of modern authority finds section 546(a) to be a non-jurisdictional statute of limitations.

Second, section 546(a) contains both pregnant suppositions and telling omissions. Although "in a literal sense a statute of repose limits the time during which a suit 'may be brought' because it provides a point after which a suit cannot be brought, . . . a statute of repose can prohibit a cause of action from coming into existence."[636] By design, a statute of repose bars an action a specified number of years after a defendant has last acted, even if the plaintiff has not yet suffered injury; neither when a plaintiff files suit nor whether the pleaded cause of action has yet accrued is relevant to its operation. Two contrary characteristics typify all statutes of limitations: "(1) the statute provides a plaintiff with a specified period of time within which to pursue a claim to preserve a remedy; and (2) such period begins when the plaintiff has or discovers he has a complete and present claim."[637] In its first two lines, section 546(a) exhibits both these attributes. To begin with, its text presupposes the legal existence of an "action or proceeding under [S]ection 544, 545, 547, 548, or 553."[638] As a matter of law, this can only come about "when all the elements of the action, including injury

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[631] *See* 577 U.S. at 246–47 (finding that both statutory text and context corroborate that section 3282(a) does not impose a jurisdictional limit).

[632] *See* 28 U.S.C. §§ 157, 1334.

[633] *Cf.* Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 163–67 (2010) (reasoning similarly as to 17 U.S.C. § 411).

[634] 11 U.S.C. § 546(a).

[635] *See, e.g.*, Cheswold Volunteer Fire Co. v. Lambertson Constr. Co., 489 A.2d 413, 421 (Del. 1985) ("[B]ecause the statute of repose is a substantive provision, it relates to the jurisdiction of the court. . . ."); Smith v. Am. Radiator & Standard Sanitary Corp., 248 S.E.2d 462, 465 (N.C. Ct. App. 1978) (explaining that a statute of repose "acquires its substantive quality by barring a right of action even before injury has occurred if the injury occurs subsequent to the prescribed time period"), *quoted in, e.g.*, Bolick v. Am. Barmag Corp., 293 S.E.2d 415, 418 (N.C. 1982).

[636] CTS Corp. v. Waldburger, 573 U.S. 1, 16 (2014), *superseded by statute on other grounds*, An Act to Make Technical Corrections to Session Law 2014–17, S.L. 2014–44, § 1, 2014 N.C. Sess. Laws (focusing upon the limitations period imposed by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980), *as recognized in* Sutherland v. DCC Litig. Facility, Inc. (*In re* Dow Corning Corp.), 778 F.3d 545, 553 n.2 (6th Cir. 2015).

[637] *In re* Neff, 505 B.R. 255, 263 (B.A.P. 9th Cir. 2014) (citing Young v. United States, 535 U.S. 43, 47–49 (2002)).

[638] 11 U.S.C. § 546(a).

or damages, have coalesced, resulting in a legally cognizable claim."[639] It next specifies a deadline by which a suit predicated on such a colorable cause may be commenced,[640] measured from the very moment in time when that cause arose and the trustee, as a plaintiff, thus possessed a viable cause of action—and not from the date of the defendant's last culpable act or omission.[641]

In a revealing contrast, the one Code provision overwhelmingly regarded as a statute of repose—section 727(e)(1), which limits when a trustee "may request a revocation of a discharge" attained by a chapter 7 debtor—reads rather differently.[642] It neither implicitly nor explicitly incorporates any notion of accrual. Instead, it absolutely forecloses the emergence of a cause of action under section 727(d)(1) "one year after … [a] discharge is granted."[643] "Although words are subject to nuance, the meaning of this language appears clear: § 727(d)(1) . . . actions must be brought within specific time periods,"[644] that "begins to run upon a fixed date, and not from the occurrence or discovery of an injury, consistent with a statute of repose."[645] Here, practical logic reinforces this inference, as this deadline lies virtually beyond section 546(a)'s temporal terminus. To wit, if a "discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge," section 727(e)(1) fixes the expiration date of any possible request for revocation not as either the *later* of two years after the order for relief is entered *or* one year after the appointment or election of a trustee within this two-year window, as does section 546(a)(1), or when a debtor's case is closed or dismissed, as does section 546(a)(2), whichever is *earlier*, but rather as one year *after* a discharge has been granted.[646] Because most chapter 7 cases close shortly after a bankruptcy court enters the final discharge order, the deadline to sue in section 727(e)(1) usually falls after the last possible date for a trustee to act under section 546(a). This gap is significant, as it too is part and parcel of a pattern: the temporal window in statutes of repose is usually longer than that for the regular statute of

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[639] Wyatt v. A-Best Prods. Co., 924 S.W.2d 98, 102 (Tenn. Ct. App. 1995); *see also, e.g.*, Heimeshoff v. Hartford Life & Accident Ins. Co., 571 U.S. 99, 105 (2013) ("As a general matter, a statute of limitations begins to run when the cause of action 'accrues'—that is, when 'the plaintiff can file suit and obtain relief.'") (quoting Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal., 522 U.S. 192, 201 (1997)); Clark v. Iowa City, 87 U.S. 583, 589 (1875) ("All statutes of limitation begin to run when the right of action is complete. . . .").

[640] 11 U.S.C. § 546(a).

[641] *Cf.* Goad v. Celotex, 831 F.2d 508, 511 (4th Cir. 1987) ("In contrast to statutes of limitation, statutes of repose serve primarily to relieve potential defendants from anxiety over liability for acts committed long ago.").

[642] *See In re* Taylor, 449 B.R. 686, 688–89 (Bankr. E.D. Pa. 2011) (citing, *inter alia, In re* Abdelmassia, 362 B.R. 207, 214 (Bankr. D.N.J. 2007); *In re* Dolliver, 255 B.R. 251, 257 (Bankr. D. Me. 2000); *In re* Bevis, 242 B.R. 805, 809 (Bankr. D.N.H. 1999); *In re* Blanchard, 241 B.R. 461, 464 (Bankr. S.D. Cal. 1999); and *In re* Johnson, 187 B.R. 984, 988 (Bankr. S.D. Cal. 1995)).

[643] 11 U.S.C. § 727(e)(1).

[644] *In re* Bevis, 242 B.R. 805, 810 (Bankr. D.N.H. 1999).

[645] *In re* Andersen, Bankr. No. 09-14033-JNF, Adv. Pro. No. 11-1083, 2011 WL 5835099, at *10 (Bankr. D. Mass. Nov. 21, 2011).

[646] *Compare* 11 U.S.C. § 546(a)(1)–(2), *with* 11 U.S.C. § 727(e)(1).

limitations.[647] Section 727(e)(1) is distinguishable from section 546(a) in one final way: though section 727(d)(1), the substantive provision subject to the former, specifically contemplates both a debtor who defrauded and a creditor ignorant of such deceit, section 727(e)(1)'s countdown marches regardless of such nescience.[648] As these provisions' plain texts attest, Congress thus had the opportunity to provide for further relief for such parties, but it "instead made a conscious choice to limit the revocation to one year, presumably in favor of finality and the fresh start principle."[649] In this context, Congress' refusal to qualify section 727(e)(1) by, for example, transplanting language akin to that it had consciously inserted into section 727(d)(1), the *substantive* provision to which section 727(e)(1)'s yearly allotment applies, or cross-referencing either section 727(d)(1) or its factual predicates *after* its one-year deadline's coronation cuts against the importation of any equitable exceptions to its unambiguous extremity. After all, Congress has already contemplated the circumstances equitable tolling and waiver seek to remedy—primarily, fraudulent concealment and unintended ignorance[650]—but while it transformed these circumstances into substantive elements of a section 727(d)(1) claim, it had inserted or alluded to neither in the only limitations provision applicable to that very claim: section 727(e)(1).[651] In its print and plan, a typical statute of limitations implies the opposite,[652] the usual absence of such exceptions rarely accompanied by such suggestive evidence of their effective recognition and rejection. In short, section 727(e)(1)'s positively final text, relatively later concrete deadline, and implicit rejection of any ameliorative exceptions favor its categorization as a statute of repose—and section 546(a)'s classification as a non-jurisdictional and non-substantive limitations provision due to its corresponding features. A statute of limitations, in other words.

Bankruptcy courts have similarly read other provisions reminiscent of section 727(e)(1).[653] Like sections 727(e)(1) and 727(d)(1), section 727(a)(2)(A) does not provide a creditor with a specified period of time for pursuing a claim to preserve a remedy, and its temporal limitation depends on when a petition has been docketed, not when a claim has accrued or been discovered.[654] Thus, section 727(a)(2)(A) must be treated, federal courts insist, as "a statute of repose not subject to equitable

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[647] RESTATEMENT (SECOND) OF TORTS, § 899 cmt. g. (AM. L. INST. 1939).

[648] 11 U.S.C. §§ 727(d)(1), 727(e)(1); *see also In re* Stucker, 153 B.R. 219, 222 (Bankr. N.D. Ill. 1993) ("Any inability of creditors to invoke those statutory protections by virtue of late knowledge of the case arising from a debtor's omission from the schedule of creditors, is a matter which should be left to the wisdom of Congress, and is not a matter which furnishes a basis for relief from the time limit of section 727(e)(1).").

[649] *In re* Underwood, Bankr. Case No. 10-77907-WLH, Adv. Pro. No. 13-5138, 2013 WL 4517905, at *3 (Bankr. N.D. Ga. Aug. 15, 2013).

[650] *See supra* Part II.A.2.b.

[651] *In re* Anzo, Bankr. Case No. 14-22766-JRS, 2017 WL 432787, at *2 (Bankr. N.D. Ga. Jan. 30, 2017).

[652] *Cf.* Braun v. Sauerwein, 77 U.S. 218, 223 (1869) ("[T]he running of a statute of limitation may be suspended by causes not mentioned in the statute itself.").

[653] *See In re* Khan, Bankr. Case No. 20 B 17315, Adv. Pro. No. 21 A 67, 2022 WL 108329 at *2 n.2 (Bankr. N.D. Ill. Jan. 12, 2022).

[654] 11 U.S.C. § 727(a)(2)(A).

tolling."[655] More directly relevant is section 548(a)(1), a section expressly subject to section 546.[656] As written, the former provision permits the avoidance of only those transfers made "on or within 2 years before the date of the filing of the [relevant] petition,"[657] clearly limiting a trustee's power to avoid incontestably verboten transfers to those made within two years before the petition date. While the date of the bankruptcy petition establishes this lookback period and thus determines which transfers are avoidable and which are not, "transfers that are more than two years old are not avoidable, as measured from the date that the transfers were made (i.e., the culpable act.)."[658] Because section 548(a)(1) utilizes this measure to set an outside limit on a trustee's avoiding powers, bankruptcy courts concur, its "two-year lookback period . . . meets the definition for a period of repose."[659]

Third, section 546(a) includes language describing the covered period in the singular. The title of section 546 as a whole is the plural "[l]imitations on avoiding powers," thus clarifying that it encompassed a multiplicity of constrictions. Containing this section's sole time-based constraints, section 546(a) structurally collapses into a single "earlier" deadline, and it utilizes "the period" and "the time," two singular noun phrases that denote a finite temporal span, to refer to the window and mark the limit imposed by section 546(a)(1)(A) and section 546(a)(2), respectively.[660] Analogous language in the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), the Court pointedly observed in 2014, "would be an awkward way to mandate the pre-emption of two different time periods with two different purposes," such as statutes of limitations and repose.[661] Albeit weakly,[662] section 546(a)'s design demands the same ratiocination's invocation.[663]

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[655] *In re* Neff, 505 B.R. 255, 268 (B.A.P. 9th Cir. 2014); *accord* DeNoce v Neff (*In re* Neff), 824 F.3d 1181, 1186–88 (9th Cir. 2016) (affirming *In re* Neff, 505 B.R. 255).

[656] 11 U.S.C. § 546(a); *In re* Vaughan Co., 477 B.R. 206, 214 (Bankr. D.N.M. 2012); *In re* Supplemental Spot, LLC, 409 B.R. 187, 197 (Bankr. S.D. Tex. 2009).

[657] 11 U.S.C. § 548(a)(1); *In re* Bernard L. Madoff Inv. Secs. LLC, 773 F.3d 411, 423 (2d Cir. 2014).

[658] *In re* Sandburg Mall Realty Mgmt. LLC, 563 B.R. 875, 896 (Bankr. C.D. Ill. 2017); *see also, e.g.*, McCann v. Hy-Vee, Inc., 663 F.3d 926, 930 (7th Cir. 2011) ("A statute of repose is strong medicine, precluding as it does even meritorious suits because of delay for which the plaintiff is not responsible."); *In re* Enron Corp. Sec., Derivative & "ERISA" Litig., 310 F. Supp. 2d 819, 856 (S.D. Tex. 2004) ("Neither the doctrine of equitable estoppel nor that of equitable tolling applies to statutes of repose because 'their very purpose is to set an outer limit unaffected by what the plaintiff knows.'").

[659] *In re* Sandburg Mall Realty Mgmt. LLC, 563 B.R. at 896.

[660] 11 U.S.C. § 546(a)(1)(B).

[661] CTS Corp. v. Waldburger, 573 U.S. 1, 15 (2014), *superseded by statute on other grounds*, An Act to Make Technical Corrections to Session Law 2014–17, S.L. 2014–44, § 1, 2014 N.C. Sess. Laws (focusing upon the limitations period imposed by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980), *as recognized in* Sutherland v. DCC Litig. Facility, Inc. (*In re* Dow Corning Corp.), 778 F.3d 545, 553 n.2 (6th Cir. 2015).

[662] *See* 1 U.S.C. § 1 ("In determining the meaning of any Act of Congress, unless the context indicates otherwise— words importing the singular include and apply to several persons, parties, or things; words importing the plural include the singular. . . .").

[663] *Cf.* Zilkha Energy Co. v. Leighton, 920 F.2d 1520, 1524 (10th Cir. 1990) (referring to section 546(a)'s "period of limitation").

While history reveals an imprecision in the judicial and legislative differentiation between statutes of limitations and statutes of repose, such practice does not render these statutes' modern doctrinal differences any less real—or Congress's silence any less significant. True, the term "statute of limitations" has sometimes been used in a less formal way,[664] and "although some cases recognized the differences between statutes of limitation and repose, a number of cases confused the terms or used them interchangeably" even after the latter's distinct emergence.[665] Congress itself has often referred to statutes of repose as "statutes of limitations,"[666] and rarely enacted statutes of limitations,[667] much less unambiguously denoted "statutes of repose,"[668] at least until the tort reform movement reached critical mass in the late 1980s.[669] As shown above, policies of repose were regularly cited as justification for statutes of limitations until the full-scale development of statutes of repose as distinct offshoots in the last two decades of the twenty-first century.[670] At the same time, the distinction between statutes of limitations and statutes of repose was understood by some courts and scholars well before 1978.[671] By 1969, in fact, at least thirty states had enacted statutes of repose for actions brought against architects, designers, engineers, and building contractors;[672] this marked proliferation in comparable legislation in

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[664] *CTS Corp.*, 573 U.S. at 13 (recognizing that a statute of limitation can "refer to any provision restricting the time in which a plaintiff must bring suit").

[665] McDonald v. Sun Oil Co., 548 F.3d 774, 781 (9th Cir. 2008).

[666] *See, e.g.*, 15 U.S.C. § 78u-6(h)(1)(B)(iii)(I)(aa) (creating a statute of repose and placing it in a provision entitled "Statute of limitations"); 42 U.S.C. § 2278 (same).

[667] *See* Bd. of Regents v. Tomanio, 446 U.S. 478, 483 (1980) ("Congress did not establish a statute of limitations or a body of tolling rules applicable to actions brought in federal court under § 1983—a void which is commonplace in federal statutory law.").

[668] Nat'l Credit Union Admin. Bd. v. Nomura Home Equity Loan, Inc., 727 F.3d 1246, 1264 (10th Cir. 2013); *see also, e.g.*, United States v. Kubrick, 444 U.S. 111, 117 (1979) (referring to statutes of limitations generally as "statutes of repose"); Guar. Tr. Co. v. United States, 304 U.S. 126, 136 (1938) (referring to a statute of limitations: "The statute of limitations is a statute of repose. . . ."); FHFA v. UBS Am. Inc., 712 F.3d 136, 140, 142–43, 143 n.3 (2d Cir. 2013) ("[C]ourts . . . have long used the term 'statute of limitations' to refer to statutes of repose." (referring, *inter alia*, to Ernst & Ernst v. Hochfelder, 425 U.S. 185, 210 (1976))); Alexander v. Beech Aircraft Corp., 952 F.2d 1215, 1218 n.2 (10th Cir. 1991) ("Both types of statutes are often referred to as statutes of limitations.").

[669] *Cf.* Gary Wilson, Vincent Moccio & Daniel O. Fallon, *The Future of Products Liability in America*, 27 WM. MITCHELL L. REV. 85, 88–94 (2001) (detailing the history behind the spread of damages caps and statutes of repose at the state and federal levels). Congressional silence, however, has not stopped federal courts from construing certain limitations provisions as statutes of repose.

[670] *See* Wilson et al., *supra* note 669, at 98–101; *see also* Bain, *supra* note 98, at 128 (contending that many state legislatures, often at the urging of insurance companies, enacted statutes of repose in the latter half of the twentieth century, and that statutes of repose were a direct response to advancements in tort law that dictated the statute of limitations should not begin to run until the plaintiff discovered (or "accrued") the harm).

[671] *E.g.*, Vasquez v. Whiting Corp., 660 F. Supp. 685, 688 (E.D. Pa. 1987); Walsh v. Gowing, 494 A.2d 543, 547–48 (R.I. 1985); Klein v. Catalano, 437 N.E.2d 514, 516–17, 519–20 (Mass. 1982); Rosenberg v. N. Bergen, 293 A.2d 662, 667–68 (N.J. 1972); *see also* McGovern, *supra* note 75, at 579 ("One of the most popular methods of restricting liability in [product liability] actions has been the enactment of statutes of repose—statutes that further restrict the period of time in which a plaintiff may bring an action under applicable tort or contract statutes of limitation.").

[672] *E.g.*, ALASKA STAT. § 09.10.055 (Supp. 1968); ARK. STAT. ANN. § 37-237 (Supp. 1967); CAL. CIV. PRO. CODE § 337.1 (Supp. 1968); FLA. STAT. ANN. § 95.11(10) (Supp. 1969); GA. CODE ANN. § 3-1006 (Supp. 1968); HAW. REV. STAT. § 657-8 (1968); IDAHO CODE ANN. § 5-241 (Supp. 1967); ILL. ANN. STAT. ch. 83, §

jurisdictions throughout the United States had already attracted academic notice.[673] In April 1973, the fact that the limitation period ran from the completion of an improvement to real estate instead of from the date the injury occurred, a federal district court reasoned, indicated a legislative intent that the statute be one of repose.[674] Less than two months later, the Supreme Court of Nevada interpreted a six-year limitation on any action regarding improvements to real property to prohibit any indemnity action as well, reasoning that the apparent purpose of the statute was "to afford ultimate repose and protection from liability. . . ."[675] Beginning with its 1977 edition, the *Restatement (Second) of Torts* explicitly differentiated between the two statutes' essential character.[676] While the fifth edition of *Black's Law Dictionary* from 1979 equated these limitations provisions, its entry for "Statute of limitations" muddled the issue with a final sentence—statutes of limitations are "[a]lso sometimes referred to as 'statutes of repose'"[677]—and "reflect[ed]" an earlier, broader usage in which the term 'statute of repose' referred to all provisions delineating the time in which a plaintiff must bring suit," as the Court opined forty years later and dozens of pre-1960 cases corroborate,[678] already dated at the time of its release.[679] In fact, the concept that statutes of repose and statutes of limitations were distinct was well enough established to even be reflected in the work of the Superfund Section 301(e)

24f (1966); IND. ANN. STAT. §§ 2-639 to 2:642 (Supp. 1967); KAN. STAT. ANN. § 60-513 (1964); KY. REV. STAT. § 413.135 (Supp. 1968); LA. REV. STAT. § 9:2772 (Supp. 1968); MICH. COMP. LAWS ANN. § 720.5 (1968); MINN. STAT. ANN. § 541.051 (Supp. 1968); MISS. CODE. ANN. § 720.5 (Supp. 1968); NEV. REV. STAT. ANN. § 11.205 (Supp. 1967); N.H. REV. STAT. ANN. § 508:4-b (1968); N.J. STAT. ANN. § 2A:14-1.1 (Supp. 1968); N.M. STAT. ANN. § 23-1-26 (Supp. 1967); N.C. GEN. STAT. ANN. § 1-50(5) (Supp. 1965); N.D. CENT. CODE § 28-01-44 (Supp. 1967); OHIO REV. CODE ANN. § 2305.131 (Page Supp. 1968); OKLA. STAT. ANN. tit. 12, § 109 (Supp. 1968); PA. STAT. ANN. tit. 25, § 65.1 (Supp. 1966); Ch. 11 [1966] S.D. LAWS 403; TENN. CODE. ANN. §§ 28-314 to 28:318 (Supp. 1967); UTAH CODE ANN. § 78-12-25.5 (Supp. 1967); VA. CODE ANN. § 8-24.2 (Supp. 1966); WASH. REV. CODE ANN. § 4.16.300–320 (Supp. 1968); WIS. STAT. ANN. § 4893.155 (1966). By 1981, the number of statutes of repose had exploded. McGovern, *supra* note 75, at 580 ("There are now ninety-eight statutes in forty-eight states that can be considered product liability statutes of repose.").

[673] Agus v. Future Chattanooga Dev. Corp., 358 F. Supp. 246, 251 n.2 (E.D. Tenn. 1973) (citing to Margaret A. Cotter, Comment, *Limitation of Action Statutes for Architects and Builders—Blueprints for Non-Action*, 18 CATH. U. L. REV. 361, 361, 361 n.1 (1969)); *see also, e.g.*, O'Connor v. Altus, 335 A.2d 545, 552–54 (N.J. 1975) (construing a then relatively recent statute of repose); *cf.* Howell v. Burk, 568 P.2d 214, 229–30 (N.M. 1977) (outlining the traditional justifications for statutes of repose); Josephine H. Hicks, Note, *The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 VAND. L. REV. 627, 632–34 (1985) (same).

[674] *Agus*, 358 F. Supp. at 250–51.

[675] Nev. Lakeshore Co. v. Diamond Elec., 511 P.2d 113, 114 (Nev. 1973).

[676] RESTATEMENT (SECOND) OF TORTS, § 899 cmt. g. (AM. L. INST. 1939).

[677] BLACK'S LAW DICTIONARY 835, 1169 (5th ed. 1979); *see also* NCUA Bd. v. Nomura Home Equity Loan, Inc., 764 F.3d 1199, 1228 (10th Cir. 2014) (quoting the two references to "statutes of repose" in this early entry); *cf.* Pillow v. Roberts, 54 U.S. 472, 477 (1852) ("Statutes of limitation . . . are statutes of repose, and should not be evaded by a forced construction").

[678] CTS Corp. v. Waldburger, 573 U.S. 1, 14 (2014), *superseded by statute on other grounds*, An Act to Make Technical Corrections to Session Law 2014–17, S.L. 2014–44, § 1, 2014 N.C. Sess. Laws (focusing upon the limitations period imposed by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980), *as recognized in* Sutherland v. DCC Litig. Facility, Inc. (*In re* Dow Corning Corp.), 778 F.3d 545, 553 n.2 (6th Cir. 2015).

[679] In its next edition, the legal world's most authoritative dictionary separately defined these limitations provisions. BLACK'S LAW DICTIONARY 927 (6th ed. 1990).

Group, created by Congress in the 1980 version of the CERCLA.[680] Yet, although the legal world had already come to see statutes of repose as a distinct category by the end of the 1960s and surer in this division's propriety as decades passed, Congress did not make the same distinction in the originally enacted and the repeatedly revised text of section 546(a).

2. Apposite context: embedded purposes and applied presumptions

a. Bankruptcy law: section 546(a)'s split relationship to the Avoidance Provisions

Section 546(a) entombs a "limitations" period for multiple causes of action authorized under each of the five Avoidance Provisions. Broadly speaking, a trustee may avoid selected interests to the same extent as certain lien creditors and bona fide purchasers for value under generally applicable non-bankruptcy law, statutory liens, preferences, and "fraudulent transfers" under sections 544, 545, 547, and 548, respectively.[681] Section 553, the fifth section enumerated in section 546(a), blesses "setoffs" and avoids others,[682] but creates no federal right to such relief like section 547 or section 548.[683] Each of the foregoing provisions bequeath the same power to avoid a pre-petition encumbrance unto a trustee,[684] and all these avoiding powers are created by the Code, not one "available to the debtor-in-possession or trustee outside a bankruptcy court."[685]

Below this façade, however, this quintet splits over the legal fount of the elements required to avoid transfers, preference, and liens. Section 547 establishes "a Federal cause of action, civil in nature, that requires turnover of property";[686] it alone enumerates every essential element for that cause of action.[687] Though it implicitly incorporates non-bankruptcy law,[688] section 548 is similarly designed and drafted;[689] more than just a lodestar, federal law supplies its substantive perquisites.[690] In

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[680] *See CTS Corp.*, 573 U.S. at 14–15 (so observing).

[681] *See* 11 U.S.C. §§ 544, 545, 547, 548 (2018); *see also supra* Part III.B.2.i–iv.

[682] 11 U.S.C. § 553; *see* Citizens Bank v. Strumpf, 516 U.S. 16, 18–19 (1995).

[683] *See Citizens Bank*, 516 U.S. at 18.

[684] *Cf. In re* Madoff, 480 B.R. 501, 527–28 (Bankr. S.D.N.Y. 2012) (classifying sections 544(b), 547, and 548 as "avoidance provisions"); *In re* Palm Beach Fin. Partners, Bankr. Case No. 09-36379-BKC-PGH, Adv. Pro. No. 11-02970-BKC-PGH-A, 2013 Bankr. LEXIS 5664, at *50–51 (Bankr. S.D. Fla. July 30, 2013) (characterizing sections 544, 545, 547, 548, and 553 as codifying "avoidance powers").

[685] *In re* Mahoney, Trocki & Assocs., 111 B.R. 914, 918 (Bankr. S.D. Cal. 1990).

[686] *In re* Kelton Motors, Inc., 130 B.R. 170, 176 (Bankr. D. Vt. 1991).

[687] *See In re* Howes, 165 B.R. 270, 271 (Bankr. E.D. Mo. 1994) (observing that "[f]ederal law sets forth the circumstances that must be shown to have existed if a transfer of an interest of property of the debtor may be avoided" under section 547).

[688] *See, e.g.*, Barnhill v. Johnson, 503 U.S. 393, 397–98 (1992); *In re* Chase, Bankr. Case No. 02-10582, Adv. Pro. No. 03-1058, 2004 WL 2915331, at *6 (Bankr. D. Vt. Oct. 25, 2004).

[689] *See, e.g.*, *In re* Gabor, 280 B.R. 149, 155 (Bankr. N.D. Ohio 2002) (describing section 548 as affording a "federal cause[] of action to set aside a transfer or conveyance"); *In re* United Energy Corp., 102 B.R. 757, 760 (B.A.P. 9th Cir. 1989) ("[S]ection 548 provides a federal statutory basis for avoiding fraudulent transfers.").

[690] *See* McKenzie v. Irving Tr. Co., 323 U.S. 365, 369–70 (1945) (holding that what constitutes a transfer

contrast to both section 547 and section 548, section 544 looks to generally applicable non-bankruptcy law for the substance and the limitations of any cause of action whose commencement by a trustee its text allows.[691] Section 545 follows this pattern,[692] as does, in resoundingly clarion fashion, section 553.[693] While the Code imposes supplemental requirements and limitations,[694] every meaningful element and related constraint)—except for, in the case of section 544 and section 545, who may claim the status of a plaintiff (a trustee)—comes by means of non-bankruptcy legal sources. In other words, whether codified or not, non-bankruptcy law, and it alone, supplies the substance of any claim under section 544, section 545, or section 553. Whatever this reliance's advisability, this distinction between the Avoidance Provisions subject to section 546(a) follows from their enacted text.

For *Rund* and its analogues, the presumed purposes of section 546(a) specifically and the Code's Avoidance Provisions generally compel its nullification of any statutes of repose. While the states' traditional powers over certain matters may justify deferral by a federal court, no thusly themed body of law, one validated by history and precedent, exists as to avoidance actions in a bankruptcy case. Numerous compelling reasons may—or may not—justify the enactment of one or more periods of repose, but "generalized policy considerations" cannot rightly transform these relatively recent enactments into recognizable areas of "traditional state concern," such as public health and safety. Based on this absence of a truly "substantial countervailing state law considerations," the Supremacy Clause forecloses debate, and "the goals to be served by federal bankruptcy law must prevail."[695] Because

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and when it is complete is a matter of federal law under the 1898 Act); *In re* BT Prime Ltd., 599 B.R. 670, 700 (Bankr. D. Mass. 2019) (opining that "the required elements" under section 548(a)(1)(B) "are clearly stated in the statute").

[691] *See, e.g., In re* Asher, 488 B.R. 58, 61 (Bankr. E.D.N.Y. 2013) ("[I]n accordance with longstanding traditions regarding the role of the states in defining and creating property rights, § 544(a)(3) recognizes that a party can only become a BFP by application of state law."); *In re* TMIC Indus. Cleaning Co., 19 B.R. 397, 399 (Bankr. W.D. Mo. 1982) ("[T]he extent of the trustee's rights, remedies and powers as a lien creditor are measured by the substantive law of the jurisdiction governing the property in question."); *In re* Ireland, 14 B.R. 849, 850–51 (Bankr. M.D. La. 1981) ("The general rule is that the validity and effect of a lien or privilege on a chattel are determined by the law of the state where the chattel was located at the time the lien was created.").

[692] *See, e.g.*, Grant v. Kaufman (*In re* Hagen), 922 F.2d 742, 744 n.2 (11th Cir. 1991) ("[S]tate law applies in determining the creation of a lien and the consequences and rights attributable to the lien, other than the bankruptcy statutory issues."); McEwen v. Westphal (*In re* Pierce), 809 F.2d 1356, 1359 (8th Cir. 1987) ("The nature, extent, and validity of the statutory lien are matters governed by state law."); *In re* Bodine, 190 B.R. 759, 762 (S.D.N.Y. 1995) ("The enforceability of charging liens, however, is governed by state law."); *In re* Sheldahl, Inc., 298 B.R. 874, 876 (Bankr. D. Minn. 2003) ("State law determines whether a lien is enforceable against property acquired by a bona fide purchaser under 11 U.S.C. § 545.").

[693] *See, e.g., In re* Lehman Bros. Inc., 458 B.R. 134, 139 (Bankr. S.D.N.Y. 2011).

[694] *See In re* SemCrude, L.P., 399 B.R. 388, 393 (Bankr. D. Del. 2009) ("[S]etoff is appropriate in bankruptcy only when a creditor both enjoys an independent right of setoff under applicable non-bankruptcy law, and meets the further Code-imposed requirements and limitations set forth in section 553."); *see also In re* Awal Bank, BSC, 455 B.R. 73, 87 (Bankr. S.D.N.Y. 2011) ("Section 553 provides for the recovery of property, not just the avoidance of a transfer . . . . Further, [section] 553 recognizes, in the first instance, a limited right of set-off that is, in turn, based on applicable non-bankruptcy law.").

[695] *In re* Princeton-N.Y. Inv., Inc., 199 B.R. 285, 297 (Bankr. D.N.J.).

section 546(a) "in essence gives the trustee some breathing room to determine what claims" to assert under sections 544, 545, 547, 548, and 553,[696] construing it to negate statutes of repose effectively multiplies a trustee's opportunities to maximize the estate, hence benefitting a debtor's unsecured creditors as a body.

Intuitively compelling, this analysis is simultaneously over- and under-inclusive. Devised by Congress "to insure finality and to prevent the assertion of stale claims,"[697] section 546(a) simultaneously serves the "common interest" of litigants and the legal system in "easily stated, easily applied rules," as "[b]right line rules save the time of the parties and the courts for the merits of the disputes" by "tell[ing] the parties what they must do to protect their rights."[698] To the extent section 546(a) does so, it positively nods to the concerns underlying both types of limitations provisions, with a reading that it should not obviate all state statutes of repose applicable to "borrowed" or "derivative" claims consonant with, even if not singularly compelled, by its approbation of repose-tinctured ideas.[699] Regardless, at the granular level, no reason exists to prioritize one of section 546(a)'s purported purposes—the preference by a trustee or creditor for the enjoyment of a longer timeframe to consider the possibility of avoidance actions under section 544, section 545, or section 553, as *Rund* and similar cases expressly hold or logically impel—over these other equally statutorily-sanctioned objectives. Furthermore, while maximization of an estate animates four of the five Avoidance Provisions subject to section 546(a), section 553 expressly prioritizes the aims of the common-law's offset jurisprudence, and both section 544 and section 545, embodiments of bankruptcy law's dualistic character, operate by reference to generally applicable non-bankruptcy law.[700] Essentially, each of these sections anchors the powers it transmits in such alien soil, and each represents an act of explicitly codified deference independent of the agency, but consistent with the lesson, of the *Butner* rule. By making its priority so clear, then, the Code's actual statutory text, the very Avoidance Provisions whose purposes have been invoked as justification to sidestep state statutes of repose, impliedly endorses consultation of non-bankruptcy substantive law, which necessarily includes most statutes of repose, properly defined, based on an objective tenet as venerable as the estate's growth and the debtor's relief. Indeed, "there would be no point in expressly incorporating state laws if such laws did not occasionally differ from federal law," and state laws

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[696] *In re* Dry Wall Supply, Inc., 111 B.R. 933, 936 (D. Colo. 1990) (as to section 544 only).

[697] *E.g.*, Jobin v. Boryla (*In re* M & L Bus. Mach. Co.), 75 F.3d 586, 591 (10th Cir. 1996); Ford v. Union Bank (*In re* San Joaquin Roast Beef), 7 F.3d 1413, 1415 (9th Cir. 1993).

[698] *In re* Afco Dev. Corp., 65 B.R. 781, 787 (Bankr. D. Utah 1986).

[699] While, to be sure, it would it would also be consistent to construe section 546(a) to negate all state limitations provisions, as *Rund* argues, and to concurrently be a statute of limitations and repose, two inferences follow from the possibility highlighted in this sentence. First, if the policies underlying the statutes of repose deserve some solicitude, the habitual dismissal of state statutes of repose in a manner that functionally favors (and is intended to favor) the one side they were not normally intended to support—the trustee, as the heir to a prepetition person, whether real or imagined—appears too cavalier. Second, although the existence of multiple possible constructions undercuts its decisiveness, this argument underscores the majority's bluntly myopic reliance on one prism and one perch. *See supra* Parts III.B.1; *see also infra* Parts III.B.2.b, IV.B.3.

[700] *See supra* Part II.B.

incorporated by section 544(b), among others, are rightly regarded as "part of the incentive system Congress set up in the . . . Code" that "cannot be said to undermine these incentives."[701] Thus, the Court in *Stellwagen v. Clum*,[702] in fact cited section 70e of the 1898 Act, the precursor to section 544(b), in upholding a statute allowing assignees to void certain preferential transfers.[703] That Congress could deed otherwise under the Supremacy Clause does not prove that it really did, and whether Congress should act to further secure the Code's unique ends by revising sections 544, 545, 546, and 553 is irrelevant to their current function. Instead, pursuant to modern interpretive tenets, just as "generalized" policy concerns cannot alone affect preemption, amorphous bankruptcy policies cannot override these provisions' plain meaning.[704] Seen in this light, in privileging one of bankruptcy law's favored policies, regardless of the Code's controlling prose, but disdaining the concerns animating statutes of repose as insufficiently weighty, *Rund* and its kin fail twice: they embrace a paradoxical approach and confuse the creation of a federal right to pursue a cause of action, one substantively circumscribed by non-bankruptcy law, as the creation of the cause of action itself.[705]

b. Preemption doctrine: applying binding presumptions

As previewed above, two rules-of-thumb dictate the bankruptcy-specific relevance of certain preemption doctrines. *First*, due to the primacy of legislative intent, "'the purpose of Congress is the ultimate touch-stone' in every preemption case,"[706] controlling in "both express and implied preemption situations."[707] *Second*, federal courts are generally loath to find preemption. Consequently, whenever "Congress [has] legislated . . . in a field which the States have traditionally occupied," a strong assumption—"that the historic police powers of the States were not to be

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[701] Sherwood Partners v. Lycos, Inc., 394 F.3d 1198, 1205 n.7 (9th Cir. 2005) (construing and concurring with Perkins v. Petro Supply Co. (*In re* Rexplore Drilling, Inc.), 971 F.2d 1219, 1222 (6th Cir. 1992)).

[702] 245 U.S. 605, 613–14 (1918).

[703] *See Sherwood Partners*, 394 F.3d at 1201.

[704] *See* Koenig Sporting Goods, Inc. v. Morse Rd. Co. (*In re* Koenig Sporting Goods, Inc.), 203 F.3d 986, 988–89 (6th Cir. 2000) ("When a statute is unambiguous, resort to legislative history and policy considerations is improper.").

[705] *See In re* Trans-Indus., 419 B.R. 21, 30 (Bankr. E.D. Mich. 2009) (rejecting trustee's arguments that adversary proceeding asserting a claim for breach of fiduciary duties under the Employee Retirement Income Security Act of 1974 constituted a core proceeding, for such "claims, of course, can exist outside of bankruptcy"). *But see In re* Mid-States Express, Inc., 433 B.R. 688, 695 (Bankr. N.D. Ill. 2010) (contending, based on *In re* Rexplore Drilling, Inc., 971 F.2d at 1222, and *Sherwood Partners*, 394 F.3d at 1205, that "state law avoidance power is merely part and parcel of the substantive right to avoid certain transfers created by the Bankruptcy Code" and thus concluding that "the substantive right to avoid transfers is, in a strong sense, created by the Bankruptcy Code"). In a clause, this opinion concedes a statutory verity whose import it overlooks: "Although section 544(b), when taken alone, does not appear to be a substantive right created by the Bankruptcy Code. . . ." *In re* Mid-States Express, Inc., 433 B.R. at 695. Notably, when dealing with the extent of a bankruptcy court's jurisdiction, different principles apply.

[706] Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (citing, *inter alia*, Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963)).

[707] Stabile, *supra* note 588, at 7.

superseded by the Federal Act unless that was the clear and manifest purpose of Congress,"[708] a principle that extends to cases implicating matters of public health and safety[709] and torts with traditional state law remedies[710]—reigns. Often known as the "*Rice* Presumption" based on its origins in *Rice v. Santa Fe Elevator Corp.*,[711] this tenet applies "in all pre-emption cases, and particularly in those in which Congress has 'legislated . . . ,'" even when "the Federal Government has regulated [in that field] for more than a century";[712] a separate variant of the presumption against preemption, dubbed the "constitutional presumption" by some, defers to any state laws enacted pursuant to Tenth Amendment reserved powers based on federalism policy.[713] Per the former, as one appellate panel opined, "for preemption to occur in a field traditionally occupied by the states, there must be a 'sharp' conflict between state law and federal policy."[714] As judicial practice attests, the enforcement of a state's police power dealing with imminent threats to public health and safety is usually accorded overriding importance in bankruptcy cases.[715] While some insist the Court's devotion to either form of the presumption against preemption has recently waned,[716] it retains much, if not quite all, of its juridical foothold outside of express preemption cases.[717]

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[708] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

[709] *See* Hillsborough Cnty. v. Automated Med. Labs., Inc., 471 U.S. 707, 715 (1985) (blocking preemption of state law governing blood/plasma products by Food and Drug Administration regulations); Kassel v. Consol. Freightways Corp., 450 U.S. 662, 670 (1981) (employing deference to state regulation of safety under dormant Commerce Clause).

[710] *See* Philip H. Corboy & Todd A. Smith, *Federal Preemption of Product Liability Law: Federalism and the Theory of Implied Preemption*, 15 AM. J. TRIAL ADVOC. 435, 450–55 (1992) (discussing the Court's reluctance to find preemption of state tort laws).

[711] *See* McDaniel v. Wells Fargo Invs., 717 F.3d 668, 674–75 (9th Cir. 2013).

[712] Wyeth v. Levine, 555 U.S. 555, 565, 565 n.3 (2009); N.Y. SMSA Ltd. v. Town of Clarkstown, 603 F. Supp. 2d 715, 721 (S.D.N.Y. 2009).

[713] Elizabeth Y. McCuskey, *Body of Preemption: Health Law Traditions and the Presumption Against Preemption*, 89 TEMP. L. REV. 95, 101–11 (2016).

[714] Witco Corp. v. Beekhuis, 38 F.3d 682, 687 (3d Cir. 1994).

[715] *E.g.*, Saravia v. 1736 18th St., N.W., Ltd., 844 F.2d 823, 827 (D.C. Cir. 1988) (*per curiam*); *In re* Pub. Serv. Co., 108 B.R. 854, 870 (Bankr. D.N.H. 1989); Cuevas, *supra* note 484, at 420.

[716] *E.g.*, Calvin Massey, *"Joltin' Joe Has Left and Gone Away": The Vanishing Presumption Against Preemption*, 66 ALB. L. REV. 759, 759, 762–64 (2003); Susan Raeker-Jordan, *A Study in Judicial Sleight of Hand: Did* Geier v. American Honda Motor Co. *Eradicate the Presumption Against Preemption?*, 17 BYU J. PUB. L. 1, 16–20, 33, 43–44 (2002); Lars Noah, *Reconceptualizing Federal Preemption of Tort Claims as the Government Standards Defense*, 37 WM. & MARY L. REV. 903, 913–25 (1996).

[717] *See* Chamber of Com. v. Whiting, 563 U.S. 582, 594 (2011) (quoting CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993)) ("When a federal law contains an express preemption clause, we 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent.'"); *see also* Puerto Rico v. Franklin Cal. Tax-Free Tr., 136 S. Ct. 1938, 1946–47 (2016) (reading section 109 as an express preemption provision whose existence bars invocation of "any presumption against preemption," thus extending the logic of *Whiting* to a bankruptcy case); *In re* Syngenta AG MIR 162 Corn Litig., No. 14-2591, MDL No. 2591, 2016 WL 4382772, at *3 (D. Kan. Aug. 17, 2016) (declining to invoke presumption in light of the express preemption provision in the United States Grain Standards Act); Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 62 (2007) ("The rumors of the death of the *Rice* [P]resumption against preemption may be exaggerated. Against *Geier*, one can set three more recent decisions that refused to preempt state law, one of which recited *Rice*'s clear statement rule as a justification for its holding. If the Court were so inclined, there is little doubt that the

As obliged by these regnant presumptions, two statutory facts loom large. *First*, while section 547 and section 548 expressly empower trustees to exercise Code-manufactured powers, sections 544, 545, and 553 enable a trustee to put to use, to a lesser or greater degree, the rights of creditors and claimants circumscribed by generally applicable non-bankruptcy law. By their own terms, these sections reserve judgments about potential causes of action and scopes of liability to what non-Code law decrees. Section 544 may be the most potent and most well-known, but section 545 and section 553 place a trustee into similarly incorporative straightjackets. Enablement, not creation is their identical *raison d'etre*. *Second*, as previously discussed, statutes of repose are always substantive and often jurisdictional. Wherever one appears, it operates as an essential element of a cause of action rather than an extrinsic procedural limitation.[718]

In light of these facts, *Rund*'s reliance on the Code's primacy as justification for overriding statutes of repose under all of the Avoidance Provisions covered by section 546(a) is misplaced. As the Court observed in both 1989 and 2009, "'[t]he case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them.'"[719] Where apparent, such facts therefore undercut any argument that a particular statute of repose poses an unacceptable obstacle to the attainment of congressional purpose,[720] the linchpin of preemption analysis.[721] For all its innovations, the Code "explicitly and implicitly recognizes its dependence on state law in altering the relationship between the debtor and its creditors,"[722] and state laws over numerous matters "continue[] to play a vital interstitial role in defining the commercial rights, interests and entitlements of participants in the bankruptcy case."[723] While federal bankruptcy law can be characterized as "pervasive" and as involving a "dominant" federal interest, it "coexists peaceably with, and often expressly incorporates, state laws regulating the rights and obligations of debtors (or

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ambiguity in its preemption precedents would leave it ample room to convert *Rice* into a more powerful default rule disfavoring preemption by ambiguous federal laws.") (citing Gonzales v. Oregon, 546 U.S. 243 (2006); Bates v. Dow Agrosciences LLC, 544 U.S. 431 (2005); and Sprietsma v. Mercury Marine, 537 U.S. 51 (2002)).

[718] *See* Moore v. Liberty Nat'l Life Ins., 267 F.3d 1209, 1218 (11th Cir. 2001) (quoting First United Methodist Church of Hyattsville v. U.S. Gypsum Co., 882 F.2d 862, 865–66 (4th Cir. 1989)); *see also* Rosenberg v. Town of N. Bergen, 293 A.2d 662, 667 (N.J. 1972) ("The function of [a] statute [of repose] is thus rather to define substantive rights than to alter or modify a remedy."); Cronin v. Howe, 906 S.W.2d 910, 913 (Tenn. 1995) ("[The] distinction has prompted courts to hold that statutes of repose are substantive and extinguish both the right and the remedy, while statutes of limitation are merely procedural, extinguishing only the remedy.").

[719] Wyeth v. Levine, 555 U.S. 555, 575 (2009) (quoting Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 166–67 (1989)).

[720] *See* CTS Corp. v. Waldburger, 573 U.S. 1, 14 (2014) (making this same point about CERCLA, another comprehensive statute), *superseded by statute on other grounds*, *as recognized in* Sutherland v. DCC Litig. Facility, Inc. (*In re* Dow Corning Corp.), 778 F.3d 545, 553 n.2 (6th Cir. 2015).

[721] Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996).

[722] Plank, *Federalism*, *supra* note 12, at 1064.

[723] Ponoroff, *Limitations*, *supra* note 12, at 355.

their assignees) and creditors."[724] The generality of section 546, combined with the diametric approaches to state law represented by sections 544, 545, and 553, on the one hand, and section 547 and section 548, on the other, supports this inference as to the former triad. Anchored in bankruptcy law's history and the Code's evolution, three other factors, already discussed, bolster this conclusion: (1) while the Code standardized an unruly area of law, its architects chose to incorporate much state law, a predilection evidenced by, among dozens of distinct provisions, section 544 and section 553; (2) while sections 544, 545, 546(a), and 553 do not, the Code imports language indicative of repose from generally applicable non-bankruptcy law into other sections governing other causes of action, including one—section 548—governed by section 546(a)'s limitations period; and (3) the separation of statutes of repose from statutes of limitations was already apparent by 1978, with the distinction between these related constructs attracting greater recognition even as Congress amended section 546(a) in 1982 and 1994 and added increasingly explicit statutes of repose to other federal laws. Even if all these indications did not settle the matter, their collective cogency triggers the application of a "well-established 'presumption[] about the nature of pre-emption'":[725] specifically, that "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'"[726] In practice, this presumption supports adoption, "where plausible," of "a narrow interpretation" of an express preemption provision, especially "when Congress has legislated in a field traditionally occupied by the States."[727] In a fact overlooked by *Rund* and related cases, statutes of repose do fall within this area, as their propagation began in earnest in the late 1950s,[728] and "[i]n our federal system, there is no question that States possess the 'traditional authority to provide tort remedies to their citizens' as they see fit.'"[729]

3. Legislative history

The skimpy history behind section 546(a) is neither conclusive nor definitive, but sheds some, if not "considerable[,] light on the proper characterization of this provision."[730] As already noted,[731] before the enactment of section 546(a), no separate

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[724] Sherwood Partners, v. Lycos, Inc., 394 F.3d 1198, 1201 (9th Cir. 2005).

[725] *CTS Corp.*, 573 U.S. at 18 (quoting *Medtronic, Inc.*, 518 U.S. at 484–85).

[726] Altria Grp. v. Good, 555 U.S. 70, 77 (2008) (quoting Bates v. Dow Agrosciences LLC, 544 U.S. 431, 449 (2005)); *accord* Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 21 (2013) (Kennedy, J., concurring in part and concurring in judgment); United Motorcoach Ass'n v. City of Austin, 851 F.3d 489, 492 (5th Cir. 2017); Farina v. Nokia, Inc., 625 F.3d 97, 118 (3d Cir. 2010).

[727] *Altria Grp.,* 555 U.S. at 77.

[728] *See supra* Part II.A.3.

[729] Wos v. E.M.A. ex rel. Johnson, 568 U.S. 627, 639–40 (2013) (quoting Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984)).

[730] *In re* Outboard Marine Corp., 299 B.R. 488, 499 (Bankr. N.D. Ill. 2003). While the interpretive scheme applicable to time-centric texts seemingly retains an openness to this extrinsic source to this day, such reliance invites the usual spate of objections and may contravene the Court's regnant approach to bankruptcy law.

[731] *See supra* Part II.B.3.a.

and distinct statute of limitations for a trustee's avoiding powers existed.[732] Instead, in its original incarnation, section 11(d) of the 1898 Act had barred suits from "be[ing] brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed."[733] After the Chandler Act, section 11(e) of the 1898 Act provided a general two-year statute of limitations for suits brought by a receiver or trustee.[734] Although the issue of limitations garnered no more than brief discussion in 1977–78,[735] according to the Senate's official report, Congress implanted in section 546(a)[736] "[a] statute of limitations to the use by the trustee of the [then Code's various] avoiding powers," then set as "two years after . . . [a trustee's] appointment, or the time the case is closed or dismissed, whichever occurs later."[737] Though silent about the substance of section 546(a),[738] the House repeatedly described the similarly temporal language of section 108(a) as a "statute of limitations" in one of its reports.[739] Thus, a trustee could not pursue "a claim that is barred at the time of the commencement of the case by the statute of limitations" under section 541, as "[h]e could take no greater rights than the debtor himself had," but sections 108(a) and (b) afforded an exception to a trustee by "tolling . . . the *statute of limitations* if it had *not* run before the date of the filing of the petition."[740] Similarly, the "extension of the *statute of limitations*" provided by section 108(c) protected a creditor "to the extent that the [automatic] stay would otherwise prevent him from asserting his rights timely."[741]

The history of the Bankruptcy Amendments Act of 1994,[742] which altered the length and applicability of the limitations period in section 546(a) in certain respects, hints at no uncommon purpose or newfangled construction.[743] As the House then

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[732] *See In re* Outboard Marine Corp., 299 B.R. at 499; *In re* Elkay Indus., 167 B.R. 404, 407–08 (D.S.C. 1994).

[733] Bankruptcy Act of 1898, ch. 541, § 11(d), 30 Stat. 544, *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549; Engstrom v. De Vos, 81 F. Supp. 854, 858 (E.D. Wash. 1949).

[734] Chandler Act, ch. 575, § 11(e), 52 Stat. 840, 849 (1938), *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549.

[735] *In re* Afco Dev. Corp., 65 B.R. 781, 784–85 (Bankr. D. Utah 1986).

[736] Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, 2597.

[737] S. REP. NO. 95-989, at 87 (1978) (emphasis added); *In re* Outboard Marine Corp., 299 B.R. at 499.

[738] The House, however, did label the deadline by which a "proceeding on a trustee's bond may not be *commenced*" as "a two-year statute of limitations. . . ." H.R. REP. NO. 95-595, at 326 (1977) (emphasis added).

[739] *See* H.R. REP. NO. 95-595, at 318; *see also* Simon v. Navon, 116 F.3d 1, 4–5 (1st Cir. 1997) (quoting H.R. REP. NO. 95-595, at 318).

[740] H.R. REP. NO. 95-595, at 367–68 (emphasis added); *see also* S. REP. NO. 95-989, at 82 (exactly mirroring this language regarding the interplay between section 108 and section 541).

[741] H.R. REP. NO. 95-595, at 122–23 (emphasis added); *In re* Daniel, 13 B.R. 555, 559 (Bankr. S.D. Ohio 1981).

[742] Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106.

[743] *See* Pugh v. Brooks (*In re* Pugh), 158 F.3d 530, 537–38 (11th Cir. 1998); *see also, e.g., In re* Rodriguez, 283 B.R. 112, 119 (Bankr. E.D.N.Y. 2001) (citing the summary of this legislative history proffered in *In re* Pugh, 158 F.3d at 537–38); *cf.* McCuskey v. Cent. Trailer Servs., Ltd., 37 F.3d 1329, 1333 (8th Cir. 1994) (contending that Congress did not "intend[] courts construing § 546(a)(1) to make the well-established purposes of statutes of limitations subservient to consideration of a chapter 7 trustee's ability to pursue actions to maximize the . . . estate after a case is converted from chapter 11"). A maddening split in judicial decisions necessitated this amendment. *Compare* United States Lines (S.A.), Inc. v. United States (*In re* McLean Indus.),

explained, section 546(a) operated as a "2-year statute of limitations," a subsection "not intended" (1) "to affect the validity of any tolling agreement," (2) "to have any bearing on the equitable tolling doctrine where there has been fraud determined to have occurred," or (3) "to be jurisdictional"[744]; consequently, they would be subject to extension "by stipulation between the necessary parties to the action or proceeding."[745] After passage of this act by Congress, but prior to its presentment to the President, Congressman Jack B. Brooks of Texas, a major sponsor of the House bill, reinforced this view when he spoke so as to clarify the provision that would become section 546(a).[746] "This section defines the applicable statute of limitation period . . . ," Sam Rayburn's protégé then explained; "[a]doption of this change is not intended to create any negative inference or implication regarding the status of current law or interpretations of section 546(a)(1)," he continued; its "time limits are not intended to be jurisdictional and can be extended by stipulation between the necessary parties to the action or proceeding," he concluded, borrowing the final sentence from the House Report that his committee had released three days earlier.[747]

As thin as it is, this history evidences a vision of section 546(a) as a typical statute of limitations, its temporal constriction neither jurisdictional nor substantive.[748] For interpretive purposes, that Congress grasped the link between statutes of limitations and tolling, as embodied in "proposed . . . § 108," is clear from the House's 1977 report;[749] the Senate's report is even more overt in its characterization of section 108 as "extend[ing] or suspend[ing] the running of the statute of limitations. . . ."[750] True, because "the running of a statute of limitation may be suspended by causes not mentioned in the statute itself,"[751] the *absence* of any reference to tolling in the plain text of section 546(a) is relatively insignificant. However, by expressly stating the axiomatic—that only one limitations provision is subject to equitable or statutory

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30 F.3d 385, 388 (2d Cir. 1994) (finding the defendants successful in asserting a limitations defense), *and* Constr. Mgmt. Serv., Inc. v. Mfrs. Hanover Tr. Co. (*In re* Coastal Grp.), 13 F.3d 81, 86 (3d Cir. 1994), *and* Upgrade Corp. v. Gov'n Tech. Servs., Inc. (*In re* Softwaire Centre Int'l, Inc.), 994 F.2d 682, 684 (9th Cir. 1993), *with* Maurice Sporting Goods, Inc. v. Maxway Corp. (*In re* Maxway Corp.), 27 F.3d 980, 984–85 (4th Cir. 1994) (holding that the limitations period does not begin to run at the filing of chapter 11 petition but rather upon the appointment of trustee).

[744] H.R. REP. NO. 103-835, at 49–50 (1994); *see also, e.g., In re* Pugh, 158 F.3d at 538 (interpreting section 546(a), as amended in 1994); *In re* Shape, Inc., 138 B.R. 334, 337 (Bankr. D. Me. 1992) (construing the pre-1994 version).

[745] H.R. REP. NO. 103-835, at 50; *In re* Rodriguez, 283 B.R. 112, 119 (Bankr. E.D.N.Y. 2001) (stressing the analysis of this history provided in *In re* Pugh, 158 F.3d at 538).

[746] *In re* Outboard Marine Corp., 299 B.R. 488, 499 (Bankr. N.D. Ill. 2003).

[747] 140 CONG. REC. E2204-01 (daily ed. Oct. 7, 1994) (statement of Rep. Jack B. Brooks).

[748] *See In re* Outboard Marine Corp., 299 B.R. at 496–97; *In re* Harry Levin, Inc., 175 B.R. 560, 579 n.14 (Bankr. E.D. Pa. 1994); *see, e.g., In re* Levy, 416 B.R. 1, 7 (Bankr. D. Mass. 2009) (collecting cases so holding).

[749] H.R. REP. NO. 95-595, at 367–68 (1977).

[750] S. REP. NO. 95-989, at 15 (1978); *accord id.* at 30–31; S. REP. NO. 95-1106, at 31 (1978).

[751] Braun v. Sauerwein, 77 U.S. (10 Wall.) 218, 223 (1869); *see also* Zahrbock v. Star Brite Inn Motel, 788 N.W.2d 822, 831 (S.D. 2010) (Konenkamp, J., concurring in result) (tracing equitable tolling to the Revolutionary War based on *Braun*, 77 U.S. at 223).

exceptions[752]—this aside does heighten the taxonomical significance of the linguistic similarity between section 108 and section 546(a). Conversely, as the congressional gloss on section 727(a)(2)(A) and section 727(e)(1) evidences,[753] Congress understood how to draft statutes of repose, intuitively, if not formally, familiar with the "two-sentence structure" characteristic of these distinct limitations provisions:[754] a shorter statute of limitations paired with a "corollary" unqualified termination of liability.[755] It nonetheless chose not to adopt a version of section 546(a) constructed similarly to these two subsections; rather, it aped the language its own records describe as indicative of a true statute of limitations. Indeed, based upon this same history, even as some federal courts have construed section 546(a) as jurisdictional[756] and therefore effectively treated it as a statute of repose,[757] a decisive majority has coalesced around the decidedly opposite characterization advanced in such cases as *Pugh v. Brooks (In re Pugh)*[758] and *McFarland v. Leyh (In re Texas General Petroleum Corp.)*,[759] resulting in an apparently "lopsided split"[760]: that section 546 has always been, and still remains, a statute of limitations subject to the doctrines of waiver, equitable tolling, and equitable estoppel.[761]

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[752] *E.g.*, Bowen v. City of New York, 476 U.S. 467, 479 (1986); Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 398 (1982); Amy v. Watertown, 130 U.S. 320, 323–26 (1889).

[753] H.R. REP. NO. 95-595, at 384–85.

[754] Cal. Pub. Emps.' Ret. Sys. v. ANZ Secs., Inc., 137 S. Ct. 2042, 2049–50 (2017).

[755] Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. 663, 697 (2014); *see, e.g.*, 21 U.S.C. § 335b(b)(3)(B) (2018) ("No action may be initiated under this section . . . more than 6 years after the date when facts material to the act are known or reasonably should have been known by the Secretary but in no event more than 10 years after the date the act took place."); 28 U.S.C. § 1658 (suit "may be brought not later than the earlier of — (1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation.").

[756] *See, e.g.*, Starzynski v. Sequoia Forest Indus., 72 F.3d 816, 822 (10th Cir. 1995) (observing the split in authority and suggesting that section 546(a) may indeed be jurisdictional); Martin v. First Nat'l Bank of Louisville (*In re* Butcher), 829 F.2d 596, 600 (6th Cir. 1987) (deeming section 546(a) to be jurisdictional); *In re* Ry. Reorganization Est., Inc., 133 B.R. 578, 581 (Bankr. D. Del. 1991) (citing *In re* Butcher, 829 F.2d at 600). Subsequent opinions cast doubt about the present cogency of this once zealously advocated construction. *E.g.*, Jobin v. Boryla, (*In re* M & L Bus. Mach. Co.), 75 F.3d 586 (10th Cir. 1996); Bartlik v. U.S. Dep't of Lab., 62 F.3d 163 (6th Cir. 1995).

[757] *See In re* Frascatore, 98 B.R. 710, 718–19 (Bankr. E.D. Pa. 1989) ("[W]e believe that the wording of this statute may render it a so-called 'statute of repose,' which is nonwaivable. . . . This conclusion is not supported by any authorities directly on point, but by the statements of certain courts, although admittedly in other contexts, that § 546(a) is jurisdictional in nature."); *see also, e.g., In re* Calvanese, 169 B.R. 104, 113–14 (Bankr. E.D. Pa. 1994) (citing *In re* Frascatore, 133 B.R. at 718–19). By failing to take notice of the clear, albeit nascent, emergence of statutes of repose in the 1970s, see *infra* Part IV.B.3, the Court's language from *United States v. Kubrick* possibly bears the blame for this reading's persistence, 444 U.S. 111, 117 (1979) ("Statutes of limitations . . . are statutes of repose[.]").

[758] 158 F.3d 530 (11th Cir. 1998).

[759] 52 F.3d 1330 (5th Cir. 1995).

[760] *In re* Martin Levy of Berlin D.M.D., P.C., 461 B.R. 1, 7 (Bankr. D. Mass. 2009).

[761] *E.g., In re* J & D Sci., Inc., 335 B.R. 791, 797 (Bankr. M.D. Fla. 2006); *In re* Outboard Marine Corp., 299 B.R. 488, 496–97 (Bankr. N.D. Ill. 2003); *In re* Com. Fin. Serv. Inc., 294 B.R. 164, 173–75 (Bankr. N.D. Okla. 2003); *In re* Rodriguez, 283 B.R. 112, 119–20 (Bankr. E.D.N.Y. 2001); *In re* Iron-Oak Supply Corp., 162 B.R. 301, 307 (Bankr. E.D. Cal. 1993).

4. Lingering concerns

Whatever its analytical weaknesses, the *Rund* approach undeniably appeals for at least two reasons. *First*, for all practical purposes, it gifts a trustee with the kind of breathing room to consider and, if convinced, the opportunity to undertake actions whose success would enlarge a debtor's estate and thus redound to the benefit of the majority of that bankrupt's unsecured creditors, as *Rund* succinctly stated.[762] For all its tenacity, even the *Butner* Rule must retreat if "some federal interest requires a different result,"[763] and the *Rice* Presumption is not just weakened in such circumstances but arguably inapplicable when Congress makes clear its intent to supplant state law by legislation consonant with its enumerated powers.[764] *Second*, federal statutory law is replete with rights of action that do not contain express limitation periods,[765] and the U.S. Code is littered with statutory provisions in which Congress created repose periods using terms like "limitations" or "statute of limitations."[766] As the Court has recently acknowledged, statutes of repose "are not ubiquitous," and "[m]ost statutory schemes provide for a single limitation period without any outer limit to safeguard against serial relitigation."[767] In one example both telling and disquieting, though the Court has construed section 13 of the Securities Exchange Act of 1934 as a statute of repose, the actual legislative history reveals how much such a reading can privilege hyper-literalism over accuracy, for it "confirms that 'statute of repose' was not a concept known to Congress in the mid-1930s, let alone a concept with invariant characteristics. . . ."[768] Admittedly, the Code's effective date came about more than four decades after passage of this securities law. Still, statutes of repose had existed as distinct limitations provisions

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[762] *In re* EPD Inv. Co., 523 B.R. 680, 686 (B.A.P. 9th Cir. 2015); *see also In re* Bayou Steel BD Holdings, LLC, Bankr. Case No. 19-12153 (KBO), Adv. Pro. No. 21-51013 (KBO), 2022 WL 3079861, at *4–8 (Bankr. D. Del. Aug. 3, 2022); *supra* Part II.C.2.

[763] Butner v. United States, 440 U.S. 48, 55 (1979), *cited in, e.g.*, Travelers Cas. & Sur. Co. of Am. v. PG & E, 549 U.S. 443, 451 (2007); *see also supra* Part III.A.

[764] *See* McDaniel v. Wells Fargo Invs., 717 F.3d 668, 675 (9th Cir. 2013) (citing Williamson v. Mazda Motor of Am., Inc., 562 U.S. 323 (2011) ("Where . . . federal law grants an actor 'a choice,' and state law 'would restrict that choice,' state law is preempted if preserving 'that choice was a significant federal regulatory objective.'")

[765] *E.g.*, 15 U.S.C. §§ 78j, 80b-15, 1125 (2018); 29 U.S.C. §§ 185, 412, 791, 2104.

[766] *In re* Countrywide Fin. Corp. Mortg.-Backed Sec. Litig., 900 F. Supp. 2d 1055, 1063 (C.D. Cal. 2012) (giving, as examples, 15 U.S.C. § 77m and 28 U.S.C. § 1658); *see also, e.g.*, NCUA Bd. v. Nomura Home Equity Loan, Inc., 764 F.3d 1199, 1216 & n.18 (10th Cir. 2014) (noting that "Congress has used the term 'statute of limitations' or related terms in legislation several times after CERCLA and [the Financial Institutions Reform, Recovery, and Enforcement Act] to encompass repose periods," including 15 U.S.C. § 78u-6(h)(1)(B)(iii)(I)(aa); 49 U.S.C. § 40101; and 42 U.S.C. § 300aa-16(a)); Jones v. Saxon Mortg., Inc., 537 F.3d 320, 326 (4th Cir. 1998) ("All the parties to this lawsuit concede that [a statute entitled "Time limit for exercise of right"] is a statute of repose and not a statute of limitation."); Byrd v. Trans Union LLC, No. 3:09-609, 2010 WL 2555119, at *2 (D.S.C. June 18, 2010) (finding a statute of repose in a statutory text that Congress, in the Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, § 156, 117 Stat. 1952, captioned "statute of limitations").

[767] China Agritech, Inc. v. Resh, 138 S. Ct. 1800, 1809 (2018).

[768] Stephen B. Burbank & Tobias Barrington Wolff, *Class Actions, Statutes of Limitations and Repose, and Federal Common Law*, 167 U. PA. L. REV. 1, 66 (2018).

for less than twenty years at the time of its enactment, a fact that potentially undercuts some, if not all, the validity of any conclusions regarding congressional intent derived from such pre-Code history.[769]

On the other hand, though *Rund* and its progeny make much of these reasons, neither can normally supersede textual and contextual indicia. To the extent that purpose is relevant, it is the objective embodied in the enacted legislative text, such as section 546(a) or any one of the Avoidance Provisions. As modern case law establishes, bankruptcy courts enjoy "the power to exercise equity in carrying out the *provisions* of the Bankruptcy Code" but not "to further the purposes of the Code generally, or otherwise to do the right thing,"[770] tightly bound by the *Butner* Rule and the *Rice* Presumption. Accordingly, notions of fairness and justice not explicitly fastened to a specific section may not factor into the decipherment of its text.[771] By invoking *general* policies as a matter of course, the *Rund* school improperly emphasizes congressional intent and policy concerns over the plain language of the relevant statutory text,[772] not just that of section 546(a) but also sections 544, 545, and 553. Even a brief look at section 544(b) makes this clear, as its text provides for the incorporation of a state avoidance statute that defines preferences differently from the federal definition in section 547(b). In accordance with its plain command, state laws incorporated by it are "part of the incentive system Congress set up in the Bankruptcy Code" and hence "cannot be said to undermine these incentives";[773] the same can be said about section 545 and section 553. That textual exegesis, in turn, is reinforced by the always separate but here symbiotic commands of *Rice* and *Butner*, which may only be overridden when a contrary federal interest, anchored in the relevant statutory text, can be credibly advanced. Considering the relevant text suggests otherwise and the substantive nature of statutes of repose, it follows that their imposition coheres with the Code's purpose as reflected in its actual design, if not its ambitious but presumptive aims, as to sections 544, 545, and 553, but not sections 547 and 548. If nothing else, such an interpretation has modesty's allure.

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[769] *Cf.* McDonald v. Sun Oil. Co., 548 F.3d 774, 781 (9th Cir. 2008) ("[A]lthough some cases recognized the differences between statutes of limitation and repose [in 1986], a number of cases confused the terms or used them interchangeably . . . [and] considerable uncertainty about the distinction existed."), *abrogated in part*, CTS Corp. v. Waldburger, 573 U.S. 1, 16 (2014), *superseded by statute on other grounds*, An Act to Make Technical Corrections to Session Law 2014–17, S.L. 2014–44, § 1, 2014 N.C. Sess. Laws (focusing upon the limitations period imposed by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980), *as recognized in* Zyda v. Four Seasons Hotels & Resorts, 371 F. Supp. 3d 803, 806 n.4 (D. Haw. 2019).

[770] New England Dairies, Inc. v. Dairy Mart Convenience Stores, Inc. (*In re* Dairy Mart Convenience Stores, Inc.), 351 F.3d 86, 91–92 (2d Cir. 2003) (emphasis in original).

[771] *See, e.g.*, Lamie v. U.S. Tr., 540 U.S. 526, 538 (2004) ("Our unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding."); Cent. Tr. Co. v. Off. Creditors' Comm. of Geiger Enters., 454 U.S. 354, 360 (1982) (*per curiam*) ("While the Court of Appeals may have reached a practical result, it was a result inconsistent with the unambiguous language used by Congress.").

[772] *Cf., e.g., In re* Gaither, 595 B.R. 201, 210 (Bankr. D.S.C. 2018); *In re* CVAH, Inc., 570 B.R. 816, 835 (Bankr. D. Idaho 2017); *In re* Kipnis, 555 B.R. 877, 883 (Bankr. S.D. Fla. 2016); *In re* Kaiser, 525 B.R. 697, 713 (Bankr. N.D. Ill. 2014).

[773] Sherwood Partners, v. Lycos, Inc., 394 F.3d 1198, 1205 n.7 (9th Cir. 2005).

CONCLUSION

Of statutes generally, and of bankruptcy laws more narrowly, interpretation is the study of prose and verse, a holistic meditation on varieties of meaning collated from semantics as much as pragmatics, from the words' moral meaning, truth, or reality as much as their drafters' intent, by reason as much as practice.[774] Axiomatically, policy and purpose cannot override statutory prose, however unwise or imprecise it may be and subject to limited exceptions, as part of this process. At their most expansive, the former two concepts can justify construing section 546(a) to preempt all statutes of repose for purposes of any action pursuant to all the Avoidance Provisions, especially considering the constitutional primacy of federal bankruptcy legislation. But, as this article shows, such an approach is hard to square with the interpretive schematic germane to the Code's construction, with its uneven—yet very real—deference to state law; preemption's precise limitations, even where conflict at first appears to exist, when it comes to sections 544, 545, and 553; and a contestable grasp of the specific and general objectives relevant to each of the Avoidance Provisions despite its unabashedly purposive bent. If the interpretation of section 546(a) preferred by *Rund* and its cohort is to flow naturally from the Code's unpoetic stanzas, it cannot come via judicial exegesis. Rather, Congress must speak. With untrammeled equity deposed, the power to avoid state statutes of repose potentially applicable to bankruptcy's Avoidance Provisions is one that it alone possesses.

[774] *See* Richard H. Fallon Jr., *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1244–51 (2015) (collecting and describing the usual referents for claims of legal meaning).