

NEITHER ‘TWIXT NOR ‘TWEEN: EMERGING PROPERTY INTERESTS IN BANKRUPTCY

Lawrence Ponoroff*

A core policy underlying the federal bankruptcy system is to draw a hard line between the debtor’s pre- and postfiling lives. This serves both to further the debtor’s fresh start and assure a final accounting and settlement of all prepetition claims against the debtor. For this reason, a consensus has developed in the decisional law that the term “claim,” for purposes of determining participation in a bankruptcy case, is defined more expansively than under state-law rubrics. Until recently, most cases have adopted a similarly expansive approach to defining property of the estate in the case of debtor causes of action that evolve over time and, thus, are tied to events occurring both pre- and postfiling. This advances the creditor equality aims of the system by ensuring that claims defined as arising prepetition (and thus subject to discharge) will share in the property interests of the debtor correspondingly defined. Recently, however, some courts have begun to analyze property interests that straddle the filing by tying the question to state-law accrual rules. This Article takes the position that those authorities are misguided, misunderstand the division of authority between state and federal law in bankruptcy cases, and have unnecessarily complicated the analysis of assignment of debtor causes of action to the property of the estate. It concludes by urging that characterization of these claims be resolved under a federal framework and with specific attention to the unique aims of the bankruptcy system.

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* Dean and Professor of Law, Michigan State University College of Law. In the interests of candor, the Author wishes to disclose that he served as an expert witness in a lawsuit involving the core issue that forms the basis of this Article. He also wishes to make clear that the views expressed in this Article are entirely his own, and (as one would hope) the positions he took as an expert in that case are consistent with the analysis offered in this Article.

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INTRODUCTION

One of the foundational policy objectives of the Bankruptcy Reform Act of 1978¹ was to provide the most comprehensive relief possible for both debtors and creditors.² Attainment of this goal requires that entry of the order for relief in a bankruptcy case³ operate to hew a distinct and largely impenetrable barrier between the debtor’s pre- and postbankruptcy lives.⁴

1. The current law of bankruptcy is found in Title 11 of the United States Code. 11 U.S.C. §§ 101-1532 (2016), *amended by* Pub. L. No. 114-254, CONGRESS.GOV (Dec. 10, 2016), <https://www.congress.gov/bill/114th-congress/house-bill/2028/all-info>. It was enacted on November 6, 1978, as the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, (the “1978 Act”), and governs all cases filed on or after October 1, 1979. In the text of this Article, except where otherwise indicated, all references herein to the “Code” or the “Bankruptcy Code” are to Title 11 of the United States Code as amended through December 10, 2016.

2. *See* H.R. REP. NO. 95-595, ch. 3, at 180 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6141 (emphasis added) (“The proposed law will permit a complete settlement of the affairs of a bankruptcy debtor . . .”); *Kelly v. Robinson*, 479 U.S. 36, 55 (1986) (Marshall, J., dissenting) (referring to the foregoing statement on the legislative history in urging a broad definition of the term “debt” for purposes of the discharge); *see also infra* note 41.

3. Pursuant to Code § 301(b), the filing of a petition under any chapter of the Code automatically constitutes the order for relief under such chapter. In an involuntary case, the order for relief is not entered automatically upon filing. Rather, relief is only ordered upon the granting of the involuntary petition. *See* 11 U.S.C. § 303(h). Involuntary filings are, by far, the exception rather than the rule. In 2012, for example, according to statistics maintained by the Administrative Office of the United States Courts, involuntary filings represented less than one half of one percent of all bankruptcy filings for the year. *See* UNITED STATES COURTS, U.S. BANKRUPTCY COURTS—VOLUNTARY AND INVOLUNTARY CASES FILED, BY CHAPTER OF THE BANKRUPTCY CODE (2012), http://www.uscourts.gov/sites/default/files/statistics_import_dir/Table702_6.pdf.

4. *See, e.g.,* Laura B. Bartell, *Straddle Obligations Under Prepetition Contracts: Prepetition Claims, Postpetition Claims or Administrative Expenses?*, 25 EMORY BANKR.

To illustrate this point, consider the following simple but instructive hypothetical. Assume Sally files for relief under Chapter 7 at 10:30 a.m. on May 15, 2018. On the way to the courthouse to lodge her petition, Sally negligently clips a pedestrian, Barry, with her car, causing Barry grievous bodily injury. After having filed her petition—and thus commencing her case—Sally, while driving home, manages to strike another pedestrian, Stanley, at about 11:30 a.m., causing him injuries similar to those suffered by Barry just about an hour earlier.⁵

In Sally's bankruptcy case, Barry will have a "claim,"⁶ simultaneously entitling him to his pro rata share of the distribution, if any, made to unsecured creditors⁷ and resulting in the discharge of the unsatisfied portion of the liability arising from his personal-injury claim.⁸ Stanley, whose tort claim arose after the filing of the case, will not be entitled to participate in distributions from the estate

DEV. J. 39, 39 (2008) ("The Bankruptcy Code divides the universe of claims into two basic categories—those that arise at or before the order for relief concerning the debtor, and those that do not—and treats each class very differently."); *see also* Porrett v. Hillen (*In re Porrett*), 564 B.R. 57, 66 (D. Idaho 2016) ("[C]ommencement of the case 'sets a date of cleavage and establishes the moment at which the parties' respective rights in property must be determined.'" (citations omitted)); *In re Sturgis Iron & Metal Co.*, 420 B.R. 716, 749 n.63 (Bankr. W.D. Mich. 2009) ("[T]he entire bankruptcy process is based upon a division in [t]ime, [sic] with claims that arose prepetition against the debtor being treated in one manner and claims that arose against the estate post-petition being treated in a different manner."); *Siegel v. Fed. Dep. Ins. Corp. (In re Indymac Bancorp, Inc.)*, 2012 WL 1037481 *12 (Bankr. C.D. Cal. Mar. 29, 2012) (noting that the phrase "as of the commencement of the case" in § 541(a)(1) is intended to set a date of cleavage for establishing the parties' respective rights in property). The importance of the date of filing as establishing a date of cleavage between the debtor's pre- and postpetition lives has deep roots in bankruptcy jurisprudence. *See* James Angell McLaughlin, *Amendment of the Bankruptcy Act*, 40 HARV. L. REV. 583, 604 (1927) ("It is essential to working out a practicable theory of bankruptcy administration that some day be fixed as of which adjustments shall be made. All the assets in existence on a certain day ought to be applied toward the liquidation of all the liabilities on that day insofar as possible.").

5. The date of the filing of the bankruptcy petition also serves as the date of cleavage in a Chapter 11 case. *See* Ashland Petroleum Co. v. Appel (*In re B & L Oil Co.*), 782 F.2d 155, 158 (10th Cir. 1986) ("Once a petition is filed, debts that arose before the petition may not be satisfied through post-petition transactions.").

6. *See* 11 U.S.C. § 101(5)(A) (defining a "claim" as "a right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured . . .").

7. Nonpriority, unsecured claimholders are paid *pari passu* under Code § 726(a)(2) and ahead of claims falling into subsection (a)(3) and (a)(4), and ahead of the debtor, who takes after satisfaction of all allowed claims and legal interest thereon. 11 U.S.C. § 725(a)(5), (6).

8. *See* 11 U.S.C. § 727(b) (limiting the scope of the discharge to "debts that arose before the date of relief of the order of relief). Chapters 11 and 13 have comparable provisions regarding individual debtors. *See* 11 U.S.C. § 1141(d)(1) (debts arising prior to confirmation subject to discharge); and § 1328(a) (upon plan completion all debts provided for in the plan are discharged).

but will be able to pursue his claim against Sally free from the bankruptcy discharge.⁹

In most Chapter 7 cases, Stanley will fare better than Barry in the long-run.¹⁰ That being true, there is no additional reason to kick Barry while he is already down. Stated in other words, it would be manifestly inequitable, on the one hand, to limit Barry (and other prepetition creditors) to his ratable share of the net assets (if any) of the bankruptcy estate without, on the other hand, including within that estate all of Sally's assets that existed as of the commencement of the case;¹¹ hence, the Code's far-reaching approach to defining property of the estate.¹² The primary inclusive provision is § 541(a)(1), which defines the estate as "all legal or equitable interests of the debtor in property as of the commencement of the case."¹³ The Supreme Court has routinely found that, to fulfill the purposes of bankruptcy law, the definition of property of the debtor's estate must be broadly interpreted to include all legally cognizable interests extant as of the time of filing, even if contingent or not subject to possession until a future time.¹⁴

So far so good. The breakdown incongruity, however, occurs with respect to the categorization of claims and property interests that reside partly in a debtor's prepetition life and partly in his or her postpetition life. With respect to such *claims*,

9. In addition, the automatic stay in § 362 of the Code does not apply to actions against the debtor or the debtor's property based on claims that arose after the commencement of the case. *See, e.g.*, 11 U.S.C. §§ 362(a)(1)–(8) (each subsection referring, in one manner or another, to claims arising *before* the commencement of the bankruptcy case).

10. In fact, most Chapter 7 cases are "no-asset" cases in which there are no distributions to unsecured creditors. Lois I. Lupica, *The Consumer Bankruptcy Fee Study; Final Report*, 20 AM. BANKR. INST. L. REV. 17, 53 (2012) (highlighting that of the 7,350 Chapter 7 cases forming the sample for the author's national study, 6,603 (or about 90%) were no-asset cases). Even in those cases where there are distributable assets, the "full-pay" Chapter 7 case is rare indeed. The situation is a little different in Chapter 11 where, depending on the terms of the plan, it may be in a creditor's interest to have his or her claim classified as prepetition. For instance, in *Epstein v. Off. Comm. of Unsecured Creditors of Estate of Piper Aircraft (In re Estate of Piper Aircraft)*, 58 F.3d 1573, 1576 (11th Cir. 1995), the representative appointed on behalf of unknown future claimants attempted to argue, ultimately unsuccessfully, that future claimants held claims within the meaning of § 105(a) of the Code. *Id.* at 1571.

11. *See, e.g., In re Meyers*, 139 B.R. 858, 861 (Bankr. N.D. Ohio 1992) ("The debtors' position [that their lottery winnings were not part of the bankruptcy estate] . . . boggles the mind from a policy perspective, and certainly offends the spirit of bankruptcy law. These debtors would wish to enjoy their windfall uninhibited by previously established debts.").

12. *See* H.R. REP. NO. 95-595, at 367 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6323 ("The scope of this paragraph [§ 541(a)(1)] is broad. It includes all kinds of property, including tangible and intangible causes of action (*see* Bankruptcy Act Sec. 70A(6)), and all forms of property currently specified in Section 70A of the Bankruptcy Act . . ."). *See* authorities cited *infra* note 44.

13. 11 U.S.C. § 541(a)(1) (2016). More broadly speaking, property of the bankruptcy estate includes the nine nonexclusive subcategories of property detailed in subsection (a)(1) through (a)(9) of 11 U.S.C. § 541. *Id.* at § 541(a)(1)–(9).

14. *See, e.g., United States v. Whiting Pools*, 462 U.S. 198, 204–05 (1983).

the uncertainty in the case law over the standard governing when a claim against the debtor (and, ergo, the estate) arises has largely dissipated since 2010 in favor of an expansive definition of “claim” driven by the object in bankruptcy of achieving a final resolution of all prefilings assets and liabilities of the debtor.¹⁵ Inexplicably, at the same time, the broad consensus that—up until about 2015—had existed with respect to assigning particular *property interests* as property of the estate *vel non* has deteriorated.¹⁶ This raises the disquieting possibility that a prepetition claimholder against the estate, as determined under the prevailing broad interpretation of that status, will receive no benefit from property of the debtor that, under a comparable interpretation, would have belonged to the bankruptcy estate and, thus, have been available to apply to prepetition claims.

The dissonance derives from a conceptual disparity over the relative role of state and federal law in the making of these determinations. In turn, in a very real sense, it is a microcosmic reflection of the unhealthy ambiguity surrounding the division of authority between state and federal law in bankruptcy more generally.¹⁷ The discordance is readily apparent from the Fifth Circuit’s decision in *In re Cantu*,¹⁸ wherein the court determined that the “line of cases assessing whether a tort claim *asserted against* the debtor is a dischargeable one that arose prepetition is quite different from the situation we face concerning the timing of a claim *asserted by* the debtor.”¹⁹ Thus, instead of employing—as urged by the trustee—the consensus test that had emerged for defining when a claim against the debtor arises,²⁰ the court adopted what it dubbed the “accrual approach” for deciding whether a claim owned by the debtor becomes property of the estate.²¹

Under this approach, according to the court, a claim by the debtor will not be deemed to arise for purposes of § 541(a) until a cause of action has “accrued” under state law.²² The court continued that “[t]he accrual of a cause of action means the right to institute and maintain a suit, and whenever one person may sue another a cause of action has accrued.”²³ As a general proposition, accrual under state law (including under Texas law per the court in *Cantu*) will turn on whether the wrongful

15. The most recent circuit to adopt this approach was the Third Circuit in *Jeld-Wen v. Van Brunt (In re Grossman’s, Inc.)*, 607 F.3d 114, 125 (3d Cir. 2010). For further discussion see *infra* notes 35–42 and accompanying text.

16. See *infra* Section III.B.

17. See generally Lawrence Ponoroff, *Whither Recharacterization*, 68 RUTGERS U. L. REV. 1217, 1262 (2016) (discussing the relative role of state and federal law in relation to the existence and treatment of a claim in a bankruptcy case).

18. *Cantu v. Schmidt (In re Cantu)*, 784 F.3d 253 (5th Cir. 2015).

19. *Id.* at 259.

20. See *infra* notes 39–42 and accompanying text.

21. *Cantu*, 784 F.3d at 257.

22. *Cantu*, 784 F.3d at 260. Ironically, the accrual approach as applied to claims against the estate was widely criticized and eventually rejected by the only circuit to follow that approach. See sources cited *infra* note 39.

23. *Cantu*, 784 F.3d at 260 (citing *State Farm Life Ins. Co. v. Swift (In re Swift)*, 129 F.3d 792, 795 (5th Cir. 1997) (quoting *Luling Oil & Gas Co. v. Humble Oil & Refining Co.*, 191 S.W.2d 716, 721 (1946))).

conduct at issue has caused a “legal injury.”²⁴ Therefore, in order for the claim to be classified as property of the estate, facts must have come into existence before the filing of the bankruptcy petition authorizing the debtor to seek a legal remedy.²⁵

In effect, then, *Cantu* requires that each of the essential elements of the cause must have occurred or been satisfied before commencement of the bankruptcy case. Notably, however, the court continued that accrual may occur “even if the fact of the injury is *not discovered until later*, and even if all resulting damages have not yet occurred.”²⁶ In so doing, the court introduced the distinction between an “accrual rule,” tied to the occurrence of some form of injury, and a “discovery rule,” requiring knowledge or reason to know of the injury.²⁷ Due to imprecise analysis and use of language, this distinction has maddeningly confused the analysis in cases where the two do not coincide.²⁸

In eliciting this contrast between claims against versus claims by the debtor, the court drew on the reasoning of a 1996 bankruptcy-court decision from the Western District of Texas.²⁹ In that opinion, the court rationalized the divergent treatment on the basis that neither the fresh-start policy nor the due-process considerations that underlie the decisions focused on when a claim has arisen against the estate “translate” to the situation where the question posed involves whether a cause of action *by* the debtor belongs to the estate.³⁰ The observation is undoubtedly true, but as a principled rationale for drawing a distinction between the scope of creditor claims and property interests of the debtor, it is woefully inadequate. Specifically, it differentiates but does not really explain why the difference matters; it offers no affirmative justification for why the standard should be less inclusive in circumstances where the issue is whether a property interest is captured in the bankruptcy estate. This is particularly troubling given the potential that employment

24. *Cantu*, 784 F.3d at 258.

25. *Id.* at 260. In reaching this decision, the court attempted to “clarify” its earlier holding in *Wheeler v. Magdovitz (In re Wheeler)*, 137 F.3d 299 (5th Cir. 1998) (per curiam), in which the court analyzed the question of when a debtor cause of action arose under both the accrual approach and the test developed by the Court in *Lemelle v. Universal Mfg. Corp.*, 18 F.3d 1268 (5th Cir. 1994) for determining when a claim against the estate would be deemed to arise. *Id.* at 258–59. The court noted that *Wheeler’s* use of the “prepetition relationship” test set forth in *Lemelle* was at odds with the court’s earlier decision in *State Farm Life Ins. Co. v. Swift (In re Swift)*, 129 F.3d 792 (5th Cir. 1997), holding that some form of legal injury must occur before a cause of action accrues under state law. *Id.* at 259–60. Referencing the “rule of orderliness,” the court concluded that the conflict would be resolved in favor of the earlier decision. *Id.*

26. *Id.* at 260 (emphasis added) (further citations omitted) (citing *Murphy v. Campbell*, 964 S.W.2d 265, 270 (Tex. 1997)).

27. See, e.g., *In re Wagner*, 530 B.R. 695 (Bankr. E.D. Wis. 2015), discussed *infra* text accompanying notes 195–211.

28. See *infra* Section II.B.

29. *Swift v. Seidler (In re Swift)*, 198 B.R. 927, 935–56 (Bankr. W.D. Tex. 1996) (a companion case to *State Farm* that failed to even mention the primary Supreme Court authority on the issue, *Segal v. Rochelle*, 382 U.S. 375 (1966)); see *infra* text accompanying notes 74–78.

30. *Cantu*, 784 F.3d at 259.

of this less inclusive standard creates for prejudicing prepetition claimholders and, thereby, upsetting the distributional scheme contemplated by the Code.³¹

While it is possible to read *Cantu* narrowly—based on the distinction between “accrual” and “discovery”—so as not to entirely cede an important issue of bankruptcy law to the vagaries of state-law statute-of-limitations doctrine,³² in fairness, it is not the most plausible interpretation of the holding *even if* that is what was intended by the panel.³³ In either case, *Cantu* is wrong on the law and just plain bad policy.

For this reason, this Article espouses the view that the judgment concerning when a debtor’s cause of action against a third party belongs to the bankruptcy estate should be made under a federal standard that comports with the widely accepted federal approach used to determine the existence of a claim against the estate.³⁴ In supporting this position, Part I of this Article establishes the basic case favoring the use of a complementary standard for assessing when claims by and against the estate should be regarded to exist for bankruptcy purposes. Part II focuses on the special issue of, as existed in *Cantu*, claims that do not neatly fall into either the debtor’s pre- or postbankruptcy-petition life but have roots in both (hereinafter referred to as “straddle claims”). Part III then examines the case law concerning straddle claims, emphasizing the growing disagreement and uncertainty among courts in recent years. Next, Part IV places this issue in the broader context of the division of authority between state and federal law in bankruptcy cases, concluding that federal interests predominate when it comes to determining the characterization of straddle claims under § 541(a)(1). Finally, Part V sets forth a recommendation regarding the standard governing application of the preferred federal rule for deciding if a debtor’s cause of action is estate property and then considers under what circumstances that rule, though technically applicable, might be suspended in the interests of other policy aims.

31. Excluding assets from the estate as postpetition operates to the benefit of the debtor or postpetition creditors. In either case, it is contrary to key bankruptcy policy considerations. The fresh start is not intended to be a head start, and advantaging postpetition creditors at the expense of their prepetition counterparts runs counter to bankruptcy-equality policy as discussed *infra* notes 54, 258, 266, and 356–58 and accompanying text.

32. See *State Farm Life Ins. Co. v. Swift (In re Swift)*, 129 F.3d 792, 795–97 (5th Cir. 1997) (describing the distinction between accrual of a cause of action and commencement of the running of the statute of limitations based on “discovery” of the existence of the claim); see also *infra* text accompanying notes 179–80 and 244. For a cogent explanation of why the focus on “accrual” and “discovery” of a cause of action, and the effect those might have on the running of the statute of limitations, is a “distraction” insofar as resolution of the underlying issue of what constitutes property of the estate is concerned, see *In re Carroll*, 586 B.R. 775, 788–89 (Bankr. E.D. Cal. 2018).

33. Of course, it is a little unclear exactly what the court intended, other than a much greater deference to state-law rules addressing ripeness than had been contemplated by the overwhelming weight of authority at the time addressing the question of the standard to be applied in determining when straddle claims are included in the estate.

34. See *infra* notes 37–42 and accompanying text.

I. THE COMPLEMENTARITY OF “CLAIMS” AND “PROPERTY OF THE ESTATE”

As already observed, with the intention of maximizing the scope of relief available in a bankruptcy case, the legislative history of the Code makes crystal clear that what constitutes a “claim” under the definition in § 101(5)—affecting both who is entitled to participate in distributions from a bankruptcy estate and what is subject to discharge—is to be given an expansive definition.³⁵ There is also no question that the determination of when a claim arises occurs under federal, not state, law.³⁶ In other words, a claim may, and often does, arise for bankruptcy purposes well before a cause of action based on the same facts accrues under state law.³⁷

The only circuit to have followed the approach that a claim does not arise for bankruptcy purposes until it actually accrues under state law³⁸ was roundly (and appropriately) criticized for taking this position.³⁹ Eventually, that court reversed field on the point in 2010,⁴⁰ adopting what has come to be known as the *prepetition-relationship* test, under which a claim is deemed to arise for purposes of § 101(5) once there is some relationship, such as conduct, exposure, impact, or privity, prior to the commencement of the bankruptcy case.⁴¹ Pursuant to this standard, a party

35. H.R. REP. NO. 95-595, at 309 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6266 (“[T]he bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be dealt with in the bankruptcy case.”).

36. *E.g.*, *In re Wilbur*, 237 B.R. 203, 209 (Bankr. M.D. Fla. 1999) (“Federal, not state law, controls the issue of when a claim arises for the purposes of bankruptcy.”); *In re Nat’l Gypsum Co.*, 139 B.R. 397, 405 (Bankr. N.D. Tex. 1992) (“While non-bankruptcy law governs the *existence* of a claim under the Code, it is not dispositive of the *time* at which a claim arises under the Code.” (emphasis in original)).

37. *See, e.g.*, *In re Solitron Devices, Inc.*, 510 B.R. 890, 895 (Bankr. S.D. Fla. 2014) (“A creditor need not have a cause of action that can be pursued under non-bankruptcy law to hold a claim under the Bankruptcy Code.”).

38. *See* *Avellino & Bienes v. M. Frenville Co. (In re M. Frenville Co.)*, 744 F.2d 332, 337 (3d Cir. 1984) (en banc).

39. *See, e.g.*, *Cadleway Props., Inc. v. Andrews (In re Andrews)*, 239 F.3d 708, 710 n. 7 (5th Cir. 2001) (describing *Frenville* as universally rejected); *In re Yanks*, 49 B.R. 56, 58 (Bankr. S.D. Fla. 1985) (noting that *Frenville* ignores fundamental bankruptcy policies); Ralph R. Mabey & Annette W. Jarvis, *In re Frenville: A Critique by the National Bankruptcy Conference’s Committee of Claims and Distributions*, 42 BUS. LAW. 697 (1987).

40. *See* *Jeld-Wen v. Van Brunt (In re Grossman’s, Inc.)*, 607 F.3d 114, 125 (3d Cir. 2010) (holding that the claimant’s exposure to a product, if it occurs prepetition, gives rise to claim under § 101(5) even though the injury resulting from such exposure is not manifested until after the bankruptcy filing).

41. *See, e.g.*, *Williams v. Placid Oil Co. (In re Placid Oil)*, 753 F.3d 151, 159 n.2 (5th Cir. 2014); *Lemelle v. Univ. Mfg. Corp.*, 18 F.3d 1268, 1277 (5th Cir. 1994); *Ritter Ranch Dev., LLC v. City of Palmdale (In re Ritter Ranch Dev., LLC)*, 255 B.R. 760, 765 (B.A.P. 9th Cir. 2000) (noting that the Ninth Circuit follows the prepetition-relationship test); *In re Chateaugay*, 102 B.R. 335, 350 (Bankr. S.D.N.Y. 1989) (“The legislative history to § 101(4) [now 101(5)] demonstrates that the term ‘claim’ is intended by this definition to be as broadly interpreted as possible so that maximum relief can be afforded to a debtor.”). The Eleventh Circuit has adopted an even broader version of the prepetition-relationship test in

that is, for example, exposed prepetition to a defective or dangerous product (or perhaps a harmful environmental emission) has a claim, even though no actual injury has yet occurred. A party would also have a claim if it suffered a prepetition injury but did not know, or have reason to know, of the existence of the claim until after the filing of the petition.⁴²

Similarly, the “property of the estate” for purposes of § 541(a) consists of “every conceivable interest of the debtor, future, nonpossessory, contingent, speculative, and derivative, . . . [including] causes of action owned by the debtor or arising from property of the estate.”⁴³ Courts have consistently held that the scope

Chapter 11 cases by extending its application to claims arising prior to the debtor’s confirmation of a plan of reorganization. *Epstein v. Off. Comm. Of Unsecured Creditors of Piper Aircraft Corp.* (*In re Piper Aircraft Corp.*), 58 F.3d 1573 (1995). Also, a few older decisions follow a “conduct test,” under which a claim arises as soon as the acts giving rise to the defendant’s liability were performed. *E.g.*, *Grady v. A.H. Robins Co.*, 839 F.2d 198 (1988); *cf. United States v. LTV Corp. (In re Chateaugay Corp.)*, 944 F.2d 997, 1003 (2d Cir. 1991) (criticizing the conduct test as *too broad*).

No matter which test courts use in attempting to determine whether the unknown future claimant has a “claim” cognizable in bankruptcy, they generally have little problem concluding that those who have entered into a prepetition contract with the debtor (and therefore have an opportunity to present their claims in the bankruptcy case) have cognizable claims, and that a creditor need not have a cause of action that could be pursued under state law. *See In re Remington Rand Corp.*, 836 F.2d 825, 826–27 (3d Cir. 1988); *In re Nat’l Gypsum Cop.*, 139 B.R. 397, 405 (N.D. Tex. 1992).

42. *See In re Future Energy Holdings Corp.*, 522 B.R. 520, 527 (Bankr. D. Del. 2015) (claim arises upon exposure to product). One important caveat in relation to the prepetition-relationship test is assuring future claimants with constitutionally sufficient notice. *See Lemelle*, 18 F.3d at 1277; *infra* notes 327–37 and accompanying text.

43. *See Chartschlaa v. Nationwide Mut. Ins. Co.*, 538 F.3d 116, 122 (2d Cir. 2008); H.R. REP. NO. 95-595, at 367 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6322–23. The legislative purpose of this section was to move away from the “complicated mélange of references to State law” and to “determine what is property of the estate by a simple reference to what interests in property that debtor has at the time of the commencement of the case.” *Id.* at 175 (footnotes omitted); *see also* *Rajala v. Freedom Capital, LLC*, 661 Fed. Appx. 512, 515 (10th Cir. 2016); *Logan v. JKV Real Estate (Servs.) (In re Bogdan)*, 414 F.3d 507, 512 (4th Cir. 2005) (noting that causes of action have uniformly been included within the definition of property of the estate); *Bavely v. United States (In re Terwilliger’s Catering Plus, Inc.)*, 911 F.2d 1168, 1172 (6th Cir. 1990) (holding that once the determination of property rights is made under state law, federal bankruptcy law dictates to what extent that interest is property of the estate for the purposes of § 541); *Winick & Rich, P.C. v. Strada Design Assocs. (In re Strada Design Assocs.)*, 326 B.R. 229, 236 (Bankr. S.D.N.Y. 2005) (“Section 541(a) is not restricted by state law concepts such as when a cause of action ripens or a statute of limitations begins to run, and ‘property of the estate’ may include claims that were inchoate on the petition date.”).

For authorities specifically regarding the applicability of § 541(a) to a debtor’s causes of action or legal claims, *see McGuire v. United States*, 550 F.3d 903, 914 (9th Cir. 2008) (“A chose in action is property of the bankruptcy estate pursuant to 11 U.S.C. § 541(a)(1).”) (citing *City & County of San Francisco v. PG & E Corp.*, 433 F.3d 1115, 1126 (9th Cir. 2006)); *Smith v. Arthur Andersen, L.L.P.*, 421 F.3d 989, 1002 (9th Cir. 2005) (“The ‘property of the estate’ includes ‘all legal or equitable interests of the debtor in property as of the

of § 541 is broad and is to be generously construed⁴⁴ “and that an interest may be property of the estate even if it is novel or contingent.”⁴⁵ In the words of the leading treatise in the field, “[i]t would be hard to imagine language that would be more encompassing” than this broad definition.⁴⁶ This interpretation, again, is consistent with the Code’s goal of drawing a bright line of demarcation between the debtor’s pre- and postbankruptcy lives so as to settle, “as of the commencement of the case,” all of the debtor’s financial affairs—assets and liabilities—to the fullest extent possible.⁴⁷

There is, therefore, an almost symbiotic relationship between the definition of “claim” in § 101(5) and “property of the estate” in § 541(a).⁴⁸ They are coterminous and interrelated to the point that the identical temporal language—“as of the commencement of the case”—is used in both provisions. In his influential treatise, Professor Tabb expounds on this relationship, speaking of the scope of § 541(a), in the following terms:

As this expansive statutory language suggests, Congress intended that property of the estate have a very broad scope. The encompassing reach of the bankruptcy estate mirrors the sweeping definition of “claim” in § 101(5). In each instance, Congress operated from the baseline premise that, to the extent reasonably possible, the

commencement of the case . . . including the debtor’s ‘causes of action.’””) (citing *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205 n.9 (1983)); *Cohen v. Drexel Burnham Lambert Group, Inc. (In re Drexel Burnham Lambert Group, Inc.)*, 138 B.R. 687, 701 (Bankr. S.D.N.Y. 1992).

44. See, e.g., *Gladstone v. Bancorp*, 811 F.3d 1133, 1139 (9th Cir. 2016) (“The legislative history of the Bankruptcy Code reveals the concept of property of the estate to be interpreted broadly.”) (quoting *Chappel v. Proctor (In re Chappel)*, 189 B.R. 489, 493 (9th Cir. BAP 1995)). “This definition is unquestionably broad, and it is well-settled that property of the estate includes ‘every conceivable interest of the debtor’ held as of the commencement of the bankruptcy case, whether that interest is ‘future, nonpossessory, contingent, speculative [or] derivative.’” *Moyer v. Slotman (In re Slotman)*, 2013 WL 7823003, at *5 (Bankr. W.D. Mich. 2013) (citing *In re Yonikus*, 996 F.2d 866, 869 (7th Cir. 1993)); see also *Arrowsmith v. United States (In re Health Diagnostic Laboratory, Inc.)*, 578 B.R. 552, 561 (Bankr. E.D. Va. 2017) (holding that Congress intended that “property” for purposes of § 541(a) be understood as a sweeping term, incorporating both tangible and intangible property). Moreover, by virtue of § 541(a)(7), property of the estate also includes any interest in property that the estate acquires after the commencement of the case. See, e.g., *TMT Procurement Corp. v. Vantage Drilling Co. (In re TMT Procurement Corp.)*, 764 F.3d 512, 523 (5th Cir. 2014).

45. See, e.g., *Parks v. Dittmar (In re Dittmar)*, 618 F.3d 1199, 1207 (10th Cir. 2010) (citations omitted); *Yonikus*, 996 F.2d at 869 (“[E]very conceivable interest of the debtor, future, nonpossessory, contingent, speculative, and derivative, is within reach of 11 U.S.C. § 541.”) (citations and quotation marks omitted).

46. 5 COLLIER ON BANKRUPTCY ¶ 541.01 (Richard Levin & Henry J. Sommer eds., 16th ed.).

47. See *supra* note 4.

48. But see *Cantu v. Schmidt*, 784 F.3d 253, 259–60 (5th Cir. 2015) (rejecting this proposition); *supra* text accompanying notes 18–27.

bankruptcy case should settle all of the debtor's financial affairs [assets and liabilities alike] as of the time of the bankruptcy filing.⁴⁹

In short, it is essential to realizing the basic policy objectives ingrained in the bankruptcy system that the parameters of "property of the estate" and what constitutes a "claim against the estate" be given not only the broadest practicable definition, *but also complementary* definitions so that prefiling claims receive their pro rata share of prefiling property, similarly defined, before being forever discharged.⁵⁰

Achieving this goal requires that, just as the question of when a claim arises for purposes of participation in a bankruptcy case does not depend on state law,⁵¹ the determination of property of the estate in the context of straddle claims cannot be made *solely* by reference to state law. To do so would be to disregard the balance that Congress has struck between the competing interests of debtors and creditors under the bankruptcy law.⁵² Central to accomplishing that balance is the necessity of carving a wide chasm between the debtor's pre- and postpetition lives,⁵³ such that in return for the fresh start that the debtor receives in the latter, prepetition creditors receive all of the debtor's property attributable to the former. Put another way, claims and property interests belonging to the debtor's prepetition life must be matched in the same fashion that an auditor will match revenues and expenses to the particular accounting period to which they relate.⁵⁴

49. CHARLES J. TABB, *LAW OF BANKRUPTCY* § 5.2 p. 389–91 (4th. ed. 2016).

50. This assures equity among creditors, a goal central to the accomplishment of bankruptcy policy. "[E]quality is equity, and this is the spirit of the bankrupt law." *Cunningham v. Brown*, 265 U.S. 1, 13 (1924).

51. See *supra* notes 20, 37–42 and accompanying text.

52. Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 785 (1987) ("In bankruptcy, with an inadequate pie to divide and the looming discharge of unpaid debts, the disputes center on who is entitled to shares of the debtor's assets and how those shares are to be divided. Distribution among creditors is not incidental to other concerns; it is the center of the bankruptcy scheme."); see also Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L. J. 857, 857 (1982) (noting that while bankruptcy is usually thought of as a procedure for providing relief to an overburdened debtor, in fact, most of the bankruptcy process is concerned with creditor-distribution questions).

53. See David G. Epstein, Casey Ariail & David M. Smith, *Not Just Anna Nicole Smith: Cleavage in Bankruptcy*, 31 EMORY BANKR. DEV. J. 15, 19–20 (2014) ("Even more important than the cleavage effect of a bankruptcy petition on the rights of prepetition and postpetition creditors against the debtor is the cleavage effect of a bankruptcy petition on the relative rights of creditors.").

54. In the context of determining whether certain transactions represented secured loans or leases for purposes of § 365 of the Bankruptcy Code, Judge Easterbrook made the identical conceptual point about Code policy and methodology:

Bankruptcy draws a line between the existing claims to a firm's assets and newly-arising claims If there are not enough assets to go around, some [existing] claims may be written down or extinguished. The ongoing operations of the business are treated entirely differently; new claims are paid in full as they arise. It is as if the bankruptcy process creates two separate firms—the pre-bankruptcy firm that pays off old claims against

It is well settled that the issue of what constitutes “property of the estate” within the meaning of § 541 is a federal question, and it is irrelevant that state law might not call the same interest “property.”⁵⁵ That said, however, of necessity the nature and attributes of a debtor’s interest in that property will usually and necessarily be determined by reference to nonbankruptcy law, and most frequently state law. The Supreme Court established this principle in *Butner v. United States*,⁵⁶ holding that unless some federal interest requires a different result, property interests should be analyzed no differently in bankruptcy than under state law.⁵⁷

This holding could be seen as providing a basis for deviating, in the case of assigning a debtor’s cause of action to the estate, from the jurisprudence concerning claims against the estate and when they are deemed to arise.⁵⁸ That conclusion, however, would be erroneous. Often regarded as making a more sweeping statement than it does about the relative role and authority of state versus federal law in bankruptcy cases,⁵⁹ *Butner* actually does no more than express in the negative the basic truism that when a state-law property definition interferes with federal bankruptcy policy, the state-law rule is preempted under the Supremacy Clause of the federal Constitution.⁶⁰ For example, in *In re Kanter*,⁶¹ the court invalidated a state statute that purported to defease the bankruptcy trustee of any interest in a prepetition personal-injury lawsuit.⁶² The court found that enforcement of that provision directly conflicted with the definition of “property of the estate”

pre-bankruptcy assets, and the post-bankruptcy firm that acts as a brand-new venture.

Boston & Maine Corp. v. Chicago Pacific Corp., 785 F.2d 562, 565 (7th Cir. 1986); *see also* *United Airlines, Inc. v. HSBC Bank USA*, 416 F.3d 609 (7th Cir. 2005). While it is bankruptcy-rehabilitation policy that supports the analysis to which Judge Easterbrook refers in *United Airlines*, a Chapter 11 case, the fresh-start and equality policies call for the same sort of sharp demarcation in Chapter 7 between rights and obligations belonging to the debtor’s pre- and postfiling lives, respectively.

55. *Board of Trade of City of Chicago v. Johnson*, 264 U.S. 1 (1924); *McCarthy, Johnson, & Miller v. North Bay Plumbing, Inc. (In re Petit)*, 217 F.3d 1072, 1078 (9th Cir. 2000) (stating that “whether an interest claimed by the debtor is ‘property of the estate’ is a federal question to be decided by federal law”); *Anderson v. Rainsdon (In re Anderson)*, 572 B.R. 743, 748 (Bankr. 9th Cir. 2017) (concluding that § 541(a) trumps any distinction under state law regarding whether an interest is property of the estate); *Terry v. Evans, (In re Evans)*, 527 B.R. 228, 234–35 (Bankr. E.D. Va. 2015) (holding federal law controls question of what constitutes property of the estate); *see also* cases cited *supra* note 36.

56. 440 U.S. 48 (1979).

57. *Id.* at 55.

58. *See* cases cited *supra* note 41–42.

59. *See infra* notes 245–52 and accompanying text.

60. *See* Ponoroff, *supra* note 17, at 1261–62; *see also* *The Finley Group Liquidating Agent for RedF Marketing, LLC v. Roselli (In re Redf Marketing, LLC)*, 589 B.R. 534, 542 (Bankr. W.D.N.C. 2018) (reliance on state law to determine relevant property interests in federal tax-refund claims would interfere with an important federal interest); *infra* text accompanying note 255–58.

61. *Kanter v. Moneymaker*, 505 F.2d 228 (9th Cir. 1974).

62. *Id.* at 2321.

under the former bankruptcy law,⁶³ as well as with the overall distributional priority scheme established by the 1898 Act.⁶⁴

Thus, state law will often identify the existence, elements, and characteristics of the cause of action. However, the determination of whether that claim *belongs* to the debtor's pre- or postpetition life—i.e., whether it is property of the estate or of the debtor—must be resolved as a matter of federal law and under a standard that conforms to the purposive objectives of the Bankruptcy Code,⁶⁵ just as the determination of when a claim against the estate arises is not driven by state-law rules.⁶⁶ This is the point that the court overlooked in *Cantu*, and it is a point that is increasingly becoming a source of misunderstanding in the decisional law.⁶⁷

II. THE MAJORITY APPROACH TO STRADDLE CLAIMS

A. *The Continuing Viability of Segal v. Rochelle*

While intended to include every conceivable interest of the debtor in property as of the commencement of the case, § 541(a)(1) of the Code does not explicitly address how to assign a property interest that constitutes a straddle claim—again, defined as a postpetition right or payment that at least in part derives from prepetition events or activity.⁶⁸ In that regard, the Supreme Court's ruling in *Segal v. Rochelle*,⁶⁹ a case decided under the 1898 Act, remains precedential. This is due to the facts that (a) Congress did not materially alter language of the former

63. See Act of July 1, 1898, ch. 541, 30 Stat. 544 (1898), *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 [hereinafter the "1898 Act"].

64. *Kanter*, 502 F.2d at 231; see also *Arrowsmith v. United States (In re Health Diagnostic Laboratory, Inc.)*, 578 B.R. 552, 563 (Bankr. E.D. Va. 2017) (holding that the question of whether a debtor has an interest in property would be governed by federal, not state, law because of a countervailing federal interest established by the federal tax law).

65. See, e.g., *Cohen v. Chernushin (In re Chernushin)*, 911 F.3d 1265, 1269 (10th Cir. 2018) (noting that while state law determines interests, once identified recourse must still be had to federal law to resolve the extent to which that interest is property of the state); *Bavely v. United States (In re Terwilliger's Catering Plus, Inc.)*, 911 F.2d 1168, 1172 (6th Cir. 1990) (holding that once the determination of property rights is made under state law, federal bankruptcy law dictates to what extent that interest is property of the estate for the purposes of § 541); *Winick & Rich, P.C. v. Strada Design Assocs. (In re Strada Design Assocs.)*, 326 B.R. 229, 236 (Bankr. S.D.N.Y. 2005) ("Section 541(a) is not restricted by state law concepts such as when a cause of action ripens or a statute of limitations begins to run, and 'property of the estate' may include claims that were inchoate on the petition date."); see also *supra* note 55.

66. See *supra* notes 36–37 and accompanying text.

67. See *infra* Section III.B.

68. See TABB, *supra* note 49, at §5.2, p. 402 (describing the issue).

69. 382 U.S. 375 (1966).

statute⁷⁰ defining property of the estate when enacting the 1978 Code,⁷¹ and (b) both the Senate and House Reports accompanying adoption of the Code categorically state that the result reached in *Segal* is approved under the new law.⁷²

In *Segal*, the Court held:

The main thrust of § 70a(5) [the precursor to § 541(a)(1) of the Code in relation to third party claims and causes of action] is to secure for creditors everything of value the bankrupt may possess in alienable or leviable form when he files his petition. To this end the term “property” has been construed most generously and an interest is not outside its reach because it is novel or contingent or because enjoyment must be postponed.⁷³

Distinguishing, for example, future wages, the Court in *Segal* found that a tax-loss carryback refund for a taxable year ended prior to the filing of the petition, but that was attributable to losses incurred prepetition, constituted property of the estate.⁷⁴ In articulating more broadly the test for ascertaining whether a property interest that formally emerges into existence or matures after the filing of the case becomes an asset of the estate, the Court held the inquiry should be whether the right in question was “sufficiently rooted in the pre-bankruptcy past . . . that it should not be excluded from property of the estate.”⁷⁵ This test follows naturally from the broad definition of “property of the estate” and the expansive interpretation that language has received in the courts.⁷⁶

70. Section 70a(5) of the 1898 Act provided, in pertinent part, that the estate would include “property, including rights of action, which prior to the filing of the petition he [the debtor] could have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered.” Act of July 1, 1898, ch. 541, 30 Stat. 544, *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549.

71. It is widely recognized that authority under the 1978 Act continues to be precedential except where expressly stated otherwise in the Code or legislative history. *See United Savs. Ass’n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.* 484 U.S. 365, 382 (1987); *see also* George R. Pitts, *Rights to Future Payment as Property of the Estate Under Section 541 of the Bankruptcy Code*, 64 AM. BANKR. L.J. 61, 63 (1990) (“What is striking about the leading cases under section 70(a) of the Bankruptcy Act, the predecessor of section 541, however, is their construction of the term property *without* recourse to applicable nonbankruptcy law.”).

72. *See* S. REP. NO. 989, at 82 (1978), as *reprinted in* 1978 U.S.C.C.A.N. 5787, 5868; H.R. REP. NO. 95-595, at 180 (1977), as *reprinted in* 1978 U.S.C.C.A.N. 5963, 6323.

73. *Segal*, 382 U.S. at 379.

74. *Id.* at 382–84.

75. *Id.* at 379. The exercise thus requires linking property interests to particular events in time, in order to ascertain if the losses suffered or harm incurred by the debtor occurred before or after the bankruptcy filing. The Court also suggested a possible limitation of this rule tied to the fresh-start policy. *Id.* However, it is not clear that this aspect of the holding survived enactment of the Code. *See infra* note 339.

76. *See supra* notes 43–44 and accompanying text.

Several circuit courts have conceded what is expressly stated in the legislative history; namely, that *Segal* remains good authority under the Code.⁷⁷ The sufficiently rooted test advanced by the Court in *Segal* discriminates between rights to payment that, as of the time of filing, represent at least a contingent or potential property interest arising from prepetition events, even if unknown, and rights to payment either primarily tied to postpetition events or as to which the debtor has nothing more than a mere wish or expectation but no recognized legal entitlement until sometime *after* filing.⁷⁸ Accordingly, if the claim is critically tied to the past and could become legally cognizable under applicable law, the *Segal* test is satisfied notwithstanding the fact that the right is not yet mature—not yet actionable—and indeed may never mature.

The Ninth Circuit's decision in *In re Ryerson* is representative.⁷⁹ It involved the value of a payment that the debtor was entitled to receive upon termination of his employment under certain conditions.⁸⁰ As of the time of the debtor's bankruptcy filing, the right to such payment had not yet vested and was still contingent on the occurrence of future events not certain to occur.⁸¹ The debtor's employment was later terminated postfiling, and the right to the payment was therefore matured.⁸²

77. See, e.g., *Tyler v. D.H. Cap. Mgmt., Inc.*, 736 F.3d 455, 461 (6th Cir. 2013) (observing that most courts analyze whether an asset is estate property under *Segal*'s sufficiently rooted test); *Parks v. Dittmar (In re Dittmar)*, 618 F.3d 1199, 1207 (10th Cir. 2010); *Fix v. First State Bank of Roscoe*, 559 F.3d 803, 809 (8th Cir. 2009); *Fruehauf Trailer Corp. Ret. Plan No. 003 (In re Fruehauf Trailer Corp.)*, 444 F.3d 203, 211 (3d Cir. 2006); *Witko v. Menoye (In re Witko)*, 374 F.3d 1040, 1043 (11th Cir. 2004); *In re Yonikus*, 996 F.2d 866, 869, 869 n.3 (7th Cir. 1993); *In re Schneider*, 864 F.2d 683, 685 (10th Cir. 1988); *Rau v. Ryerson (In re Ryerson)*, 739 F.2d 1423, 1426 (9th Cir. 1984); *Chartschlaa v. Nationwide Mut. Ins. Co.*, 538 F.3d 116, 122 (2d Cir. 2008) (providing a discussion of when even postpetition-acquired property will be property of the estate when it is sufficiently rooted in the prebankruptcy past); *Riggs Nat'l Bank of Wash. D.C. v. First Am. Bank of Va. (In re Andrews)*, 80 F.3d 906, 910 (4th Cir. 1996); *Brown v. Dellinger (In re Brown)*, 734 F.2d 119, 123 (2d Cir. 1984); *accord Jess v. Carey (In re Jess)*, 169 F.3d 1204, 1207 (9th Cir. 1999) (holding that attorneys' fees paid postpetition but attributable to prepetition work were estate property even when receipt of a contingency fee depended on the debtor's continued postpetition services).

78. See *infra* text accompanying notes 115–21.

79. *Rau v. Ryerson (In re Ryerson)*, 739 F.2d 1423 (9th Cir. 1984). The Ninth Circuit's Bankruptcy Appellate Panel's decision in *Congrejo Invs., L.L.C. v. Mann (In re Bender)*, 385 B.R. 800 (B.A.P. 9th Cir. 2007), *appeal dismissed*, 586 F.3d 1159 (9th Cir. 2009), *cert. denied*, 568 U.S. 1085 (2013), appears to question the continued applicability of the *Segal* and *Ryerson* line of cases in the Ninth Circuit. *Bender* involved property transferred by the debtor to trust and then to an LLC in which the debtor had a one-third membership interest. *Id.* at *1. However, any suggestion that *Bender* might have been read at the time as casting into doubt the circuit court's continuing adherence to *Segal* is belied by the fact that, in an opinion issued *subsequent* to the BAP's decision in *Bender*, the Ninth Circuit relied on *Segal* in applying Code § 541(a). E.g., *Leroux v. CPA Ins. Co.*, 720 Fed. Appx. 832 (9th Cir.); *Yan v. Fu (In re Yan)*, 649 Fed. App'x 359 (9th Cir. 2016).

80. *Ryerson*, 739 F.2d at 1424.

81. *Id.*

82. *Id.*

The court concluded that this payment, although it did not become choate or payable until well after the filing of the bankruptcy case, was property of the estate because it related to prepetition services.⁸³ Thus, it was sufficiently rooted in the debtor's prebankruptcy past, despite the uncertainty as of the time of filing whether the right to the payment would ever actually come due.⁸⁴ In other words, under *Ryerson* and the traditional analysis governing claims that depend on both pre- and postpetition events, a postpetition benefit received pursuant to a prepetition entitlement is property of the estate.

B. Other Varieties of Straddle Claims

As with the contingent bonus payment in *Ryerson*, a tort claim based on exposure, contact, or circumstances occurring prior to filing bankruptcy is property of the estate, even if the cause, existence, and extent of the injury itself is not known until much later.⁸⁵ The tort victim's awareness of the cause of action should be irrelevant.⁸⁶ What is relevant is when the events giving rise to the claim primarily took place.⁸⁷ Consequently, when the cause of action accrues for state statute-of-

83. *Id.* at 1425–26.

84. *Id.* (pointing out as well that because the payment related to prepetition services it would also be swept up under § 541(a)(6) concerning after-acquired property in the form of “[p]roceeds, product, offspring, rents, and profits of or from property of the estate”).

85. *E.g.*, *Mueller v. Hall (In re Parker)*, 368 B.R. 86, *7 (B.A.P. 6th Cir. 2007) (not selected for official publication) (“[T]he question in this case is not whether the malpractice claim accrued, based on the moment the last element of the cause of action accrued, prior to [the debtor] filing bankruptcy, but whether the malpractice claim is sufficiently rooted in [the debtor]’s pre-bankruptcy past to constitute property of the estate.”); *Miller v. Pacific Shore Funding*, 287 B.R. 47, 50 (D. Md. 2002) (“Property of the debtor does not escape the bankruptcy estate merely because the debtor is unaware of its existence.”); *see also Tyler v. D.H. Cap. Mgmt., Inc.*, 736 F.3d 455, 462 (6th Cir. 2013) (“[A]ll causes of action that hypothetically could have been brought pre-petition are property of the estate. This is the case ‘even if the debtor[] w[as] unaware of the claim.’”) (internal citations omitted) (quoting *In re Michael*, 423 B.R. 323, 330 (Bankr. D. Idaho 2009); then quoting *In re Hettick*, 413 B.R. 733, 752–53 (Bankr. D. Mont. 2009) (“If the cause of action accrued prior to a debtor’s petition date, it is an asset that must be scheduled. . . . Moreover, the accrued cause of action is property of the estate even if the debtors were unaware of the claim when they filed for bankruptcy protection.”)).

86. *See Polis v. Getaways, Inc. (In re Polis)*, 217 F.3d 899, 902 (7th Cir. 2000) (noting even though the debtor did not bring her Truth in Lending Act and consumer protection claims until after filing for bankruptcy, the claims arose out of a transaction that occurred before bankruptcy and thus were property of her bankruptcy estate); *In re Marci*, No. 06 C 4441, 2007 WL 1958576, at *2 (N.D. Ill. June 29, 2007) (“[w]hether aware of his injury or not,” plaintiff’s claim arose prior to bankruptcy and thus belonged to bankruptcy trustee); *In re Saunders*, No. 94–23489–BKC–RBR, 2003 WL 23239155, at *4 (Bankr. S.D. Fla. Dec. 10, 2003) (“[E]ven though the state statute of limitations governing how long the plaintiff has to institute a malpractice action may not have begun, a debtor may have a property interest.”). A plaintiff’s discovery of his or her cause of action, while potentially relevant to a statute-of-limitations analysis, does not affect the accrual of his or her claim for determining the nature of the bankruptcy estate.

87. *See, e.g.*, authorities cited *supra* note 77 and *infra* note 242.

limitations purposes or otherwise has no bearing on the determination of if it does or does not fall under § 541(a)(1). In a post-*Ryerson* decision, the Ninth Circuit expressed the point as follows:

To determine when a cause of action accrues, we look to state law. . . . It is important, however, to distinguish principles of accrual from principles of discovery and tolling, which cause the statute of limitations to begin to run after accrual has occurred for purposes of ownership in a bankruptcy case. . . . We conclude that Cusano's open book account claim accrued for bankruptcy purposes to the extent that sums were owed on that account at the time he filed his petition. An action could have been brought for those sums at that time. Our conclusion is not affected by the fact that limitations on such an action had not yet begun to run.⁸⁸

Particularly illuminating, and quite characteristic of the traditional analysis that has controlled the determination of property of the bankruptcy estate, is the Third Circuit's decision in *In re O'Dowd*.⁸⁹ In that case, the debtor purchased an apartment building in 1990 containing undisclosed structural flaws.⁹⁰ In March 1992, the debtor filed a Chapter 11 petition and thereafter hired an attorney [Attorney Two] to represent her in both the bankruptcy case and in a malpractice action against the attorney [Attorney One] who had represented her in the real-estate purchase.⁹¹ In 1994, the debtor's case converted to Chapter 7,⁹² and a discharge order was entered in December 1994.⁹³ Shortly thereafter, Attorney Two withdrew and debtor hired Attorney Three to represent her in the malpractice action.⁹⁴ In May 1995, the trustee proposed to settle the malpractice case for \$10,000.⁹⁵ Debtor objected and the bankruptcy court allowed the case to proceed in state court with the understanding that the trustee would receive the first \$10,000 of proceeds.⁹⁶

The debtor subsequently fired Attorney Three and hired Attorney Four to represent her in the malpractice case, and in 1996 the case settled for an undisclosed amount.⁹⁷ Sometime later, the debtor discovered that Attorney Two had left out a number of causes of action against Attorney One, which were now time-barred.⁹⁸ In November 1996, the debtor brought a malpractice action against Attorneys Two and Three based on the omitted claims.⁹⁹ Attorney Three filed a motion to dismiss for

88. See *Cusano v. Klein*, 264 F.3d 936, 947 (9th Cir. 2001); *D.H. Capital Mgmt., Inc.*, 736 F.3d at 463 (“[A]ccrual for the purposes of § 541 is different from accrual for statute-of-limitations purposes.”); see also *infra* note 136 and accompanying text.

89. *O'Dowd v. Truegar*, 233 F.3d 197 (3d Cir. 2000).

90. *Id.* at 199.

91. *Id.* at 200.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

lack of standing on the ground that the action represented property of the estate.¹⁰⁰ At the direction of the state court, the parties returned to the bankruptcy court for a determination on Attorney Three's assertion.¹⁰¹ The bankruptcy court ruled that the postdischarge suit constituted property of the estate under *Segal*, despite the argument, with which the court agreed, that the cause of action did not *accrue* until 1996 when the debtor learned of the omitted claims, well after the debtor's bankruptcy case had been closed.¹⁰²

On appeal, the district court affirmed on the basis of the bankruptcy court's alternative analysis that, because the claims could be traced directly to Attorney One's prepetition conduct, the postpetition malpractice action represented an interest in property acquired by the estate after the commencement of the case within the meaning of § 541(a)(7).¹⁰³ The Third Circuit concurred.¹⁰⁴ Under either approach, the claim—which clearly did not arise until well after the commencement of the case—was property of the estate because, temporally, most (albeit surely not all) of the underlying circumstances and activities giving rise to its existence occurred in the debtor's prebankruptcy past.¹⁰⁵

Straddle claims also come in more than one flavor. In one type of situation, the debtor may have been exposed to a harmful agent prior to the commencement of the bankruptcy case but may not manifest a legal injury until after filing.¹⁰⁶ In another case, all of the elements of the cause of action may have occurred prior to bankruptcy filing, including the injury, but the debtor may not become aware of the casual connection until postfiling.¹⁰⁷ The first situation is properly analyzed under the *Segal* standard; namely, whether the claim is sufficiently rooted in the debtor's prebankruptcy past.¹⁰⁸ In the latter scenario, the claim belongs entirely to the past because, at filing, it was neither contingent nor uncertain in any fashion. Rather, it is simply that the victim did not discover the existence of the cause of action until

100. *Id.* at 201.

101. *Id.*

102. *Id.* at 201, 203.

103. *Id.* Code § 541(a)(7) includes as "property of the estate" any interest in property acquired by the estate after the commencement of the case. 11 U.S.C. § 541(a)(7).

104. *O'Dowd*, 233 F.3d at 203 (rejecting the debtor's argument that the claim belonged to her because it did not accrue under state law until after the bankruptcy case had been commenced).

105. *Id.* at 204 (noting the bankruptcy estate was the injured party).

106. That was, for example, the situation in *Cantu v. Schmidt* (*In re Cantu*), 784 F.3d 253, 255 (5th Cir. 2015). *See supra* text accompanying note 24.

107. *See, e.g., Arnot v. Endresen* (*In re Endresen*), 530 B.R. 856 (Bankr. D. Ore. 2015), *aff'd in part, rev'd in part*, 548 B.R. 258 (Bankr. 9th Cir. 2016); *In re Richards*, 249 B.R. 859, 861 (Bankr. E.D. Mich. 2000) ("All of the allegedly wrongful conduct giving rise to the debtor's claim occurred prepetition, and indeed more than twenty-five years prepetition. Further, although the diagnosis was made seven months after the petition was filed, that timing appears to have been more a result of happenstance than of medical necessity."). In some situations, of course, it is impossible to draw a fixed line in terms of when an injury is suffered because the onset and progression of a particular disease resulting from product exposure are not knowable with scientific certainty. *See infra* text accompanying note 275.

108. *Supra* text accompanying note 75.

much later, doubtlessly tolling the state statute of limitations, but having no effect on the fact that the claim is a property interest includable with the property of the estate.¹⁰⁹ Thus, although it is technically still governed by *Segal*, the conclusion that the interest belongs to the estate can be in little question or doubt. Nonetheless, as discussed below,¹¹⁰ without clearly distinguishing the two situations (or even acknowledging the significance of the distinction),¹¹¹ certain recent decisions have gone off the rails in both scenarios, applying a “discovery” or “accrual” rule, rather than a rule derived from and driven by the bankruptcy-specific principles that govern ownership of property interests in a bankruptcy case.

Rounding out the picture, it is helpful to point out that once the debtor discovers the existence of a claim belonging to his or her past, the obligation to notify the court is clear. Specifically, the duty of a debtor seeking shelter under the bankruptcy laws to disclose all assets, or potential assets, to the bankruptcy court is a continuing one: it does not end with the filing of the initial forms and schedules; rather, a debtor must amend his or her financial statements if circumstances change or new assets are discovered.¹¹² Because this duty derives from §§ 521(a)(1) and 541(a)(7) of the Code, the duty of continuing disclosure is not chapter-specific; it is applicable in *all* cases under the Code.¹¹³ Full and honest disclosure in a bankruptcy case assures equitable treatment and maximization of value for prepetition creditors.¹¹⁴ Indeed it is regarded as so crucial to the effective functioning of the federal bankruptcy system that 18 U.S.C. § 152 makes it a crime for any person to “knowingly and fraudulently conceal from a . . . trustee. . . in connection with a case under title 11, any property belonging to the estate of a debtor.”

C. The “Crop Disaster Payment” Cases

At first blush, three courts of appeals decisions might appear to cast into question the continued viability of *Segal* under the Code.¹¹⁵ However, even to the

109. See, e.g., *In re Carroll*, 586 B.R. 775, 782–83 (Bankr. E.D. Cal. 2018) (distinguishing between a situation where all of the elements of a legal interest exist as of the commencement of the case, regardless of the debtor’s knowledge, and circumstances where one or more element of the cause of action is missing); *Engelby v. I.C. Sys., Inc.*, No. 17-CV-0296, 2018 WL 1514246, at *6 (D. Minn. Mar. 27, 2018) (distinguishing the situation where an unlawful act occurs prefiling but no injury occurs until later, from a case where the unlawful acts themselves did not occur until after the filing of the petition); see also sources cited *supra* note 85; *infra* text accompanying notes 120–21.

110. See *infra* Section III.B.

111. See *infra* note 244.

112. See *Billups v. Pemco Aeroplex, Inc. (In re Burnes)*, 291 F.3d 1282, 1286 (11th Cir. 2002); *Brown Manufacturing v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 187, 207–08 (5th Cir. 1999); *In re De-Rosa Grund*, 544 B.R. 339, 376 (Bankr. S.D. Tex. 2016) (discussing a debtor’s continuing duty of disclosure in bankruptcy).

113. See 11 U.S.C. § 103.

114. See *supra* note 52.

115. They are: *Bracewell v. Kelly (In re Bracewell)*, 454 F.3d 1234 (11th Cir. 2006); *Burgess v. Sikes (In re Burgess)*, 438 F.3d 493 (5th Cir. 2006); *Drewes v. Vote (In re Vote)*, 276 F.3d 1024 (8th Cir. 2002).

extent that these cases represent good authority,¹¹⁶ they are, upon closer analysis, easily harmonized with the holding in *Segal* and the majority approach for determining when straddle claims represent property of the estate. All three cases involved the identical factual milieu—i.e., a postfiling, federal crop-disaster payment received by the debtor in respect of a prefiling crop loss.¹¹⁷ In concluding that the payment was *not* property of the estate, each of the opinions justified its holding on the ground that, as of the date of filing, Congress had not yet authorized the federal program under which the payments were made.¹¹⁸ Thus, at the time of filing, the prospect of recovery was nothing more than a “mere hope.” Even though the events triggering entitlement to payment were rooted in the past, the actual legal right to payment did not arise (exist) until *after* the bankruptcy filing.¹¹⁹

In sharp contrast with those decisions, in the typical straddle-claim situation, the claim does not depend on the promulgation of a new law or the creation of a new right after the commencement of the bankruptcy case. To the contrary, the right exists prepetition but is contingent, unknown, or for other reasons, not a fully choate legal interest as of the bankruptcy filing.¹²⁰ Conversely, in the case of a latent injury, the resultant claim is more than a mere hope or expectation: it is a well-recognized state or common law claim for relief, even if it is not yet ripe under state law. Therefore, the debtor’s knowledge, or even ability to know, of the claim should have no bearing on its inclusion in the bankruptcy estate.¹²¹

Illustrating the salience of the distinction between an established right to payment and a hope that such a right might arise in the future is the Eleventh Circuit’s decision in *In re Thomas*.¹²² The issue in *Thomas* involved a dispute over the proceeds of a postpetition real-estate sale that arose from a prepetition option contract. In a *per curiam* opinion, the court distinguished its earlier crop-disaster decision,¹²³ stating that, in the current case, the debtor had more than a “mere hope, wish and prayer” that he might profit from the option contract.¹²⁴ He had a valid,

116. In his dissent in *Bracewell*, Judge Pryor pointed out, *inter alia*, that the majority overlooked two “venerable” decisions of the Supreme Court (*Williams v. Heard*, 140 U.S. 529 (1891) and *Milnor v. Metz*, 41 U.S. 221 (1842)), which established that property rights are created by reason of losses suffered, not by later legislation providing compensation for such losses. 454 F.3d at 1251.

117. *Bracewell*, 454 F.3d at 1236; *Burgess*, 438 F.3d at 495; *Drewes*, 276 F.3d at 1026.

118. In *Drewes*, 276 F.3d at 1026, the court explicitly noted that this fact distinguishes the case from *Segal*.

119. The distinction between a legal right to payment (even if contingent) and a “mere hope” also finds instantiation in the Ninth Circuit’s decision in *Sliney v. Battley* (*In re Schmitz*), 270 F.2d 1254, 1258 (9th Cir. 2001), involving the value of future fishing quotas, granted seven years after filing, although calculated by reference to prefiling landings of halibut and sablefish.

120. *E.g.*, *In re Carroll*, 586 B.R. 775, 787–88 (Bankr. E.D. Cal. 2018).

121. See sources cited *supra* notes 85, 86, and *infra* note 136.

122. *Thomas v. Bender*, 516 Fed. App’x 875 (11th Cir. 2013).

123. See *Billups v. Pemco Aeroplex, Inc.* (*In re Burnes*), 291 F.3d 1282, 1286 (11th Cir. 2002).

124. *Thomas*, 516 Fed. Appx. at 878.

cognizable legal interest in the property as of the commencement of the case, even though that interest was not fully matured.¹²⁵

Similarly, in *In re Endresen*, in 2004, the debtors purchased ten residential lots in a Portland, Oregon subdivision, intending to use them as rental properties.¹²⁶ Unbeknownst to the debtors, these homes suffered from construction defects that, over time, resulted in significant damage.¹²⁷ The debtors filed bankruptcy in June 2011, and their case was closed as a “no asset” case in October of the same year.¹²⁸ In 2013, the debtors became coplaintiffs in a suit against the developer of the subdivision that included the debtors’ ten lots.¹²⁹ In that action, the debtors claimed to have first learned of the construction defects in 2012.¹³⁰ In 2014, the debtors settled their claims against the developer based on the construction defects for \$318,200.¹³¹ The trustee then sought to reopen the debtors’ bankruptcy case, urging that the settlement proceeds belonged to the bankruptcy estate.¹³²

Relying on Oregon law, the debtors countered that their construction defect claims did not “accrue” until they discovered their existence, which was well after their bankruptcy case had been not only been filed, but actually closed and that, consequently, the settlement proceeds in question were not property of the estate.¹³³ Certainly, the first part of the argument was true as a matter of Oregon law.¹³⁴ Citing the Ninth Circuit’s decision in *Cusano v. Klein*,¹³⁵ however, the bankruptcy court disagreed with the debtors’ legal analysis regarding § 541(a), noting that principles

125. *Id.*; see also *Tyler v. D.H. Capital Mgmt., Inc.*, 736 F.3d 455, 461 (6th Cir. 2013) (noting that most courts follow *Segal*).

126. 530 B.R. 856, 859–60 (Bankr. D. Or. 2015), *aff’d in part, rev’d in part* Arnot v. Endresen, 548 B.R. 258, 261 (B.A.P. 9th Cir. 2016). It is important to note that the issue on appeal from the bankruptcy court’s decision was whether the settlement proceeds, once they became property of the estate, were “proceeds” of the mortgages encumbering the lots, such that they became subject to liens of the holders of those mortgages and thereby enjoyed priority over the trustee’s claim. *Id.* at 264. While the BAP reversed the bankruptcy court’s decision awarding the trustee the share of the settlement proceeds that belonged to one of these lenders under the so-called equities of the case exception to § 552(b)(1) of the Code, the point to be made is that the threshold analysis of the bankruptcy court regarding whether the settlement proceeds were property of the estate to begin with was *undisturbed* on appeal. *Id.* at 273–74.

127. *Endresen*, 530 B.R. at 861.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 863.

134. See *Abraham v. T. Henry Const., Inc.*, 249 P.3d 534, 536 n.3 (Or. 2011); *Berry v. Branner*, 421 P.2d 996, 1000 (Or. 1966); *Tavtighian-Coburn v. All Star Custom Homes, LLC*, 337 P.3d 925, 926 (Or. Ct. App. 2014).

135. 264 F.3d 936, 947 (9th Cir. 2001).

of accrual *must be distinguished* from principles of discovery and tolling that might cause a statute of limitations to run after accrual has occurred.¹³⁶

The court continued that, in determining when a cause of action accrues for purposes of ownership in a bankruptcy proceeding, the time of discovery is *not* relevant to the inquiry.¹³⁷ Referring to *Segal* as the “touchstone” for ascertaining when assets are regarded as prepetition and, thus, property of the estate,¹³⁸ the court concluded that the construction defect, and the existence of the claim at issue, arose at the time of the faulty construction of the residences, years prior to the bankruptcy filing.¹³⁹ At that point in time (and at all points thereafter), the debtors had a legal right to seek redress from the developer for the construction flaws. The fact that these defects went undiscovered until after the closing of the case was, as the court phrased it, “merely fortuitous.”¹⁴⁰ In effect, all of the alleged wrongful conduct and the consequent injury and damages giving rise to the debtors’ claim occurred prepetition. For this reason, the claim was not only sufficiently rooted but actually completely rooted in the past.

III. STRADDLE CLAIMS IN THE CASE LAW: THE BURGEONING (AND WRONG) MINORITY VIEW

A. Pre-2015

Up until about the time of the Fifth Circuit’s *Cantu* decision,¹⁴¹ the overwhelming number of reported court decisions followed the type of analysis employed by the bankruptcy court in *Endresen* for deciding whether straddle claims

136. *Id.* at 947–48; *see* sources cited *supra* note 85; *see also* Goldstein v. Stahl (*In re* Goldstein), 526 B.R. 13 (Bankr. 9th Cir. 2015) (citing *Cusano* in support of the proposition that accrual for § 541 purposes is different from accrual for statute-of-limitations purposes).

137. *Endresen*, 530 B.R. at 864 (citing Tyler v. D.H. Capital Mgmt., Inc., 736 F.3d 455, 462 (6th Cir. 2013)).

138. *Id.* at 865. Other recent cases applying *Segal* consistent with this view include: *In re* Whittick, 547 B.R. 628, 635–36 (Bankr. D.N.J. 2016) (applying *Segal* to find that a prepetition loan approval gave the debtor an interest in funds that became property of the estate under §§ 541(a)(1) and (a)(6) when the funds were received postpetition); *In re* Kooi, 547 B.R. 244, 248 (Bankr. W.D. Mich. 2016) (noting that in applying § 541(a)(1), “most courts analyze whether the asset is ‘sufficiently rooted in the pre-bankruptcy past’ of the debtor”); *In re* Segura, No. 07-31907, 2016 WL 829830, at *2 (Bankr. N.D. Ohio 2016) (“Since *Segal*, courts, including the Sixth Circuit Court of Appeals, analyze whether an asset received by a debtor postpetition is ‘sufficiently rooted in the pre-bankruptcy past’ of the debtor such that it should be regarded as property of the bankruptcy estate.”); *see also* sources cited *supra* note 136.

139. *Endresen*, 530 B.R. at 865 (citing *In re* Richards, 249 B.R. 859, 861 (Bankr. E.D. Mich. 2000) (following *Segal*’s sufficiently rooted test)).

140. *Id.* (noting that this was likely due to the fact that the properties were rentals and that the Endresens were absentee landlords).

141. *See Cantu v. Schmidt (In re Cantu)*, 784 F.3d 253 (5th Cir. 2015).

belonged to the estate.¹⁴² For example, in *Field v. Transcontinental Ins. Co.*,¹⁴³ the court found a claim for bad-faith refusal to defend an insured constituted property of the estate, even though the debtor did not request, nor did the insurer refuse, indemnification until more than eight months after the bankruptcy case had been filed.¹⁴⁴ The district court in *Field* acknowledged as a “difficult question” whether the debtor had any prepetition cause of action as a matter of state law.¹⁴⁵ Ultimately, however, the court concluded that it was unnecessary to resolve that question “because the bankrupt’s estate includes not only claims that had accrued and were ripe at the time the petition was filed, but also those claims that accrued post-petition, but that ‘are sufficiently rooted in the pre-bankruptcy past.’”¹⁴⁶ As *Field* demonstrates, these decisions employing a *Segal* analysis included,¹⁴⁷ but were not limited to, situations involving latent tort injury.¹⁴⁸

Against this mostly unified judicial approach to straddle claims there was some, albeit largely scant, pre-2015 authority deviating from *Segal*’s sufficiently rooted approach and adopting the alternative view that in order for a debtor’s cause of action to be regarded as “estate property” it must have been “accrued” or

142. *E.g.*, Johnson, Blakely, Pope, Bokor, Ruppel & Burns, P.A. v. Alvarez (*In re Alvarez*), 224 F.3d 1273, 1276–77 (11th Cir. 2000) (the last of the three elements of the state-law cause of action for legal malpractice had been satisfied at the moment of the bankruptcy filing; therefore, the court found the claim to be property of the estate, holding that in deciding ownership over the claim for bankruptcy purposes, the time of discovery of the injury sufficient (or necessary) to commence the statute of limitations under state law is irrelevant); *see also* Casey v. Grasso (*In re Riccitelli*), 320 B.R. 483, 491 (Bankr. D. Mass. 2005) (opining that whether a cause of action is property of the estate does not turn on whether, under state law, the cause of action has accrued as of the petition date); *Richards*, 249 B.R. at 861 (determining whether a cause of action is property of the estate, the test is not the date that cause of action accrues under state law; appropriate inquiry is whether cause of action is sufficiently rooted in debtor’s prebankruptcy past).

143. 219 B.R. 115 (E.D. Va. 1998), *aff’d*, 173 F.3d 424 (4th Cir. 1999).

144. *Id.* at 118.

145. *Id.* at 119 (“In short, whether Dangerfield had a ripe, viable bad faith or declaratory judgment action at the time of the petition is a difficult question as to which there is no controlling precedent.”).

146. *Id.* (quoting *Segal*); *see also* cases cited *supra* note 85.

147. *Jenkins v. A.T. Massey Coal Co., Inc.* (*In re Jenkins*), 410 B.R. 182, 186–87 (Bankr. W.D. Va. 2008) (damages resulting from a personal-injury claim based on an incident occurring prepetition, but that were not manifest until after the commencement of the case, were nonetheless property of the estate); *In re Richards*, 249 B.R. 859, 861 (Bankr. E.D. Mich. 2000) (holding that cause of action for asbestos-related injuries was property of the estate).

148. Some examples of cases involving tort-based claims include: *In re Tomaiolo*, 205 B.R. 10, *aff’d sub nom.* Tomaiolo v. Rodolakis (*In re Tomaiolo*), No. 90-40350, 2002 WL 226133 (D. Mass. Feb. 06, 2002) (involving legal malpractice claims); *Winick & Rich, P.C. v. Strada Design Assocs.* (*In re Strada Design Assocs.*), 326 B.R. 229 (Bankr. S.D.N.Y. 2005) (stating, also in connection with an analysis of legal malpractice claims, “[s]ection 541(a) is not restricted by state law concepts such as when a cause of action ripens or a statute of limitations begins to run, and ‘property of the estate’ may include claims that were inchoate on the petition date”).

“discovered” consonant with state-law considerations of ripeness and statute-of-limitations analysis.¹⁴⁹ The two most notable decisions were the bankruptcy courts’ opinions in *In re Smith*¹⁵⁰ and *In re Holstein*,¹⁵¹ although those cases, like *Cantu* itself,¹⁵² were capable of being read somewhat more narrowly, as explained more fully below.

To begin with, the court in *Smith* proceeded from the misbegotten premise that “[s]tate law determines when an interest becomes property of the estate.”¹⁵³ It is true that, unless some federal interest dictates otherwise, state law generally defines what constitutes a property interest.¹⁵⁴ However, as discussed earlier, it is widely understood that what is property of the bankruptcy estate is a matter determined solely by federal law.¹⁵⁵ Multiple circuit courts of appeal have recognized that the breadth of the Code’s articulation of “property of the estate” reflects Congress’s intent to include “[e]very conceivable interest of the debtor, future, nonpossessory, contingent, speculative, and derivative, is within the reach of § 541.”¹⁵⁶ This is intended to ensure that anything of value extant as of the commencement of the case, whether considered “property” or not under state law,¹⁵⁷ can be liquidated and distributed in order to maximize prepetition creditors’ recovery.

On the merits, the court in *Smith* reached its decision that the debtor’s postbankruptcy settlement payment from the Fen-Phen class action was not property of the estate based on the court’s interpretation of the Kansas statute regarding accrual of causes of action for state-law personal-injury claims.¹⁵⁸ Pursuant to that statute, which imposes a two-year statute of limitations for such claims, a cause of action does not accrue until a wrongful act causes substantial injury.¹⁵⁹ Thus, according to the court in *Smith*, even though the debtor’s use of the drug occurred

149. See *supra* text accompanying notes 25–31.

150. 293 B.R. 786 (Bankr. D. Kan. 2003).

151. *Holstein v. Knopfler*, 321 B.R. 229 (Bankr. N.D. Ill. 2005); see also *In re Hertogh*, 412 B.R. 24 (Bankr. D. Conn. 2009); *Swift v. Seidler (In re Swift)*, 198 B.R. 927 (Bankr. W.D. Tex. 1996).

152. See *supra* text accompanying note 32.

153. *Smith*, 293 B.R. at 778–79.

154. See *supra* text accompanying notes 36, 55, and 65.

155. See *Sierra Switchboard Co. v. Westinghouse Elec., Inc.*, 789 F.2d 705, 708–09 (9th Cir. 1986); see also authorities cited *supra* notes 42, 54, and 111 (making clear beyond any serious argument that property of the estate, ultimately, is a matter determined under federal law).

156. *Tyler v. D.H. Cap. Mgmt., Inc.*, 736 F.3d 455, 461 (6th Cir. 2013) (quoting *In re Yonikus*, 996 F.2d 866, 869 (7th Cir. 1993); see also *Rau v. Ryerson (In re Ryerson)*, 739 F.2d 1423, 1425 (9th Cir. 1984) (citing legislative history); *In re Dittmar*, 618 F.3d 1199, 1207 (10th Cir. 2010) (“[E]very conceivable interest of the debtor, future, nonpossessory, contingent, speculative, and derivative, is within reach of 11 U.S.C. § 541.”); additional authorities cited *supra* note 43.

157. This, of course, includes causes of action in favor of the debtor. See sources cited *supra* note 43.

158. K.S.A. § 60-513(b).

159. *In re Smith*, 293 B.R. 786, 789 (Bankr. D. Kan. 2003).

prefiling, the trustee could not prevail in claiming the settlement proceeds as property of the estate without showing that the debtor suffered substantial injury, and that such injury was reasonably ascertainable, as of the time of the commencement of the debtor's bankruptcy case.¹⁶⁰

In the face of myriad authority that accrual for purposes of the commencement of a state statute of limitations is *not* determinative of whether a claim is property of the estate,¹⁶¹ the *Smith* court's legal holding was and remains suspect. In addition, the facts of the case itself are distinguishable from cases like *Endresen*. In *Smith*, the trustee could demonstrate only ingestion of Fen-Phen prior to the bankruptcy filing, but no prefiling injury.¹⁶² Thus, a key element of the applicable state-law cause of action could not be established as of the date of filing. In *Endresen*, although not yet known by the debtors, all of the elements of the cause, including injury and consequent damages, had unquestionably occurred or were satisfied before the commencement of the debtors' bankruptcy case.¹⁶³

This distinction might be pressed into service to form a basis for reconciling the outcomes in the two cases.¹⁶⁴ However, it would still entail carving out an exception to *Segal* that would be difficult to square with the actual holding of the Supreme Court in that case, inasmuch as the absence of observable injury may bear on, but does not resolve definitively, which side of the bankruptcy filing the claim is most critically rooted.¹⁶⁵ Thus, at the time it was decided, *Smith* was out-of-step with the strong, prevailing majority approach for deciding when emerging property interests constitute property of the estate.¹⁶⁶

The claim at issue in *Holstein* was the debtor's cause of action against his former bankruptcy lawyers, who, the debtor maintained, had committed malpractice in the handling of an objection to discharge in the case, thereby causing the debtor's

160. *Id.*

161. *E.g.*, *D.H. Cap. Mgmt., Inc.*, 736 F.3d at 461 ("The nature and extent of property rights in bankruptcy are determined by the 'underlying substantive law.'") (citing *Raleigh v. Ill. Dep't of Rev.*, 530 U.S. 15, 20 (2000)). "But 'once that determination is made, federal bankruptcy law dictates to what extent that interest is property of the estate' for the purposes of § 541." *Id.* (citing *Bavely v. United States (In re Terwilliger's Catering Plus, Inc.)*, 911 F.2d 1168, 1172 (6th Cir. 1990)); *Cusano v. Klein*, 264 F.3d 936, 947 (9th Cir. 2001) ("It is important, however, to distinguish principles of accrual from principles of discovery and tolling, which may cause the statute of limitations to begin to run after accrual has occurred for purposes of ownership in a bankruptcy case."); *see also supra* notes 85 and 136 and accompanying text.

162. *Smith*, 293 B.R. at 790 (noting that the plaintiff was asymptomatic when she discontinued use of the drug and filed for bankruptcy).

163. *See supra* text accompanying notes 114–19.

164. The same distinction could be made in *Cantu v. Schmidt (In re Cantu)*, 784 F.3d 253 (5th Cir. 2015). *See supra* notes 25–28, 32 and accompanying text.

165. Some decisions, even in purporting to follow *Segal*, make more of the distinction than is warranted. *See, e.g.*, *In re Davis*, 589 B.R. 146 (Bankr. E.D. Tenn. 2018).

166. It is also out of step with many cases decided since 2015. *See cases cited supra* note 138 and *infra* note 242.

discharge to be denied unnecessarily.¹⁶⁷ The court concluded the claim was not property of the estate because there was no injury to the debtor until the actual denial of discharge, which did not occur until three years into the case.¹⁶⁸ Of course, this rationale ignored the fact that simply because the question of damages flowing from a breach of duty may still be contingent should have no bearing under a *Segal*-type analysis, provided that the conduct at issue predated in the main the bankruptcy filing.¹⁶⁹

The trustee in *Holstein* did not disagree with the court's conclusion that the debtor's claim did not accrue under Illinois law until postfiling.¹⁷⁰ Rather, he asserted that the date of filing was irrelevant because *Segal*'s sufficiently rooted test focuses on when the breach of duty occurred.¹⁷¹ While conceding that it was taking a narrower view of the Supreme Court's holding in *Segal* than what it acknowledged to be the interpretation followed by the majority of courts,¹⁷² the court rejected the argument on the ground that "[t]he broader reading some courts have given *Segal* is not consistent with *Butner* or with the plain reading of § 541(a)(1)."¹⁷³ Instead, the court held that *Segal* "does not expand estate property to include legal or equitable interests a debtor acquires post-petition, as long as a clever trustee can tie those interests to the 'pre-bankruptcy past.'"¹⁷⁴ Therefore, because the debtor's cause of action for legal malpractice did not exist under Illinois law as of the commencement of his bankruptcy case, the court concluded that it was not property of the estate.¹⁷⁵

Once again, the opinion in *Holstein* can be factually distinguished from a number of other straddle-claim cases that reach the opposite conclusion. Specifically, the *Holstein* court based its holding on the elements of malpractice in Illinois: (1) an attorney-client relationship, giving rise to a duty of care; (2) a breach of that duty; and (3) actual damages or injury proximately resulting from the breach.¹⁷⁶ The court found that Holstein suffered no injury until after his discharge was denied, and until that point, there was still a chance that the discharge objection would be unsuccessful.¹⁷⁷ Therefore, the court reasoned, there could have been no legal malpractice claim as of the commencement of the case.¹⁷⁸ Conversely, as noted

167. *Holstein v. Knopfler*, 321 B.R. 229, 233 (Bankr. N.D. Ill. 2005).

168. *Id.* at 236 (noting that, as of the date of the filing of the case, the debtor had not yet suffered any loss).

169. *Supra* text accompanying notes 42 and 78.

170. *Holstein*, 321 B.R. at 237.

171. *Id.*

172. *Id.* at 237–38.

173. *Id.* at 238.

174. *Id.*

175. *Id.*

176. *Id.* at 235.

177. *Id.* at 236.

178. *Id.*; cf. *Witko v. Menotte (In re Witko)*, 374 F.3d 1040 (11th Cir. 2004). In *Witko*, the court concluded that under state law the debtor's legal malpractice cause of action did not exist until his alimony action concluded with an adverse outcome that was proximately caused by his attorney's negligence. *Id.* at 1043. That did not happen until after the debtor's bankruptcy filing and thus could not be traced to an injury occurring prior to or contemporaneous with the bankruptcy filing. *Id.* at 1044. For an example of a case where,

above, where all of the elements of the debtor's claim have occurred prior to the filing of the bankruptcy case, the prevailing view is that the claim is swept under § 541(a) even if the debtor had no knowledge of the claim's existence until a later time.¹⁷⁹ Indeed, *Holstein* might also be distinguished based on the fact that the breach of duty itself, and not just the injury flowing therefrom, occurred postfiling. Thus, it is possible to rationalize (albeit imperfectly) the decision in *Holstein* with the majority approach to straddle claims, although again, *Holstein*'s narrow construction of *Segal*, and its deference to state-law analysis regarding accrual, were and remain untenable.¹⁸⁰

Unlike the court's opinion in *Smith*,¹⁸¹ the *Holstein* opinion did properly recognize that federal law determines when a debtor's interest in property is property of the estate under § 541 of the federal Bankruptcy Code.¹⁸² However, the decision to reflexively revert to state-law concepts nonetheless represented a weak and largely isolated minority view at the time the opinion was issued. Moreover, *Holstein*'s suggestion that the reading given to *Segal* by the majority of courts is not consistent with the language of Code § 541(a)(1)¹⁸³ is questionable,¹⁸⁴ and it has received little traction in subsequent decisional law. For example, in *Putizer v. Ace Hardware Corp.*,¹⁸⁵ decided by a district court in the same district as the bankruptcy court's decision in *Holstein*, the debtor argued that his fraud claims belonged to him rather than his bankruptcy estate because, due to Ace's fraudulent concealment, he

based on a *Segal*-type analysis, the legal malpractice was found to occur at (rather than after) the filing of the bankruptcy petition, and the resultant claims were determined to be includable in the debtor's estate irrespective of whether they had technically accrued prepetition under state law, see *In re Sheikhzadeh*, No. 14-14219-BFK, 2018 WL 3197752, at *6 (Bankr. E.D. Va. 2018).

179. See, e.g., *In re Carroll*, 586 B.R. 775, 790 (Bankr. E.D. Cal. 2018) (contrasting a case where there was no prepetition injury with the instant cases where the claims in question were "not merely 'rooted' in the prepetition period, but which germinated, sprouted, grew, blossomed, and became anchored prepetition"); *In re Endresen*, 530 B.R. 856 (Bankr. D. Ore. 2015), *aff'd in part, rev'd in part*, *Arnot v. Endresen*, 548 B.R. 258 (Bankr. 9th Cir. 2016) (discussed *supra* text accompanying notes 126–140); see also *supra* notes 106–09 and accompanying text.

180. Whatever factual nuances might be found to offer some superficial harmonization of *Holstein* don't alter the basic fact that, ultimately, the court reached its decision based on state-law rubrics rather than an overriding federal standard. On this critical aspect, there is no way to reconcile *Holstein* with decisions such as *Winick & Rich, P.C. v. Strada Design Assocs. (In re Strada Design Assocs.)*, 326 B.R. 229 (Bankr. S.D.N.Y. 2005) and *In re Tomaio*, 205 B.R. 10, 13 (Bankr. D. Mass. 1997), *aff'd sub nom. Tomaio v. Rodolakis (In re Tomaio)*, No. 90-40350, 2002 WL 226133 (E.D. Mass. Feb. 6, 2002).

181. See *supra* text accompanying note 153.

182. *Holstein*, 321 B.R. at 234 (drawing the distinction between this point and the role of state law generally in defining property interests).

183. *Id.* at 238.

184. The language of the 1898 Act that Court was construing in *Segal* (§ 70a(5)) was for all intents and purposes identical to the language of Code § 541(a)(1). See *supra* note 68 and accompanying text.

185. 50 F. Supp. 3d 964 (N.D. Ill. 2014).

was not aware of his cause of action until after the close of his bankruptcy case.¹⁸⁶ The court had this to say:

For the purpose of § 541 of the Bankruptcy Code, a claim or cause of action has accrued when all of the “elements of the cause of action had occurred as of the time the bankruptcy case was commenced, so that the claim is sufficiently rooted in the debtor’s prebankruptcy past.”¹⁸⁷

The court continued: “[A] debtor’s actual knowledge of a claim is irrelevant to whether he had a property interest at the time of bankruptcy.”¹⁸⁸

The opinion in *Putizer* only mentioned *Holstein* once, and then only for the innocuous proposition that property acquired postpetition is not property of the estate.¹⁸⁹ In sum, therefore, both *Smith* and *Holstein*, and perhaps one or two others like them,¹⁹⁰ were outliers when decided. Furthermore, in each case, the trustee was unable to prove the existence of an injury prior to the filing of the bankruptcy case, and thus, they could be read as stopping short of a wholesale rejection of the majority approach to straddle claims.¹⁹¹ However, the larger point to be made is that, although

186. *Id.* at 983.

187. *Id.* at 982 (quoting *Paul v. USIS Commercial Servs., Inc.*, No. 04 RB 1384 CBS, 2006 WL 2385202, at *2 (D. Colo. Aug. 17, 2006)); *Segal v. Rochelle*, 382 U.S. 375, 380 (1966).

188. *Putizer*, 50 F. Supp. 3d at 983. The court proceeded to cite the following in support of this proposition:

See In re Polis, 217 F.3d 899, 902 (7th Cir. 2000) (even though debtor did not bring her Truth in Lending Act and consumer protection claims until after filing for bankruptcy, the claims arose out of a transaction that occurred before bankruptcy and thus were property of her bankruptcy estate); *In re Macri*, No. 06 C 4441, 2007 WL 1958576, at *2 (N.D. Ill. June 29, 2007) (“[w]hether aware of his injury or not,” plaintiff’s claim arose prior to bankruptcy and thus belonged to bankruptcy trustee); *In re Saunders*, No. 94-23489-BKC-RBR, 2003 WL 23239155, at *4 (Bankr.S.D.Fla. Dec. 10, 2003) (“[E]ven though the state statute of limitations governing how long the plaintiff has to institute a malpractice action may not have begun, a debtor may have a property interest.”). A plaintiff’s discovery of his cause of action, while potentially relevant to a statute of limitations analysis, does not affect the accrual of his claim for determining the nature of the bankruptcy estate. *In re Macri*, 2007 WL 1958576, at *2; *In re Swift*, 129 F.3d 792, 796 (5th Cir. 1997); *In re Tomaiolo*, 205 B.R. 10, 15 (Bankr. D. Mass.1997). Regardless of Lorenz’s ignorance of his claim, his interest in this cause of action against Ace remains with the bankruptcy estate. The bankruptcy trustee, rather than Lorenz or Arvada Ace, is the real party in interest under Rule 17(a), and only the bankruptcy trustee appointed to Lorenz’s Chapter 7 case is entitled to bring these claims.

Id. at 983.

189. *See id.* at 982.

190. *See* cases cited *supra* note 151.

191. *See supra* notes 11 and 111. In other words, some of the actual elements of the cause of action did not arise until after commencement of the case. This is distinguishable

a few aberrations could be found, until approximately 2015 there seemed to be little disagreement over the fact that claims by and claims against the debtor should be assessed in essentially the same manner for purposes of ascertaining, respectively, the property of the estate and claimholders entitled to participate in the bankruptcy case.

B. Post-2014

As discussed earlier, in 2015, the Fifth Circuit issued its opinion in *In re Cantu*,¹⁹² expressly rejecting application of the “prepetition relationship” test (which applies when evaluating claims against the estate) for purposes of deciding whether a debtor’s cause of action belonged to the estate, instead embracing what the court referred to as the “accrual approach.”¹⁹³ However, the *Cantu* court also qualified its holding that, “as a rule, a cause of action accrues when a wrongful act causes *some* legal injury,” by adding, “even if the fact of injury is not discovered until later, and even if all resulting damages have not yet occurred.”¹⁹⁴ Thus, the muddying of the waters began in earnest.

The picture became considerably murkier when the bankruptcy-court decision in *In re Wagner* issued a short time later.¹⁹⁵ The debtor in *Wagner* had a medical procedure performed prior to filing his no-asset Chapter 7 case.¹⁹⁶ After the discharge was entered and the case closed, Wagner allegedly first discovered the possibility that an implant used in the procedure might be defective.¹⁹⁷ Approximately three years later, a settlement program to compensate eligible claimants was established, and the United States Trustee moved to reopen the case to allow the case trustee to administer the debtor’s settlement proceeds for the benefit of the estate’s creditors.

Predictably, the debtor argued that the proceeds were not property of the estate because, under applicable state law, the debtor had not sustained any damage “as of the commencement of the case.”¹⁹⁸ The trustee countered that the claim giving

from the situation where all of the elements have been satisfied, including a legal injury, but the debtor is not yet aware of either the harm or the cause of the harm. *See supra* text accompanying notes 106–07. It is a distinction that should not matter under a *Segal*-type analysis but has been one that may make a difference if the issue is controlled by state-law accrual rules. *See supra* text accompanying note 109.

192. *Cantu v. Smith*, (*In re Cantu*) 784 F.3d 253 (5th Cir. 2015).

193. *See supra* text accompanying notes 20–23. Recall, this was the view expressly and roundly rejected in determining when a claim *against* the estate arises. *See supra* notes 39–40 and accompanying text.

194. *Cantu*, 784 F.3d at 260 (emphasis omitted) (citing *Murphy v. Campbell*, 964 S.W.2d 265, 270 (Tex. 1997)).

195. *See* 530 B.R. 695 (Bankr. E.D. Wis. 2015).

196. *Id.* at 697.

197. *Id.*

198. Of course, often it cannot be known if the damage was suffered as of the commencement of the case. This is the problem with the “accrual approach,” at least to the extent that it is understood as requiring actual knowledge of the claim. *See supra* note 121 and accompanying text. A discovery rule pushes the envelope further, but at the expense of foregoing the bankruptcy goal of drawing a clean line between the debtor’s past and the

rise to the settlement existed for purposes of § 541(a) prior to the filing date.¹⁹⁹ Initially, the court recognized both the continuing viability of *Segal* in the Seventh Circuit, and that accrual for statute-of-limitations purposes is different than accrual for determining property of the estate.²⁰⁰ Nonetheless, the court continued that § 541(a)(1) of the Code “does not indicate how a court should determine whether a claim is sufficiently matured as of ‘the commencement of a case’ to constitute ‘an interest of the debtor in property.’”²⁰¹ Then, giving the impression that they were truly of equal prevalence and dignity in the case law, the court identified what it referred to as the two competing theories that “courts and litigants have applied” for resolving the question—namely, the claim accrual and the sufficiently rooted tests—and stated that it would analyze the issue under each approach.²⁰²

Looking first to state law, the court noted that Wisconsin follows the “discovery rule” to determine when a claim accrues.²⁰³ Under this rule, a cause of action accrues either upon discovery of injury from the wrongful conduct, or when, in the exercise of reasonable diligence, the injury should have been discovered.²⁰⁴ Again, this ties the question of the scope of § 541(a), as it relates to causes of action of the debtor, to the determination of when the state statute of limitation commences to run.²⁰⁵ Although acknowledging that the discovery rule has its critics,²⁰⁶ the court concluded that it was appropriate for situations where, as in this case, there is a gap between the harm and the manifestations of symptoms or discovery of the injury caused by the harmful conduct.²⁰⁷

future. This, in turn, impinges on the distributional goals of the bankruptcy system as well. *See supra* note 31 and *infra* notes 255, 258, 266 and accompanying text. Moreover, whatever other disagreements may exist over whether *Segal* remains viable under the Code and how it should be applied, the overwhelming majority of cases hold that a prepetition claim becomes property of the estate without regard to the debtor’s lack of knowledge or awareness of the cause of action. *E.g., In re Carroll*, 586 B.R. 775, 782 (Bankr. E.D. Cal. 2018) (“Congress does not qualify or limit a debtor’s legal interest based on whether the debtor did or did not know that she had a legal interest (a cause of action) or whether state law tolls the running of the statute of limitations . . . based on Debtor not being aware of such interests.”) (citing *In re Ross*, 548 B.R. 632, 641 (Bankr. E.D.N.Y. 2016), *aff’d*, *Mendelsohn v. Ross*, 251 F. Supp. 3d 518 (E.D.N.Y. 2017)).

199. *Wagner*, 530 B.R. at 698–99.

200. *Id.* at 699–700; *see also* sources cited *supra* note 136.

201. *Wagner*, 530 B.R. at 701.

202. *See id.*

203. *Id.* at 698.

204. *Id.* at 702 (citing *Hansen v. A.H. Robins, Inc.*, 335 N.W.2d 578, 583 (Wis. 1983)).

205. Though sometimes, indeed often, overlooked by courts, it will be recalled that “accrual” of a cause of action—when it becomes legally enforceable—may precede actual discovery of the same. *See supra* notes 25–28, 32 and accompanying text.

206. *Wagner*, 530 B.R. at 703 (quoting *State Farm Life Ins. v. Swift (In re Swift)*, 129 F.3d 792, 796 (5th Cir. 1997)).

207. Of course, not all straddle-claims cases involve tort causes of action. *See supra* note 120. However, it is not clear if the court meant to limit its holding. *See Wagner*, 530 B.R. at 705 (adopting the “discovery rule” in the case of “injuries that are potential but not certain”).

Turning to the *Segal* analysis, the court reviewed several cases with similar facts in which the trustee prevailed because of the finding that most of the critical conduct giving rise to the claim occurred in the prebankruptcy past.²⁰⁸ These included circumstances, most germane to the court, where the disease resulting from exposure to the harmful product was not known or diagnosed until after the bankruptcy filing.²⁰⁹ However, the court, expressing sympathy with the opinion in *Holstein*,²¹⁰ reproved the sufficiently rooted test and concluded that “[i]n the case of injuries that are potential but not certain, the ‘discovery rule’ adopted by the state of Wisconsin is the fairer and more predictable rule in determining whether a claim is property of the estate.”²¹¹

The dial was turned a notch further a year later with the issuance of another bankruptcy-court opinion in *In re Harber*.²¹² Similar to *Wagner*, one of the joint debtors in *Harber*, Elizabeth Harber, had allegedly defective medical devices implanted in two hip-replacement surgeries prior to the bankruptcy filing.²¹³ The difference was that, in this case, the debtor was aware of the potential claim pre-filing and had even joined a class-action lawsuit against the device manufacturer.²¹⁴ The debtors listed the claim in their schedules but noted that the hip replacements were currently operating satisfactorily.²¹⁵ On motion of the trustee, the court later closed the case, subject to reservation of the claim against the device manufacturer.²¹⁶

Several months later, Mrs. Harber learned of elevated metals levels in her blood and of the need for hip-revision surgery.²¹⁷ Upon being advised by the Harbers’ bankruptcy counsel of a potential settlement with the device manufacturer, the trustee moved to reopen the Harbers’ case and sought turnover of any settlement

208. *Wagner*, 530 B.R. at 704–05 (citing *In re Simmons*, 520 B.R. 136 (Bankr. M.D. Fla. 2014); *In re Webb*, 484 B.R. 501 (Bankr. M.D. Ga. 2012); *In re Richards*, 249 B.R. 859 (Bankr. E.D. Mich. 2000); *Casey v. Grasso (In re Riccitelli)*, 320 B.R. 483 (Bankr. D. Mass. 2005)).

209. *E.g., Richards*, 249 B.R. at 861–62.

210. Discussed *supra* text accompanying notes 167–75. Of course, a discovery rule arguably goes beyond the holding in *Holstein*, although these decisions sometimes use the terms “accrual” and “discovery” interchangeably, so it’s difficult to line them up with perfect clarity.

211. *Wagner*, 530 B.R. at 705; *cf. Gaito v. A-C Liab. T.*, 542 B.R. 155, 171 (E.D. Pa. 2015). The 14 cases were heard in the District Court for the Eastern District of Pennsylvania as part of the consolidated asbestos products-liability multidistrict litigation. The court also eschewed a sufficiently rooted test. Instead, applying the discovery test under maritime law, the court determined that a “cause of action accrues when the injury manifests itself,” with the critical inquiry focusing on when the plaintiff had knowledge of the injury and its cause. *Id.* at 164 n.7 (citing *Nelson v. A.W. Chesterson Co.*, 2011 WL 6016990, MDL No. 875 (E.D. Pa. Oct. 27, 2011)).

212. *See Sikirica v. Harber*, 553 B.R. 522 (Bankr. W.D. Pa. 2016).

213. *Id.* at 525; *Wagner*, 530 B.R. at 697.

214. *Harber*, 553 B.R. at 526.

215. *Id.*

216. *Id.*

217. *Id.*

proceeds that the debtors might receive from the manufacturer.²¹⁸ The debtors opposed the trustee's motion on the basis that Mrs. Harber sustained no injury until well after the bankruptcy filing, and therefore, they contended the proceeds did not represent property of the estate.²¹⁹ Specifically, the debtors urged the court to employ the "accrual approach" for deciding if the proceeds were estate property, with accrual occurring when a cause of action arises under applicable state law.²²⁰ The trustee countered that the court should use the *Segal* test, focusing, of course, on whether the claim was sufficiently rooted in the debtors' bankruptcy past.²²¹ Like the court in *Wagner*, the *Harber* court suggested that it would analyze the facts under each approach.²²²

Beginning with what it termed "the state law accrual approach," the court observed that, under Pennsylvania law, a cause of action accrues when the holder has "the right to institute suit."²²³ In the case of a cause of action involving latent injury, that means when the claimholder discovers or should have discovered that he or she had been injured.²²⁴ Thus, unlike other decisions that distinguished between accrual and discovery,²²⁵ the *Harber* court conflated the two.²²⁶

The trustee had entreated that the court should follow the Third Circuit's holding in *In re Grossman's*,²²⁷ wherein the court parted company with its earlier decision on the issue and adopted the "prepetition relationship" approach for determining the existence of a claim under § 101(a)(5).²²⁸ The *Harber* court declined, citing the Fifth Circuit's rejection of that approach in *Cantu* in the context of the determination of the property of the estate.²²⁹ In justifying its decision, the

218. *Id.*

219. *Id.* at 526–27.

220. *Id.* at 528. Note this rule would seem to be narrower than the rule in *Wagner*, which focused on *discovery*. See *supra* notes 203–207 and accompanying text, although the *Harber* court later seemed to meld the two together. See *infra* note 226 and accompanying text.

221. *Harber*, 553 B.R. at 528.

222. *Id. Wagner*, 520 B.R. at 701.

223. *Harber*, 553 B.R. at 528 (observing that, in the context of a personal-injury suit, this included actual damage suffered as a result of the defendant's breach of a legal duty).

224. *Id.* at 529 (quoting *Wilson v. el-Daief*, 964 A.2d 354, 361–62 (Pa. 2008)). Thus, the court seemed to ignore the distinction recognized in other cases between the incurring of a legal injury and discovery of the same. See, e.g., *supra* note 25. Of course, that distinction is itself a fuzzy one because identifying when a legal injury is incurred can be a tricky proposition. See *infra* note 275.

225. See, e.g., text accompanying notes 25 and 37.

226. See also *infra* notes 314–15 and accompanying text for an example of another decision committing essentially the same *faux pas*.

227. *Harber*, 553 B.R. at 527 (citing *Jeld-Wen v. Van Brunt (In re Grossman's, Inc.)*, 607 F.3d 114, 125 (3d Cir. 2010) (en banc)).

228. *In re Grossman's, Inc.*, 607 F.3d at 121, 125; see *supra* text accompanying note 40–41; see also *In re Rutenberg*, 745 F.3d 647, 652 (3d Cir. 2014) (noting that the focus is on when the claims exists, not when it accrues).

229. *Harber*, 553 B.R. at 529–30 (quoting *Cantu v. Schmidt (In re Cantu)*, 784 F.3d 253, 259 (5th Cir. 2015)).

court noted that the legislative history with respect to the breadth of “property of the estate,” while fulsome, was not *quite* as expansive as the expressions in the legislative history relating to the scope of the definition of “claim.”²³⁰ Based on that razor-thin reed, the court returned to the claim-accrual approach dictated by state law for resolution of the issue.²³¹ Because Mrs. Harber had exhibited no symptoms or damages relating to the implants as of the date of the debtors’ bankruptcy filing, the court thus concluded that her claim did not constitute estate property.²³²

Next, the court purported to consider the sufficiently rooted test, acknowledging the continued vitality of *Segal* under the Code.²³³ Rather than actually doing so, however, the court observed that different decisions had employed different approaches to the application of *Segal*, ranging at the extremes from whole-hearted adoption to outright rejection.²³⁴ In between, the court identified what it termed a “blended approach,” marrying a strict *Segal* analysis with elements of the state-law accrual approach.²³⁵ In support of its decision to adopt this blended approach, the court stated that “complete adherence to *Segal*, without any consideration of the state accrual test, is inconsistent with *Butner* and the plain language of section 541(a)(1).”²³⁶

How this marriage of two very dissimilar approaches occurs, and what it looks like, was left unclear by the *Harber* court, to say the least. The court’s description of the blended approach, in fact, consisted solely of a citation to language from a Massachusetts bankruptcy-court decision²³⁷ to the effect that considerations of the extent to which the claim is rooted in the prebankruptcy past should be tempered by considerations bearing on the debtor’s ability to make a fresh start.²³⁸

230. *Id.* at 530. The court also concluded, without much by way of explanation, that there was “no proof” that the Third Circuit intended its holding of when a claim arises *against* the estate to apply to circumstances involving the question of when claims *by* the estate arise. *Id.* For an equally unsatisfying explanation for the distinction between the treatment of claims against the estate versus claims by the estate, see *supra* notes 29–30 and accompanying text.

231. *See Harber*, 553 B.R. at 530.

232. *Id.* at 531.

233. *Id.* (“There can be little doubt that *Segal* retains vitality after the passage of the Bankruptcy Code in 1977.”).

234. *Id.* at 531–32.

235. *Id.* at 532.

236. *Id.* In point of fact, it is inconsistent neither with the full holding of the Court in *Butner v. United States*, 440 U.S. 40, 55 (1979), *infra* text accompanying note 252, nor the scopic nature of the definition of “property of the estate” in § 541(a)(1), *supra* notes 43–44).

237. *Harber*, 553 B.R. at 532 (citing *Vasey v. Grasso (In re Riccitelli)*, 320 B.R. 483 (Bankr. D. Mass. 2005)).

238. *Id.* But see *infra* note 339 (suggesting that this portion of the holding in *Segal* was not carried forward into the Code). The court in *Harber* also rejected the trustee’s argument that the debtors should be judicially estopped from asserting ownership of the cause of action because they had listed it as an “asset” on the schedules files in conjunction with their petition. 553 B.R. at 533–35.

While that particular view finds support in the language of the *Segal* opinion itself,²³⁹ exactly what it has to do with state-law accrual principles is, putting it mildly, a puzzle. As a practical matter, the approach that the *Harber* decision actually appears to be endorsing is a de facto broad, open-ended “balancing of the equities” exercise, which is in fact what the court proceeded to do in reaching its conclusion that Mrs. Harber’s claim, though with undeniable and significant roots in the past, was not property of the bankruptcy estate.²⁴⁰

The “discovery rule,” whether seen as distinct from or synonymous with an accrual approach, has attracted somewhat of a following in a handful of recent cases,²⁴¹ but at the same time, other contemporary decisions continue to adhere to the majority approach to straddle claims.²⁴² Moreover, the factual permutations that

239. See *Segal v. Rochelle*, 382 U.S. 375, 379 (1966). On the other hand, as noted, it is debatable whether that aspect of the *Segal* holding carried forward into the Code. See *infra* note 339.

240. *Harber*, 553 B.R. at 532–33. The court based this conclusion on the fact that Mrs. Harber did not learn of her condition until after the discharge had been granted in the debtors’ case. *Id.* This, of course, does not mean that she had not been harmed by the defective device. See *supra* note 224 and *infra* note 275. However, the court cited the absence of any proof that the implant failure developed slowly over time; it was due to a gradual deterioration rather than an acute event. *Harber*, 553 B.R. at 533. Thus, the trustee failed, according to the court, to meet his burden of proving that the cause of action was sufficiently rooted in Mrs. Harber’s prepetition past. *Id.* The court also rejected the trustee’s arguments that the debtors should be judicially estopped from contesting inclusion of the claim in the estate because they had failed to object when the trustee excepted it from abandonment on the closing of the case. *Id.* at 533–35.

241. *Williamson v. Peters*, No. 17-2356-CM, 2018 WL 780554, at *2 (D. Kan. Feb. 7, 2018) (noting that property interests that exist at filing but have yet to fully materialize have been treated as estate property (citing *Segal*), but then proceeding to analyze whether a cause of action represents property of the estate under the state-law accrual test set forth in *In re Smith*, 293 B.R. 786, 788 (Bankr. D. Kan. 2003) (discussed *supra* notes 153–160 and accompanying text)); *Mendelsohn v. Ross*, 251 F. Supp. 3d 518 (E.D.N.Y. 2017) (recognizing applicability of *Segal*, but concluding that because the most critical element that created the debtor’s property interest—the discovery that there was a defect with the medical device—did not occur until well after the petition date, this “interest was not ‘substantially rooted’” in her prebankruptcy past for purposes of § 541”), *aff’d*, 251 F. Supp. 3d 518 (E.D.N.Y. 2017).

242. See, e.g., *Lawrence v. Shelbyville Road Shoppes, LLC* (*In re Shelbyville Road Shoppes, LLC*) 775 F.3d 789, 795–96 (6th Cir. 2015) (applying *Segal*); *In re Sheikhzadeh*, No. 14-14219-BFK, 2018 WL 3197752 (Bankr. E.D. Va. June 26, 2018) (applying the sufficiently rooted test to determine that legal malpractice claims were property of the estate); *In re Carroll*, 586 B.R. 775, 784–88 (Bankr. E.D. Cal. 2018) (distinguishing *Mendelson’s*, cited *supra* note 198, application of *Segal*); *Callahan v. Roanoke Cty, VA* (*In re Townside Constr., Inc.*), 582 B.R. 407, 414–16 (Bankr. E.D. Va. 2018) (discussed *infra* notes 251–58 and accompanying text); *In re Whittick*, 547 B.R. 628, 635 (Bankr. D.N.J. 2016) (applying *Segal* to find that a prepetition loan approval gave the debtor an interest in funds that became property of the estate under §§ 541(a)(1) and (a)(6) when the funds were received postpetition); *In re Kooi*, 547 B.R. 244, 248 (Bankr. W.D. Mich. 2016) (noting that in applying § 541(a)(1), “most courts analyze whether the asset is ‘sufficiently rooted in the pre-bankruptcy past’ of the debtor”); *In re Segura*, No. 07-31907, 2016 WL 829830, at *2 (Bankr. N.D. Ohio Mar. 2, 2016) (“Since *Segal*, courts, including the Sixth Circuit Court of

have arisen are more varied and more nuanced than the cases rejecting (or limiting) *Segal* have openly identified or labeled,²⁴³ leaving us with a lack of clear and effective guidelines.²⁴⁴ What is clear is that the principal point of disparity among these standards is the degree to which resolution of the matter should be resolved under state law as opposed to in accordance with unique federal bankruptcy concepts of equality, equity, and fresh start. Therefore, it is to the broader question of the proper role of state-law principles in resolving bankruptcy-specific issues that attention is turned next as the foundation for recommending *Segal*'s sufficiently rooted test as the proper standard for dealing with straddle claims in a bankruptcy case.

IV. THE INTERACTION OF STATE AND FEDERAL AUTHORITY IN BANKRUPTCY CASES

As earlier pointed out,²⁴⁵ the holding in *Butner* regarding property interests in bankruptcy simply reflects the reality that Congress has not elected to enact a comprehensive federal commercial law. Thus, of necessity, the determination of which interests represent property rights that may then become part of a bankruptcy estate is left to state law, except, according to *Butner*, where some federal interest compels a different right.²⁴⁶ This oft-cited holding—that state law governs parties' relative rights in bankruptcy, absent a countervailing federal bankruptcy interest—is actually nothing more than a particularized application of the Supreme Court's

Appeals, analyze whether an asset received by a debtor postpetition is 'sufficiently rooted in the pre-bankruptcy past' of the debtor such that it should be regarded as property of the bankruptcy estate."); *cf.* *Murray v. 3M Co.*, 297 F. Supp. 3d 869, 872 (E.D. Ark., 2018) (describing *Segal*'s sufficiently rooted test as the governing standard in the Eighth Circuit, but also suggesting that property of the estate is tied to state-law accrual rules).

243. See *supra* text accompanying notes 96–101.

244. While courts have used labels such as an "accrual approach," or a "discovery rule" or a "blended approach" almost interchangeably, they have not been consistent in terms of whether the defining event is the occurrence of the last element of the cause or whether it is the discovery of the same. See *Harber*, 553 B.R. at 529 (quoting *Wilson v. el-Daief*, 964 A.2d 354, 361–62 (Pa. 2008)); discussed *supra* note 224. That is to say, it is unclear whether the operative event is the legal right to enforce the claim or the time that the state statute of limitations commences to run. Moreover, depending on fortuity of state law, discovery could be an actual element of the cause. Compounding the confusion, as seen in the *Harber* opinion (*Sikirica v. Harber*, 553 B.R. 522 (Bankr. W.D. Pa. 2016)), some courts have suggested accrual is tantamount to establishing that the claim is sufficiently rooted in the prebankruptcy past, ignoring the fact that accrual is simply not the determining factor under a *Segal*-type analysis. See, e.g., *Mueller v. Hall (In re Parker)*, 368 B.R. 86, *7 (B.A.P. 6th Cir. 2007) (unpublished) (noting that the question is not whether the debtor's claim accrued in terms of whether the last element of the cause of action occurred prior to the filing of bankruptcy, but whether the debtor's claim is sufficiently rooted in the debtor's prebankruptcy past).

245. See *supra* text accompanying notes 55–64.

246. *United States v. Butner*, 440 U.S. 48, 55 (1979).

famous statement in *Erie Railroad Co. v. Tompkins* that “[t]here is no federal general common law.”²⁴⁷

Bankruptcy, however, presents unique challenges for application of the *Erie* doctrine, as the source of jurisdiction in bankruptcy cases, of course, is federal and grounded in policy considerations that do not exist in routine diversity-of-citizenship actions.²⁴⁸ Nonetheless, ever since the first long-standing federal bankruptcy law was enacted in 1898, state law has continued to play a vital interstitial role in defining the commercial rights, interests, and entitlements of participants in a bankruptcy case.²⁴⁹ Thus, the tension between the two—and, in particular, when federal policy trumps state-law rules and consequences—is pervasive and acute.²⁵⁰

Nearly 65 years ago, Professor Hill articulated some of the ramifications of the *Erie* doctrine in the context of the bankruptcy system, noting:

[T]he federal courts are not to shrink from applying a “federal common law” in “those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its sources in those statutes, rather than by local law.” But always the limits of the authority of the federal courts to

247. 304 U.S. 64, 78 (1938). The policies underlying the *Erie* principle are to avoid having the outcome of litigation differ when the suit is brought in federal court and the forum-shopping such a result would produce. *See* *Hanna v. Plumer*, 380 U.S. 460, 467–68 (1965). Of course, the statement that there is no federal common law is itself a bit of an overgeneralization. There has, however, developed special federal common law in a number of areas of activity, such as banking, labor relations, environmental protection, pension plans, and of course bankruptcy, where there is a strong federal interest. *See generally* Official Comm. of Unsecured Creditors of the Columbia Gas Transmission Corp. v. Columbia Gas Sys. Inc. (In re Columbia Gas Sys.), 997 F.2d 1039, 1054–64 (3d Cir. 1993) (discussing when federal common law will control the adjudication of an issue). *See also* Allan Erbsen, *Erie’s Four Functions: Reframing Choice of Law Rules in Federal Court*, 89 NOTRE DAME L. REV. 579, 618–27 (2013).

248. U.S. CONST. art. 1, § 8, cl. 4.

249. *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) (discussing the “vital interstitial role [of state law] in defining the commercial rights, interests, and entitlements of participants in the bankruptcy case”); 1 GRANT GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* 403 (1965) (citing the 1898 Act as the “most familiar example” of how state law operates in the background of federal legislation to fill the inevitable gaps in the fabric of federal statutory law).

250. For more detailed discussion of the diverging views over the extent to which private state-law rights should be regarded as inviolate in bankruptcy, *see* Ponoroff, *supra* note 17, at 1220 n.8. *See also* Adam J. Levitin, *Toward a Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime*, 80 AM. BANKR. L.J. 1, 29, 71–77 (2006) (making a compelling case for the common law of bankruptcy as involving a uniquely federal interest).

make substantive law are the limits of the federal policy being executed.²⁵¹

The full holding in *Butner*, then, simply established a baseline or default rule regarding the nature or character of property interests in bankruptcy. That is to say, once the bankruptcy case is initiated, state law will usually provide the *source* of the right in question, but it does not provide the ground on which federal jurisdiction is founded. And therefore, it is the policies of the federal bankruptcy law that determine how the right is treated in the administration of the bankruptcy case—whether consonant with state law or otherwise.²⁵²

For these reasons, under a proper reading of *Butner*, substantive state law will ordinarily determine what, if any, legal claims against third parties the debtor possesses as of the commencement of the case. However, *Butner* does not mean all attributes of state law, including when a cause of action accrues or a period of limitations begins to run, must be imported and applied in answering important federal questions, such as the scope of property of the estate. The same, of course, is true, and widely acknowledged, with respect to defining claims *against* the estate and when they arise.²⁵³ In a similar fashion, state law defines the existence and nature of such claims, but whether the claims are allowed (and in what amount) or disallowed is a question of federal law, just as the question of how claims are allocated between secured and unsecured portions is determined by the Bankruptcy Code, not state law.²⁵⁴

251. Alfred Hill, *The Erie Doctrine in Bankruptcy*, 66 HARV. L. REV. 1013, 1033 (1953), cited in Ralph Brubaker, 32 No. 4 Bankruptcy Law Letter 1 (Pt. I) (2012); see also Vern Countryman, *The Use of State Law in Bankruptcy Cases (Part 1)*, 47 N.Y.U. L. REV. 407, 408–09 (1972) (“Also in the category of judicial errors, in my judgment, are those decisions which treat *Erie Railroad Co. v. Tompkins* as requiring the application of state law in bankruptcy cases.” (footnote omitted)); Donald R. Korobkin, *Rehabilitating Values: A Jurisprudence of Bankruptcy*, 91 COLUM. L. REV. 717, 766 (1991) (describing bankruptcy as “provid[ing] a forum in which competing and various interests and values accompanying financial distress may be expressed and sometimes recognized”).

252. See Ponoroff, *supra* note 17 at 1261–63 (indicating that questions concerning how a claim, once identified under state law, will be treated in bankruptcy are controlled exclusively by federal law and therefore must be resolved based on the policies implicated upon the filing of a bankruptcy case; policies that simply do not attain under state law). The general awkwardness of the marriage between state and federal law in bankruptcy is exacerbated by the fact that, at their core, the two systems imagine a very different sort of problem to which each is responding. See also Juliet M. Moringiello, *(Mis)use of State Law in Bankruptcy: The Hanging Paragraph Story*, 2012 WISC. L. REV. 963, 987–88 (2012) (pointing out as well that, implicitly, the Court held that state law generally controlled property rights upon entry into bankruptcy, but not necessarily what happened to them in bankruptcy or how they looked upon exit); Ponoroff, *supra* note 249, at 356 (same); *In re TransAmerica Nat. Gas Corp.*, 79 B.R. 663, 667 (Bankr. S.D. Tex. 1987) (refusing to enforce a liquidated-damages provision in a contract because the effect of doing so would be to enforce a rejected contract).

253. See *supra* text accompanying notes 37–41.

254. See *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 240 (1946) (“In determining what claims are allowable and how a debtor’s assets shall be

In sum, Congress has permitted state law to function within the fabric of federal bankruptcy law in order to identify the prebankruptcy rights of the parties involved in a bankruptcy case; it was not, however, constitutionally compelled to do so.²⁵⁵ No one has more forcefully made this point than Professor Juliet Moringiello, who has observed that “courts have so overused *Butner* that its limited scope has been buried State law does not prevail in bankruptcy, rather, it is displaced unless Congress has permitted it to govern for specific bankruptcy purposes.”²⁵⁶

Whether particular facts establish a substantive cause of action will usually be resolved under applicable nonbankruptcy, most often state, law.²⁵⁷ However, the question of when the cause of action “arises” for purposes of assigning it (or not) to a debtor’s bankruptcy estate is quite a different matter. The jurisprudence controlling when a cause of action arises under state law is, of necessity, nonuniform and, of course, developed wholly oblivious to the special considerations that pertain in a bankruptcy case and that have no analog under state law.²⁵⁸ Moreover, states use comparable language and concepts, such as “legal injury,” with subtle shadings of different meaning.²⁵⁹ Thus, to ascertain whether any particular straddle claim belongs to the estate by reference to the jumble of state-law accrual norms means the outcome will inevitably be the product of the serendipity of location and local politics, rather than based on reasoned policy objectives.²⁶⁰ Indeed, it is much like

distributed, a bankruptcy court does not apply the law of the state where it sits. *Erie R. Co. v. Tompkins* . . . has no such implication [B]ankruptcy courts must administer and enforce the Bankruptcy Act as interpreted by this Court in accordance with authority granted by Congress to determine how and what claims shall be allowed under equitable principles.”); see also TABB, *supra* note 49, §12.12, at 1240 (pointing out that questions of how secured claims are allocated are governed by § 506(a)).

255. *In re Pruitt*, 401 B.R. 546, 553–54 (Bankr. D. Conn. 2009).

256. See Moringiello, *supra* note 252, at 988 (noting that state law determines a creditor’s priority rights, but not its “remedy rights,” as to do so would upset bankruptcy collectivist policies). Professor Moringiello expanded on the overly broad interpretation that has been given to *Butner* in the case law in *When Does Some Federal Interest Require a Different Result?: An Essay on the Use and Misuse of Butner v. United States*, 2015 U. ILL. L. REV. 657, 665 (2015) (noting how the opinion in *Butner* has without justification “morphed” into a rule seen as limiting the ability to modify property rights in bankruptcy).

257. See *supra* notes 56–57 and accompanying text.

258. Bankruptcy, in other words, is distinct from state law in that it is concerned with a collectivized debt-collection process in which considerations of equality of distribution among, and maximization of value for, creditors (concerns to which state law is largely oblivious) all factor into a comprehensive and intricate scheme for wrapping up the debtor’s prepetition financial life and, ideally, providing the debtor with a path to financial viability in the future. See *supra* note 252.

259. Compare *Cantu v. Schmidt (In re Cantu)*, 784 F.3d 253, 260 (5th Cir. 2015) (distinguishing between the occurrence of a legal injury and discovery of the same), with *In re Smith*, 293 B.R. 786, 789 (Bankr. D. Kan. 2003) (requiring that the showing of substantial injury entails that the injury was “reasonably ascertainable” as of the commencement of the case).

260. This result flies in the face of the Court’s rationale for the *Erie* rule in the first place. See *supra* notes 251–54. It also hardly promotes the constitutional objective of giving

expecting to find an able short-order cook by posting a job description identifying the key skills of an experienced auto mechanic. The state-law rules governing accrual, ripeness, tolling, etc. were, as they necessarily had to be, formed without taking into account considerations of fresh start, value maximization, and creditor equality in mind (or even anywhere near the neighborhood!).

The accrual approach, in whatever form, for determining whether debtor claims are property of the estate ignores the central fact that the entire bankruptcy process is predicated on drawing a sharp line on the temporal map, with claims arising on one side of that line being treated in one manner and claims that arise on the other side of that line being treated in quite a different manner.²⁶¹ In an effort to promote fresh start and bring as full of an accounting as possible of the debtor's prepetition life, as has been seen, the courts eventually came universally to reject a state-law accrual approach to the definition of "claim" for purposes of § 101(5).²⁶² The invectives that were hurled at the Third Circuit's *Frenville* decision,²⁶³ effectively leading to the displacement of that opinion,²⁶⁴ apply with no less force to the discovery or accrual tests for assessing ownership of debtor causes of action. Exclusive reliance on a state-law accrual theory ignores the intent of Congress to define "property of the estate" broadly and assure equitable treatment of creditors. It is, therefore, no surprise that, in interests of creditor equality and equity, the majority of courts have rejected, and continue to reject, state-law accrual rules for determining property of the estate.²⁶⁵ Nevertheless, the recent decisional law exhibiting an increased willingness to abandon or diminish the precedential value of *Segal* in favor of state-law procedural niceties is disturbing.

Comparable treatment of similarly situated creditors is no less fundamental a tenet of bankruptcy law than fresh start.²⁶⁶ Though usually thought of in terms of treating all prepetition creditors on equal terms, it also means that there should be no unfair discrimination between pre- and postpetition creditors. Defining "property of the estate" more narrowly than the definition of claims for purposes of § 101(5) operates to favor postpetition creditors at the expense of their prepetition

Congress the authority to enact a "uniform law" on the subject of bankruptcies throughout the United States. *See* U.S. CONST. art. I, § 8, cl. 4.

261. *See supra* note 4 and text accompanying note 46; *see also* Epstein et al., *supra* note 53, at 18 (identifying the cleavage effect of the filing of a bankruptcy petition as an integral part of the fundamental bankruptcy policy behind the discharge).

262. *See supra* notes 37–41 and accompanying text.

263. *See* Avellino & Bienes v. M. Frenville Co. (*In re* M. Frenville Co.), 744 F.2d 332, 337 (3d Cir. 1984).

264. *See supra* text accompanying note 41.

265. *See* sources cited *supra* notes 77–80, 142, 242.

266. *See* Howard Delivery Serv. v. Zurich Am. Ins., 547 U.S. 651, 667 (2006) (identifying the deep roots of the equality-of-distribution objective in the Bankruptcy Code); Begier v. I.R.S., 496 U.S. 53, 58 (1990) ("Equality of distribution among creditors is a central policy of the Bankruptcy Code."); H.R. REP. NO. 95-595, at 178 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6138 ("the prime bankruptcy policy of equality of distribution among creditors").

counterparts.²⁶⁷ It stands to reason, therefore, that an important federal interest is compromised under the accrual or discovery theories for deciding whether straddle claims are property of the estate. Accordingly, despite the unremitting pull and tug between state and federal law in the bankruptcy process that occurs more generally, in this context, *Butner*, by its own terms, is pushed off stage.

V. APPLICATION OF *SEGAL* AND THE MAJORITY RULE TO STRADDLE CLAIMS

In *Harber*, the bankruptcy court attempted to fashion a third alternative to the state-law accrual and sufficiently rooted tests; namely, the “blended” approach.²⁶⁸ While not suggesting that it was intended by the court as such, the blended approach is little more than a rhetorical flimflam.²⁶⁹ In fact, there really are only two alternatives to dealing with straddle claims; either assign them to the debtor’s pre- or postpetition life based on idiosyncratic state-law rules or do so under the uniform federal standard established by the Supreme Court in *Segal*. The two “blend” about as well as fire and gasoline. For the reasons noted immediately above,²⁷⁰ bankruptcy-related considerations dictate that the latter should control.

To begin with, *Segal*’s continued viability under the Code is beyond any serious question,²⁷¹ and its application is not displaced by the *Butner* principle.²⁷² Additionally, the *Segal* standard, when properly applied, is consistent with the consensus understanding of when a claim against the estate arises and the important policy objectives that drive that understanding.²⁷³ Moreover, it eliminates the confusing and unresolved issues under the state-law accrual approach of whether the operative event is the discovery of the claim or when the legal injury (or such other final element of the cause) actually occurred, without regard to knowledge.²⁷⁴

267. It might be argued that treating claims by the debtor less expansively than claims against the debtor is not so much an inter-creditor issue, but rather about advancing fresh-start policy. However, that view would not simply be naïve; it would ignore the fact that contemporary bankruptcy law remains very much a creditors’ remedy. Professor Thomas Jackson recognized this fact over 25 years ago with his comment that “[b]ankruptcy, at first glance, may be thought of as a procedure geared principally toward relieving an overburdened debtor from ‘oppressive’ debt. Yet . . . most of the bankruptcy process is in fact concerned with creditor-distribution questions.” Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors’ Bargain*, 91 YALE L.J. 857, 857 (1982). The availability of prepetition assets to satisfy the claims of postpetition creditors would simply be an unearned boon for those creditors in contravention of the distributional norms intended to control the bankruptcy scheme. See *supra* note 54.

268. See *supra* text accompanying notes 235–36.

269. The key element is accrual, rendering *Segal* considerations not just secondary but also superfluous. See also *infra* text accompanying notes 307 and 318–25 for a later decision engaging in a similar charade.

270. See *supra* text accompanying notes 245–54.

271. See *supra* notes 77, 79–84.

272. *Supra* text accompanying notes 245–54.

273. *Supra* notes 34–41 and accompanying text.

274. Some courts, it will be recalled, require actual discovery of the harm, e.g., *In re Wagner*, 530 B.R. 695 (Bankr. E.D. Wis. 2015), while others only require that the legal

Finally, trying to determine temporally the onset of a legal injury is itself problematic and unnecessarily vague. This is due to the fact that locating the precise point in time when an initially latent injury occurs is often an impossible exercise, particularly in product cases, as the disease (or its existence) tends to be a progressive affair; there is not a single moment in time before which it does not exist and after which it does.²⁷⁵

By contrast, the sufficiently rooted approach to straddle claims advances core bankruptcy policies and eliminates the impreciseness associated with a state accrual or discovery approach. It is not, however, without some interpretational issues of its own. Two are perhaps most pressing: the standard to be used in assessing on which side of the filing date the roots are deepest, and under what circumstances might a property interest that is more closely connected to prefiling events nonetheless be excluded from the estate and remain with the debtor.

A. Application of the Sufficiently Rooted Test

“Sufficient” is an inherently indeterminate term. It is clearly less than “substantial” and arguably can even be less than 50%. In terms of deciding when a claim is “sufficiently rooted” in the debtor’s past so as to constitute estate property, most cases involving latent tort injury present no particular problem, or no more problem than those posed by application of the prepetition-relationship test for assigning claims against the estate.²⁷⁶ If the exposure or other conduct putting the debtor in contact with the dangerous or defective product all occurred prior to filing, the sufficiently rooted test is satisfied.²⁷⁷ It is noteworthy that in both *Wagner* and *Harber*, where the courts indicated an intent to analyze the issue under both the accrual or discovery test and *Segal*,²⁷⁸ neither of the reported opinions actually states a conclusion of how the case would be decided under the traditional “rooted in the prebankruptcy past” test. Rather, they simply declare that the discovery rule or

injury have been sustained, e.g., *Cantu v. Schmidt*, (In re *Cantu*), 784 F.3d 253 (5th Cir. 2015). See also *supra* notes 106–11 and accompanying text and note 244.

275. This is particularly true with respect to asbestos and other product-related injury, which may be latent at the time of initial exposure and through the progression of the disease until the disease eventually manifests itself. Thus, the only verifiable point in time is exposure. See *J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 506 (Pa. 1993) (sustaining the lower court’s determination that “bodily injury,” for purposes of liability insurance coverage encompasses the progression of the disease from “the period of exposure until, ultimately, the manifestation of recognizable incapacitation constitutes the final ‘injury’”). Courts that place the burden of establishing the time of injury on the trustee, see *supra* note 240, must inevitably conclude that the cause of action is not property of the estate if the disease is not discovered until postfiling, regardless of other facts. This seems to defy the letter and spirit of a sufficiently rooted test.

276. *Supra* notes 40–42 and accompanying text.

277. Technically, if all of the elements of the cause have been satisfied or occurred prior to filing, *Segal* is satisfied without much further analysis, because the claim resides entirely in the past. See *supra* note 109 and accompanying text. Under a discovery approach, of course, that conclusion does not follow.

278. 530 B.R. 695, 701 (Bankr. E.D. Wis. 2015); *Sikirica v. Harber*, 553 B.R. 522, 528 (Bankr. W.D. Pa. 2016).

“blended approach,” respectively, represent fairer and more predictable rules for determining whether a claim is property of the estate.²⁷⁹ Implicitly, this might be seen as an admission of sorts that, in both cases, the trustee would have prevailed under a traditional *Segal*-type analysis.

While the product-liability cases may be straightforward for the most part, there are other situations where either the use/exposure continues after filing, or nonproduct cases where the assignment of the debtor’s cause of action to the past or the future is less than clear.²⁸⁰ In these circumstances, adoption of a simple preponderance approach to satisfaction of the sufficiently rooted test would seem both most serviceable and most appropriate. To begin with, as the applicable standard of proof in most civil actions, it is well-known and understood.²⁸¹ In operation, the question for inclusion in or exclusion from § 541(a)(1) would be whether the events, circumstances, and activities that form the basis of the debtor’s cause of action occurred predominantly (more than half) prior to or after the commencement of the case.

An example of such a case is the decision in *Field v. Transcontinental Ins. Co.*,²⁸² discussed earlier,²⁸³ where the bankruptcy court dealt with a situation involving a debtor’s bad-faith claim against an insurer for failure to defend and cover liability arising out of an accident that occurred five months *prior* to the debtor’s bankruptcy filing.²⁸⁴ It will be recalled that the insurer thus argued that the claim did not accrue until it denied the debtor’s request for indemnification.²⁸⁵ Even though it is unlikely that the debtor had a prepetition cause of action under state law, the court concluded that this fact had no bearing on the resolution of the question under *Segal*’s sufficiently rooted test.²⁸⁶ Instead, once the accident occurred, the debtor had a contingent right to coverage that was alone enough to assign the claim to the debtor’s past.²⁸⁷ Of course, the court did not use the language of “preponderance” in

279. See *supra* notes 211, 236 and accompanying text.

280. See cases cited *supra* note 148.

281. See generally RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 432 (2d ed. 1977) (offering an economic-efficiency justification for the preponderance test); *Miller v. Minister of Pensions* [1947] 2 All ER 372 (K.B.D.) (defining “preponderance” as greater than 50%); John Leubsdorf, *The Surprising History of the Preponderance Standard of Civil Proof*, 67 FLA. L. REV. 1569 (2015).

282. 219 B.R. 115 (E.D. Va. 1998), *aff’d*, 173 F.3d 424 (4th Cir. 1999).

283. *Supra* text accompanying notes 143–46.

284. The insurer did, however, receive notice of the claim two months prior to filing. *Field*, 219 B.R. at 118.

285. The defendant-insurer argued that until it actually denied coverage to the debtor, “there was no antagonistic assertion of rights between the parties, and thus no actual controversy.” *Id.* at 119.

286. *Id.* (“This is so because the bankrupt’s estate includes not only claims that had accrued and were ripe at the time the petition was filed, but also those claims that accrued postpetition, but that are ‘sufficiently rooted in the pre-bankruptcy past.’”).

287. *Id.* As an alternative basis for its holding, the court noted the fact that the policy at issue, and hence the rights flowing from it, existed prior to the bankruptcy petition. *Id.* In support of this alternative holding, the court cited two cases involving when a claim arises for purposes of § 101(5). *Id.* at 20. For another textbook example of the predominance approach,

its opinion, but it is beyond cavil that such an approach would have yielded the same outcome—and perhaps more readily so in that the major components of the claim coincided with the principal event triggering the right to coverage.

A preponderance standard is also consistent with the bankruptcy court's analysis in *In re Riccitelli*,²⁸⁸ a case finding that the prebankruptcy roots of the claim in question were too shallow to support the trustee's argument for inclusion.²⁸⁹ The circumstances in *Riccitelli* involved the prefiling failure by the debtor's attorney to file a homestead exemption in the debtor's favor, as well as his failure to ascertain that one had not already been filed by or on behalf of the debtor.²⁹⁰ The trustee urged that the resulting cause of action for malpractice based on these omissions occurred before the filing of the bankruptcy petition.²⁹¹ The court disagreed, opining that the acts and omissions complained of did not *cause* harm—make it all but inevitable—until the debtor *filed* the bankruptcy petition; thus, albeit only momentarily, placing the negligence outside the debtor's prebankruptcy past.²⁹² Further, the court noted the exemption right forgone by the lawyer's negligence—and that would have placed the homestead beyond the reach of the debtor's creditors—was one that the Bankruptcy Code gave the debtor *as against the estate*, an entity that did not exist until the bankruptcy case was commenced.²⁹³ Thus, the conclusion was that the claim's prepetition roots were overwhelmed by significant postpetition aspects of the claim.²⁹⁴ In other words, a preponderance of the facts and circumstances forming the essential elements of the claim occurred either as of the moment of filing or thereafter.

One might certainly question the *Riccitelli* court's application of the facts to the legal standard established by *Segal*. For example, in *In re J.E. Marion, Inc.*²⁹⁵ the court held that a legal malpractice claim based on bankruptcy counsel's conduct both prior to and after the commencement of the case represented property of the estate.²⁹⁶ The point, however, is that the court in *Riccitelli* recognized that its

see *In re Bolton*, 584 B.R. 44 (Bankr. D. Idaho 2018). See also *In re Tomaiolo*, 205 B.R. 10, 14 (Bankr. D. Mass. 1997), *aff'd sub nom.* Tomaiolo v. Rodolakis (*In re Tomaiolo*), No. 90-40350, 2002 WL 226133 (D. Mass. Feb. 6, 2002) (holding a malpractice claim to be part of the estate where most, but not all, of the allegations of negligence occurred prepetition).

288. 320 B.R. 483 (Bankr. D. Mass. 2005).

289. *Id.* at 490–91.

290. *Id.* at 485–86.

291. *Id.* at 486–87.

292. *Id.* at 491. See also *Lawrence v. Commonwealth of Ky. Transp. Cabinet (In re Shelbyville Road Shoppes, LLC)*, 775 F.3d 789, 795 (6th Cir. 2015) (concluding that a good-faith deposit made by the debtor's assignor on a proposed real-estate purchase did not constitute property of the estate under *Segal*'s sufficiently rooted test).

293. *Riccitelli*, 320 B.R. at 492 (“Treating this claim as an asset of the estate would be tantamount to giving the remedy to the party that derived a windfall from counsel's negligence instead of to the party that was harmed by it, taking the benefit of the exemption from the Debtor a second time.”).

294. *Id.*; see also *O'Dowd v. Truegar (In re O'Dowd)*, 233 F.3d 197 (3d Cir. 2000), discussed *supra* text accompanying notes 89–105.

295. 199 B.R. 635 (Bankr. S.D. Fla. 1996).

296. *Id.* at 637; see also *supra* note 85.

outcome must be guided by the Supreme Court's holding in *Segal*.²⁹⁷ The fact that the court's actual *execution* of the sufficiently rooted test—as opposed to its articulation of the applicable standard—is open to some question does not draw away from the principal value of the case as it relates to the advantages of a preponderance approach for applying *Segal*.²⁹⁸

A more principled and faithful application of the sufficiently rooted standard can be found in the recent bankruptcy court's decision in *In re Townside Construction, Inc.*²⁹⁹ In a nutshell, the former Chapter 7 debtor corporations, which shared a common owner, filed suit in state court against a lender that had initiated postpetition foreclosure proceedings against the debtors' properties, alleging collusion with the foreclosure trustee and various other irregularities in connection with the sales.³⁰⁰ The bankruptcy cases were reopened for purposes of determining, on a joint motion, whether the causes of action, which had not been disclosed in the debtors' schedules or in their § 341 hearings,³⁰¹ were property of the various estates.³⁰² After initially affirming the continued viability of *Segal* under the Code and under circuit precedent,³⁰³ the court turned to the application of § 541(a) and *Segal* to the stipulated facts of the case. Pointing to multiple indications that the debtors began having suspicions about the bank well before their bankruptcy cases were filed,³⁰⁴ the court concluded that the debtors' causes of action “are ‘sufficiently rooted’ in the Debtors’ pre-bankruptcy pasts with Pinnacle [the bank] to fall within the *Segal* test, and further that the alleged causes of action sufficiently flow from the Debtors’ prepetition assets such as to fall within the scope of § 541(a)(1) and (7).”³⁰⁵

297. *Riccitelli*, 320 B.R. at 489–90.

298. Contrast the standard applied in *Riccitelli* with *In re de Hertogh*, 412 B.R. 24, 30 (Bankr. D. Conn. 2009) (applying Connecticut law to conclude that a legal malpractice claim based on failure to secure a homestead exemption for the debtor was not property of the estate because it did not *accrue* prior to the commencement of the case).

299. *Callahan v. Roanoke Co., VA (In re Townside Constr. Co.)*, 582 B.R. 407 (Bankr. E.D. Va. 2018).

300. There were actually two separate lawsuits: the first, which was removed to the bankruptcy court, came before the court for approval of a proposed settlement. *Id.* at 411. The second dealt with different properties and alleged the collusion with the foreclosure trustee and related entities, one of which was the high bidder in one of the sales. *Id.* at 412. A copy of the complaint in the second case was filed with the bankruptcy court three days prior to the hearing on the motion in the first case. *Id.*

301. *Id.* at 410–11, 415.

302. The trustee maintained that the causes of action arising from the foreclosure were estate property and, further, the suits had improperly proceeded without his authorization and participation. *Id.* at 412. The debtors countered that the causes of action alleged were not property of the estates and that they were free to bring the litigation without the Trustee's involvement or participation. *Id.* at 412–13.

303. *Id.* at 414–15.

304. *Id.* (noting the debtors' concerns the lender was communicating with other banks about their loans).

305. One of the debtors' cases was an asset case, the other not. This meant, in the former instance, unsecured, prepetition creditors' deficiencies would be reduced by damages recovered from the lender, and in the latter, such recovery might allow distributions to be made. *Id.* at 6.

Because, under state law, the causes of action could not conceivably have arisen until the actual foreclosure settings, the analysis in *Townside* is antithetical to the approach taken in decisions such as *Harber*.³⁰⁶

Although a preponderance test can be squared with the overwhelming number of cases applying a traditional *Segal*-like analysis, a recent bankruptcy-court decision³⁰⁷ has raised the specter of an alternative method for defining “sufficiently rooted” that merits discussion. Like *Holstein* and *Wagner*, the case involved a hip-replacement device implanted in one of the joint debtors (Mr. Bolton) two years prior to the commencement of the case.³⁰⁸ Three years after the case was closed, Mr. Bolton was diagnosed as requiring a hip “revision” of his replacement.³⁰⁹ A year later, the debtors filed a products case against the manufacturer of the components used in the replacement and, four years later, received a settlement offer of approximately \$235,000.³¹⁰ Thereupon, the trustee in the debtors’ bankruptcy case moved to reopen for purposes of administering the products-liability claim and any recovery therefrom as assets of the estate.³¹¹

In deciding if the claim arising from the hip-replacement surgery was estate property, the court found that the products-liability cause of action did not “accrue” under Idaho state-law rules until “objective medical evidence” supported the existence of Mr. Bolton’s injury and resulting damages.³¹² Rejecting the trustee’s argument for an earlier date,³¹³ the court found that no such injury was experienced or detected prior to the filing of the debtors’ case.³¹⁴ Thus, on this basis, the court concluded that Mr. Bolton’s cause of action could not properly be regarded as property of the estate.³¹⁵

The court continued, however, that this determination did not necessarily dispose of the issue due to the trustee’s alternative argument that the cause of action was nonetheless property of the estate because it was sufficiently rooted in the debtors’ prebankruptcy past.³¹⁶ After conceding the continued viability of *Segal* under the Code,³¹⁷ the court turned to the matter of identifying the appropriate standard for unspooling the meaning of “sufficiently rooted.”³¹⁸ Inexplicably, the court proceeded to review a number of cases following the state-law accrual

306. See *supra* text accompanying notes 212–36.

307. *In re Bolton*, 584 B.R. 44 (Bankr. D. Idaho 2018).

308. *Id.* at 47.

309. *Id.* at 48.

310. *Id.*

311. *Id.*

312. *Id.* at 51–52.

313. *Id.*

314. *Id.* at 52. Presumably, by specifically using the phrase “objectively ascertainable” the court was adopting an approach, even though it purported to be addressing state law relative to “accrual” of a cause of action. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.* at 53.

approach rather than a traditional approach to *Segal*.³¹⁹ Based on that authority, which was not germane in any way to the question posed, the court then held that in order for property acquired postpetition to be “sufficiently rooted in the past” it must arise from some prepetition right or entitlement, and that this could not be said to be the case until Mr. Bolton’s injury was “objectively ascertainable.”³²⁰

Bolton is suspect on a number of grounds. First, the court treated the question as a matter of first impression in the circuit, ignoring relevant authority from the Ninth Circuit.³²¹ Second, unlike cases where the right could not be said to exist until after the bankruptcy filing,³²² a cause of action based on exposure to dangerous and defective products was obviously a known and well-established state-law right. Third, the court ignored testimony that Mr. Bolton had complained to his physician about hip pain prior to the debtors’ bankruptcy filing.³²³ Finally, and perhaps most relevant for present purposes, the court, without seeming to recognize as much, conflated accrual of a cause under state law with *Segal*’s sufficiently rooted test by defining the latter in relation to the identical standard governing the former.³²⁴ In effect, the *Bolton* court gave *Segal* absolutely no independent field of operation and, instead, came to the non sequitur that only a claim that had accrued under state law could be categorized as “sufficiently rooted” in the debtor’s prebankruptcy past.³²⁵ For all intents and purposes, the court’s purported test for applying the

319. These included *Sikirica v. Harber (In re Harber)*, 553 B.R. 522 (Bankr. W.D. Pa. 2016), discussed *supra* text accompanying notes 212–348, and *In re Wagner*, 530 B.R. 695 (Bankr. E.D. Wis. 2015), discussed *supra* text accompanying notes 195–211.

320. *Bolton*, 584 B.R. at 55. As is apparent, the court ended up—somewhat astonishingly—in the same place in connection with its sufficiently rooted analysis as it had under the state-law accrual case; namely, that the cause could not belong to the prebankruptcy past if there was no discovery of the harm until postfiling. *Id.* Also, the court likened the situation to the facts underlying the Ninth Circuit’s decision in *Sliney v. Battley (In re Schmitz)*, 270 F.2d 1254 (9th Cir. 2001), discussed *supra* note 119, rather than the facts of *Rau v. Ryerson (In re Ryerson)*, 739 F.3d 1423, 1426 (9th Cir. 1984), discussed *supra* text accompanying notes 79–84, when just the opposite would seem appropriate. *Bolton*, 584 B.R. at 54–55. In *Schmitz*, as in the crop-disaster cases, *supra* Section II.C, there was no cognizable legal claim until the filing of the bankruptcy case. *Schmitz*, 270 F.3d at 1258. In *Bolton*, there could hardly be a doubt that Idaho law provided a cause for individuals harmed by implantation of defective products. *Bolton*, 584 B.R. at 48. (state-law causes of action asserted by the debtors in their products liability suit included strict liability, negligence, breach of implied warranty of merchantability, and breach of express warranty).

321. *Bolton*, 584 B.R. at 53 (“As near as the Court can determine, there is no published Ninth Circuit case law addressing this precise issue.”). Insofar as the “precise” issue—a faulty medical device—was concerned, that may have been true, it could hardly be said that the Ninth Circuit had not opined on the standard to be applied in determining whether after-acquired property represented estate property—as the court’s own citation to *Ryerson* and *Schmitz* made abundantly clear. *Id.*; see also *Cusano v. Klein*, 264 F.3d 936, 947 (9th Cir. 2001).

322. See *supra* note 178.

323. *Bolton*, 584 B.R. at 48.

324. *Id.* at 53.

325. *Id.* at 55 (“Debtors’ cause of action against the hip device manufacturer would not arise until that device resulted in an injury to Mr. Bolton that was objectively

sufficiently rooted standard was, in substance, a wholesale abnegation of that standard. Thus, at bottom, the opinion should be regarded as an aberration that in no way undermines the wisdom of employing a case-by-case analysis focused on when the majority (a preponderance) of the relevant facts, circumstances, and events underlying the cause occurred, or even an argument for a lesser standard,³²⁶ although the latter is not the position advanced in the present treatment.

B. Limitations on the Sufficiently Rooted Test

Another potential quandary associated with the *Segal* analysis is whether it applies without reservation any time a property interest is tied to both pre- and postbankruptcy events, or if there are situations where countervailing policy considerations might warrant a relaxing of its application. Interestingly, a comparable question surrounds the scope of the prepetition-relationship approach for defining claims against the estate, although in that context the answer is dictated by the minimum constitutionally required notice to claimholders. The problem surfaces in the case of unknown future claimants; i.e., individuals who had prepetition contact with the debtor (or exposure to its product) but have not yet manifested indications, or discovered the existence, of any injury as of the time of the bankruptcy filing.³²⁷

The definition of the term “claim” under § 101(5) cannot be divorced from fundamental principles of due process.³²⁸ The importance, however, of closure and

ascertainable. On bankruptcy day, it remained a ‘nebulous possibility’ that the device would cause him injury.”). This is the same circular reasoning that the court employed in *Harber*. See *supra* note 226 and accompanying text.

326. As noted at the beginning of this Section, by definition, “sufficient” implies a lower standard than “substantial” and might plausibly include less than 50%. See *supra* Section V.A.

327. Cf. *In re UNR Indus., Inc.*, 71 B.R. 467, 469 n.1 (Bankr. N.D. Ill. 1987) (distinguishing between “putative claimants,” as including all persons that were exposed to asbestos but had not been diagnosed as having an asbestos-related disease, from “future claimants,” referring to persons who had been exposed to the debtor’s asbestos, had not yet gotten sick, but who, in the future, would be diagnosed as having an asbestos-related disease as a result of that exposure).

328. If potential future tort claimants have not filed claims because they are unaware of their injuries, they might challenge the effectiveness of any purported notice of the claims bar date, and ergo, the discharge. See generally, *Jeld-Wen v. Van Brunt (In re Grossman’s, Inc.)*, 607 F.3d 114 (3d Cir. 2010) (opining that any application of the prepetition-relationship test cannot be divorced from “fundamental principles of due process”). It is concern over satisfaction of the Due Process Clause that has caused most courts to reject the “conduct” test, see *supra* note 41, for determining when a claim arises under § 101(5). See, e.g., *United States v. LTV Corp. (In re Chateaugay Corp.)*, 944 F.2d 997, 1004–05 (2d Cir. 1991); *In re Piper Aircraft Corp.*, 162 B.R. 619, 625–26 (Bankr. S.D. Fla. 1994) (noting that the conduct test likely defines “claim” too broadly), *aff’d*, 168 B.R. 434 (S.D. Fla. 1994), *aff’d*, *Epstein v. Off. Unsecured Creditors Comm.*, 58 F.3d 1573 (11th Cir. 1995). One commentator opined that “[t]he ‘pre-petition relationship test’ ameliorates the problem often attributed to the ‘conduct test’—that a bankruptcy proceeding cannot identify and afford due process to claimants.” Barbara J. Houser, *Chapter 11 as a Mass Tort Solution*, 31 LOY. L.A. L. REV. 451, 465 (1998).

finality in bankruptcy—assuring as complete a settlement as possible—has caused courts to be creative in assuring that the demands of due process are satisfied while still capturing virtually all claims falling under the prepetition-relationship test. In *In re Placid Oil Co.*,³²⁹ for example, a reorganized debtor reopened its previously closed case in order to determine whether certain postconfirmation asbestos-related claims asserted by a former employee had been discharged by the earlier confirmation of the debtor's plan.³³⁰ Following the bankruptcy court's grant of summary judgment to the debtor,³³¹ the former employee appealed. The Eleventh Circuit affirmed, ruling that in the case of an "unknown creditor" a debtor's publication of notice of the bankruptcy proceeding in a newspaper of national circulation satisfied due-process requirements.³³²

Another device used to permit the restructuring of a business to proceed while still avoiding the potential due-process problems implicated by discharging unknown claims has been the appointment of a future-claims representative, charged with the responsibility to assure protection of the rights of such claimants in connection with a comprehensive bankruptcy settlement.³³³ The most innovative approach yet in the context of asbestos-related claims was adopted by the bankruptcy court as part of the *Manville* plan of reorganization.³³⁴ In that case, the court oversaw the confirmation of a consensual plan that included the establishment of a trust out of which all asbestos health-related claims, known and unknown, were to be paid.³³⁵

The health trust created in *Manville* became the basis for Congress's effort to deal with the problem of asbestos claims on a national basis, which it did by enacting § 524(g) of the Code as part of the Bankruptcy Reform Act of 1994.³³⁶ Section 524(g) authorizes courts "to enjoin entities from taking legal action for the purpose of . . . collecting, recovering, or receiving payment or recovery with respect

329. Williams v. Placid Oil Co., 753 F.3d 151 (5th Cir. 2014).

330. *Id.* at 153.

331. *Id.* (both the bankruptcy court and the district court concluded that the former employee's argument that the debtor's notice was insufficient on due-process grounds).

332. *Id.* at 163–64 (rejecting the argument that the bar-date notice must inform unknown claimants of the nature of potential claims); *see also* Ralph R. Mabey & Jamie A. Gavrin, *Constitutional Limitations on the Discharge of Future Claims in Bankruptcy*, 44 S.C. L. REV. 745 (1993) (concluding that discharge of future claims is constitutionally permissible).

333. *See In re Amatex Corp.*, 755 F.2d 1034, 1042–43 (3d Cir. 1985); *Piper*, 162 B.R. at 619.

334. *See In re Matter of Johns-Manville Corp.*, 68 B.R. 618, 625–27 (Bankr. S.D.N.Y. 1986), *aff'd*, 78 B.R. 407 (S.D.N.Y. 1987), *aff'd sub nom. Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988).

335. *Id.* at 621; *see also* Laura B. Bartell, *Due Process for the Unknown Future Claim in Bankruptcy—Is This Notice Really Necessary?*, 78 AM. BANKR. L.J. 339 (2004) (arguing that actual notice to a future-claims representative is adequate notice to unknown claimants).

336. *See* H.R. REP. NO. 103-835, at 40 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3348–49.

to any [asbestos-related] claim or demand” through the establishment of a trust from which asbestos-related claims and demands are paid.³³⁷

The limits on the inclusion of straddle claims as property of the estate are obviously not set by the strictures of the Due Process Clause. Rather, to the extent they exist, they proceed from the demands of the fresh-start principle itself. The Court in *Segal* noted that the term “property” for purposes of § 70a(5) of the 1898 Act was to be broadly construed so as “to secure for creditors everything of value the bankrupt may possess in alienable or leviable form when he files his petition.”³³⁸ However, the Court continued that the “limitations on the term do grow out of other purposes of the Act; one purpose which is highly prominent . . . is to leave the bankrupt [now “debtor”] free after the date of his petition to accumulate new wealth in the future.”³³⁹ After balancing the extent to which the claim in *Segal* was rooted in the prebankruptcy past against how the claim impacted the debtor’s ability to make a fresh start, the Court determined that the tax-refund claim at issue should come into the bankruptcy estate because it was “so little entangled with the bankrupts’ ability to make an unencumbered fresh start”³⁴⁰

A debtor’s claim with respect to injuries suffered because of prepetition contact with or exposure to a dangerous or harmful product is generally quite different from the type of postpetition claim that some courts have sometimes kept out of the estate as having been acquired by the debtor principally in his or her postpetition life.³⁴¹ Likewise, a claim that arises out of activities and events

337. The statutory prerequisites imposed by § 524(g) in establishing a health trust in return for a channeling injunction—i.e., limiting such claimants’ recourse to the trust—against future claims are detailed in *In re Combustion Eng’g, Inc.*, 391 F.3d 190, 234 n.45 (3d Cir. 2004).

338. *Segal v. Rochelle*, 382 U.S. 375, 379 (1966).

339. *Id.* at 379. There is, however, serious doubt as to whether this aspect of the holding survived enactment of the Code. *See Rau v. Ryerson (In re Ryerson)*, 739 F.2d 1423, 1426 (9th Cir. 1984) (finding that the Code eliminates the *Segal* limitation concerning that the asset not be entangled in the debtor’s ability to make a fresh start) (citing S. Rep. No. 989, 95th Cong., 2d Sess. at 82 (1978), reprinted in U.S.C.C.A.N. 5787 at 5868); *In re Richard*, 249 B.R. 859, 861 (Bankr. E.D. Mich. 2000) (“The 1978 Bankruptcy Code follows *Segal* to the extent that it includes after acquired property ‘sufficiently rooted in the pre-bankruptcy past’ but eliminates the requirement that it not be entangled in the debtor’s ability to make a fresh start.”) (cited by *Tyler v. D.H. Cap. Mgmt., Inc.*, 736 F.3d 455, 462 (6th Cir. 2013)); *Hoffman v. Bruneau (In re Bruneau)*, 148 B.R. 4, 6 (Bankr. D. Conn. 1992) (citing *In re Ryerson*, 739 F.2d 1423). The argument is essentially that the fresh start is assured through the Code’s exemption scheme in § 522, and the exclusion of earnings attributable to postpetition services from the after-acquired property are captured by § 541(a)(6).

340. *Segal*, 382 U.S. at 380 (distinguishing future wages or a subsequent bequest); *see also In re Tomaiolo*, 205 B.R. 10, 14 (Bankr. D. Mass. 1997), *aff’d sub nom. Tomaiolo v. Rodolakis (In re Tomaiolo)*, 2002 WL 226133 (D. Mass. Feb. 6, 2002) (disagreeing expressly with the decision in *Swift v. Seidler (In re Swift)*, 198 B.R. 927 (Bankr. W.D. Tex. 1996), which had examined the issue only in terms of state-law-claims accrual principles); *see* authorities cited *supra* notes 147–48.

341. *E.g.*, *Casey v. Grasso (In re Riccitelli)*, 320 B.R. 483, 491 (Bankr. D. Mass. 2005), discussed *supra* text accompanying notes 288–94.

occurring wholly on the prebankruptcy side of the line, even if not coming due until after filing, do not much compromise the fresh start that the bankruptcy process is intended to afford the debtor³⁴²—a fresh start, it will be recalled, purchased from prepetition creditors by liquidation and payout of all of the debtor's interests in property extant as of filing.³⁴³ Thus, a distinction is easily drawn between wages attributable to pre- versus postpetition services, regardless of when payable.³⁴⁴ The same is true for claims predominantly residing in the past. Their allocation to prepetition creditors by virtue of inclusion in the estate does not impinge to any significant degree on the debtor's ability to begin anew, from the date of filing, with a clean slate. Likewise, in the grand balancing of debtor protection with creditor rights that defines the bankruptcy process,³⁴⁵ assignment of such claims to the bankruptcy estate represents less than full, but at least acceptable, compensation of a sort for the fresh start from prepetition claims that the debtor acquires through the proceeding.³⁴⁶

However, in some circumstances reopening and postpetition turnover of assets acquired pursuant to a claim predominantly residing in the debtor's prebankruptcy past might not produce a material benefit for prepetition creditors. Theoretically, this could be due to the fact that prepetition creditors were paid in full so that there is nothing to gain by reopening the case. However, that scenario—a full-pay Chapter 7 case—is rare, to say the least.³⁴⁷ More realistically, even though general creditors were not fully paid by distributions earlier in the case, reopening might be uncalled for if neither such creditors nor their successors exist any longer, or the cost of identifying and locating them would, along with the other costs of administration, consume substantially all of the newly recovered assets.³⁴⁸ In those

342. *E.g.*, *Field v. Transcontinental Ins. Co.*, 219 B.R. 115, 119 (E.D.Va.1998), *aff'd*, 173 F.3d 424 (4th Cir. 1999), discussed *supra* text accompanying notes 143–46. The fresh start is an aim of the system; it is not an entitlement to be achieved to the exclusion of all other considerations. That is to say, the object is to create the conditions that will hopefully permit the debtor to return to economic health, not to guaranty the same.

343. *See generally* Lawrence Ponoroff & F. Stephen Knippenberg, *Debtors Who Convert Their Assets on the Eve of Bankruptcy: Villains or Victims of the Fresh Start?*, 70 N.Y.U. L. REV. 235 (1995) (“A central feature of American consumer bankruptcy law is the ‘fresh start’ policy, which, through the dual mechanisms of discharge and exemption, affords debtors a certain degree of economic viability in exchange for the surrender of present assets at filing.”); Elizabeth Warren, *Bankruptcy Policymaking in an Imperfect World*, 92 MICH. L. REV. 336, 361 (1993) (noting that one of the “normative function the bankruptcy system serves is to constrain externalization of business losses to parties not dealing with the debtor”). *See also supra* note 31.

344. *See* 11 U.S.C. § 541(a)(6); *Segal*, 382 U.S. at 379–80 (explaining why future wages of the debtor are not included in the property of the estate).

345. *See supra* notes 52 and 267.

346. *See supra* text accompanying notes 53–54.

347. In fact, well over 90% of Chapter 7 cases are no-asset cases, and, of the remaining, most of the debtors did not expect to have assets that might be distributed to creditors when they filed. *See* Dalié Jiménez, *The Distribution of Assets in Consumer Chapter 7 Bankruptcy Cases*, 83 AM. BANKR. L.J. 795, 796 (2009).

348. Particularly with respect to noncorporate or institutional creditors, one can reasonably assume that the greater the passage of time between closing of the case and receipt

situations, leaving the property interest in question with the debtor obviously causes no harm; indeed, it actually enhances the fresh-start objective. More importantly, it also saves unnecessary administrative expense to reach a result that would, in the end, operate to the benefit neither of the debtor nor his or her creditors.³⁴⁹ It is certainly conceivable that when the cause is first discovered—and thus becomes ripe under state law—years or even decades after the bankruptcy case is closed, these circumstances could attain. In that scenario, if the debtor’s standing is challenged by the defendant to avoid having to pay the obligation, abandonment of the claim should be sought from and readily ordered by the bankruptcy court.³⁵⁰ This will, as noted, likely advance the debtor’s fresh start without extracting an undue price or sacrifice from the debtor’s prepetition creditors.

Alternatively, and more challenging, is the question of when a right to payment that can be traced both to pre- and postpetition events might also be excluded from the estate under this standard, even if, under a preponderance approach, it belongs to the past and there are as-yet-unsatisfied general creditors extant. One scenario might be where the postfiling use, and any related harm, make it so intertwined with the debtor’s abilities to preserve his or her postbankruptcy economic health and viability that finding otherwise would be considered as interfering intolerably with the debtor’s fresh start.³⁵¹ In effect, just as a claim against the estate might be spared from the discharge because of principles of

of the assets in question, the greater the likelihood that it will prove, if not impossible, at least infeasible to locate such nonprofessional creditors in order to provide proper notice of the deadline for filing a claim. *See In re Lowery*, 398 B.R. 512, 516 (Bankr. E.D.N.Y.2008) (finding the potential benefit to creditors insufficient to reopen when there were four creditors with aggregate claims of \$13,249.90 and 10–14 years had passed from the time the claims were incurred). Of course, the amount of assets at stake and the debtor’s good faith or lack thereof will bear on the analysis. *See, e.g., In re Arana*, 456 B.R. 161, 175 (Bankr. E.D.N.Y. 2011) (finding the concern of the difficulty of locating creditors to be outweighed by the potential benefit to 30 creditors with a total of \$112,862.83 in claims).

349. Because the expenses of administration are paid ahead of unsecured claims, *see* 11 U.S.C. §§ 507(a)(2) and 726(a)(1), there is nothing to be gained if the cost of reopening the case to administer the new asset will consume all or substantially all such assets.

350. This is due to the effect that if the claim properly belongs to the estate, the debtor will technically lack standing to pursue on his or her own behalf. *E.g., Segal v. Segal (In re Segal)*, 579 B.R. 734, 740 (E.D. Pa. 2016); *Runaj v. Wells Fargo Bank*, 667 F. Supp. 2d 1199, 1206 (S.D. Cal. 2009) (A “debtor may not prosecute a cause of action belonging to the bankruptcy estate absent a showing her claims were exempt from the bankruptcy estate or abandoned by the bankruptcy trustee”); *cf. Ah Quin v. Cty. of Kauai Dep’t of Transp.*, 733 F.3d 267, 270 (9th Cir. 2013) (upon reopening of debtor’s case, the trustee abandoned his interest in the debtor’s pending discrimination claim in order to allow the action to be pursued by the debtor).

351. As noted earlier, it is not clear that this aspect of the *Segal* holding survived enactment of the Code. *See supra* note 339. However, the entire bankruptcy system is an exercise in balancing competing policies, *supra* note 222 and text accompanying note 289, so the inquiry is never precluded. That said, in my view, this “intolerable interference” should never be satisfied by the fact that the debtor could *really* use the money, as such a standard would almost invariably result in debtor retention of the assets in question.

fundamental fairness,³⁵² so too might a claim by the debtor deemed to predominantly reside in the prebankruptcy past nonetheless avoid capture by the estate in order to serve competing bankruptcy policies.

Assume, for example, the property interest at issue involves liability for an injury (unknown at the commencement of the case) that since the closing of the case has impaired the debtor's ability to earn a livelihood and provide for his or her family. Those facts alone should not warrant altering the conclusion reached under the sufficiently rooted test. Again, it is the opportunity for a fresh start the bankruptcy system provides, not a guaranty that this will lead to financial well-being. If, however, we add to the mix that the postpetition payment received by the debtor on account of such claim has been innocently committed in a fashion that cannot be unwound without causing irrevocable economic harm—i.e., a material worsening of the debtor's financial situation beyond simple loss of the asset—then the circumstances might call for a balancing of such harm against the prejudice suffered by prepetition creditors by not recovering the asset. Even this presumes, however, that the claim at issue was not sufficiently matured at filing as to belong *entirely* to the debtor's prebankruptcy past; i.e., not all elements of a prepetition cause occurred or were satisfied prior to the filing of the bankruptcy petition.³⁵³ If that condition is satisfied—there is a connection to postpetition as well as prepetition events—then considerations of fresh start might justify allowing the cause or its value to remain with the debtor in spite of its significant prebankruptcy roots.

Although bankruptcy courts are, by dint of what they do day-in-and-day-out, quite good at this sort of interest-balancing approach, the reality is that circumstances such as these are unlikely to be encountered except in the exceedingly rare case. This is appropriate in the sense that just as the exclusion of a prepetition claim from the discharge undermines the core bankruptcy aim of bringing a full and final settlement to the debtor's prepetition life,³⁵⁴ so too should creditor-equality principles be abandoned only sparingly. Stated another way, prepetition creditors should only seldom be required to sacrifice their end of the bankruptcy bargain by foregoing their ratable share of a postpetition-discovered asset that is critically (but not entirely) rooted in the debtor's prebankruptcy past. The point to be made, however, is that no rule is so inflexible and unabiding that it is privileged from ever allowing exception, and language in the *Segal* decision³⁵⁵ can be drawn upon to allow for the possibility, on proper facts, that the sufficiently rooted test might be tempered based on compelling equitable considerations.³⁵⁶

352. *Supra* notes 328–32, 262 and accompanying text.

353. Such a claim, belonging entirely to the prebankruptcy past, is, in a sense, not really a straddle claim at all. *See supra* text accompanying notes 107–09; e.g., *In re Carroll*, 586 B.R. 775 (Bankr. E.D. Ca. 2018), discussed *supra* notes 109 and 179.

354. *See, e.g., supra* text accompanying notes 329–35.

355. *See supra* notes 339–41 and accompanying text.

356. Historically, it has been quite frequently said that bankruptcy courts are “courts of equity.” *See, e.g.,* *Pepper v. Litton*, 308 U.S. 295, 304 (1939) (“[F]or many purposes ‘courts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity.’”) (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 240

CONCLUSION

Modern bankruptcy law reflects a careful balancing of debtor protection and creditor rights.³⁵⁷ Setting the normative fulcrum is neither easy nor ever permanent.³⁵⁸ It also entails an ambition to accomplish policy goals that have no counterparts under state law.³⁵⁹ Two of the most pivotal of these policies are providing the broadest relief possible by treating the filing of a petition as cleaving a wide chasm between the debtor's pre- and postbankruptcy lives,³⁶⁰ and assuring equitable treatment of creditor claims.³⁶¹ When a creditor is deemed under one test to have a claim against the estate, but then is deprived of its share of an asset that upon application of the same test would be property of the estate, both of these key principles are done violence.

In implementing these policy objectives in the context of property interests with a tie to both pre- and postpetition activities and events, the Supreme Court adopted a test that is not only simple to articulate and apply, but also sensitive to the unique balancing of debtor and creditor interests that animate the federal bankruptcy law. It is a test that achieves equity *inter se* by following the same broad outline as has been adopted with respect to claims against the estate that have not accrued as of the commencement of the case.³⁶² Finally, it is a test that has been clearly carried forward under the Code³⁶³ and not altered by other pronouncements (often

(1934)). A principle source of this power has been found to reside in Code § 105(a), which in pertinent part states: "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Code]." 11 U.S.C. § 105(a). In recent years, however, that assertion has been called into some question. *But see* Randolph J. Haines, *The Conservative Assault on Federal Equity*, 88 AM. BANKR. L.J. 451, 455 n. 23 (2014) (quibbling with some of the more recent arguments questioning whether bankruptcy courts are truly courts of equity, referring to these arguments as "formulistic," and observing that the jurisdictional amendments in 1978 and 1984 were intended to broaden, not narrow, bankruptcy courts' jurisdiction). *See generally* Alan M. Ahart, *The Limited Scope of Implied Powers of a Bankruptcy Judge: A Statutory Court of Bankruptcy, Not a Court of Equity*, 79 AM. BANKR. L.J. 1, 32 (2005) ("[A] bankruptcy court should not be referred to as a court of equity. Supreme Court and other decisions rendered under the Bankruptcy Code stating that the bankruptcy court possesses all equitable authority or powers are incorrect—at least where a bankruptcy judge is the presiding judicial officer.").

357. Epstein et al., *supra* note 53, at 21 (noting that, in addition to fresh start, bankruptcy seeks "to get the most value out of the debtor's assets for the benefit of all of the debtor's prepetition creditors"); *see also supra* notes 51 and 222 and accompanying text.

358. *See* Lawrence Ponoroff, *Bankruptcy Preferences: Recalcitrant Passengers Aboard the Flight from Creditor Equality*, 90 AM. BANKR. L.J. 329, 330 (2016) (pointing out the balancing that goes on in the bankruptcy arena between the competing interests between debtors and creditors, and among creditors, is a normative one and not a "feat of mechanical engineering").

359. *Id.* at 383.

360. *See supra* note 4.

361. *See supra* notes 31, 54, 266, 356.

362. *Supra* text accompanying notes 35–42.

363. *See* sources cited *supra* note 77.

misunderstood) of the Supreme Court in relation to the role of state law in bankruptcy cases.³⁶⁴

The effort in recent cases to disaggregate the question of when claims against the estate arise from the question of when claims by the debtor become property of the estate is ill-considered and has introduced needless uncertainty and complexity into the law. Use of the state-law accrual or discovery test (or both), formulated in each case with other, nonbankruptcy considerations in mind is inappropriate precisely because of its inattention to the careful balance struck by the Code between ensuring the debtor's fresh start and securing maximum value for the creditors who otherwise suffer the cost of that right to a new financial life.

By contrast, employment of *Segal*'s sufficiently rooted test, governed by a preponderance standard, ensures that the equilibrium between debtor and creditors, as well as among creditors, is properly struck in the overwhelming number of cases where the issue arises. It also eliminates the inevitable confusion involved with pressing murkily defined state-law concepts into service to address core bankruptcy questions. Therefore, the inexplicable drift in the decisional law away from the sufficiently rooted test and toward a greater reliance on state law in assessing whether straddle claims fall under property of the estate³⁶⁵ needs to be stemmed, and the question should be addressed from the relevant perspective of what approach to interpreting § 541(a)(1) in the context of straddle claims will most effectively implement the multifaceted and not-always-complementary goals of the federal bankruptcy law.

364. See *supra* notes 56–63, 247, 249 and accompanying text.

365. Uncomfortably, the trends toward greater deference to state law in addressing key bankruptcy issues have not been limited to issues surrounding the scope of § 541(a)(1). See, e.g., Ponoroff, *supra* note 17 (addressing the same issue in the context of when to recharacterize debt as equity).