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Bankruptcy Preferences: Recalcitrant Passengers Aboard the Flight From Creditor Equality

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by

Lawrence Ponoroff*

"It is a riddle, wrapped in a mystery, inside an enigma."
—Sir Winston Churchill, October 1939

I. INTRODUCTION

In his famous radio address from London, the then First Lord of the Admiration was referring to the action likely to be taken by Russia in the war that had recently erupted on the European continent. He could just as easily, however, have been speaking about bankruptcy preference law. Alas, while Churchill flirted often with bankruptcy in his personal life, his public remarks usually inclined toward “less weighty” topics than preference liability and recovery. Undoubtedly, with the possible exception of the discharge, there is no aspect of the bankruptcy law so utterly misunderstood by and exasperating to the credit community than the rules governing preferential transfers. Their frustration is understandable. But even bankruptcy professionals and specialists struggle to articulate a coherent and consistent account of bankruptcy preference policy and doctrine.

Ultimately, any discussion of the scope and function of preference law in isolation from the larger goals of the bankruptcy system is an empty one. What is more, meaningful discourse about the goals of a bankruptcy regime must take place against the backdrop of the larger legal framework, competing public policy considerations, and differing perceptions over the social as well as economic costs of bankruptcy. Should individuals and entities be permit-

*Dean and Professor of Law, Michigan State University College of Law. The author wishes readers to be aware that this article was finalized prior to the automatic adjustment of certain dollar amounts in the Bankruptcy Code that occurred on April 1, 2016 pursuant to 11 U.S.C. § 104(a).

1J.A. MACLACHLAN, BANKRUPTCY § 247, 83 (1956) (observing that “[t]he law of preference is the most significant contribution of bankruptcy to commercial law . . .”). It is also perhaps the most distinctive and controversial contribution inasmuch as targeted creditors in particular have a hard time wrapping their minds around the fact that a prebankruptcy transfer that was in payment of a valid debt and perfectly lawful under state law may set aside as a preference under 11 U.S.C. § 547(b) and, thus, recovered by the bankruptcy estate under 11 U.S.C. § 550(a).
ted—indeed even encouraged—through the bankruptcy process to alter their behavior so as to avoid a result that would otherwise attain under applicable state or nonbankruptcy federal law? Correspondingly, when and why should other parties be compelled to abide by results that, but for the interposition of a bankruptcy proceeding, would not need to be countenanced? More broadly posed, what are the distributive goals that should govern the bankruptcy system and what is the optimum institutional design for achieving them? And how are these essential questions regarding the political economy best decided? Soon it becomes difficult to even know where to start.

So, let us begin with a basic axiom; namely, that bankruptcy entails the balancing not only of the competing interests of debtors and creditors, but also of competing interests among creditors. But the act of “balancing,” by definition, implies that there is some point along the spectrum, perchance equidistant from the two antipodal ends, where the fulcrum can be placed to ensure perfect equipoise. That is not, however, the kind of balancing that goes on in the bankruptcy arena, where the exercise is a normative one, not a feat of mechanical engineering. There is no point of perfect equilibrium. Hence, where the pivot is placed at any point in time will depend on those larger moral and social value judgments, not only with respect to which unanimity of opinion will never be achieved, but that, like public policy, will tend to wax and wane over time.

Further complicating matters, the dialogue concerning bankruptcy policy and bankruptcy reform does not occur behind a Rawlsian veil of ignorance. Different system participants will necessarily push for rules that favor their particular interest at the expense of others. It may be a zero sum game, but there are spoils to be gained and plunder to be had (or preserved). As public choice theory, gloomy as it may be, has long recognized, economic rent-seeking is an inevitable (and not always undesirable) aspect of virtually any political system, but exacerbated in a society marked by widely pluralistic differences in belief over key abstractions such as fairness, equality, and justice. And, even the most objective commentators will disagree over how

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4 See, e.g., Susan Block-Lieb, Congress' Temptation to Defect: A Political and Economic Theory of Legislative Resolutions, 39 ARIZ. L. REV. 801 (1997) (proposing a model for explaining bankruptcy legislation based on a combination of game theory and public choice theory, and demonstrating the effect that interest groups have in directing bankruptcy reform legislation away from the intended objects of the system).
much sacrifice we should demand of debtors, or who should bear the costs of financial failure, or how losses should be apportioned to assure the optimum allocation of those costs.

In fact, while everyone has an opinion on these questions, no one knows the real answers because there are none to be had. In the world of debtor-creditor relations there are no absolutes, only relativistic and situational judgments that surely coalesce over time at the fringes—no one advocates for debtors’ prison any longer (at least not openly)—but that will never achieve the certainty of the “laws” say of Physics. And that’s why Law is a humanity and not a science. And yet, it will not do to simply throw in the towel; we have to have the conversation and continue to make decisions about how our system of bankruptcy is to look and function.

Not long ago, and perhaps in an overly cranky mood, I described the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”5 as “oxymoronically titled . . . clumsily drafted, unnecessarily prolix, internally inconsistent, and annealed in a cauldron of special interest pressures.”6 But, as Professor Mechele Dickinson has quite fairly pointed out, the legislation was the product of broad bipartisan support.7 So if the finger of blame is to be pointed accurately, we may need both hands.

Bearing in mind that BAPCPA represented a series of amendments to an existing Code, it may be profitable to consider what it was that Congress so desperately thought needed amending. As originally enacted, the Bankruptcy Reform Act of 1978 (the “1978 Act”)8 was unquestionably the most debtor-friendly U.S. bankruptcy law ever enacted, and much of the history of bankruptcy reform legislation since that date is explicable in terms of efforts by the financial services industry and credit providers to claw back what they regarded as the undeserved and disproportionate advantages conferred on

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6Lawrence Ponoroff, Reclaim This! Getting Credit Seller Rights in Bankruptcy Right, 48 U RICH. L. REV. 733-34 (2014). Judge (now Professor) Markell made the same point by citing Lewis Carroll. See In re Trejos, 352 B.R. 249-253-54 (Bankr. D. Nev. 2006) (“Making practical sense . . . of much of BAPCPA requires bankruptcy judges to adopt the approach of the White Queen, and believe in ‘as many as six impossible things before breakfast.’”).

7See generally A. Mechele Dickerson, Regulating Bankruptcy: Public Choice, Ideology, & Beyond, 84 WASH. U. L. REV. 1861, 1866 (2006) (observing that members in both the House and Senate voted in overwhelming numbers in favor of the various, but substantively very similar, versions of bankruptcy reform legislation introduced between 1997 and the enactment of BAPCPA).

debtors. BAPCPA doubtless represented the most successful of those efforts to date, but we should not lose sight of its place in that larger contextual dynamic, or, for that matter, of the ironic precipitant that brought bankruptcy reform center stage.

Specifically, as part of the Bankruptcy Reform Act of 1994, Congress created an independent commission, the National Bankruptcy Review Commission (the "NBRC"), to "investigate and study issues relating to the Bankruptcy Code; to solicit divergent views of parties concerned with the operation of the bankruptcy system; to evaluate the advisability of proposals with respect to such issues; and to prepare a report to be submitted to the President, Congress and the Chief Justice." The NBRC's report was to be publicly released on October 20, 1997. Fully aware of its content and general orientation, the lobby for consumer creditor providers and organizations connived to ambush the report by pressing furiously for the introduction of bipartisan legislation that largely advanced the views of the four dissenting NBRC commissioners. Their efforts were ultimately successful. It was that legislative proposal and its successors, not the NBRC Report, which dominated the conversation over the next several years, and eventually resulted in the enactment of BAPCPA.

In many ways, BAPCPA was not only an anti-NBRC bill, but also a wholesale rear-guard action against the 1978 Act. Most well-known for

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9 See generally Jean Braucher, A Fresh Start for Personal Bankruptcy Reform: The Need for Simplification and a Single Portal, 55 AM. U. L. REV. 1295, 1301-03 (discussing the credit industry's efforts to nullify the 1978 Act's perceived liberalization of personal bankruptcy). See also Kenneth M. Ayotte & Edward R. Morrison, Creditor Control and Conflict in Chapter 11, 1 J. LEGAL ANALYSIS 511, 511-12 (2009) (discussing the dramatic expansion of control exercised by secured creditors in Chapter 11 over the preceding decade).

10 Which is to say, there was a lot more "abuse protection" than "creditor protection" in BAPCPA, although, if one looks hard enough, one does find some scraps, such as the additional protection for retirement assets in §§ 522(b)(3)(C) and 541(b)(7), greater controls over reaffirmations in § 524(k), expansion of the discharge injunction in § 524(i) to include the proper crediting of payments, and elevated protection in several areas for Domestic Support Obligations. See infra note 192. Of course the parties who have to make good on those domestic obligations are "consumers," too, and they likely do not regard most of these provisions as providing them with greater relief. Also at least one skeptic (or realist) has wondered aloud how much of the motivation had to do with grabbing an opportunity for "positive political relations." See CHARLES J. TABB, THE LAW OF BANKRUPTCY 673 (3rd ed. 2013).


12 Id. at tit. VI, § 603, 108 Stat. at 4147.


14 NBRC REPORT, supra, at 1029, et seq. (Individual Commissioner views). See Dickerson, supra n.7, at 1065 (noting that before the NBRC's Report was even filed, the credit lobby found supporters in the 105th Congress to sponsor legislation adopting the views of the dissenting Commissioners).

tightening of the screws on consumer debtors,\(^{16}\) whether in the form of the means test, elimination of ride-through, or the insistence on use of retail valuation of personal property collateral in Chapters 7 and 13,\(^{17}\) BAPCPA also openly sought to limit judicial involvement, and hence judicial discretion, in several areas perceived as bearing unfavorably on creditor payouts.\(^{18}\) Receiving only slightly less attention was BAPCPA’s lopsided leaning toward preserving the contractual rights of secured creditors at the expense of their unsecured counterparts,\(^{19}\) as evinced by the above-mentioned valuation rules in § 506(a)(2),\(^{20}\) prohibition against strip down of most vehicle (and some

\(^{16}\)See generally Braucher, supra note 9, at 1301 (observing that the credit industry never accepted the 1978 Act’s perceived liberalization of personal bankruptcy); Linda Coco, Debtor’s Prison in the Neo Liberal State: “Debtfare” and the Cultural Logics of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 49 CAL. W. L. REV. 1 (2012) (suggesting that BAPCPA shifts the risk and the responsibility of the lending relationship onto consumer debtors by forcing financially distressed individuals to continue servicing debt obligations both inside and outside the bankruptcy system); (Robert J. Landry, III & Nancy Hisey Mardis, Consumer Bankruptcy Reform: Debtors’ Prison Without Bars or “Just Desserts” for Deadbeats! 36 GOLDEN GATE U. L. REV. 91 (2006) (reviewing the consumer features of the bill and their likely impact).

\(^{17}\)The means test is found in § 707(b)(2) and the elimination of ride-through in a combination of §§ 521(a)(2), 521(a)(6) and 362(h)(1). Newly-added § 506(a)(2) mandates the use of replacement value, without deduction for costs of sales or marketing, for individual debtors in Chapters 7 and 13.

\(^{18}\)See, e.g., Jean Braucher, The Challenge to the Bench and Bar Presented by the 2005 Bankruptcy Act: Resistance Need Not Be Futilé, 2007 U. III. L. Rev. 93, 94 (observing that the subtext of BAPCPA “was the view that bankruptcy judges and consumer debtors’ lawyers needed to be reined in to keep them from facilitating abuse by consumer debtors.”); Kara Bruce, Rehabilitating Bankruptcy Reform, 13 NEV. L. J. 174 (2012) (discussing BAPCPA’s emphasis on a rules-based framework to limit what was perceived as undesirable judicial interference in Chapter 11). See also Coop v. Fredrickson (In re Fredrickson), 545 F.3d 652, 658 (8th Cir. 2009) (pointing out that in requiring that above-median-income debtors’ “projected disposable income” in Chapter 13 be calculated using the “means test,” Congress wanted to eliminate what it perceived as widespread abuse of the system by curtailing bankruptcy courts’ discretion and requiring debtors to pay more to their unsecured creditors); In re Nance, 371 B.R. 358, 366 (Bankr. S.D. Ill. 2009) (“It is clear from the Chapter 7 means test, the adoption of standardized expense calculations for above-median debtors, and the calculation methods for determining ‘projected disposable income’ that a major goal of Congress was to replace judicial discretion with specific statutory standards and formulas.”). Of course, consumer bankruptcy lawyers came in for their share of criticism as well: “Mr. President, I think there is a widespread recognition that bankruptcy lawyers are preying on unsophisticated consumers who need counseling and help in setting up a budget and who do not need to declare bankruptcy. Bankruptcy lawyers are the fuel which makes the engines of the bankruptcy mills run.” 144 CONG. REC. S10649 (1998) (remarks of Sen. Grassley).

\(^{19}\)By definition, an insolvency situation is a zero sum game. Thus, provisions in BAPCPA, including in §§ 547(e)(2) and 547(c)(3), that provide greater protection for secured claims must come at the expense of unsecured creditors. See infra notes 25, & 195-206 and accompanying text. An exception to this statement might have been the provision that disables bifurcation under § 506(a)(1) as to certain secured claims in Chapter 13, see § 1325(a)(6) (infra note 21) where the debtor elects to surrender the collateral. However, now that the weight of authority in the appellate courts is that the unsecured claim persists where the debtor surrenders rather than retains the collateral, even that small exception has been desiccated. See, e.g., In re Wright, 492 F.3d 829 (2007) (holding bifurcation may still occur under state law when the collateral is surrendered to the secured creditor).

\(^{20}\)See supra note 17.
other) loans in Chapter 13; provision for recovery of costs, charges, and fees in favor of oversecured statutory lienors; elimination of Chapter 13 property valuations on conversion to Chapter 7; and assuring that Chapter 13 plan payments are not only at least equal to the present value of allowed secured claims, but also sufficient to provide adequate protection to the holders of such claims. One might have fairly questioned, as many did, whether this was a good thing from the perspective of the larger national economy.

Others might have, and did, question its fair-mindedness given that, other than the amounts owing on undersecured debts in excess of the value of the underlying collateral, unsecured claims generally consist of smaller trade debt and obligations owing to nonconsensual creditors, such as tort victims and other so-called non-adjusting creditors.

21 This prohibition against strip down of certain (mostly motor vehicle) liens in Chapter 13 is contained in what's famously referred to as the “hanging paragraph” following § 1325(a)(9). See generally, David Gray Carlson, Cars and Homes in Chapter 13 After the 2005 Amendments to the Bankruptcy Code, 14 AM. BANKR. INST. L. REV. 301 (2006).

22 This was accomplished by adding the language “or State statute under which such claim arose” to the end of § 506(c), and, in so doing, partially overruling the Supreme Court’s decision in Ron Pair Enterps., Inc. v. United States, 489 U.S. 225 (1989).

23 Codified as § 348(f)(1)(C).

24 Codified as § 1325(a)(3)(B)(iii)(II). See In re Nichols, 440 F.3d 850, 857-58 n.6 (6th Cir. 2006) (“[T]he new language seems to require that payments made after confirmation be in equal amounts and keep pace with depreciation during the term of the plan.”).

25 In discussing the impact of BAPCPA in Chapter 11, Professor Bruce wisely cautioned: “When considering future revisions to the Bankruptcy Code, Congress need not ignore the agendas of commercial landlords, utility providers, and other interest groups. Congress should, however, more carefully weigh those interests against the broader values sought in bankruptcy.”). Bruce, supra note 18, at 213. See also Brian Rothschild, The Illogic of No Limits on Bankruptcy, 23 EMORY BANKR. DEV. J. 473, 475 n.1 (2007) (collecting BAPCPA criticism and describing the academic response as “consistently negative”). In addition, empirical work has now revealed that BAPCPA has certainly resulted in higher attorneys’ fees, delay, and time consuming paperwork, but not necessarily higher payouts to unsecured creditors. See Lois R. Lupica, The Consumer Bankruptcy Fee Study: Final Report, 20 AM. BANKR. INST. L. REV. 17 (2012) (finding significant post-BAPCPA increase in the cost of access to the Chapter 7 and Chapter 13 consumer bankruptcy systems); and The Consumer Bankruptcy Creditor Distribution Study: Final Report, which can be found at http://mainelaw.maine.edu/wp-content/uploads/2014/01/lupica-creditor-distributions.pdf, (concluding that no matter how it is looked at, unsecured distributions declined nationally as a share of total distributions under both Chapter 7 and 13, and that the decline was statistically significant).

On the other hand, some scholars have speculated that this was the nature of the game all along. See Ronald J. Mann, Bankruptcy Reform and the “Sweet Box” of Credit Card Debt, 2007 ILL. L. REV. 375, 383-92 (2007) (suggesting that by slowing the tide of personal bankruptcies, credit card issuers intended to profit from debt servicing revenues from debtors not yet in bankruptcy).


27 Non-adjusting creditors would include both nonconsensual creditors, including employees, as well as small unsecured creditors who lack either the leverage or the sophistication to raise their costs of credit to
Critiques of BAPCPA along these lines are well-known. But there is another related, broader, but less widely considered tension embedded not just in BAPCPA, but in bankruptcy reform legislation generally. That is the tension between the values underlying state law debt collection remedies, generally including the primacy of security, and the equality and rehabilitative objectives of a collectivized regime for dealing with default and financial distress. And here, BAPCPA seems to have signaled a decisive victory for state law in the epic battle between federal bankruptcy policy, on the one hand, and state debt collection rules and norms, on the other. The story of the degree of deference bankruptcy should afford to state law rights and entitlements is a larger one than can be told here. However, it is one that can, I believe, profitably be illustrated by examining BAPCPA’s changes to the preference and preference-related provisions of the Code. Just as the 1978 Act is widely recognized as representing the high water mark of debtor relief, it also signaled the historical apogee of the core bankruptcy principles take account of the higher risk associated with unsecured lending. The phrase developed as a response to defenses of the efficiency of security that were predicated on the assumption that, although unsecured creditors will receive less on insolvency, they should be able to compensate by charging a higher interest rate. See, e.g., Lucian Arye Bebchuk & Jesse M. Fried, The Uneasy Case for the Priority of Secured Claims in Bankruptcy, 105 Yale L.J. 857, 882-83 (1996).

See, e.g., Daniel Keating, RadLAX Revisited: A Routine Case of Statutory Interpretation or a Sub Rosa Preservation of Bankruptcy Law’s Great Compromise?, 20 Am. Bankr. Inst. L. Rev. 465, 466 (2012) (referring to the delicate balance in bankruptcy between a secured creditor’s state-law rights to foreclose on collateral and a debtor’s need to use that same collateral to reorganize as the “Great Compromise”); Lawrence Ponoroff & F. Stephen Knippenberg, The Immovable Object Versus the Irresistible Force: Re-thinking the Relationship Between Secured Credit and Bankruptcy Policy, 95 Mich. L. Rev. 2234 (1997). While both of these articles focused on secured credit, the tension between state collection law and bankruptcy affects unsecured creditors as well, since state law’s emphasis on “first come, first served” in terms of sharing the debtor’s assets encourages unsecured creditors to reduce their claims to judgment and obtain an execution lien on the debtor’s property before their counterparts, thereby becoming a secured creditor. The existence of the lien creates new issues because of the special solicitude shown for in rem rights, but the point is that bankruptcy norms and state collection remedy norms are fueled by very different impulses. See generally Sherwood Partners, Inc. v. Lycos, Inc., 394 F.3d 1198 (9th Cir. 2005), cert. denied, 546 U.S. 927 (2005).

Bankruptcy law accomplishes equitable distribution through a distinctive form of collective proceeding. This is a unique contribution of the Bankruptcy Code that makes bankruptcy different from a collection of actions by individual creditors. In a world of individual actions, each creditor knows that if he waits too long, the debtor’s assets will have been exhausted by the demands of the quicker creditors and he will recover nothing. The creditors race to the courthouse, all demanding immediate payment of their entire debt. Like piranhas, they make short work of the debtor, who might have survived to pay off more of his debts with a little bit of reorganization—or at least might have more equitably fed the slower piranhas. Id. at 1202-03.

Some additional discussion, however, can be found infra in Part VII.A. The issue arises because, while state law must of course yield to federal bankruptcy law, it is also true that bankruptcy law could not operate other than against the backdrop of state commercial law.

See David A. Skeel, Jr.’s Dominion: A History of Bankruptcy Law in America 131-
of debtor continuation through reorganization and creditor equality, both implemented through, *inter alia*, the trustee’s avoiding powers, including principally the power to set aside and recover preferential transfers.\(^3\) And just as has been the case in the consumer arena,\(^3\) legislative action affecting preference liability and recovery since that time, culminating (at least to date) with BAPCPA, has been to retreat from that summit in favor of ever-increasing obeisance to the state law bargain and to the growing hegemony of a creditor competition model over a creditor cooperation model.\(^3\)

II. PREFERENCE LAW AND POLICY: A BRIEF OVERVIEW

The power to set aside preferential transfers is certainly not the only avoiding power with which trustees are vested in order to assist in realizing the objectives sought to be served in a bankruptcy case, but it is undoubtedly the most controversial, misunderstood, and, to borrow a word from Churchill, enigmatic of the trustee’s array of avoiding powers.\(^3\) Voidable preferences may, but need and generally do not, involve fraud;\(^3\) they also may, but need and generally do not, involve policing the commercial law’s concern

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59 (2001) (discussing the profound changes in the bankruptcy system occasioned by the 1978 Act, the factors that accounted for expansion of the bankruptcy law and the decision to make it more attractive for individuals and corporations).

31 The role of the preference law in reorganization cases is more complicated and more controversial. Certainly, creditor equality remains an objective in Chapter 11, but it must compete with other policies that attain in reorganization that do not apply in Chapter 7. See infra text accompanying notes 39 & 258-263.

32 See supra note 9 and accompanying text.

33 See infra note 57. Of course, the rhetoric of those supporting legislation to further dismantle the 1978 Act speak in higher-minded, moralistic terms. See, e.g., Todd J. Zywicki, *Bankruptcy Law as Social Legislation*, 5 Tex. Rev. L & Pol. 393, 430 (2001) ("A primary impetus for bankruptcy reform is thus to rein in the excesses of the bankruptcy system that were created in the 1970s and to bring the bankruptcy laws back into line with traditional, universal notions of morality and personal responsibility. As such, it is consistent with other legislative initiatives, such as welfare reform, which similarly attempt to reinstate the traditional moral foundations of our social legislation.").

34 In one of the classic treatments of the evolution of bankruptcy preferences from its English law origins through its different iterations in American bankruptcy legislation, Professor Robert Weisberg concludes ultimately that the effort to objectify the law of preferences has failed, and was doomed to fail, inasmuch as it only masks what remains a centuries-old unresolved cultural division over acceptable commercial behavior and the true goals of the commercial law. See Robert Weisberg, *Commercial Morality, the Merchant Character and the History of the Voidable Preference*, 39 Stan. L. Rev. 3, 10-11 (1986).

35 Section 5(b) of the Uniform Fraudulent Transfers Act (1984), for example, treats the transfer by an insolvent debtor to an insider-creditor on account of an antecedent debt as fraudulent with respect to a creditor whose claim arose before the transfer, if it can be shown that the insider-creditor had reasonable cause to believe that the debtor was insolvent. In fact, even a transfer to a real creditor has been regarded as fraudulent under certain circumstances going back as far as *Twyne’s Case*, 76 Eng. Rep. 809 (1601) (finding the transfer of property in satisfaction of an existing debt to be fraudulent based on the fact that it was made in secret and the transferor retained possession of the property). However, most preferences involve payments that are perfectly lawful under applicable nonbankruptcy law and are unassailable under the fraudulent transfer law.
with secret liens.\textsuperscript{36} Many people, therefore, find the idea of preference liability counterintuitive, certainly on first encounter, and often even after repeated exposure.\textsuperscript{37} It is hardly surprising, therefore, that the preference law has been a lightning rod for brickbats whenever the occasion for reexamining preference recovery arises.\textsuperscript{38}

The concept of a preference is a very basic one; namely, that one creditor, who has been advantaged by the prebankruptcy transfer from an insolvent debtor of cash or security, should return that cash to the bankruptcy estate (or lose that security) in order to ensure equality among all of the debtor’s similarly positioned creditors.\textsuperscript{39} Preference law focuses on the relationship

\textsuperscript{36}Because of the operation of § 547(e)(2), the transfer of a lien on personal or real property given in exchange for new value becomes a preference only if the lienor fails to take the steps necessary to perfect its lien within 30 days of the date “it becomes effective between the transferor and transferee.” Until BAPCPA, the relation-back period was limited to ten days. See infra text accompanying notes 195-197 for further discussion. Section 60a (7) of the 1898 Act contained a similar provision, with a twenty-one-day grace period (or such shorter time if prescribed by state law)—in the case of a transfer for present consideration—to perfect in order for the transfer to be deemed to have been made at the time the lien was granted rather than the time of subsequent perfection. As one example of the dissatisfaction felt by some over the use of the preference law to address the problems associated with ostensible ownership, see C. Robert Morris, Jr., Bankruptcy Law Reform: Preferences, Secret Liens, and Floating Liens, 54 MINN. L. REV. 737, 740 (1969) (noting that originally voidable preferences “were voidable without regard to the form of transfer, and nonpreferential transactions were not within the reach of the section,” but that “subsequent amendments, however, have extended the provision of § 60 to condemn certain unrecorded transactions regardless of whether they were, in fact, preferences.”). Professor Morris went on to condemn the confusion created by conflating unrecorded transfers with “true” preferences. Id. at 753-57. In point of fact, life might be simpler if we simply had a statute that provided that all security transfers (save for purchase money transactions) not recorded within x days after attachment may be invalidated by the trustee. However, for the time being, we have consigned regulation of delayed perfection transactions to the preference law.

\textsuperscript{37}It seems odd at first blush that a professional creditor would inveigh against preference law as vehemently as an occasional creditor, inasmuch as the former will presumably benefit at times from a preference recovery in a case where it holds an unavoidable claim in the case. The impact in those situations, however, is likely to be diffused (and accordingly) small and not very visible. On the other hand, when a creditor is the target in a preference action, the impact is direct and almost invariably much more significant in financial terms. See generally Brooke E. Gotberg, Conflicting Preferences: Avoidance Proceedings in Bankruptcy Liquidations and Reorganizations, 100 IOWA L. REV. 51, 54-56 (2014) (pointing out that while dismay over application of the preference law is understandable among creditors who are “non-repeat players,” the disapproval by repeat players, who might from time-to-time actually benefit from application of the preference law, is no less vehement).

\textsuperscript{38}See infra notes 88-95 & 279-280 and accompanying text.

\textsuperscript{39}Equality of distribution is central to bankruptcy policy and summed up in the frequently invoked maxim that “equality is equity.” See Bailey v. Glover, 88 U.S. 342, 346 (1874) (“It is obviously one of the purposes of the Bankruptcy law that there should be a speedy disposition of the bankrupt’s assets. This is second only in importance to securing equality of distribution.”); Frank R. Kennedy, Statutory Liens in Bankruptcy, 39 MINN. L. REV. 697, 699-00 (1954) (noting that American bankruptcy law has moved in the direction of increasing distributions to unsecured creditors by decreasing the portions that go to secured and priority claimants). See also Howard Delivery Serv. v. Zurich Am. Ins., 547 U.S. 651, 657 (identifying the deep roots of the equality of distribution objective in the Bankruptcy Code). It is important to point out that, in connection with preference liability, equality policy is served not only when other unsecured creditors receive more than they would have without return of the preference. We
among creditors in light of the unique goals of a collectivized debt collection proceeding and, therefore, is quite different in operation and objective than the state law "race of the diligent" where the baseline rule is "first in time first in right." It is as if the dawn of the 90th day before filing (in the case of noninsiders) witnesses the imposition of a kind of commercial ceasefire, under the terms of which all interests are frozen in place so that, by the time the case is formally commenced, the horse (to mix my metaphors) will not already have exited the barn. That proposition seems innocuous enough, yet it has been anything but so in its application under the Code. As fashioned by the 1978 Act, the determination of a preferential transfer was recast and broadened to operate (at least on the face of it) as a rule of strict liability. That is to say, there was no longer any need to prove intent, culpability, complicity, or consanguinity to establish an avoidable preference; just that the transfer had preferential effect.

determine recovery of avoided transfers under § 550(a) based upon whether the estate will be made better off, not whether one particular group of creditors or another will be better off as a result of its recovery. See, e.g., Gonzales v. Conagra Grocery Prods. Co. (In re Furrs Supermarket, Inc.), 373 B.R. 691, 699 (B.A.P. 10th Cir. 2007) (noting that "benefit to the estate" refers to all potentially interested parties and not just unsecured creditors or any other class of creditors). Cf. Rushton v. Bank of Utah (In re C.W. Mining Co.), 477 B.R. 176, 188-90 (B.A.P. 10th Cir. 2012) (distinguishing Furrs where avoidance and recovery of a postpetition transfer would only benefit the trustee, not the estate, in the form of increased compensation, but noting that "benefit to the estate" is to be broadly construed). The point to be made is that if the estate is administratively insolvent, the preference recovery may principally, or even only, benefit priority claimants. That does not make use of the preference power inappropriate and "equality," in the broad sense of the term, is still served in that the preferred creditor is now treated in a nondiscriminatory manner in relation to all other general creditors, which is to say they together equally receive nothing. What is promoted by application of the preference law is not necessarily equality of distributions from the estate, as much as protection of the bankruptcy law distributional scheme—which also makes certain claims more "equal" than others. Preference policy is also more nuanced in the Chapter 11 context because of the presence of other policy considerations in reorganization that do not exist in liquidation and must be accommodated along with preference policy. See infra notes 258-266. In short, equality may be a desirable goal for a variety of reasons ranging from a commitment to fairness, to maximizing economic utility, to enhancing the prospects for debtor survival through reorganization.

In a sense, except for transactions involving new value, the suggestion is that the preference law should be seen as imposing the same kind of standstill as the automatic stay does upon filing, and largely for similar reasons. See Thomas H. Jackson, Avoiding Powers in Bankruptcy, 36 STAN. L. REV. 725, 758-59 (describing preference law as a means to police Jackson's hypothetical "creditor's bargain" model under which creditors would, ex ante, agree to ratable distribution of the debtor's assets after insolvency).

See Charles Jordan Tabb, Rethinking Preferences, 43 S.C. L. REV. 981, 1035 (1992) (advocating repeal of § 547(c)(2) as undermining the operation of preference law as a rule of strict liability).

Section 547(b) sets out two initial unnumbered elements of a preference: (1) a "transfer," and (2) "of an interest of the debtor in property," and then five additional numbered requirements. Looking to the numbered requirements, the bankruptcy trustee may void a transfer of property of the debtor if she can establish:

* first, the transfer was "to or for the benefit of a creditor"; and
* second, the transfer was made for or on account of an "antecedent debt," i.e., a debt owed prior to the time of the transfer; and
* third, the debtor was insolvent at the time of the transfer; and
* fourth, the transfer was made within ninety days before the date of the filing of the bankruptcy
This was not always the case; in fact, had never been the case. For the last 40 years of its existence, the Bankruptcy Act of 1898, for instance, only permitted a trustee to avoid a preferential transfer if the creditor receiving the transfer, or benefitted thereby, “has reasonable cause to believe that the debtor is insolvent.” In fact, until adoption of the current Code, every U.S. bankruptcy law that had anything at all to say about preferences incorporated some notion of culpability or intent as one of the elements of a preferential transfer. This was quite consistent with English law, from which our concept of a preferential transfer was inherited. There are already extant several fine treatments of the historical evolution of preference law, which

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petition, or was between ninety days and one year before the date of the filing of the petition if the transfer was to an “insider”; and

• fifth, the transfer has the effect of increasing the amount that the transferee would receive in a Chapter 7 case. It is the last of these elements—that the transfer enable the transferee to receive more than it would have received had the transfer not been made and the debtor’s estate liquidated in Chapter 7—that makes the preferential effect dispositive. In other words, the fact that setting aside of the transfer will not increase distributions to other unsecured creditors (perhaps the recovery will all go to pay the trustee’s attorney or pay other administrative expenses in the case) is irrelevant to the existence of a preference if it can be shown that the estate was made better off by the transfer. See supra note 39.

See Vern Countryman, The Concept of a Voidable Preference in Bankruptcy, 38 VAND. L. REV. 713, 725 (1985). See also Lawrence Ponoroff, Evil Intentions and an Irresolute Endorsement for Scientific Rationalism: Bankruptcy Preferences One More Time, 1993 WIS. L. REV. 1439, 1477-78 (suggesting that elimination of a mens rea test from preference law was an evolutionary one, wending its way from the more demanding requirement of proving the debtor’s intent to prefer, to the less demanding rule that the transferee have knowledge of the preferential result). Even the 1978 Act contained a limited knowledge/intent standard for a time. Until 1984, in the case of a transfer to an insider made outside of the ninety days prior to filing, the trustee still had to show that the insider-transferee had “reasonable cause to believe the debtor insolvent.” Id. at 1479, n.109.


See § 60(b) of the Bankruptcy Act of 1898. As originally enacted, the 1898 Act required proof that a preference was intended. Act if July 1, § 60, 30 Stat. 562. This requirement was softened by an amendment in 1910 substituting reasonable cause to believe that a preference would be effected, Act of June 25, 1910, § 11, 36 Stat. 842, and then revised further by the Chandler Act of 1938, 52 Stat. 870, to require only reasonable cause to believe that the debtor was insolvent. And yet, this requirement still often proved the most difficult element for the trustee to establish inasmuch as insolvency under the Act was defined, as it is in § 101(33) of the Code, in balance sheet, and not equity sense, terms. See § 1(19) of the former Act.

The Bankruptcy Act of 1800 did not did not address preferential transfers at all. See Countryman, supra note 43 at 718. However, Professor McCoid suggests that preferences were nonetheless sometime recovered under the 1800 Act based on principles derived from English law at the time. See John C. McCoid, II, Bankruptcy, Preferences, and Efficiency: An Expression of Doubt, 67 VA. L. REV. 249, 253 (1981).

Countryman, supra note 43, at 114-18 (identifying the connection between early English preference law and law of fraudulent transfers).

See Weisberg, supra note 34 at 40-41, 55-56 (citing Lord Coke in The Case of Bankrupts, 76 Eng. Rep. 441, 473 (K.B. 1584) concerning the moral dimension of preference liability, and noting the influence of British thinking on early American commercial ideology).

See, e.g., Countryman, supra note 43, at 714-26; McCoid, supra note 46, at 230-60; Tabb, supra note 41, at 995-1014; Weisberg, supra note 34.
obviates the need for recounting the unfolding of those historical antecedents at this juncture, though these narratives are all well worth the read.

Just as the elimination of a *mens rea* standard for establishing a voidable preference is of relatively recent origin, so, too, is the adoption of an integrated scheme of exceptions or defenses to preference liability a fairly new phenomenon.50 The coincidence of these two developments is a manifestation of the deep-seated dualism, if not outright schizophrenia, that has long beleaguered the development of a reasoned and dependable approach to preference recovery.51 In significant measure, the exceptions to preference liability in § 547(c), including particularly the all-important ordinary course of business exception in subsection (c)(2), highlight the fact that the normative justification for the preference law remains in the minds of many not solely (or even primarily) "equality," but also "deterrence."52 This is quite consistent with Congress's articulation in the legislative history of the 1978 Act of

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50 Of the current nine exceptions in § 547(c), only the subsequent advance rule in § 547(c)(4) had a specific counterpart under the former Act. See § 60c of the Bankruptcy Act of 1898. However, many commentators believe that § 547(c)(2) is a form of codification of the judicially-created "current expense rule" applied from time-to-time under the former Act. See, e.g., Lissa L. Broome, Payments on Long-Term Debt as Voidable Preferences: The Impact of the 1984 Bankruptcy Amendments, 1987 Duke L.J. 78, 89-91; Countryman, supra note 43, at 767-69.

51 See Tabb, supra note 41, at 1016-1027 (describing § 547(c)(2) as irreconcilably at odds with proper basis for preference liability). Professor Countryman was of the same mind. Countryman, supra note 43, at 817-18. See also Ponoroff, supra note 43, at 1481 n.199 (noting that "[i]t would be difficult and perhaps unfair to disassociate completely the scheme of preference exceptions in § 547(c) from the sentiment that these transactions do not involve the sort of deliberate 'eve of bankruptcy' grab which colored earlier preference law" and identifying § 547(c)(2) as the most direct expression of that sentiment."); infra note 52 and accompanying text.

52 The House Committee Report that accompanied the Bankruptcy Reform Act of 1978, provided as follows:

> The purpose of the preference § is two-fold. First, by permitting the trustee to avoid prebankruptcy transfers that occur within a short period before bankruptcy, creditors are discouraged from racing to the courthouse to dismember the debtor during his slide into bankruptcy. The protection thus afforded the debtor often enables him to work his way out of a difficult financial situation through cooperation with all of his creditors. Second, and the more important, the preference provisions facilitate the prime bankruptcy policy of equality of distribution among creditors of the debtor. The operation of the preference § to deter "the race of diligence" of creditors to dismember the debtor before bankruptcy furthers the second goal of the preference §-that of equality of distribution.

H.R. REP. No. 595, 95th Cong., 1st Sess. 177-79 (1977) [hereinafter HOUSE REPORT]. Consistent with the suggestion in the HOUSE REPORT regarding the hierarchy between the two policies, most commentators, believe that the "equality" objective is preeminent. See authorities cited infra note 189. See also Gotberg, supra note 37, at 64-65 (noting that the deterrence policy encourages exceptions to preference liability, while the equality policy would avoid all preferential transfers regardless of whether they promoted on-going economic activity between the debtor and its creditors); Rafael I. Pardo, On Proof of Preferential Effect, 55 Ala. L. Rev. 281, 283 (2004) (noting that the greater amount test in § 547(b)(5) determines preferential effect on the basis of whether the actual result of the transfer is greater than the result of a hypothetical liquidation without the transfer—and that's it).
the alternative purpose for the preference law.\(^{53}\) It is also consistent with carving out an exception for behavior that "leave undisturbed normal financial relations";\(^{54}\) the justification offered by Congress in 1978 for inclusion of an ordinary course of business defense to preference recovery.\(^{55}\) This conceptualization of preference liability appeals to credit providers precisely because it comports with their instinct that they should only be "penalized" for execrable behavior, but it does so by subordinating the collectivized goals of the bankruptcy system to the individual creditor/debtor state law relationship. It is, therefore no accident that, as with most of the 1978 Act amendments to the Code generally,\(^{56}\) the amendments to § 547 since its original enactment principally have operated either to enlarge the exceptions or, with the same effect, to contract the reach of the statutory definition of a preferential transfer.\(^{57}\)

\(^{53}\)See id.; and text accompanying infra note 189 regarding the primacy of the equality objective over deterrence.

\(^{54}\)See House Report supra note 52, at 373. The Report goes on to explain obliquely that the reason for this is "because it does not detract from the general policy of the preference section to discourage unusual action by either the debtor or his creditors during the debtor's slide into bankruptcy," seeming to forget entirely about the "more important" equality objective. See also Templeton v. O'Cheskey (In re American Housing Foundation), 785 F.3d 143, 160 (5th Cir. 2015) (describing § 547(c)(2) as providing "a safe haven for a creditor who continues to conduct normal business on normal terms.").

\(^{55}\)See also Michael J. Herbert, The Trustee Versus the Trade Creditor: A Critique of Section 547(c)(1), (2), & (4) of the Bankruptcy Code, 17 U. RICH. L. REV. 667, 691-94 (1983) (suggesting the inconsistency between a justification based upon the policy of rewarding creditors that provide the debtor with new credit and the primary explanation for § 547(c)(2) that the ordinary course creditor was unaware of the debtor's situation and thus had no intent to gain an advantage over other creditors). For another critique of that justification of the ordinary course of business defense, see Tabb, supra note 41, at 1022-24 (arguing that the assumption about affecting creditor behavior with the chosen legal rule is extremely dubious)

\(^{56}\)See supra note 9.

\(^{57}\)The most expansive set of revisions were accomplished under the 2005 amendments to the Code and are discussed in detail below. See infra notes 78-81 & 130-134 and accompanying text. The 1984 amendments, Pub. L. 98-353, 98 Stat. 333, notably eliminated the forty-five-day limitations on the incurring and payment of debts in the ordinary course of business under § 547(c)(2). The 1984 Act also introduced the low-dollar safe harbor for consumer debts of less than $600, currently in § 547(c)(8). See generally, Ponoroff & Ashby, supra note 55, at 22-27. The former opened the door to a major expansion of the exception by virtue of application of the exception to payments on long-term debt. See Union Bank v. Wolas, 502 U.S. 151 (1991); infra text accompanying notes 125-127. Section 304(f) of the 1994 amendments, Pub. L. 103-394, 108 Stat. 4106 added the exception currently in § 547(c)(7) for transfers made in payment of a domestic support obligations, and § 202(c) added a new subsection (c) to § 550 to protect noninsider creditors benefitted by a payment to an insider made more than ninety days but less than one-year prior to filing. The latter, of course, was a response to the Seventh Circuit's DePrizio decision. See infra note 130. The only pre-BAPCPA amendment that arguably expanded the scope of preference liabil-
Although each tinged to one degree or another by the notion of creditor inculpability, the other preference exceptions involve transactions that can be sorted into one of three categories: (1) meeting the technical definition of a preference under § 547(b), but not having actual preferential effect; i.e., do not result in a diminution of the estate; (2) reflecting a legislative judgment that a competing, nonbankruptcy policy objective outweighs bankruptcy equality policy; or (3) representing an attempt to inhibit the trustee from bringing a preference claim either improvidently or with improper ulterior motive.

Exceptions that simply clarify and refine what kind of transfers violate the equality norm underlying the definition of a preference in § 547(b)—the first of the above three categories—are necessary and largely unobjectionable. Exceptions explained by the second category represent policy determinations that are made from time to time, any one of which we might agree with or not, but that are an inescapable consequence of the reality that bankruptcy law doctrine, at any given moment in time, is an expression of political judgment and interest group politics (which may not be very different things). The balancing of bankruptcy policies against the policies underlying other specific laws is inevitable and is reflected in multiple locations throughout the Code. Thus, the only significant question to be addressed is not necessarily how the balance has been struck in any particular situation, but rather when

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58 The exceptions in §§ 547(c)(1) and (c)(3) clearly fall into this category.
59 I would also include the subsequent new value and improvement in position test in, respectively, §§ 547(c)(4) and (c)(5) in this category. I do so because they can, at least in part, be defended on the basis of the absence of preferential effect. Section 547(c)(4), of course, is also frequently justified on the basis that it encourages debtors and creditors to continue normal financial relations and, thus, enhances prospects for the debtor to remain out of bankruptcy altogether—a justification that derives from the deterrence rationale of the preference law and ignores the equality consideration. However, as noted, I believe the subsequent advance rule in subsection (c)(4) can be defended as well as not interfering with equality policy, as the estate is replenished by the amount of the new value. See also infra note 298.
60 Clearly, the exceptions in §§ 547(c)(7), 547(h), and 546(e) fall into this category. Also, while perhaps sui generis, § 547(c)(6)'s protection for statutory liens probably comes closest to this category of the three offered. For a somewhat different classification of the preference exceptions, see Gotberg, supra note 37, at 69-81 (dividing the subsection(c) exceptions into two categories: narrowing exceptions (such as § 547(c)(1)) and true exceptions (such as § 547(c)(2))).
61 The so-called de minimis dollar value exceptions in §§ 547(c)(8) and (9) are clearly in this category. See also infra text accompanying notes 220-224, regarding modification of the venue rules for the same purpose.
62 This is evident, for example, in the § 507(a) unsecured claim priorities and several of the nonconduct-based exceptions to the dischargeability of a particular debt in § 523(a). In a different sort of way, the limitations on rejection of collective bargaining agreements in Code § 1113, and the special provisions regarding retiree benefits in § 1114, are also illustrations of how the Code seeks to accommodate the conflicting policy considerations animating other laws.
do the sum of these policy-based exceptions to a bankruptcy rule begin to
take a toll on the effectiveness of that rule (and eventually the larger aspira-
tions of the bankruptcy regime) that is greater than the sum of their individ-
ual parts?63 Regarding the third category of preference exception, as
discussed more fully below,64 the approach taken in §§ 547(c)(8) and (c)(9),
imposing a minimum dollar threshold for invoking the bankruptcy court’s ju-
risdiction in, respectively, consumer and nonconsumer preference cases, repre-
sents unimaginative and almost certainly ill-fitting responses to the putative
problem it purports to address.

Returning, to the broader theme underlying the scheme of preference ex-
ceptions, a deterrence rationale conflicts with equality policy in a fashion that
at best simultaneously diminishes the effectiveness of each, and at worst ob-
structs realization of the core ambitions of the bankruptcy system.65 It is also
unrealistic to imagine that any defense to preference liability founded on the
absence of the opprobrious behavior perceived as principally animating pre-
ference law in the first instance could ever be crafted with the precision nec-
essary to capture only and all of the conduct sought to be approved and none
of the praxes intended to be proscribed. That is to say, any defense to prefer-
ence liability founded chiefly on a deterrence-oriented rationale will serve its
intended objective, if at all, only on occasion and serendipitously at that. Sec-
ction 547(c)(2), which rests most squarely on this explanation of preference
policy, is the exemplar.66 This alone might not be so alarming but for the fact
that, at the same time, exceptions of this ilk critically erode the preference
law’s ability to serve its other, and assuredly its primary,67 core objective.

For these reasons, many commentators,68 myself included,69 have been

63Certainly, this is a circumstance we have witnessed in other parts of the Code. The proliferation of
exceptions to the automatic stay, twenty-eight in total after the addition of ten more by BAPCPA, might
be a case where this phenomenon has taken effect. Likewise, the ever-increasing scope of debt categories
excepted under § 523(a) from the individual discharge might qualify as well.

64See infra text accompanying notes 207-219. The changes to venue rules, also discussed below (infra
text accompanying notes 220-224) present a somewhat different approach to regulation of misuse of the
preference power and, as such, are much more defensible.

65This includes not only the traditional notion of “equality of distribution,” but also debtor continua-
tion and the Code’s distributional scheme generally. See infra Party VII.

66See infra Part VIA.

67See supra note 52, quoting legislative history describing the equality objective as the most important.
See also infra note 189.

68See Countryman, supra note 43, at 748 (suggesting that, despite the legislative history discussing the
aim of “deterring creditors from scrambling for advantage,” it seems ridiculous to expect [the preference
law to produce] deterrence. . . .”); McCoid, supra note 46, 263-64 (offering reasons to be skeptical of
preference law’s deterrent effect). To be sure, McCoid also questioned whether there were sufficient
preference recaptures to warrant the assertion that preference law actually ameliorates distributional
equalities. Id at 262-63. See also David Gray Carlson, Security Interests in the Crucible of Voidable Prefer-
tential. 1995 U. ILL. L. REV. 211, 215-18 (identifying several reasons that raise serious doubt over whether
deterrence is the principal purpose of voidable preference law); Tabb, supra note 41, at 986-94 (discussing
critical of the deterrence justification for the preference law. In part, this is based on the aforementioned impotence of deterrence-based defenses actually to achieve their desired aim. More importantly, however, it is grounded on the increasingly corrosive impact that the growth of these exceptions has had since 1978 on the framing of a comprehensible and internally consistent preference policy. The deterrence justification of voidable preferences rests on three highly dubious assumptions: (1) that there are “good” and “bad” preferences; (2) that it is possible to easily (or even not so easily) distinguish between the two; and (3) that the distinction, even to the extent it exists and can be detected, matters. And yet, the thrust and focus of most reform legislation since 1978 has been based on the conviction that each assumption is true beyond the shadow of a doubt.

The ineffectiveness of the deterrence explanation for bankruptcy preferences can best be illustrated by looking closely at the description in the legislative history of how it operates. To paraphrase, without a preference law, creditors that supposedly might otherwise have been inclined to work with the debtor will feel obliged to swoop in to claim their share of the available spoils as soon they learn that the debtor has come upon financially-troubled waters. Thus, the debtor’s slide into bankruptcy will become inevitable. But, with the existence of preference liability, the reasoning goes, any such efforts will be futile, so that the creditors will say, “shucks, no point if I’m just going to have to give it back.” The yarn continues, moreover, that the protection of the preference law will also encourage both existing and new creditors to continue doing business with this debtor despite its financially unstable position. Finally, then, in a truly utopian world, both of these phenomena will, in some number of cases, coalesce to create the conditions that will allow the debtor actually to right the sinking ship, return to solvency, and avoid bankruptcy entirely.

the primacy of the equality over deterrence explanation for the preference law). But see Jackson, supra note 40 (identifying the purpose of the preference law as preventing creditors, with or without the debtor’s help, from “opting-out” of the collective proceeding during the transitional period prior to bankruptcy).

69 Ponoroff, supra note 43, at 1479, 1484 (discussing the impact of accepting the rationale that “the policy of the preference law is to ensure substantial equality, not punish nefarious behavior.”).

70 See supra note 52.

71 The argument is merely the flip side of the proposition that the preference law will in fact deter precipitous collection activity and, in substance, is really nothing more than part of the apology for evermore exceptions to preference recovery that hinge on the creditor’s supposed innocence. See infra note 94. It also ignores a critical passage from the House Report accompanying the 1978 Act, stating: “To argue that a credit’s state of mind is an important element of a preference and that creditors should not be required to disgorge what they took in supposed innocence is to ignore the strong bankruptcy policy of equality among creditors.” See House Report, supra note 52, at 178.

72 See, e.g., David J. DeSimone, Section 547(c)(2) of the Bankruptcy Code: The Ordinary Course of Business Exception Without the 45 Day Rule, 20 Akron L. Rev. 95, 99 (1986) (“If the bankruptcy laws in
Of course, overlooked in this simplistic and rosy picture of creditor behavior is the fact that the existence of a preference law might just as easily motivate a creditor, otherwise inclined to work with the debtor, to race to the courthouse and grab the debtor's remaining assets with the hope not only of getting ahead of its fellow creditors, but also of getting ahead of the ninety-day clock. The point being that (short of collusion) the beginning of the preference period can only be known retrospectively. Thus, a preference law is just as likely to precipitate the premature dismantling of the debtor and the slide into bankruptcy as it is to prevent those events from occurring. Effective deterrence-based rules hinge on their in terrorem effect; the penalty must exceed the crime, but the only "penalty" for receiving a preference is the obligation to return it. Thus, the in terrorem effect of preference law is tepid at best. The rules of preference recovery simply provide no meaningful or predictable motivation for creditors to refrain from collection activity, and surely critics of the current preference law are hardly remonstrating for stiffer penalties as the solution. The possibility that the debtor will not file, or will not file within 90 days, or that the trustee will not pursue the claim, are each alone enough, and together more than sufficient, to warrant investment in the modest costs of judgment execution even with the threat of a future preference challenge looming.

Although, as noted earlier, BAPCPA originated as a preemptive strike against the NBRC Report, uncharacteristically its provisions concerning preference law included the near verbatim adoption of three of the NBRC's recommendations. These were: (1) further broadening of the exception in

general, and specifically the preference laws, did not 'discourage the dismemberment of ailing, but salvageable debtors,' there would be far more bankruptcies."). Personally, I used to be more sympathetic to the encouraging creditors to continue doing business with the debtor argument. See Ponoroff, supra note 43, at 1516 (proposing a preference rule guided by strict liability, but "tempered by defined exceptions that protect the existing life-blood of the troubled firm and offer hope for badly needed new infusions ...."). In my dotage, however, I have now come to agree with Professor Tabb's assessment that: "Whether a debtor will or will not go into bankruptcy, whether a preference action will even be brought if bankruptcy does ensue, and whether such a preference action will be successful if brought are all much more remote concerns than the basic question of whether the debtor will pay." Tabb, supra note 41 at 1023. See also supra note 55 & infra note 295.

73The ability of creditors to force the debtor into a proceeding under § 303 provides some protection against such conspiratorial collusion between the debtor and one of its creditors. Moreover, most transactions of this sort are likely to involve creditors with access to or control over the debtor, who would thus be subject to the extended insider preference period.

74See McCoid supra note 46, at 263-65 (pointing out that because preference law does not penalize, it may not act as an effective deterrent).

75Id. at 269-70 (conceding, in something of an understatement, that a more deterrent-designed preference section would likely have costs that exceed its benefits).

76See infra text accompanying notes 13-15.

77The remaining amendments to preference law accomplished under BAPCPA are reviewed infra text accompanying notes 130-134.
§ 547(c)(2) by substitution of a disjunctive test in place of the then-current objective test for ascertaining whether a preferential payment qualifies for protection as an “ordinary” transaction;78 (2) inclusion of a new exception in cases involving nonconsumer debtors, essentially operating as a safe harbor for transfers to a noninsider creditor of property aggregating less than $5,00079; and (3) a change in the venue rules to require that preference claims against noninsiders on nonconsumer debts seeking recovery of less than $10,00080 be brought in the district where the creditor maintains its principal place of business.81 In turn, these NBRC recommendations were a nearly wholesale incorporation of certain of the recommendations made in a study of preferences sponsored by the American Bankruptcy Institute and conducted between May of 1995 and May of 1997.82 Hence, a brief review of that study helps to paint a more complete picture of the landscape.

III. THE ABI STUDY

The ABI Preference Study remains the only large-scale, major empirical study of preferences and preference litigation to date. It was, however, an attitudinal not an observational study, which is to say that the basic data that the Task Force83 conducting the study worked from were survey responses. Two surveys were employed by the Task Force; one designed for

78 The requirement that the debt be incurred in the ordinary course of business or financial affairs of the debtor and the transferee remained unaltered. However, the requirements that the payment be made in the ordinary course of business or financial affairs of the parties and according to ordinary business terms, was amended to state these latter two requirements in the alternative. Thus, after BAPCPA, “ordinariness” as between the parties or in terms of objective industry practices suffices to establish the defense, rather than, as had been the case, have to satisfy both the subjective and objective standards. It should, however, be noted that in the explanatory text to this recommendation there is a suggestion that the intent was that ordinary business terms could provide the standard of “ordinariness” only when there is insufficient prepetition conduct to establish a course of dealings between the parties. See NBRC REPORT, supra note 13, at 802. That limitation is not, however, reflected in the language of the actual recommendation, which is what was effectively adopted by BAPCPA; thus, perhaps, broadening the exception beyond what the Commission intended.

79 The recommendation eventually became codified as § 547(c)(9). Due to the fact, however, that this dollar amount is one of the amounts that is adjusted every three years under § 104(a), the current minimum amount sufficient to allow a creditor to invoke this defense is $6,225.

80 Again, because this figure is also one that adjusts every three years under § 104(a), the minimum current amount that must be exceeded to overcome the requirement that the action be brought in the district of the creditor’s place of business is $12,475.

81 28 U.S.C. § 1409(b) (2013). Prior to BAPCPA, venue was proper in the district court where the case was pending, except for a narrow limitation if the amount of the claim was less than $1,000. That narrow limitation has been retained, although the dollar figure has been adjusted upward under § 104(a) to $1,250.


83 The Task Force consisted of 13 attorneys, six accountants/turnaround specialists, seven credit managers, one banker, and a Reporter. The individual members of the Task Force, and the Reporter, are listed
credit providers (Survey 1), a group anticipated as most likely to be affected by the preference laws, and the other for bankruptcy professionals (Survey 2), a group perceived to be most knowledgeable about the actual day-to-day operation of the preference laws. A total of 1,586 copies of Survey 1, and 1,000 of Survey 2, were disseminated. According to the ABI Study, the return rates for these surveys were, respectively, 29.4% and 35.6%.

It should have come as no surprise to anyone to learn that the credit provider group was overall much more dissatisfied with, and jaundiced about, the operation of the preference law than the bankruptcy professionals group. There was, however, some shared sentiments, as both groups (1) were apparently suspicious about the effectiveness of the preference laws in serving their stated objectives, (2) believed that the ordinary course of business defense should be clarified and made easier to apply, (3) supported a minimum dollar amount floor as a condition to the trustee’s ability to bring a

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84 ABI Study, supra note 82, at 2. While regular credit providers are most likely to be defendants in preference actions, they are also likely to be beneficiaries of preference actions in situations where they are creditors in a proceeding in which preference actions are successfully brought against other creditors, thereby, at least in theory, adding to the estate and potentially the amount of the dividend to unsecured creditors. However, as discussed supra note 37 and infra note 88, even professional credit providers, who are just as likely to be benefited as disadvantaged by the preference law, are generally hostile to the concept in the abstract and in practice.

85 Id.

86 Survey 1 was mailed to: (i) all 386 members of the Commercial Finance Association, and to (ii) the 1200 members of the National Association of Credit Management with Certified Credit Executive (CCE) or Certified Business Fellow (CBF) designations. Survey 2 was mailed to 1000 randomly selected members of the American Bankruptcy Institute who were listed in the membership rolls as being an attorney, accountant, or turnaround consultant, and who stated that at least part of their practice involved business bankruptcy. Id. at 2-3.

87 Those percentages may represent statistically representative sample sizes from which to draw conclusions with some confidence, but my nonstatistically-based experience has been that the naysayers are generally more likely to speak out, and in a louder voice, than their more contented counterparts.

88 Although the ABI Study observed that credit providers could be affected both positively and negatively by application of the preference law, supra note 82, I believe the overall hostile attitude toward preference law was predictable. Even though it is true that they may sometimes benefit from a preference recovery in a case where they hold a claim, the impact is likely to be small and not very visible. On the other hand, when they are the target in a preference action, the impact is direct and usually significant in financial terms. See supra note 37. See also Gotberg, supra note 37, at 54 (pointing out that another reason why preference law is not popular with “repeat players” is that preference liability is not contingent on recovery inuring to the benefit of unsecured creditors); infra note 246.

89 ABI Study, supra note 82, at 3 (noting a widely-expressed criticism about the coercive nature of many preference actions, and the belief that often recoveries funded administrative expenses without any benefit in the form of increased distributions to general creditors). The assumption, even if true, that this renders the preference law “ineffective” is open to serious question. See infra notes 217, 261, & 318 and accompanying text.

90 Id. at 4.
preference action,\textsuperscript{91} and (4) were concerned that the difficulty and expense of preference litigation created pressure on defendants to settle preference claims of even dubious validity.\textsuperscript{92} The two groups disagreed fairly sharply over the extent to which unsecured creditors as a group benefitted from application of the preference law,\textsuperscript{93} but were more in accord in expressing support for reforms aimed at providing protection for creditors that had "assisted" the debtor prefiling in its efforts to avoid bankruptcy entirely.\textsuperscript{94} Again, not unexpectedly, the credit provider group was strongly of the mindset that the recipient of a preferential transfer should only be required to

\textsuperscript{91}This was hardly a new concept. The idea of a dollar-denominated threshold for bringing preference actions goes back at least to the Commission established by Congress in 1970 to "study, evaluate and recommend changes to [the existing bankruptcy law]. 14 Act of July 24, 1970, Pub. L. No. 91-354, 86 Stat. 468. See \textsc{Comm'n on the Banker. Laws of the U.S., Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 93-137, pt. 2, at 166 (1973) (the "1973 Commission Report") (setting a proposed floor of $1,000-$5,287 in inflation-adjusted dollars).\textsuperscript{92}\textsc{Abi Study supra note 82, at 25. Those criticisms have persisted. See \textsc{Pardo, supra note 52, at 298, n.86 (pointing out, with reference to the NBRC Report, that concern exists that preference litigation is sometime initiated improvidently simply for its settlement value, unnecessary and undesirable costs); infra text accompanying notes 279-280.\textsuperscript{93}See \textsc{Abi Study, supra note 82, at 5 (showing that almost 75% of the credit providers believed that preference recoveries rarely or never increased distributions to unsecured creditors, compared with 37.5% of the professional group). Of course, the production of additional distributable assets for unsecured creditors is not a requirement of the statute. Equality is achieved when all similarly-position creditors receive the same amount, even if that amount is zero. See supra note 39.\textsuperscript{94}Both groups thought that creditors who tried to work with debtors were penalized by the preference laws, and that those laws discouraged settlements and workouts. While proposed reforms, such as protecting additional collateral granted to a creditor in exchange for favorable concessions, were couched in terms of encouraging creditors to help debtors work out of their financial troubles, the subtext seemed to be a polemic for yet more defenses to preference liability. As noted earlier (supra note 72), I used to be more persuaded by the "encourage creditors to do business" argument (as opposed to an outright deterrence) rationale for preferences. See also \textsc{Ponoroff & Ashby supra note 55, at 58-62 (suggesting a more modest construction of § 547(c)(2) focused on this rationale). I also concede that a preference exception may operate after the fact to reward a creditor who dealt with the debtor in the shadow of bankruptcy, but I have become more cynical and simply no longer believe that protection from preference liability, which again can only be known in retrospect, can really influence creditor behavior. Moreover, since we are only arguing over this issue once a bankruptcy case has been filed, even in the unlikely event the creditor was influenced to deal with the debtor because of insulation from preference liability, it is apparent that this "assistance" was not very effective. Creditors, whether in continuing to do business with a troubled debtor or pulling the plug, act out of self-interest—and properly so. It is fanciful to assume that a creditor that is concerned about a debtor's financial condition will decide to extend credit to that debtor because a subsequent repayment might be immune from the trustee's preference power. Given that there is no assurance that the subsequent repayment will be forthcoming at all, and in fact considerable doubt about the matter, it is hard to imagine the preference defense having any effect on the relationship or creditor behavior. See \textsc{Tabb, supra note 41, at 1024 (pointing out that in this situation what the careful creditor would do is insist on cash on delivery regardless of what the preference laws say). The best, therefore, that can be said is that the exception does not discourage a creditor from continuing to do business with the debtor—but it surely does not encourage any extension of new credit to the debtor. And, in most cases, there are already enough of other reasons for the creditors to be dissuaded from extending new credit to the debtor that the absence of one more is hardly likely to make much of a difference.\textsuperscript{95}See \textsc{Tabb, supra note 41, at 1024 (pointing out that in this situation what the careful creditor would do is insist on cash on delivery regardless of what the preference laws say). The best, therefore, that can be said is that the exception does not discourage a creditor from continuing to do business with the debtor—but it surely does not encourage any extension of new credit to the debtor. And, in most cases, there are already enough of other reasons for the creditors to be dissuaded from extending new credit to the debtor that the absence of one more is hardly likely to make much of a difference.\textsuperscript{96}
disgorge the value of the payment (or forfeit transferred lien) if either the debtor or the creditor had “done something wrong.”

The ABI Study ultimately concluded with four specific recommendations for reform (Recommendations One through Four) and nine “other ideas for consideration” (Recommendations Seven through Thirteen), oddly including reinserting an “intent” requirement as an element of a voidable preference. As noted above, of the major revisions to the preference law made under BAPCPA, two came from the Task Force’s recommendations, and one from the other suggested ideas.

Professor Charles Jordan Tabb, who served as Reporter on the ABI Study, published an article shortly after the enactment of BAPCPA describing and analyzing the Act’s changes to bankruptcy preference law. While a faithful and diligent Reporter, it is clear that, as a matter of his own personal views, Professor Tabb was skeptical about these changes, including the ones derived directly from the ABI study, referring to them collectively as “further weakening the normative underpinning of preference law and predicting that, no doubt as intended, preference recoveries would decline in the ‘brave new world’ of preferences in which we now live.”

Professor Tabb’s skepticism was warranted. And it goes deeper than the not inconsiderable damage to the bankruptcy system caused by shielding prefiling transfers that advantage one creditor at the expense of all similarly

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95 ABI Study, supra note 82, at 12. This simply confirms why a bankruptcy regime is required so as to constrain the inevitable exercise of self-interested behavior by individual creditors—and behavior that undermines both fresh start and rehabilitation policy.

96 ABI Study, supra note 82, at 25-27.

97 Id. at 27-31.

98 See ABI Study, supra note 82 (Recommendation Seven) (“Require proof that the debtor intended to prefer the creditor; or, alternatively, provide a safe harbor from preference liability for transfers made by the debtor in response to creditor collection efforts.”).

99 See supra notes 77-83 and accompanying text.

100 These were the provision of a safe harbor for preferential payments below a certain dollar amount (§ 547(c)(9), and expansion of the ordinary course of business defense in § 547(c)(2)). ABI Study supra note 82 (Recommendations One and Four).

101 Amendment of the venue statute, 11 U.S.C. § 1409(b) was proposed by Recommendation Thirteen. ABI Study, supra note 82. Perhaps the most significant of the other changes to the preference law accomplished under BAPCPA—expansion of the grace period in § 547(e)(2) from ten to thirty days (infra text accompanying notes 195-197)—was not raised in the ABI Study. Instead, the Task Force proposed as an idea for consideration to make the date of transfer of a security interest coincide with the date the security interest is deemed perfected under state (or other applicable nonbankruptcy) law. This suggestion was, however, made with the least enthusiasm of the Task Force’s recommendations. ABI Study, supra note 82 (Recommendation Nine).


103 Id. at 455-56.

104 Ponoroff, supra note 43, at 1490-1514 (proposing a new “super rule” of preferences entailing amendment of §§ 547(c)(2) & (4), and making the presumption of insolvency conclusive).
situated creditors. It is also a tile in a larger mosaic that evinces a fundamental shift in emphasis away from the goals of the bankruptcy law as embodied in the 1978 Act toward a system that exhibits far greater deference to the inefficiencies and wastefulness of state collection rules, a deference that inevitably comes at the expense of the bankruptcy system's commitment to the goals of equality and rehabilitation.

IV. THE NORMATIVE FOUNDATION OF THE 1978 ACT

The 1978 Act signaled a major shift away from fealty to the state law bargain and the state law of creditors remedies\(^\text{105}\) (which work well enough so long as the debtor remains solvent) and toward attainment of the purposeful objectives of a modern bankruptcy system,\(^\text{106}\) which are vastly superior in the aggregate to state law tools when there are insufficient fish and loaves to go around. This change in emphasis did not go unnoticed by many influential commentators writing about the time that the 1978 Act came into effect or shortly thereafter. Typically, however, the focus was either on the consumer-friendly provisions of the 1978 Act or what some perceived as its disdain for the contractual rights of secured creditors.

Regarding the latter, consider, for example, the not entirely tongue-in-cheek observation made by Professor Peter Coogan:

When I first heard of Grant Gilmore's *The Death of Contract*\(^\text{107}\) my initial expectation was that he would point out

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\(^{105}\) As observed, the shift was in certain respects a tentative one, given the continued adherence to a deterrence justification for the law and the exceptions that hinge to one extent or the other on the view that innocent transferees should be accorded some shelter since, if innocent, they did not need to be "deterred" in the first place. See supra notes 50-55 and accompanying text.

\(^{106}\) As far back as in Bailey v. Glover, 88 U.S. 343, 346 (1874), the Supreme Court described equality of distribution as the most important purpose of the bankruptcy law. See also Young v. Higbee, 324 U.S. 204, 210 (1945) ("Historically one of the prime purposes of the bankruptcy law has been to bring about a ratable distribution among creditors of a bankrupt's assets; to protect the creditors from one another. And the corporate reorganization statutes look to a ratable distribution of assets among classes of stockholders as well as creditors."). To achieve this goal, the Bankruptcy Code creates a comprehensive and intricate scheme designed to equitably distribute the debtor's nonexempt assets. See Sherwood Partners, Inc. v. Lycos, Inc. 394 F.3d 1198, 1203–04 (9th Cir. 2005) ("Bankruptcy law accomplishes equitable distribution through a distinctive form of collective proceeding. This is a unique contribution of the Bankruptcy Code that makes bankruptcy different from a collection of actions by individual creditors. In a world of individual actions, each creditor knows that if he waits too long, the debtor's assets will have been exhausted by the demands of the quicker creditors and he will recover nothing. . . . Federal bankruptcy law seeks to avoid this scenario by "creating a whole system under federal control which is designed to bring together and adjust all of the rights and duties of creditors and embarrassed debtors alike.").

\(^{107}\) The reference, of course, is to Professor Gilmore’s 1974 book in which he observed that Contract Law appeared to be on the verge of being reabsorbed into Tort Law, and losing its identity as a separate and coherent area legal field of study. As with the rumor of Mark Twain’s death, the concern turned out to have been greatly exaggerated.
the extent to which the exercise by Congress of its power to enact law on the subject of bankruptcy already had, and through the then-current proposals for a new Bankruptcy Act probably would, cut down or change the effect that the parties thought they could provide for under prevailing state contract law.\textsuperscript{108}

Along similar lines, Professor Ted Eisenberg, in his criticism of § 547’s treatment of inventory and receivables financing, mused that, “[t]he reform movement’s technicians should have articulated the costs of a separate bankruptcy rule and decisionmakers should have considered these costs before imposing such a rule” (upsetting state law priority under Article 9 in the name of “equality”).\textsuperscript{109} Finally, on a cheerier note, Professor Richard Hagedorn noted that:

One of the more significant departures of bankruptcy law from the common law of debtor-creditor relationships is the condemnation of preferential transfers. Although some creditors are given priority treatment under bankruptcy law, one of the basic underpinnings of bankruptcy law is the equal treatment of creditors. . . . [T]he new Bankruptcy Code appropriately eliminated the reasonable-cause requirement except for transfers involving “insiders,” . . . . The effect on the survival of the secured claim is somewhat deleterious. However, the Code will undoubtedly eliminate a great deal of litigation and the need to interpret conflicting judicial decisions, thus adding more predictability to the position of the holder of a secured claim. In the balance, it would appear that the change constitutes a definite improvement in bankruptcy law.\textsuperscript{110}


\textsuperscript{109}Theodore Eisenberg, \textit{Bankruptcy Law in Perspective}, 28 U.C.L.A. L. REV. 953, 959 (1981). See also Albert F. Reisman, \textit{The Challenge of the Proposed Bankruptcy Act to Accounts Receivable and Inventory Financing of Small-to Medium-Sized Business}, 83 COM. L.J. 169, 174 (1978) (“[t]he proposed Bankruptcy Act would virtually negate the effectiveness of Article 9 security interests in bankruptcy proceedings . . . .”). But see Dean C. Gordanier, Jr., \textit{The Indubitable Equivalent of Reclamation. Adequate Protection for Secured Creditors Under the Bankruptcy Code}, 54 AM. BANKR. L.J. 299, 299 (1980) (“[i]n facilitating business reorganizations . . . . the Code may prove to be no more successful than its predecessor, the Bankruptcy Act, and for the same reason: secured creditors have, practically speaking, a veto over many if not most of the plans proposed under chapter 11.”).

\textsuperscript{110}Richard B. Hagedorn, \textit{The Survival and Enforcement of the Secured Claim Under the Bankruptcy Reform Act of 1978}, 54 AM. BANKR. L.J. 1, 8-10 (1980). The prediction about eliminating litigation turned out to be off-target largely because of the resurrection of culpability as a real or subliminal element of a voidable preference.
The consumer provisions of the 1978 Act, in turn, were soon pilloried for causing a sharp spike in bankruptcy filings. For example, according to Vern McKinley, writing for a Cato Institute journal: "A clear culprit of the rise in bankruptcies is the Bankruptcy Reform Act of 1978 that moved the Code in a decidedly pro-debtor direction as part of the 'consumer' movement of that period." Critics of the 1978 Act argued that by, among other changes, establishing a federal exemption scheme more generous than that available in many states and enhancing the desirability of Chapter 13 through the creation of the so-called superdischarge, the new law made filing easier, less stigmatizing, and thus more attractive to the average prospective debtor than had been the case under prior law.

Still, the movement away from state law rules and remedies in 1978 (which prompted Professor Eisenberg to deem the 1978 Act a "failure") was not nearly as abrupt as it may have seemed to some at the time. Most of the legislative changes were in fact evolutionary, not revolutionary. As Professor William Vukowich commented in response to the charge that the 1978 Act was responsible for the rapid surge in consumer filings, "[t]hese slight changes [involving discharge provisions under Chapter 13 as well as a minimum federal exemption] hardly account for the large increase in bankruptcy filings or for all of the 'abuses' alleged to occur under the new law."

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111 Vern McKinley, Ballooning Bankruptcies: Issuing Blame for the Explosive Growth, 20 REGULATION 33, 38 (1997). See also the authorities collected in Todd J. Zywicki, Institutions, Incentives, and Consumer Bankruptcy Reform, 62 WASH. L. REV. 1071, 1080 n.18 (2005); Todd J. Zywicki, An Economic Analysis of the Consumer Bankruptcy Crisis, 99 NW. L. REV. 1463, 1467 (2005) (noting the "stunning increase" in consumer bankruptcy filing rates between 1979 and 2004, and the inability of traditional explanations to account for this increase other than by reference to the to the added benefits and reduced costs associated with bankruptcy since the 1978 Act).

112 Of course, with the majority of the states opting out of the federal bankruptcy exemptions, and gradual elimination of the Chapter 13 superdischarge beginning in 1990 and nearly completed by BAPCPA, these factors no longer play whatever role they might have in 1979. See also David A. Moss & Gibbs A. Johnson, The Rise of Consumer Bankruptcy: Evolution, Revolution, or Both? 77 AM. BANKR. L.J. 311, 328 (1999) (offering several explanations debunking the belief that the explosion in consumer filings was attributable to the 1978 Act, including the fact that rate of growth did not slow down or reverse course when Congress enacted a set of pro-creditor bankruptcy reforms in 1984).

113 See Eisenberg, supra note 109, at 953.

114 Coogan, supra note 108, at 154-55 (acknowledging that the new bankruptcy law, while perhaps most shocking at first blush in its treatment of security interests, at bottom involves a balance that must occur between the need for overburdened debtors to return to financial viability and the rights and interests of creditors and lessors who are due sums owed by the debtor). Hagedorn, supra note 110, at 28 (concluding that, in comparison with the former Act, holders of secured claims will have a more difficult time protecting their interests under the new Code, but that the changes appear warranted in light of competing interests entailed in the reform of the bankruptcy law).

115 See Moss & Johnson, supra, note 112, at 329-31. Of course, as BAPCPA finally proved, eventually these pro-creditor reforms will take their toll on consumer filings. It is no coincidence, for example, that consumer filings peaked in 2005 prior to the effective date of BAPCPA. See http://news.abi.org/sites/default/files/statistics/Total-Business-Consumer1980-2013.pdf. See also Zywicki, supra note 111, at 1080 (noting the spike in consumer bankruptcy filings between the passage of BAPCPA in April 2005 and its
As for the Act’s assault on secured credit, Professor Margaret Howard has pointed out that, “the history of bankruptcy law shows a steady alteration of the rights of secured creditors, undertaken for the purposes of achieving equality of distribution and assuring the debtor a fresh start. No revolution occurred with passage of the Bankruptcy Code (the Code) in 1978; rather, the Code continued a progression that began in 1898.”

What the disparagers of the 1978 Act overlooked (or, in the case of the credit industry, chose to ignore out of self-interest) was that, in its contemporary form, bankruptcy is intended to be a mechanism for nonfulfillment of state law contract and tort obligations without consequence; or at least without being subjected to the liability that would normally attend nonfulfillment of such duties. Unless we are prepared as a society to wholly subsidize their losses, achievement of enhanced debtor protection has to come largely at the expense of the debtor’s creditors. At the same time, typically, a debtor’s creditors are not an undifferentiated, monolithic horde. Creditors come in many flavors, secured and unsecured, consensual and nonconsensual, commercial and consumer, just to name a few. The payback for unsecured creditors (which in bankruptcy of course includes undersecured creditors) is the possibility of a bigger pie and substantially equal treatment of claims, achieved, in part, through the preference law. Accordingly, the 1978 Act’s pursuit of a more robust fresh start for debtors, greater creditor equality, and effective date in October); Thomas Bak, John Golmant, & James Woods, A Comparison of the Effects of the 1978 and 2005 Bankruptcy Reform Legislation on Bankruptcy Filing Rates, 25 EMORY BANKR. DEV. J. 11 (2008).

Margaret Howard, Dewsnupping the Bankruptcy Code, 1 J. BANKR. L. & PRAC. 513, 527 (1992). See also Kennedy, supra note, at 482-83 (1982) (observing that nineteenth century bankruptcy legislation became reflected a growing tendency to restrict the rights of secured creditors “in the interest of facilitating attainment of the objectives of the bankruptcy laws to effect equality of distribution and to afford a fresh start for the debtor.”).

See Elizabeth Warren, Bankruptcy Policymaking in an Imperfect World, 92 Mich. L. Rev. 336, 361 (1992) (discussing as one of the normative functions of the bankruptcy law a desire to constrain externalization of losses to parties not dealing with the debtor firm).

To be sure, it will be less than equivalent return value in many cases. Bankruptcy is, at its core, a system for distributing limited assets and, when feasible, assuring debtor continuation. Therefore, maximization must be understood in relative, and not absolute, terms and must be viewed from the perspective of creditors as a group, rather than any individual creditor that could be better or worse off as a consequence of the debtor’s bankruptcy. See, e.g., Adam J. Levitin, Bankrupt Politics and the Politics of Bankruptcy, 97 Cornell L. Rev. 1399, 1405 (2012) (describing bankruptcy as involving an inherently political distributional exercise, rather than purely a system to maximize returns to creditors).

Of course, painstaking and unremitting equality has never characterized our bankruptcy law. Or, put another way, as the unsecured priorities in § 507(a) vividly illustrate, some claims are more equal than others mostly due to countervailing policy (or political) considerations. Still, the view has always been that such exceptions should be narrowly construed so as to interfere to the least extent possible with the Code’s underlying theme of creditor equality. See, e.g., Nathanson v. Nat’l Labor Relations Board, 344 U.S. 25, 29 (1952) (“The theme of the Bankruptcy Act is ‘equality of distribution’ . . . ; and if one claimant is to be preferred over others, the purpose should be clear from the statute,” quoting Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215, 219 (1941)).
enhanced prospects for debtor survival through reorganization, all pressed for 
less deference to state law distributional rules and creditor remedies than 
theretofore had been the case, including limiting the scope of protection 
afforded to secured claims to the value of the underlying collateral, and not the 
full array of state law contract rights.\textsuperscript{120} As noted,\textsuperscript{121} however, ever since 
the 1978 Act, the thrust of most so-called bankruptcy reform legislation has 
been to halt and then begin to reverse the swing of the pendulum in favor of 
debtor relief and ratable distribution among creditors\textsuperscript{122}—with BAPCPA il-
lustring the physical law that when the pendulum does swing back, rarely 
does it stop at dead center.

V. POST-1978 PREFERENCE REFORM

A. Early Amendments

The impact of the backlash against the 1978 Act on the preference law 
was, until BAPCPA, rather modest.\textsuperscript{123} Beyond a shadow of a doubt, the

\textsuperscript{120}This is why, for example, we do not provide adequate protection when the creditor has an equity 
cushion in the collateral (Bankers Life Ins. Co. of Neb. v. Alycan Interstate Corp. (In re Alycan Interstate 
Corp.), 12 B.R. 803 (Bankr. D. Utah 1981)), and why we do not provide adequate protection for lost 
opportunity costs (United Savs. Assoc. of Tex. v. Timbers of Inwood Forest Assoc's, Ltd., 484 U.S. 365 
(1988)). Of course, BAPCPA has made serious inroads on that principle (supra notes 19-23 and accompa-
nying text) and the Supreme Court has been less than perfectly consistent on the point. See Keating, 
supra, note 28, at 495-97 (suggesting Timbers was an outlier and the Court's bias is toward preserving, to 
the extent possible, the secured creditor's state law remedies). See also Douglas G. Baird, Secured Credit-
ors' Rights After ResCap, 2015 U. ILL. L. REV. (questioning the conventional explanation of secured 
creditors' rights in bankruptcy). Nevertheless, the decision to limit the protection afforded to security is 
reflected by the Code's elimination of any reference to "secured parties." Instead, § 506(a)(1) refers to 
secured and unsecured claims, with the former being determined by reference to the value of the collateral 
rather than the state law status of the creditor holding the claim. The one statutory exception that has 
always existed of course is in the case of oversecured claims per § 506(b). One early commentator had 
gone so far as to suggest that Congress intended section 547 to allow for the redistribution of funds from 
secured to unsecured creditors, Ross, 'The Impact of Section 547 of the Bankruptcy Code Upon Secured 
and Unsecured Creditors, 69 MINN. L. REV. 39, 41-42 (1984). The suggestion is a dubious one to begin with, 
and, in any case, that is certainly not the way things have worked out.

\textsuperscript{121}See supra note 9 and accompanying text.

\textsuperscript{122}The process was likely aided by the fact that the one major attempt to create a unified theory of 
bankruptcy, grounded in the law and economics tradition, emphasized a contractual approach to the subject. See generally THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 8-21 (1986) 
(setting forth basic principles of bankruptcy law and presenting bankruptcy as a system of contracts bet-
tween creditors); Douglas G. Baird, Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to War-
ren, 54 U. CHI. L. REV. 815, 831-33 (1987) (advocating for a view of bankruptcy that would preserve in 
bankruptcy proceedings the rights and relations creditors have outside of bankruptcy law). Jackson's credi-
tors' bargain theory posits that bankruptcy law should try to emulate the bargain that creditors would 
have made themselves. From this, it follows that the avoiding powers, and particularly the preference law, 
should be seen as a mechanism for policing creditors that seek to "opt-out" of the bargain by jumping the 
gun to obtain more than their contractually-agreed share. See, e.g., Jackson, supra note 40, at 756-59 
(describing preference law as a means to bind creditors "to their presumptive ex ante agreement and to foil 
the attempts of each creditor to welsh on the agreement for individual gain.").

\textsuperscript{123}See supra note 57.
most important amendment occurred in 1984 with the elimination of the language in § 547(c)(2) that had required that the ordinary course payment be made "not later than 45 days after such debt was incurred" in order to qualify under the exception.\textsuperscript{124} That small change fully flung open the door to the argument that the ordinary course of business defense should not be limited to current expenses,\textsuperscript{125} a position that the Supreme Court eventually sanctioned in Union Bank v. Wolas,\textsuperscript{126} holding that payments on long-term debt could qualify for protection under the exception. The policy significance of this expansion in the scope of § 547(c)(2) was arguably even greater than its practical impact in specific cases, despite the fact that the practical impact was itself of no small consequence. Because the ordinary course of business defense has always stood out like a sore thumb under the 1978 Act's new conception of a voidable preference,\textsuperscript{127} its extension beyond short-term recurring debt not only expanded its reach, but also planted the seeds for the reintroduction of a subliminal but very real bad faith or bad motive element into the fundamental conception of what constitutes a bankruptcy preference in the first place.\textsuperscript{128}

B. THE REST OF THE BAPCPA AMENDMENTS

Those seeds took root, and the preference law's relative insulation from legislative tinkering came to a clattering and unceremonious end with BAPCPA. In addition to codification of the recommendations of the ABI Study detailed above,\textsuperscript{129} BAPCPA made the following changes to the preference law: (1) included a new subsection designed to protect a noninsider-creditors benefitted by the transfer of a security interest to an insider during

\textsuperscript{124} See Barash v. Public Fin. Corp., 658 F.2d 504, 509-11 (7th Cir. 1984) (pointing out that this limitation had narrowed the exception to credit transactions that were not intended to be outstanding for very long).

\textsuperscript{125} See generally Broome, supra note 30, at 81 (observing that extension of § 547(c)(2) to payments on long-term debt reflects yet another shift in the goal of preference law—from that of preserving equality of distribution of the debtor's assets among its creditors to that of avoiding preferential transfers received by creditors under unusual circumstances). It also may have eviscerated what at least some believed was the original, and much less ambitious, rationale for § 547(c)(2), which was simply to codify the judicially-created "current expense" rule, under which some courts indulged the fiction that payments on short-term debt (to creditors unlikely to be in a position to monitor the debtor's financial condition) did not meet the requirement of antecedence. See Thomas M. Ward & Jay A. Shulman, In Defense of the Bankruptcy Code's Radical Integration of the Preference Rules Affecting Commercial Financing, 61 WASH. U. L. Q. 1, 18 (1983). See also infra note 295.

\textsuperscript{126} Union Bank v. Wolas, 502 U.S. 151 (1991) (applying the plain language of the statute). At the time of the amendment in 1984, the sponsors of the amendment explained only that elimination of the forty-five-day rule was intended to "relieve buyers of commercial paper with maturities in excess of [forty-five] days of the concern that repayments of such paper at maturity might be considered as preferential transfers." See 130 CONG. REC. S8897 (daily ed. May 27, 1984).

\textsuperscript{127} See Countryman, supra note 77, at 775 (describing the exception after 1984 as "indefensible").

\textsuperscript{128} See infra text accompanying notes 171-172.

\textsuperscript{129} See supra notes 77-81 and accompanying text.
the extended insider preference period;\textsuperscript{130} (2) added an exception, peculiarly-placed in § 574(h), for payments made under a repayment schedule created by an approved nonprofit budget and credit counseling agency; (3) re-wrote and expanded the purview of the defense in § 547(c)(7) for domestic support obligation payments;\textsuperscript{131} (4) raised the threshold amount in the case of consumer debts from under $5,000 to under $15,000 for triggering the requirement in 28 U.S.C. § 1409(b) that the case be brought in the district where the defendant resides;\textsuperscript{132} and (5) extended the relation-back period in § 547(e)(2) for when a transfer would be deemed to occur from ten to thirty days,\textsuperscript{133} and, correspondingly, raised the grace period in § 547(c)(3) from twenty to thirty days.\textsuperscript{134}

Collectively, these changes accelerated, as intended, a movement toward narrowing the scope of transfers that qualify as preferential, and, even among those that still do, increasing the type and number of such transfers immunized from avoidance and recovery.\textsuperscript{135} Clearly, there is a need for empirical work to determine whether the perceptions so strongly voiced in the ABI Study, and repeated in the NBRC Report, concerning the ineffectiveness and the misuse of the preference power are as widespread as they are alleged to be,\textsuperscript{136} as well as to assess the impact of BAPCPA on the number of preference adversary proceedings brought by trustees, the size of the recoveries, and the benefit (or not) to other creditors. Almost certainly, however, that work would reveal that (1) prior to 2005, some preference actions produced no increase in distributions to unsecured creditors and, likely, were brought solely for their settlement value; and (2) since 2005, there has been an overall decline \textit{per capita} in preference litigation and recoveries. But so what? Those observations, even once corroborated, would only beg the question what ought to be the goal of the preference law. In other words, we cannot meaningfully assess any empirical findings until we establish the appropriate

\textsuperscript{130}Section 1213(2) of BAPCPA added subsection (i) to § 547 in an attempt to put the final nail in the coffin of the "single transfer" theory first articulated by the Seventh Circuit in \textit{In re Deprizio}. The first nail was the addition in 1994 of § 550(c). See supra note 57. The effort though, like the rest of the amendments, also involved a narrowing of the scope of preference liability. In addition, Professor Tabb still questions whether Congress has really closed the door all the way on \textit{DePrizio}'s (847 F.2d 1186 (1989) single transfer theory. See Tabb, supra note 10, at 504-05.

\textsuperscript{131}BAPCPA § 217.

\textsuperscript{132}BAPCPA § 410. Because of subsequent adjustments under § 104(a), that dollar figure is currently $18,675.

\textsuperscript{133}BAPCPA § 403. This section is oddly captioned "Protection of Refinance of Security Interest," even though it has nothing to do with the refinance of a security interest.

\textsuperscript{134}BAPCPA § 1222.

\textsuperscript{135}The 2005 amendments to the preference law and practice are examined in depth in Tabb, supra note 102.

\textsuperscript{136}The complaints about preference law along these lines have persisted to the present day, despite the changes made by BAPCPA. See infra text accompanying notes 279-280.
evaluatory criteria against which they are to be held and the relative weight to be accorded to each such criterion. Before turning to those inquiries, however, it may be worthwhile to consider briefly each of BAPCPA's preference amendments in somewhat more depth and, where appropriate, to scrutinize how they have fared in the case law.

VI. PREFERENCE LITIGATION POST-BAPCPA

A. THE ORDINARY COURSE OF BUSINESS DEFENSE

Turning first to what was assuredly the most impactful amendment—the further expansion of § 547(c)(2)—recall that, before BAPCPA, the received understanding was that the transfer had to satisfy both objective and subjective components in order to be insulated from preference recovery. That is, the transfer must have been ordinary in subjective terms of the actual practices and dealings of the debtor and the transferee as required by former subparagraph (2)(B), and also ordinary in objective terms of standard industry practice as required by former subparagraph (2)(C).

After 2005, § 547(c)(2) on its face provides two, alternative defenses: a subjective “ordinary course of business” defense under subsection (2)(A), and a separate, independent objective “ordinary business terms” defense under subsection (2)(B). Thus, so long as the debt is incurred in the ordinary course of business (or financial affairs) of the debtor and the transferee, if the transfer is ordinary in terms of the actual practices of the debtor and the transferee, whether or not the transfer also complies with any objective standard set by industry practice is irrelevant; and so presumably is the converse true as well.

Initially, a question arose as to whether the interpretation of the phrase

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137 Most courts agree that because the statute refers to “of the debtor and the transferee” and not “between the debtor and the transferee,” even first time transactions can qualify for exception under the statute. See, e.g., Jubber v. SMC Elec. Prods., Inc. (In re C.W. Mining), 798 F.3d 983 (10th Cir. 2015) (noting this view is followed in three other circuits).

138 As discussed earlier, the NBRC Report’s discussion of this recommendation suggests that subsection (C) should only supply a separate defense when there is no established course of dealings between the parties. See supra note 78. The language of the statute does not support that construction, although it has been suggested that some courts have applied it as such. See Bryan Kotliar, A NEW READING OF THE ORDINARY COURSE OF BUSINESS EXCEPTION IN SECTION 547(C)(2), 21 AM. BANKR. INST. L. REV. 211, 246-47 (2013) (describing the practice as “fudging” on the language, as Professor Tabb predicted (see Tabb, supra note 102, at 443) might occur when there is an established course of dealings between the parties). But see Noreen Wiscovitch-Rentas v. Villa Blanca VB Plaza LLC (In re PMC Marketing Corp.), 543 B.R. 345, 357, n.8 (B.A.P. 1st Cir. 2016) (holding that after BAPCPA, satisfaction of both subjective and objective tests is no longer required); Stanziola v. Southern Steel & Supply, L.L.C. (In re Conex Holdings, LLC), 518 B.R. 269, 283, n.64 (Bankr. D. Del. 2014), reconsidered denied, 524 B.R. 55 (2015) (noting that the statutory language of the BAPCPA amendments to § 547(c)(2) is clear and that if Congress intended to add a subjective component to § 547(c)(2)(B) or to somehow make it more difficult for a creditor to prevail under the subsection, it could easily have done so).
"ordinary business terms" in § 547(c)(2)(B) should continue to be governed by pre-BAPCPA case law now that paragraph (B) provides a stand-alone basis for relief, no longer subject to the discipline of paragraph (A)'s subjective focus on the dealings of and between the parties. That case law had largely treated "ordinary business terms" as a lesser or secondary requirement, easily met so long as the parties had an established and reasonably lengthy relationship that could be examined. That is to say, if the transfer met the subjective test of ordinariness, the additional requirement of "ordinary business terms" primarily operated as a safeguard against collusion and creative testimony. As such, in situations where the transfer at issue was made on terms that conformed more or less with the historic pattern of obligations and payments between the debtor and the transferee-creditor, the review under former subsection (2)(C) (now subsection 2(B)) called for a relatively cursory examination of congruity of that pattern with industry-wide norms.

In one of the first cases decided under the revised exception, in In re National Gas Distribs., LLC, the corporate debtor paid off two loans (totaling over $3.2 million) to the defendant-bank shortly before their maturity dates (which the bank willingly had extended on several previous occasions) and shortly before the debtor filed under Chapter 11. Coincidentally (or not so coincidentally), both loans, although unsecured by assets of the debtor,
were guaranteed by the owner of the debtor and his spouse.\textsuperscript{143} It was "explained" that this was done as part of the couple’s end-of-year tax planning and, apparently, without any prompting by the bank. There was no question that both transfers satisfied the elements of a preferential transfer. In response, however, to the Chapter 11 trustee's motion for summary judgment, the bank contended that the payments were not recoverable because they had been made according to ordinary business terms in the banking industry, as purported to be established by the affidavit testimony of one of the bank’s vice presidents.\textsuperscript{144}

In his ruling, Judge A. Thomas Small sensibly surmised that with "ordinary business terms" now representing an autonomous, self-contained defense, pre-BAPCPA interpretations of the phrase might no longer be appropriate, thus requiring that the provision be looked at afresh.\textsuperscript{145} Upon so doing, the court initially parted ways from most pre-BAPCPA precedent by deciding that, when (as in this case) the parties are in different industries, conformity with the industry standards of both the debtor and the creditor must be considered.\textsuperscript{146} Once identified, the court continued that the applicable industry standards must then be applied to the factual circumstances of the transfer in a much more granular manner than had characterized the approaches of the courts prior to 2005.\textsuperscript{147} On application of these requirements to the facts of the case, Judge Small concluded that the transfers to the bank could not

\textsuperscript{143}Id. at 397. In addition, at about the same time as these transfers, the debtor transferred $850,000 to the bank as collateral for two outstanding letters of credit, which theretofore had been secured by a hypothecation of assets from the debtor's owner's spouse. Upon receipt of that transfer, the bank released its security interest in the spouse's assets. For reasons that are unclear, while the trustee apparently demanded repayment of those transfers, he did not seek recovery under § 547(b). Thus, although not directly at issue in the case, the court observed that the transfer was still relevant to the course of dealing between the debtor and the bank. Id. In any case, there appears to have been no question that the obligations at issue were incurred in the ordinary course of business and financial affairs of the debtor and the bank.

\textsuperscript{144}One of the questions left unanswered by Tolona Pizza was whether testimonial evidence such as this is alone sufficient to establish industry norms and the conformity of the transfer with those norms, or whether some form of either expert testimony or documentary evidence is required. Cf. Stanziale v. Southern Steel & Supply, L.L.C. (In re Conex Holdings, LLC), 518 B.R. 269, 285-86 (Bankr. D. Del. 2014), reconsid. denied, 524 B.R. 55 (2015) (finding affidavit testimony from officer of defendant-bank, even though uncontroverted, insufficient to prove industry standard where it lacked any objective basis of analysis).

\textsuperscript{145}Id. at 400. This seemed to make sense in that, prior to 2005, the "ordinary business terms" requirement served a "back-up" role. See supra notes 140-141. In addition, as the court observed, neither a plain meaning analysis nor the legislative history to BAPCPA provided any guidance. Id.

\textsuperscript{146}The question had not been addressed in Tolona Pizza because, in that case, the debtor and creditor were in the same industry. While pre-2005 case law was split on whether to focus on the debtor's industry or, as the bank argued for, the creditor's industry, the governing law in the Fourth Circuit, Judge Small noted, was to examine the creditor's industry in determining conformity with industry terms. Id. at 404, citing Advo-System, Inc., v. Maxway Corp., 37 F.3d 1044, 1048 (4th Cir. 1994).

\textsuperscript{147}Id. at 404-05.
meet the standards necessary to qualify for protection under § 547(c)(2)(B). By way of explanation he offered that:

It may be standard practice for borrowers to pay loans close to the time that the loans mature, but is it standard in the banking industry for a borrower with a multi-million dollar enterprise to pay all of its corporate loans based upon the owner’s end-of-the-year personal financial planning, especially where the corporation has not arranged for financing to continue the business? If that conduct is standard within the banking industry, it is certainly not ordinary from the debtor’s perspective and is not consistent with sound business practice in general. . . . The change made by the BAPCPA amendments “substantially lightens the creditor’s burden of proof, by allowing the creditor protection from preference recovery if the transfer meets industry standards, regardless of whether it was in the ordinary course of business of the debtor and the creditor. . . .” 148 Although the creditor’s burden has been lightened by BAPCPA, it still has some weight, and it has not been lightened to the extent that [the defendant] can prevail in this proceeding.149

As well thought-out and reasoned as the decision in National Gas seems to be, to date, it is the only case to find that the standard of what constitutes “ordinary business terms” has in fact changed after BAPCPA.150 Other courts addressing the issue have continued to follow the pre-BAPCPA case law construing “ordinary business terms,” rather than applying a heightened standard per National Gas.151 And so, at least thus far, the opportunity to

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149National Gas, 346 B.R. at 405.

150But see Kotliar, supra note 138, at 252 (arguing that carrying the Tolona Pizza standard forward after 2005 is unwarranted and urging adoption of the court’s approach in In re Midway Airlines, 180 B.R. 1009 (Bankr. N.D. Ill. 1995)).

tap even lightly on the brakes insofar as the ever-increasing acceleration of the ordinary course of business exception is concerned has been lost.

While § 547(c)(2) threatens to become the exception that consumes the rule, and is the undisputed darling of the credit industry, mercifully, since BAPCPA other courts have been more vigilant in policing and holding the line on what constitutes the parties' ordinary course of business under subsection (2)(A) of the exception. Three decisions involving the Litigation Trust established under the confirmed plan in the Quebecor World (USA) Chapter 11 case are illustrative. In the first, In re Quebecor World (USA), Inc.,\(^{152}\) the trustee sought to recover a preferential payment of $67,078 made ninety-one days after the invoice for $74,998 was issued. The difference in amounts was due to the fact that the debtor had been inadvertently overcharged by $7,920, and a credit memo for that amount was eventually issued by the defendant. However, the parties had been doing business with one another for nearly three years and, prior to the preference period, defendant’s invoices were on average paid in less than sixty days. The defendant attempted to explain the disparity by arguing that correction of the error in the original invoice accounted for the late payment, but the court had none of it given the more than thirty-day deviation from past practice and the absence of evidence to establish that billing errors had typically caused this kind of delay in the past.\(^{153}\)

In the next reported Quebecor World case,\(^{154}\) the preference defendant had been providing transportation services to the debtor for about six years. The trustee was attempting to recover ten payments made to the defendant during the preference period on account of prior unsecured debts. The defendant relied on § 547(c)(2) to oppose the trustee’s action, utilizing one year’s worth of historical data reflecting the parties’ pre-preference period course of dealing as the baseline against which to compare the challenged payments. The trustee urged instead, and the court accepted, a baseline based on two-years of prior dealings between the parties, which, using a weighted average analysis,\(^{155}\) shortened the time between invoice and payment from thirty-five


\(^{153}\)Id. at 370-71.


\(^{155}\)Id. at 387 n.3 (explaining the weighted average method as “a manner of calculating the average days to payments taking into account the sum of each payment by multiplying the amount of the invoice by the days it took to make payment then dividing that value by the total amount of the invoices in the data set.”).
to twenty-seven days. 156

Next, in terms of the methodology to be used in comparing these historical pre-preference period data to the actual preferential payments, the court rejected the defendant's proposed "total range" approach, 157 which would have treated as ordinary anything falling within the high and low during the applicable pre-preference period. Instead, the court adopted an "average lateness" method, calling for the grouping of payments into individual "buckets" by age, 158 and then an analysis to determine the percentage of the historical payments falling into each bucket. Based on this analysis, the court found eighty percent of the pre-preference period payments had been made in one or more of the buckets representing eleven to thirty-five days from the date of invoice and, from this, concluded that preferential payments made more than forty-five days after the date invoiced could not reasonably be characterized as having been made in the ordinary course of business. 159

In the final Quebecor World case of note, 160 the trustee maintained that several payments totaling $69,207.60 made to the defendant shortly before the filing of the debtor's bankruptcy case were preferential under § 547(b). Following an accounting, it was agreed that approximately $34,000 of this amount was protected by undisputed defenses. In response to the balance of payments, the defendant relied on § 547(c)(2) to shield the funds from preference recovery. Again, the court adopted a two-year baseline "to reduce the likelihood that the debtor's financial difficulties had already taken hold... thus distort[ing] otherwise 'ordinary' practices under regular financial

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156 Id. at 387. Although the difference was not great, the court believed the two-year baseline was more appropriate not simply because it was longer, but also because it included, or was more likely to include, a time frame when the debtor was financially healthy.

157 Id. at 387-88 ("Such a theory, however, has previously been rejected as impermissibly expanding the ranges of ordinary transactions. See In re M. Fabrikant & Sons, Inc., No. 06-12737, 2010 WL 4622449, *3 n.2; In re CIS Corp. 214 B.R. at 120 (Bankr. S.D.N.Y. 1997). The Court rejects it here as well because that proposed methodology captures outlying payments that skew the analysis of what is ordinary.").

158 Id. at 388. For an in-depth discussion and critique of the two approaches, see Joseph M. Mulvihill, The Ordinary Course of Business Defense in Bankruptcy Preference Actions: Methods of Comparison, 38 Del. J. Corp. L. 637 (2013). Of course, as noted above, supra note 139, the 'Tolona Pizza (and most circuits) follow a total range approach in relation to determining conformity with "ordinary business terms."

159 Id. (allowing that same deviation from the historical average is tolerated, but that this disparity was too great to be considered ordinary). There is general agreement in the case law that particular importance is placed on timing of payments, but a myriad of other factors can bear on whether the payments were made in the ordinary course for purposes of subsection (c)(2)(A). See, e.g., Stanziale v. Industrial Specialists, Inc. (In re Conex Holdings, LLC), 522 B.R. 480, 486-87 (Bankr. D. Del. 2014) (detailing factors other courts have considered as relevant to the inquiry of whether the transfer was ordinary as between the debtor and creditor). See also Faith v. Inline Distrib. Co. (In re Newton Enters.), No. 9:13-bk-12388-PC, 2015 WL 3524603, *4 (Bankr. C.D. Cal. 2015) (finding that the fact that a payment was made after the cessation of business is not only one factor to consider in defining ordinary course).

conditions."\textsuperscript{161}

Turning next to a comparison of the average time of payments,\textsuperscript{162} the court found that over ninety-nine percent of the preference period payments at issue were made more than sixty days after the invoice date, whereas, under the parties' baseline pre-preference period practice, payments were, on average, made in slightly over fifty days after invoices were received.\textsuperscript{163} In concluding that the payments at issue were hence not made in the ordinary course of business or financial affairs of the debtor and the defendant, the court made clear that what was important was the disparity in the length of time that elapsed from invoice to payment during the two periods under examination.\textsuperscript{164} Accordingly, the court observed that it did not matter that there was no evidence of any unusual creditor collection activity, or that the preference period payments, apart from this significant shift in timing, were made in a manner consistent with prior practice.\textsuperscript{165} By way of explanation, the court noted that, while the fact that preference payments are made in response to creditor pressure can often be indicative of transactions out of the ordinary course,\textsuperscript{166} the absence of such creditor pressure does not establish the opposite.\textsuperscript{167} For this reason, it was incumbent on the defendant to come forward with at least some evidence to establish that late payments of this magnitude were consistent with the standard course of dealings between

\textsuperscript{161}Id. at 762.

\textsuperscript{162}The court, once more, rejected the "total range" approach. Id.

\textsuperscript{163}Id. at 763. More specifically, the weighted average time to payment increased from fifty days to almost eighty days—a roughly fifty-five percent increase.

\textsuperscript{164}Id. at 765 (noting that late payments alone are "presumptively nonordinary").

\textsuperscript{165}Id. (explaining that creditor collection pressure can support a finding that a transfer was out of the ordinary course, but that its absence does not prove the opposite, and that consistency in the manner of payment cannot overcome a significant increase in average payment time during the preference period).

\textsuperscript{166}See A.E. Liquidation, Inc. v. Texstars, Inc. (In re AE Liquidation, Inc.), No. 08-13031, 2013 WL 5488476 *5 (Bankr. D. Del. 2013) (noting that unusual collection activity during the preference period can defeat an ordinary course of business defense); Compton v. Plains Marketing, LP (In re Tri-Union Dev. Corp.), 349 B.R. 145, 150 (Bankr. S.D. Tex. 2006) (stating that unusual creditor collection activity is a signal factor in finding nonconformity with the ordinary course of business defense). Cf. Troisio v. E.B. Eddy Forest Products U.S. (In re Global Tissue LLC), 106 Fed. Appx. 99, 102 (3d Cir. 2004) ("[T]he court's general inquiry in these preference cases is to determine whether the payments to a creditor made in the 90 days preceding a filing for bankruptcy were in response to a zealous creditor's attempt to collect on a debt through preferential treatment ahead of other creditors, or an attempt by the debtor to maintain normal business practices in hope of staving off bankruptcy.").

\textsuperscript{167}See Jubber v. SMC Elec. Prods., Inc. (In re C.W. Mining), 798 F.3d 983 (10th Cir. 2015) (identifying four factors bearing on whether a payment was made in the ordinary course); Quebecor World, 518 B.R. at 765, citing Ames Merch. Corp. v. Cellmark Paper, Inc. (In re Ames Dep't Stores, Inc.), 430 B.R. 24, 33 (Bankr. S.D.N.Y. 2011), aff'd, 470 B.R. 28 (S.D.N.Y. 2012), aff'd, 506 Fed App'x 70 (2d Cir. 2012). See also v. Schoenmann v. BCCI Constr. Co. (In re Northpoint Communications, Inc.), 361 B.R. 149, 157-58 (Bankr. N.D. Cal. 2007) (holding that when the objective characteristics of the transfer deviate significantly from the parties' prior dealings, the transfer should not be regarded within the ordinary course, despite evidence that the transfer was not the product of either creditor pressure or the debtor's desire to prefer).
the parties. Because the defendant was unable to do so, the court concluded that it had failed to establish a material issue of fact that would preclude award of summary judgment in favor the trustee.168

It is decisions like these, and recent others of their ilk,169 that have added (or at least retained) some bite in the subjective test for establishing ordinari­ness under § 547(c)(2)(A). However, it will be of small consolation if courts continue to treat the objective test in subsection (2)(B) with an insouciant wave.170 Moreover, as discussed further below,171 while I would favor either the elimination of the ordinary course of business defense in its entirety or at least a significant reduction in its reach, irrespective of whether it stays or goes, it is critical to the future integrity of bankruptcy reform legislation to clearly and definitively prioritize the equality and deterrence rationales that have put §§ 547(b) and 547(c)(2) into irreconcilable conflict with one another from the beginning.172 The final Quebeccor World decision, by rejecting

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168Id. at 765-66.
169See, e.g., Jubber, 798 F.3d at 990 (stating that although the exception is broad enough to encompass first time transactions between the parties, "there are real teeth in the ordinary-course requirement"); Vaqueria Tres Monjitas, Inc. v. Wiscovitvch-Rentas (In re PMC Marketing), 526 B.R. 441 (D.P.R. 2015) (upholding the bankruptcy court's finding of a lack of subjective ordinari­ness where the average lateness prior to the preference period was 86 days and during the preference period increased to 134 days); The Unsecured Creditors Committee of Sparrer Sausage Company, Inc. v. Jason's Foods, Inc. (In re Sparrer Sausage Co., Inc.), 2014 W.L. 4258103, *2 (Bankr. N.D. Ill 2014) (applying the second approach of com­paring average lateness during the baseline period to the time it took to pay invoices during the preference period from Quebeccor World, 491 B.R. 379, 386 (Bankr. S.D.N.Y. 2013) ); Bruno Machinery Corp. v. Troy Die Cutting Co., LLC (In re Bruno Machinery Corp.), 435 B.R. 819, 839-42 (Bankr. N.D.N.Y. 2010) (analyzing the parties' prior course of dealings in terms of the timing of payments during and prior to the preference period in concluding that the defense was not available, with only an offhand dismissal of the possibility of saving the transfers under § 547(c)(2)(B)). But see Faith v. Inline Distrib. Co. (In re Newton Enters.), No. 9:13-bk-12388-PC, 2015 WL 3524603, *4 (Bankr. C.D. Cal. 2015) (noting that even lack of an on-going business at the time of the challenged transfer does not necessarily negate a defense under § 547(c)(2)).
170In fairness, it should be noted that, even though applying the pre-2005 standard, courts have stopped short of giving defendants a free pass on proof of ordinary business terms. See, e.g., Burtch v. Revchem Composites, Inc. (In re Sierra Concrete Design, Inc.), No. 08-12029, 2015 WL 4381571, *10-11 (Bankr. D. Del. 2015) (holding that the defendant failed to meet its burden of proof where evidence consisted of undetailed testimony from its CEO about various acceptable payment ranges in the industry, unsupported by any objective reports or data). The other hope, of course, is that, despite the plain statu­tory language, courts will continue to insist on ordinari­ness in relation to the parties' prior dealing when such dealings actually exist—the approach contemplated when the decoupling of the subjective and objec­tive prongs of § 547(c)(2) was first proposed. See supra notes 78 & 138. In this respect, the approach taken in the Quebeccor World cases is promising, although a direct explanation of the relevance of subsec­tion (c)(2)(B) when a course of dealings exist would have been even more helpful.
171See infra text accompanying note 295 and accompanying text.
172I use the word prioritize cautiously here, since, as we've seen, once deterrence is offered as a policy defense things can come unhinged pretty quickly. However, the fact is that a preference law intended to promote equality of distribution will, in some instances, necessarily have a deterrent effect, and potentially a desirable deterrent effect along the lines of what Congress hoped would be the case. Surely, the con­verse is true as well. But just because application of the rule may serve a deterrence function does not translate automatically into a view that culpable behavior should become an element of the cause or
the argument that the absence extraordinary creditor collection pressure should alone be sufficient to establish protection under subsection (c)(2), or even to create a presumption of "ordinariness," was a tacit vindication of the equality rationale in its refusal to accept what would have been a much broader construction of the exception. To be sure, "ordinary course" remains a proxy for no preferential intent, but at least the court resisted a construction that would have made the mere absence of collection pressures a proxy for ordinariness.

B. STEALTH EXCEPTIONS

In addition to the § 547(c) exceptions to the trustee's preference recovery authority, the Code contains a couple of other exceptions—one of considerable importance and the other of more trifling practical significance, but nonetheless representing a potentially disturbing precedent. Although only one of these "stealth exceptions" is a product of BAPCPA, brief consideration of both may be instructive.

1. Settlement Payments

As for the first, the 1978 Act contained certain statutory protections from the trustee's avoidance powers, called "safe harbors," in order to avoid upheavals in the commodity futures markets. The financial contracts qualifying for protection were gradually expanded to include securities contracts, commodities contracts, forward contracts, repurchase agreements, swap agreements, and master netting agreements. These exemptions, as amended, from the trustee's avoiding powers (including § 547) are still part

innocence a basis for defense. One objective must be dominant and control formulation and application of the rule on a consistent basis and without regard to other objectives that may or may not be served in any particular instance. Arguably, Congress recognized that at some level in 1978, by indicating that the equality component was the most important. Somewhere, however, the wheels quickly came off the track.

173 See supra notes 166-168 and accompanying text.

174 The fact that the preferred creditor placed no special pressure on the debtor and otherwise behaved in the same fashion in its dealing with the debtor as had always been the case, is a strong indicator that the creditor was not seeking to gain any advantage. Indeed, the increase in average lateness without collection pressure could even be taken as a signal that the creditor was actually attempting to be helpful to the debtor during this period of financial distress; behavior that a deterrence explanation of the law would commend. However, this type of outlook is (1) fraught with difficult proof issues—part of the reason Congress eliminated the Act's "reasonable cause to believe" requirement, and (2) ignores the criticality of equality to the success of a collective proceeding. Once the debtor is insolvent, it is a zero sum game, and the fact that the debtor is in bankruptcy means that deterrence has already failed. Thus, permitting preferences that upset equality to be retained based on how and why the payment was attained is truly an exercise in missing the point.

175 5. REP. No. 95-989, at 8 (1978), reprinted in 1978 U.S.C.C.A.N. 5787. This protection was initially found in § 746(c), which was subsequently repealed and replaced in 1982. See infra note 178.

176 Each of these types of contracts and agreements are defined in separate subsections of § 101 of the Code.
They protect transfers that are in the nature either of (1) settlement payments by or to a financial institution, or (2) transfers made in connection with financial contracts. In both cases, the purpose is to minimize the disruption that might otherwise be caused in commodities and securities markets in the event of a major bankruptcy affecting those industries. Specifically, if a firm were required to repay amounts received in settled securities transactions, and as a result be left with insufficient capital or liquidity to meet its current securities trading obligations, this could place other market participants, and the even capital markets themselves, in jeopardy.

The safe harbors from preference recovery in § 546(e) fall into the category of exceptions reflecting a legislative determination that, in this particular context, a competing policy interest outweighs full realization of bankruptcy goals. With that principle, I have no objection in general, and in this instance, no objection in particular. The problem, however, is with the execution. Specifically, multiple amendments to these safe harbors, and the definitions of the type of agreements insulated by them, have expanded their potential reach far more broadly than necessary in order to protect against market instability and financial contagion. For example, applying a plain meaning approach, some courts have sheltered from preference recovery even transfers made pursuant to ordinary physical supply contracts. The 2014 Final Report and Recommendations of the American Bankruptcy Institute Commission to Study the Reform of Chapter 11 recognizes the disconnect between the expansive language of § 546(e) and its intended purpose, and

177 See §§ 546(e)-(g) and (j). See generally Eleanor Heard Gilbran, Testing the Bankruptcy Code Safe Harbors in the Current Financial Crisis, 18 AM. BANKR. INST. L. REV. 241 (2010) (reviewing the evolution of the safe harbor provisions).

178 See H.R. Rep. No. 97-420, at 1 (1982), reprinted in 1982 U.S.C.C.A.N. 583, 583 (discussing the need to prevent the failure of one securities or commodities firm from infecting the industry more generally and potentially even "collapse of the affected market.").

179 No objection, that is, except perhaps when the totality of carve-outs from bankruptcy policy become so numerous as to create an imbalance solely by virtue of their collective weight. See supra notes 62 & 63 and accompanying text.

180 E.g., Grede v. FCStone LLC, 746 F.3d 244, 253 (7th Cir. 2014) (overturning the district court’s limitation on policy grounds of § 546(e) to shareholders in public companies based on the language of the statute). See also Stephen J. Lubben, The Bankruptcy Code Without Safe Harbors, 84 AM. BANKR. L.J. 123, 141-43 (2010) (proposing amendments to the Code to address the legitimate concerns behind the safe harbors, but severely limiting their application).

181 See, e.g., Lightfoot v. MXEnergy Elec., Inc. (In re MBS Mgmt. Servs., Inc.), 690 F.3d 352 (5th Cir. 2012); (characterizing electric requirements contracts as forward contracts under the Bankruptcy Code and, thus, as immune from recovery under § 547(b). But see In re National Gas Distribs., LLC, 369 B.R. 884, 899-900 (Bankr. E.D.N.C. 2007), rev’d, 556 F.3d 247 (4th Cir. 2009) (refusing to apply the safe harbors in a fraudulent transfer action, with their attendant chilling impact on the "established aims and order of bankruptcy proceedings," where there was no threat of disruption or instability in the financial markets).

182 The report, hereinafter referred to as the "CHAPTER 11 COMMISSION REPORT," can be found at: https://abiworld.app.box.com/s/vvircv5xxv83aav4dp4b.
specifically recommends a number of narrowing amendments so as to limit its application in connection with these and similar transactions that do not implicate a threat to the securities transfer system or the capital markets. Adoption of these proposals would represent a healthy correction in terms of accommodating the legitimate concerns over unregulated application of the bankruptcy law in capital and commodity market transactions, but without interfering unduly with the objectives to be attained in a bankruptcy case. At the same time, it would mark an almost historic reversal of the trend since 1978 to limit continually the scope of the trustee’s preference authority, and, in so doing, frustrate full attainment of core bankruptcy policy objectives.

2. Alternative Repayment Plan Payments

The second stealth exception, provided courtesy of BAPCPA, is contained in § 547(h) and pertains to transfers made under an alternative repayment schedule created by an “approved nonprofit budgeting and credit counseling agency.” BAPCPA was keen, of course, on the idea that, with proper credit counseling, many debtors would be able to work out their financial problems without needing to resort to bankruptcy. Thus, presumably to encourage creditors to go along with these repayment plans, § 547(h) offers amnesty from preference prosecution for payments made under such plans. The effort brings to mind one of the catch phrases from the motion picture Field of Dreams: “Build it and they will come.” They did eventually come to Ray Kinsella’s baseball diamond in the middle of his Iowa cornfield, but it is not at all clear that this similar roll of the dice has paid off thus far or will in the future.

In the meantime, one thing that is certain is that the safe harbor of § 547(h) represents a stunning triumph for the deterrence theory of the preference law and its correlative proposition that the existence of the law will

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183 See Chapter 11 Commission Report, supra, Part IV E, 94-110. These proposed reforms go significantly beyond, but also include, the immunizing of certain transfers from preference recovery. Among them is the specific recommendation the “ordinary supply contracts” be excluded from the safe harbors.

184 This is reflected of course in the credit counseling eligibility requirement for individuals in § 109(h)(1) and the provision in § 502(k) for reduction by twenty percent of the claim of a creditor that is found to have unreasonably refused to negotiate an alternative repayment plan with the debtor.

185 A list of approved budget and credit counseling agencies can be found here: http://www.justice.gov/ust/eo/bapca/ccde/cc_approved.htm. The requirements for approval are set forth in § 111 of the Code. It is not entirely clear why the agency must be "approved" in order for the exception to apply if the policy is to encourage out-of-court work-outs, but given its direct assault on preference law's equality objective, I will not complain about the limitation.


187 Is this ability to retain what would otherwise be preferential payments enough motivation really to induce a creditor otherwise not inclined to modify in any way the debtor's obligation to do so? I question that, but if so, Congress might have sought to help the cause of avoiding bankruptcy by defining "alternative" to include elements of both composition and extension.
incentivize creditors, not otherwise inclined to do so, to engage in credit transactions and continue working with financially-struggling debtors. Unlike other “carve-outs” from preference recovery that may be defensible on the basis that they advance important competing policy interests, the only justification for § 547(h) is to promote a negative agenda; i.e., the avoidance of the need for bankruptcy entirely. Put another way, it is premised not on, for instance, protection of the public securities markets or the welfare of a debtor’s former spouse or dependent child, but simply on the belief (principally held among those most negatively affected) that there ought to be fewer bankruptcy cases.

Perhaps not surprisingly, there are no reported cases of consequence that I can find involving § 547(h), so it has likely done no particular damage (or good) thus far, and it is probably unlikely to do so in the future. However, the very existence of the provision, as narrow in its application as it is, raises concern over the continued use of special pleading in connection with bankruptcy reform legislation. There is a lot of that, of course, in BAPCPA, but it is particularly troubling when the result is, as here, an exception that takes direct aim at the paramount purposive object of the law being revised—in this case equality policy. Even when individually unremarkable, the proliferation of provisions such as these, based on inherently unverifiable assumptions about the benefit of this thing or that, has made for a far more ponderous statute than is necessary or desirable. The fact that the door has been opened wider under § 547 to this type of micro-legislation is disquieting in that it makes it easier to imagine the adoption of additional exceptions in the future that will operate essentially as private bills for a particular interest or industry and, in the process, chip away yet further at the scope and coherence of preference liability.

C. Domestic Support Obligations

A consistent theme in BAPCPA was heightened protection for domestic support obligations (“DSOs”), which are defined in Code § 101(14A). Whether the product of a congressional preoccupation with “family values” themes or a more sinister political calculation about the popular public appeal
of such provisions, the elevation in the quantum of protection under BAPCPA for DSOs is manifested in multiple places, including the preference law. Specifically, former § 547(c)(7), adopted in 1994 to shield child support, alimony, and maintenance payments, was abrogated in favor of the current version of the exception.

Consistent with the thrust of the other preference amendments, the new language represents an expansion on the former version of § 547(c)(7) in that it now includes protection not only for the direct beneficiaries of such payments, but also governmental units that have taken such a DSO claim by assignment. Once more, however, research reveals no reported cases involving the exception being invoked by a governmental unit. Obviously, that does not necessarily mean that it has not occurred, but one nonetheless wonders, as with transfers pursuant to an alternative repayment plan, if this growing penchant for narrow, single interest-oriented legislation represents wise legislative decision-making as opposed to the proverbial camel's nose under the tent for turning the Bankruptcy Code into a pressure group laden behemoth along the lines of the Internal Revenue Code.

D. DELAYED RECORDING

The decision to increase the grace period in § 547(e)(2) for determining when the transfer of an interest in property will be deemed to occur is no less, and perhaps even more, curious and inexplicable than the decision to utilize the preference law as the mechanism for vindicating the law's hostility toward unrecorded liens in the first place. Nonetheless, permitting a short delay between attachment and perfection could be defensible, despite the relative ease under state law in assuring that that perfection will occur immediately upon attachment. Even in that case, however, one might have imagined that the original ten-day period in § 547(e)(2) was more than adequate to the task. Because of BAPCPA's extension of the look-back period to 30 days for all security interests, and not just purchase money liens, some creditors will be permitted to gain a preferential advantage without conse-

191 See supra note 10

192 These provisions derived from Subtitle B of BAPCPA, §§ 211-220, titled "Priority Child Support," and are scattered throughout the Code. See also supra note 10.

193 See supra note 57.

194 The new first priority for DSOs in § 507(a)(1) contains a comparable provision in subsection (a)(1)(B).

195 Although it is easy to see the reason for invalidating liens that are not perfected in a timely fashion, it is difficult to understand why the task fell to the preference statute. Congress might just as, if not more easily, have adopted as a counterpart to § 544(a) a provision that permitted the trustee to avoid any lien required to be recorded under state law for priority purposes, and not so recorded, within x number of days of the date of actual transfer. See supra note 36.

196 Under the U.C.C., for instance, the filing of a financing statement can, and often does, precede the attachment of the security interest. See U.C.C. § 922(d).
sequence, and potentially even to do so when it is obtained with purposeful intent to evade the bankruptcy proceeding entirely; behavior that BAPCPA's view of the preference law would otherwise vigorously condemn.

The increase in protection for tardily recorded security interests by 200 percent (at least temporally) becomes even more puzzling in light of the principal concern animating asset-based financing under state law; namely, responding to the potential damaging reliance caused by a debtor's ostensible ownership of property. In this respect, BAPCPA—perhaps torn between a devotion to state law definition of property rights and priorities on the one hand and protection of security on the other—chose to focus on the later by adopting an even laxer standard for invalidating untimely recorded liens than is observed under state law, where, again, the only relation back rules to gain priority over an intervening judicial lien pertain to purchase money security interests.¹⁹⁷

Speaking of purchase money security interests, the extension of the grace period in §547(c)(3) to coincide with the grace period in §547(e)(2) might, at first blush, be seen as somewhat more understandable in that state law has always regarded the dangers associated with the wicked "secret lien" as far more attenuated when the creditor has provided that value that allows acquisition of the collateral. But §547(c)(3) already had a relation-back rule that coincided with the uniform version of U.C.C. §9-317(e). Other than apparent symmetry with §547(e)(2), it is hard to imagine a justification warranting extension of that relation-back period beyond what is allowed in most states.¹⁹⁸ Moreover, the changes did not in fact place the two rules in actual symmetry with one another because they operate in different circumstances. Since 1984, the time when the grace period commences to run under subsection (e)(2)—"attachment"¹⁹⁹ of the interest—is different from when the same period begins to run under subsection (c)(3)—the debtor's receipt of possession of the collateral.²⁰⁰ Thus, where the debtor had "rights in the collateral" at the time the lien was granted,²⁰¹ but did not obtain possession until ten

¹⁹⁷See U.C.C. §9-317(e) (twenty-day relation back period for establishing priority of purchase money security interest over intervening judicial lien creditors) and U.C.C. §9-317(a)(2) (unperfected (nonpurchase money) security interest subordinate to the rights of a lien creditor).

¹⁹⁸As noted, this is twenty days under the uniform version of article 9. Id. See also Countryman, supra note 43, at 776-79 (citing the legislative history to the 1978 Act in support of the argument that §547(c)(3) was intended only to apply only when the purchase money collateral was acquired after the transfer of the security interest and not to protect provide additional protection in the case of delayed perfection).

¹⁹⁹See U.C.C. §9-203(b). The language used in section 547(e)(2) is the time the transfer "becomes effective" between the parties.


²⁰¹Under Article 2 or other state law, a debtor may acquire "rights in collateral" or the "power to transfer rights in the collateral" for purposes of §9-203(b)(2) prior to actually taking delivery of the
days later, failure to perfect within 30 days of the granting of the lien would cause the transfer to be on account on an antecedent debt by virtue of § 547(e)(2)(B) and, assuming satisfaction of the remaining elements of § 547(b), a preference. If, however, the security interest were purchase money, the holder's ability to resist preference recovery would be extended based on the defense in subsection (c)(3) for an additional ten days beyond expiration of the grace period in § 547(e)(2).

A good illustration of the impact of these changes can be found in the bankruptcy court's opinion In re Lloyd.202 The case itself did not involve a preference challenge at all, but rather the trustee's exercise of his strong-arm powers under § 544(a) to set aside the lien rights of the defendant in the debtors' 2011 Subaru. The facts were undisputed. On December 14, 2013, the debtors purchased and took delivery of the Subaru, financed by a $20,495 loan from the defendant.203 On the same date, the debtors signed and delivered to the defendant a Title and Registration Application (the "Application") listing the defendant as holding a lien on the vehicle. The debtors filed for relief under Chapter 7 on December 18, 2013, and, on January 13, 2014, exactly thirty days after debtors' execution of the Application, the defendant filed the Application with the state Motor Vehicles Division, thereby perfecting its lien on the vehicle.

The matter was before the court on the defendant’s Rule 12(b)(6) motion to dismiss the trustee's claim on the basis of Code § 546(b) and the language of the Arizona Certificate of Title statute,204 the latter providing that the constructive notice arising upon filing the Application relates back to the date of execution if it is filed within thirty days thereof. The trustee countered that the standard twenty-day look-back period in U.C.C. § 9-317(e) for purchase money loans should pertain. The court disagreed, concluding that, in this case, the motor vehicle title statute, and not the U.C.C., was the generally applicable law governing interests that take priority over intervening liens for purposes of § 546(b) and, thus, the trustee's rights under § 544(a) could not be used to set aside the lien.205

The analysis in Lloyd seems unarguable and the ruling correct. However, consider how the matter would have been resolved if BAPCPA had not changed the grace periods under §§ 547(e)(2) and (c)(3). Doubtless, the case would have been brought as a preference action, as the transfer of the lien on

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203 Although never stated explicitly in the facts, it seems quite clear that the security interest in this case was purchase money, or, in the verbiage of § 547(c)(3), that this was an "enabling loan."
204 A.R.S. § 28-2133 (2014).
205 Lloyd, 511 B.R. at 662-64.
the vehicle would have been deemed to have occurred on January 13, 2014, having not been perfected by December 24, 2013—within ten days of when it became effective between the parties. Thus, it would have been made on account of an antecedent debt and, almost certainly, would have satisfied the remaining elements of a preferential transfer under § 547(b). Moreover, former § 547(c)(3) would not have affected the trustee’s rights to set aside the lien, even though this was a purchase money lien, since the twenty-day grace period, which in this case would have commenced to run at the same time; i.e., December 14, 2013 (when the debtors received possession of the Subaru), would also have expired prior to the defendant’s filing of the Application.\(^\text{206}\)

The rather obvious point to be made is that delayed filings that would have triggered avoidance under § 547 prior to 2005 are now shielded from challenge, thus vindicating the contract law rights of the secured creditor over the policy of ratable distribution among other creditors. And this is true despite the fact that, in this case, the secured lender sat on its state law rights (perhaps even deliberately), and, in most other cases (not involving titled vehicles) where U.C.C. § 9-317(e) would apply, the creditor would not even have been protected under state law. To what principled end this additional protection of security, and the concomitant hobbling of preference law, can be ascribed is difficult to apprehend.

E. Low-Dollar Floor Exceptions

Unquestionably, the inclusion of the new small dollar safe harbor in § 547(c)(9)\(^\text{207}\) for commercial cases where “the aggregate value of all property that constitutes or is affected by such transfer is less than [$6,225]” has had an impact on the volume of preference litigation. But it is a fair hypothesis that the impact has cut both ways. Obviously intended, along with the venue provisions discussed below,\(^\text{208}\) to respond to allegations of vexatious or groundless preference claims being asserted primarily for their nuisance value and to secure a quick settlement,\(^\text{209}\) this new exception has doubtless caused trustees not to assert some number of preference claims that prior to BAPCPA would have been filed. At the same time, however, it has generated (and retains the potential to generate) a fair amount of new litigation over issues such as: (a) which of the two § 547(c) floors to apply in any given case,\(^\text{210}\) (b) whether the exception applies when the aggregate of all of the

\(^{206}\)Note also that the limitation on the trustee’s avoiding powers in § 546(b) does not apply to § 547.

\(^{207}\)This new provision joined the existing safe harbor in § 547(c)(8), originally enacted as § 547(c)(7), for transfers to an individual consumer debtor where the value of the property constituting or affected by the transfer is less than $600. Also, this dollar limitation does not adjust under § 104(a). See supra note 57.

\(^{208}\)See infra text accompanying notes 220-224.

\(^{209}\)See supra note 92 and accompanying text.

\(^{210}\)This will turn on the determination of whether or not the debtor’s debts are primarily consumer
preferences received by the defendant exceed the floor,\(^{211}\) (c) whether the defense can be applied _pro tanto_ when the aggregate value of the property constituting or affected by transfer exceeds the threshold,\(^{212}\) and (d) the relationship between the low-dollar safe harbor exceptions and other preference exceptions.\(^{213}\) In short, while § 547(c)(9) has surely prevented some prefer-

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211 Slobodian v. United States (In re Net Pay Solutions, Inc.), No. 15-2833, 2016 WL 2731676 (3d Cir. May 10, 2016) (holding that § 547(c)(9) requires a creditor-by-creditor and transfer-by-transfer analysis); Elec. City Merchandise Co. v. Hailes (In re Hailes), 77 F.3d 873, 874 (5th Cir. 1996) (holding that multiple transfers to the same debtor may be aggregated for purposes of disabling the exception under § 547(c)(8)). Cf. Pierce v. Collection Assocs., Inc. (In re Pierce), 779 F.3d 814 (8th Cir. 2014), wherein the court concluded that although the aggregate value of all sums garnished by judgment creditor during the preference period exceeded $600, the judgment creditor was entitled to raise the _de minimis_ in § 547(c)(8), because the last two payments withheld from the debtor’s wages were never paid over to the creditor prior to bankruptcy. _See also_ In re Djer, 188 B.R. 586, 588 (Bankr. D. Minn. 1995) (noting authority on both sides of the issue in relation to § 547(c)(8)). In _In re Transcontinental Refrigerated Lines, Inc._, 483 B.R. 520, 522 (Bankr. M.D. Pa. 2010), the court looked to the rule of construction in § 102(7) to find that the reference to “such transfer” in § 547(c)(9) should be deemed to include the plural “transfers.” Of course, this does not resolve the additional argument against aggregation based on the perambulatory language in § 547(c), which refers to “a transfer.”

212 _See_ W. States Glass Corp. of N. Cal. v. Barris (In re Bay Area Glass, Inc.), 454 B.R. 86, 89-90 (B.A.P. 9th Cir. 2011) (holding that § 547(c)(9) cannot serve as a safe harbor for the part of the preference that falls below the jurisdictional minimum); Ray v. Cannon’s, Inc. (In re Vickery), 63 B.R. 222, 223 (Bankr. E.D. Tenn.1986) (“The wording of the exception [§ 547(c)(8)] clearly makes $500 a cut-off point on the trustee’s right to recover and more importantly on his decision to bring suit. A [transfer] of $599 is protected but a [transfer] of $601 is not.”). And, as if all of this were not enough ado about very little, if, as the court noted in Vickery, one dollar makes this kind of difference, then in the case of noncash transfers, the issue of valuation will be pivotal in determining applicability of the defenses under both §§ (c)(8) and (c)(9).

213 In other words, assuming, as the majority of courts now do, that we aggregate all preferential transfers under § 547(c)(9), suppose that, while insolvent and within ninety days of filing, the debtor makes two payments of $5,000 each to a creditor on prior debts. In response to the trustee’s claim to recover the two payments, assume further that the creditor is successfully able to establish that one, but
ence filings (or, if filed, recoveries). The surfeit of related litigation concerning the scope and proper application of the exception makes one wonder whether, from the perspective of the system as a whole, the game has been worth the candle.

Of far greater concern, however, is a conviction that dollar-denominated floors are very blunt and inexact tools for accomplishing any objective other than eliminating all preference claims below a certain amount, which of course is not the raison d'être for either § 547(c)(8) or (c)(9). In addition, unless a minimum amount in controversy is calibrated to the size of estate, the magnitude of its impact will fluctuate from case-to-case, and wildly so from the largest to the smallest cases. What is “trifling” depends a great deal on scale. Finally, bearing in mind that the trustee has discretion whether or not to bring a preference claim in the first place, and presumably exercises that discretion in at least some number of cases where the exercise of the preference power would not produce any (or only minimal) benefit to the estate, the only reason for a de minimis safe harbor is as an anodyne for those situations where the trustee either misuses her authority or misjudges the benefits of its application. But just how effective is this mechanism for achieving that objective?

Even conceding for sake of argument that abuse of the preference power is as widespread of a problem as credit provider complaints would have one believe, I would submit that a dollar-denominated floor for bringing a preference action is a simultaneously overinclusive and underinclusive strategy for responding to the behavior sought to be controlled. To begin with, while it

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214 It is impossible to know, except anecdotally, about adversary proceedings that were not filed, so it is pure conjecture as to whether the number of cases where the trustee has refrained from filing are greater or less than the number of cases involving the interpretation of § 547(c)(9). Probably the former, but, again, it is important to stress that some of the unfiled claims below the minimum are cases where it would not have been beneficial to the estate and/or other general creditors if the trustee had been permitted to proceed.

215 I can be as cynical as the next fellow, but surely it cannot be the case that every trustee indiscriminately files preference claims for improper ulterior motive, such as enriching herself or her law firm. While the trustee is not necessarily alone in terms of standing to bring preference actions (see infra note 262), it is even less likely that individual creditors or creditors' committees would have any incentive to seek authority to pursue a preference action other than to benefit the estate.

216 These, of course, were the principal complaints of the creditor provider group during the ABI STUDY. See supra notes 88-92 and accompanying text.
is impossible to know how many cases that might otherwise have been filed by trustees have been scotched because of § 547(c)(9), it is reasonable to surmise that the operation of any barrier to preference recovery discriminating solely on the basis of amount in controversy would be just as likely, when applied, to bar an action untainted by bad faith (and that would have increased distributions to unsecured creditors) as it would be to prevent a strike suit producing little or no benefit for the estate or general creditors. Moreover, it bears reiterating that the recovery of assets sufficient to permit or increase distributions to unsecured creditors is desirable, but is not itself an element of an avoidable preference, nor is it necessarily the only purposive goal of the preference law.217

At the same time, low-dollar threshold limitations are also underinclusive in that they will apply even in situations where the defendant engaged in the very sort of intentional opt-out behavior that it is the policy of the deterrence-based justification for the preference law to interdict.218 In sum, both of the low-dollar exceptions, and particularly so the more impactful limitations of subsection (c)(9), are lazy ways to deal with the problem that they seek to remediate, even assuming a problem of the magnitude warranting a response exists in the first place. It is a messy shotgun approach that inevitably results in lots of collateral damage while, at the same time, permitting some of guiltiest duck to fly away scot free. Obviously, minimum amount thresholds for triggering jurisdiction have the benefit of administrative ease, precisely because they are blind to any criterion or consideration other than the value of the property subject to the challenged transfer. There are, however, better, more principled, and more finely calibrated ways to address the misgivings of creditors regarding wasteful or self-interested use of the preference law that do not entail discarding the infant along with its bathwater.219

217See supra note 39. This is particularly true in reorganization cases where other policy objectives are implicated. See Mellon Bank v. Dick Corp., 351 F.3d 290 (7th Cir. 2003) (permitting use of the preference power where the recovery would only directly benefit a secured creditor when the action was necessary to secure the lender’s agreement to provide critical postpetition financing facility). “The operating business counts as an ‘estate’ without regard to the identity (and priority) of those who will receive distributions eventually.” Id. at 293. That is, “benefit to the estate” for recovery of avoided transfers under § 550(a) does not necessarily require that the value recovered flow to unsecured creditors. See infra note 261 and accompanying text. But see Thomas D. Goldberg, Curbing Abusive Preference Actions: Rethinking Claims on Behalf of Administratively Insolvent Estates, 23 AM. BANKR. INST. 14 (2004) (making the argument that preference actions should not be brought where there is no likelihood of distributions to unsecured creditors).

218See Jackson, supra note 40, at 759-63. See also Jackson, supra note 122, at 125-28 (adopting the position that the justifications for the preference law are to prevent dismantling of the bankruptcy estate and in order to assure that no creditor is able to unilaterally opt-out of the hypothetical creditor’s bargain model that Jackson posits creditors, as risk-neutral wealth maximizers, would agree to ex ante to assure that the law operates as efficiently as possible). Jackson’s view is the strongest endorsement of a deterrence-based rationale for crafting the preference law.

219See infra text accompanying notes 311-314.
beginning unexpectedly enough, with the last of the changes to preference law and procedure wrought under BAPCPA, to which attention is turned next.

F. Venue Provisions

The general rule governing venue of proceedings arising in a bankruptcy case is 28 U.S.C. § 1409(a), which calls for such proceedings to be commenced in the district where the case is pending—so-called "home court" advantage for the trustee. Prior to 2005, subsection (b) contained an exception to this rule for proceedings "arising in or related to such case to recover a money judgment of or property worth less than $1,000 or a consumer debt of less than $5,000;..." In these narrow situations, venue was proper in the district where the defendant resided.

BAPCPA amended subsection (b) in order to (i) raise the consumer debt limitation to $15,000 [currently $18,675]; (ii) add an exception to the home court advantage for proceedings seeking recovery of a nonconsumer debt against a noninsider of less than $10,000 [currently $12,475], and (iii) make all of the amounts in subsection (b) subject to triennial adjustment under § 104(a). As set forth in the legislative history to the 1978 Act, these "small debt" (and now not so small debt) exceptions to the general rule are intended to prevent unfairness to "distant debtors of the estate" who potentially might otherwise have to incur expenses to defend a preference claim that either exceeds the value of the claim or makes the cost of its defense a problematic proposition.

Like the low-dollar safe harbors in §§ 547(c)(8) and (9), these provisions achieve their intended objective only in some of the cases in which they will apply and, even then, only fortuitously. However, unlike those other exceptions, they do not represent absolute bars to the trustee's ability to pursue the action; they just make it a little more expensive and inconvenient. That is by no means objectionable; it simply adjusts the playing field. Each case can still be evaluated on its own merits and an appropriate decision made whether or not to file a claim. It is also more likely than not to be the case that in the instances where these exceptions to home court advantage dis-

220 E.g., Etalco v. AMK Indus., Inc., (In re Etalco), 273 B.R. 211, 219 (B.A.P. 9th Cir. 2001) (observing that the purpose of 28 U.S.C. § 1409(a) is to provide the debtor with a "home court" advantage). See also Appel v. Gable (In re B & L Oil Co., 834 F.2d 156, 159 n.8 (10th Cir.1987) (noting that centralizing proceedings in one court advances the important goal of the efficient administration of bankruptcy cases).

221 See HOUSE REPORT, supra note 52, at 446.

222 It bears noting that the increase in the venue level for consumer cases was not part of the NBRC recommendations concerning preferences. See NBRC REPORT, supra note at 800. While raising the level from $5,000 (or simply indexing it under § 104(a)) is not itself objectionable, the increase to $15,000 is proportionately much higher than the just the $5,000 difference compared with commercial cases, given what I presume is likely the mean dollar value of the two types of claims.
suade the trustee from initiating a preference action, the claim will have been of the sort that was borderline to begin with, which is to say of the type that the critics of the preference law had (or claimed to have had) in mind. The same cannot be said about a minimum amount in controversy requirement that must be met in order to invoke the court’s jurisdiction, which is just as likely to bar a preference action that might have been beneficial to the estate as one that would have produced insignificant return beyond the recovery of professional costs entailed in its prosecution. In short, I believe BAPCPA’s changes with regard to proper venue in preference cases were not only harmless, but perhaps even beneficial.

The problem, however, with changing venue rules is that their constructive or favorable impact, whatever it might have been in 1978 or even ten years ago, has waned and likely will continue to do so. The near-universal adoption of electronic filing and the increased incidence of conducting hearings either telephonically or via videoconferencing technology has rendered tinkering with the venue rules of much more limited utility in policing truly bad faith preference actions than may have been true in the past. Distance alone simply does not create the same potential for prejudice and disadvantage that was earlier true. Concomitantly, the benefits flowing from home court advantage are not as fulsome as they might once have been.

Despite this fact, the call for expansion of the “district where the debtor resides” exceptions has not abated. And, a further tapering of the trustee’s home court advantage would not be deleterious in the grand scheme of things. However, to address effectively the legitimate dissatisfaction regularly raised concerning trustees’ decisions to invoke the preference laws (even if the reality is not quite as loud as the din) by means other than continuing to impose arbitrarily blanket limitations on the scope of preference liability and recovery, tinkering with the venue rules will not be enough. Instead, as discussed further below, some fresh approaches will be needed as BAPCPA recedes further and further in our rearview mirror.

VII. PREFERENCE LAW GOING FORWARD

A. THE ROLE OF STATE LAW IN BANKRUPTCY LEGISLATION

The need to honor creditors’ state law rights, interests, and entitle-

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223 It is the all or nothing nature of so-called de minimis exceptions (which are no longer so de minimis) that make them poor proxies for rules prohibiting the actual behavior sought to be proscribed. See supra text accompanying notes 217-219.

224 The Chapter 11 Commission Report calls for a significant increase (nearly double the current level) in the dollar value of preference claims that should be subject to the exception in 28 U.S.C. § 1409(b) from the general “where the case is pending” rule. See infra note 284 and accompanying text.

225 There is, however, a tipping point in terms of how far this strategy can be carried, as its application will increase the expense and duration of bankruptcy cases. See supra note 220.
ments—and the need from time-to-time to modify those rights, interests and entitlements in pursuit of the goals of equality, fresh start, and debtor survival—generate an essential and inescapable tension in bankruptcy law. The future of preference law is inextricably intertwined with the broader question of how that tension will be resolved. Federal bankruptcy law could take one of many approaches to state commercial law. To be sure, Congress has the authority to promulgate an entirely new regime of property rights and priorities that would attain upon the debtor’s filing of a bankruptcy petition. Of course, developing such a system would be burdensome. It would also expand opportunities, without significant corresponding benefits, for strategic gaming by debtors and creditors who might perceive particular advantage under one system versus the other.226 Alternatively, a federal bankruptcy system might set up a purely procedural mechanism for the collective adjudication of claims against the debtor, through devices like the automatic stay and the discharge, but otherwise leave creditors’ state law rights wholly undisturbed.227 The Bankruptcy Act of 1898’s panoptic incorporation of state exemptions is one limited example of this kind of blanket deference to substantive state law.228 That approach, however, if adopted across-the-board,

226 See, e.g., Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156, 165 (1946), wherein the Court began with the principle that the validity of a debt or obligation “in the absence of overruling federal law, is to be determined by state law.” The Court noted, however, that in the bankruptcy context, the question of allowing any claim ultimately rests with the federal courts and is a matter of federal law in which equitable principles play a large part. Id. at 162-63. See also Vern Countryman, The Use of State Law in Bankruptcy Cases (Part 1), 47 N.Y.U. L. Rev. 407, 408-09 (1972) (discussing reasons for the incorporation of substantive state law rules for application in bankruptcy cases).

227 This is essentially the position taken by contractarian theorists, who advocate that bankruptcy should be limited in purpose and operation to enforcing prebankruptcy contractually determined rights and priorities, beginning with Douglas G. Baird and Thomas Jackson’s “creditors’ bargain” theory of bankruptcy. Baird and Jackson argued that when pursuing these goals, rights established elsewhere generally should not be changed. Thomas H. Jackson, Bankruptcy, Non-Bankruptcy Entitlements and the Creditors’ Bargain, 91 YALE L.J. 857, 860 (1982) (explaining the model generally); Douglas Baird, Loss Distribution, Forum Shopping, and Bankruptcy: A Reply To Warren, 54 U. CHI. L. Rev. 815, 825-28 (1987) (identifying forum-shopping as a principal concern as to why rights established outside of bankruptcy should not be altered within bankruptcy). A more extreme version of this outlook was proposed in Michael Bradley & Michael Rosenzweig, The Untenable Case for Chapter 11, 101 YALE L.J. 1043, 1078 (1992) (arguing for taking bankruptcy, or at least reorganization, out of the judicial process entirely). See also infra note 237. But see Elizabeth Warren, Bankruptcy Policy, 54 U. CHI. L. REV. 775, 781 (1987) (taking the position that when determining parties’ rights in a bankruptcy proceeding, only state substantive law should be relied on, not state collection rules). It should also be noted that while differing rules may present a risk of forum-shopping as a principal concern as to why rights established outside of bankruptcy should not be altered within bankruptcy), A more extreme version of this outlook was proposed in Michael Bradley & Michael Rosenzweig, The Untenable Case for Chapter 11, 101 YALE L.J. 1043, 1078 (1992) (arguing for taking bankruptcy, or at least reorganization, out of the judicial process entirely). See also infra note 237. But see Elizabeth Warren, Bankruptcy Policy, 54 U. CHI. L. REV. 775, 781 (1987) (taking the position that when determining parties’ rights in a bankruptcy proceeding, only state substantive law should be relied on, not state collection rules). It should also be noted that while differing rules may present a risk of forum-shopping, they do not always produce that result. See William J. Woodward, Jr. & Richard S. Woodward, Exemptions as an Incentive to Voluntary Bankruptcy: An Empirical Study, 57 AM. BANKR. L.J. 53, 66-70 (1983) (concluding that altering federal exemptions probably has no significant effect on bankruptcy filing rates). Cf. Susan Block-Lieb & Edward J. Janger, The Myth of the Rational Borrower: Rationality, Behavioralism, and the Misguided “Reform” of Bankruptcy Law, 84 TEX. L. REV. 1481, 1523-25 (2006) (asserting that the evidence thus far as to the correlation between exemption law and personal filing rates have produced conflicting and confusing results).

228 Bankruptcy Act of 1898, ch. 541, § 6, 30 Stat. 544.
would surely diminish the prospects for achieving the unique objectives of the bankruptcy system in any kind of meaningful way.229

Wisely, our system eschews both of these extremes, although of necessity it leans somewhat toward the latter since the scope of federal commercial law is quite limited. The Supreme Court’s decision in United States v. Butner230 is frequently and not inaccurately trotted out in support of this view, with an emphasis on the portion of the Court’s holding that stated: “Congress has generally left the determination of property rights in the assets of a bankrupt’s estate to state law.”231 Too often, however, the Court’s qualification to that statement—unless “some federal interest requires a different result”—is overlooked or given insufficient attention in the rhetoric of those inclined to advocate in favor of the hegemony and unmolested preservation of state law contractual and property rights.232 Indeed, Butner is not uncommonly cited as making a far more sweeping statement than it really did in terms of the division of authority between state and federal law in bankruptcy cases.233 Properly understood, the full holding in Butner actually does no more than express in the negative the basic truism that when a state law property definition interferes with a federal bankruptcy interest, the state law rule must yield under the Supremacy Clause of the federal Constitution.234 Put another way, state law often defines the nature, scope, and attributes of a property interest because there is no superseding federal law

229 See infra text accompanying notes 236-241.
231 Id. at 54.
232 Id. See generally 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). Professor Moringiello expands 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 (2015).
233 Id. at 670 (describing Butner as a “default rule” that applies in the absence of a contrary federal rule or policy interest). See also In re Pruitt, 401 B.R. 546, 564 (Bankr. D. Conn. 2009) (suggesting that many courts read Butner too broadly).
234 U.S. Const. art. VI, cl. 2. In the context of a bankruptcy question, Chief Justice Marshall concluded in Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 193-96 (1819), that “[w]henever the terms in which a power is granted to congress, or the nature of the power, require that it should be exercised exclusively by congress, the subject is as completely taken from the state legislatures, as if they had been expressly forbidden to act . . . .” See also Kanter v. Moneymaker (In re Kanter), 505 F.2d 228 (9th Cir. 1974), in which the court invalidated a state statute that purported to defease the bankruptcy trustee of any interest in a prepetition personal injury lawsuit. The court found that enforcement of that provision directly conflicted with the provisions of the former Bankruptcy Act’s definition of property of the estate as well as with the overall distributional priority scheme established by the Act. Id. at 230. More recently, of course, Puerto Rico’s legislation, permitting public corporations to negotiate with creditors and legally reorganize their debt if those negotiations failed, was struck in federal court because it was preempted by the Code. See http://dealbook.nytimes.com/2015/02/08/judge-strikes-down-puerto-ricos-debt-restructuring-law/?_r=0.
that plays that role when a bankruptcy case is filed. However, just because state law initially determines the nature and substance of a creditor's claim in bankruptcy does not mean that state law will in variably control what happens during the course of a bankruptcy case.\textsuperscript{235}

Inevitably, incorporation and strict enforcement of state law property and contract rights cannot alone define the contours of a bankruptcy system (or at least of our bankruptcy system) because federal bankruptcy law seeks to attain purposive objectives that have no analog under state law.\textsuperscript{236} Thus, a progressive bankruptcy code cannot merely contain a set of procedural rules and leave all of the substantive issues to state law in the manner of a federal court adjudicating a state law claim where jurisdiction is based of diversity of citizenship.\textsuperscript{237} A healthy and utile system of bankruptcy embodies a set of distributional norms and outcomes that differ from state law, and that have

\textsuperscript{235}For example, whether claims are allowed (and in what amount) or disallowed is a question of federal law. Similarly, how claims are allocated between secured and unsecured portions is determined by the Bankruptcy Code, not state law. Congress has permitted state law to function within the fabric of federal bankruptcy law in order to identify the pre-bankruptcy rights of the parties involved in a bankruptcy case; it is not, however, constitutionally compelled to do so. See Pruitt, 401 B.R. at 553-54. For instance, state law determines the existence and amount of a lessor's claim arising from the tenant's breach, but, in order to not to disrupt the aims of bankruptcy, § 502(b)(6) places on a cap on how much of that claim will be allowed. See Moringiello, supra note 232, at 83-85 (distinguishing bankruptcy "entry" rights from bankruptcy "exit" rights).

\textsuperscript{236}Even one of the early and leading proponents of the view that bankruptcy law should simply sort out private state law results without advancing substantive goals to accommodate the competing interests that might be seen at stake in a bankruptcy case has acknowledged the need for adjustment and even destruction of some private state law rights in order to assure the debtor's right to a fresh start. See Thomas H. Jackson, The Fresh-Start Policy in Bankruptcy Law, 98 HARV. L. REV. 1393, 1394 (1985). Similarly, the policy of rehabilitation of the debtor means bankruptcy must offer "a forum in which competing and various interests and values accompanying financial distress may be expressed and sometimes recognized." See, e.g., Donald R. Korobkin, Rehabilitating Values: A Jurisprudence of Bankruptcy, 91 COLUM. L. REV. 717, 766 (1991).

\textsuperscript{237}See Countryman, supra note 226, at 409 ("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"). Judge Friendly earlier expressed the same view in Fore Improvement Corp. v. Selig, 278 F.2d 143 (2d Cir. 1960) (concurring opinion), noting that, "Congress is not required to direct the federal courts to look to state law for the definition of state-created rights asserted in bankruptcy, as it is when federal jurisdiction rests solely on diversity of citizenship. The question is of intent, not of power." Id. at 147. See also Vanston Bondholders Protective Committee v. Green, 329 U.S. 156, 240 (1946) ("In determining what claims are allowable and how a debtor's assets shall be distributed, a bankruptcy court does not apply the law of the state where it sits. Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487, 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."). On the other hand, the view is out there that the Erie model is precisely the method that should be used to structure the relationship between state and federal law in bankruptcy. See Charles W. Mooney, Jr., A Normative Theory of Bankruptcy Law: Bankruptcy As (Is) Civil Procedure, 61 WASH. & LEE L. REV. 931, 934 (2004); Thomas E. Plank, The Erie Doctrine and Bankruptcy, 79 NOTRE DAME L. REV. 633, 691-92 (2004) (suggesting the desirability, to the extent feasible, of following Erie in bankruptcy cases so as to advance the development of a coherent body of national commercial law).
aggregate social and economic aspirations, such as allowing for survival of a business through reorganization and the discharge of debt, that are alien or forbidden to state law. The salience of this point is sometimes neglected because bankruptcy recognizes, as it must, the validity of liens created under state law. But even in that regard, the rules of bankruptcy relating to secured claims differ considerably from the treatment of secured claims outside of bankruptcy, beginning with the bifurcation of undersecured claims under § 506(a)(1) and ending with the abrogation of certain liens entirely. In short, the "secured creditor" who comes into the bankruptcy proceeding with its lien intact may come out of the proceeding resembling quite a different character entirely. So, the question (the answer to which is never fixed or certain in the fashion of a mathematical exercise) becomes to what extent bankruptcy legislation should defer to the contractual or other legal arrangement struck by the parties under state law?

Certainly the 1978 Act, even though advancing a more ambitious bankruptcy-specific agenda than any previous bankruptcy law, continued to defer to state law in key respects. BAPCPA, however, placed a giant

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238 The federal Constitution specifically bars the states from granting a general discharge by virtue of the Contract Clause, which forbids the states from retroactively passing laws that impair the obligation of contracts. U.S. Const. art. 1, §10, cl. 1. As for reorganization, the state law of creditor remedies based on a race of the diligent is destined to assure the demise of the insolvent debtor, not its survival or continuation.

239 Given the quite limited scope of property interests created and defined by federal law, most claims arise under state law. See supra text accompanying notes 226-235.

240 The Code eschews the phrase "secured creditor" entirely, focusing instead on the character of the claim under § 506(a)(1), which is defined in relation to the value of the creditor's interest in the debtor's property. See supra note 120. Assuming reasonably accurate valuations, this bifurcation actually benefits the undersecured creditor by allowing for at least a pro rata recovery on its deficiency claim.

241 Professor Howard points out that while the Supreme Court's opinion in Long v. Bullard, 117 U.S. 617 (1886), is often cited for the proposition that "liens pass through bankruptcy unaffected," that is a serious misreading of the case, which did not actually address the ability to avoid or reduce liens in bankruptcy. See Howard, supra note 116, at 526. See also Woolsey v. Citibank, N.A. (In re Woolsey), 696 F.3d 1266, 1274 (10th Cir. 2012) ("Chapter 7 indubitably permits liens to be removed in many situations."). Cf United States v. Security Industrial Bank, 459 U.S. 70 (1982), (holding that § 522(f), permitting avoidance of certain liens exemption impairing liens, can only be applied prospectively). Finally, and most provocatively, recently, Professor Tabb has advanced the thesis that the Fifth Amendment does not constrain Congress's ability under the Bankruptcy Clause to modify the rights of secured creditors. See Charles J. Tabb, The Bankruptcy Clause, the Fifth Amendment, and the Limited Rights of Secured Creditors in Bankruptcy, 2015 U. ILL. L. REV. 765 (2015).

242 See supra note 30 and accompanying text.

243 This is due, in part, to the fact that most private law rights are still established under state law. Of course, how an allowed claim is characterized in bankruptcy is another matter and one that is "wholly federal" in its determination. See In re Whipple, 417 B.R. 86, 89 (Bankr. C.D. Ill. 2009); supra note 226. See also Richardson v. Schafer (In re Schafer), 455 B.R. 590 (B.A.P. 6th Cir. 2010), rev'd, 689 F.3d 601 (6th Cir. 2012) (observing that when addressing an issue that involves state law, bankruptcy courts should ordinarily consider and weigh the constitutional preference for uniformity against the state's interest in having its own laws applied).
thumb back on the state law rules side of the equation in this delicate balancing exercise. As noted earlier, this is most evident in the specific provisions of the law dealing with restricting access to debtor relief and the protection of security. My more confined focus, however, has been on how the preference law has been dragged along in the process, and why that may be systemically undesirable. It is the very nature of preferences to flout state law rules in pursuit of bankruptcy distributorial goals. Preference law is designed to disrupt payments and transfers that are, with certain very limited exceptions, perfectly lawful under state law—and that, quite frankly, do no harm except in the insolvency situation, which is when we must become concerned not only with each creditor's rights against the debtor, but also with the competition that exists among creditors for priority in, or even just an aliquot share of, the debtor's limited assets.

It is hardly unexpected that those who find themselves on the defensive side of a preference lawsuit might be more than just disappointed at the prospect of having to return to the estate a payment lawfully received from (or forego a lien validly given by) the debtor on a bona fide debt. But this is the classic example of a place where state and common law rules and procedures, preoccupied with the individual creditor collection effort and not the interests of creditors inter se, may provide plainly inappropriate guidance. This is due to the fact that these rules are predicated on an entirely different allocational scheme than the distributorial principles that govern in system where contemporary bankruptcy norms are given preeminence. That is part of the reason why individual creditors, focused narrowly on their own claims, should be fully expected to squawk about the "ineffectiveness" and "unfairness" of the preference law, and also why these complaints have to be sifted through that filter of self-interest.

244 See supra text accompanying notes 16-24.

While preferences are fully permissible under common law, some, but certainly less than all, states provide "mini" preference provisions in their assignment for the benefit of creditors statutes. However, such attempts by the states to authorize the assignee of an assignment for the benefit of creditors to prosecute and recover a preferential transfer have on occasion been struck on pre-emption grounds. Sherwood Partners, Inc. v. Lycos, Inc., 394 F.3d 1198 (9th Cir. 2004), cert. denied, 546 U.S. 927 (2005) (pointing out that recovery by a state assignee would preclude later recovery by the bankruptcy trustee, thus thwarting bankruptcy distributorial policy over which Congress has exclusive authority). But see Ready Fixtures Co. v. Stevens Cabinets, 488 F.Supp.2d 787 (W.D. Wis. 2007) (holding that Wisconsin's mini-preference provision is not preempted); Geoffrey L. Berman & Catherine E. Vance, State Law Preference Actions: Still Alive after Sherwood Partners v. Lycos, 26 AM. BANKR INST. J. 24 (2008) (suggesting that state-enacted preference avoidance statutes might not be entirely a thing of the past).

246 It is of small solace to a creditor compelled to disgorge a preferential payment or lose on lien on valuable property to be assured that their "selfless" actions will help advance bankruptcy fresh start and rehabilitation policy. Moreover, whether exaggerated or not, there is still the widely held belief among creditors and more than a few bankruptcy professionals that many preference claims are brought without proper prior investigation and deliberation. See, e.g., Goldberg, supra note 217, at 14.
As Thomas Jackson colorfully explained many years ago in his explanation of bankruptcy by analogy to a lake filled with fish, bankruptcy is designed to make one hundred competing fishers act like the sole owner of the lake, thereby ensuring a sustainable supply of fish.\textsuperscript{247} As opposed to state grab law rules and their allocation of limited assets on a first-come-first-served basis, by imposing mandatory rules requiring a group of creditors to cooperate in a coordinated manner, bankruptcy is much more efficient and cost effective, even in a liquidation mode, than each creditor pursuing its own individual interests. A key to achieving that aim is ratable distribution of the assets in possession of the estate at filing. However, it also requires administration of those assets possessed by the estate sufficiently in advance of filing so as to assure that the effort is not undermined either by the frantic machinations sometimes characterizing the debtor's activities in the days and weeks immediately preceding the filing, or by purely routine transactions that happen to result in one or more creditors receiving more than a ratable share of the common pool.\textsuperscript{248} This is where the preference law steps into the breach. But BAPCPA has eroded the effectiveness of the preference law largely in pursuit of either questionable goals\textsuperscript{249} or the correction of unsubstantiated abuses.\textsuperscript{250} In the process, the 2005 Amendments have further muddied the waters in relation to why we need a preference law in the first place. Therefore, a renewed focus on that elementary but vital question is in order. Before turning finally, however, to the considerations that might profitably guide preference reform in the future, it is worth examining a couple of recent proposals addressing the desired direction of preference law and policy.

\textbf{B. Some Other Proposals for the Future}

In a 2014 article,\textsuperscript{251} Professor Brooke Gotberg took her crack at resolving the conundrum of the preference law. Like myself and others,\textsuperscript{252} she en-

\textsuperscript{247}See \textit{Jackson}, supra, note 122, at 11-13.

\textsuperscript{248}Jackson was concerned of course about transfers that were occasioned by the very deliberate jockeying for position that can go on once creditors become aware that the debtor is floundering financially. See \textit{Jackson}, supra note 40, at 759-60. However, under a view where preference law does not police the creditors' bargain, but actually advances the achievement of substantive goals distinct from state law, it is of no moment whether the transfer was extraordinary or routine.

\textsuperscript{249}See supra notes 70-72 and accompanying text concerning the futility of the deterrence explanation of preference law and its counter hypothesis, i.e., that preference exceptions for innocent transferees will encourage creditors to continue to do business with the financially flagging debtor.

\textsuperscript{250}See \textit{infra} note 279 and accompanying text.

\textsuperscript{251}Gotberg, supra note 37.

\textsuperscript{252}See supra notes 68 & 69. See also Broome, supra note 30, at 96 ("By eliminating the 'reasonable cause to believe' requirement, Congress deliberately shifted from a policy of avoiding only those preferential transfers that were made to creditors who had reason to know of the debtor's insolvency and may have therefore exerted pressure on the debtor, to a policy of preserving equal distribution, even in the absence of creditor pressure.").
endorsed the premise that preference law should be driven principally by the equality of distribution rationale, and noted the tendency of many of the preference exceptions, founded on a deterrence explanation of the law, to impair or destabilize the policy of ratable distribution.253 Her solution to the troubling conflict between the two accounts of preference law is a novel one. Rather than attempting to reconcile some of the internally inconsistent aspects of this area of law by either prioritizing or eliminating them, as other have proposed, she suggests adapting application of the law in relation to the type of proceeding at issue based upon what she regards as the corresponding value(s) that dominates in each such proceeding. This leads her to call for elimination of preference recovery entirely in all Chapter 11 cases,254 save for the (not uncommon) situation where a liquidating plan has been confirmed,255 and expansion of preference recovery in Chapter 7 by virtue of the abrogation of those exceptions that she identifies as operating to carve out entirely certain kinds of transfers or creditors from preference liability, including, most notably, the ordinary course of business exception.256

Although, in fairness, Gotberg describes her proposal as a “thought piece,” and not a specific proposal for reform,257 the call for total elimination of preferences in reorganization cases is much like killing the patient in order to halt the spread of the disease. It is true that the debtor in possession is likely to be more circumspect in exercising preference recovery authority due the importance of preserving certain relationships necessary in its post-confirmation life,258 and that the direct benefit to unsecured creditors from exercise of the preference power may be more attenuated in Chapter 11 than Chapter 7.

253Gotberg, supra note 37, at 65-66 (discussing the conflict between deterrence and equal distribution).
254Id. at 88 (stating that the “relative unimportance of equal distribution” in the reorganization context belies the need for maintaining preference actions in Chapter 11).
255Id. at 86-87 (“If chapter 11 is used as a liquidating chapter rather than an opportunity to preserve a debtor’s going concern value, then policy considerations associated with a chapter 7 liquidation should predominate, and the availability of preference actions adjusted accordingly.”). Given the trend of modern firms tending to have capital structures that are entirely consumed by multiple layers of secured debt, with the result being that the Chapter 11 filing becomes little more than a quick § 363 sales, followed by confirmation of a liquidation plan or conversion to Chapter 7, this is a big exception. See, e.g., Douglas G. Baird & Robert K. Rasmussen, The End of Bankruptcy, 55 STAN. L. REV. 751, 777-85 (2002) (discussing the decrease in traditional stand-alone reorganizations). But see J. Lawrence Westbrook, Secured Creditor Control and Bankruptcy Sales: An Empirical View, 2015 U. ILL. L. REV. 831 (suggesting that the conventional picture of secured creditor control and 363 sales is inaccurate and overstated).
256Gotberg distinguishes between what she describes as “narrowing exceptions” (§§ 547(c)(1), (3), (5) and subsection (i)) and “true exceptions” (§ 547(c)(2), (4), (6), (7), (8), (9) and subsection (h)). Gotberg does not categorize § 546(e), although it seems safe to assume she would regard it as a true exception. Gotberg, supra note 37, at 67-77. See also supra notes 58-61 for a somewhat different classification of the preference exceptions.
257Id. at 60.
258See authorities cited id. at 65, n.65.
These factors, however, do not of necessity make the preference power or the principle of equality less important in reorganization than in liquidation.\textsuperscript{259} 

To begin with, recovery of preferential transfers can be a ready source of cash needed to cover operational costs, costs of administration and, in particular, critical to meeting the cash demands that arise immediately on confirmation.\textsuperscript{260} Thus, application of the preference power can, in some cases, mean the difference between survival of a firm and liquidation—a not insignificant consideration. In addition, it bears reiterating that bankruptcy “equality” goals can be served other than by means of increasing the distributions to unsecured creditors with funds recovered in a preference action. They can also be achieved by assuring that claims statutorily entitled to priority receive payment before general creditors, or that the estate benefits in some other fashion\textsuperscript{261} even when, as a result of recovery of that preference, general creditors as a group receive no increased dividend. The point is that the transferee who disgorges the preference is now treated just like (equally with) other general creditors so that the distributional hierarchy established by the Code is not circumvented. Furthermore, while a debtor in possession in Chapter 11 will often be less motivated to bring any particular preference claim than a trustee in a Chapter 7 case, the debtor in possession does not always have the final word on whether or not to pursue the preferential transfer\textsuperscript{262} and, in any case, the fact that some preference actions may not be

\textsuperscript{259} See Padilla v. Wells Fargo Mortgage, Inc. (In re Padilla), 379 B.R. 643 (Bankr. S.D. Tex. 2007) (noting that the principle of equality among creditors underlies the Chapter 13 process, and citing Young v. Higbee Co., 324 U.S. 204, 210 (1945), involving a Chapter X reorganization under the former Act). Gotberg does eventually acknowledge that it would be an exaggeration to say that “there is no value in ensuring parity among similarly situated creditors in a chapter 11 case . . .” However, she ultimately dismisses these concerns as associated with “extreme or ‘idiosyncratic’” transfers (id. at 89), even though they pertain to matters such as classification of claims, treatment of claims within classes, and the standards necessary to confirm a plan over the dissent of members of an approving class. Likewise, she ignores the important role that preference recovery can play in facilitating reorganization and protecting the distributional scheme in bankruptcy by assuring equality among similarly positioned creditors—regardless of whether this results in an increase in distributions to general creditors. See supra notes 217 & infra note 261.

\textsuperscript{260} See, e.g., § 1129(a)(9)(A), requiring as a condition to confirmation payment in cash of all administrative claims, unless the holder of any such claim agrees to a different treatment.

\textsuperscript{261} See Silverman Consulting, Inc. v. Hitachi Power Tools, U.S. A., Ltd. (In re Payless Cashways, Inc.), 290 B.R. 689, 696 (Bankr. W.D. Mo. 2004) (holding that even if recovery goes to payment of administrative expenses and does not produce a dividend for unsecured creditors, there is still a benefit to the estate warranting exercise of the Chapter 11 trustee’s power to avoid preferential transfers). See also supra notes 39 & 217 and accompanying text.

\textsuperscript{262} With court approval, the action may be brought by an individual creditor or, not uncommonly in Chapter 11, by the Unsecured Creditor’s Committee. See, e.g., Official Comm. of Unsecured Creditors of Cybergeneics Corp. v. Chinery, 330 F.3d 548 (3d Cir. 2003). See also PW Enters. Inc. v. North Dakota Racing Comm’n (In re Racing Servs., Inc.), 540 F.3d 892 (8th Cir. 2008) (finding that an unsecured creditor in Chapter 7 may sue derivatively on behalf of the estate when either the trustee consents or refuses to sue, provided that court finds that the suit is in the best interest of creditors and is necessary and beneficial to the efficient resolution of the bankruptcy proceeding); Countrywide Home Loans v.
filed does not itself render the power to bring preference claims irrelevant or even less critical in Chapter 11 than in Chapter 7.263

In addition to the foregoing, the exclusion of preference liability in Chapter 11 cases would have a profound dampening effect on involuntary filings, not infrequently triggered by the occurrence of a large preferential transfer,264 as well as on the ability to hold insiders accountable for profits they attain by utilizing the special knowledge they possess about the debtor.265 Finally, the proposal gives insufficient attention to the fact that many cases filed, voluntarily or involuntarily, under one chapter of the Code eventually end up proceeding under another chapter. Merely because a case starts out as a Chapter 11 case does not mean it will stay a Chapter 11 case. Indeed, a nontrivial number of reorganization cases end up in Chapter 7.266 Cases can also be converted to Chapter 11 just as easily as from Chapter 11. Thus, the sort of all or nothing distinction Gotberg proposes in relation to preference

Dickson (In re Dickson), 427 B.R. 399, 403-05 (B.A.P. 6th Cir. 2013) (acknowledging split of authority on whether a Chapter 13 debtor may be granted derivative standing to pursue an avoidance action, but concluding that, as a court of equity, the bankruptcy court may confer such standing if the trustee is unable or unwilling to act). Cf. Reed v. Cooper (In re Cooper), 405 B.R. 801, 810-12 (Bankr. N.D. Tex. 2009) (observing that while most circuit courts have permitted creditors committees, or even individual creditors, to pursue estate causes of action when the Chapter 11 debtor in possession refuses to sue, derivative standing should be viewed differently in Chapter 7 since there is not the same potential for conflict of interest with a trustee in place).

263 The proponents of further limiting the preference law vigorously point in support of their position to situations where trustees assert claims without proper deliberation and with an almost reckless abandon. See supra note 92 & infra note 279 and accompanying text. It would be ironic indeed if, because debtors in possession in the exercise of proper business judgment sometimes decide to refrain from bringing what might be a colorable preference claim, we should conclude that the preference power should be uprooted entirely in Chapter 11 (and presumably chapters 12 and 13). The inability to recover prefiling assets could also make it more difficult to confirm a plan due to meet the "best interests" test in §§ 1225(a)(4) and 1325(a)(4), since, under Gotberg's proposal, the hypothetical liquidation under Chapter 7 would include the transferred assets, but recovery of them could not be sought in the rehabilitation proceeding).

264 The debtor seeking to sustain the transfer could simply exercise its broad authority under § 706(a) to convert the case to Chapter 11 and, thereby, thwart the petitioning (and other) creditors.

265 While not the goal of a preference rule animated by equality objectives, inevitably its application will root out and remedy some "evil" preferential transfers, which are most likely to be made in favor of parties with special knowledge of the debtor's financial situation and, thus, the ability to scoop the competition by acting before the debtor's travels become more widely known. Thus, while it is impossible for the system to fashion doctrine that serves simultaneously equality and deterrence without undermining the effectiveness of each (see supra text accompanying note 65), the two are not always mutually exclusive or incompatible as applied. See also supra note 172.

266 One older report found that of Chapter 11 cases filed between January 1989 and December 1997, 34.27% are converted (presumably to Chapter 7). Karen M. Gebbia, First Report of the Select Advisory Committee on Business Reorganization, 57 Bus. Law. 163, 241 (2000). An article written for the Executive Office of the U.S. Trustee, suggests that the percentage of cases converting for the three years following the effective date of BAPCPA was 23.29%. Ed Flynn & Phil Crewson, Chapter 11 Filings Trends in History and Today, which can be found at http://www.justice.gov/ust/eo/public_affairs/articles/docs/2009/abi_2009005.pdf.
liability would have an enormous impact on (and present huge opportunities for strategic behavior in connection with) the decision by both preferred and non-preferred creditors of whether or not to seek (or oppose) conversion of the case.

Gotberg points out that Chapter 11 is concerned with debtor survival, maximizing creditor repayment, and protecting the interests of constituents (such as employees or the community in which the debtor operates) that do not possess cognizable legal claims against the estate but who nevertheless have a stake in the outcome of the case. From this, she deduces that a strict policy of equal distribution "has no place in the more flexible standards accorded to reorganizing businesses."\textsuperscript{267} I am not persuaded by the last point. As noted, the fact that equality policy operates in conjunction with other policy considerations in Chapter 11 that do not attend a Chapter 7 case does not make equality policy, properly understood, less compelling in the reorganization context.\textsuperscript{268} It means only that there are more variables at work in Chapter 11 than in Chapter 7, and the added complexity affects the role that the preference decision and preference recoveries will play in Chapter 11. That is to say, equality policy must be balanced and implemented vis-à-vis other considerations implicated in reorganization that simply do not exist in liquidation, but to conclude from this that the preference law is "both unnecessary and unwelcome in the reorganization context"\textsuperscript{269} strikes me as a gross overstatement.

In a reply to Gotberg's innovative proposal,\textsuperscript{270} Professor Dan Bussell concurs with Gotberg that there is a problem with the preference law, but he disagrees with her both about the source of the problem and the solution—some mighty large "quibbles." In turn, however, his description of the problem is the same shopworn rant about use of the preference law to coerce settlements from innocent creditors, all for the purpose of "enriching estate professionals,"\textsuperscript{272} and his solution is a yet even larger minimum dollar limitation on the trustee's ability to recover prefiling transfers.\textsuperscript{273} While this would address what Bussell apparently considers to be the principal concern

\textsuperscript{267}Gotberg, \textit{supra} note 37 at 88.
\textsuperscript{268}Id. at 89 (admitting that, "[t]his is not to say that there is no value in ensuring parity among similarly situated creditors in a chapter 11 case, or that the creditors themselves might not view this as a priority.").
\textsuperscript{269}Id. at 88.
\textsuperscript{271}Id. at 12. By contrast, I agree with Gotberg about the source of the problem; i.e., the failure to frame preference law solely with reference to the equality objective, at least under the broad formulation of the meaning of equality in bankruptcy as I framed it above (see \textit{supra} note 39).
\textsuperscript{272}Bussell, \textit{supra} note 270, at 12.
\textsuperscript{273}Id. at 13 (suggesting raising the jurisdictional floor on preference recovery from the current level of $6,225 to the astonishing level of $100,000 or even higher).
underlying the current preference rules, it would do so in a wholly arbitrary manner and, in the process, beget lots of unintended casualties. If your goal is to eliminate every person named “Noah,” an approach entailing the execution of everyone whose first name begins with the letter “N” will get the job done, but you are going to have some mighty unhappy “Nathans,” Nelsons,” and “Nevilles” along the way. Plus, are there any “Knowahs” out there?

The one thing Bussel and I do agree on is that “the defenses to preference law are designed largely to protect innocent receipt of preferences; they do not apply to parties that can be shown to have deliberately subverted ratable distribution on the eve of bankruptcy.”\textsuperscript{274} However, Bussel thinks this is a good thing and I do not. Implicit in his statement is the assumption that preferences are in fact about sanctioning creditors that deliberately engaged in opt-out behavior\textsuperscript{275} (or debtors that facilitate that result), and sending a warning message to other creditors that might be considering doing likewise. Concomitantly, his belief that creditors that had no wicked motivations in securing or receiving a preferential transfer should be protected from preference liability flies in the face of the legislative history explaining the recasting of preference law under the 1978 Act.\textsuperscript{276} It is also unlikely, for reasons already discussed, that these immunity-providing defenses will effectively accomplish their desiderata in any given case let alone on a system-wide basis.\textsuperscript{277} Yet, in the futile effort to do so, their existence and proliferation tacitly perpetuates the historical commercial psychosis that has precluded the development of a consistent, well-grounded preference policy going back to the early days of the Republic.

A second, at least partial, proposal for reform comes from the Chapter 11 Commission Report.\textsuperscript{278} I use the phrase “partial proposal” because, of course, the focus of the Commission Report was solely on Chapter 11. Yet, there is no indication that the Commissioners considered their discussion of, and recommendations regarding, preference issues to be somehow specific to reorganization. Moreover, the Commission Report’s Recommended Principles in relation to preferences seem largely a response to strident testimony received concerning the widespread use of the preference power for improper or ulterior motives;\textsuperscript{279} grievances relating to preference law that in the past have

\textsuperscript{274}Id. at 15. Oddly, however, Bussel is prepared, by means of a significant increase in the dollar threshold in § 547(c)(9), to give a pass to any number of creditors who may quite intentionally subvert the policy of ratable distribution. \textit{See supra} text accompanying notes 216-217.
\textsuperscript{275}See \textit{supra} note 51 and accompanying text.
\textsuperscript{276}See \textit{supra} text accompanying notes 41-42.
\textsuperscript{277}See \textit{supra} text accompanying notes 65-66.
\textsuperscript{278}See \textit{supra} note 182.
\textsuperscript{279}See Chapter 11 Commission Report, \textit{supra} note 182, at 150, noting that witnesses expressed strong frustration with the preference law and a belief that some trustees pursued preference actions indiscriminately and without regard to the merits of the claims. It appears, however, that this testimony
been leveled without regard to its application under any particular chapter of the Code. The fact that the Commission Report's consideration of the issues bearing on the scope of preference liability and recovery was so limited should not be understood as advocating that its recommendations should be dismissed or regarded as extraneous. To the contrary, perhaps because some of the Commissioners appeared to have taken this testimony with a grain of salt, I believe the Commission Report's approach for dealing with the perception of rampant misuse of the preference power offers a more reasoned response to these putative problems than many of the solutions of the past. However, in their totality, these recommendations do have to be viewed and understood as having been spawned to at least some degree by the discontent expressed during testimony by parties with a dog in the hunt. Furthermore, it is unfortunate that the Commission's work proved not to be the occasion for a broader reconsideration of the positive purposes to be served through use of the trustee's preference authority in bankruptcy.

In any case, the Commission Report's Recommended Principles concerning preference litigation are: (1) bar the trustee from issuing a demand letter, or instituting suit, for the return of an alleged preference unless, based on reasonable due diligence, the trustee has developed a good faith belief that a colorable claim for recovery exists; (2) require the trustee to plead the allegations constituting the claim for preference recovery with particularity; (3) increase the minimum dollar amount defense of § 547(c)(9) to $25,000, thereafter to continue to be indexed under § 104(a); and (4) amend the venue provision in 28 U.S.C. § 1409(b) to: (a) clarify its application to preference claims, and (b) raise the dollar limit for nonconsumer debts to $50,000 in the aggregate, thereafter also to be adjusted under

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280 Chapter 11 Commission Report, supra note 182, at 148, 151 ("Legal conclusions or speculative allegations should not be sufficient to support a preference claim.").
§ 104(a).285 As discussed below,286 with the exception of the recommendation to raise even further the low-dollar exception of § 547(c)(9), these principles make a great deal of sense, particularly if placed in the context of what I hope would be a larger solution.287

Just as interesting as what the Chapter 11 Commission recommended, are the proposals it elected not to adopt, each of which would have represented a further significant and unhealthy narrowing of the breadth of preference liability in bankruptcy. Among these were proposals to: (1) create a rebuttable presumption under § 547(c)(2) that the transfer was made in the ordinary course of business, thus shifting the burden of proof from the defendant to the trustee; (2) adopt some form of fee shifting or “loser pay” rule in the context of preference litigation; and, most extreme, (3) eliminate preference law entirely. The Commission wisely decided to pass on each of those propositions.288

C. A Few Suggestions for Future Reform

From the beginning, it seems, our approach to preference legislation has been consistently plagued by the lack of a single, unified, and reasonably enduring answer to the question of, “so why a preference law”? The orthodox justification for avoiding preferences in bankruptcy was to prevent prebankruptcy dissipation of the debtor’s assets among a few favored or aggressive creditors.289 And therein lies the rub. Does the preference law police only culpable behavior that has the effect of undermining creditor equality or is it intended to advance the bankruptcy goal of ratable distribution among similarly positioned creditors unrelated to intent? It can surely do both on occasion, but not consistently; thus, the architecture of preference law must proceed from one blueprint or the other.290

The 1978 Act offered a new concept and new definition of a preferential

285See Chapter 11 Commission Report, supra note 182, at 148 & 151. Proportionately, this might make sense insofar as the venue floors for consumer and nonconsumer cases are concerned. See supra note 222. However, I might caution proceeding more incrementally insofar as raising the venue floors before the trustee enjoys home court advantage is concerned in light of the original justification for 28 U.S.C. § 1409(a). See supra note 220.

286See infra text accompanying notes 311-314.

287See infra notes 294-302 and accompanying text.

288The loser pays rule is intriguing, but ultimately it places the burden award of attorneys’ fees and costs on the distributees of the estate who are not in a position and have no ability to control the risk that they bear. The Commissioners also indicated a reluctance based on the nature of preference litigation, “which often is uncertain and involves trustees initially working with limited information.” Chapter 11 Commission Report, supra note 182 at 151. Moreover, the bankruptcy courts already have discretion under Fed. R. Bankr. P. 7054 to allow costs to a prevailing party. See, e.g., Northwestern Corp. v. Magten Asset Mgmt. Corp. (In re Northwestern Corp.), 326 B.R. 519, 529 (Bankr. D. Del. 2005).

289See Eisenberg, supra note 109, at 963.

290See supra notes 172 & 265.
transfer based solely on its effect, finally shedding the law's historical entanglement with the exasperating requirement of proving a creditor's (or anyone else's) state of mind. But the effort was a hesitant one in the sense that the 1978 Act also sent a signal that the law was not intended to disturb routine, so-called normal financial transactions; that its purpose was also about deterring the state law "race of diligence," and rewarding creditors that continued to do business with a financially distressed debtor. This left open a crack in the door through which some of the gains that had been achieved by the 1978 Act in removing the historical impediments to preference recovery would be lost in the ensuing years. Because it is impossible to deter someone that does not possess (or cannot be proved to possess) the proscribed intent, the mental leap of faith was quickly made that all innocent transferees ought to be protected. This outlook formed the basis, in whole or in part, for many of the exceptions in § 547(c), and produced the mounting and largely self-interested pressure to backtrack from the decision to ignore intent; pressure that finally erupted in BAPCPA and persists even ten years later.

Personally, I would retain the "no fault" definition of a voidable preference in § 547(b) and eliminate those defenses that run counter to that concept and the larger policy it implements of drawing a hard line in the dirt 90-days prior to filing, permitting only those transactions that do not have specific preferential effect to cross. In short, I would not lose a moment's sleep or shed a single tear if the ordinary course of business defense were to be repealed tomorrow, or, if retained, restored to its original formulation in the 1978 Act. In addition to §§ 547(c)(1) and (c)(3), I would retain the

291 Supra note 52. See also the 1973 COMMISSION REPORT, pt. 1, at 203-04 (describing the intent requirement as "the most troublesome feature" of then then current preference law).
292 Supra note 54.
293 See supra notes 51-57 and accompanying text.
294 This would include transfers that do not result in a diminution in the value of the estate or which are preferential in a technical sense only. See In re Ogden, 314 F.3d 1190, 1198 (10th Cir. 2002) (identifying as the fundamental issue in a preference claim "is whether the transfer diminished or depleted the debtor's estate."); see also supra notes 58-59 and accompanying text. In addition, I accept the fact that, due to competing policy considerations that are sometimes regarded as paramount, certain kinds of transfers or transferees might warrant protection, but I think it's critical that these circumstances be closely scrutinized, lest they become the mechanism for special pleading, or the sheer number of policy-based exceptions begins to desiccate the structural integrity of the rule. See supra note 63 and accompanying text.
295 In this view I am hardly alone—despite the popularity of the ordinary course of business defense with the credit industry. See, e.g., Countryman, supra note 43, at 776 ("In view of the feeble inspiration for this exception, and because the exception is completely at war with the concept of a preference and has no rational confining limits, the best future for present § 547(c)(2) is repeal."); Tabb, supra note 41, at 987 (same). As enacted in 1978, § 547(c)(2) likely represented a codification of the judicially-created "current expense" rule under the former Act, although the legislative history of the 1978 Act never refers directly to the current expense rule. See Michael Kaye, Preferences Under the New Bankruptcy Code, 54 AM. BANKR. L.J. 197, 202 (1980) ("The underlying rationale of [§ 547(c)(2) and the current expense rule] is the same: no diminution of the estate, payment not for antecedent debt, and allowing the debtor to stay in business."). While the several rationales for the current expense rule under the 1898 Act were offered,
subsequent new value defense in § 547(c)(4) and the protection in § 547(c)(5) for inventory and receivables lenders, although not because they reward economic activity between the creditor and the debtor during the preference period, though they occasionally do, but, more importantly, because their operation does not result in a diminution of estate assets during the critical preference period.

On the other hand, I would eliminate any look-back period in § 547(e)(2), thus rendering a secured transaction in which there is a gap between attachment and perfection preferential, and leave it to § 547(c)(1) to provide including as an exception to the antecedent debt requirement, the point of importance for these purposes is that it operated to shield only short-term, routine transactions from preference recovery. See Ward & Shulman, supra note 125, at 19-20 (1983) (indicating that wage payments and monthly payments to trade creditors and utility companies are "ordinary and important transactions" that should not be treated as preferences). In the past, I argued in favor of retaining the ordinary course of business exception in the form of a current expense rule. Ponoroff, supra note 43, at 1490-95. I did so with the view that the defense should be limited so as to operate only when serving the most defensible justification for an ordinary course exception; namely, to encourage creditors to continue to do business with a financially beleaguered debtor. See Ponoroff & Ashby, supra note 55, at 62-70. As noted earlier, while I have in later years despaired of the view that creditors can be encouraged to continue dealing with distressed debtors by configuration of the preference rule and its defenses (see supra notes 72 & 94), I might still accept the idea as defensible on other grounds.

Because I consider the primary justification for continuing the exception in § 547(c)(4) to be that the preferential funds have been restored to the estate, such that there is no preferential effect, I would need to add a caveat. It derives from the fact that some cases have interpreted the "remain unpaid" language in § 547(c)(4)(B) to exclude postpetition payments, such as under § 503(b)(9). See, e.g., Commis­sary Operations, Inc. v. Dot Foods, Inc., (In re Commis­sary Operations, Inc.), 421 B.R. 873 (Bankr. M.D. Tenn. 2012) ("[T]he possibility that a debtor may pay a creditor's § 503(b)(9) claim post-petition does not negate the value represented by the claim that the creditor provided to the debtor. The deliveries benefit the estate ... regardless of whether the § 503(b)(9) claimants are paid at a later date for those deliveries."). For a more complete discussion of the distinction, which derives from whether the rationale for the exception is based on replenishing the estate or rewarding a creditor that continued doing business with a troubled debtor, is discussed at considerable length in Friedman's Liquidating Trust v. Roth Staffing Companies LP (In re Friedman's Inc.), 738 F.3d 547 (3d Cir. 2013). I believe that it should not matter if the new value is repaid before or after the filing of the petition, and would, thus, support the view taken by Judge Diehl in TI Acquisition, LLC. v. Southern Polymer (In re TI Acquisition, LLC), 429 B.R. 377, 385 (Bankr. N.D. Ga. 2010) ("Allowing BOTH new value credit and payment of [a] § 503(b)(9) claim elevates the claim of that creditor and results in double payment to that creditor."). Finally, I would note that some years ago I also advocated for converting the § 547(c)(4) exception from a subsequent to a net advance rule, on the basis that "while expanding the scope of creditor protection ... [it] would limit the importance of the existing preference exceptions in §§ 547(c)(1), (3), and, most importantly, (2)." See Ponoroff, supra note 43, at 1506. I stand by that view, but could abide the defense in either form.

Of course, the fact they reward this behavior does not mean they are effective in actually encour­aging the behavior. See supra notes 72 & 94.

While not condoning any one in particular, I also accept that some estate diminishing transfers will be preserved in the interests of advancing what are perceived as more weighty policy considerations, such as, for example, protecting the public commodities and securities markets. See supra notes 175-179, & 293 and accompanying text. This is neither good nor bad from my perspective, so long as the policy-based exceptions are grounded in legitimate public policy decisions and do not proliferate to an unhealthy extent. See supra notes 63 & 188 and accompanying text.

See Morris, supra note 36. Cf. George Dawson, An Uneasy Relationship Between the Bankruptcy
relief to creditors in situations entailing exchanges that are nearly contemporaneous and intended to be such. I would also restore the look-back period in § 547(c)(3) to twenty days, thereby conforming it with the uniform version of Article 9, or, perhaps even better, simply define the grace period by reference to applicable state law.\textsuperscript{300} Perhaps it almost goes without saying that I would applaud heartily abolition altogether of the low-dollar safe harbors in §§ 547(c)(8) and (9), since I believe there are better means to regulate abusive use of the preference power,\textsuperscript{301} as well as the defense in § 547(h) for creditors receiving payment under an alternative repayment plan.

But the larger decision that still needs to be made once and for all, now that BAPCPA has shoved preference rules back down the rabbit hole, is what do we want the preference law to accomplish? In turn, that means deciding more broadly what model we want our bankruptcy law to adhere to: one that exists solely to maximize outcomes for the holders of cognizable legal rights, or one that considers as well the interests of other stakeholders and possesses its own distributive norms, separate and apart from state law and underlying state law bargains, in pursuit of goals unique to a federal bankruptcy regime, such as fresh start, equality, and debtor rehabilitation.\textsuperscript{302}

There is a sharp divergence of opinion on this pivotal question, as the events leading up to enactment of BAPCPA clearly demonstrated.\textsuperscript{303} However, the one thing that seems clear is that the histrionics that have dominated the discussion of preference policy and reform for the past twenty years or more about spurious preference suits designed to coerce settlements and that produce no additional value for unsecured creditors\textsuperscript{304} are simply noise that deflect attention away from the real issue.\textsuperscript{305} That issue parallels

\begin{footnotesize}
\textit{Reform Act and the Uniform Commercial Code: Delayed and Continued Perfection of Security Interests}, 36 U. Fla. L. Rev. 38, 56-64 (1984) (pointing out that the Code authorizes delayed perfection in cases where Article 9 does not, and suggesting its elimination where perfection occurs after the commencement of the case).

\textsuperscript{300}See Tabb, supra note 10, at 535-37 (suggesting this approach).

\textsuperscript{301}See infra text accompanying notes 311-314

\textsuperscript{302}While an entirely different subject, the trend in recent years is for many Chapter 11s to consist of little more than a quick § 363 sale or sales followed by liquidation. See generally Chapter 11 at the Crossroads: Does Reorganization Need Reform?—A Symposium on the Past, Present and Future of U.S. Corporate Restructuring, 18 Am. Bankr. Inst. L. Rev. 365, 397-00 (2010). This does not, however, negate the importance of equality policy in Chapter 11, although it does suggest that ways to make Chapter 11 more effective is an important priority, as the profession has recently come to see. See Chapter 11 Commission Report, supra note 182, at 12-13. See also supra note 255.

\textsuperscript{303}See supra text accompanying notes 11-15.

\textsuperscript{304}See supra notes 92 & 279 and accompanying text. See also Goldberg, supra note 37 (espousing the same concerns).

\textsuperscript{305}As noted earlier, some of the members of the Commission issuing the Chapter 11 Commission Report believed that these situations might represent more the exception rather than the rule. See supra note 280. Also, even to the extent the problem exists, which I am willing concede to at least some degree, there are better ways to deal with it. See infra notes 311-314 and accompanying text.
\end{footnotesize}
the question of what model we want our bankruptcy law to conform to generally.\textsuperscript{306} In the narrow context of the preference law, the question is whether the goal should be 1) to promote the distributional framework established by the Bankruptcy Code (including but not limited to ratable distribution among general creditors), which commands a model of creditor cooperation achieved through mandatory recovery of transfers that diminish the estate, or 2) simply to police the most egregious sorts of opt-out behavior, which then calls for the creditor competition model that infringes to the least extent possible on state collection remedy norms.

If the latter, the answer is not continuing to raise the jurisdictional threshold for bringing preference actions, or even further tinkering necessarily with the venue rules. Likewise, the solution is not continuing to riddle the rule on preferential transfers with even more litigation-producing exceptions, and ever more expansive interpretations of existing exceptions, with the aim of shielding transfers supposedly devoid of preferential intent and, conversely, that are supposed to encourage creditors to do business with a beleaguered debtor. If preference law is deemed to be about culpable behavior, the right answer is the direct reintroduction of a state of mind requirement into the elements of a preferential transfer\textsuperscript{307} and extending presumptive validity to all transfers occurring within at least the ninety-day, and perhaps also the extended insider, preference periods.\textsuperscript{308} That approach, though roundly rejected in the 1978 Act due to its cumbersome application and inconsistency with the distributional policies undergirding contemporary bankruptcy law,\textsuperscript{309} would preserve private state law results to the fullest degree practicable, while still maintaining at least some semblance of a bankruptcy system.

If, however, the creditor cooperation model is the preferred solution in bankruptcy, as I believe it to be, then we need to accept preference law as a rule of strict liability, and understand that it will apply equally to transactions wholly devoid of improper motivation as well as to transfers precipitated by deliberate effort to circumvent the distribution rules in bankruptcy. I would also submit that a decision to embrace this model does not need to be temporized by concerns over the putative susceptibility of preference law to being exploited for improper purposes by greedy and unscrupulous trustees and their counsel.\textsuperscript{310} At this juncture, those concerns are a distraction and, in

\textsuperscript{306}See supra text accompanying note 302.
\textsuperscript{307}See supra notes 43-48 & 98.
\textsuperscript{308}Proposals for shortening the preference period might also be considered on the basis that the closer in time the transfer to the bankruptcy filing, the greater the likelihood of intent to gain an advantage, and vice versa. See ABI Study, supra note 82 at 4 (indicating that the credit provider group favored a proposal to reduce the preference period for noninsiders from ninety to sixty, or even thirty, days. The bankruptcy professional group, however, favored retaining the status quo).
\textsuperscript{309}Supra notes 42 & 52.
\textsuperscript{310}This is neither to discount nor exaggerate such concerns (though I suspect the complaints indicate
any event, devitalizing the scope of preference recoveries as a means to assure the power is not misused is much like watering down a critical vaccine to the point of ineffectiveness because of its potential to actually produce the disease its intended to inhibit in some very small number of cases.

The truly abusive use of the preference power, to whatever extent it does actually occur, can also be dealt with by a combination of existing controls over groundless and vexatious litigation,\(^{311}\) coupled with sensible proposals to expand those controls, such as those proposed in the Chapter 11 Commission Report of requiring exercise of due diligence by the trustee before asserting a demand or formal claim for preference recovery and insisting that preference claims be pled with particularity.\(^{312}\) Moreover, such reforms do not necessarily have to await further congressional action. Many of these measures are already available to the court as a matter of general case administration authority.\(^{313}\) In turn, additional procedural controls along these pro-

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\(^{311}\) There is general agreement that the bankruptcy court has authority to issue sanctions against both a litigant and counsel for proceeding unreasonably or vexatiously under FED. R. BANKR. P. 9011(c), 28 U.S.C. § 1927, as well as pursuant to the court inherent authority to supervise the proceedings that take place before it. See, e.g., In re Green, 422 B.R. 469, 473-74 (S.D.N.Y. 2009) (bankruptcy courts have the same inherent authority as district courts as well as under 28 U.S.C. § 1927); Kahn v. Mahia (In re Kahn), 488 B.R. 513 (Bankr. E.D.N.Y. 2013); NEGT Energy Trading Holdings Corp. v. Orrick, Herrington & Sutcliffe L.L.P. (In re Nat'l Energy & Gas Transmission, Inc.), Adv. No. 05-09048PM, 2009 WL 902058 (Bankr. D. Md. Mar. 27, 2009). See also Hermosilla v. Hermosilla (In re Hermosilla), 450 B.R. 276, 290-91 (Bankr. D. Mass. 2011) (stating that Rule 9011 embodies the policy of promoting "responsible behavior on the part of [attorneys]" and requires them "to conduct [themselves] in a manner bespeaking reasonable professionalism and consistent with the orderly functioning of the judicial system," citing Featherston v. Goldman (In re D.C. Sullivan Co., Inc.), 843 F.2d 596, 598 (1st Cir.1988), aff'd in part on rehearing en banc, 878 F.2d 1478 (1989)). In most situations, however, the failure to investigate the availability of defenses to preference liability will not alone justify an imposition of sanctions under Rule 9011. See infra note 314. Cf. In re Excello Press, Inc., 967 F.2d 1109, 1111-1112 (7th Cir.1992) (holding that, while, ordinarily, it will be not be unreasonable for a plaintiff's counsel to fail to conduct a prefiling investigation regarding affirmative defenses, at times an attorney may have a responsibility to examine "whether any obvious affirmative defenses bar the case.").

\(^{312}\) See supra notes 281-282 and accompanying text. I would also not object to increasing modestly the dollar limits in 28 U.S.C. § 1409(b) that must be exceeded before venue is proper in the district where the case is pending rather than where the defendant resides, although for reasons discussed earlier it is not clear that this would make nearly as big a difference as the other proposed reforms. See supra Part VI.F. But see supra note 220. See also Daniel J. Bussel, A Third Way, Examiner as Inquisitor, 91 AM. BANKR. L.J. 59 (2016) (suggesting that examiners could be profitably used as an alternative to the "litigate or sell" model not only to assess the bare legal sufficiency of avoidance claims, but also to investigate actively the facts and apply the law in making a determination of the legal merits of such claims).

\(^{313}\) In addition, a court concerned about misuses or abuses of the trustee's preference power has other tools at its disposal to assure that does not occur. A textbook example can be found in Judge Jernigan's order regarding pursuit of preference actions in In re Brook Mays Music Co., No. 06-32816-SGJ, 2007 WL 4060375 (Bankr. N.D. Tex. Aug. 1, 2007), involving an increasingly common scenario of a piecemeal liquidation through § 363 sales in a Chapter 11 case, followed by conversion to Chapter 7. In her conversion order, Judge Jernigan directed the trustee to prepare a report detailing potential preference claims, including those recipients who possess § 503(b)(9) claims and other information bearing on the utility of
posed lines will put more bite into the tools currently available to the bankruptcy court to police the filing of preference actions undertaken for an improper purpose by making the sanctionable behavior more conspicuous.\footnote{Currently, the failure of the trustee to conduct a prefiling investigation to ferret out the existence of affirmative defenses will not alone give rise to sanctions under \textit{Fed. R. Bankr. P.} 9011. See \textit{Moore v. Lief, Cabraser \\& Heiman (In Re Keegan Mgmt. Co.)}, 78 F.3d 431 (4th Cir. 2000); \textit{Berger Indus., Inc. v. Artmark Prods. Corp. (In Re Berger Indus., Inc.)}, 298 B.R. 37 (Bankr. E.D.N.Y. 2003). See also \textit{supra} notes 39, 217, \\& 261 discussing the value of pursuit of preference claims, and their serving of the equality objective of the law, even when the proceeds from recovery do not inure to the benefit of general creditors.}

Once these concerns are laid to rest, the determination of whether distributive fairness and economic welfare are best served by the model of creditor cooperation or creditor competition can be made without the complicating considerations that, to date, have blurred our judgment about the future direction of preference law. Quite obviously, I believe the former is superior to the latter in an insolvency or reorganization setting and should thus guide the crafting of preference law doctrine in the future. The larger point, however, is that the train can go east or it can go west, but it cannot go in both directions at the same time.\footnote{Though application of an equality-based rule may sometimes have a deterrent effect, and vice versa, one objective must be the dominant one in the crafting of the rule. See \textit{supra} note 172.} And, when it tries to do so, it goes nowhere. In turn, the direction chosen in relation to preferences will be part of the answer to the larger question of the purposes and policy of our bankruptcy law—whether it is to be little more than a federal assignment for the benefit of creditors (with the added tweaks of the availability of the automatic stay and the power to discharge debts) or whether the structure and such claims, such as likely defenses. Specifically, the court indicated its concern over the trend in large bankruptcy cases for the trustee to simply sue all transferees with "reckless abandon" and no consideration of whether individual claims make economic sense. Referring to the phenomenon as "preference run amok," Judge Jernigan indicated that she wished to set some ground rules prior to appointment of the trustee. In response to the trustee's Preliminary Report, which the court described as thoughtful and helpful (id. at *2), the court was able to eliminate certain sorts of transfers (e.g., to priority claimants, parties to executory contract that were ultimately assumed, etc.) and, in the process, reduced the number of defendant-entities receiving transfers during the ninety-day preference period from over 1,400 to 189. The court also directed that the trustee must, at least forty-five days prior to initiating any preference action, make demand on the party that would be the subject of the action and allow such party twenty days to respond with information that could be relevant to the existence of a good defense. Id. Finally, the court indicated its "consternation" over preference litigation being waged where "there is little chance that unsecured creditors are going to realize any benefit" given the size of superpriority administrative expense priorities that was given to secured lenders in connection with postpetition financing. \textit{Id.} at 3. The court, acknowledged, however, that the standard is "for the benefit of the estate" and not the unsecured creditor pool, and, thus, was not prepared to order a "blanket ruling" barring preference litigation if the only parties likely to benefit would be professionals and secured or undersecured lenders. \textit{Id.} See also \textit{supra} notes 39, 217, \\& 261 discussing the value of pursuit of preference claims, and their serving of the equality objective of the law, even when the proceeds from recovery do not inure to the benefit of general creditors.
composition of the bankruptcy law extends beyond a surface-level façade to include a substantive role in dealing with the complicated circumstances of, and competing interests implicated by, financial distress and other business-related problems that find no satisfactory solution under state or other nonbankruptcy law.\footnote{Since early on after enactment of the 1978 Act, it has been clear, particularly in the case of reorganization, that bankruptcy serves a broader set of purposes than simply responding to financial distress in a more efficient manner than state law. See Lawrence Ponoroff & F. Stephen Knippenberg, The Implied Good Faith Filing Requirement: Sentinel of an Evolving Bankruptcy Policy, 85 Nw. U. L. Rev. 919, 966-67 (1991).}

VIII. CONCLUSION

Eliminating preference recovery in Chapter 11 on the grounds that the equality objective is less pressing in reorganizations than in liquidation is unwise as well as unworkable.\footnote{See supra text accompanying notes 258-259} An insistence upon a showing of a direct connection between preference recovery and distributions to general creditors, is equally impractical. What matters, ultimately, is benefit to the estate,\footnote{See supra notes 39, 217, & 261. See also Stalnaker v. DLC, Ltd. (In re DLC, Ltd), 295 B.R. 593, 607-08 (B.A.P. 8th Cir. 2003) (holding that an estate may be benefitted by exercise of a trustee avoiding power even when there are no unsecured creditors, and distinguishing Harstad v. First Am. Bank (In re Harstad), 39 F.3d 898 (8th Cir. 1994), where the estate had terminated prior to commencement of the action).} whether manifest in greater distributions to general unsecured creditors or providing the cash critical to cover the expenses necessary to administration of the estate or assuring confirmation of a plan of reorganization. Insistence upon an inexorable casual chain running from the avoided transfer to specific dollars in the hands of general creditors is an exercise in missing the point, as is the largely self-serving grumbling about reckless deployment of the preference law. These concerns are paltry in the grand scheme of things and relate only in the most attenuated sense to the fundamental question of what kind of bankruptcy system we want in the future.

If we have anything at all to be thankful to BAPCPA about ten years later, it is that the law placed into sharp focus, perhaps more so than ever before, the problem that has afflicted preference recovery since the Constitutional Convention decided that bankruptcy law would be federal law.\footnote{See Weisberg, supra note 34, at 3 ("American bankruptcy law has never decided what to do about the crucial but elusive concept of the voidable preference.").} We came tantalizingly close to resolving the problem with the 1978 Act. So close, in fact, that over the next nearly 30 years we were able to delude ourselves into believing that the train actually could go east and west simultaneously. It is clear now, as we look at the fractured state of the preference law, itself merely a microcosm for the fractured state of our outlook on bank-
ruptcy in society at large, that the only principled way to proceed is to choose a direction for the future and follow it, realizing that the course will never be a perfectly straight or orderly one.

I recognize the argument that BAPCPA may in fact have represented not just the latest reflexive reaction to the 1978 Act, as I perceive it to be, but rather that epiphanic decision about direction. Were that the case, I would personally be sorry to see this erosion in our commitment to the cooperative goals of the bankruptcy system in favor of a decision to embrace the wasteful competition associated state law remedies. But if it is not the case, then we face a watershed moment about the political economy, and an urgent need to act. Decisions necessarily involve taking risk; it is easy to procrastinate and, in a political environment, easy to obfuscate the fact that one even faces a decision point. Deciding, however, to avoid making a choice is itself a decision, and more often than not a decision that partakes of the worst features of all the available choices. I fear that we have lived with that kind of gloomy compromise long enough.

Although, as my late colleague, Jean Braucher, summed it up, "[t]he problems with the 2005 Act are breathtaking." Braucher, supra note 18, at 97 ("... it is important not to lose sight of the fact that "most of the provisions of the 1978 Act are still in place."); Acceptance Remarks of the Honorable W. Homer Drake, Jr., 24 EMORY BANKR. DEV. J. 9, 11 (2008). Thus, I do not regard BAPCPA as unalterably foretelling the future direction of bankruptcy law, as much as I see it as an aberrational example of everything that is wrong about interest group capture over a major piece of legislation.