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*501 IT'S TIME TO RETURN TO OUR ROOTS: THE BANKRUPTCY COMMON LAW THAT GOVERNS INSOLVENT ESTATES

Most of us probably remember that the first task in answering a bar exam question is to identify the body of law that provides the relevant analysis. And even most non-bankruptcy lawyers would probably identify insolvency law, more commonly known as bankruptcy law, as the relevant body of law to determine what comprises an insolvent estate or how it should be distributed. Yet in the past three decades, the United States Supreme Court (the "Supreme Court") and many circuit courts have fumbled or failed to follow this simple rule of legal analysis. And this failure to begin by identifying the appropriate body of law has been exacerbated by another first year law school mistake - reliance on headnotes or isolated quotes without first understanding the facts and context of an apparent precedential opinion. Most recently, the Supreme Court held that the fact that a question of corporate property rights happens to arise "in the context of a federal bankruptcy" "doesn't change much,"[1] without first identifying the appropriate body of law and without considering the factual contexts of its cited authorities. These failures not only resulted in an irrelevant opinion but also drove the Supreme Court to the type of constitutional analysis[2] that it ordinarily seeks to avoid when the case can be resolved on non-constitutional grounds.

Such analytical failures are of purely modern origin. Since at least 1571 insolvency law has been recognized as the unique analytical framework for the ultimate determination of the asset side of an insolvent estate. This was made most evident in 1601 when Lord Coke held that the Statute of 13 Elizabeth c. 5 (1571) trumped two-party contract rights and property rights.[3] ***502** On the liability side the overriding relevance of insolvency law was recognized as early as 1584 when the concept of avoidable preferences became part of the common law of insolvency.[4] As recently as 1970 the Supreme Court unequivocally stated that the common law of bankruptcy and the "basic purpose of the Bankruptcy Act" superseded any other body of law that might otherwise identify what must be included in an insolvent estate.[5]

Yet even before the Supreme Court's recent pronouncement that "the context of a federal bankruptcy" "doesn't change much" the Ninth Circuit had held that characterization of claims and interests in a bankruptcy estate should be determined by "reference to state law" rather than by the federal common law governing insolvent estates.[6] And the Fifth Circuit had held that determination of property of estate hinges on the existence of a "prepetition legal interest" such as a property right or cause of action defined by non-bankruptcy law,[7] purportedly distinguishing the Supreme Court precedent holding that the "purposes" of the bankruptcy law "must ultimately govern."[8]

How in the relatively short time of three decades could four centuries of insolvency common law be supplanted? And how could this change in focus become so complete that insolvency law is no longer recognized as being the appropriate body of law to begin the analysis? The goals of this Article are to explore (1) why the body of insolvency law must ultimately govern both the assets and the priority of liabilities of an insolvent estate, (2) how this principle was understood and applied for most of the previous four centuries, and (3) what has led many courts astray over the past 30 years, including recently the Supreme Court.

I. PROPERTY OF THE ESTATE IS DEFINED BY BANKRUPTCY LAW, NOT "PROPERTY" LAW

A. PROPERTY OF THE ESTATE IS NOT LIMITED BY OTHER LAW

The first English bankruptcy law was the act of 34 Hen. VIII c. 4, adopted in 1542 and entitled "an act against such persons as do make bankrupts." ***503** [9] It was extensively amended by the Statute of 13 Eliz. c.7 in 1571. Together they established basic English bankruptcy law for more than one hundred fifty years until the adoption of the discharge in the Statute of Anne in 1705.[10]

Because there was no discharge, the sole purpose of the first English bankruptcy law was to collect all of the debtor's assets and distribute their proceeds to the creditors. One might ask why the central government felt it necessary to create this novel collective remedy rather than simply allowing the creditors to exercise their own legal remedies. Perhaps one reason is that creditors' remedies were otherwise incapable of seizing many if not most of an insolvent entrepreneur's[11] most valuable assets, particularly those that were created by the recent expansion of commerce and business.[12]

Then, as now, the principal remedy for individual creditors was execution of judgment by the writ of *fieri facias,* more commonly known today as a writ of execution.[13] But that writ was effective only to "seize the defendant's chattels."[14] It did not extend to land, which could only be executed on after 1285 by an alternative procedure called *elegit,* which did not transfer ownership of the land but only the rents it generated until the debt was paid.[15] "The writ of execution could not touch anything but that which the common law court could recognize as property."[16] So although the writ of *fi. fa.* could reach a trader's inventory it could not reach what might constitute most of the trader's wealth that might be tied up in contracts, receivables and other collection rights, other kinds of *choses* in action, or investments in partnerships or joint ventures, or trust estates. Such assets could not be reached by any legal process because they were not recognized by "law," as distinct from equity, as being any kind of "property."[17] "At common law judgments could ***504** not be levied upon estates merely equitable, because courts of law did not recognize any such titles and could not deal with them."[18]

All of those non-legal equitable assets could only be reached by a creditor's bill. After the creditor had obtained a judgment and had "failed to obtain seizure of his debtor's property under execution" the creditor could file a bill requesting the Court of Chancery to order the judgment debtor to turn over to the receiver any interest in any "equitable asset." But this process was cumbersome in requiring an action at law, a judgment, a writ of execution and finally a bill in equity. And it benefited only those judgment creditors who were made party to the bill in equity, and even as to them a creditor's bill gave full priority to the creditor who first filed the bill rather than sharing them equally or equitably among all creditors.[19]

So the solution was the bankruptcy act of 1542[20] as amended in 1571.[21] It dispensed entirely with the necessity of judgments and writs and the narrow legal definition of leviable "property." Instead, upon proof that the debtor was a trader who had committed an act of bankruptcy, the debtor was required to "make a full discovery of all his estate and effects, as well in expectancy as possession."[22] Then by operation of law "all the personal estate and effects of the bankrupt are considered vested, by the act of bankruptcy, in the future assignees of the commissioners, whether they be goods in actual possession, or debts, contracts, and other choses in action ...."[23] "The property vested in the assignees is the whole that the bankruptcy had in himself at the time he committed the first act of bankruptcy, or that has been vested in him since, before his debts are satisfied or agreed to."[24]

Therefore since the origin of bankruptcy law the property of the estate ***505** has never been limited to "property," or even to any rights that were recognized by the law. No legal requirement or technicality could limit the estate, which even included expectancies in existence at the time of the first act of bankruptcy and anything else that might be of benefit to the debtor at any time thereafter until all the debts were satisfied, even if not an expectancy at the time of bankruptcy.

This history, which has been incorporated into America's common law and was understood by the Framers when they adopted the Bankruptcy Clause, is one unequivocal reason why insolvency common law[25] must supersede all other law in the analysis of either the assets or the priority of liabilities of an insolvent estate. That has been the primary intent of this body of Anglo-American common law since before 1542.

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And if that primacy of insolvency common law were not clear enough from the historical evolution and the manifest statutory intent of the acts of 1542 and 1571, it also became part of the common law just a very few years later, in *Twyne's Case.*[26] Twyne's Case is usually analyzed for the purpose of understanding one relatively narrow branch of insolvency law, actual fraudulent transfer law and the "badges of fraud." But for present purposes its more significant function is to establish that on appropriate facts insolvency common law is the governing body of law despite a party's otherwise compelling argument that contract rights or property rights should prevail.

The actual facts are critical to an appreciation of the broader significance of *Twyne's Case.* Pierce was the debtor, who owed at least two creditors, £400 to Twyne and £200 to C. C. obtained judgment and a writ of *fieri facias*. When the Sheriff executed the writ he sought to levy it upon sheep on Pierce's pasture and bearing Pierce's brand.[27] But Twyne had his allies forcibly resist the sheriff's levy.

Twyne was prosecuted in the Star Chamber. His defense was that the sheep were his, not Pierce's, because they had been deeded to him, along with all of Pierce's other goods and chattels that had a value not exceeding £300, which Twyne had accepted in full satisfaction of his £400 debt. He even produced in evidence a written deed, executed by Pierce. Yet Twyne and ***506** Pierce were convicted of "rebellious riot" by the Star Chamber.[28]

For future bar examinees the official Reporter Lord Coke (who also happened to be the Queen's Attorney General and prosecutor of the case) explained why although the deed was for fair consideration and bona fide and undoubtedly binding between Pierce and Twyne, neither property law nor contract law was the appropriate body of law to apply to the facts. Because Pierce was indebted to others besides Twyne and the deed was of all of Pierce's goods and possessions, and yet Twyne allowed Pierce to remain in possession of the sheep and brand them, sheer them and sell them as his own, instead the applicable body of law was the common law underlying[29] the Statute of 13 Eliz. c.5. And where the predicate of that statute is satisfied, i.e., that the transfer was not in good faith, that insolvency law rendered the deed and transfer to Twyne void. On such appropriate facts, that body of insolvency common law[30] trumped otherwise valid contract and property law.

There is another, even simpler reason why insolvency law must be the ultimate governing body of law, instead of either contract or property law, to apply to the facts of *Twyne's Case:* C. was not a party to the contract and deed between Pierce and Twyne, and could have had no knowledge of them, because they were made in secret, and so could not have been deemed bound by them. The body of law that Twyne asserted for his defense simply did not apply to C. or restrict his rights. The validity of Twyne's defense vis a vis the actions of C. and the sheriff must hinge upon a body of law and legal analysis that governs the rights of nonparties to an alleged contract or property right, and on these facts the body of law that addresses such third-party rights is insolvency law.

Lord Coke's explanation not only gave birth to actual fraudulent transfer law but, more broadly and more appropriately for present purposes, established the superseding application of insolvency law over a defense of contract or property rights. And this was not because of the source or authority ***507** of that insolvency law. Nothing in Lord Coke's explanation hinges on the primacy of the particular statute or even of statutes generally as compared to common law. Indeed, to the contrary, it has been conclusively demonstrated both that the fraudulent conveyance statute was not intended to apply to creditors generally but only to raise revenue for the Crown, and that the bankruptcy statute passed just a few days later did not include a provision on fraudulent transfers.[31] Rather, Lord Coke held the insolvency law to govern the analysis because of its relevance to the totality of the facts. At least in a common law system this illustrates how a bar exam should be answered, by first identifying the appropriate body of law based on the relevant facts, rather than by reference to the superiority of the sovereign or the structural priorities of the possibly applicable statutes.

The first consequence of Lord Coke's analysis of *Twyne's Case* is that because of the applicability of the Statute of Eliz., the transfer of ownership of the sheep was void. This meant that they remained the property of Pierce, and of Pierce's insolvent estate, and therefore legally subject to the writ levied by the sheriff in execution of C.'s judgment. Twyne therefore had no legal right to resist the sheriff's levy, so his forceful resistance subjected him to conviction for riot.[32]

The broader significance, however, is that the property of Pierce's bankruptcy estate, had there been a bankruptcy action commenced under the bankruptcy statute[33] adopted just a few days after the fraudulent transfer statute, the property of that estate would not have been limited to *any* legal meaning of property as recognized by any other body of law. Rather, by virtue of the common law recognized in *Twyne's Case,* after 1601 property of a bankruptcy estate would include anything on which

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the debtor's creditors could realize, even if legal ownership was not vested in the debtor as of the act of bankruptcy. Creditors' equitable rights and powers would expand the estate far beyond the debtor's legal ownership and rights.

B. SUPREME COURT RECOGNITION OF BANKRUPTCY COMMON LAW

From the origins of English bankruptcy, the property vested in the bankruptcy estate was always far broader and far more indeterminate than "property" as defined by any other law. Such property of the estate was always defined solely by the purposes of insolvency law, and solely by the common law, not by statute.

This indeterminate concept of property of the estate, not limited by any other law, was a central feature of all of America's bankruptcy laws. "The ***508** Supreme Court first considered the matter under the Bankruptcy Act of 1800, which gave the bankruptcy assignee all of the bankrupt's nonexempt estate and effects - without express limitation to that which he could transfer or upon which his creditors could levy - not only as of the time of bankruptcy but also any that 'vested' in him before he received his discharge."[34] Note the use of the extremely general, non-legal and nontechnical term "effects," which echoes Blackstone's summary of the English bankruptcy acts of 1542 and 1571.[35] Similarly the Bankruptcy Act of 1867 "gave the bankruptcy assignee title to all of the bankrupt's nonexempt 'property and estate' ...."[36] The Bankruptcy Act of 1898 defined the estate to include eight broad paragraphs of interests but most broadly all "property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded or sequestered."[37]

Under the Bankruptcy Act of 1898 the Supreme Court held in *Segal v. Rochelle*[38] that in defining property of the estate, "[t]he main thrust of § 70a(5) is to secure for creditors everything of value the bankruptcy may possess in alienable or leviable form when he files his petition. To this end the term 'property' has been construed most generously and an interest is not outside its reach because it is novel or contingent or because enjoyment must be postponed."[39] And the opinion was explicit that determinations of property of the estate must be governed by bankruptcy law and its purposes, not by any other body of law including the Constitution or state law:

> Admittedly, in interpreting this section '[i]t is impossible to give any categorical definition to the word 'property,' nor can we attach to it in certain relations the limitations which would be attached to it in others.' ... Whether an item is classed as 'property' by the Fifth Amendment's Just-Compensation Clause or for purposes of a state taxing statute cannot decide hard cases under the Bankruptcy Act, whose own purposes must ultimately govern."[40] The First Circuit decision quoted by the Supreme Court involved a liquor license that under state law could not be "revoked without compensation [and] represents no vested right, [and therefore] ***509** it is not possible to regard it as property of itself."[41] But because the license "represents invested capital" for which an administrator would have to account after the death of the licensee, it is "property which the bankrupt is bound to assist in realizing for his creditors.[42]

Segal was neither an aberration nor a novelty at the Supreme Court: the Court had held in 1924 that even though the Supreme Court of Illinois had held that even if a stock exchange seat was neither property nor subject to judicial process under state law, whether it was property of the estate was a bankruptcy question not governed by state property law or state judicial process because "when the language of Congress [in Bankruptcy Act § 70a(5)] indicates a policy requiring a broader construction of the statute than the state decisions would give it, federal courts cannot be concluded" by state courts.[43]

Segal and its predecessors held that property of the estate is not limited to "property" as defined by any other law, but rather must be solely governed by the purposes of bankruptcy law. That principle, first recognized in *Twyne's Case* and emphatically restated in *Segal,* has never been questioned or even narrowed since. The language, structure and legislative history of the United States Bankruptcy Code (the "Code") unequivocally indicate that the *Segal* definition was understood to be a minimum definition of property of the estate as defined by Bankruptcy Code § 541,[44] which *broadened* the definition by further eliminating *any* reference to state law, such as the former Act's requirements that such property be transferable or alienable. The language of Bankruptcy Code § 541 was drafted by the first Bankruptcy Commission[45] based on the analysis and recommendations of Professor Vern Countryman to avoid "cluttering up" the definition "with references to nonuniform state law on transferability and the reach of judicial process" while continuing "the sensible notion expressed by the Supreme Court nearly seventy [now 118] years ago that 'a thing having ... vendable value must be regarded as property.'"[46]

Where this broad bankruptcy-specific definition of property of the estate is of most significance is with inchoate assets such as expectancies,[47] debtor's ***510** contingent claims, and potential causes of action. As Blackstone noted,[48] bankruptcy law has always regarded "expectancies" as assets that the bankruptcy court should administer for the benefit of creditors rather than left to the discharged debtor unless they are akin to future earnings from personal services or otherwise necessary for the debtor's "fresh start."

C. RECENT DEVIATIONS

There are therefore at least five compelling reasons why the assets and liabilities of an insolvent estate must be analyzed solely under insolvency law rather than any other contract law, property law or civil procedure. The most fundamental is that insolvency law is the only relevant body of law that addresses the interests of creditors in a transaction to which they are not parties. The other four reasons are history, common law, *Segal v. Rochelle*, and Code language. At least three have been applicable for over 400 years. Yet in just the past 30 years some of these reasons have frequently been forgotten or ignored in favor of some other less relevant analysis or body of law.

A prime example of the failure to consider the most fundamental question - the appropriate body of law to frame the analysis--is the Fifth Circuit's 2006 decision in *Burgess v. Sikes.*[49] The facts are simple. The individual debtor was a farmer who filed Chapter 7 in 2002. The following year Congress enacted the Agricultural Assistance Act of 2003, which provided crop disaster relief payments to qualifying farmers for 2001 or 2002 crop losses.[50] The Chapter 7 trustee received an approximate $25,000 check for the debtor's 2001 crop losses. The individual debtor filed a motion for turnover and the Fifth Circuit ultimately held, *en banc*, that the payment for 2001 crop losses was not property of the estate but instead belonged to the debtor.

The Fifth Circuit's opinion rested primarily on the language of Bankruptcy Code § 541 that defines the estate to be comprised of "[a]ll legal and equitable interests of the debtor in property *as of the commencement of the case."*[51] From this language the Fifth Circuit opinion held that "the question we must decide is temporal: when did Burgess acquire a LEGAL interest in the disaster-relief payment?"[52]

This framing of the "question" was sufficient to drive the answer because it assumed three unspoken premises: that the Bankruptcy Code imposes a temporal limitation that had been rejected by four centuries of insolvency law; that only "legal interests" could be property of the estate and the powers ***511** of equity are disregarded; and that the purposes of insolvency law have no bearing in the analysis. From the history briefly summarized above it should be evident that each of these premises is wrong, or at least subject to debate rather than being adopted by unacknowledged assumption.

The opinion also held that *Segal* was distinguishable because, according to the Fifth Circuit, in that case the debtor actually had a "legal interest" as of the filing date--a "*claim* for a tax refund if certain conditions were met,"[53] even though the tax year was not yet concluded. And it held that *Segal*'s language and mode of analysis, which the opinion truncated to the "sufficiently rooted in the pre-bankruptcy past" concept, had been overruled by the language of Bankruptcy Code § 541 that the Circuit construed as requiring "a pre-petition legal interest nonetheless."[54]

The dissent did a convincing job of explaining that the language and intent of Bankruptcy Code § 541 had been to *broaden* the definition of property of the estate as it had existed under the Act, and that the Supreme Court had expressly so held in *Whiting Pools.*[55] But unfortunately even the otherwise well-reasoned dissent fell into the trap of assuming that § 541 includes only "legally recognizable interests although they may be contingent and not subject to possession until some future time."[56] It even concluded that the broad definition of property of the estate expressed in *Whiting Pools* and *Segal* "yields the conclusions that Burgess's lost crops were 'property,'"[57] adopting an analytical approach that the common law has always rejected.

Although the dissent frequently referred to "the goals of bankruptcy law"[58] it never framed the question whether equity would regard the crop disaster payment as more properly belonging to the discharged debtor or to his creditors. It never considered whether equity would regard the recompense for lost crops as representing "invested capital" even though not a legally cognizable interest under any other law, as the First Circuit had held in the case[59] the Supreme Court relied on in *Segal.*

Essentially the same analytical deficiency infected the Sixth Circuit's recent analysis in *In re Blasingame.*[60] The issue there was whether the debtor's inchoate legal malpractice claim was property of the estate even though the ***512** debtor had suffered no

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damage as of the filing date. The malpractice was the filing attorney's failure to advise the schedules should include $1.2 million in household goods, a $1.7 million life estate, and use of a 2008 Mercedes Benz titled in a sole corporation owned by the debtor. The principal damage flowing from this alleged malpractice was denial of the debtor's discharge.

The Sixth Circuit's opinion questioned whether *Segal*'s "'rooted in the past' concept survived the Bankruptcy Code's enactment."[61] While noting that federal bankruptcy "law determines when a property interest becomes part of the bankruptcy estate," the Circuit ultimately relied on Tennessee tort law on the accrual of a cause of action:

> Thus, while it remains difficult to determine whether, if ever, an unaccrued claim can be 'sufficiently rooted' in a debtor's past, it is clear that at the very least there must be some awareness of the claim in order for it to exist as a legal interest and be properly included in the debtor's bankruptcy petition.[62]

The opinion therefore implicitly held that an asset had to constitute a "legal interest" in order to be property of the estate, and explicitly relied on two-party tort law to define that legal interest.

That analysis fails to apply *Segal*'s holding that only the purposes of insolvency law, and not any other law, should determine property of the estate. It fails to recognize that tort law only addresses the rights between a tort plaintiff and a tort defendant, principally to apply a statute of limitations, and has no relevance to the plaintiff's creditors, most of whom would in most circumstances have no awareness of the existence of the claim even if the plaintiff was aware. While those analytical deficiencies might suggest the opposite result because the claim does seem to be sufficiently "rooted in the debtor's past," the analysis of the purposes of insolvency law might compel the same result the court reached by application of irrelevant tort law. Should equity regard the proceeds of the malpractice claim as the debtor's "invested capital" from which creditors should be repaid, or should equity regard the recompense for the loss of the discharge as an appropriate "limitation" on property of the estate growing out of "other purposes of the Act, one purpose of which is ... to leave the bankrupt free after the date of his petition to accumulate new wealth in the future."[63] Framed in that fashion, it is difficult to view the debtor's loss of a discharge as akin to invested capital, like the crops in *Burgess*, and rather evidently more closely related to the fresh start principle. ***513** Equity might compel the opposite result if the malpractice had resulted in the loss of a realizable asset, such as loss of a lien right due to failure to record or loss of a cause of action due to expiration of a statute of limitations. But the possibility of such different results demonstrates the benefit of framing the question in terms of the equitable purposes of the insolvency law, and as a question of the appropriate body of law, rather than framing it as a question about the accrual of two-party tort causes of action.

II. PRIORITY AMONG CREDITORS

Property of the estate determines the contest between the discharged debtor and the creditors who were not party to the transaction. Insolvency common law is the only relevant law to analyze the asset side of the estate. The liability side of the estate also involves third-party rights. The insolvency rules of distribution should determine any contest between a creditor who had a particular transaction with a debtor and the other creditors who were not a party to it. Again, the fundamental threshold issue should be the appropriate body of law to address priority disputes involving third parties to a debtor-creditor transaction.

A. RECHARACTERIZATION

One principal priority rule is that debt must be repaid in full before any return to equity. This fundamental priority rule is itself mostly insolvency common law[64] because Bankruptcy Code § 726(a)(6), which applies only in Chapter 7 cases, does not even mention "equity" interests and the well-known "absolute priority rule" in reorganizations was based solely on the "fair and equitable" language[65] of the Bankruptcy Act until it was codified in 1978 as Bankruptcy Code § 1129(b)(2)(B). For purposes of this insolvency priority rule, what body of law should distinguish debt from equity?

It would seem that the Supreme Court had conclusively held in *Prudence Realization Corp. v. Geist*[66] that insolvency common law, not any state law, governs such priority issues. The Supreme Court there held that notwithstanding ***514** *Erie R. Co. v. Tompkins*,[67] because the "bankruptcy act prescribes its own criteria for distribution to creditors," "[i]n the interpretation and

application of federal statutes, federal not local law applies."[68] Consequently it applied the "familiar equity rule applied by the federal courts in liquidation proceedings under federal statutes that a solvent guarantor or surety of an insolvent's obligation will not be permitted, either by taking indemnity from his principal or by virtue of his right of subrogation, to compete with other creditors payment of whose claims he has undertaken to assure, until they are paid in full."[69] That can only be interpreted as an unequivocal holding that when the issue is the priority of distribution of an insolvent estate, insolvency common law prevails over any other law that applies only to the contracting parties.[70]

And yet after concluding that the power to allow or disallow claims under Code § 502(b) authorizes a bankruptcy court to "recharacterize" a claimed debt as equity, the Fifth Circuit recently held that state tax law provides the appropriate multi-factor test (imported from federal tax law) to distinguish debt from equity.[71] The opinion did not attempt to explain why the manner in which a government imposes taxes should be the relevant law to ensure that creditors are paid in absolute priority over equity interests. The Ninth Circuit has agreed that recharacterization is permissible based on state law but did not attempt to identify what state law would be appropriate to weigh the equities between creditors and a potential equity holder.[72] Other courts have held that recharacterization, or perhaps more properly "characterization,"[73] is not limited to state law or tax law but is based on the bankruptcy court's "equitable authority to ensure 'that substance will not give way to form, that technical considerations will not prevent substantial justice from being done.'"[74] Yet while applying characterization for these equitable purposes some courts adopted the 11-part test identified in *Roth Steel Tube*,[75] a tax case, or the thirteen-factor tests employed in other tax cases,[76] without attempting to explain how or why the tax considerations would coincide with the equitable concerns of the bankruptcy court.

***515** The Bankruptcy Code does not identify any other source of law to interpret terms such as "debt" and "claim." When such terms are used in the context of prioritization of claims, the Supreme Court has held that the use of identical terms in other bodies of law is not "dispositive" and does not relieve courts from "making a functional examination."[77] A "functional examination" is good description of the process of the common law.

B. WHEN A CLAIM ARISES

Another insolvency priority rule is that all pre-petition claims are treated equally but claims arising postpetition are either costs of administration that must be paid in full before any distribution to pre-petition claims or are not discharged. For this priority rule the competing claims are all substantially similar kinds of debts but of vastly different priority solely due to the date the claim arises. For purposes of treating some similar creditors so much better than others, what body of law should determine when a claim arises, two-party law or insolvency law that considers the interests of non-party creditors?

For over a quarter century the Third Circuit held the appropriate body of law to determine when a claim arises is state law governing when a cause of action accrues,[78] which became known as the "accrual test."[79] For a tort claim such as asbestosis, this would mean the claim does not arise upon exposure to asbestos but only when there is injury. The purpose of such law is primarily to calculate the statute of limitations between the claimant and the defendant, which has no relevance to the equity or priority of treatment among similar creditors.

Most courts,[80] ultimately including the Third Circuit itself,[81] rejected the "accrual" test in favor of the "conduct"[82] or the "conduct plus" or "prepetition relationship" test.[83] In doing so, as well as dealing with "future claims," most courts have relied on the Bankruptcy Code's broad definition of "claim,"[84] which has no counterpart or analogy in state law and which reflects Congress's intent to define "claim" most broadly,[85] as well as an effort to "balance the competing interests of the debtor's fresh start with the creditor's ***516** right to compensation."[86] Such a balancing of interests seems to implicitly, but not explicitly, recognize that the fundamental issue is the choice of the appropriate body of law to govern the priority of liabilities of the estate, an approach that has been ignored in the context of recharacterization.

III. CAUSES OF HISTORICAL MYOPIA/RELIANCE ON IRRELEVANT LAW

What leads courts to fail to identify the relevant body of law and to ignore four centuries of insolvency law when determining the property of an insolvent estate or priority among creditors? Most of the opinions fail to expressly state why they resort to a body of law other than insolvency law, but there are some clues to be found in the opinions.

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A. CODE LANGUAGE

Probably the best reason that could be suggested would be some indication from the language of the Bankruptcy Code. For example, the Bankruptcy Code's extremely broad definition of "claim" is for many courts enough to indicate the congressional intent was not to refer to a state law cause of action. And because there really is no other body of law that incorporates concepts such as a contingent and unmatured unliquidated claim courts have had to create their own framework. When doing so many opinions reference the purposes of the Bankruptcy Code to allow for a fresh start while treating all creditors fairly and equitably.

But Bankruptcy Code language has not been a satisfactory rationale for deferring to state property law when analyzing property of the estate. That language - "all legal and equitable interests of the debtor" - would seem to require an analysis far broader than merely legal interests because it expressly includes "and equitable interests." Yet almost all opinions that defer to state law do so by referencing only legal interests and never even undertake any examination of what might constitute an equitable interest. And such analyses ignore the four centuries of history that has always used the word "property" in this context while simultaneously holding that it is not limited to property rights recognized by law. And there is no language of the Code suggesting how to distinguish debt from equity.

B. BUTNER AND ITS PROGENY

In both the contexts of recharacterization[87] and property of the estate[88] probably the most cited reason to defer to state law is some of the Supreme ***517** Court's language in *Butner v. United States*[89] and to a lesser extent in *Raleigh v. Ill. Dept. of Revenue*[90] and *Travelers Cas. & Sur. Co v. Pac. Gas & Elec. Co.*[91] But none of those cases arose in the context of property of the estate or recharacterization of creditor's claims, nor any other context that requires consideration of the equities of non-party creditors as do the contexts of recharacterization and property of the estate.

None of the modern Supreme Court cases stating that claims are governed by state law has anything to do with property of the estate, i.e., the assets that should be marshaled, liquidated and distributed to creditors. The Supreme Court's broad language in *Butner*, *Raleigh* and *Traveler's* refers *only* to creditors' claims, and not at all to the debtor's assets or "effects," to use Blackstone's term. And as to creditors' claims that broad language arose *only* in the context of the validity of the claim vis a vis the debtor, not in the context of equality or priority vis a vis other creditors.

In *Butner*, for example, the sole question was whether a creditor who had only a bare mortgage also had a claim to collected rents without having taken possession of the property or sought appointment of a receiver to collect or sequester the rents as might be required by the applicable state law. Two Circuits had "adopted a federal rule of equity that affords the mortgagee a secured interest in the rents even if state law would not recognize any such interest until after foreclosure."[92] The Supreme Court rejected that federal rule of equity because aside from invalidating fraudulent transfers and improper preferences over general creditors, "Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law."[93] But the only issue that *Butner* resolved was determination of the validity of the creditor's claim, not its priority vis a vis other creditors, and certainly nothing about the debtor's property, equitable rights, "effects" or property of the estate.

In *Raleigh*, the issue was who had the burden of proof on a tax claim against the estate, the creditor/Department of Revenue or the debtor/taxpayer/trustee. The Supreme Court held that "Creditors' entitlements in bankruptcy arise in the first instance from the underlying substantive law ***518** creating the debtor's obligation, subject to any qualifying or contrary provisions of the Bankruptcy Code,"[94] citing *Butner.* Here the obligation arose from the Illinois tax code that put the burden of proof on the taxpayer and its responsible officer,[95] and nothing in the Bankruptcy Code altered that.

The issue in *Raleigh* dealt with the validity of the claim, not its relative priority or equities vis a vis other creditors. Indeed, most significantly, the Supreme Court carefully distinguished its analysis from those contexts. The trustee argued that *Vanston Bondholders Protective Comm. v. Green*[96] made allowance of claims a "federal matter." The Supreme Court distinguished *Vanston*: "But [in the *Vanston* opinion] 'allowance' referred to the ordering of valid claims when that case was decided [citation omitted], and *Vanston,* in fact, concerned distribution of assets not the validity of claims in the first instance ...."[97] That distinction makes abundantly clear that the rule of *Butner* applies only to the validity of claims "in the first instance," not to the "ordering of valid claims," as does recharacterization. And the distinction implicitly adopts the trustee's argument that the ordering of claims for purposes of distribution *was* an issue for federal bankruptcy law, both under *Vanston* and under the Code.

Raleigh's discussion of *Vanston* as having continued validity but distinguishable because of its context means that the ordering of claims and distribution of assets is *not* governed by state law but rather by equitable considerations. This is emphasized by the circuit court decisions cited by the *Raleigh* opinion for its reading of *Vanston.* The Fifth Circuit opinion the Court cited makes that crystal clear:

> The *Vanston* case seems to us to establish a rule only for the distribution of a bankrupt's assets. It did not hold that such a claim was void, but only that the claimant should not participate in the distribution of assets until all claims superior in conscience and fairness were paid. Certain language in the majority opinion, it is true, seems to imply that such a claim is void; however, that language seems to us an inadvertent confusion of the concepts of allowance of a claim and postponing or subordinating it (i.e., refusing a valid and allowed claim to participate in the distribution, when the assets are insufficient to pay claims justly entitled to priority).
>
> [R]eading the Supreme Court's opinion as a whole, we are ***519** convinced that it thought of allowance of the claim in a very loose sense. For disallowance in the technical sense means that the claim is nonexistent, but we think it is clear from the Supreme Court's opinion that it did not mean that the interest on the bond coupons was void, but simply that it should be subordinated to the claims of general creditors. This is borne out, we think, by the Court's repeated references to 'distribution of assets among the bankrupt's creditors.' 329 U.S. 156, 161, 163, 164, 67 S. Ct. 237, 239. Of course, if a claim is disallowed, the claimant is to that extent held to be no creditor at all, so no question of distribution to him could possibly arise. Any reference to distribution among creditors would be unnecessary and inapposite if the Court really meant to hold the claimants of interest on the coupons had no claim at all for this amount.[98]

The distinction between *Vanston's* equitable principles that govern the distribution of assets and *Butner*'s application of state law to the "original determination" of the existence of a claim was also recognized by the Sixth Circuit in the other case cited in *Raleigh*:

> Further, the Supreme Court later held in *Butner v. United States,* 440 U.S. 48, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979), that even though Congress has the constitutional authority to establish uniform bankruptcy laws, it "has generally left the determination of property rights in the assets of a bankrupt estate to state law." *Id.* at 54, 99 S.Ct. 914. And, we have previously held that equitable principles set forth in *Vanston* "have never been applied ... to oust state law in the original determination of the existence and amount of liability."[99]

Similarly *Traveler's* dealt only with the validity of a contractual claim for attorneys' fees, which the Court held was not disallowed solely because the issue being litigated was peculiar to bankruptcy law.[100] Like *Butner* and *Raleigh, Traveler's* dealt only with the allowance of the claim, not its priority or ordering. And in so holding the Supreme Court again cited *Vanston* as being in "*accord"* with *Butner,*[101] implying the continuing validity of *Vanston'*s distinction of the ordering of claims from *Butner*'s holding on their validity.

***520** The Supreme Court also upheld not only application of the "principles of equitable subordination" to the prioritization of claims for purposes of distribution but also, in reasoned dictum, Congress's intent "to give courts some leeway to develop the doctrine" of equitable subordination.[102] The only limit it imposed was not derived from some other body of law, such as state substantive law, but rather from the nature of equity itself which is limited to "a balancing of the equities in individual cases" and does not extend to "a categorical distinction at a legislative level of generality."[103] "[C]ategorical subordination at the same level of generality assumed by Congress in establishing relative priorities among creditors was tantamount to a legislative act and therefore was outside the scope of any leeway under § 510(c) for judicial development of the equitable subordination doctrine."[104]

Despite the broad language of *Butner* and progeny - "property interests are created and defined by state law," and "unless some federal interest requires a different result there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding"[105]--neither these nor any other Supreme Court decision under the Code provides any reason to require state law to govern either property of the estate or the ordering of creditors' claims. To the

contrary, these cases' reliance on *Vanston* is strong support for the conclusion that property of the estate and the ordering of creditors' claims should be governed by insolvency common law that considers the equities of third-party creditors.

C. FEAR OF EQUITY

Insolvency common law undertakes a very different type of analysis than property, contract or tort law, or civil procedure and statutory analysis. Insolvency common law requires a functional approach and a balancing of equities, as distinguished from what appears to be a simpler process of logical deduction from pre-established legal categories. Justice Douglas explained the relationship between equitable principles and a functional approach:

> [T]this Court has held that for many purposes 'courts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity' .... Among the granted powers are the allowance and disallowance of claims; the collection and distribution of the estates of bankrupts and the determination of controversies in relation thereto; ***521** the rejection in whole or in part 'according to the equities of the case' of claims previously allowed; and the entering of such judgments 'as may be necessary for the enforcement of the provisions' of the act .... [These] equitable powers have been invoked to the end that fraud will not prevail, that substance will not give way to form, that technical considerations will not prevent substantial justice from being done.[106]

By contrast, to many judges the formalistic approach may appear to be more traditional and more secure, whereas an equitable, functional approach may appear to be more difficult, novel and unsettling.[107] This may explain a preference for application of another existing body of law, especially one that can be applied through the logical application of formal legal categories.

IV. *RODRIGUEZ*-AN UNFOUNDED RATIONALE TO IGNORE HISTORY, PURPOSE AND RELEVANCY OF BANKRUPTCY LAW?

When combined with reference to a few words from the Bankruptcy Code the out of context quotations from *Butner* may be a sufficient basis for courts to ignore the history of insolvency law and its more amorphous equitable principles and functional approach. In addition, however, the Supreme Court recently created what may be a novel constitutional basis to favor a two-party state law approach and ignore bankruptcy history, precedent and a functional, equitable analysis. It does require avoiding the threshold question of the identification of the appropriate body of law, and a reliance on headnotes and quotes rather than the factual context of precedents. And it requires a very close reading even to determine its actual holding, much less its intent.

Superficially the opinion in *Rodriguez v. FDIC*[108] states that the substantive issue was "how a consolidated corporate tax refund, once paid to a designated agent, is *distributed* among group members,"[109] and the only holding is that that question must be determined by state law because no uniquely ***522** federal interest had been identified.[110] If that were the only holding and only import of *Rodriguez* then it is neither novel nor even significant for insolvency law. If the only real issue is to whom should the tax refund be distributed, i.e., who among the corporate family has a valid claim to the refund, then the holding either has nothing to do with bankruptcy or, even in the bankruptcy context, is a mere restatement of *Butner* because the validity of claims has always been a matter for state law.

Although nothing in the opinion indicates that it might implicate issues other than the validity and allowance of claims in a bankruptcy case, the opinion also states that the Supreme Court took the case "to decide [the] fate"[111] of what has come to be known as the "*Bob Richards* rule."[112] As superficially explained in the opinion even the Supreme Court's purported rejection of the *Bob Richards* rule has no significance for bankruptcy law beyond perhaps a restatement of the *Butner* principle. But a careful examination of the origins and evolution of the *Bob Richards* rule, coupled with the opinion's offhanded comment that "the context of a federal bankruptcy ... doesn't change much,"[113] reveals how *Rodriguez* could have monumental significance for bankruptcy law.

A. THE HOLDING OF BOB RICHARDS

The *Rodriguez* opinion correctly states that what is "known to those who practice in the area as the *Bob Richards* rule [was] so

named for the Ninth Circuit case from which it grew: *In re Bob Richards Chrysler-Plymouth Corp.,* 473 F.2d 262 (1973)."[114] But that is about all that the Supreme Court got right about the *Bob Richards* rule. Indeed, much like its conclusion, the Supreme Court misstated the important essence of the rule that it took the case to reverse. The Supreme Court stated that "As initially conceived, the *Bob Richards* rule provided that, in the absence of a tax allocation agreement, a [corporate tax] refund belongs to the group member responsible for the losses that led to it."[115] It requires a careful reading of *Bob Richards* itself to understand how incorrect, and how importantly incorrect, is this statement of the case.

Bob Richards Chrysler-Plymouth was in an involuntary bankruptcy when its parent, Western Dealer Management, filed a consolidated federal income tax return.[116] The consolidated tax return entitled the consolidated ***523** group to a $10,063 [?] refund due to net operating losses that could be carried back to prior years.[117] The entire refund was due to the losses incurred by the debtor subsidiary. The bankruptcy referee determined that although the parent had applied for and received the refund, it belonged to the subsidiary debtor. However, the parent also had a claim of $45,000 against the debtor, so the parent asserted the right of setoff. Importantly, the ONLY ISSUE decided by the district court was the parent's right of setoff,[118] which means that neither the district court nor the Ninth Circuit ever considered or decided the merits or validity of the debtor/subsidiary's claim of entitlement to the refund (which the *Rodriguez* opinion incorrectly states was the issue in the case).

What the district court held, and the Ninth Circuit affirmed, was that mutual debts did not exist, as required for setoff, because the parent held the refund "in the nature of a trust."[119] "The trust res is not owing to the bankrupt's estate but rather is owned by it."[120] Therefore the holding was not merely "how a consolidated corporate tax refund, once paid to a designated agent, is *distributed* among group members,"[121] as the Supreme Court stated the issue in *Rodriguez*, but rather whether the undisputed right to such distribution was in the nature of a debt or in the nature of ownership.

The *Bob Richards* opinion never uses the term "property of the estate," but that is what the holding was all about. It was *not* to whose benefit the refund should "inure" as the opinion suggested at one point,[122] because that would have resulted in a valid setoff. The parent's setoff could be denied only because the debtor "owned" the refund. That is why *Bob Richards* addressed a property of the estate issue, which was also implicit in the opinion's reference to the debtor's entitlement arising under *Segal v. Rochelle.*[123]

The *Rodriguez* opinion was incorrect in stating that what it called the *Bob Richard*'s rule was about "how should the [corporate] members distribute the money among themselves once the government sends it to their ***524** designated agent."[124] Rather the issue is which of them "owns" the refund, which makes it a question of property of the bankruptcy estate when one of the entities is a debtor in bankruptcy, not merely whether a parent corporation owes a debt to its subsidiary. For *that* issue the Supreme Court was simply flat wrong that "the context of a federal bankruptcy ... doesn't change much,"[125] because property of an estate is governed by insolvency law that is very different from state property law. Neither of these salient factors is evident from the *Rodriguez* opinion, much less expressly addressed.

The holding of *Bob Richards* was simply that "Absent any differing agreement [between the parent and subsidiary] we feel that a tax refund resulting solely from offsetting the losses of one member of a consolidated filing group against the income of that same member in a prior or subsequent year should inure to the benefit of that member."[126] As thus stated the rule would have no application when the parties did have a tax allocation agreement.

The Ninth Circuit opinion did not indicate it was either relying upon or making federal common law as the basis for its decision. On the one hand the opinion's citation to *Segal v. Rochelle* could be taken as a suggestion that the decision rested on federal bankruptcy law, except that the citation was only to the proposition that upon filing of the petition in bankruptcy the "Trustee acquired any interest the bankrupt had in the carryback tax refund."[127] On the other hand the opinion's statement, immediately after the holding, that allowing the party's procedures to designate the recipient of the refund "unjustly enriches the parent"[128] suggests the holding might have been based on some state law of unjust enrichment, except that this legal theory might only create a debt and not an ownership interest.

B. BOB RICHARDS' PROGENY

In cases where there was no express agreement, the Eighth[129] and Fifth Circuits[130] adopted the *Bob Richards* rationale. The Fifth Circuit appeared to rely solely on *Bob Richards*' unjust enrichment rationale: "Following the *In re Bob Richards* reasoning, the refund is the property of the Bank in the absence of a contrary agreement .... To allow [the parent] to keep the refund generated

by the Bank would unjustly enrich the parent."[131]

Bob Richards was also correctly understood and applied by the Third ***525** Circuit in 1990 in a case where there was an express allocation agreement between the parties specifying that the "maturing [interest] coupons are to be the property" of the debtor.[132] The opinion accurately summarized the analysis and holding of *Bob Richards*:

> In that case, the debtor's parent corporation received the debtor's tax refund and sought to set off the refund against the outstanding debts owed by the debtor to the parent. The court found that since there was no express or implied agreement that the parent keep the refund, the refund belonged to the debtor. The court concluded that the parent held the funds merely as a trustee and had no right to set off the trust res against its claims.[133]

The next year the Second Circuit accurately applied *Bob Richards* in its influential opinion in *In re Prudential Lines, Inc.*[134] In that case there was no express agreement but the parent took a worthless stock deduction that would have deprived its debtor subsidiary from utilizing a Net Operating Loss ("NOL") carryforward to offset future income, which the debtor claimed violated the automatic stay because the NOL was property of the estate. The Second Circuit's opinion noted that the "nature and extent of the debtor's interest in property is determined by applicable non-bankruptcy law" but "[w]hether that interest is included in the property of the debtor's estate is determined by bankruptcy law."[135] The opinion concluded that, under *Bob Richards*, where there was no express or implied agreement the debtor had "an interest" in the NOL as of the filing of the petition,[136] and that under *Segal v. Rochelle* that interest was property of the estate based on the "purposes animating the Bankruptcy Code."[137]

In a case where there was an express tax allocation agreement, the Eleventh Circuit held that the agreement made the tax refunds property of the bank subsidiary rather than the debtor parent because the language and intent was not to create a debtor-creditor relationship.[138] The opinion did not cite or rely on *Bob Richards* or its rationale for anything other than the principle that although federal tax regulations on consolidated tax returns require the refund to be distributed by the IRS to the filing parent "federal law does ***526** not govern the allocation of the Group's tax refunds."[139]

In another case where there was an express tax allocation agreement, the Sixth Circuit held that its language failed to evidence "an unambiguous intent to create a debtor-creditor relationship," and the use of terms such as "reimbursement" and "payment" were not sufficient to create a debtor-creditor relationship, and so remanded for the district court to consider "extrinsic evidence concerning the parties' intent in light of Ohio agency and trust law."[140] In doing so the opinion noted that the language of the tax allocation agreement "speaks only to the allocation of liability" and "says nothing about the ownership of such a refund."[141] The opinion also rejected application of the *Bob Richards* rule as being "a creature of federal common law"[142] and cited *Butner*'s holding that "Congress has generally left the determination of property rights in the assets of a bankrupt estate to state law."[143] The opinion did not mention *Segal v. Rochelle* or *Prudential Lines.*

The unfortunate departure from the technically correct *Bob Richards* rule - governing the ownership rather than distribution rights when there is no agreement and one entity is a debtor in bankruptcy - originated in an unnecessary overreach by the FDIC in *Barnes v. Harris.*[144] In that case three shareholders of the parent holding company, which was NOT in bankruptcy, claimed that some portion of the tax refund belonged to the parent rather than the bank subsidiary that was in an FDIC receivership. Their complaint failed to allege "any business interests other than the Bank [subsidiary] that might have generated losses,"[145] or "the existence of any agreement to allocate the refund."[146] Yet the district court also explained that "a tax refund due from a joint return generally belongs to the company responsible for the losses that form the basis of the refund,"[147] citing *Bob Richards.*

The Tenth Circuit's decision in *Barnes* is where the *Bob Richards'* progeny ran off the tracks. The Tenth Circuit affirmed the district court's explanation that "a tax refund due from a joint return generally belongs to the company responsible for the losses that form the basis of the refund. *See ... Bob Richards.*"[148] But the *Bob Richards'* analysis should have no application where neither party is in bankruptcy, because then there is no property of the estate issue and no reason to apply bankruptcy law. Absent the bankruptcy ***527** context, there is no reason to determine whether an undisputed right to distribution is a debt or a property interest. More fundamentally, there are no third parties whose interests are at stake, like the creditors in a bankruptcy case. Moreover, there was no need for the *Barnes* court to cite the *Bob Richards* rule when the plaintiff shareholders merely "assert[ed] that some portion of a tax refund might be due to the [parent] without alleging any factual basis for such ownership (and in light of other information strongly suggesting the [parent] lacks an ownership interest in the refund)."[149] It is

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not even clear that the single reference to *Bob Richards* was the basis for the holding in *Barnes*, given that the "plaintiffs have not alleged the existence of any agreement to allocate the refund."[150]

C. TENTH CIRCUIT'S RODRIGUEZ OPINION

In *Rodriguez,* the subsidiary that generated all the losses giving rise to the tax refund was a bank, United Western Bank, in an FDIC receivership. The parent that had filed the consolidated returns and therefore been paid the refund by the IRS, was a holding company whose only asset was the subsidiary bank. But the parent holding company was a debtor in bankruptcy. So even though the parties' tax allocation agreement was clear that the refund had to be "distributed" to the subsidiary bank that generated the losses, the legal dispute was whether this contract right was merely another debt for which the subsidiary would be paid as an unsecured creditor, on the assumption that the refund was property of the parent's bankruptcy estate, or whether the tax allocation agreement made the parent an agent that held the refund in trust for the subsidiary, so it was not property of the debtor's estate and had to be "distributed" in full.

At the outset of its analysis in *Rodriguez* the Tenth Circuit noted that "*Barnes*, which adopted *Rodriguez*, clearly applies to this case and outlines the general framework that we must apply in resolving the parties' dispute."[151] But in summarizing the bankruptcy court's holding the Tenth Circuit unequivocally noted that the issue ultimately was an issue of property of the bankruptcy estate, both under Bankruptcy Code § 541 and a "long line of bankruptcy cases (even pre-dating the modern Bankruptcy Code)."[152] Ultimately the Tenth Circuit found the tax allocation agreement to be ambiguous as to whether it created a debtor/creditor relationship between the parent and the subsidiary or an agency/ownership relationship. But it resolved this ambiguity expressly not on the basis of either *Barnes* or the *Bob Richards* rule ***528** but rather because "the Agreement itself provides a method for resolving the ambiguity" by providing that any ambiguity be resolved "in favor of any insured depository institution."[153] "In sum, we conclude that the Agreement creates an agency relationship between [the debtor parent] and the [subsidiary] Bank and that, consequently, the Agreement's intended treatment of tax refunds does not differ from the general rule outlined in *Barnes* and *Bob Richards.*"[154]

In short, despite citing *Barnes* and *Bob Richards* for providing the "general framework," the Tenth Circuit did not actually apply either of them, but rather relied on the pain text of the tax allocation agreement. That result did not provide the Supreme Court any basis to accept certiorari to address the merits of the *Bob Richards* rule. To concoct such a basis the Supreme Court simply stated, without citation to any case, that *Bob Richards* "represents a general rule always to be followed unless the parties' tax allocation agreement *unambiguously* specified a different result."[155] Neither the Tenth Circuit opinion in *Rodriguez* nor any other reported case so held. To the contrary, the Tenth Circuit opinion found the agreement ultimately to be unambiguous and to specify the same result as *Bob Richards.*

D. THE SUPREME COURT'S RODRIGUEZ OPINION

1. *The Opinion Misstates the Issue*

The Supreme Court described the issue in *Rodriguez* as "how should the members [of a corporate group] distribute the money [derived from a tax refund] among themselves once the government sends it to their designated agent?"[156] And it stated that to resolve this issue some courts had "crafted their own federal common law rule" known as *Bob Richards* as providing that "in the absence of a tax allocation agreement, a refund belongs to the [corporate] group member responsible for the losses that led to it."[157] But the Supreme Court's statement misstated two salient features: (1) the question is not how to "distribute the money among" the corporate group members, which is usually undisputed as it was in *Rodriguez* itself, but rather whether the distribution agreement creates a debtor/creditor relationship or an agency/ownership relationship, and (2) the question is of significance only when one of the members is in bankruptcy or insolvent, because then it affects not only to the members but also to the creditors of the insolvent member.

Nothing in the Supreme Court's opinion suggests they were even aware ***529** of the existence or significance of these two salient features of the *Bob Richards* context. To the contrary, it expressly disclaimed any such awareness when it stated that "no one has explained why the *distribution* of a consolidated corporate tax refund should be among"[158] the types of cases that might not be governed by state law. By referencing distribution rights rather than property of the estate issues, and by

referencing the issue as involving corporate tax refunds generally, the Supreme Court made clear that no one had explained the significance of these facts.

2. *The FDIC Abandoned the Bob Richards Argument*

At oral argument before the Supreme Court, the FDIC made no argument contrary to the debtor's statement of the issue, made no argument in support of the *Bob Richards* rule as applied in any context, and indeed "expressly conced [ed] that federal courts 'should not apply a federal common law rule to ... put a thumb on ... the scale' when deciding which corporate group member owns some or all of a consolidated refund."[159] Much of the appellant's oral argument focused on the fact that the FDIC had "abandoned any defense of the *Bob Richards* rule."[160] Justice Ginsburg asked "Why should we take up Bob Richards at all in this case? Because both sides agree that that's not what should be dispositive."[161] Justice Sotomayor said "we don't need to reach *Bob Richards.*"[162] Justice Ginsburg noted there was no adversarial confrontation or actual controversy between the parties, in which case Justice Kagen noted ordinarily, without having to think twice, the Supreme Court would "appoint an amicus."[163]

At oral argument Justice Kavanaugh suggested to appellant's lawyer how the opinion should read: "That's all we would say: *Bob Richards*. Federal common law. We don't do that. That's not a good rule. That's all we're going to say about this."[164] And Justice Gorsuch insisted that the FDIC's lawyer agree: "If *Bob Richards*, as understood by the lower courts, as creating a federal common law rule, to require a clear statement in a contract before a contract will be enforced, contrary to existing state law, do we all agree, can we all agree on one thing, that's wrong?"[165]

The lack of any briefing or argument on the validity of the *Bob Richards* rule, in any context, probably accounts for the failure of the *Rodriguez* opinion ***530** to address it. Indeed, the opinion does not even address the validity of the Tenth Circuit's holdings in *Rodriguez* itself: "Who is right about all this we do not decide."[166] Instead of either affirming or reversing, the *Rodriguez* opinion merely vacates the Tenth Circuit's opinion and remands for further proceedings.[167]

3. *The Supreme Court's Only Holding Merely Requires Explanation, No Change In Substantive Law*

Instead of deciding who wins, or who gets the $4 million tax refund, the *Rodriguez* opinion makes explicit that "We took this case only to underscore the care federal courts should exercise before taking up an invitation to try their hand at common lawmaking. *Bob Richards* made the mistake of moving too quickly past important threshold questions at the heart of our separation of powers."[168] In other words, the "cautionary tale" of *Rodriguez* is simply that before applying federal common law, a federal court must identify why the federal rule is "necessary to protect uniquely federal interests."[169] On that score, the Supreme Court was quite correct that the Tenth Circuit's opinion below (as well as its prior opinion in *Barnes*) failed to identify any justification for any reliance on *Bob Richards*. This is accurate because the Tenth Circuit opinion in *Rodriguez* did not rely on *Bob Richards,* and its opinion in *Barnes* did not have any justification for reliance on *Bob Richards* since neither corporate member was in bankruptcy or even insolvent, which would be necessary to give creditors any interest in property of the estate issues.

The specific, narrow holding of *Rodriguez* also properly criticizes the *Bob Richards* opinion without reversing its result. As noted above, the *Bob Richards* opinion failed to *expressly* identify the property of the estate issue as the reason why insolvency common law was the appropriate body of law to apply, rather than state contract, property, agency or trust law that fails to address the interests of third-party creditors. But nothing in the *Rodriguez* opinion, whose explicit holding was "ONLY to address the care federal courts should exercise,"[170] holds or even suggests that either the implicit rationale or the result of *Bob Richards* should be reversed or corrected.

***531 E. THE UPSHOT**

1. *Rodriguez Will Be Misinterpreted and Misapplied*

Carefully read, *Rodriguez* contains only one holding and it is about how Article III courts should write opinions rather than about substantive law: in order to apply federal common law an Article III court must always identify the basis for doing so. As the Tenth Circuit's opinion on remand[171] demonstrated there was no need to apply federal common law in *Rodriguez* itself

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because the tax allocation agreement resolved any ambiguity in favor of the bank, and since this was the entity that generated the refund that result was consistent with the interests of the creditors of both the debtor parent and of the insolvent subsidiary bank. But in a case like *Bob Richards*, it would be appropriate to apply common law, derived from decisions such as *Segal*, to conclude that the refund should be regarded as property of the subsidiary debtor's estate in order to protect the interests of its creditors, which are not adequately considered by state agency law alone. Therefore if the *Bob Richards* opinion had so indicated the basis for applying such bankruptcy common law it would be consistent with this holding of *Rodriguez* and should not be deemed to have been reversed by *Rodriguez.*

Unfortunately, it is not likely that *Rodriguez* will be so accurately and narrowly understood and applied. For example, Westlaw is already reporting *Bob Richards* has being "abrogated" by *Rodriguez.* At least one writer has already argued that not only has *Bob Richards* been "invalidated" but that other, broader and more careful precedents are "destined for the chopping block,"[172] including the Second Circuit's influential analysis in *Prudential Lines.*[173]

The most dangerous possibility is that *Rodriguez* will be used to argue that *Bob Richards'* reliance on *Segal* was incorrect. And there are already some circuit court suggestions that *Segal* was abrogated by the language of the Code and no longer good law.[174] Such a result would severely limit creditor's rights and set bankruptcy law back to a time before Henry VIII. It is this potentially devastating possibility that could make *Rodriguez* the most significant bankruptcy decision of the century.

It will require careful analysis by practitioners and judges to demonstrate that *Bob Richards* is not so abrogated because *Rodriguez* neither considered or addressed its application of *Segal* to the property of the estate issue, but ***532** rather only addressed what law should govern the right to the *distribution* of the tax refund, as distinct from whether that distribution right was a creditor's claim or an ownership interest.

It will also now be an even greater challenge for practitioners and judges to distinguish *Butner* from property of the estate issues. The *Rodriguez* opinion's quote from *Butner* was correct, that "the determination of property rights in the assets of a bankrupt's estate" is generally left to state law.[175] When no creditor's interests are involved or considered, it is entirely correct that rights in assets of a bankruptcy estate are determined by state law. But that does not imply that what constitutes property of the estate is governed by state law, or what rights flow from an asset being property of the estate, both of which are governed ultimately by bankruptcy law, either the statute or, where necessary, common law to fill the gaps. Unfortunately the *Rodriguez* opinion's citation *Butner* in what should have been a property of the estate analysis will exacerbate the confusion and lead to further misuse of *Butner* in such an inappropriate context.

Perhaps the most fundamental effect of the misinterpretation of *Rodriguez* is that it adds another reason for courts to ignore the proper threshold question of the appropriate body of law. *Rodriguez* suggests the "threshold" question should be whether state or federal law applies, instead of whether the issue should be resolved by insolvency law or by contract or property law. This will exacerbate the existing trend to ignore the analysis that considers third-party creditors' interests in favor of a simpler analysis that considers only two parties' rights.

Indeed, the *Rodriguez* opinion adds a novel argument for the application of two-party contract or property law to decide the property of an insolvent estate or the priority among creditors. It suggests that traditional insolvency law somehow violates not only *Erie* and principles of federalism but also separation of powers. The principle that Justice Kavanagh referenced as "Federal common law; We don't do that" is generally understood as the *Erie* doctrine, but the *Erie*[176] decision was solely based on principles of federalism.[177] And the *Erie* doctrine applies only in diversity cases, not when jurisdiction is based on federal question.[178] But instead of referencing *Erie* or even federalism ***533** Justice Gorsuch's opinion indicates the problem lies "at the heart of our separation of powers."[179]

If Justice Gorsuch noticed *Bob Richards'* citation to *Segal v. Rochelle* and actually read and understood both cases, his reference to separation of powers seems to imply that the judicial branch intrudes on the legislative powers by interpreting property of the estate consistent with Congress's bankruptcy law "whose own purposes must ultimately govern."[180] This new argument suggests it is a violation of separation of powers for the judiciary to seek to implement the purposes of federal legislation if there are no particular words to ground the analysis.

Or is the separation of powers problem the reliance on controlling precedent? After all, stare decisis is based solely on federal common law, not on any statute enacted by Congress. If courts' reliance on venerable precedent such as *Segal* raises a separation

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of powers issue then the Supreme Court's future interpretations of bankruptcy law become wildly unpredictable. Almost all of the difficult issues that bankruptcy judges and lawyers deal with are controlled or driven by precedent that is federal common law. Bankruptcy case precedents cannot be anything else, because they are certainly not state common law nor federal civil law. Indeed, this suggestion of the *Rodriguez* opinion seems to call into question the long line of Supreme Court decisions emphasizing the continued validity of pre-Code analyses and practices.[181]

2. *Third-Party Creditors' Interests Must Be Considered.*

When one of the parties is insolvent, the proper "threshold question" is not federalism or separation of powers, as *Rodriguez* suggests,[182] but rather what is the appropriate body of law that considers the creditors' interests. That appropriate body of law can only be insolvency law. And, in general, that law will be found in federal cases because state law is preempted from addressing the collective rights of creditors: "Bankruptcy law accomplishes equitable distribution through a distinctive form of collective proceeding. ***534** This is a unique contribution of the Bankruptcy Code that makes bankruptcy different from a collection of actions by individual creditors."[183] "[S]tatutes that give state assignees or trustee avoidance powers beyond those that may be exercised by individual creditors trench too close upon the exercise of the federal bankruptcy power."[184]

So the choice of law to decide issues involving property of an insolvent estate does not raise constitutional issues of either federalism or separation of powers, as *Rodriguez* baselessly suggests. Rather, it is a more fundamental legal question of what is the appropriate body of law that considers the collective interests of creditors. There is no inherent reason why this law must be federal; the issue could arise under state law in the context of an assignment for benefit of creditors. But when there is a bankruptcy case the law will necessarily be federal common law. It is somewhat happenstance that all American bankruptcy law is exclusively federal because the need for federal law arose from the need to make the discharge effective in all states, not the need for a federally imposed rule for property of the estate or priority among creditors. More specifically, the impetus for the Bankruptcy Clause arose from the need to make the discharge effective as a writ of habeas corpus operative against state jailors.[185] "[T]he Framers, in adopting the Bankruptcy Clause, plainly intended to give Congress the power to redress the rampant injustice resulting from States' refusal to respect one another's discharge orders."[186] But in the process the Framers federalized all of the laws "on the subject of Bankruptcies," not just the effect of the discharge, because "[T]he power granted to Congress by that [Bankruptcy] Clause is a unitary concept rather than an amalgam of discrete segments."[187] This necessarily includes property of the estate and priorities among creditors.

V. CONCLUSION.

The past few decades of insolvency law have experienced an unfortunate analytical failure at the most fundamental level - the failure to begin by identifying the relevant body of law to resolve an issue. This failure is as evident in academic analyses as in judicial opinions.[188] What has been overlooked in ***535** this process is the importance of third-party creditors' interests when deciding either the assets or the priority of liabilities of an insolvent estate. The argument, or assumption, that such issues can be resolved by state law ignores the most salient fact that in general such state law considers only the interests of the two parties to a contract, tort or property issue, and has no relevance to the third-party creditors' interests. While state law is essential to resolving the rights of contracting parties, or the rights of a victim vis a vis the tort perpetrator, it is not ultimately determinative of the rights of third parties such as creditors of either of them, nor is it ultimately determinative when one of the two parties is insolvent.

The choice of the ultimately relevant body of law must begin with the facts, not with the nature of the source of the law. It is probably the case that some Article III judges' failure to appreciate the distinction between allowance and priority when applying a quote from *Butner*, or their insecurity in the area of insolvency law, or their preference for a formalistic approach over an equitable, functional analysis, has been responsible for some of the myopic misapplications of two-party law in third-party contexts such as insolvency. But in the most recent decades political debates about federalism have also gained prominence and influence in this choice of law. This is most evident in *Rodriguez,* a case that the Supreme Court admittedly took up solely to issue a proclamation about federalism (or what it calls separation of powers) and not to change an incorrect result.

This political influence on important bankruptcy issues is both unfortunate and unnecessary because nothing about the choice of the relevant body of law has anything to do with federalism. Reliance on federal decisions about creditors' rights does not

infringe on any states' rights because, as demonstrated above, the referenced state law generally has no interest in creditors rights and any such state law consideration of creditors rights would likely either be preempted or outright forbidden by the constitutional prohibition of state impairment of the obligation of contracts.[189]

Footnotes

a1 Retired Chief United States Bankruptcy Judge, District of Arizona. Portions of this analysis were originally developed for use in the Norton Bankruptcy Litigation Seminar and for publication in the Norton Bankruptcy Law Adviser and in that regard, I thank Keith Lundin and Bill Norton for their comments and support.

1 Rodriguez v. Fed. Deposit Ins. Corp., 140 S. Ct. 713, 718 (2020).

2 "*Bob Richards* made the mistake of moving too quickly past important threshold questions at the heart of our separation of powers." *Id.*

3 *See* text accompanying notes 26-28 *infra.*

4 The Case of Bankrupts, 2 Co. Rep. 25a, 76 Eng. Rep. 441 (K.B.1584) (Sir Edward Coke's discussion of bankruptcy commissioners' power to avoid preferences), *cited by* Cent. Va. Cmty. College v. Katz, 546 U.S. 356, 373 (2006).

5 Lines v. Frederick, 400 U.S. 18, 19 (1970) ("It is impossible to give any categorical definition to the word 'property' [of the estate], nor can we attach to it in certain relations the limitations which would be attached to it in others." (quoting Segal v. Rochelle, 382 U.S. 375, 379 (1966)).

6 Official Comm. of Unsecured Creditors v. Hancock Park Capital II, L.P. (*In re* Fitness Holdings Int'l, Inc.), 714 F.3d 1141, 1148 (9th Cir. 2013).

7 *In re* Burgess, 438 F.3d 493, 499 (5th Cir. 2006).

8 Segal v. Rochelle, 392 U.S. 375, 379 (1966), *distinguished by Burgess*, 438 F.3d at 499 ("*Segal* is distinguishable because the debtor did have a prepetition legal interest in that case").

9 Charles Jordan Tabb, *The History of Bankruptcy Law in the United States*, 3 AM. BANKR. INST. L. REV. 5 (1995), *reprinted in* CHARLES JORDAN TABB, BANKRUPTCY ANTHOLOGY 12 (2002),

10 *Id.* at 13.

11 "The bankruptcy law only applied to 'traders,' *i.e.,* to merchant debtors. This limitation remained until the nineteenth century." *Id.*

12 "As commerce expanded, the need for a collective procedure to collect debts became evident. Individual collection

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remedies, such as the common law execution writs of fieri facias, elegit, and lebari facias, did not address the distinct problems presented by a debtor's multiple defaults." *Id.* at 12.

[13] BAKER, J.H., AN INTRODUCTION TO ENGLISH LEGAL HISTORY 66 (4th ed., Butterworths LexisNexis 2002).

[14] *Id.*

[15] *Id.*

[16] GARRARD GLENN, THE RIGHTS AND REMEDIES OF CREDITORS RESPECTING THEIR DEBTOR'S PROPERTY 6 (Little, Brown, and Co. 1915).

[17] But if the debtor had something which in a practical sense was property on which he himself could realize at any time, but which was not capable of being the subject matter of a common law possessory action, no writ of execution would avail. Such was the case where the debtor owned an interest in a trust estate. At common law judgments could not be levied upon estates merely equitable, because courts of law did not recognize any such tittles and could not deal with them. Nor could the debtor's interest in any choses in action be taken in execution ... in view of the impossibility of assigning a chose in action.
Id. at 7.

[18] *Id.* at 7 (quoting Commissioners Freedman's Sav. & Trust Co. v. Earle, 110 U.S. 710, 712 (1884)).
Ordinarily and strictly, the term 'equitable assets' applies only to property and funds belonging to the estate of a decedent, which by law are not subject to the payment of debts, in the course of administration by the personal representatives, but which the testator has voluntarily charged with the payment of debts generally, or which, being non-existent at law, have been created in equity, under circumstances which fasten upon them such a trust.
Id. at 717-18.

[19] *Id.* at 11-12.

[20] An Act Against Such Persons As Do Make Bankrupts, 34 Hen. VIII c. 4.

[21] 13 Eliz. c. 7.

[22] SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND ch. 31, *reprinted in* TABB, *supra* note 9, at 16.

[23] *Id.* at 16-17.

[24] *Id.* at 17.

[25] The term "insolvency common law" is used here because the issue of what constitutes the estate can arise not only upon the filing of a statutory bankruptcy but also "by virtue of an assignment by the debtor who was insolvent, [when] the

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proceeds of the equitable interest sought to be subjected would have been distributed ratably among all creditors." Comm'rs Freedman's Sav. & Trust Co. v. Earle, 110 U.S. 710, 717 (1884).

26 Twyne's Case, 3 Co. Rep. 80b, 76 Eng. Rep. 809 (Star Chamber 1601), *reprinted in* ELIZABETH WARREN AND JAY LAWRENCE WESTBROOK, THE LAW OF DEBTORS AND CREDITORS 71 (6th ed. Aspen Pub. 2009).

27 In fact although some sheep may have been involved the principal assets were cattle, horses and sheep. Emily Kadens, *New Light on Twyne's Case*, 94 AM. BANKR. L.J. 1, 3, 34-50 (2020).

28 *Id.* at 77.

29 As to private right, the Statute seemed inapplicable on its face .... The penal clause, and the clause giving the Government half the recovery, logically should have led to a strict construction of the statue as a penal law; but this was discarded in favour of the 'common law principle' which, it was said, underlay the whole Statute of Elizabeth.
GARRARD GLENN, I FRAUDULENT CONVEYANCES AND PREFERENCES § 61d, at 95-96 (Rev. Ed., Baker, Voorhis & Co. 1940).

30 Although there was an underlying statute, this is common law in the broader sense of "any rule of federal law created by a court ... when the substance of that rule is not clearly suggested by federal enactments-- constitutional or congressional." Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883, 893-94 (1986), *quoted in* Adam J. Levitin, *Toward a Federal Common Law of Bankruptcy: Judicial Lawmaking In a Statutory Regime*, 80 AM. BANKR. L.J. 1, 66 (2006).

31 GLENN, *supra* note 29, §§ 61a - 61c, at 86-94.

32 GLENN, *supra* note 29, at 86.

33 *Id.* at 92 (summarizing the adoption of 13 Eliz. c. 7).

34 Vern Countryman, *The Use of State Law in Bankruptcy Cases (Part I),* 47 N.Y.U. L. REV. 407, 439 (1972).

35 Tabb, *supra* note 9, at 16-17; *see* text accompanying note 20, *supra*.

36 Countryman, *supra* note 34, at 441.

37 Bankruptcy Act § 70a(5).

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

39 *Id.*

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[40] *Id. (*quoting Fisher v. Cushman, 103 F. 860 (1st Cir. 1900)).

[41] *Fisher*, 103 F. at 865.

[42] *Id.*

[43] Board of Trade of City of Chicago v. Johnson*,* 264 U.S. 1, 10 (1924).

[44] "The result of *Segal v. Rochelle* [citation omitted] is followed." H.R. REP. NO. 95-595, at 367-68 (1977); S. REP. NO. 95-989, at 82-83 (1978).

[45] REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, PART II, H. Doc. No. 93-137, at 148-49 (Sept. 6, 1973).

[46] Countryman, *supra* note 34, at 474.

[47] *Id.* at 438-47.

[48] BLACKSTONE, *supra* note 22.

[49] Burgess v. Sikes *(In re* Burgess*)*, 438 F.3d 493 (5th Cir. 2006).

[50] *Id.* at 495.

[51] *Id.* at 496 (emphasis in Fifth Circuit opinion).

[52] *Id.* at 497 (emphasis added).

[53] *Id.* at 499 (emphasis in original).

[54] *Id.* at 499 (citing Goff v. Taylor, 706 F.2d 574, 578 (5th Cir. 1983), *overruled on other grounds by* Patterson v. Shumate, 504 U.S. 753 (1991)).

[55] *Id.* at 510 (analyzing United States v. Whiting Pool*s*, 462 U.S. 198 (1983)) ("although [§ 541] could be read to limit the estate to those 'interests of the debtor in property' at the time of the filing of the petition, we view [it] as a definition of what is included in the estate, rather than as a limitation").

[56] *Id.* at 518 (quoting Rau v. Ryerson (*In re* Ryerson), 739 F.2d 1423, 1425 (9th Cir. 1984)).

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[57] *Id.* at 516.

[58] *Id.* at 512.

[59] Fisher v. Cushman, 103 F. 860 (1st Cir. 1900); *see also* text accompanying notes 41-42, *supra.*

[60] 986 F.3d 633 (9th Cir. 2021).

[61] *Id.* at 640.

[62] *Id.* at 641.

[63] Segal v. Rochelle, 382 U.S. 375, 379 (1966).

[64] Some of the most basic principles of bankruptcy practice are nowhere to be found in the Code. For example, it is axiomatic that all equity interests are junior in priority to all creditors. How do we know this? For Chapter 7 cases, § 726 provides the order of distribution. There is no analogous provision in Chapters 9, 11, 12, or 13 .... The rule that creditors are senior to equity holders is a pre-Code practice that lacks any statutory pedigree."
Levitin, *supra* note 30, at 63-64.

[65] "The words 'fair and equitable' as used in § 77B, sub. F are words of art which prior to the advent of § 77B had acquired a fixed meaning through judicial interpretations in the field of equity rece4ivership reorganizations." Case v. Los Angeles Lumber Prods. Co., 308 U.S. 1, 7 (1939).

[66] 316 U.S. 89 (1942).

[67] 304 U.S. 64 (1937).

[68] *Prudence*, 316 U.S. at 95.

[69] *Id.* at 96.

[70] In *Prudence Realization Corp. v. Geist*, "the Supreme Court rejected the state rule and instead crafted a new rule of federal common law." Levitin, *supra* note 27, at 75.

[71] *In re* Lothian Oil, Inc., 650 F.3d 539, 544 (5th Cir. 2011).

[72] *In re* Fitness Holdings, Int'l, 714 F.3d 1141 (9th Cir. 2013).

[73] *In re* SubMicron Sys. Corp., 432 F.3d 448, 454 n.7 (3d Cir. 2006)

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74 *Id.* at 454 (quoting Pepper v. Litton, 308 U.S. 295, 305 (1939)).

75 Roth Steel Tube Co. v. C.I.R., 800 F.2d 625 (6th Cir. 1986).

76 *See, e.g.,* Stinnett's Pontiac Serv., Inc. v. Comm'r, 730 F.2d 634, 638 (11th Cir. 1984); Estate of Mixon v. United States, 464 F.2d 394, 402 (5th Cir. 1972). For a bankruptcy case following the same test, see *In re Cold Harbor Assocs., L.P.,* 204 B.R. 904, 915 (Bankr. E.D. Va. 1997).

77 United States v. Reorganized CF & I Fabricators of Utah, Inc., 518 U.S. 213, 224 (1996).

78 Avelline & Bienes v. M. Frenville Co. *(In re* M. Frenville Co.*)*, 744 F.2d 332 (3d Cir. 1984).

79 Kilbarr Corp. v. Gen Serv. Admin. *(In re* Remington Rand Corp.*)*, 836 F.2d 825 (3d Cir. 1988).

80 *In re* Andrews, 239 F.3d 708 n.7 (9th Cir. 2001) (the *Frenville* "approach has been universally rejected).

81 *In re* Grossman's Inc., 607 F.3d 114 (3d Cir. 2012).

82 Saint Catherine Hosp. of Indiana, L.L.C. v. Ind. Family and Soc. Serv. Admin., 800 F.3d 312, 315 (7th Cir. 2015) ("virtually all courts now apply some version of the 'conduct test,"' rather than the "outmoded 'accrual theory"').

83 *See In re* Hassanally, 208 B.R. 46, 52 (B.A.P. 9th Cir. 1997).

84 11 U.S.C. § 101(5).

85 *Saint Catherine's,* 800 F.3d at 315.

86 *Hassanally,* 208 B.R. at 52 n.9.

87 *E.g., In re* Fitness Holdings Int'l, Inc., 714 F.3d 1141, 1146 (9th Cir. 2013) ("This analysis raises the further question of how courts are to determine whether there is a 'right to payment' that constitutes a 'claim' under the Code. Supreme Court precedent establishes that, unless Congress has spoken, the nature and scope of a right to payment is determined by state law." (citing Travelers Cas. & Sur. Co. Of Am. V. Pac. Gas & Elec. Co., 549 U.S. 443 (2007) and Butner v. United States, 440 U.S. 48 (1970))).

88 *E.g., In re* Blasingame, 986 F.3d 633, 638 (6th Cir. 2021) ("While § 541 dictates what interests are property of the estate pursuant to federal bankruptcy law, the 'nature and extent of [the] property rights ... are determined by the 'underlying [state] substantive law."' (quoting Raleigh v. Ill. Dept. of Rev., 530 U.S. 15 (2000))).

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[89] 440 U.S. 48 (1970).

[90] 530 U.S. 15 (2000).

[91] 549 U.S. 443 (2007).

[92] *Butner*, 440 U.S. at 53.

[93] *Id.* at 54.

[94] *Raleigh*, 530 U.S. at 20.

[95] *Id.*

[96] 329 U.S. 156 (1946).

[97] *Raleigh*, 530 U.S. at 23-24.

[98] Fahs v. Martin, 224 F.2d 387, 394-95 (5th Cir. 1955), cited by *Raleigh*, 530 U.S. at 24.

[99] *In re* Highland Superstores, Inc., 154 F.3d 573 (6th Cir. 1998), *cited by Raleigh,* 530 U.S. at 24.

[100] Travelers Cas. And Sur. Co. of Am. v. Pacific Gas & Elec. Co., 549 U.S. 443, 451 (2007).

[101] *Id.*

[102] United States. v. Noland, 517 U.S. 535, 540 (1996).

[103] *Id.* at 540-41.

[104] United States v. Reorganized CF & I Fabricators of Utah, Inc., 518 U.S. 213, 299 (1996) (discussing United States v. Noland, 517 U.S. 535 (1996)).

[105] Butner v. United States, 440 U.S. 48, 55 (1970).

[106] Pepper v Litton, 308 U.S. 295, 304 (1939).

[107] Randolph J. Haines, *The Conservative Assault on Federal Equity*, 88 AM. BANKR. L.J. 451, 485 (2014). *Accord,*

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Levitin, *supra* note 27, at 17-18 ("The jurisprudential concern about "doing equity" is not just one of a lack of uniform results between courts, but one of judges themselves not knowing how to proceed. It is far easier to follow the techniques of application of law to fact taught in law school than to create justice out of whole cloth; judges are not Solomons. Nor are they generally technical experts in any particular field. Without some channeling or direction of their discretion, many judges would simply be lost, particularly in cases where one's personal moral (or economic efficiency) compass can give no bearing.").

108 140 S. Ct. 713 (2020).

109 *Id.* at 718 (emphasis in original).

110 *Id.*

111 *Id.* at 717.

112 *Id.* at 716.

113 *Id.* a 718.

114 *Id.* at 716.

115 *Id.* at 716.

116 Western Dealer Management, Inc. v. England *(In re* Bob Richards Chrysler-Plymouth Corp., Inc., 473 F.2d 262 (9th Cir. 1973).

117 *Id.* at 263.

118 The referee concluded that [the accountant for both the parent and the debtor] held [the refund] as the bankrupt's agent, and that [the parent] could retain the refund free and clear as a set-off against the $45,000 owed by the bankrupt. This last conclusion was the only issue raised in the district court, which held that mutual debts and credits required by Section 68a of the Bankruptcy Act 911 U.S.C. § 108(a)) did not exist. The correctness of this ruling is the only issue raised on appeal.
Id. at 263-64.

119 *Id.* at 265.

120 *Id.*

121 *Rodriguez*, 140 S. Ct. at 718 (emphasis in original).

122 *Bob Richards,* 473 F.2d at 265.

123 *Id.* at 264.

124 *Rodriguez,* 140 S. Ct. at 716.

125 *Id.* at 718.

126 *Bob Richards*, 473 F.2d at 265.

127 *Id.* at 264.

128 *Id.* at 265.

129 Jump v. Manchester Life Cas. Management Corp., 438 F. Supp. 185, 188-89 (E.D. Mo. 1977), *aff'd,* 579 F.2d 449 (8th Cir. 1978).

130 Capital Bancshares, Inc. v. Fed. Deposit Ins. Corp., 957 F.2d 203 (5th Cir. 1992).

131 *Id.* at 208.

132 *In re* Bevill, Bresler & Schulman Asset Mgmt. Corp., 896 F.2d 54, 56 (3d Cir. 1990).

133 *Id.* at 58.

134 928 F.2d 565 (2d Cir. 1991).

135 *Id.* at 569 (citations omitted).

136 *Id.* at 571.

137 *Id.* at 573.

138 *In re* BankUnited Financial Corp., 727 F.3d 1100 (11th Cir. 2013); *accord, In re* NetBank, Inc., 729 F.3d 1344 (11th Cir. 2013).

139 *BankUnited,* 727 F.3d at 1102, n.2.

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140 Fed. Deposit Ins. Corp. v. AmFin Financial Corp., 757 F.3d 530, 535 (6th Cir. 2014).

141 *Id.* at 534.

142 *Id.* at 535.

143 *Id.* at 536 (quoting Butner v. United States, 440 U.S. 48, 54 (1979)).

144 783 F.3d 1185 (10th Cir. 2015).

145 *Id.* at 1195-96.

146 *Id.* at 1196.

147 *Id.* at 1195.

148 *Id.* at 1195.

149 *Id.* at 1196.

150 *Id.*

151 Rodriguez v. Fed. Deposit Ins. Corp. *(In re* United W. Bancorp. Inc.*)*, 893 F.3d 716, 725 (10th Cir. 2018), *rev'd on other grounds,* 140 S. Ct. 713 (2020), *aff'd on other grounds,* 959 F.3d 1269 (10th Cir. 2020).

152 *Id.,* at 722.

153 *Id.* at 729.

154 *Id.*

155 *Rodriguez,* 140 S. Ct. at 717.

156 *Id.* at 716.

157 *Id.* at 716.

158 Id. at 718 (emphasis added).

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[159] *Id.* at 718.

[160] Transcript of Oral Argument, at 4 (argument of Mitchell Reich, Attorney for Petitioner), Rodriguez v. Federal Deposit Ins. Corp., 140 S. Ct. 713 (2020) (No. 18-1269).

[161] *Id.* at 6 (Justice Ginsburg).

[162] *Id.* at 18. (Justice Sotomayor).

[163] *Id.* at 26 (Justice Kagen).

[164] *Id.* at 14.

[165] *Id.* at 34.

[166] *Rodriguez,* 140 S. Ct. at 718.

[167] On remand the Tenth Circuit eliminated any reference to *Bob Richards* and simply held that under the terms of the tax allocation agreement the refund belonged to the nondebtor subsidiary bank. *In re* United W. Bancorp, Inc., 959 F.3d 1269 (10th Cir. 2020).

[168] *Rodriguez*, 140 S. Ct. at 718.

[169] *Id.* at 717 (quoting FDIC v. AmFin Fin. Corp., 757 F.3d 530 (6th Cir. 2014)).

[170] *Id.* at 718 (emphasis added).

[171] *In re* United W. Bancorp, Inc., 959 F.3d 1269 (10th Cir. 2020).

[172] Mitchell P. Reich*, A Swan Song for Federal Common Lawmaking in Bankruptcy Courts*, 39 AM. BANKR. INST. J. 20, 20 (Sept. 2020).

[173] *In re* Prudential Lines Inc., 928 F.2d 565 (2d Cir. 1991).

[174] *In re* Bracewell, 454 F.3d 1234, 1242 (11th Cir. 2006) ("The § 541(a)(1) definition, with its explicit temporal limitation, controls our analysis rather than *Segal*'s test. *See Burgess,* 438 F.3d at 498 ("*Segal*'s 'sufficiently rooted' test did not survive the enactment of the Bankruptcy Code.")).

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[175] *Rodriguez,* 140 S. Ct. at 718 (quoting Butner v. United States, 440 U.S. 48, 54 (1979)).

[176] Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817 (1937).

[177] *See* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 504 (2001) (Scalia, J.) ("the federalism principle of *Erie R. v. Tompkins*").

[178] *Erie*,

whether it be viewed as stating a constitutional requirement or merely a principle of federal policy, states a rule only for 'federal courts exercising jurisdiction in diversity of citizenship cases' and requires them to follow state law rather than to fashion their own 'general law' in an area where 'Congress was confessedly without power to enact ... statutes.' Countryman, *supra* note 31, at 409; *see also* Heiser v. Woodruff, 327 U.S. 726, 732 (1946) ("For nothing decided in *Erie R. Co. v. Tompkins*, *supra*, requires a court of bankruptcy, in applying statutes of the United States governing the liquidation of bankrupt's estate, to adopt local rules of law in determining what claims are provable, or to be allowed, or how the bankrupt's estate is to be distributed among claimants.").

[179] *Rodriguez,* 140 S. Ct. at 718.

[180] Segal v. Rochelle, 392 U.S. 375 (1966).

[181] Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot., 474 U.S. 494 (1986); Kelly v. Robinson, 479 U.S. 36 (1986); United Sav. Ass'n. of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365 (1988); *In re* Ahlers, 485 U.S. 197 (1988); United States v. Ron Pair Enters., Inc., 489 U.S. 235 (1989). Pa. Dept. of Pub. Welfare v. Davenport, 495 U.S. 552 (1990); Cohen v. de la Cruz, 523 U.S. 213 (1998).

[182] *Rodriguez,* 140 S. Ct. at 718 ("*Bob Richards* made the mistake of moving too quickly past important threshold questions at the heart of our separation of powers.").

[183] Sherwood Partners, Inc. v. Lycos, Inc., 394 F.3d 1198, 1203 (9th Cir. 2005).

[184] *Id.* at 1205.

[185] Central Virginia Community College v. Katz, 546 U.S. 356, 374-77 (2005) (citing Randolph J. Haines, *The Uniformity Power: Why Bankruptcy is Different,* 77 AM. BANKR. L.J. 129, 179-181 (2003)).

[186] *Id.* at 377.

[187] *Id.* at 370.

[188] *See, e.g.,* Bruce Grohsgal, *The Argument for a Federal Rule of Decision for a Bankruptcy Court's Recharacterization of a Claim as Equity,* 94 AM. BANKR. L.J. 681, 725 (2020) ("The appropriate threshold constitutional question in a bankruptcy case is whether Congress exercised its power under the Bankruptcy Clause to alter state law, rather than

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whether state law is 'well equipped' to determine the matter."); Cameron J. Schlagel, *Bankruptcy, Debt Recharacterization, and the Constitution - An* Erie *Relationship*, 93 AM. BANKR. L.J. 1, 44 (2019) ("Given the strong connection between bankruptcy jurisprudence and *Erie*, federal courts in recharacterization cases are required to apply state law as the rule of decision - not a federal rule of their own creation."); Ron Meisler, *Debt Recharacterization in Bankruptcy: Overview and Development*s, 28 NORTON J. BANKR. L. & PRAC. (June 2019) ("[T]he minority [state law] approach [to recharacterization dovetails with the 'basic federal rule' expressed in *Butner* and its progeny that applicable 'state law governs the substance of claims.'"); James M. Wilton & Stephen Moeller-Sally, *Debt Recharacterization Under State Law*, 62 BUS. LAW. 1257, 1280 (August 2007) ("The Supreme Court has long recognized that claims of creditors in bankruptcy must generally be allowed or disallowed in accordance with state law. As a result, debt recharacterization should not be regarded as a separate federal cause of action, but rather as a defense or remedy in disputes over the allowance of claims under state law.").

189 "No State shall ... pass any law ... impairing the obligation of contracts." U.S. CONST. art. I, § 10, cl. 1.

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verse the judgment of the Arizona Supreme Court.

Simon E. RODRIGUEZ, as Chapter 7 Trustee for the Bankruptcy Estate of United Western Bancorp, Inc., Petitioner

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for United Western Bank

No. 18-1269

Supreme Court of the United States.

Argued December 3, 2019

Decided February 25, 2020

Background: Chapter 7 trustee for bankruptcy estate of parent bank holding company brought adversary proceeding against Federal Deposit Insurance Corporation (FDIC), in its capacity as receiver for affiliate bank, requesting declaratory judgment that $4,081,335 tax refund arising as result of consolidated tax returns filed by holding company was property of bankruptcy estate, requesting turnover of tax refund, and objecting to FDIC's proof of claim. The United States Bankruptcy Court for the District of Colorado, Thomas B. McNamara, J., 558 B.R. 409, entered summary judgment in trustee's favor. FDIC appealed. The District Court, William J. Martinez, J., 574 B.R. 876, reversed and remanded. Trustee appealed. The United States Court of Appeals for the Tenth Circuit, Briscoe, Circuit Judge, 914 F.3d 1262, affirmed. Certiorari was granted.

Holdings: The Supreme Court, Justice Gorsuch, held that the federal common law rule known as the *Bob Richards* rule, which is used by some courts to determine ownership of consolidated corporate tax refunds, is not a legitimate exercise of federal common lawmaking, and so federal courts should rely on the law of the relevant state, together with any applicable federal rules, to resolve how such refunds should be distributed to members of an affiliated group, abrogating *In re Bob Richards Chrysler-Plymouth Corp.*, 473 F.2d 262.

Vacated and remanded.

1. Federal Courts ⟹3018

The cases in which federal courts may engage in common lawmaking are few and far between.

2. Internal Revenue ⟹3870

Affiliated group of corporations may file a consolidated federal tax return. 26 U.S.C.A. § 1501.

3. Internal Revenue ⟹3867

Affiliated corporate group seeking to file a single federal tax return must comply with a host of regulations which are pretty punctilious about ensuring the government gets all the taxes due from corporate group members. 26 U.S.C.A. §§ 1501, 1502; 26 C.F.R. § 1.1502-0 et seq.

4. Internal Revenue ⟹4955

Pursuant to federal regulations, when an affiliated group of corporations has filed a consolidated federal return, the Internal Revenue Service (IRS) will pay the group's designated agent a single refund, and that payment discharges the government's refund liability to all group members. 26 U.S.C.A. §§ 1501, 1502; 26 C.F.R. § 1.1502-0 et seq.

5. Internal Revenue ⚷3865, 4955

"Tax allocation agreements" developed by affiliated groups of corporations that have filed consolidated federal returns usually specify what share of a group's tax liability each member will pay, along with the share of any tax refund each member will receive. 26 U.S.C.A. § 1501.

See publication Words and Phrases for other judicial constructions and definitions.

6. Federal Courts ⚷3018

Judicial lawmaking in the form of federal common law plays a necessarily modest role under a Constitution that vests the federal government's "legislative Powers" in Congress and reserves most other regulatory authority to the states. U.S. Const. art. 1, § 1; U.S. Const. Amend. 10.

7. Federal Courts ⚷3018

There is no federal general common law; instead, only limited areas exist in which federal judges may appropriately craft the rule of decision.

8. Federal Courts ⚷3018

Among the limited areas in which federal judges may appropriately craft the rule of decision, and in which federal common law often plays an important role, are admiralty disputes and certain controversies between states.

9. Federal Courts ⚷3018

Before federal judges may claim a new area for common lawmaking, strict conditions must be satisfied; one of the most basic is that, in the absence of congressional authorization, common lawmaking must be necessary to protect uniquely federal interests.

10. Internal Revenue ⚷4955

The federal common law rule known as the *Bob Richards* rule, which is used by some courts in determining how a tax refund arising from a consolidated federal return should be allocated among members of an affiliated group of corporations, is not necessary to protect uniquely federal interests and, thus, is not a legitimate exercise of federal common lawmaking, and so federal courts should rely on the law of the relevant state, together with any applicable federal rules, to resolve how such refunds should be distributed to group members; abrogating *In re Bob Richards Chrysler-Plymouth Corp.*, 473 F.2d 262. 26 U.S.C.A. §§ 1501, 1502; 26 C.F.R. § 1.1502-0 et seq.

11. Corporations and Business Organizations ⚷1008, 2420

Corporations are generally creatures of state law, which is well equipped to handle disputes involving corporate property rights.

12. Bankruptcy ⚷2534

Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law.

13. Internal Revenue ⚷3027

The Internal Revenue Code generally creates no property rights. 26 U.S.C.A. §§ 1 et seq.

14. Federal Courts ⚷3018

Federal courts should exercise care before taking up an invitation to try their hand at common lawmaking.

Syllabus *

The Internal Revenue Service (IRS) allows an affiliated group of corporations to file a consolidated federal return. See 26

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

U.S.C. § 1501. The IRS issues any refund as a single payment to the group's designated agent. The tax regulations say very little about how the group members should then distribute that refund among themselves. If a dispute arises and the members have no tax allocation agreement in place, federal courts normally turn to state law to resolve the distribution question. Some courts, however, have crafted their own federal common law rule, known as the *Bob Richards* rule. See *In re Bob Richards Chrysler-Plymouth Corp.,* 473 F.2d 262. The rule initially provided that, in the absence of an agreement, a refund belongs to the group member responsible for the losses that led to it. But it has since evolved, in some jurisdictions, into a general rule that is always followed unless an agreement unambiguously specifies a different result. Soon after United Western Bank suffered huge losses, its parent, United Western Bancorp, Inc., was forced into bankruptcy. When the IRS issued the group a $4 million tax refund, the bank's receiver, respondent Federal Deposit Insurance Corporation (FDIC), and the parent corporation's bankruptcy trustee, petitioner Simon Rodriguez, each sought to claim it. The dispute wound its way through a bankruptcy court and a federal district court before the Tenth Circuit examined the parties' tax allocation agreement, applied the more expansive version of *Bob Richards*, and ruled for the FDIC.

Held: The *Bob Richards* rule is not a legitimate exercise of federal common lawmaking. Federal judges may appropriately craft the rule of decision in only limited areas, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729, 124 S.Ct. 2739, 159 L.Ed.2d 718, and claiming a new area is subject to strict conditions. One of the most basic is that federal common lawmaking must be " 'necessary to protect uniquely federal interests.' " *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640, 101 S.Ct. 2061, 68 L.Ed.2d 500. The *Bob Richards* rule has not satisfied this condition. The federal courts applying and extending *Bob Richards* have not pointed to any significant federal interest sufficient to support the *Bob Richards* rule. Nor have the parties in this case. State law is well-equipped to handle disputes involving corporate property rights, even in cases, like this one, that involve federal bankruptcy and a tax dispute. Whether this case might yield the same or a different result without *Bob Richards* is a matter the court of appeals may take up on remand. Pp. 717–718.

914 F.3d 1262, vacated and remanded.

GORSUCH, J., delivered the opinion for a unanimous Court.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Nicholas J. Podsiadly, General Counsel, Floyd I. Robinson, Deputy General Counsel, Colleen J. Boles, Assistant General Counsel, J. Scott Watson, Senior Counsel, Noel J. Francisco, Solicitor General, Joseph H. Hunt, Assistant Attorney General, Malcolm L. Stewart, Deputy Solicitor General, Michael R. Huston, Assistant to the Solicitor General, Department of Justice, Joseph Brooks, Counsel, Federal Deposit Insurance Corporation, Washington, DC, for Respondent.

For U.S. Supreme Court briefs, see:

2019 WL 6045346 (Reply.Brief)

2019 WL 4192162 (Pet.Brief)

2019 WL 5290511 (Resp.Brief)

Justice GORSUCH delivered the opinion of the Court.

[1] This case grows from a fight over a tax refund. But the question we face isn't who gets the money, only how to decide the dispute. Should federal courts rely on state law, together with any applicable federal rules, or should they devise their own federal common law test? To ask the question is nearly to answer it. The cases in which federal courts may engage in common lawmaking are few and far between. This is one of the cases that lie between.

The trouble here started when the United Western Bank hit hard times, entered receivership, and the Federal Deposit Insurance Corporation took the reins. Not long after that, the bank's parent, United Western Bancorp, Inc., faced its own problems and was forced into bankruptcy, led now by a trustee, Simon Rodriguez. When the Internal Revenue Service issued a $4 million tax refund, each of these newly assigned caretakers understandably sought to claim the money. Unable to resolve their differences, they took the matter to court. The case wound its way through a bankruptcy court and a federal district court before eventually landing in the Tenth Circuit. At the end of it all, the court of appeals ruled for the FDIC, as receiver for the subsidiary bank, rather than for Mr. Rodriguez, as trustee for the corporate parent.

[2–4] How could two separate corporate entities both claim entitlement to a single tax refund? For many years, the IRS has allowed an affiliated group of corporations to file a consolidated federal return. See 26 U.S.C. § 1501. This serves as a convenience for the government and taxpayers alike. Unsurprisingly, though, a corporate group seeking to file a single return must comply with a host of regulations. See 26 U.S.C. § 1502; 26 CFR § 1.1502–0 *et seq.* (2019). These regulations are pretty punctilious about ensuring the government gets all the taxes due from corporate group members. See, *e.g.*, § 1.1502–6. But when it comes to the distribution of refunds, the regulations say considerably less. They describe how the IRS will pay the group's designated agent a single refund. See § 1.1502–77(d)(5). And they warn that the IRS's payment discharges the government's refund liability to all group members. *Ibid.* But how should the members distribute the money among themselves once the government sends it to their designated agent? On that, federal law says little.

[5] To fill the gap, many corporate groups have developed "tax allocation agreements." These agreements usually specify what share of a group's tax liability each member will pay, along with the share of any tax refund each member will receive. But what if there is no tax allocation agreement? Or what if the group members dispute the meaning of the terms found in their agreement? Normally, courts would turn to state law to resolve questions like these. State law is replete with rules readymade for such tasks—rules for interpreting contracts, creating equitable trusts, avoiding unjust enrichment, and much more.

Some federal courts, however, have charted a different course. They have crafted their own federal common law rule—one known to those who practice in the area as the *Bob Richards* rule, so named for the Ninth Circuit case from which it grew: *In re Bob Richards Chrysler-Plymouth Corp.*, 473 F.2d 262 (1973). As initially conceived, the *Bob Richards* rule provided that, in the absence of a tax allocation agreement, a refund belongs to the group member responsible for the losses that led to it. See *id.*, at 265. With the

passage of time, though, *Bob Richards* evolved. Now, in some jurisdictions, *Bob Richards* doesn't just supply a stopgap rule for situations when group members lack an allocation agreement. It represents a general rule always to be followed unless the parties' tax allocation agreement *unambiguously* specifies a different result.

At the urging of the FDIC and consistent with circuit precedent, the Tenth Circuit employed this more expansive version of *Bob Richards* in the case now before us. Because the parties did have a tax allocation agreement, the court of appeals explained, the question it faced was whether the agreement unambiguously deviated from *Bob Richards*'s default rule. *In re United Western Bancorp, Inc.*, 914 F.3d 1262, 1269–1270 (2019). After laying out this "analytical framework" for decision, *id.*, at 1269 (emphasis deleted), the court proceeded to hold that the FDIC, as receiver for the bank, owned the tax refund.

Not all circuits, however, follow *Bob Richards.* The Sixth Circuit, for example, has observed that "federal common law constitutes an unusual exercise of lawmaking which should be indulged ... only when there is a significant conflict between some federal policy or interest and the use of state law." *FDIC v. AmFin Financial Corp.*, 757 F.3d 530, 535 (2014) (internal quotation marks omitted). In the Sixth Circuit's view, courts employing *Bob Richards* have simply "bypassed th[is] threshold question." 757 F.3d at 536. And any fair examination of it, the Sixth Circuit has submitted, reveals no conflict that might justify resort to federal common law. *Ibid.* We took this case to decide *Bob Richards*'s fate. 588 U.S. ––––, 139 S.Ct. 2778, 204 L.Ed.2d 1157 (2019)

[6–9] Judicial lawmaking in the form of federal common law plays a necessarily modest role under a Constitution that vests the federal government's "legislative Powers" in Congress and reserves most other regulatory authority to the States. See Art. I, § 1; Amdt. 10. As this Court has put it, there is "no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Instead, only limited areas exist in which federal judges may appropriately craft the rule of decision. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004). These areas have included admiralty disputes and certain controversies between States. See, *e.g., Norfolk Southern R. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 23, 125 S.Ct. 385, 160 L.Ed.2d 283 (2004); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110, 58 S.Ct. 803, 82 L.Ed. 1202 (1938). In contexts like these, federal common law often plays an important role. But before federal judges may claim a new area for common lawmaking, strict conditions must be satisfied. The Sixth Circuit correctly identified one of the most basic: In the absence of congressional authorization, common lawmaking must be " 'necessary to protect uniquely federal interests.' " *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640, 101 S.Ct. 2061, 68 L.Ed.2d 500 (1981) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964)).

[10] Nothing like that exists here. The federal government may have an interest in regulating how it *receives* taxes from corporate groups. See, *e.g.,* 26 CFR §§ 1.1502–6, –12, –13. The government also may have an interest in regulating the *delivery* of any tax refund due a corporate group. For example and as we've seen, the government may wish to ensure that others in the group have no recourse against federal coffers once it pays the group's designated agent. See § 1.1502–77(d)(5). But what unique interest could the federal

government have in determining how a consolidated corporate tax refund, once paid to a designated agent, is *distributed* among group members?

The Sixth Circuit correctly observed that *Bob Richards* offered no answer—it just bypassed the question. Nor have the courts applying and extending *Bob Richards* provided satisfactory answers of their own. Even the FDIC, which advocated for the *Bob Richards* rule in the Tenth Circuit, failed to point that court to any unique federal interest the rule might protect. In this Court, the FDIC, now represented by the Solicitor General, has gone a step further, expressly conceding that federal courts "should not apply a federal common law rule to . . . put a thumb on . . . the scale" when deciding which corporate group member owns some or all of a consolidated refund. Tr. of Oral Arg. 40; see also *id.*, at 32–36.

[11–13] Understandably too. Corporations are generally "creatures of state law," *Cort v. Ash*, 422 U.S. 66, 84, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), and state law is well equipped to handle disputes involving corporate property rights. That cases like the one now before us happen to involve corporate property rights in the context of a federal bankruptcy and a tax dispute doesn't change much. As this Court has long recognized, "Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law." *Butner v. United States*, 440 U.S. 48, 54, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979). So too with the Internal Revenue Code—it generally " 'creates no property rights.' " *United States v. National Bank of Commerce*, 472 U.S. 713, 722, 105 S.Ct. 2919, 86 L.Ed.2d 565 (1985) (quoting *United States v. Bess*, 357 U.S. 51, 55, 78 S.Ct. 1054, 2 L.Ed.2d 1135 (1958)). If special exceptions to these usual rules sometimes might be warranted, no one has explained why the distribution of a consolidated corporate tax refund should be among them.

Even if the Tenth Circuit's reliance on *Bob Richards*'s analytical framework was mistaken, the FDIC suggests we might affirm the court's judgment in this case anyway. The FDIC points out that the court of appeals proceeded to consult applicable state law—and the FDIC assures us its result follows naturally from state law. The FDIC also suggests that the IRS regulations concerning the appointment and duties of a corporate group's agent found in 26 CFR §§ 1.1502–77(a) and (d) tend to support the court of appeals's judgment. Unsurprisingly, Mr. Rodriguez disagrees with these assessments and contends that, absent *Bob Richards*, the Tenth Circuit would have reached a different outcome.

[14] Who is right about all this we do not decide. Some, maybe many, cases will come out the same way under state law or *Bob Richards*. But we did not take this case to decide how this case should be resolved under state law or to determine how IRS regulations might interact with state law. We took this case only to underscore the care federal courts should exercise before taking up an invitation to try their hand at common lawmaking. *Bob Richards* made the mistake of moving too quickly past important threshold questions at the heart of our separation of powers. It supplies no rule of decision, only a cautionary tale. Whether this case might yield the same or a different result without *Bob Richards* is a matter the court of appeals may consider on remand. See, *e.g.*, *Conkright v. Frommert*, 559 U.S. 506, 521–522, 130 S.Ct. 1640, 176 L.Ed.2d 469 (2010); *Travelers Casualty & Surety Co. of America v. Pacific Gas & Elec. Co.*, 549 U.S. 443, 455–456, 127 S.Ct. 1199, 167 L.Ed.2d 178 (2007); *Gonzales v. Duenas-Alvarez*,

549 U.S. 183, 194, 127 S.Ct. 815, 166 L.Ed.2d 683 (2007).

The judgment of the court of appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Michelle MONASKY, Petitioner

v.

Domenico TAGLIERI
No. 18-935

Supreme Court of the United States.

Argued December 11, 2019

Decided February 25, 2020

Background: Father filed petition under the Hague Convention on Civil Aspects of International Child Abduction, and its implementing statute, the International Child Abduction Remedies Act (ICARA), seeking return of his child to Italy. Following bench trial, the United States District Court for the Northern District of Ohio, No. 1:15-cv-00947, Solomon Oliver, Jr., Chief Judge, 2016 WL 10951269, granted petition. Mother appealed. The United States Court of Appeals for the Sixth Circuit, Boggs, Circuit Judge, 876 F.3d 868, affirmed. On rehearing en banc, the Court of Appeals, Sutton, Circuit Judge, 907 F.3d 404, affirmed. Certiorari was granted.

Holdings: The Supreme Court, Justice Ginsburg, held that:

(1) child's "habitual residence" under the Hague Convention depended on the totality of the circumstances specific to the case, not on actual agreement between the parents on where to raise their child, and

(2) first-instance habitual-residence determination under the Hague Convention was subject to deferential appellate review for clear error, abrogating *Mozes v. Mozes*, 239 F.3d 1067.

Affirmed.

Justice Thomas and Justice Alito filed opinions concurring in part and concurring in the judgment.

1. Child Custody ⚷804

Child's "habitual residence" under the Hague Convention on Civil Aspects of International Child Abduction, and its implementing statute, the International Child Abduction Remedies Act (ICARA), depended on the totality of the circumstances specific to the case, not on actual agreement between the parents on where to raise their child; the term "habitual residence" suggested fact-sensitive inquiry, not categorical one, clear trend existed among treaty partners to treat the "habitual residence" determination as fact-driven inquiry into particular circumstances of the case, and actual-agreement requirement would undermine Convention's aim to stop unilateral decisions to remove children across international borders. 22 U.S.C.A. § 9003(b).

2. Child Custody ⚷804

The determination of habitual residence under the Hague Convention on Civil Aspects of International Child Abduction, and its implementing statute, the International Child Abduction Remedies Act (ICARA), does not turn on the existence of an actual agreement between the parents on where to raise their child. 22 U.S.C.A. § 9003(b).

86 S.Ct. 511
Supreme Court of the United States

Gerald SEGAL, Individually and d/b/a Segal Cotton Products, et al., Petitioners,
v.
William J. ROCHELLE, Jr., Trustee.

No. 44.
|
Argued Nov. 17, 1965.
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Decided Jan. 18, 1966.

Synopsis
Bankruptcy proceeding, wherein the United States District Court for the Northern District of Texas, 221 F.Supp. 282, entered order upon determining that a loss-carryback belonged to the creditors rather than to the bankrupts and the bankrupts appealed. The United States Court of Appeals, Fifth Circuit, 336 F.2d 298, affirmed and certiorari was granted. The Supreme Court, Mr. Justice Harlan, held that, inasmuch as Texas court of equity could and would compel assignment of any loss-carryback refunds received by bankrupts from United States, bankrupts' claims for such loss-carryback refunds based on losses in year of bankruptcy were 'transferable' within section of Bankruptcy Act to effect that trustee of estate of bankrupt shall be vested with title of bankrupt to property which prior to filing of petition he could by any means have transferred and refund claims passed under the Act to the trustee.

Affirmed.

Attorneys and Law Firms

****513 *376** Henry Klepak, Dallas, Tex., for petitioners.

William J. Rochelle, Jr., Dallas, Tex., for respondent.

Opinion

Mr. Justice HARLAN delivered the opinion of the Court.

This case, presenting a difficult question of bankruptcy law on which the circuits have differed, arises out of the following facts. On September 27, 1961, voluntary bankruptcy petitions were filed in a federal court in Texas by Gerald Segal, Sam Segal, and their business partnership, Segal Cotton Products. A single trustee, Rochelle, was designated to serve in all three proceedings. After the close of that calendar year, loss-carryback tax refunds were sought and obtained from the United States on behalf of Gerald and Sam Segal under Internal Revenue Code s 172. The losses underlying the refunds had been suffered by the partnership during 1961 prior to the filing of the bankruptcy petitions; the losses were carried back to the years 1959 and 1960 to offset net income on which the Segals had both paid taxes. By agreement, Rochelle deposited the refunds in a special account, and the Segals applied to the referee in bankruptcy to award the refunds to them on the ground that bankruptcy had not passed the refund claims to the trustee.

***377** Concluding that the refund claims had indeed passed under s 70a(5) of the Bankruptcy Act[1] as 'property * * * ****514** which prior to the filing of the petition * * * (the bankrupt) could by any means have transferred,' the referee denied the Segals' application. The District Court affirmed the denial, and the Segals and their partnership appealed to the Court of Appeals for the Fifth Circuit.[2] That court too rejected the Segals' contention.

As the Court of Appeals here recognized, the Court of Appeals for the First Circuit in Fournier v. Rosenblum, 318 F.2d 525, and the Court of Appeals for the Third Circuit in In re Sussman, 289 F.2d 76, have both ruled squarely that a bankrupt's loss-carryback refund claims based on losses in the year of bankruptcy do not pass to the trustee but instead the bankrupt is entitled to the refunds when they are ultimately paid. Concededly, under s 70a(5) the trustee must acquire the bankrupt's 'property' as of the date the petition is filed and property subsequently acquired belongs to the bankrupt. See note 1, supra; 4 Collier, Bankruptcy 70.09 (14th ed. 1962). Since the tax laws allow a loss-carryback refund claim to be made only when the year ***378** has closed, see I.R.C. ss 172(a), (c), 6411, both the First and Third Circuits reasoned that prior to the year's end a loss-carryback refund claim was too tenuous to be classed as 'property' which would pass under s 70a(5). Alternatively, the Third Circuit stated that because of the federal anti-assignment statute,[3] inchoate refund claims were not in any event property 'which prior to the filing of the petition * * * (the bankrupt) could by any means have transferred,' as s 70a(5) also requires. Both circuits felt the result to be unfortunate, not least because the very losses generating the refunds often help precipitate the bankruptcy and injury to the creditors, but both believed the statutory language left no option.

After detailed discussion of the problems, the Court of Appeals in this case resolved that the loss-carryback refund

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claims were both ‘property’ and ‘transferable’ at the time of the bankruptcy petition and hence had passed to the trustee. 336 F.2d 298. We granted certiorari because of the conflict and the significance of the issue in bankruptcy administration.[4] 380 U.S. 931, 85 S.Ct. 939, 13 L.Ed.2d 819. ***379** Conceding the question to be close, we are persuaded by the reasoning of the Fifth Circuit and we affirm its decision.

****515** I.

We turn first to the question whether on the date the bankruptcy petitions were filed, the potential claims for loss-carryback refunds constituted ‘property’ as s 70a(5) employs that term. Admittedly, in interpreting this section ‘(i)t is impossible to give any categorical definition to the word ‘property,’ nor can we attach to it in certain relations the limitations which would be attached to it in others.’ Fisher v. Cushman, 1 Cir., 103 F. 860, 864, 51 L.R.A. 292. Whether an item is classed as ‘property’ by the Fifth Amendment's Just-Compensation Clause or for purposes of a state taxing statute cannot decide hard cases under the Bankruptcy Act, whose own purposes must ultimately govern.

The main thrust of s 70a(5) is to secure for creditors everything of value the bankrupt may possess in alienable or leviable form when he files his petition. To this end the term ‘property’ has been construed most generously and an interest is not outside its reach because it is novel or contingent or because enjoyment must be postponed. E.g., Horton v. Moore, 6 Cir., 110 F.2d 189 (contingent, postponed interest in a trust); Kleinschmidt v. Schroeter, 9 Cir., 94 F.2d 707 (limited interest in future profits of a joint venture); see 3 Remington, Bankruptcy ss 1177—1269 (Henderson ed. 1957). However, limitations on the term do grow out of other purposes of the Act; one purpose which is highly prominent and is relevant in this case is to leave the bankrupt free after the date of his petition to accumulate new wealth in the future. Accordingly, future wages of the bankrupt do not constitute ‘property’ at the time of bankruptcy nor, analogously, does an intended bequest to him or a promised gift—even though state law might permit all of these ***380** to be alienated in advance. E.g., In re Coleman, 87 F.2d 753; see 4 Collier, Bankruptcy 70.09, 70.27 (14th ed. 1962). Turning to the loss-carryback refund claim in this case, we believe it is sufficiently rooted in the pre-bankruptcy past and so little entangled with the bankrupts' ability to make an unencumbered fresh start that it should be regarded as ‘property’ under s 70a(5).

Temporally, two key elements pointing toward realization of a refund existed at the time these bankruptcy petitions were filed: taxes had been paid on net income within the past three years, and the year of bankruptcy at that point exhibited a net operating loss. The **Segals** stress in this Court that under the statutory scheme no refund could be claimed from the Government until the end of the year, but as cases already cited indicate, postponed enjoyment does not disqualify an interest as ‘property.’ That earnings by the bankrupt after filing the petition might diminish or eliminate the loss-carryback refund claim does further qualify the interest, but we have already noted that contingency in the abstract is no bar and the actual risk that the refund claims may be erased is quite far from a certainty.[5] Unlike a pre-bankruptcy promise of a gift or bequest, passing title to the trustee does not make it unlikely the gift or bequest will be effected. Nor does passing the claim hinder the bankrupt from starting out on a clean slate, for any administrative inconvenience to the bankrupt will not be prolonged, see 110 U.Pa.L.Rev., at 279—280, and the bankrupt without a refund claim to preserve has more reason to earn income rather than less.

***381** We are told that if this loss-carryback refund claim is ‘property,’ that label ****516** must also attach to loss-carryovers, that is, the application of pre-bankruptcy losses to earnings in future years. Since losses may be carried forward five years and in some cases even seven or ten years, I.R.C. ss 172(b)(1)(B)—(D), great hardship for the estate is foreseen by petitioners in keeping it open for this length of time. While in fact the trustee can obviate this detriment to the estate—by selling a contingent claim in some instances or simply forgoing it—inconvenience and hindrance might be caused for the bankrupt individual. Without ruling in any way on a question not before us, it is enough to say that a carryover into post-bankruptcy years can be distinguished conceptually as well as practically. The bankrupts in this case had both prior net income and a net loss when their petitions were filed and apparently would have deserved an immediate refund had their tax year terminated on that date; by contrast, the supposed loss-carryover would still need to be matched in some future year by earnings, earnings that might never eventuate at all.

II.

Having concluded that the loss-carryback refund claims in this case constituted ‘property’ at the time of the bankruptcy petitions, it remains for us to decide whether in addition they were property ‘which prior to the filing of the petition * * * (the bankrupt) could by any means have transferred * * *.’[6] The prime obstacle ***382** to an affirmative answer is 31 U.S.C. s 203, which renders ‘absolutely null and void’ all transfers of any claim against the United States unless among other conditions the claim has been allowed and the amount ascertained. See n. 3,

supra. Plainly since the tax laws calculate the refund only on the full year's experience after the year has closed, the claims in the present instance could not have been allowed or ascertained at the time the petitions were filed.

The respondent argues that the transferability requirement of s 70a(5) can be met by relying on the long-established rule that s 203 does not apply to prevent transfers by 'operation of law.' See United States v. Aetna Cas. & Surety Co., 338 U.S. 366, 373—374, 70 S.Ct. 207, 211—212, 94 L.Ed. 171; Goodman v. Niblack, 102 U.S. 556, 560, 26 L.Ed. 229.[7] The phrasing of s 70a(5), however, suggests that it contemplates a voluntary transfer and is not satisfied simply because property could have been transferred by operation of law, such as by death, bankruptcy, or judicial process. Not only is there practically no form of property that would not be transferable under the broader reading, but such a reading also makes redundant the alternative route for complying with s 70a(5) through showing that the property 'might have been levied upon and sold under judicial process * * *.'[8] Admittedly, ****517** the Bankruptcy Act defines the word 'transfer' in its general definitional section to include at least certain transfers that are 'involuntary,' ***383** [9] but legislative history indicates that the introduction of this latter term into the Act 40 years after its framing was not aimed at s 70a(5) at all. See H.R.Rep. No. 1409, 75th Cong., 1st Sess., p. 5; Analysis of H.R. 12889, 74th Cong., 2d Sess., p. 7 House Judiciary (Comm. Print).

Difficulty in defining the term 'transfer' is enhanced by the absence of any explanation for Congress' having made transferability a condition in the first place. Bankruptcy Acts prior to the present one enacted in 1898 had no like limitation on the trustee's succession to property, see Bankruptcy Acts of 1867, s 14, 14 Stat. 522; of 1841, s 3, 5 Stat. 442; and of 1800, ss 5, 13, 2 Stat. 23, 25, and under the predecessor Act claims against the Government passed without impediment to the trustee. See, e.g., Erwin v. United States, 97 U.S. 392, 24 L.Ed. 1065. This history and the chance that the 1898 limitation sought only to respect state policies against alienating property such as a contingent remainder or spendthrift trust fund argue for flatly ignoring the limitation in this instance. See 14 Stan.L.Rev., at 383—386. Nevertheless, we have been shown no legislative history on the point, and an uncertain guess at Congress' intent provides dubious ground for disregarding its plain language. In any event, we are not prepared to accept this argument, just as we cannot now go beyond a narrow definition of the term 'transfer,' in a case in which these points have not been thoroughly briefed by the parties.

***384** The Court of Appeals determined that despite s 203 a sufficient voluntary transfer of the loss-carryback refund claim could have been made prior to bankruptcy to satisfy s 70a(5), and on balance we share this view. In Martin v. National Surety Co., 300 U.S. 588, 596, 57 S.Ct. 531, 534—535, 81 L.Ed. 822, a unanimous Court held that s 203, in spite of its broad language, 'must be interpreted in the light of its purpose to give protection to the Government' so that between the parties effect might still be given to an assignment that failed to comply with the statute. The opinion reasoned that after claims have been collected by the assignor, requiring compliance with the invalid assignment by transfer of the recovery to the assignee presented no danger that the Government might become 'embroiled in conflicting claims, with delay and embarrassment and the chance of multiple liability.' 300 U.S., at 594, 57 S.Ct. at 534. While other circumstances encouraged Martin to uphold the assignment and this Court has not faced the problem head-on since that time, we find no reason to retreat now from the basic holding in Martin which was both anticipated and followed by a number of other courts, state and federal. See California Bank v. United States Fid. & Guar. Co., 9 Cir., 129 F.2d 751; Royal Indem. Co. v. United States, 93 F.Supp. 891, 117 Ct.Cl. 736; Leonard v. Whaley, 91 Hun 304, 36 N.Y.S. 147; Ann., 12 A.L.R.2d 460, 468—475 (1950). Among these States is Texas, whose precedents leave little doubt that an assignment of the claims at issue would be enforced in equity in the normal case. Trinity Univ. Ins. Co. v. First State Bank, 143 Tex. 164, 183 S.W.2d 422; see ****518** United Hay Co. v. Ford, 124 Tex. 213, 76 S.W.2d 480 (dictum).

It should not be pretended that this contemplated 'transfer' is one in the fullest sense that term permits. For example, this Court has ruled that one holding a claim invalidly assigned under s 203 may not sue the Government upon it though he join his assignor as well. ***385** United States v. Shannon, 342 U.S. 288, 72 S.Ct. 281, 286, 96 L.Ed. 321. Yet it remains true that a Texas court of equity could and would compel the assignment of any refund received, if indeed it might not try to compel a reluctant assignor to collect the claim or make it over by a valid assignment when that became possible. This, we believe, suffices to make the **Segals**' claims transferable within the meaning of s 70a(5). Cf. 4 Collier, Bankruptcy 70.37, at 1293, n. 6 (14th ed. 1962).

Affirmed.

All Citations

382 U.S. 375, 86 S.Ct. 511, 15 L.Ed.2d 428, 17 A.F.T.R.2d 163, 66-1 USTC P 9173

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Footnotes

1 30 Stat. 565, as amended, 11 U.S.C. s 110(a)(5) (1964 ed.). In relevant part that section provides: '(a) The trustee of the estate of a bankrupt * * * shall * * * be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located * * * (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered * * *.'

2 The wife of Gerald Segal and the estate of the deceased wife of Sam Segal had unsuccessfully urged before the referee their own contingent rights to half the refunds, but review on this issue was not sought.

3 Rev.Stat. s 3477, as amended, 31 U.S.C. s 203 (1964 ed.). The section, so far as relevant, states: 'All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor * * * shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof.'

4 Considerable commentary has been directed to the problem. Practically all the writers agree that it is desirable for the trustee to receive the refunds although a minority contend that existing law will not permit this result. See Herzog, Bankruptcy Law—Modern Trends, 36 Ref.J. 18 (1962); 60 Nw.U.L.Rev. 122 (1965); 40 Notre Dame Law 118 (1964); 14 Stan.L.Rev. 380 (1962); 40 Tex.L.Rev. 569 (1962); 42 Tex.L.Rev. 542 (1964); 17 U.Fla.L.Rev. 241 (1964); 16 U.Miami L.Rev. 345 (1961); 110 U.Pa.L.Rev. 275 (1961).

5 So far as losses by the bankrupt after filing but before the year's end might increase the refund—a situation not claimed to be present in this case—the Court of Appeals suggested '(a) proration of the refund in the ratio of the losses before and after the filing date would be indicated * * *.' 336 F.2d, at 302, n. 5.

6 The 'choice of law' rules relevant to this question are not in dispute. What would constitute a 'transfer' is a matter of federal law. 4 Collier, Bankruptcy 70.15, at 1035—1036 and n. 25 (14th ed. 1962). Whether an item could have been so transferred is determined generally by state law, save that on rare occasions overriding federal law may control this determination or bear upon it. Id., at 1034—1035 and n. 22. The Segals were Texas residents, the business was apparently based in Texas, and the bankruptcy court was located there; no other State's law is claimed to be relevant.

7 This exception is the simplest reason why s 203 does not interfere with the vesting in the trustee of property coming within s 70a(5), for all transfers under s 70a are explicitly by 'operation of law,' see n. 1, supra; but of course property must still qualify as transferable within the meaning of s 70a(5).

8 See n. 1, supra. The respondent has not argued that under Texas law the Segals' inchoate refund claims would be subject to such judicial process, and apparently in Texas the claims' contingent status would render this argument quite doubtful. See 26 Tex.Jur.2d, Garnishment s 17 (1961), and cases there cited.

9 Bankruptcy Act s 1(30), as amended by the Chandler Act, 52 Stat. 842, as amended, 11 U.S.C. s 1(30) (1964 ed.), pertinently reads: "Transfer' shall include the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage, lien, encumbrance, gift, security or otherwise * * *.'

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114 S.Ct. 2048
Supreme Court of the United States

O'MELVENY & MYERS, Petitioner,
v.
FEDERAL DEPOSIT INSURANCE CORPORATION as Receiver for American Diversified Savings Bank et al.

No. 93–489.
|
Argued March 21, 1994.
|
Decided June 13, 1994.

Synopsis

Federal Deposit Insurance Corporation (FDIC), as receiver for failed savings and loan (S&L), sued former counsel of S&L for legal malpractice and breach of fiduciary duty regarding counsel's advice and services in connection with public offerings. The United States District Court for the Central District of California, Terry J. Hatter, Jr., J., granted summary judgment for law firm on ground that FDIC stood in shoes of S&L to whom wrongdoing of insiders was attributed so as to preclude any claims against law firm. FDIC appealed. The Court of Appeals for the Ninth Circuit, Poole, Circuit Judge, 969 F.2d 744,reversed and remanded ruling that officers' inequitable conduct, even if attributable to S&L, was not imputed to FDIC so as to preclude legal malpractice action. Law firm petitioned for writ of certiorari. The Supreme Court, Justice Scalia, granted writ and held that: (1) California law, rather than federal law, governs imputation of corporate officer's knowledge of fraud to corporation asserting cause of action created by state law; (2) California law, rather than federal law, applied to whether knowledge of fraudulent conduct of S&L's officers could be imputed to FDIC suing as receiver; and (3) even if Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) was inapplicable to instant receivership which began prior to effective date of FIRREA, judicial creation of special federal rule of imputation with respect to FDIC would not be justified absent any significant conflict between federal policy or interest and use of state law.

Reversed and remanded.

Stevens, J., concurred and filed opinion joined by Blackmun, O'Connor, and Souter, JJ.

****2050** *Syllabus*[*]

Respondent Federal Deposit Insurance Corporation (FDIC), receiver for an insolvent California savings and loan (S & L), caused the S & L to make refunds to investors in certain fraudulent real estate syndications in which the S & L had been represented by petitioner law firm. The FDIC filed suit against petitioner in the Federal District Court and alleged state causes of action for ****2051** professional negligence and breach of fiduciary duty. Petitioner moved for summary judgment, alleging, *inter alia,* that knowledge of the fraudulent conduct of the S & L's officers must be imputed to the S & L, and hence to the FDIC, which, as receiver, stood in the S & L's shoes; and thus the FDIC was estopped from pursuing its tort claims. The court granted the motion, but the Court of Appeals reversed, indicating that a federal common-law rule of decision controlled.

Held: The California rule of decision, rather than a federal rule, governs petitioner's tort liability. Pp. 2052–2056.

(a) State law governs the imputation of corporate officers' knowledge to a corporation that is asserting causes of action created by state law. There is no federal general common law, *Erie R. Co. v. Tompkins,* 304 U.S. 64, 78, 58 S.Ct. 817, 822, 82 L.Ed. 1188, and the remote possibility that corporations may go into federal receivership is no conceivable basis for adopting a special federal common-law rule divesting States of authority over the entire law of imputation. Pp. 2052–2053.

(b) California law also governs the narrower question whether corporate officers' knowledge can be imputed to the FDIC suing as receiver. This Court will not adopt a judge-made federal rule to supplement comprehensive and detailed federal statutory regulation; matters left unaddressed in such a scheme are presumably left to state law. Title 12 U.S.C. § 1821(d)(2)(A)(i)—which states that "the [FDIC] shall, ... by operation of law, succeed to—all rights, titles, powers, and privileges of the insured depository institution"—places the FDIC in the insolvent S & L's shoes to pursue its claims under state law, except where some provision in the extensive framework of the Financial Institutions Reform, ***80** Recovery, and Enforcement Act of 1989 (FIRREA) specifically creates a special federal rule of decision. Pp. 2053–2054.

(c) Judicial creation of a special federal rule would not be justified even if FIRREA is inapplicable to the instant receivership, which began in 1986. Instances where a special federal rule is warranted are few and restricted, limited to situations where there is a significant conflict between some federal policy or interest and the use of state law. The FDIC has identified no significant conflict here,

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not even one implicating the most lightly invoked federal interest: uniformity. Pp. 2054–2056.

969 F.2d 744 (CA 9 1992), reversed and remanded.

SCALIA, J., delivered the opinion for a unanimous Court. STEVENS, J., filed a concurring opinion, in which BLACKMUN, O'CONNOR, and SOUTER, JJ., joined, *post,* p. 2056.

Attorneys and Law Firms

Rex Lee, for petitioner.

Paul Bender, for respondents.

Opinion

Justice SCALIA delivered the opinion of the Court.

The issue in this case is whether, in a suit by the Federal Deposit Insurance Corporation (FDIC) as receiver of a federally ***81** insured bank, it is a federal-law or rather a state-law rule of decision that governs the tort liability of attorneys who provided services to the bank.

I

American Diversified Savings Bank (ADSB or S & L) is a California-chartered and federally insured savings and loan. The following facts have been stipulated to, or are uncontroverted, by the parties to the case, and we assume them to be true for purposes of our decision. ADSB was acquired in 1983 by Ranbir Sahni and Lester Day, who respectively obtained 96% and 4% of its stock, and who respectively served as its chairman/CEO and president. Under their leadership, ADSB engaged in many risky real estate transactions, principally through limited partnerships sponsored by ADSB and its subsidiaries. Together, Sahni and Day also fraudulently overvalued ADSB's assets, engaged ****2052** in sham sales of assets to create inflated "profits," and generally "cooked the books" to disguise the S & L's dwindling (and eventually negative) net worth.

In September 1985, petitioner O'Melveny & Myers, a Los Angeles-based law firm, represented ADSB in connection with two real estate syndications. At that time, ADSB was under investigation by state and federal regulators, but that fact had not been made public. In completing its work for the S & L, petitioner did not contact the accounting firms that had previously done work for ADSB, nor state and federal regulatory authorities, to inquire about ADSB's financial status. The two real estate offerings on which petitioner worked closed on December 31, 1985. On February 14, 1986, federal regulators concluded that ADSB was insolvent and that it had incurred substantial losses because of violations of law and unsound business practices. Respondent stepped ***82** in as receiver for ADSB,[1] and on February 19, 1986, filed suit against Messrs. Sahni and Day in Federal District Court, alleging breach of fiduciary duty and, as to Sahni, Racketeer Influenced and Corrupt Organizations Act violations. Soon after taking over as receiver, respondent began receiving demands for refunds from investors who claimed that they had been deceived in connection with the two real estate syndications. Respondent caused ADSB to rescind the syndications and to return all of the investors' money plus interest.

On May 12, 1989, respondent sued petitioner in the United States District Court for the Central District of California, alleging professional negligence and breach of fiduciary duty. The parties stipulated to certain facts and petitioner moved for summary judgment, arguing that (1) it owed no duty to ADSB or its affiliates to uncover the S & L's own fraud; (2) that knowledge of the conduct of ADSB's controlling officers must be imputed to the S & L, and hence to respondent, which, as receiver, stood in the shoes of the S & L; and (3) that respondent was estopped from pursuing its tort claims against petitioner because of the imputed knowledge. On May 15, 1990, the District Court granted summary judgment, explaining only that petitioner was "entitled to judgment in its favor ... as a matter of law." The Court of Appeals for the Ninth Circuit reversed, on grounds that we shall discuss below. 969 F.2d 744 (1992). Petitioner filed a petition for writ of certiorari, which we granted. 510 U.S. 989, 114 S.Ct. 543, 126 L.Ed.2d 445 (1993).

***83** II

It is common ground that the FDIC was asserting in this case causes of action created by California law. Respondent contends that in the adjudication of those causes of action (1) a federal common-law rule and not California law determines whether the knowledge of corporate officers acting against the corporation's interest will be imputed to the corporation; and (2) even if California law determines the former question, federal common law determines the more narrow question whether knowledge by officers so acting will be imputed to the FDIC when it sues as receiver of the corporation.[2]

The first of these contentions need not detain us long, as

it is so plainly wrong. ****2053** "There is no federal general common law," *Erie R. Co. v. Tompkins,* 304 U.S. 64, 78, 58 S.Ct. 817, 822, 82 L.Ed. 1188 (1938), and (to anticipate somewhat a point we will elaborate more fully in connection with respondent's second contention) the remote possibility that corporations may go into federal receivership is no conceivable basis for adopting a special federal common-law rule divesting States of authority over the entire law of imputation. See *Bank of America Nat. Trust & Sav. Assn. v. Parnell,* 352 U.S. 29, 33–34, 77 S.Ct. 119, 121–122, 1 L.Ed.2d 93 (1956). The Ninth Circuit believed that its conclusion on this point was in harmony with *Schacht v. Brown,* 711 F.2d 1343 (CA7 1983), *Cenco Inc. v. Seidman & Seidman,* 686 F.2d 449 (CA7 1982), and *In re Investors Funding Corp. of N.Y. Securities Litigation,* 523 F.Supp. 533 (SDNY 1980), 969 F.2d, at 750, but even a cursory examination of those cases shows the contrary. In *Cenco,* where the cause of action similarly arose under state common law, the Seventh Circuit's analysis of ***84** the "circumstances under which the knowledge of fraud on the part of the plaintiff's directors [would] be imputed to the plaintiff corporation [was] merely an attempt to divine how Illinois courts would decide that issue." *Schacht, supra,* at 1347 (citing *Cenco, supra,* at 455). Likewise, in *Investors Funding,* the District Court analyzed the potential affirmative defenses to the state-law claims by applying "[t]he controlling legal principles [of] New York law." 523 F.Supp., at 540. In *Schacht,* the Seventh Circuit expressly noted that "the cause of action [at issue] arises under RICO, a federal statute; we therefore write on a clean slate and may bring to bear federal policies in deciding the estoppel question." 711 F.2d, at 1347.

In seeking to defend the Ninth Circuit's holding, respondent contends (to quote the caption of its argument) that "The Wrongdoing Of ADSB's Insiders Would Not Be Imputed To ADSB Under Generally Accepted Common Law Principles," Brief for Respondent 12—in support of which it attempts to show that nonattribution to the corporation of dishonest officers' knowledge is the rule applied in the vast bulk of decisions from 43 jurisdictions, ranging from Rhode Island to Wyoming. See, *e.g., id.,* at 21–22, n. 9 (distinguishing, *inter alia, Cook v. American Tubing & Webbing Co.,* 28 R.I. 41, 65 A. 641 (1905), and *American Nat. Bank of Powell v. Foodbasket,* 497 P.2d 546 (Wyo.1972)). The supposed relevance of this is set forth in a footnote: "It is our position that federal common law does govern this issue, but that the content of the federal common law rule corresponds to the rule that would independently be adopted by most jurisdictions." Brief for Respondent 15, n. 3. If there were a federal common law on such a generalized issue (which there is not), we see no reason why it would necessarily conform to that "independently ... adopted by most jurisdictions." But the short of the matter is that California law, not federal law, governs the imputation of knowledge to corporate victims of ***85** alleged negligence, and that is so whether or not California chooses to follow "the majority rule."

We turn, then, to the more substantial basis for the decision below, which asserts federal pre-emption not over the law of imputation generally, but only over its application to the FDIC suing as receiver. Respondent begins its defense of this principle by quoting *United States v. Kimbell Foods, Inc.,* 440 U.S. 715, 726, 99 S.Ct. 1448, 1457, 59 L.Ed.2d 711 (1979), to the effect that "federal law governs questions involving the rights of the United States arising under nationwide federal programs." But the FDIC is not the United States, and even if it were we would be begging the question to assume that it was asserting its *own* rights rather than, as receiver, the rights of ADSB. In any event, knowing whether "federal law governs" in the *Kimbell Foods* sense—a sense which includes federal adoption of state-law rules, see *id.,* at 727–729, 99 S.Ct. at 1457–1459—does not much advance the ball. The issue in the present case is whether the California rule of decision is to be applied to the issue of imputation or displaced, and if it *is* applied it is of only theoretical interest whether the basis for that ****2054** application is California's own sovereign power or federal adoption of California's disposition. See *Boyle v. United Technologies Corp.,* 487 U.S. 500, 507, n. 3, 108 S.Ct. 2510, 2516, n. 3, 101 L.Ed.2d 442 (1988).

In answering the central question of displacement of California law, we of course would not contradict an explicit federal statutory provision. Nor would we adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law. See *Northwest Airlines, Inc. v. Transport Workers,* 451 U.S. 77, 97, 101 S.Ct. 1571, 1583–1584, 67 L.Ed.2d 750 (1981); *Milwaukee v. Illinois,* 451 U.S. 304, 319, 101 S.Ct. 1784, 1793, 68 L.Ed.2d 114 (1981). Petitioner asserts that both these principles apply in the present case, by reason of 12 U.S.C. § 1821(d)(2)(A)(i) (1988 ed., Supp. IV), and the comprehensive legislation of which it is a part, the Financial Institutions ***86** Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub.L. 101–73, 103 Stat. 183.

Section 1821(d)(2)(A)(i), which is part of a title captioned "Powers and duties of [the FDIC] as ... receiver," states that "the [FDIC] shall, ... by operation of law, succeed to—all rights, titles, powers, and privileges of the insured depository institution...." 12 U.S.C. § 1821(d)(2)(A)(i) (1988 ed., Supp. IV). This language appears to indicate that

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the FDIC as receiver "steps into the shoes" of the failed S & L, cf. *Coit Independence Joint Venture v. FSLIC,* 489 U.S. 561, 585, 109 S.Ct. 1361, 1374, 103 L.Ed.2d 602 (1989), obtaining the rights "*of* the insured depository institution" that existed prior to receivership. Thereafter, in litigation by the FDIC asserting the claims *of* the S & L—in this case California tort claims potentially defeasible by a showing that the S & L's officers had knowledge—" 'any defense good against the original party is good against the receiver.' " 969 F.2d, at 751 (quoting *Allen v. Ramsay,* 179 Cal.App.2d 843, 854, 4 Cal.Rptr. 575, 583 (1960)).

Respondent argues that § 1821(d)(2)(A)(i) should be read as a *nonexclusive* grant of rights to the FDIC receiver, which can be supplemented or modified by federal common law; and that FIRREA as a whole, by demonstrating the high federal interest in this area, confirms the courts' authority to promulgate such common law. This argument is demolished by those provisions of FIRREA which specifically create special federal rules of decision regarding claims by, and defenses against, the FDIC as receiver. See 12 U.S.C. § 1821(d)(14) (1988 ed., Supp. IV) (extending statute of limitations beyond period that might exist under state law); §§ 1821(e)(1), (3) (precluding state-law claims against the FDIC under certain contracts it is authorized to repudiate); § 1821(k) (permitting claims against directors and officers for gross negligence, regardless of whether state law would require greater culpability); § 1821(d)(9) (excluding certain state-law claims against FDIC based on oral agreements by the S & L). *Inclusio unius, exclusio alterius.* It is hard to ***87** avoid the conclusion that § 1821(d)(2)(A)(i) places the FDIC in the shoes of the insolvent S & L, to work out its claims under state law, except where some provision in the extensive framework of FIRREA provides otherwise. To create additional "federal common-law" exceptions is not to "supplement" this scheme, but to alter it.

We have thought it necessary to resolve the effect of FIRREA because respondent argued that the statute not only did not prevent but positively authorized federal common law. We are reluctant to rest our judgment on FIRREA alone, however, since that statute was enacted into law in 1989, while respondent took over as receiver for ADSB in 1986. The FDIC is willing to "assume ... that FIRREA would have taken effect in time to be relevant to this case," Brief for Respondent 35, n. 21, but it is not self-evident that that assumption is correct. See *Landgraf v. USI Film Products,* 511 U.S. 244, 268–270, 274, 114 S.Ct. 1483, 1498–1499, 1502, 128 L.Ed.2d 229 (1994); cf. *id.,* at 290–291, 114 S.Ct. 1522, at 1524 (SCALIA, J., ****2055** concurring in judgment). It seems to us imprudent to resolve the retroactivity question without briefing, and inefficient to pretermit the retroactivity issue on the basis of the FDIC's concession, since that would make our decision of limited value in other cases. As we proceed to explain, even assuming the inapplicability of FIRREA this is not one of those cases in which judicial creation of a special federal rule would be justified.

Such cases are, as we have said in the past, "few and restricted," *Wheeldin v. Wheeler,* 373 U.S. 647, 651, 83 S.Ct. 1441, 1445, 10 L.Ed.2d 605 (1963), limited to situations where there is a "significant conflict between some federal policy or interest and the use of state law." *Wallis v. Pan American Petroleum Corp.,* 384 U.S. 63, 68, 86 S.Ct. 1301, 1304, 16 L.Ed.2d 369 (1966). Our cases uniformly require the existence of such a conflict as a precondition for recognition of a federal rule of decision. See, *e.g., Kamen v. Kemper Financial Services, Inc.,* 500 U.S. 90, 98, 111 S.Ct. 1711, 1717, 114 L.Ed.2d 152 (1991); *Boyle, supra,* 487 U.S., at 508, 108 S.Ct., at 2516; *Kimbell Foods,* 440 U.S., at 728, 99 S.Ct., at 1458. Not only the permissibility but also the scope of judicial displacement of state rules ***88** turns upon such a conflict. See, *e.g., Kamen, supra,* 500 U.S., at 98, 111 S.Ct., at 1717; *Boyle, supra,* 487 U.S., at 508, 108 S.Ct., at 2516. What is fatal to respondent's position in the present case is that it has identified *no* significant conflict with an identifiable federal policy or interest. There is not even at stake that most generic (and lightly invoked) of alleged federal interests, the interest in uniformity. The rules of decision at issue here do not govern the primary conduct of the United States or any of its agents or contractors, but affect only the FDIC's rights and liabilities, as receiver, with respect to primary conduct on the part of private actors that has already occurred. Uniformity of law might facilitate the FDIC's nationwide litigation of these suits, eliminating state-by-state research and reducing uncertainty—but if the avoidance of those ordinary consequences qualified as an identifiable federal interest, we would be awash in "federal common-law" rules. See *United States v. Yazell,* 382 U.S. 341, 347, n. 13, 86 S.Ct. 500, 504, n. 13, 15 L.Ed.2d 404 (1966).

The closest respondent comes to identifying a specific, concrete federal policy or interest that is compromised by California law is its contention that state rules regarding the imputation of knowledge might "deplet [e] the deposit insurance fund," Brief for Respondent 32. But neither FIRREA nor the prior law sets forth any anticipated level for the fund, so what respondent must mean by "depletion" is simply the forgoing of *any* money which, under any *conceivable* legal rules, might accrue to the fund. That is a broad principle indeed, which would support not just elimination of the defense at issue here, but judicial creation of new, "federal-common-law" causes of action to enrich the fund. Of course we have no authority to do that,

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because there is no federal policy that the fund should always win. Our cases have previously rejected "more money" arguments remarkably similar to the one made here. See *Kimbell Foods, supra,* 440 U.S., at 737–738, 99 S.Ct., at 1463–1464; *Yazell, supra,* 382 U.S., at 348, 86 S.Ct., at 504; cf. *Robertson v. Wegmann,* 436 U.S. 584, 593, 98 S.Ct. 1991, 1996, 56 L.Ed.2d 554 (1978).

***89** Even less persuasive—indeed, positively probative of the dangers of respondent's facile approach to federal-common-law-making—is respondent's contention that it would "disserve the federal program" to permit California to insulate "the attorney's or accountant's malpractice," thereby imposing costs "on the nation's taxpayers, rather than on the negligent wrongdoer." Brief for Respondent 32. By presuming to judge what constitutes malpractice, this argument demonstrates the runaway tendencies of "federal common law" untethered to a genuinely identifiable (as opposed to judicially constructed) federal policy. What sort of tort liability to impose on lawyers and accountants in general, and on lawyers and accountants who provide services to federally insured financial institutions in particular, ****2056** " 'involves a host of considerations that must be weighed and appraised,' " *Northwest Airlines, Inc.,* 451 U.S., at 98, n. 41, 101 S.Ct., at 1584, n. 41 (quoting *United States v. Gilman,* 347 U.S. 507, 512–513, 74 S.Ct. 695, 698, 98 L.Ed. 898 (1954))—including, for example, the creation of incentives for careful work, provision of fair treatment to third parties, assurance of adequate recovery by the federal deposit insurance fund, and enablement of reasonably priced services. Within the federal system, at least, we have decided that that function of weighing and appraising " 'is more appropriately for those who write the laws, rather than for those who interpret them.' " *Northwest Airlines, supra,* 451 U.S., at 98, n. 41, 101 S.Ct., at 1584, n. 41 (quoting *Gilman, supra,* 347 U.S., at 513, 74 S.Ct., at 698).

We conclude that this is not one of those extraordinary cases in which the judicial creation of a federal rule of decision is warranted. As noted earlier, the parties are in agreement that if state law governs it is the law of California; but they vigorously disagree as to what that law provides. We leave it to the Ninth Circuit to resolve that point. The judgment is reversed and the case remanded for proceedings consistent with this opinion.

So ordered.

***90** Justice STEVENS, with whom Justice BLACKMUN, Justice O'CONNOR, and Justice SOUTER join, concurring.

While I join the Court's opinion, I add this comment to emphasize an important difference between federal courts and state courts. It would be entirely proper for a state court of general jurisdiction to fashion a rule of agency law that would protect creditors of an insolvent corporation from the consequences of wrongdoing by corporate officers even if the corporation itself, or its shareholders, would be bound by the acts of its agents. Indeed, a state court might well attach special significance to the fact that the interests of taxpayers as well as ordinary creditors will be affected by the rule at issue in this case. Federal courts, however, "unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers." *Northwest Airlines, Inc. v. Transport Workers,* 451 U.S. 77, 95, 101 S.Ct. 1571, 1582, 67 L.Ed.2d 750 (1981). Because state law provides the basis for respondent FDIC's claim, that law also governs both the elements of the cause of action and its defenses. Unless Congress has otherwise directed, the federal court's task is merely to interpet and apply the relevant rules of state law.

Cases like this one, however, present a special problem. They raise issues, such as the imputation question here, that may not have been definitively settled in the state jurisdiction in which the case is brought, but that nevertheless must be resolved by federal courts. The task of the federal judges who confront such issues would surely be simplified if Congress had provided them with a uniform federal rule to apply. As matters stand, however, federal judges must do their best to estimate how the relevant state courts would perform their lawmaking task, and then emulate that sometimes purely hypothetical model. The Court correctly avoids any suggestion about how the merits of the imputation issue should be resolved on remand or in similar cases that may arise elsewhere. "The federal judges who deal ***91** regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues." *Butner v. United States,* 440 U.S. 48, 58, 99 S.Ct. 914, 919, 59 L.Ed.2d 136 (1979).

All Citations

512 U.S. 79, 114 S.Ct. 2048, 129 L.Ed.2d 67, 62 USLW 4487

Footnotes

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* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 For simplicity's sake, we refer to a "receiver" throughout, which we identify as the FDIC. The reality was more complicated. The first federal entity involved was the Federal Savings and Loan Insurance Corporation (FSLIC), which was appointed conservator of ADSB in 1986 and receiver in June 1988. The Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub.L. 101–73, 103 Stat. 183, abolished FSLIC, and caused FDIC, the manager of the FSLIC resolution fund, to be substituted as receiver and party to this case. See *id.,* §§ 215, 401(a)(1), 401(f)(2).

2 The Court of Appeals appears to have agreed with the first of these contentions. Instead of the second, however, it embraced the proposition that federal common law prevents the attributed knowledge of corporate officers acting against the corporation's interest from being used as the basis for an estoppel defense against the FDIC as receiver. Since there is nothing but a formalistic distinction between this argument and the second one described in text, we do not treat it separately.

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