Bankruptcy Theory and the Acceptance of Ambiguity

by

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We rarely notice it, but in much of our daily experience there is an indeterminate and flexible relationship between wholes and their parts. Almost any given phenomenon can be viewed as being a whole in and of itself, or as a collection of parts. For example, on a given evening while we are stuck in our cars during rush-hour, we may look around us and notice “traffic.” But on the next evening, in exactly the same rush-hour circumstances, we may instead notice individual vehicles such as “a cute little blue Subaru,” “one of those new hybrids,” and the like, rather than “traffic.” The difference between the two conceptions is not attributable to any objective difference in circumstances between the two occasions, but rather to our internal state of mind or subjective purposes. Perhaps on the second occasion but not the first we are interested in buying a new car, so our attention gravitates toward the car level rather than the traffic level of the identical objective phenomenon.

In daily life such indeterminacies cause little problem, but in law, where the discourse is often abstract and the need for certainty is generally great, the same patterns of indeterminacy cause serious and heretofore unnoticed problems of ambiguity. Statutes and other authoritative legal texts depend heavily on abstract nouns such as “property,” “contract,” and “transfer,” and the root of the ambiguity is that each of these nouns can operate at a variety of levels of specificity. The differentiating and intention-clarifying vocabulary of “traffic” as opposed to “cars” is usually absent in these legal contexts, so that the same word sometimes does duty on a broad level, an intermediate level, or a narrow level. To take one common example, the word “property” might refer broadly to all of a person’s ownership rights in all tangible and intangible things, or intermediately to particular items in which a person has

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sole ownership rights, or narrowly to any stick in any bundle of rights.\footnote{A related aspect of this particular example, specifically the idea of regulatory takings under the Takings Clause, is briefly discussed near the end of this Article. See infra Part III.D.1.} The precise meaning of the word is sometimes recoverable from context or from the intentions of the drafter, but these, too, can be indeterminate.

The result is a specialized type of ambiguity, which for convenience I will initially call “part/whole ambiguity.”\footnote{A more precise term is “mass/multiplex ambiguity,” as discussed in the remainder of this Introduction and particularly in Part II.} This type of ambiguity is particularly troublesome and fascinating because it tends to remain unnoticed at both of its two crucial levels. First, the drafters fail to notice it, thereby generating the ambiguity in the first place. And second and more central to this Article, judges or other interpreters of the ambiguous text also may fail to notice it—instead, they may grasp unthinkingly for one level of meaning or another without ever realizing that alternatives are possible and that a choice of levels is necessary. Typically, these unthinking choices of level are motivated subconsciously by substantive policy preferences, much like the subconscious attention to “traffic” or “cars” that we all make at rush hour. In law as in daily life, subconscious choices such as these may be perfectly legitimate in their own right. But in law, and in the judicial process in particular, concerns of systemic legitimacy, transparency and soundness of reasoning demand that the subconscious choices be recognized and articulated.

In this Article, I show that part/whole ambiguities are important problems within the Bankruptcy Code and many other areas of law, and I deploy insights from the cognitive sciences to establish a theoretical grounding for them. As a result, I establish a new theoretical vantage point from which to critique the notion of “plain meaning” of certain legal texts, and I call for judges to self-consciously and forthrightly acknowledge that their resolutions of part/whole ambiguities are sometimes based on policy judgments, rather than on some purported plain meaning or other objective basis.

Part I explores in detail one part/whole ambiguity, embodied in the word “transfer” (or the phrase “transfer of an interest in property”) in the Bankruptcy Code. This ambiguity is shown to lie at the heart of a difficult and unsettled problem of bankruptcy law, namely the amount of recovery that should flow from the receipt by an undersecured creditor of a preferential transfer.\footnote{The precise issue is whether the full amount of the preference should be considered to be a single indivisible whole transfer, or whether each dollar-and-cent component of the preference can be considered to be its own whole transfer rather than simply a part of the larger whole. The former view results in the recovery of the entire preference, while the latter view results in the recovery of only a part, so the consequences of this subtle question are highly practical and substantial.} Part II.A shows that certain insights from the cognitive sciences—including linguistics, psychology, and the philosophy of language—provide a powerful explanation of this and related ambiguities. To conceive of a given
phenomenon as one undivided whole (for example, one large transfer) is to treat it as a mass, and to conceive of the same phenomenon as being composed of a number of smaller wholes (for example, several smaller transfers) is to treat it as a multiplex. The cognitivists have shown that the human mind has the ability to shift effortlessly and subconsciously between the mass conception and the multiplex conception, in one form of a process known as image schema transformation.

Most of the remainder of the Article demonstrates the far-reaching power of these theoretical insights, making clear that there is a deep-seated structural unity among the subject of preferential transfers and other subjects, both within and outside of the Bankruptcy Code. Part II.B first articulates the unifying theme by showing how the preference issue exemplifies certain basic, non-legal, normative questions about the distribution of wealth in society. The key to this point is that society itself can be thought of in either mass or multiplex terms. Economic liberals tend to conceive of society as a mass: an integral and undivided whole in which the common interest takes precedence over individual interests. Conversely, economic conservatives tend to conceive of society as a multiplex: a readily divisible aggregation of individuals in which each person’s separate interests are paramount. Liberal society has perennially and contentiously struggled over these divergent social views, and this Article demonstrates the deep structural parallels that make the bankruptcy issues inseparable from the social normative issues. In important ways, bankruptcy theory is social theory.

Part III then plays out the theme by applying it to fraudulent transfers of charitable contributions (subpart A), the doctrine of Moore v. Bay (subpart B), the dischargeability of student loans (subpart C), and various issues from the typical first-year law school curriculum, including the constitutionality of so-called partial takings of property, the divisibility of contracts, and jurisdiction over corporations and other business entities based on diversity of citizenship (subpart D).

One tenet of the cognitive theory is that neither the mass view nor the multiplex view of a given phenomenon is inherently right or wrong. On the contrary, either conception can be legitimate and seem natural, depending on the circumstances, including notably the purposes of the perceiver. In the legal context, these purposes translate into the conscious or unconscious policy judgments of judges and other relevant participants. Accordingly, Part II.A’s theoretical insights do not, themselves, resolve the ambiguities discussed in Parts I and III. Nor do I propose any other magic bullet that could resolve these difficult issues in some facile manner. On the contrary, one large-scale theme of this Article is that ambiguity should not be condemned, but instead accepted and even welcomed. Ambiguity is the natural result of
the flexible patterns of human cognition. As the popular joke has a software designer tell the complaining customer, "It's not a bug, it's a feature."

However, as Part IV shows, Part II's insights do provide a new and powerful theoretical standpoint from which to critique so-called plain meaning justifications for many judicial decisions. The theory brought to bear by this Article makes it easy to recognize the pervasiveness and irreducibility of mass/multiplex ambiguities even in otherwise clear-seeming statutes. (Legislative history and similar sources can, to be sure, sometimes be helpful, but they may also be absent or less than dispositive and, more to the point, judges may often fail to recognize an ambiguity in the first place, thereby not resorting to such sources.) Accordingly, a judge who wishes to accept the responsibilities of adjudication in a spirit of self-consciousness and candor should discard the illusory objectivity of a plain-meaning approach to these ambiguities. In its place, the judge should embrace the reality that her resolution is not the only possible one, and that her choice among the alternatives is inescapably founded on policy preferences, forthrightly acknowledged and articulately defended.

I. PREFERENCE DOCTRINE AND THE PROBLEM OF UNDERSECURED CREDITORS

This Article's principal illustration of a part/whole or mass/multiplex ambiguity is the treatment of undersecured creditors under the Bankruptcy Code's provisions on avoidability of preferential transfers. The issue is fairly complex and technical, but it is nonetheless an ideal foundation for this Article's later and more broadly-ranging theoretical discussion, for at least two reasons that, ironically, are both linked directly to the complexity and technicality itself. First, bankruptcy law shares with most other areas of business law a high degree of detail (because these details are usually considered necessary for the planning of private action), and the discovery of striking ambiguities at the heart of all of that detail is intrinsically important. And second, the area of bankruptcy law on which the discussion centers is—apart from the key ambiguity that I discuss—highly clear in its mechanics, so that the questions at issue in connection with the ambiguity are clear-cut and easily grasped.

As background, Part IA presents the basic law of preferences, and against that background, Part IB shows that the law of preferences is indeterminate in its treatment of undersecured creditors due to a part/whole ambiguity. Part IC expands upon this ambiguity's rich implications and the failure of attempts to resolve it by appeal to policy arguments, and Part ID shows the similar failure of an attempt to resolve it by appeal to a textualist argument.
A. BASICS OF PREFERENCE AVOIDANCE

In simplified terms, the Bankruptcy Code's so-called preference provisions invalidate payments of money or other transfers of property, made before bankruptcy by the now-bankrupt individual or entity (the Debtor) to one of its creditors. This enables the trustee in bankruptcy to recover the money or other property from the creditor that previously received it, and then to redistribute that money or property to all of the debtor's creditors on a pro rata basis. This grant of power is extraordinary, for at least two reasons. First, it overrides the debtor's previous decision to pay one creditor rather than another. And second, it overrides the creditor's basic property rights that are established and recognized by state law.

To illustrate, suppose that Debtor, before it files its bankruptcy petition, has three creditors: A, a supplier, B, Debtor's landlord, and C, a tort victim, to each of whom Debtor owes $1,000. Debtor's total assets are worth only $1,200, so with $3,000 in debts and $1,200 in assets, Debtor is insolvent. Further suppose that a month before bankruptcy, Debtor decides to pay A, but only A, in full and transfers $1,000 to A. Debtor may have chosen to pay A rather than the other creditors for any number of reasons: perhaps A threatened to cut off the supply of inventory to Debtor, or perhaps A threatened to ruin Debtor's credit rating, or perhaps Debtor simply likes to pay its debts alphabetically. The reason for the payment is generally irrelevant under state law as opposed to bankruptcy law, and of course state law is all that applies at the time of Debtor's pre-bankruptcy payment to A. Debtor may pay whomever it chooses in whatever order it chooses. Moreover, once A is paid, basic property rights dictate that she gets to keep that payment: the payment is now A's property, and no one has the right to take it from her without her permission.

Of course, instead of paying A in full and ignoring its other creditors, Debtor could have chosen to pay out its assets equally to all its creditors, so that each of A, B and C are paid $400 of the $1,000 they are owed. But the important point is that nothing in state law mandates such equality of treatment. If A succeeds in pressuring Debtor for payment before B or C does, then A is rewarded with exactly the payment that she sought. The touchstone of state debtor/creditor law is rugged individualism, dog-eat-dog,\(^4\)


\(^3\)By contrast, under bankruptcy law, the reason may be relevant to the extent that one of the exceptions to preference avoidance is triggered. See infra notes 8 and 28.

\(^4\)I do not here take a position that creditors may be squared with dogs, though it is worth noting that the bankruptcy power that keeps creditors at bay is called a "stay." Concerning the undertone of intentional wrongdoing that remains associated with the receipt of preferences despite the Code's elimination of state of mind as an element, see Lawrence Ponoroff, Evil Intentions and an Irresolute Endorsement for
every creditor for itself, and absence of concern about the resulting inequalities.

The touchstone of the federal Bankruptcy Code, by contrast, is equality of treatment among similarly situated creditors. So if Debtor still had its $1,200 in assets after declaring bankruptcy (that is, if Debtor had not made the $1,000 payment to A beforehand), then the Bankruptcy Code would entitle each of A, B and C to receive its respective pro rata share of those assets: each would be paid $400 (and the remaining $1,800 in debt would in most cases be discharged). A, B and C are all of equal rank (i.e., they are all general unsecured creditors of Debtor), and they must therefore be treated alike, in stark contrast to the state law result. 7

Preference law arises at the intersection of the state law and federal law rules: it addresses the question of whether A, having been paid $1,000 before Debtor’s bankruptcy, is entitled to keep that payment despite the bankruptcy. In other words, will A’s state law property rights prevail over B’s and C’s bankruptcy law right to be treated equally with A? And the surprising answer is “no,” subject to certain exceptions not important here. 8 The preference provisions of the Bankruptcy Code override state-created property rights, invalidating pre-bankruptcy payments and allowing the trustee to recover those payments for the benefit of all creditors. After Debtor declares bankruptcy, its trustee would recover the $1,000 previously paid to A, and would redistribute the pool of assets equally (just as if Debtor had never paid A), so that as above each creditor would receive $400 (and the remaining $1,800 in debt would be discharged). No creditor is treated better than any other creditor, and everyone shares the pain of Debtor’s insolvency equally. Preference law overrides a debtor’s pre-bankruptcy choices, neutralizes the dog-eat-dog strength that some creditors have over others before the bankruptcy, and nullifies those creditors’ property rights. 9

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7As Professor Klee declares in the opening lines of one of his articles, “[i]f the Bankruptcy Code were a Country and Western song, its refrain would be ‘Equity is Equality.’ At its core, the bankruptcy system embodies the principle that creditors with similar rights are treated equally. Debtors are not permitted to prefer their friends at the expense of other creditors.” Kenneth N. Klee, Tithing and Bankruptcy, 75 Am. Bankr. L.J. 157, 157 (2001).

8For example, to the extent a transfer was made in the ordinary course of business of the debtor and the transferee, or according to ordinary business terms, it will be sheltered from avoidance by § 547(c)(2).

9See, e.g., Report of the Commission on the Bankruptcy Laws of the United States, 93rd Cong. 1st Sess., H.R. Doc. No. 93-137 (Part 1) 202 (1973) [hereinafter COMMISSION REPORT] (statement of Professor Charles Seligson) (“A cornerstone of the bankruptcy structure is the principle that equal treatment for those similarly situated must be achieved. It would be highly inequitable to disregard what transpires prior to the filing of the bankruptcy petition; to do so would encourage a race among creditors, engender
In order to finish setting the stage for Part I.B’s discussion of the part/whole ambiguity in preference law, it is necessary to briefly see how the foregoing effect of preference law is embodied in the statute, and how this statute applies in two simple cases. Bankruptcy Code § 547(b) empowers the trustee to “avoid any transfer”10 of the debtor’s money or other property that meets certain enumerated elements. The most important of these elements (and the one that will lie at the heart of the part/whole ambiguity) is set forth in § 547(b)(5): basically, that the transfer “enables [the] creditor to receive more” than it would receive if the transfer had not been made and the creditor had instead received only the distribution it would be entitled to under the remainder of bankruptcy law.11 This element is satisfied by Debtor’s payment to Creditor A, because if A had not been paid $1,000 before the bankruptcy, A would have had a $1,000 claim in Debtor’s bankruptcy, just like B and C, and would have been paid $400 on a pro rata basis. The pre-bankruptcy payment, or transfer, caused A to receive $600 more than it would otherwise have received, and thus it satisfies the statute and may be avoided as a preference.12 Indeed, the words quoted above from § 547(b)(5) highlight precisely the inequity that preference law seeks to redress: the transfer “enables [the] creditor to receive more,” that is, the transfer preferred the creditor over others.

Courts apply § 547(b)(5) with two simple rules of thumb that address two typical situations (but as Part I.B shortly makes clear, this Article’s inquiry occupies the difficult territory between the two). The first rule of thumb is that § 547(b)(5) is always satisfied when the transfer is to a cred-

favoritism by the debtor, and result in inequality of distribution. At bankruptcy, the bankrupt would be left, as Collier says, with only tag ends and remnants of unencumbered assets.

Another way of looking at preference law is that it counteracts the efforts of the creditor who, by its pre-bankruptcy conduct, attempts “to opt out” of the bankruptcy distribution scheme. See THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 125 (1986) (“Preference law . . . is essentially a transitional rule designed to prevent individual creditors from opting out of the collective proceeding once that event becomes likely.”)

10The term “avoid” can be understood as meaning “invalidate and expose to recovery.” The term “transfer” is the abstract noun that is the subject of Part I.B’s part/whole ambiguity discussion.

11The other conditions of § 547(b), each of which is also satisfied by the hypothetical payment to A, are that the transfer of the property (here, the $1,000) be (1) to or for the benefit of a creditor (here, to Creditor A); (2) for or on account of an antecedent debt owed by the debtor before such transfer was made (here, A was owed $1,000 for inventory supplied to Debtor); (3) made while the debtor was insolvent (here, Debtor’s debts exceeded its assets); and (4) made within 90 days before the bankruptcy filing, or within a year if the transfer was to an insider (here, Debtor paid A one month before bankruptcy). 11 U.S.C. § 547(b) (2006). Section 547(b) also allows for certain exceptions, set forth in § 547(c), which in effect amount to further conditions on avoidability.

12The entire amount of the payment (in our hypothetical, $1,000) is avoidable as a preference, rather than just the difference between what the creditor was paid and what it would be entitled to receive in the bankruptcy distribution (in our hypothetical, a difference of $600). This distinction becomes significant in the argument developed below. See infra note 32 and accompanying text.
tor that is unsecured (that is, a creditor that has no collateral) and when, as is almost always the case, the Debtor's unsecured creditors in the bankruptcy proceeding will receive less than full payment on their claims.13 As a moment's reflection makes clear, this is simply a common-sense implementation of preference law's basic goal of imposing equality of treatment among creditors.14 The second rule of thumb is that § 547(b)(5) is never satisfied when the transfer is to a fully secured creditor (that is, a creditor having collateral whose value exceeds or at least equals the amount of debt secured).15 This, too, makes common sense: fully secured creditors get paid in full in bankruptcy,16 and as a result, a payment to such a creditor by the debtor before bankruptcy does not "enable[ ] the creditor to receive more" than it would receive in the bankruptcy had the pre-bankruptcy payment not been made.

**B. THE INDETERMINATE TREATMENT OF UNDERSECURED CREDITORS**

The fascinating and difficult questions arise at the intersection of the two rules of thumb. How should preference law treat a pre-bankruptcy transfer that is made neither to an unsecured creditor nor to a fully secured creditor, but to an undersecured creditor (that is, a creditor having collateral that is worth less than the debt that it secures)? To illustrate, suppose that as before, Creditor A is owed $1,000, but that she now has $700 in collateral securing that debt (meaning that A is undersecured rather than unsecured). And suppose that as before, Debtor makes a payment to A before bankruptcy, but that the payment is now in the amount of $400 rather than $1,000. The law is clear about two basic points. First, undersecured creditors are treated as having a secured claim to the extent of their collateral's

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13Regarding unsecured creditors generally receiving less than full payment in bankruptcy, see T.B. Westex Foods, Inc. v. FDIC (In re T.B. Westex Foods, Inc.), 950 F.2d 1187, 1192 (5th Cir. 1992) ("An unsecured creditor's claim against a bankrupt debtor will rarely be worth one hundred cents on the dollar."). Professor Countryman pointed out that if unsecured creditors are receiving full payment in bankruptcy, it is very likely that the purportedly preferential transfer was not made while the debtor was insolvent and would thus not be preferential for failure to satisfy § 547(b)(3). Vern Countryman, The Concept of a Voidable Preference in Bankruptcy, 38 Vand. L. Rev. 713 (1985). Regarding the satisfaction of § 547(b)(5) under these circumstances, see Palmer Clay Products Co. v. Brown, 297 U.S. 227, 229 (1936); Countryman, ante, at 735-36 ("[M]ost courts have no difficulty in reading § 547(b)(5) as incorporating the rule of Palmer Clay Products: a preferential effect exists if the trustee can establish that a defendant unsecured, nonpriority creditor, without the allegedly preferential payment or lien, would have received less than a 100% payout in a Chapter 7 liquidation.")

14For every dollar of unsecured debt that is discharged by a pre-bankruptcy payment, the payee receives full payment, but for every dollar of unsecured debt that is discharged in bankruptcy, the payee would receive only pro rata payment (in our hypothetical, 40 cents on the dollar), and the resulting inequality is exactly what preference law exists to redress.

15See Jackson, supra note 9, at 138.

16Indeed, this is one of the principal reasons that some creditors demand collateral in the first place.
value, and as having an unsecured claim for the remainder,\textsuperscript{17} so that A has a $700 secured claim (which will be paid in full on account of her collateral) and also a $300 unsecured claim (on which A will receive a pro rata distribution, equal in proportion to B's and C's). And second, pre-bankruptcy payments to undersecured creditors are deemed to be made first on the unsecured claim (and therefore to be avoidable under the first rule of thumb discussed above).\textsuperscript{18} By implication, such payments are only deemed to be made on the secured claim (and therefore not to be avoidable) to the extent that the total payment exceeds the unsecured claim. For example, if Debtor had paid A $200 or $300 rather than $400, courts would treat that payment as applying to the unsecured claim, and thus as a preference.\textsuperscript{19} But the question becomes much more difficult—and current law ceases to be a guide—with our $400 payment. The $400 payment exceeds the amount of the $300 unsecured claim, thereby forcing at least $100 to be applied to the secured claim. And this finally raises the central doctrinal question of this Part I: whether that $100 is shielded from avoidance. In more general terms, when an undersecured creditor receives payment that exceeds the unsecured portion of its debt (and otherwise satisfying the elements of § 547(b)), will that excess be shielded from avoidance or not?

Bankruptcy scholars, practitioners, and judges are quick to voice confident yes-or-no opinions on this question, but when their opinions are marshaled, there is no consensus, and there turn out to be just about as many proponents of avoiding the payment as a preference as there are proponents of shielding the creditor from that avoidance. The proponents of shielding

\textsuperscript{17} 11 U.S.C. § 506(a) (2006).

\textsuperscript{18} See, e.g., 5 COLLIER ON BANKRUPTCY ¶ 547.03[7] (Lawrence P. King ed., 15th ed. 2002) ("the payment would ordinarily be applied to the unsecured portion of the undersecured debt"); Krafsur v. Scurlock Permian Corp. (In re El Paso Refinery), 171 F.3d 249, 254 (5th Cir. 1999) ("if . . . the [undersecured] creditor does not actually release collateral upon application of the payment, then the payment is ipso facto a payment on the unsecured portion of the claim.") (citation omitted); Belfance v. Bancroft Nat'l Bank (In re McCormick), 5 B.R. 726, 729-30 (Bankr. N.D. Ohio 1980) ("The Court must assume, in the absence of proof to the contrary, that the payments were credited towards the unsecured portion of the debt, since this course of action would comport with standard business practice."); Barash v. Pub. Fin. Corp., 658 F.2d 504, 508 (7th Cir. 1981) (expressly reaffirming McCormick); McGoldrick v. Juice Farms, Inc. (In re Ludford Fruit Products, Inc.), 99 B.R. 18, 23 (Bankr. C.D. Cal. 1989) ("Persuasive case law and simple logic dictate that the [payments were apportioned to the unsecured portion of the debt . . . .]"); see David Gray Carlson, Adequate Protection Payments and the Surrender of Cash Collateral in Chapter 11 Reorganization, 15 CARDOZO L. REV. 1357, 1374 (1994); Craig H. Averch & Michael J. Collins, Avoidance of Foreclosure Sales as Preferential Transfers Another Serious Threat to Secured Creditors?, 24 Tex. TECH. L. REV. 985, 1003 (1993) ("Unless the parties otherwise agreed to the contrary, payments on account of a partially secured debt are applied first to the unsecured portion.").

\textsuperscript{19} This approach responds well to A's probable motivation at the time she receives the payment, namely to minimize the amount of her unsecured claim in an impending bankruptcy. At the same time, it furthers preference law's overall goal of undoing last-minute improvements to one creditor's position that come at the expense of other creditors.
argue that, in our hypothetical, the $100 excess over the unsecured portion of A's debt is being applied to A's secured claim, and that because secured claims get paid in full in bankruptcy, the $100 payment does not "enable[ ] [the] creditor to receive more" than it would receive in bankruptcy if the payment had not been made.\textsuperscript{20} By contrast, the proponents of avoidance argue that Debtor paid A $400 (not just $300), that the $400 payment as a whole does "enable[ ] [the] creditor to receive more," and that the plain language of § 547(b) enables the trustee to avoid "any transfer" that meets these requirements.\textsuperscript{21} To this last point the proponents of shielding have a rebuttal: each dollar paid by Debtor is a separate "transfer," and that each such transfer should be analyzed separately, with 100 of the transfers not being avoidable.\textsuperscript{22}

As so often in private law, the core of the answer must come from the statute, but in this case the statute merely enriches the problem rather than providing an answer. As seen above, § 547(b) enables the trustee to avoid "any transfer" that meets the enumerated conditions, and the key insight here is that the word "transfer" (or the fuller phrase "any transfer of an interest of the debtor in property") in § 547(b) is ambiguous—specifically, it presents a part/whole ambiguity. The statute can be equally well understood as referring to the $400 transfer as a whole, or to each of the four hundred individual dollars transferred separately. Part II shows that this ambiguity is deeply rooted in the patterns of human cognition, and Part IV uses the resulting insights as a vantage point from which to challenge the legitimacy of so-called plain meaning approaches to adjudication in general; but for the moment, one can simply notice that the ambiguity of the word "transfer" in § 547(b) un-

\textsuperscript{20}11 U.S.C. § 547(b)(5). See Levit v. Ingersoll Rand Fin. Corp. (In re DePrizio), 874 F.2d 1186, 1200 (7th Cir. 1989) (noting, in dictum, that as to a "fully-secured creditor [that is paid in full] . . . there is no avoidable preference. . . . If, on the other hand, the security covered only 90% of the debt, then only the remaining 10% of the payment is avoidable as a preference."); David G. Epstein, Steve H. Nickles & James J. White, Bankruptcy § 6-20, at 584 (1992) (declaring that "[i]n no event is the payment preferential beyond the amount of undersecurity" because "while preferential effect is necessary to a preference, a transfer is a preference only to the extent that the transfer causes this effect") (citing DePrizio, 874 F.2d at 1200) (emphasis added).

This result would be consistent with the protection of state-law property rights; of course a powerful though not uncontroversial theme in bankruptcy theory. See, e.g., Charles W. Mooney, Jr., A Normative Theory of Bankruptcy Law: Bankruptcy As (Is) Civil Procedure, 61 Wash. & Lee L. Rev. 931 (2004) (arguing that bankruptcy law's core role should be to maximize recoveries by those with nonbankruptcy legal entitlements against the debtor).

\textsuperscript{21}See E. Allan Farnsworth et al., Teachers Manual for Commercial Law: Cases and Materials 190 (5th ed. 1993); David Gray Carlson, Security Interests in the Crucible of Voidable Preference Law, 1993 U. Ill. L. Rev. 211, 272 ("Usually, § 547(b)(5) is conceived of as an 'all or nothing' test, such that the entire . . . payment is avoided.")

\textsuperscript{22}Cf. Carlson, supra note 21, at 272 (speaking in terms of multiple "debits" rather than multiple "transfers").
dercuts any attempt to rely on a plain meaning argument to resolve the undersecured creditor question.

One attraction of code-based law is that the textual ambiguities appearing in a statute may often be resolved by reference to definitions that are codified elsewhere in the code, but in this case there is no such easy solution. The Bankruptcy Code does define “transfer,” but the definition’s only helpful phrase is “each mode . . . of . . . parting with property,” and this phrase is just as consistent with a “whole” view as with a “part” view. Bankruptcy Code § 102(7) provides a rule of construction that “the singular includes the plural,” but this is also of no help, because such a rule is quite different from something like “the singular includes all fractional subparts thereof.” Section 102(7) tells us that more than one of a thing can be covered, but without helping us determine what that thing is. In other words, we remain stymied by our initial ambiguity.

Another attraction of code-based law is that the meaning of one statutory passage can often be gleaned from other related statutory passages. And indeed, the concept of partially avoidable transfers (that is, transfers that are conceived on a “part-by-part” level, so that some dollars are avoidable while others are shielded) is clearly embraced by at least some passages of § 547. The Bankruptcy Code’s usual linguistic tool for indicating this part-by-part conception is the phrase “to the extent,” and it is quite striking that the exceptions to preference avoidance, which appear in § 547(c), are nearly all expressed using this phrase. In fact, the use of “to the extent” in subsection

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23 The general definition is “each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing or parting with (i) property or (ii) an interest in property.” 11 U.S.C. § 101(34) (2006).

24 The DePrizio case notes that the Code defines “transfer” from the perspective of the debtor, but this is not determinative either. DePrizio, 874 F.2d at 1195-96.


28 For more on this phrase and similar tools, see infra note 100 and accompanying text.

27 See supra note 8.

29 One example is the so-called contemporaneous exchange exception, in which the Code excepts from avoidance a transfer “to the extent that such transfer was intended by the debtor and the creditor . . . to be a contemporaneous exchange for new value given to the debtor” and was “in fact a substantially contemporaneous exchange.” 11 U.S.C. § 547(c)(1) (emphasis added). A typical example of this provision would be the debtor’s bank paying the debtor’s check that clears a few days after the debtor incurs a debt for new inventory purchased. The contemporaneous exchange exception, and the bearing that some commentators believe that it has on the operation of § 547(b)(5), is discussed infra in Part I.D.

As a second example, in the so-called floating lien exception, the Code excepts from avoidance a transfer of inventory or receivables “except to the extent” that the creditor’s level of undersecuredness diminishes at the petition date as compared to the beginning of the preference period. 11 U.S.C. § 547(c)(5) (emphasis added). Technically, this subsection’s “to the extent” concept appears not in an exception to avoidance, but in an exception to the exception (a fact that does not affect the analysis here).

There is no need to detail all of § 547(c)’s other exceptions here, other than to notice that all of them, other than (c)(8) and (9), are expressly formulated on a “to the extent” basis. (Subsection (c)(6)’s exception
(c) is so pervasive that its absence from subsection (b)(5) is striking.\(^{29}\) And this absence constitutes a plain-language argument for construing subsection (b)(5) as treating only the “whole” of a transfer rather than its parts. The contextual evidence here, as in the legislative history, too,\(^{30}\) makes it quite clear that when Congress wanted to express the idea of a part-by-part differentiation, it knew how to do so.\(^{31}\)

A further argument in favor of avoiding the whole of the transfer to an undersecured creditor, rather than making a part-by-part analysis and avoiding only the part that corresponds to the unsecured claim, proceeds by analogy with the simple case of a pre-bankruptcy payment to a wholly unsecured creditor. In such a case, as seen above, the whole of the payment is recoverable, and not just the difference between the amount of the transfer and the amount of the bankruptcy distribution.\(^{32}\) This rule appears to be founded on...

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\(^{29}\) As a trivial matter, the phrase does appear in clause (C) of subsection (b)(5), in the reference to the hypothetical liquidation analysis that is at § 547(c)'s core, but this clause (C) is irrelevant to the question at hand. What matters is that the phrase does not appear in § 547(b)'s core statement that the trustee can avoid “any transfer... that enables [a] creditor to receive more....” See 11 U.S.C. § 547(b).

\(^{30}\) See, e.g., H.R. Rep. No. 95-595, at 373 (1977) U.S. CODE CONG. & ADMIN. NEWS 1978, at 6329 (“If a creditor can qualify under any one of the §§547(c) exceptions, then he is protected to that extent. If he can qualify under several, he is protected by each to the extent that he can qualify under each.”) (emphases added); S. Rep. No. 95-989, at 88 (1978), U.S. CODE CONG. & ADMIN. NEWS 1978 at 5874 (same).

\(^{31}\) Correspondingly, when Congress did not intend a part-by-part differentiation, it omitted the “to the extent” language from § 544(b), see infra Part III.B (discussing Moore v. Boy).

\(^{32}\) See supra note 12. A clear example of this rule is given in David Gray Carlson, Voidable Preferences and Proceeds: A Reconceptualization, 71 AM. BANKR. L. J. 517, 533 (1997). (As a technical matter, Carlson’s example actually concerns a transfer to an undersecured creditor rather than an unsecured creditor, but the amount of the transfer is less than the unsecured portion of the creditor’s claim. Therefore, the entire transfer is treated as a payment on the unsecured portion of the debt, see supra note 14 and accompanying text, and does not raise Part I.B’s central issue of preferences to undersecured creditors.) See also David Wheeler, ABI Preference Handbook 23 (2002) (“As a practical matter, the courts will avoid the entire transfer.”).
the fact that the amount of final, actual distributions remains uncertain until the end of the bankruptcy proceeding, when all avoidance actions have been brought and resolved and recovered, and all other questions (such as the amount of post-petition administrative claims, etc.) have been determined.\textsuperscript{33} It is perhaps for this reason that the actual distribution amount to unsecured creditors need not be determined to an "actuarial certainty."\textsuperscript{34} Should not the same reasoning apply to undersecured creditors, where there is also uncertainty as to the amount of a final payout?\textsuperscript{35}

Overall, then, even if the eventual arithmetical result is likely to be the same either way,\textsuperscript{36} it is important to decide whether the creditor's property interest is avoided or not during the meantime. The property's interim treatment matters, quite apart from its final fate.

The plot only thickens when one proceeds to consider the courts' treatment of the statute. Given the stark absence from subsection (b)(5) of "to the extent" or any equivalent thereof, and the striking contrast with subsection (c), it is astonishing from a textualist standpoint to realize that so many

\textsuperscript{33}Perhaps this is why the text of § 547(b)(5) speaks of the amount that the preferred creditor "would" receive in a hypothetical liquidation, rather than what it "will" receive in the instant proceeding.


\textsuperscript{35}In opposition, one can argue that the allowed amount of a secured claim is fixed, for preference purposes, at the time of the bankruptcy petition, and that the value of the allowed secured claim is protected against diminution by adequate protection payments under 11 U.S.C. §§ 362(d)(1), 361. Regarding fixing the allowed amount at the petition date, see, e.g., Palmer Clay Products Co. v. Brown, 297 U.S. 227, 229 (1936) ("Whether a creditor has received a preference is to be determined, not by the actual situation would have been if the debtor's assets had been liquidated and distributed among his creditors at the time the alleged preferential payment was made, but by the actual effect of the payment as determined when bankruptcy results"); Seitz v. Yudin (In re Cavalier Indus., Inc.), 2002 Bankr. LEXIS 430, 8 (Bankr. E.D. Pa.) (finding proper time to value collateral for § 547(b)(5) purposes is the petition date); Carlson, supra note 21, at 265 (stating collateral "must be valued as of the day of the bankruptcy petition, if only for the narrow purpose of conducting the hypothetical liquidation test").

But an uncertainty about the ultimate payout nonetheless persists, just as it does with unsecured creditors. The existence of a system aimed at stabilizing collateral values does not ipso facto make those values stable, so that in the case of large market value changes or deterioration of the collateral, adequate protection payments may be insufficient. In fact, the Code contemplates such an eventuality by providing for a superpriority administrative claim for adequate protection that turns out to be inadequate, 11 U.S.C. § 507(b) (2006), and by providing for the lifting of the automatic stay if the debtor cannot provide adequate protection, 11 U.S.C. § 362(d)(1). Neither of these remedies, of course, ensures that the creditor will ultimately recover the value of the collateral that was determined on the petition date.

A more reasonable approach to valuation - that valuation should "vary with the circumstances of the case" - has been suggested by Professor Countryman. See Countryman, supra note 13, at 741; see also \textbf{CHARLES JORDAN TABB, THE LAW OF BANKRUPTCY} 378 (1997) ("Nothing on the face of the statute suggests that the court [in carrying out the § 547(b)(5) hypothetical liquidation analysis] may temper its commanded flight of fantasy with reality. In some instances, however, not doing so might lead to absurd results that would conflict with other provisions of the Code.").

\textsuperscript{36}See \textit{infra} note 44 and accompanying text.
courts blithely paraphrase subsection (b)(5) as if it did contain the phrase. The intellectually estimable Judge Easterbrook, in the landmark preference case of *Levit v. Ingersoll Rand (In re DePrizio)*, provides a prime example in writing that “under § 547(b)(5) a transfer is avoidable only to the extent the creditor received more than it would have in a Chapter 7 liquidation.”

Numerous other courts have echoed Judge Easterbrook’s mistaken articulation here, and neither Judge Easterbrook nor the others articulate any justification for doing so. Clearly, then, something other than textualism is powerfully shaping the judges’ readings, and this will be explored later in this Article.

On the particular question of whether the payment that exceeds the amount of an undersecured creditor’s unsecured claim is avoidable, the judi-

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37874 F. 2d 1186, 1199-1200 (7th Cir. 1989) (emphasis added). Judge Easterbrook makes this statement in the context of defending his holding in the case, which permitted the trustee to avoid payments stretching back for a longer pre-petition period than had been previously accepted, against protests that it would be unduly disruptive. Not so, responds Judge Easterbrook, because many pre-petition payments are not preferential when one understands § 547(b)(5) in the (textually unsupported) way he does. (The case’s holding was notoriously controversial, and has since been the object of two Congressional efforts to overrule it. See 11 U.S.C. §§ 547(j) and 550(c). Neither of these amendments affect the present analysis of § 547(b)(5).)

Nor is this passage of the opinion just a slip of Judge Easterbrook’s pen. The quoted passage continues,

A fully-secured creditor will be paid in full under Chapter 7, so there is no avoidable preference in this case with or without a guarantee by an insider. If, on the other hand, the security covered only 90% of the debt, then only the remaining 10% of the payment is avoidable as a preference.

DePrizio, 874 F.2d at 1200. And at an earlier point in the opinion he writes that “on occasion less than all of a given transfer is ‘avoided’. Section 547(b)(5) provides that a transfer is avoidable only to the extent it gives the creditor more than it would have received in a liquidation under Chapter 7.” Id. at 1196 (emphasis added).

Note that Judge Easterbrook’s subconscious choice of a part-by-part understanding of “transfer” corresponds on a general level with his substantive policy preferences. The part-by-part conception limits the trustee’s powers to invalidate payments, and as shown in Part I.C below, this directly favors the interest of creditors and the security of private property. It protects the ability of strong creditors to retain their money, it sacrifices the goal of equality of treatment of creditors, and it reduces the robustness of the trustee’s ability to marshal assets in order to rehabilitate the business of debtors. And Judge Easterbrook’s intellectual tendencies toward strong property rights and a lack of interference with private ordering are well documented. See, e.g., Frank H. Easterbrook, *Intellectual Property Is Still Property*, 13 Harv. J.L. & Pub. Pol’y 108, 118 (1990); Frank H. Easterbrook & Daniel R. Fischel, *The Economic Structure of Corporate Law* (1991).

To be sure, the DePrizio decision as a whole gives the bankruptcy trustee robust avoidance powers that undermine property rights, but the issue on which the case depends involves issues of statutory construction more complex than the resolution of an ambiguous word such as “transfer” on which this Article focuses. I make no claim that broader swaths of judicial decisionmaking such as the DePrizio case as a whole are motivated even subconsciously by raw policy or politics.

38See, e.g., Telesphere Liquidating Trust v. Galesi (In re Telesphere Commc’ns, Inc.), 229 B.R. 173, 178 (Bankr. N.D. Ill. 1999) (“to the extent that payment of a partially secured debt reduces the unsecured portion of the debt, the payment is preferential”); Gray v. A.I. Credit Corp. (In re Paris Indus. Corp.), 130 B.R. 1, 3 (Bankr. D. Me. 1991) (“Section 547(b)(5) is satisfied ... if [the creditor] is deemed an unsecured or undersecured creditor ... to the extent that they are undersecured.”).
cial authority is scant and generally weak. There seems to be only one truly on-point case, and it goes the other way, taking a whole-only instead of a part-by-part interpretation of transfer, and holding that the excess payment is preferential. In In the Matter of Ascot Mortgage, Inc., investors purchased mortgage notes from the debtor pursuant to an agreement providing that the debtor would repurchase the notes under certain circumstances. The debtor did repurchase the notes during the preference period, and the trustee sought to avoid the repurchase payment as a preference. The court apparently treated the investor defendants as having had a security interest in the notes and because the notes had been worth less than the price that the debtor was obligated to repurchase them for, the defendants had been undersecured. The court held that the entire amount of the repurchase payment was preferential, because "§ 547(b) allows a trustee to set aside the entire transfer even though, as here, the amount the creditor is preferred is small in relation to the amount of the transfer." In other words, the transfer as a whole satisfies § 547(b)(5), and the amount of the payment in excess of the unsecured claim is not shielded. However, the court's conclusion is entirely unsupported by anything other than its own ipse dixit about the language of § 547(b), which, as we have already begun to see, is stubbornly ambiguous.

Not surprisingly, what little there is of scholarly commentary on this issue, too, has been conflicting. All in all, what we clearly have here is a

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39 Most of the pronouncements by Judge Easterbrook and the other courts referred to above are dicta, because the facts of the cases involve payments that are smaller, not larger, than the undersecured portion of the creditor's claim. But even so, those pronouncements do constitute some authority for a part-by-part interpretation of "transfer" and thus for the non-avoidability of payments that exceed the undersecured claim.


41 It is routine for a buyer of notes or other receivables to be treated as a secured party when the seller retains substantial burdens related to the receivables sold, such as the debtor's obligation to repurchase the notes in this case. E.g., Thomas E. Plank, The True Sale of Loans and the Role of Recourse, 14 GEO. MASON L. REV. 287 (1991). In fact, UCC Article 9's definition of "secured party" expressly covers buyers of various types of receivables. UCC § 9-102(a)(72)(D) (2001).

42 Ascot Mortgage, 153 B.R. at 1018 n.15. (The court later holds that § 547(c)(1), discussed infra in Part I.D, applies to one of the repurchases, but only because the value of the note repurchased was fully equal to the repurchase price. See id. at 1021-24. A better analysis would have been that that repurchase did not satisfy subsection (c)(5), as a payment to a fully secured rather than an undersecured creditor would not have.)

43 For example, compare Carlson, supra note 21, at 272 (opposing avoidance based on § 547(c)(1), which is discussed infra in Part I.D), with Farnsworth et al., supra note 21, at 190 (favoring avoidance based on the plain language of § 547(b)(5)), and Charles J. Tabb & Ralph Brubaker, Teacher's Manual for Bankruptcy Law: Principles, Policies, and Practice 362-63 n. 23 (2003) (noting that "most courts would say that the trustee can recover the entire payment from [the creditor], because § 547(b) doesn't distinguish between preferential portions and unpreferential portions of a transfer. If any portion of the transfer was preferential, § 547 seems to permit avoidance of the entire transfer"). See also
genuinely open question. The substantial stakes of the question, and the reasons for resolving it one way or the other (apart from the textualist clues-countings detailed above) are discussed immediately below.

C. THE ISSUE'S VITALITY AND THE IRRECONCILABLE POLICY ARGUMENTS

At first blush, the entire issue discussed above may seem to have no practical importance. After all, even if we do treat the transfer as a whole, and recover from A the full $400 amount of the transfer, one consequence of that recovery would be that A would have a secured claim for the $100 attributable to the secured portion of the recovered payment. This secured claim, the argument continues, would be paid in full at the close of the bankruptcy proceeding, leaving A in exactly the same arithmetical position that she would have occupied had the transfer been treated on a part-by-part basis.

Peter A. Alces, Clearer Conceptions of Insider Preferences, 71 Wash. U. L.Q. 1107, 1111 n.17 (1993) ("An interesting issue, not considered in this Essay, is whether the entire transfer would be avoidable given the language of section 547, or whether only that portion of the transfer that enables the transferee to receive more than she would have in a Chapter 7 liquidation is avoidable.")

The case of Abramson v. St. Regis Paper Co. (In re Abramson), 715 F.2d 934 (3rd Cir. 1983), while not involving an undersecured creditor, provides an interesting analogy to that situation, and when viewed in that light provides an insight on Professor Carlson's analysis. The creditor in that case was owed $119,500, and during the preference period the debtor sold the creditor property worth $186,000 in exchange for $66,500 plus extinguishment of the antecedent debt. Interpreting § 60(a) of the old Bankruptcy Act (the predecessor to today's § 547), the court held that $119,500 of the transfer (i.e. the difference between the value of the property transferred and the amount of the value contributed by the creditor) was avoidable, because this was the amount by which the debtor's estate had been diminished. Id. at 938-40. Professor Carlson rightly points out that the same result would follow under current law: "If Abramson could be revisited under the Bankruptcy Code, one would say that the entire transfer - worth $186,000 - was prima facie voidable under § 547(b), but that § 547(c)(1) provides a partial defense 'to the extent' new value of $66,500 was given contemporaneously." David Gray Carlson & William H. Widen, The Earmarking Defense to Voidable Preference Liability: A Reconceptualization, 73 Am. Bankr. L.J. 591, 612 (1999).

Such a sale of property to a creditor in exchange for a combination of new value and extinguishment of antecedent debt is structurally analogous to this Part I B's central issue: a payment to an undersecured creditor in an amount exceeding the undersecured portion of the debt. (To see the analogy, imagine that the creditor in Abramson was owed $186,000, had collateral of $66,500 (and therefore an unsecured claim of $119,500), and was paid in full during the preference period. In other words, the new value in the actual case is analogous to the collateral in the hypothetical, because each arguably serves as a shield against avoidance.) The court could easily reach the same result in this new context as it did in the actual case - i.e., avoidance only of $119,500 - by adopting the part-by-part understanding of "transfer" discussed in the text above. But Professor Carlson does not adopt this part-by-part understanding of "transfer": as just noted, he views "the entire transfer - worth $186,000" as being "prima facie voidable under § 547(b)."

That is, Carlson views the transfer as a whole, and not as an aggregation of parts. (Of course, Carlson immediately goes on to reach the same result as one who holds a part-by-part view of "transfer" would, but he does so only by applying subsection 547(c)(1). On the Abramson facts, which of course are all he is addressing, Carlson is perfectly correct to do so. But in Part I D below, I explain why subsection 547(c)(1) is inapplicable to the analogous undersecured creditor situation, as a general matter. And in that undersecured creditor situation, we must take Carlson at his word and count him as belonging, consciously or not, among those who would avoid the entirety of the payment to the undersecured creditor.)
(that is, had only $300 been recovered).44 Granted, the word “transfer” as applied to $A$ is ambiguous, but that ambiguity is of no importance, because however one resolves it, the arithmetical result is the same.45

But this arithmetical argument, while true as far as it goes, fails to capture the whole story. Chapter 11 reorganization cases, in particular, are much more than arithmetical algorithms—they are hard-fought and protracted power contests.46 Part of what is at stake in a preference question is whether the creditor can use and profit from the fruits of the transfer during the long pendency of the bankruptcy case, or whether by contrast the debtor can use them during that period to facilitate the reorganization. Suppose, for example, that the Chapter 11 case involves a pre-bankruptcy payment of $1 million rather than $1,000. If the creditor who received that payment is allowed to keep it during the months or years of the bankruptcy, the creditor can use it to generate further wealth during that time. But if the debtor-in-possession is able to recover it (even if only for the duration of the case), the debtor-in-possession can use it to continue paying employees, or to acquire a strategic new product line that will help to rehabilitate the debtor’s business,

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44See, e.g., TABB & BRUBAKER, supra note 43, at 362-63 n.23 (noting that the numerical results are the same either way but recognizing that, “[o]f course, creditors would rather keep the money than have to pay it over to the trustee and then make a secured claim against the bankruptcy estate,” because of the absence of compensation for the delay in payment).

The same argument would be advanced by those who continue to adhere to a “net result test” for preferences. Under the net result test, a transfer is not avoidable, even if the statutory preference elements are otherwise met, to the extent the creditor has made offsetting advances to the estate or otherwise replenished the estate with new value. The net result test developed under the old Bankruptcy Act from the need to accommodate creditors in “running accounts” cases, i.e. cases where the debtor made repeated payments to a supplier and the supplier made repeated credit shipments to the debtor. Thomas M. Ward & Jay A. Shulman, In Defense of the Bankruptcy Code’s Radical Integration of the Preference Rules Affecting Commercial Financing, 61 WASH. U. L. Q. 1, 52-53 (1983). (Under the Code, this situation is now addressed by subsection 547(c)(4), which is further discussed infra in note 54.)

The net result test is clearly obsolete under the Code, COLIER, supra note 18, at ¶ 547.04[4], and indeed applying it under the Code would have the absurd result of making virtually all of § 547(c) redundant. See Ward & Shulman, supra at 61-62. The “diminution of the estate” test, which amounts to an expanded and more malleable version of the net result test, continues, however, to lead a shadowy half-life in the minds of judges and lawyers who came up under the Act. Properly understood, under the Code the diminution of the estate test is equally as obsolete as the net result test. Countryman, supra note 13, at 740 (explaining that under the Code the more appropriate focus is on “preferential effect” rather than “diminution of the estate”).

45The statutory ambiguity would, in this view, be analogous to a “false conflict” in the field of conflict of laws. That is, whichever jurisdiction’s law is applied, the substantive result is the same. See, e.g., EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 28 n.16 (4th ed. 2004).

46As Douglas Baird remarks in another context, with powerful simplicity, “A corporate reorganization is about bargaining.” Douglas G. Baird, The Importance of Priority, 82 CORNELL L. REV. 1420, 1435 (1997). A prosecutor friend of mine once chided me for my enthusiasm about bankruptcy law, trying to contrast it with his criminal law proceedings, which generate such passion as individuals fight for their liberty. I responded that my friend was the one missing out on true passion, because he had never seen creditors fight over assets from an insufficient pool.
or the like—all without compensating the creditor for the lost time value of money.47 These real-world consequences are completely overlooked in a merely arithmetical account.

Also at stake in a preference question are the rules of the game of the Chapter 11 power contest as a whole. All bargaining, of course, takes place in the shadow of the law,48 and any weakness in a creditor’s claim—including the creditor’s vulnerability to a preference attack—gives leverage to the debtor, for example in negotiating the provisions of the reorganization plan. A preference complaint is by no means a mere collection tool, implemented as a mechanical measure for the sole purpose of redressing clear wrongs. On the contrary, it is at least as importantly a tactical move, deployed for the purpose of advancing negotiations on other matters.49 Thus, the resolution of the part/whole ambiguity that was isolated in Part I.B can have varied and powerful effects that are felt throughout the reorganization process—effects that, again, arithmetic utterly fails to capture.

Quite apart from Chapter 11 reorganization cases, Part I.B’s preference question remains important in liquidation bankruptcies (in which the debtor’s assets are reduced to cash and paid out to creditors), too. Liquidations generally involve no plan of reorganization, so that the issues of bargaining power are less important here, and liquidations are relatively quick, so that the time


48Strongly parallel issues are at stake in the treatment of collateral generally, even where no pre-bankruptcy payment is involved. Secured creditors are stayed from seizing their collateral during the bankruptcy case, precisely in order to facilitate debtor reorganizations. See 11 U.S.C. § 362 (2006); DOUGLAS G. BAIRD, ELEMENTS OF BANKRUPTCY at 207 (4th ed. 2006) (explaining that the automatic stay “slows individual creditors from taking actions that would thwart the reorganization and, at the same time, allows the debtor to continue doing business with the rest of the world on ordinary terms.”) Indeed, even creditors that have already seized their collateral prior to the commencement of the bankruptcy are required to return that collateral to the trustee in a turnover proceeding. 11 U.S.C. § 542. (The best-known and most striking example of this turnover power is United States v. Whiting Pools, Inc., 462 U.S. 198 (1983). For a critique of the case, see Thomas E. Plank, The Creditor in Possession Under the Bankruptcy Code: History, Text, and Policy, 59 Md. L. Rev. 253 (2000).) Both of these well-established rules provide support, by analogy, for the power of the trustee to avoid the entirety of a pre-bankruptcy payment to undersecured creditors.

49To be sure, the complex factual and procedural settings of many avoidance actions may include factors that tend to reduce the importance of the issue. For example, adequate protection payments will often have to be made, see supra note 35, and in certain complex reorganization cases avoidance actions may not even be litigated until after confirmation of a plan.


value of the assets is less important here too. But the preference question remains vital to the orderly resolution of claims, which is not only liquidation's central imperative but also a principal mission of bankruptcy law as a whole. A principal feature of the Bankruptcy Code is the automatic stay that is imposed on creditors upon the debtor's filing of a bankruptcy petition, which prevents them from pursuing the debtor on their own and thereby ousts the typical dog-eat-dog state-law rush of creditors in favor of an orderly, unified process.\textsuperscript{50} The entire institution of preferences, too (far beyond the more localized question of how to treat preferential payments to unsecured creditors) exists in order to bolster the orderliness of the automatic stay.\textsuperscript{51} If the Code were to allow pre-petition payments to remain with their original payees, this would enable the same helter-skelter dismemberment\textsuperscript{52} of the debtor's assets that the automatic stay is designed to avoid. The administration of liquidation cases can best be effectuated by bringing all of the relevant property into the trustee's control, allowing creditors to present their claims, and then making orderly distributions at the end of the case, without constraint from the status quo that happens to have existed when the debtor declared bankruptcy.\textsuperscript{53} Part I.B's initially narrow-appearing preference question, then, is emblematic of many of bankruptcy's most fundamental concerns.

A final argument concerning the importance of this issue is structural or thematic. Preference law is all about timing. It is obsessed with timing, and one could even say that it fetishizes timing. For example, within § 547(b)'s basic elements of avoidability alone, the statute asks (a) was the transfer made pre-petition? (b) was it made within 90 days before the petition (or within one year, to an insider creditor)? (c) was the debtor insolvent at the time? and (d) was the transfer on account of a debt that had been incurred even earlier? Subsection 547(c)'s exceptions to avoidability, too, are replete with crucial timing questions.\textsuperscript{54} And subsection 547(e), which devotes itself

\textsuperscript{50}See 11 U.S.C. § 362.

\textsuperscript{51}See Jackson, supra note 9, at 122 ("The creditors that are the first to learn about the debtor's difficulties may try to collect what they are owed before the collective proceeding starts, instead of beginning the proceeding themselves. The irony is that this kind of action replicates the problem bankruptcy law was designed to solve: pursuit of individual interest may leave the group of creditors worse off.").

\textsuperscript{52}I do not here take a position that creditors may be equated with ravaging families of mass murderers, though it is worth noting that the total disposition of the debtor's assets is called a "liquidation." See Vincent Bugliosi, Helter Skelter: The True Story of the Manson Murders (1974).

\textsuperscript{53}As one important instance of this principle, secured creditors are stayed from seizing their collateral in a liquidation case, just as they are in a reorganization case. See 11 U.S.C. § 362(a)(4).

Also relevant here are the broad sweep of the concept of property of the estate, see 11 U.S.C. § 541, and the concomitantly broad definition of "claim." See 11 U.S.C. § 101(5).

\textsuperscript{54}For subsection (c)(1), was the exchange "substantially contemporaneous"? For subsection (c)(2), did the timing of the transfer comport with the ordinary course of business? For subsection (c)(3), was the enabling loan perfected within 30 days after the debtor received possession of the collateral? For subsection (c)(4), did the creditor advance new value after the point at which the debtor made the otherwise
entirely to adding precision to the already-crucial-under-(b) time at which a transfer is made, is a veritable orgy of deliciously hyper-technical timing rules. In light of this time-obsessed structure of preference law as a whole, one clearly should not ignore timing—and what happens during that time—when it comes to the avoidance of preferences paid to undersecured creditors. The fact that the arithmetical approach does tend to ignore matters of timing is a structural reason to be skeptical of it.

D. The Weaknesses of a Textualist Argument

Some scholars have sought to impose a part-by-part treatment of payments to undersecured creditors by regarding the payments as being subject to § 547(c)(1). As briefly discussed above, this provision prevents the trustee from invalidating a pre-bankruptcy payment to the extent that it is a "contemporaneous exchange for new value," even if the payment otherwise meets the criteria for preferentiality as discussed in Part I.A. Payments to an undersecured creditor that are attributable to the secured portion of its debt, the argument runs, are precisely such a "contemporaneous exchange for new value" because they are given in exchange for a release of part of the collateral.

The argument is unsatisfying for at least two reasons. First, as just seen,
the text of § 547(c)(1) requires not only that the payment be a substantially contemporaneous exchange for new value, but also that the transfer be made with the parties' intent that it be such a contemporaneous exchange. And yet in the case of most simple payments on undersecured debt, no such intent of the parties is evident, whether formally or otherwise, and indeed, common sense suggests that the undersecured creditor would actually intend the contrary, i.e. that the creditor keep all its collateral despite the payment's reduction of the outstanding debt. It is entirely normal and natural for a creditor to hold collateral with a value that exceeds the amount of the debt.

Moreover, even if the parties do intend a release, it is at least probable that there can be none in the absence of a specification of which portion of the collateral is being released. Under applicable state law, security interests are generally understood as being unitary, and accordingly a payment on secured debt (including undersecured debt) does not reduce the amount of the collateral, but instead reduces only the amount of the obligation that that collateral secures. Otherwise, following a partial payment and in the absence of a specific release of collateral, the secured party would have no way of knowing what remains of its collateral following the payment. For example, if the original collateral is the debtor's inventory of 1,000 television sets

58 "[T]here is no recorded instance of a partially secured creditor doing so. Instead, the creditor always takes the payment and retains all of his collateral." Countryman, supra note 1, at 744. Cf. Ngo, supra note 54, at 96 (criticizing a certain judicial justification of § 547(c)(5) on the grounds that there is no "empirical indication" of an intent to substitute items of collateral for each other).

59 Even one proponent of a (c)(1)-style analysis acknowledges this difficulty with the theory. Carlson, supra note 21, at 271 (acknowledging that undersecured creditors are "usually loath[ ] to give such releases).

60 That is, payments by the debtor and future advances by the secured party generally have the effect of contracting or expanding a continuing single security interest, at least as against a competing secured party.

Under a proper reading of the first-to-file-or-perfect rule . . . it is abundantly clear that the time when an advance is made plays no role in determining priorities among conflicting security interests [with certain limited exceptions]. Thus, a secured party takes subject to all advances secured by a competing [first-to-file] security interest . . .

UCC § 9-323, Official Comment 3. As a result, even if the debtor's payment and the consequent shrinking of the security interest constitutes "value," it may not as a practical matter enable the debtor to secure additional financing, because the competing secured creditor would remain vulnerable to future advances.

The effect of a future advance as against a lien creditor rather than a competing secured party is somewhat more complicated. See UCC § 9-323(b) (subordinating the security interest to the extent it secures an advance made more than 45 days after the person becomes a lien creditor, unless the advance is made without knowledge of the lien or pursuant to commitment entered into without knowledge of the lien). See also infra note 131 (discussing the related Coogan-Gilmore debate).

61 To be sure, the full amount of the collateral is enforceable only up to the reduced amount of the debt secured. See 11 U.S.C. § 506(a), cf. UCC § 9-608(a)(4) (providing for secured party to pay the amount of any surplus from foreclosure to debtor). But even after a portion of the debt has been paid down, the secured party is ordinarily free, in the absence of marshaling concerns, to choose which items of the now-more-relatively-abundant collateral to proceed against.
worth $500 each, and the debtor pays $1,000 on the secured portion of the debt, then what collateral is released: two of the television sets, a one-half interest in four of the television sets, one dollar worth of each of the 1,000 television sets, or some other configuration?\textsuperscript{62} In sum, the idea that the contemporaneous exchange exception automatically applies to the undersecured creditor problem is highly questionable. Accordingly, the attempt to reach a part-by-part solution to the preference question on this ground must fail, or at least fail to fully satisfy.\textsuperscript{63}

II. THE COGNITIVE THEORY OF MASS AND MULTIPLEX

Recent work in the fields of linguistics, psychology, the philosophy of language, and even neurology is yielding exciting theories about the mechanisms of human thought. One branch of this work concerns the idea that the human imagination seems to operate on the basis of certain recurring patterns, called image schemas, and that human minds have the tendency to operate spontaneously and flexibly within these patterns.\textsuperscript{64} The image schemas

\textsuperscript{62}The above discussion of partial payments should not be taken to imply that subsection (c)(1) does automatically apply in a full payment situation. Full payment does prevent questions from arising about precisely which collateral has been released - but only in cases where a release has been actually intended. To be sure, a security-interest exists only where there is an obligation secured, U.C.C. § 1-201(a)(35), and accordingly payment in full (unlike partial payment) has the consequence of extinguishing the security interest, at least until a protected future advance is made, and this counts as new value for purposes of subsection (c)(1). See 11 U.S.C. § 547(a)(2) (defining new value as including "release by a transferee of property previously transferred to such transferee"). But subsection (c)(1) also requires that that new value be the subject of an "exchange" that was "intended by [both] the debtor and the creditor," and one should not automatically bootstrap the legal consequence, important though it may be, into a jointly intended exchange. It is one thing for a creditor's security interest to be extinguished by operation of law, and another for the creditor to consciously intend to exchange that security interest.

The distinction is probably erased (and the exchange probably remains "substantially contemporaneous") in cases in which the debtor demands the filing of a termination statement and the creditor complies. See UCC § 9-513. But this is only a subset of the cases, and possibly a small subset at that, in part because an unterminated financing statement can become valuable to the creditor in connection with future advances, as discussed supra in note 60.

For one example in which 11 U.S.C. § 547(c)(1) should not be presumed to apply to a payment in full, see the hypothetical variation on the Abramson case, supra note 43.

\textsuperscript{63}It is for these reasons that the application of subsection (c)(1) to our hypothetical based on the Abramson case, supra note 43, is misplaced.


that are central to this Article are the mass and the multiplex image schemas. The essence of this mass/multiplex idea is that the human mind has the ability to understand any given phenomenon in each of two differing ways—corresponding in certain ways to a "whole" and a "part," though this will be refined below—and to shift easily between those two different understandings.

A. IMAGE SCHEMAS, AMBIGUITY AND MOTIVATION

Before examining the mass and multiplex image schemas in detail, it will be helpful to understand image schemas in general by looking briefly at one of the most pervasive of them, known as the source-path-goal image schema. 65

A moment’s reflection makes clear that an enormous variety of any human being’s common, everyday experiences can be understood in terms of a structure of source, path and goal. For example, when we first begin to crawl, we learn that to get from point A (a source) to point B (a goal), we must traverse the points in between (a path). Continuing with the same example, we constantly encounter this same pattern when we walk from home (a source), down the street (a path), to grade school (a goal), or when we run the bases in a baseball game, or walk down the hall to talk with a colleague at the office. 66 From the constant recurrence of mutually similar patterns such as these, our minds subconsciously abstract the structural commonalities of the various recurrences, and that structural commonality constitutes the source-path-goal image schema. Our minds can then put the source-path-goal image schema to use as a fundamental tool for making sense even of completely new experiences. For example, a person who has experienced travel only by foot and by car can easily abstract from those experiences to understand numerous features of travel by train, plane or space shuttle. 67


66Moreover, the same pattern is pervasive even on the non-physical, metaphorical level: for example, in making an argument, we begin from a premise (a source) and take certain “steps” (a path) to “reach” the conclusion (a goal). GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY (1980, with 2003 afterword).

67To take another example that further illuminates the metaphorical use of image schemas, if a teacher says to a student, “Let’s stroll through your argument,” the student can understand this expression, even if he or she has never heard it before, by subconsciously drawing upon the source-path-goal image schema. The student will rightly understand that the teacher is offering an informal and leisurely examination of the argument’s “path.” For more on the interplay of metaphor with image schemas see infra note 100.

Some of the particular understandings, or “entailments,” that are made available through the source-path-goal image schema are discussed infra note 83 and accompanying text.
The overall point is that the source-path-goal image schema is a distillation of prior experience that lends structure and meaning to new experience.

Other image schemas, too, including the mass and multiplex image schemas, are best understood as structural generalizations about experience, abstracted imaginatively and subconsciously from our bodies’ recurrent patterns of interaction with the world. Though each person’s interactions with the world are endlessly varied, they nonetheless share certain basic structural or organizational similarities. And as we live our lives, our minds subconsciously identify these similarities, using them as abstract frameworks, or image schemas, through which to filter new experiences. Our minds use these image schemas to make sense of the new experiences, by assimilating each new experience to the structurally similar ones that came before it. Among these other image schemas are those of containment,68 landmark/trajectory relationships,69 and, centrally for this Article, mass and multiplex.70

The mass and multiplex image schemas arise from the basic fact that in our bodily interaction with the world, we conceive of some phenomena as being whole or integral, without internal divisions, while we conceive of others as being divisible collections of smaller components. And often, we can conceive a single given phenomenon in either the first way or the second way. To conceive of it in the first way is to use what the cognitivists call a mass schema, while to conceive of it in the second way is to use what the cognitivists call a multiplex schema.71 The classic illustration of this dichotomy in the literature is based on a herd of cows; as George Lakoff points out, the herd when viewed from far away will tend to appear to an observer as a single whole, and the observer may not notice or give any thought to the individual cows that constitute it.72 By contrast, the same herd when viewed from closer by will tend to appear to the observer as a group of individual cows rather than as an undivided mass.73

68See Johnson, supra note 64, at 21-33; Lakoff, supra note 65, at 272-73.
69See Lakoff, supra note 65, at 419-20.
70See Johnson, supra note 64, at 26; Lakoff, supra note 65, at 428, 441-42.
71Ronald Langacker has discussed related ideas in terms of “continuity” (which includes generally the mass conception) and “discreteness” (which includes generally the multiplex conception). Ronald W. Langacker, On the Continuous Debate About Discreteness, 17 Cognitive Linguistics 107 (2006). See infra note 76 and text accompanying note 91.
72Lakoff, supra note 65, at 428. Our own earlier example of the traffic jam is parallel: the observer who is stressed out over being stuck in traffic will tend to pay attention to the traffic jam as a whole, rather than the individual cars that compose it.
73Id. Again, our own example of the blue Subaru, the new hybrid sedan, and the dusty pick-up truck is parallel: the observer who is thinking about buying a new car will tend to pay attention to these individual cars, rather than the traffic jam of which they are a part. See generally Langacker, supra note 71, at 121 (“A recurring aspect of our everyday experience is that large populations of discrete entities function for all intents and purposes as continuous substances. Viewed at a modest distance, sand looks as continuous as asphalt, and we often see grass as just a continuous expanse of green, without discerning individual...
This same phenomenon is common throughout human experience, in everyday life and, I submit, also in the law. The linguist Leonard Talmy discusses a number of examples from everyday life, including “breathing” versus “taking breaths,” and “furniture” versus “pieces of furniture.” In each of Talmy’s examples, the first articulation of the pair would be used for what we are calling a mass conception, and the second articulation of the pair would be used for what we are calling a multiplex conception of exactly the same whole. And now we can see that the same availability of alternative conceptions, mass and multiplex, applies to the concept of “transfer” under the Bankruptcy Code’s preference statute. In Part I.B’s basic example, the $400 that was paid to the undersecured creditor during the preference period can be conceived of either as a mass—that is, as a single $400 transfer without important constituent components—or as a multiplex—that is, as an aggregation of 400 components of $1 each (or, less likely, as an aggregation of 40,000 components of one cent each, or the like). These alternative conceptions, along with the other aspects of mass/multiplex theory discussed below, explain both the existence and the intractability of Part I.B’s controversy over the Bankruptcy Code’s treatment of undersecured creditors.

But there is one crucial factor that distinguishes Part I.B’s preference problem—and the remainder of this Article’s other issues—from the examples discussed by Lakoff, Talmy and others. In all of the linguists’ examples, the two alternative conceptions are expressed by different words or phrases (“herd” versus “cows,” “breathing” versus “taking breaths,” etc.). By contrast, in the preference problem, both alternative conceptions are expressed by the same word (one big “transfer” versus 400 components, each of which is also a “transfer”). One might even say that the linguists’ examples and the preference problem are opposites of each other: the linguists are concerned with a single given real-world situation and the ability of a speaker to articulate it in two alternative ways, while the legal analyst is concerned with a single

blades. At a low enough resolution, the constitutive particles are not only effectively identical but fade from awareness altogether.

The fact that Professors Lakoff and Langacker both explain their examples in terms of physical distance should not be understood as a limitation of the theory. As our traffic jam example shows, and further discussed below, the true distinction between mass and multiplex is the motivation of the observer. To be sure, distance is often associated with motivation, but motivation is potentially a much more flexible concept than distance.


As shown in Part III, the same holds true of many other statutory, contractual and constitutional issues, perhaps because those texts tend to be formulated in terms of abstract nouns, for which we tend to have a more limited vocabulary.

The same situation can be described by a variety of semantically distinct expressions that embody
given Congressional articulation and the ability of an addressee to interpret it as applying in two alternative ways. The legal problem involves ambiguity while the linguists’ traditional problem does not. And yet the legal problem is nonetheless explained by the linguists’ mass and multiplex image schemas.77

Cognitive theory observes, and our everyday experience helps to confirm, that the human mind has the ability to shift easily between the mass and the multiplex conception of a given whole.78 (This is true regardless of whether the two conceptions would be expressed by the same or by different vocabulary.) The process of the mind’s shifting between two such perspectives has been called an image schema transformation,79 and in particular (because the image schemas in question here are mass and multiplex) the process is called a mass/multiplex image schema transformation.80 Despite its cumbersome terminology, and despite the complexity of the experiences that it implicates, an image schema transformation is a process that our minds engage in nimbly, effortlessly, and often subconsciously. We do not consciously decide to shift our attention from the mass of the traffic jam to the multiplex composed of blue Subaru, new hybrid and dusty pick-up truck; nor do we consciously decide to shift our attention in the other direction. We simply do so.81

The shifts in a person’s conception from mass to multiplex or vice versa different ways of construing or structuring it. Our ability to impose alternate structurings on a conceived phenomenon is fundamental to lexical and grammatical variability.” LANGacker, supra note 74, at 107.

77This overlaying of ambiguity onto the mass and multiplex dichotomy has at least two important consequences. First, by bringing the linguistic theory into a common and contentious pattern of legal dispute, it reveals the enormous practical importance that the linguistic theory can potentially carry. (After all, the stakes of a judge’s decision on a statutory term that carries a mass/multiplex ambiguity tend to be much greater than the stakes of an ordinary speaker’s decision on whether to characterize a bunch of burgers-to-be as a herd or as cows.)

Second and more troublesome, it raises questions about the relationship between a person’s paying attention to the fact that a given whole is composed of components, on one hand (the subject of the instant discussion) and a person’s shifting the scope of his or her attention away from one whole and onto a smaller one exclusively, on the other hand (see, e.g., supra text accompanying notes 72 and 73). A full discussion of this second consequence is beyond the scope of this Article, but it would seem that the former and the latter are distinct, even if the former is a precondition of the latter.

78See generally Talmy, supra note 74, at 48-50 (discussing related ideas in terms of “uniplex” and “multiplex”).

79See Lakoff, supra note 65, at 440-42; Johnson, supra note 64, at 26; Lakoff & Johnson, supra note 65, at 145.

80Image schema transformations exist with image schemas other than mass and multiplex, too. For example, in the source-path-goal image schema, the mind may shift from an emphasis on, say, the source or the path to one of the other elements. For example, the sentence “He walked over the hill” is understood as focusing on the path when uttered in response to the question “How did he walk home?” But the same sentence, “He walked over the hill,” is understood as focusing on the goal when uttered in response to the question “Where did he walk to?” See Lakoff, supra note 65, at 442; Johnson, supra note 64, at 25-26.

81[O]ur thought is unconscious . . . in the sense that it operates beneath the level of cognitive awareness, inaccessible to consciousness and operating too quickly to be focused on.” Lakoff & Johnson, supra note 65, at 10. Of course, conscious shifts along these lines are also possible, and perhaps common, but they are not the focus of this Article.
are motivated simply, and powerfully, by his or her purposes or intentions of the moment. For example, if a person is delivering a speech before a large audience, she is likely to conceive of the audience as a mass, and to discount or eliminate her attention to the individuals that compose it. After all, the speaker’s purposes of filling the auditorium with her voice, maintaining her poise, and so on are tied to that mass form of conception. By contrast, when the lights come up for questions and answers at the end of the speech, the same speaker is likely to conceive of the audience as a multiplex, devoting substantial attention to the individuals that compose the whole (noticing that certain individuals have their hands raised, that others are gathering their belongings or whispering, etc.). After all, her purposes of engaging in give and take with some audience members while also being polite to others are tied to that multiplex form of attention. And this same purpose-based explanation of the shift between mass and multiplex helps to explain the intractability of Part I.B’s preference issue (and the other legal ambiguities to be discussed in Part III). As Part I.C suggests, those who view the $400 transfer as a mass probably do so, in part, because of an orientation toward loss-spreading and debtor rehabilitation, while those who view the same transfer as a multiplex probably do so, in part, because of an orientation toward protecting individual rights and responsibilities, including creditors’ property rights. The differing purposes lead to differing interpretations of the mass/multiplex ambiguity.

B. Differentiation, Social Controversies and the Absence of Predetermined Answers

One reason that cognitive theory holds image schemas to be so important is that they have entailments, that is, the basic pattern of experience that an image schema represents carries with it a wealth of implications, a kind of loose and experientially grounded logic. We subconsciously use these entailments in making sense of, and reasoning about, a new situation. Here again it may be helpful to provide an illustration based on the source/path/goal image schema before focusing on the mass and multiplex image schemas. When a person encounters a new situation, the mere fact that the situation fits into the already-familiar source/path/goal pattern allows the person to draw a number of useful conclusions, such as (a) if the person is going from Point A

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82Motivation in concept-formation is an important theme of Steve Winter’s book. E.g., Winter, supra note 64, at 97-101. In the context of motivation as applied to other aspects of cognitive theory, Winter writes about the mind responding to the world as it does “for a reason.” Id. at 97. Winter also points out a passage in which Karl Llewellyn makes a point that anticipates this aspect of cognitive theory in astonishingly close terms. “A concept . . . is built for a purpose. It is a thinking tool. It is to make your data more manageable in doing something, in getting somewhere.” Id. at 100 (quoting Karl N. Llewellyn, A Realistic Jurisprudence - The Next Step, 30 COLUM. L. REV. 431, 431 (1930)).
to Point D, she will have to traverse the path between them; (b) she will pass B before arriving at C, and C before arriving at D; (c) an obstruction of the path will prevent her from proceeding to the next point, unless she takes a detour, and so on.\textsuperscript{83}

The mass and multiplex image schemas seem to have far fewer entailments than the source/path/goal one. Perhaps this is attributable to the fact that entailments come from structure, and that the mass and multiplex image schemas have relatively little structure. It's hard to say much about the structure of either mass or multiplex other than that they are alternative ways of looking at a hunk of stuff in the world. Is it one big undivided hunk of stuff (a herd, a traffic jam, a $400 transfer), or a hunk composed of a divisible aggregation of the same stuff (lots of cows, lots of cars, lots of $1 transfers)? In fact, the seminal works in this area identify no entailments at all of the mass and multiplex image schemas,\textsuperscript{84} and I have been able to isolate only one. That one, however, appears to be very important. We can call it differentiation (or, more accurately but more clumsily, "differentiatability"). Under a mass conception, one can interact with the entire hunk in only one way, but under a multiplex conception, one is able to interact with parts of the hunk in one way and other parts of the hunk in another way. Under a mass conception, the motorist who is concerned with getting home will think only about the entire traffic jam at once, while under a multiplex conception, the motorist who is thinking of buying a new car will think about the nice little hybrid Honda in a way different from the dusty old pick-up truck. Under a mass conception, a judge will avoid the entire $400 transfer, while under a multiplex conception, the judge is able to avoid $100 while leaving the other $300 in the creditor's hands. The mass conception entails uniform treatment, and the multiplex conception entails the possibility of differential treatment.\textsuperscript{85}

\textsuperscript{83}Similar entailments can be articulated for other image schemas, such as the containment and landmark/trajectory schemas.

\textsuperscript{84}In general, the mass and multiplex image schemas have been the object of dramatically less study than others. Cf. Claudia M. Brugman, The Story of Over: Polysemy, Semantics, and the Structure of the Lexicon (1988); Robert B. Dewell, Over Again: Image-Schema Transformations in Semantic Analysis, 5 COGNITIVE LINGUISTICS 351 (1994); Alan Cienki, Some Properties and Groupings of Image Schemas, in Lexical and Syntactical Constructions and the Construction of Meaning (Verspoor et al, eds., 1997); Alan Cienki, Straight: An Image Schema and Its Extensions, 9 COGNITIVE LINGUISTICS 107 (1998). This relative neglect might be attributable partly to the relatively low level of structure discussed in the text, and partly to the fact that its importance in day-to-day thinking has tended to go unrecognized until now.

\textsuperscript{85}In this light, it becomes clear that the familiar legal tool called "aggregation" is simply the choice of a mass conception rather than a multiplex conception, applied to certain objects of analysis at a higher-than-usual level of generality.

For example, is the $75,000 amount-in-controversy requirement for diversity jurisdiction of the federal courts under 28 U.S.C. § 1332 satisfied by a plaintiff who has two otherwise unrelated breach-of-contract claims against the same defendant, each in the amount of $38,000? The general hornbook answer to this question is yes, that is, the multiple contract claims may be aggregated for this purpose. See, e.g., Edwards
These entailments help to indicate that the mass and multiplex image schemas reach far beyond herds of cows, preference law or other isolated legal problems to be surveyed in Part III. They also do much to explain many of liberal society’s broadest and most basic normative questions, including many of the day’s most contentious social and economic controversies. The powerful point is that society itself can be conceived of as either a mass or a multiplex, in which the individuals who are its components are either differentiated or not. On economic issues, to take a group of socially vital and salient-to-bankruptcy-law examples, the generally progressive viewpoint conceives of society as relatively indivisible, with all people rising or falling in tandem with their legions of brothers and sisters—a mass. By contrast, the generally conservative viewpoint on these same issues conceives of society as

v. Bates County, 163 U.S. 269, 273 (1896). Ambiguity is not an issue here (that is, no one would call the aggregation of the multiple claims a single "contract claim"), but the basic mass/multiplex question is nonetheless squarely presented, viz. whether the law will consider the aggregation of claims as a unity or not. And because the legal system wishes to permit subject-matter jurisdiction in this case — i.e. to avoid the entailment of differentiation of treatment among the various contract claims — the law chooses a mass rather than a multiplex conception. (Similar purpose-based image schema transformations help to account for the variety of other rules that govern related aggregation questions where more than one plaintiff or defendant is involved, though the distinctions in this area have been widely criticized. See 14B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3704 (3d ed. 1998); J.H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 2.9 (3d ed. 1999); Note, Aggregation of Claims in Class Actions, 68 COLUM. L. REV. 1554, 1558-62 (1968))

Aggregation can be a substantial issue where preferential transfers are concerned, too. As seen supra note 28, Bankruptcy Code § 547(c)(8) provides for the non-avoidance of certain transfers of less than $600 by consumer debtors. The aggregation issue arises when the debtor makes more than one payment to a single creditor within the preference period, each payment being less than $600 but the aggregate being more. Should all the payments be non-avoidable, or should they be aggregated? The statute fails to answer this question, despite an explicit mention of aggregation. (The statute operates when “the aggregate value of all property that constitutes or is affected by such transfer is less than $600,” but aggregation within a transfer — whatever those bounds may be — is different from aggregation across transfers.) The cases generally impose an aggregation requirement, despite the textual silence. E.g., Elec. City Merchandise Co. v. Hailes (In re Hailes), 77 F.3d 873, 875 (5th Cir. 1996); Alarcon v. Commercial Credit Corp. (In re Alarcon), 186 B.R. 135, 137 (Bankr. D.N.M. 1995). See also Collier, supra note 18, ¶ 547.04[5]. The subsection (c)(8) aggregation issue is also present in subsection (c)(9). See § 547(c)(9).

A structurally similar aggregation issue also presents itself in connection with the avoidance of certain constructively fraudulent transfers, a subject generally discussed infra in Part III.A. For that aggregation issue in particular, see infra note 153.

86The particular controversies change from year to year and election to election, but social security, progressivity of income taxation, and the legitimacy of estate taxation and minimum wage legislation are just some of the enduring themes.

87This mass viewpoint on large social questions is nicely crystallized by the title of the pop song "We Are the World," released by USA for Africa in 1985 as part of a popular wave of solidarity with Ethiopian famine victims. On a more focused level, the mass view as applied to aggregations of individuals has a nice parallel in Lawrence Solan’s work about the legitimacy of the concept of legislative intent. See Lawrence M. Solan, Public Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation, 93 COLUM. L. REV. 447 (2003). Solan uses the concept of group entity (also known as group entitativity) to show that the mind of a perceiver commonly attributes the intent of particular individuals to the entirety of a group (e.g., a legislature) to which the individuals belong.
a much more readily divisible aggregation in which individuals are paramount rather than the collective, and in which differentiation is welcome and indeed invited—a multiplex.88 (On certain non-economic issues, on the other hand, the alignment of politics and image schemas may well be the opposite.)

It is no coincidence that the preference issue and some of liberal society's broadest normative controversies are all traceable to the mass and multiplex image schemas. These are not separate subjects that just happen to share a basic structure. On the contrary, the preference issue is simply an instantiation of the normative controversies. (The same is true of the other issues to be discussed in Part III.) That is why bankruptcy theory is so important, and also why it is so intractable. To adopt a mass or a multiplex interpretation of an ambiguity in the Bankruptcy Code is concomitantly to take a mass or a multiplex position on the related underlying questions of social theory.89 As Part I.C showed, and as the other issues to be discussed in Part III will substantiate, a conflict of visions over these issues in bankruptcy law is part and parcel of a conflict of visions over social structure.90

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88 The classic quotation that crystallizes this multiplex viewpoint is from former British Prime Minister Margaret Thatcher:

I think we have gone through a period when too many children and people have been given to understand 'I have a problem, it is the Government's job to cope with it'... 'I am homeless, the Government must house me!' and so they are casting their problems on society and who is society? There is no such thing! There are individual men and women and there are families and no government can do anything except through people and people look to themselves first....

... There is no such thing as society.


89 On the preference issue, the interpretation of the statutory ambiguity and the stance on social theory happen to be isomorphic: a mass in the former corresponds to a mass in the latter, and similarly for multiplexes. But this is not always true, because statutes vary, and their social effects vary. Accordingly, with some statutes, a mass interpretation of an ambiguity will correspond to a multiplex stance on social theory, and a multiplex interpretation of the ambiguity will correspond to a mass stance on social theory. For one example, see Part III.A, in which viewing a charitable contribution as a mass corresponds to viewing society as a multiplex.

This absence of a constant “match” between statutory interpretations and social stances, far from creating a problem for the application of cognitive theory to this area of the law, is fully consistent with it. After all, as seen above, cognitive theory teaches that a person’s adoption of a mass or a multiplex conception is contextual and purpose-dependent. So there is nothing at all surprising about a person holding a mass conception in one context and a multiplex conception in another, even if the two contexts are closely related. As the saying goes, there is nothing the matter with having two different answers to two different questions.

90 This is also clear from some of the more important literature in the bankruptcy field. See Elizabeth Warren, Bankruptcy Policymaking in an Imperfect World, 92 Mich. L. Rev. 336 (1993); Douglas G. Baird, Bankruptcy's Uncontested Axioms, 108 Yale L.J. 573 (1998). In the context of the recent amendments to the Bankruptcy Code, cf. Mary Jo Wiggins, Conservative Economics and Optimal Consumer Bankruptcy Policy, 7 Theoretical Inquiries L. 347 (2006). In Part IV I call for judges to more broadly recognize
Bringing such large stakes to bear on narrow issues of statutory construction does not, of course, make those issues easier to resolve (though one hopes that the broadened discussions may sometimes be more productive). Nor does cognitive theory itself hold any ready answers to legal problems. In fact, as further developed in Part IV, the theory actually makes the legal problems harder to resolve, not easier. One aspect of that additional problematizing should be made clear here, before we move on to the other legal issues to which all this applies. There is nothing right or wrong about a person’s choosing a mass or a multiplex image schema in any given situation; even though they differ, each conception is an available and a legitimate description of the world, so long as it suits the motivations and practicalities of the situation. As the linguist Ronald Langacker writes,

Whether something is discrete [Langacker’s term for conceptions such as a multiplex] or continuous [his term for conceptions such as a mass] is subject to construal. This is not to say that the choice is arbitrary. For the most part, the world is not the way we choose to think it is, but rather the way it is intrinsically, so particular ways of thinking about it are likely to prove more successful than others. Of course, a typical phenomenon is so complex that discrete and continuous descriptions are both appropriate, for different aspects of it. Or each may be revelatory and useful for certain purposes (e.g., light described as either waves or particles).91

And of course, legal ambiguities with their associated social stances have at least as much of the complexity that Professor Langacker discerns even “a typical phenomenon.” The primary lesson for us from the cognitive theory, then, is not how to resolve the ambiguities but rather how to appreciate their resistance to resolution. The difficulty of a mass/multiplex legal ambiguity is a testament to the richness of our ordinary cognitive apparatus—to the human ability to maneuver among equally ingrained but opposing patterns of cognition. Legal rules are, in Langacker’s phrase, “subject to construal.”

91Langacker, supra note 71, at 114. One might also think here of Hamlet’s remark that “Nothing is either good or bad, but thinking makes it so.” William Shakespeare, Hamlet, act 2, sc. 2.
III. FURTHER APPLICATIONS OF THE THEORY

Because mass/multiplex ambiguities are so squarely associated with basic patterns of human cognition, one would expect them to arise frequently and in diverse areas of human experience, including many areas of the law. My initial survey confirms these expectations: a surprisingly large and diverse group of legal issues lend themselves to analysis using the structural and theoretical apparatus advanced by Part II above.

Generally, the issues tend to arise in statutes, contracts, and constitutions. It is significant that all of these texts are forward-looking in nature, and intended to apply to a broad and not entirely foreseeable range of circumstances. These facts tend to cause the texts to be written in abstract terms, and these abstractions, in turn, seem to be more susceptible to mass/multiplex ambiguity than more concrete aspects of the vocabulary, perhaps because of the more limited interaction that language-users tend to have with the abstractions.

Space precludes exploring these other issues in the depth with which Part I examined the "transfer" question. But in order to demonstrate the power, suppleness and practical importance of the theory I will briefly discuss a few of the representative issues here. I first consider three additional issues from elsewhere in the Bankruptcy Code, and these are followed by a briefer look at other issues from courses in the standard first-year law school curriculum. No exhaustive catalog of the issues is possible, and other illustrations will doubtless appear to readers in their own areas of substantive expertise.

A. CONSTRUCTIVE FRAUDULENT TRANSFERS OF CHARITABLE CONTRIBUTIONS

The trustee has the power to avoid a number of types of transfer other than those that are preferential, and within this context we can examine a different mass/multiplex statutory ambiguity that also turns on the interpretation of "transfer." The focus here is on the avoidance of so-called "constructive fraudulent transfers," i.e. of certain transfers made by an insolvent debtor in exchange for "less than a reasonably equivalent value." The avoidability of constructively fraudulent transfers is limited by a relatively recent amend-

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92 Certain broad pronouncements in judicial opinions would naturally also fit into this same category, for the same reasons.

93 11 U.S.C. § 548(a)(1)(B) (2006). This term is used because the trustee's power to avoid does not depend on actual fraudulent intent on the debtor's part, unlike the transfers covered by subsection (1)(A) of the same statute. The statute, in pertinent part, provides as follows: "The trustee may avoid any transfer ... of an interest of the debtor in property ... that was made ... within 2 years before [bankruptcy], if the debtor ... received less than a reasonably equivalent value in exchange for such transfer ... [ ] and was insolvent on the date that such transfer was made ... " 11 U.S.C. § 548(a)(1)(B) (2006).
ment to the Code, designed to shield certain charitable contributions from avoidance. The shielding itself is limited, though, to cases in which "the amount of that contribution does not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of that contribution is made."94

The ambiguity presented by this amendment is perhaps best explained by examining one case, In re Zohdi,95 which perfectly frames the issue. An insolvent but nonetheless generous debtor named Magd Eldon Zohdi donated $10,000 to the Louisiana State University Foundation, and then filed a bankruptcy petition within a year afterwards. The bankruptcy trustee sought to recover the donation from the charity on the grounds that it was a constructively fraudulent transfer; after all, Zohdi had transferred the $10,000 while insolvent and in exchange for less than reasonably equivalent value (indeed, in exchange for no value at all).96 The trustee further argued that the statutory amendment shielding charitable contributions was inapplicable, on the

94 11 U.S.C. § 548(a)(2)(A). This amendment to § 548 was enacted under the name of the Religious Freedom and Charitable Donation Protection Act of 1998, and in pertinent part, provides as follows:

A transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1)(B) in any case in which . . . the amount of that contribution does not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the contribution is made . . . .


96 The glow of warmth that a donor's own benevolence brings to himself or herself is insufficient to constitute "value," which is defined in § 548(d)(2)(A) as including primarily property or the satisfaction of a debt. See, e.g., Weinman v. Word of Life Christian Center (In re Bloch), 207 B.R. 944, 948 (D. Colo. 1997) ("Contrary to the Defendant's assertions, the statute requires that the debtor must have been provided with something of economic, as opposed to religious or spiritual, value") (citation omitted); Morris v. Midway Southern Baptist Church (In re Newman), 203 B.R. 468, 473-74 (D. Kan. 1996).

In similar cases decided before the enactment of the charitable contribution amendment, courts struggled to find "value" given in exchange for donations to churches. See, e.g., Ellenberg v. Chapel Hill Harvester Church, Inc. (In re Moses), 59 B.R. 815, 818 (Bankr. N.D. Ga. 1986) (holding tithing contribution not avoidable where contribution was required as condition of debtor's employment as deacon); see also In re Bien, 95 B.R. 281 (Bankr. D. Conn. 1989) (holding Chapter 13 debtor's contribution to Mormon Church a "reasonably necessary" expense under §1325(b), which uses the same language as §548, where tithing was required as precondition to receiving a "temple recommend" to attend services and pray). In this respect these decisions are reminiscent of Allegheny C. v. Nat'l Chautauqua County Bank of Jamestown, 159 N.E. 173, 176 (1927), in which Benjamin Cardozo famously characterized a decedent's promise of a donation to a college as being supported by consideration.

The Eighth Circuit shielded a tithing contribution from recovery under the Religious Freedom Restoration Act (RFRA) in Christians v. Crystal Evangelical Free Church (In re Young), 82 F.3d 1407, 1417 (8th Cir. 1996), vacated and remanded, 521 U.S. 1114 (1997). The Supreme Court's remand of the case was based on City of Boerne v. Flores, 521 U.S. 507 (1997), which held that RFRA was unconstitutional as applied to state law. On remand, the Eighth Circuit reinstated its earlier decision, concluding that RFRA was constitutional as applied to federal statutes such as Bankruptcy Code § 548. See Christians v. Crystal Evangelical Free Church (In re Young), 141 F.3d 854, 863 (8th Cir. 1998) (emphasis added).
grounds that Mr. Zohdi’s $10,000 donation constituted approximately 23% rather than 15% of his income for the year. Therefore, the argument concluded, the entire $10,000 was avoidable.

The charity’s counterargument was that the donation was avoidable only to the extent that it exceeded the 15% amount specified by the amendment. In other words, the charity conceded that the donation fell within the definition of a constructively fraudulent conveyance, but maintained that the $10,000 should not be treated on an all-or-nothing basis: instead, the charitable contribution amendment shielded from avoidance that part of the donation that did not exceed 15% of Zohdi’s income.

Thus the respective arguments in this case nicely illustrate the ambiguity in the term “transfer” (or, more particularly, “transfer of a charitable contribution”) that is recognized as being present in this statute, and the mass/multiplex theory presented in Part II does a beautiful job of putting the ambiguity into context. In effect, the trustee urges the court to view any “transfer” as an indivisible mass which either exceeds the 15% cap and is thus avoidable in its entirety, or does not exceed the 15% cap and is thus shielded in its entirety. The charity, on the other hand, would have the court view any “transfer” as a multiplex, with certain parts shielded from avoidance and only the remainder being avoidable. As with a preferential payment to an undersecured creditor, and as with a range of society’s basic normative economic controversies, the root of the dispute is whether to recognize possible distinctions among the parts of a whole.

Zohdi also merits our attention because the opinion in the case is quite thorough and (except for a misplaced insistence on a plain meaning of the statute) admirably thoughtful. The court rejects the charity’s multiplex argument and orders that the entire $10,000 transfer be avoided. The court notes that the charitable contribution amendment does not contain any of the phrases often used throughout the Bankruptcy Code to denote the type of multiplex conception for which the charity argued, such as “to the extent,” “in an amount not to exceed,” or “up to.” The court concludes that “the

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97See John J. Dyer & Gregory Todd Jones, Judicial Treatment of Charitable Contributions in Bankruptcy Before and After the Religious Liberty and Charitable Contribution Protection Act of 1998, 2 DePaul Bus. & Comp. L.J. 265, 292 (2004) (“[t]he Donation Act cannot claim a total success in amending § 548 because of the confusion that [the] Zohdi court demonstrated. The question of whether a donation that exceeds fifteen percent of debtor’s gross income is avoidable in its entirety or only to the extent that it exceeds the fifteen percent maximum still remains unanswered.”).
98See supra Part I.B.
99See supra Part II.B.
100Zohdi, 234 B.R. at 375. A similar phrase that might be used to denote a multiplex conception is “insofar as.” It is interesting to realize that all of these phrases can be viewed as metaphors in which the abstract noun in question (e.g. the transfer) is conceived in terms of a concrete object with a certain size that is being measured by a ruler or similar measuring stick that is marked with gradations. This metaphor fits well with the concept of differentiation that, as discussed in Part II.B, is the hallmark of a multiplex.
plain text of [the charitable contribution amendment] characterizes transfers as either covered by and analyzed under [the basic avoidance power for constructively fraudulent transfers] or excluded from coverage by, and the applicability of, the subsection.”101 What the otherwise astute judge misses here, and what this Article makes easy to see, is that the word “transfer” itself is ambiguous. With his italics in this passage (and elsewhere throughout the opinion), the judge relies heavily and confidently on the plain meaning of the abstract statutory noun. But this reliance is misplaced because “transfer” can be viewed either as a mass or as a multiplex, with the whole and the parts being denoted by the same word.102

The court’s choice of a mass conception of “transfer” has the effect of advancing a multiplex view of society.103 That is, the court’s construction of the ambiguity prevents the charity from keeping even the portion of the donation that does not exceed 15% of the debtor’s income, and this construction helps the debtor’s creditors to be repaid, which corresponds to the promotion of individual rather than collective rights and responsibilities: those who lend money are entitled to be repaid, without regard to the effect on others (even on charitable donees). The judge refuses to ask all of Zohdi’s creditors to share the burden of Zohdi’s actions. Instead, Zohdi himself (through the nullification of his action) and by extension Zohdi’s charitable conception. After all, the gradations on a ruler are internal divisions of precisely the kind that a multiplex conception highlights and a mass conception suppresses. For more on the interplay of metaphor with image schemas, see supra notes 66 and 67.

101 Id. at 375. Further confirmation of the court’s plain meaning orientation is discussed infra note 153.

102 As a part of its admirable thoroughness the court also considers the 15% rule in the context of a companion subsection, but continues its misplaced insistence on plain meaning there, too. Section 548(a)(2)(B) provides that a transfer of a charitable contribution is shielded from avoidance even when it exceeds 15% of the debtor’s gross annual income “if the transfer was consistent with the practices of the debtor in making charitable contributions.” See 11 U.S.C. § 548(a)(2)(B). The court finds that the plain meaning of this provision is to “insulate[ ] the transfer (the entirety of the transfer), only if the contribution exceeds the 15% amount” and is consistent with the debtor’s practices. Zohdi, 234 B.R. at 376. “If Congress had meant to expose only the amount in excess of the 15% of gross income, then it had the perfect opportunity to make that clear in subsection (B) by referring to the portion of the transfer otherwise subject to avoidance.” Id. The court observes that the section’s use of the singular “transfer” (as opposed to the plural “transfers”) “is instructive when the question is whether a part of a transfer is not avoidable, because the singular is used to connote a self-contained whole thing.” Id at 376 n.8. But of course, such an understanding of the ambiguous “transfer” (and of the “self-contained whole thing” that the ambiguous term refers to) is only one of two possibilities, the choice of which is not dictated by any plain meaning and which carries significant policy implications.

103 As noted supra in note 89, there is no theoretical inconsistency between such a mass reading of a statute and a corresponding multiplex view of society.

To be clear, there is obviously a difference between the court’s choice “having the effect of” advancing a multiplex view of society, on one hand, and it “being animated by” such a view or “being intended to” advance such a view, on the other. And by no means should I be misunderstood as intending to impute covert intentions to this or any other judge. Instead, I simply argue that technical decisions have consequences that are measurable in ideological terms, and I urge that judges recognize and embrace these consequences rather than denying them. See generally infra Part IV.
transferee (through the loss of the donation) have to bear the loss in a focused, differentiated way.

**B. Moore v. Bay**

Bankruptcy Code § 544(b) generally empowers a trustee in bankruptcy to avoid any transfer of the debtor’s property that is avoidable under applicable law by a creditor holding an allowed unsecured claim. The legislative history of this provision indicates that it was enacted with the intent of preserving under the new 1978 Bankruptcy Code an interpretation of the old Act’s avoidance provisions that had been reached by the aging Justice Holmes in Moore v. Bay.104 The doctrine of Moore v. Bay provides that, when the debtor has transferred an asset and the trustee is asserting the rights of an unsecured creditor that, under state law, could have avoided that transfer, the trustee is not limited by the amount of that creditor’s claim. On the contrary, the trustee has the power to avoid the transfer in its entirety, for the benefit of all creditors—even those creditors who could not have avoided the transfer under state law.

Consider, for example, a constructive fraudulent transfer similar to those discussed in Part III.A above. Assume that Debtor, before bankruptcy but while insolvent, makes a gift of $1,000 to her friend X. At the time of the gift, Debtor is already indebted to A in the amount of $200, and after the time of the gift, Debtor becomes indebted to B and C in the amount of $1,000 each. If applicable state law is provided by the Uniform Fraudulent Transfer Act,105 then on the foregoing facts A would have the right to bring an avoidance action against X, because the transfer to X was made for “less than reasonably equivalent value” and made while Debtor was insolvent.106 However, in the absence of additional facts, neither B nor C would be entitled to bring such an action, because they are not “present creditors,” that is, their claims had not arisen at the time of the alleged fraudulent transfer.107 Moreover, even A’s action would be limited to a maximum of $200 (the amount Debtor owes A), and X would be free to keep the remaining

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107See id. If B or C were able to show either that (a) Debtor was engaged, or was about to engage, in a business or transaction for which her remaining assets were unreasonably small, or (b) Debtor intended to incur, or believed or reasonably should have believed, that she would incur debts beyond her ability to pay as they became due, then they would be able to bring an action under U.F.T.A. § 4(a)(2), which is available not only to present but also to future creditors. However, the hypothetical is more useful for illustrating Moore v. Bay if we assume that B and C cannot make such factual showings.

Additionally, if the gift to X could be construed as an act intended to hinder, delay or defraud Debtor’s creditors, then all of the creditors (present or future) would also have the right to avoid the action under U.F.T.A. § 4(a)(1).
$800.\textsuperscript{108} By contrast, if Debtor has filed bankruptcy and the trustee is exercising A's rights under § 544(b),\textsuperscript{109} the picture is dramatically different. The fact that A had even his small $200 state-law right allows the trustee to take advantage of that right for the benefit of all of Debtor's creditors, who collectively are owed $2,200. While X would not be liable for more than the $1,000 that was transferred to her, she would nonetheless be required to relinquish the full amount of that transfer if that were necessary to help make the creditors whole. In effect, the trustee's avoidance power is more robust than that of the creditor from whose rights it is derived,\textsuperscript{110} and the transferee's property rights are correspondingly more vulnerable.

Because of its dramatic result, the doctrine of Moore v. Bay has always been controversial, and remains so today. The drafters of the Code were on the verge of abolishing it, as recommended by the Commission on the Bankruptcy Laws of the United States,\textsuperscript{111} with the result that the trustee would be limited to asserting state-law rights on behalf of the particular creditors who had those rights under state law. Such a limitation of the trustee's rights would seem to be less reckless or cavalier about transferees' property rights, and would be faithful to the common-sense "derivation principle" that is fundamental in commercial law: if the trustee's rights are derived from those of a creditor, they should not be greater than those of the creditor.\textsuperscript{112} But the Code's drafters were dissuaded from this course by a letter from

\textsuperscript{108}\textsuperscript{Id. § 7(a)(1), 7A(II) U.L.A. 155 (2006) (confining avoidance to "the extent necessary to satisfy the creditor's claim").}

\textsuperscript{109}\textsuperscript{The trustee is likely to use § 544(b) and state law rather than § 548, the Code's own fraudulent transfer provision, when the transfer was made more than two years before the bankruptcy petition. See supra note 32. Section 548's reach-back provision is limited to two years, while that of the U.F.T.A. is generally four years and that of some states is even longer. See 11 U.S.C. § 548(a)(1) (2006); U.F.T.A. § 9, 7A(II) U.L.A. 194 (2006).}

\textsuperscript{110}\textsuperscript{Paradoxically, this additional robustness of the trustee's power leads to a weakening of the recovery of the individual creditor, i.e. A in this hypothetical. Under state law, A acting on his own behalf would be made whole by recovering the $200 he is owed, but under § 544(b) A will recover only his pro rata share of the $1000 recovered by the trustee, which equals only $90 (or approximately 45% of his claim) on the facts given. In this connection David Carlson's phrase is particularly apt: "it has ... been suggested that the doctrine of Moore v. Bay stands for the expropriation of an actual creditor's avoidance rights." Carlson, supra note 32, at 521. Professor Jackson objects to the result on the ground that it "forces a particular unsecured creditor to share the valuable right to avoid a property interest with the entire class of unsecured creditors." Jackson, supra note 9, at 83.}

\textsuperscript{111}\textsuperscript{The foregoing objections can be mollified by recognizing that there are two separate issues in any Moore v. Bay problem: not only the extent of the avoidance, but also the distribution of the intended avoided. That is, using the facts of the example above, it would be possible to limit the avoidance to the $200 that matches A's claim, and to distribute that $200 only to A, rather than making him share it with the other creditors. For purposes of this Article's discussion, however, I am ignoring the distribution aspect.}

\textsuperscript{112}\textsuperscript{See Commission Report, supra note 9, at 200.}

\textsuperscript{113}\textsuperscript{In fact, Justice Holmes himself refers in Moore v. Bay to "the rights of the trustee by subrogation." Moore v. Bay (In re Estate of Sassard & Kimball, Inc.), 284 U.S. 4, 4-5 (1931). The derivation principle is sometimes known by the Latin formulation nemo dat quod non habet: no one gives what he hath not. E.g.,
Harvard Professor Vern Countryman\textsuperscript{113} that stressed, in part, the efficiency losses that would result from the trustee being forced to identify all of the particular creditors entitled to the state-law avoidance right.\textsuperscript{114} Implicit in Professor Countryman's argument is the basic principle of bankruptcy law that the trustee represents all of the creditors, who are to be treated equally in their sharing of recoveries and costs.\textsuperscript{115} Nor has the Code's enactment quelled the controversy: Professor Thomas Jackson criticizes Moore \textit{v.} Bay for, among other things, disregarding the relative balance of property rights versus avoidance that is dictated by state law,\textsuperscript{116} and Professor Douglas Whaley recently wrote that "it is both incredible and dismaying" that the doctrine is still with us.\textsuperscript{117}

This lively controversy parallels Part I's problem of preferences paid to undersecured creditors, and the parallel exists in two forms. First and more superficially, both issues concern the extent of the trustee's avoidance powers and the corresponding vulnerability of property interests. And second and more important, on a theoretical level the Moore \textit{v.} Bay issue can, like the preference issue, be characterized as a mass versus multiplex dichotomy.

\begin{footnotesize}

\textsuperscript{113} The \textit{Bankruptcy Reform Act: Revision of the Salary Fixing Procedure for Bankruptcy Judges, Adjustment of Debts of Political Subdivisions and Public Agencies and Instrumentalities, Hearings on S. 236, S. 236 and S. 2597 Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary, 94th Cong. 4 (1977) (written statement of Professor Vern Countryman).

\textsuperscript{114} Id. at 7-8. Some of the remainder of Professor Countryman's letter was devoted to issues bearing more closely on the particular facts of the Moore \textit{v.} Bay case, which related to disclosure of security interests. See id. With the advent of U.C.C. Article 9 and Bankruptcy Code § 544(a)(1), these issues are now largely academic, though Professor Whaley shows some real examples of where they can persist. See Douglas J. Whaley, \textit{The Dangerous Doctrine of Moore v. Bay}, 82 \textit{Tex. L. Rev.} 75 passim (2003).

Concerning Countryman's efficiency argument, Ted Eisenberg rightly notes that many of the actual creditors that an abolition of Moore \textit{v.} Bay would require trustees to identify "may choose to sit out the bankruptcy." A rough cost-benefit analysis performed by many creditors will often lead them not to participate in the proceeding, and as a result, the transferees that would otherwise be vulnerable to state-law avoidance actions at the hands of those creditors would, absent Moore \textit{v.} Bay, get a free ride. Theodore Eisenberg, \textit{A Bankruptcy Machine That Would Go of Itself}, 39 \textit{Stan. L. Rev.} 1519, 1531-32 (1987) (reviewing Thomas H. Jackson, \textit{The Logic and Limits of Bankruptcy Law} (1986)). Eisenberg goes on to show that the bankruptcy system is subject to an inevitable dilemma of under-enforcement versus over-enforcement of state-law avoidance rights, and that as a result, Moore \textit{v.} Bay cannot be dismissed for failing to provide a "perfect matching of the likely nonbankruptcy state law result." Eisenberg, supra, at 1532. This dilemma of under-enforcement versus over-enforcement is parallel to the one underlying recent controversies over class actions: entrepreneurial lawyers are analogous in this sense to bankruptcy trustees, exercising the rights of tort or other claimants who would not otherwise bring actions on their own.

\textsuperscript{115} This equality of treatment is precisely what Moore \textit{v.} Bay achieves, for good or for ill depending on one's standpoint. Recall that in the hypothetical above, all of the creditors share in the recovery, and that as a negative consequence of that sharing, a recover less than he would have under state law.


\textsuperscript{117} Whaley, supra note 114, at 93.
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Here as with the preference issue, either of the two contending results is defensible, depending on whether one thinks in terms of a mass or a multiplex. Those who favor Moore v. Bay will, consciously or not, tend to think of the rights wielded by the trustee as being derived from the creditors as a whole (a mass). And by contrast those who oppose Moore v. Bay will, consciously or not, tend to think of the rights wielded by the trustee as being derived from the creditors on a one-by-one basis (a multiplex). As we saw with preferences, one of the entailments of a multiplex view is the potential for differentiation among the various elements that make up the whole. And here, that differentiation would show itself both in the limits of the trustee's power and in the party or parties to whom the fruits of that power would go.

Moreover, here as with the preferences issue, each of the two possible results implicates different policies, and one's choice between the two results will depend on the relative importance one attributes to those policies. Indeed, the contending policies here—preservation of property rights versus equality of distribution among creditors—are virtually the same as the contending policies in the preference issue. This is perhaps no surprise in light of the fact that both issues concern avoidance actions.) Both policies are securely enshrined in the Code's theoretical underpinnings, and neither is given textual primacy over the other, at least insofar as these issues are concerned. Hence, if judges are to reach an authoritative resolution of the issues, which they must, the resolution cannot be founded on some assertedly plain meaning of the statute, but rather on a policy judgment.

Here as with the preference example, it would be incorrect to draw facile comfort from the correspondence in this area between the outcomes of the cases and the plain meaning of the statutory text. It is true that the outcomes of cases in this area generally treat creditors' claims as a mass, that is, they allow the transfer to be avoided without restriction by the amount of the state-law creditor's claim. And it is also true that this mass treatment corresponds nicely to the fact that § 544(b) contains no limiting language such as "to the extent." But this correspondence between outcome and language is a matter only of correlation and not of causation, as shown most

118 Indeed, when the Code's drafters were about to overrule Moore v. Bay, they were going to do so by providing for the trustee to assume the rights of an existing creditor "to the extent of such allowable claim or claims, for the benefit of such creditor or creditors." See Commission Report, supra note 9, at 200. The phrase "to the extent" is, of course, the linchpin of the multiplex conception of preferences as discussed in Part I, and the phrase "for the benefit of such creditor or creditors" is a good example of differentiating among the constituents of the whole creditor body.

119 I hedge this statement with the word "virtually" only because § 544(b) is expressly derived from a state-law right, while § 547(b) is not. Accordingly the property-rights aspect of the Moore v. Bay controversy is accompanied by a states' rights flavor that is harder to detect in the property-rights aspect of the preference controversy.

120 E.g., Acequia, Inc. v. Clinton (In re Acequia, Inc.), 34 F.3d 800, 809 (9th Cir. 1994).
dramatically by comparing this topic with Part I’s discussion of preferences. In the preference context, too, the statutory language contained no limiting language such as “to the extent,” and yet the resolution of that issue was not at all clear.121 The real reason for the correspondence between outcome and language in the § 544(b) context, of course, is judicial fiat: Justice Holmes reached a determination in 1931 and the drafters of the Code adopted it.

C. DISCHARGEABILITY OF STUDENT LOANS

One of the traditional pillars of the Bankruptcy Code is its offer of a “fresh start” to individual debtors. Even a financially ruined debtor should have a “new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.”122 The Code provides on one hand for the repayment of debts within certain parameters (and not necessarily in full),123 and provides on the other for the remainder of the debts to be discharged.124 The effect of the discharge is that the debtor is no longer personally liable on the unpaid portion of the debt, and that the creditor is enjoined from pursuing the debtor for repayment.125 Under the Code’s careful balancing of policies, however, certain debts are not dischargeable. Among these are debts arising from student loans—unless the absence of the discharge “would impose an undue hardship on the debtor and the debtor’s dependents.”126

Just as with the preference provision examined in Part I, this provision on non-dischargeability is written in an all-or-nothing fashion: either the debt will impose an undue hardship or not, and correspondingly the debt is either entirely discharged or it is not. However, some courts have allowed a partial discharge of student loan debt—“to the extent” that it imposes an undue hardship. In other words, those courts have viewed the student loan debt as a multiplex rather than as a mass.127 Other courts refuse to grant a partial

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121 I thank Ted Eisenberg for pointing out this contrast. As observed supra note 43 and accompanying text, the scholarly commentary goes both ways.

122 Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (citation omitted).

123 See, e.g., supra Part I.A (describing payment on pro rata basis rather than in full).


discharge, based in part on the purportedly plain language of the statute. But any debt can be viewed as either a mass or a multiplex, just as can any “transfer.” I therefore submit that the language of this statute is actually no more “plain” than the Code’s provisions on “transfer.”

Here, too, policy-based reasoning offers no definitive resolution of the issue. The fresh start policy provides powerful grounds for permitting partial discharge—after all, the debtor would by hypothesis suffer an “undue hardship” in its absence, and avoiding hardship to debtors is the major motivation for having discharges in the Code at all. But there are also strong policy grounds in favor of an all-or-nothing treatment. First of all, the all-or-nothing approach can result in the discharging of the entire debt, (even though only a part of the debt causes an undue hardship), and this result would further the same fresh-start policy as the partial discharge approach. Alternatively, the all-or-nothing approach can result in a complete denial of discharge for the debt (even though a part of the debt causes an undue hardship), and this result would protect the lender, which can very well be considered desirable for its own sake as well as enabling the lender to continue to offer student loans to future deserving borrowers. Overall, on this issue as with the others examined in this Article, both views are legitimate, and the “correct” answer is the one that fits the purposes at hand. The law is constructed by a choice among legitimate possibilities.

D. OTHER ISSUES, HEREIN FROM THE FIRST-YEAR CURRICULUM

The theory presented in Part II applies beyond the Bankruptcy Code, too, and for a brief indication of some of those many and varied applications we may examine certain issues that arise in the typical first-year law school curriculum: (1) from Constitutional Law, the idea of partial takings under the Takings Clause; (2) from Contracts, the idea of divisibility; and (3) from Civil Procedure, the idea of diversity-based subject-matter jurisdiction over corporations and other business entities.


\(^{129}\) One of the chief goals of a bankruptcy proceeding is, after all, to pay claims.

\(^{130}\) See generally Baird, supra note 46, at 1426-29 (discussing the need to consider a ruling’s impact on non-parties when assessing its normative desirability).

\(^{131}\) Because of its bearing on bankruptcy law, one issue from the Secured Transactions course also deserves brief mention here: the definition of a purchase money security interest. Purchase money security interests (or “PMSIs”) are accorded special power under U.C.C. Article 9 (where they can take priority over even previously perfected security interests, U.C.C. § 9-324 (2001) and under the Bankruptcy Code (where they are immune from the debtor’s power to avoid liens that impair an exemption in certain personal, family or household goods, 11 U.S.C. § 522(f)(1)(B)). When a basic PMSI also secures non-
1. Partial Takings of Property

The Fifth Amendment to the U.S. Constitution prohibits the taking of private property for public use without just compensation, and a continuing controversy rages within takings law as to whether a so-called partial taking, for example by the imposition of a new land-use regulation, entitles the property owner to compensation thereunder. So-called property rights advocates, who contend that regulatory restrictions do trigger the Constitution's compensation requirement, are viewing the property as a multiplex, some elements of which are being taken. Conversely, those who contend that partial takings are not compensable are viewing the property as a mass, the taking of only all of which would give rise to a claim for compensation.

The issue is perhaps most strikingly highlighted by the U.S. Supreme Court's discussion in *Lucas v. South Carolina Coastal Council.* That case

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purchase-money debt or includes non-purchase-money collateral, the question is whether the alien elements destroy the privileged status of the basic PMSI, and under prior law some courts held that it did (applying a "transformation rule") while others held that it did not (applying a "dual status rule"). See Russell A. Hakes, *According Purchase Money Status Proper Priority*, 72 OR. L. REV. 323 (1993); Paul M. Shapack, *Defining Purchase Money Collateral*, 29 IDAHO L. REV. 767 (1992-93). Revised U.C.C. Article 9 has now codified the dual status rule other than in consumer-goods transactions, see U.C.C. § 9-103(j), (h). The main point for purposes of this Article is that the transformation rule corresponds to a mass view of security interests, and advances a pro-debtor political standpoint, while the dual status rule corresponds to a multiplex view of security interests, and advances a pro-creditor political standpoint.

Significantly, the mass view (i.e., the transformation rule) had significant support in the case-law before the advent of Revised Article 9, even though PMSIs even at that time were defined in "to the extent" terms, which this Article shows to be archetypal multiplex language. This is a testament to the power of purpose-based reasoning and mass/multiplex transformations to operate even in the face of non-ambiguous statutory language. See also David Gray Carlson, *Purchase Money Under the Uniform Commercial Code*, 29 IDAHO L. REV. 793, 827-30 (1992-93) (discussing related issues that arose in the bankruptcy of Eastern Airlines, with an essentially mass view in the bankruptcy court being reversed by an essentially multiplex view on appeal). Professor Carlson calls Bankruptcy Judge Lifland's reasoning an "assertory metaphysics (that the whole is essential and its constituent units meaningless)," and points out that "one could, with equal dignity, assert that the whole is meaningless - it is rather an aggregate of units." Id. at 829 (emphasis added). The structural parallels with Margaret Thatcher and USA For Africa are clear; see *supra* notes 87 and 88.

This entire subject also resonates with the Coogan-Gilmore debate over the unitary nature or multiple nature of security interests involving future advances, see *supra* note 60. This debate continues to have two actively competing viewpoints, especially in connection with so-called "nonadvances," that is, secured obligations that do not place funds at the disposal of the debtor (such as the accrual of the debtor's interest obligations to the secured party, or the secured party's expenditure of self-protective funds on the debtor's behalf), as against an intervening lien creditor. Briefly, the leading case, *Dick Warren Cargo Handling Corp. v. Aetna Bus. Credit*, 746 F.2d 126 (2d Cir. 1984), treats these nonadvances as being a part of the original security interest, and therefore as taking priority over the rights of the lien creditor. A somewhat more recent case criticizes *Dick Warren's* approach in depth, and follows it only reluctantly because of a conclusion that the state courts would do so, too. *Uni Imports, Inc. v. Aparacor, Inc.*, 978 F.2d 984 (7th Cir. 1992). For a good discussion of the issue, see, e.g., *Knippenberg, supra* note 64. I thank Lynn LoPucki for pointing out that the *Dick Warren* and *Uni Imports* cases are best seen as taking, respectively, a mass and a multiplex view of the same phenomena.

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132See U.S. CONST. amend. V.
133Cf. U.S. Const. amend. V.
established that a regulatory measure that deprives the owner of all of a property’s economic value does trigger the Takings Clause, but leaves open the question of how to measure the extent of the “property” at issue. Justice Scalia illustrates the problem—which is known as “the denominator issue”—with the simple example of a tract of rural land that, due to state regulation, must remain 90% undeveloped. If only the burdened portion of the land is considered, then a total deprivation of economic value results, but if the whole tract of land is considered, it does not. And as Justice Blackmun insightfully insists in his dissent, there is no “objective” or “value-free” basis on which to make this choice. In Frank Michelman’s words, which Justice Blackman echoes,

We have long understood that any land-use regulation can be characterized as the “total” deprivation of an aptly defined entitlement, that is, of an entitlement consisting of an aptly defined servitude . . . . Alternatively, the same regulation can always be characterized as a mere ‘partial’ withdrawal from full, unencumbered ownership of the landholding affected by the regulation . . . .

This issue is a clear instantiation of the mass and multiplex image schemas, and the vitality of the controversy illustrates the ease with which human cognition can flip back and forth to one view or the other. As with the “transfer” issue discussed in Part I, the resolution of this issue cannot depend on any assertedly plain meaning of the term “property,” but only on the substantive policy dispositions of the decision-maker.

2. Divisibility of Contracts

For convenience, parties often use a single contract to express multiple exchanges, whether simultaneous or otherwise. For example, in the classic case of Gill v. Johnstown Lumber Co., the contract called for a logger to deliver millions of board-feet of lumber to a mill at a specified rate. The question that arises in these cases concerns the consequences of one party’s performance of some of the agreed-on elements and not of others: is the partially performing party entitled to recover at the contract rate for the ele-

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134E.g., Mark Fenster, Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity, 92 CAL. L. REV. 609 (2004).
135See Lucas, 505 U.S. at 1016 n.7
136See id. at 1054-55 (Blackmun, J., dissenting).
137Frank Michelman, Takings, 1987, 88 COLUM. L. REV. 1600, 1614 (1988). Professor Radin characterizes the latter view as “conceptual severance,” and describes it as “delineating a property interest consisting of just what the government action has removed from the owner, and then asserting that that particular whole thing has been permanently taken.” Margaret Jane Radin, The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings, 88 COLUM. L. REV. 1667, 1676 (1988).
13825 A. 120 (Pa. 1892).
ments performed, even though it has committed a breach of the contract with respect to the elements not performed? For example, in Gill, is the logger entitled to recover at the specified rate for the board-feet of lumber actually delivered? Contract law generally addresses this issue in terms of divisibility. And within the framework established by this Article, a court that holds that the contract is divisible (i.e., that the partially performing party may recover to the extent of his or her performance) is treating the contract as a multiplex. Conversely, a court that holds that the contract is not divisible (i.e., that the partially performing party may not recover) is treating the contract as a mass.

In a more formalist era, courts resolved the divisibility question by looking solely at the language of the contract. It was divisible if the consideration was expressed on a per-unit basis (for example, one million board-feet of lumber for a price of $1 per thousand board-feet), and it was not divisible if the consideration was expressed on an aggregate basis (for example, one million board-feet of lumber for a price of $1,000). The more modern approach depends instead on the substance of the parties' intentions: if the promises can be apportioned into "corresponding pairs of part performances," and if the parts of each pair are "properly regarded as agreed equivalents," the contract is divisible. The formalist approach is obviously unacceptable because of its arbitrariness, but the modern approach also carries severe problems related to ambiguity. In a lumber contract, for example, it may or may not be "proper" to "regard" a given $1 as the "agreed equivalent" of a given thousand board-feet. The propriety depends entirely on context. For example, if the lumber buyer needs the full million board-feet in order to fulfill a single particular customer's order, then it would not be "proper" to treat the contract as divisible, but otherwise, it might be.

In other words, the question of the divisibility of a contract turns ultimately on the purposes of the contracting parties, as assessed by the judge. A judge adjudicating a divisibility question must avoid the temptation of thinking that there is a single, objectively correct answer to the divisibility problem—particularly one that is purportedly dictated by the contract itself, as the old formalist view insisted. The judge should, instead, accept the reality that any given set of facts can appear one way or the other, depending on which aspects of the context are seen as predominating.

3. Diversity Jurisdiction over Corporations and Other Business Entities

In order to protect out-of-state litigants against possible bias in local fo-
rums, and in order to promote commerce, the Constitution grants power to Congress to create federal jurisdiction over "Controversies . . . between Citizens of different States." \(^\text{141}\) Congress first exercised this power in the Judiciary Act of 1789, and today it is codified in § 1332 of the Judicial Code.\(^\text{142}\)

The persistent mass/multiplex question here concerns the citizenship of corporations and other business entities. It is possible to view the entity as having the citizenship of each of its shareholders or other constituent owners, in which case diversity jurisdiction over the entity will relatively seldom exist. Alternatively, it is possible to view the entity as having the citizenship only of its place of incorporation (or place of equivalent state creation), in which case diversity jurisdiction over the entity will more often exist. Under the former view, the entity is a multiplex, and under the latter, a mass.

Pursuant to Congressional dictate in § 1332(c), corporations are treated as a mass.\(^\text{143}\) But the fact that the ambiguity is now settled in this way should not obscure how easy it is to take varying views on the question. In *Bank of the United States v. Deveaux*,\(^\text{144}\) Justice Marshall declared that the bank, "a corporation aggregate," had the citizenship of all of its shareholders, and thereby took a multiplex view. On the other hand, later in the 19th century the Supreme Court overruled *Deveaux*, thereby taking the mass view that, in light of intervening Congressional action, is now taken for granted.\(^\text{145}\)

Strikingly, the prevailing view for other business entities is to the contrary. Limited partnerships, for example, are treated as having the citizenship

\(^{141}\) U.S. CONST. art. III, § 2.


\(^{143}\) "For the purposes of this section . . . a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . . ." 28 U.S.C. § 1332(c)(2). The "principal place of business" restriction was added in order to prevent corporations from abusingly manipulating the availability of jurisdiction, see, e.g., Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1928), the well-known case in which the plaintiff changed its state of incorporation for the sole purpose of creating a diversity of citizenship basis for federal jurisdiction.

\(^{144}\) 9 U.S. (3 Cranch) 61 (1809).

\(^{145}\) See Louisville, Cincinnati, & Charleston R.R. v. Letson, 43 U.S. (2 How.) 497 (1844). Professor Lon Fuller, focusing on the question of corporate personality itself rather than diversity jurisdiction over corporations per se, argued that neither view was intrinsically right, and Fuller’s point directly prefigures the idea of motivation discussed supra in Part II.A:

Most of what has been written about the supposedly profound question of corporate personality has ignored the possibility that the question discussed might be one of terminology merely. No one can deny that the group of persons forming a corporation is treated, legally and extralegally, as a 'unit.' 'Unity' is always a matter of subjective convenience. I may treat all the hams hanging in a butcher shop as a 'unit' - their 'unity' consists in the fact that they are hanging in the same butcher shop.

of each of their partners,146 and labor unions and limited liability companies (LLCs) are treated as having the citizenship of each of their members.147 This is true despite the fact that these entities are functionally equivalent to corporations for nearly all applicable purposes other than taxation and governance provisions that, in this context, are relatively minor.148 The distinction in their treatment, therefore, is an uneasy and purely formalist confrontation of the mass and the multiplex views.

The continued existence of the distinction is attributable largely to separation-of-powers concerns.149 But this judicial deference to Congress need not be dispositive: other, countervailing policy concerns can be viewed as equally important. The animating purposes of diversity jurisdiction, i.e. the avoidance of local bias and the promotion of commerce, apply just as strongly to other entities as they do to corporations and cut, of course, toward a mass view. (That is, the fewer the citizenships of an entity, the more likely it is that that entity will be afforded the protections of diversity jurisdiction.) On the other hand, restricting the federal courts' diversity caseload has also been an important consideration in recent years,150 and a dogged adherence to the multiplex view helps to further that policy. Overall, then, in this issue as in the others examined above, "purpose" provides no easy resolution of ambiguity.

The ambiguity of "transfer," as discussed in Part I, is rarely recognized even by those who work in the substantive field of bankruptcy. By contrast, the diversity of citizenship issue, the Takings Clause issue, and the divisibility of contracts issue are each well recognized on their own terms by those who work in the respective fields. But even there, the structural relationship

146 Carden v. Arkoma Assocs., 494 U.S. 185 (1990) (5-4 decision). The Carden case also illustrates that a given person can understand a given phenomenon simultaneously as a mass for one purpose and as a multiplex for another. In one breath, Justice Scalia’s majority opinion takes a mass view of the limited partnership by writing that it, and not its partners, is the only party before the court for purposes of the real party to the controversy test. And in the next breath, the opinion takes a multiplex view of the limited partnership by writing that the citizenship of that party is to be evaluated by reference to the citizenship of each of its partners. Id. at 188 n.1. See also Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567 (2004) (adhering to the same reasoning in holding that a pre-judgment change in the citizenship of the parties does not cure an initial absence of subject-matter jurisdiction).


149 In enacting 28 U.S.C. § 1332(c), Congress chose not to include entities other than corporations in its mass treatment. And in Bouligny, supra note 147, the Court declined to breach the "dogmatic wall" separating corporations from other entities on the grounds that this was a step to be taken, if at all, by Congress. See Bouligny, 382 U.S. at 150-51, 153.

among the issues has gone unrecognized. Only when one employs the theoretical framework of mass and multiplex does one begin to see the underlying kinship of all of the issues, and to use each of the issues to inform the others.

IV. FORTHRIGHT JUDGING AND THE CRITIQUE OF PLAIN MEANING

Most legal scholarship strives to resolve problems. The present Article, however, strives to generate them—or at most to resolve them indirectly. Its more visible thrust has been to problematize a number of issues that most observers, when they notice the issues at all, consider to be easy and routine matters of statutory construction.

I adopt this problematizing stance for two principal reasons. The first, of course, is to highlight the importance of Part II’s branch of cognitive theory as applied to the law, thereby simultaneously strengthening law’s interdisciplinary dimensions. But the second is to establish new grounds from which to critique one of the tools that courts have employed in resolving statutory construction issues. Specifically, by throwing into stark relief the ambiguities that are inherent in many statutory provisions, the theory of mass and multiplex renders untenable the idea that there is any plain meaning to those provisions.

The idea of plain meaning is an attractive bedtime story. It holds out the promise of a means by which judges can reach easy and seemingly unassailable decisions, and it also seems to offer a comforting limitation on judicial power. Judges are only applying the law, not making it. The Zohdi case concerning constructive fraudulent transfers abundantly illustrates this viewpoint.\footnote{See Pierre Schlag, Normative and Nowhere to Go, 43 Stan. L. Rev. 167 (1990).}

\footnote{For ease of exposition, I focus here on “statutory” provisions, but as noted above a very similar analysis applies to other publicly- or privately-adopted linguistic provisions, including Constitutional and contractual ones. See e.g., supra Parts III.D.1, 2.}

\footnote{See supra Part III.A, particularly supra notes 101-102 and accompanying text. So strong is the court’s commitment to its plain-meaning principles that it issues dictum concerning a different issue regarding the “aggregation,” see supra note 85, of multiple charitable contributions. If the debtor made several charitable contributions, each on its own amounting to less than 15% but in the aggregate amounting to more, would each of those contributions be shielded from avoidance? Judge Phillips writes that the language of the statute would compel him to say yes, even while he remarks that he does not “like’ this logical consequence of our ruling.” See Murray v. La. State Univ. Found. (In re Zohdi), 234 B.R. 371, 385-86 n. 44 (Bankr. M.D. La. 1999).

Though distasteful sometimes, our job here is to read the statute, apply it as written to the facts, and, in so doing, present Congress with our view of what it has in fact wrought. If we are wrong in our conclusion as to what Congress has said, a reviewing court can tell us so. If we are right about what Congress has said, but it turns out that in fact Congress intended to say something else, Congress can say so and fix it.}

\footnote{Id. Contra, The Universal Church v. Geltzer (In re Geltzer), 463 F. 3d 218, 225 (2d Cir. 2006) (holding that § 548(a)(2)’s safe harbor requires consideration of the debtor’s aggregate annual contributions). For}
But plain meaning can also be a meretricious seduction for the legal system. As shown in this Article, it can enable judges to make policy judgments while believing that they are doing nothing of the kind. Judges who invoke the authority of plain meaning are sometimes simply denying the difficult ambiguities with which it is their task to grapple. The cognitive theory applied here helps to sweep away those false comforts, for all concerned. Of course, the plain meaning approach to interpretation has been attacked many times before—indeed it is a standard element of the Realist call for recognition of the non-deductive nature of judicial reasoning— but the cognitive theory of mass and multiplex gives us a new theoretical standpoint for the critique. Here again, the Zohdi case is an ideal illustration: as shown in Part III.A, the comfort that the court takes in its plain meaning methodology is severely misplaced, and a more accurate approach would instead acknowledge that the court is exercising a policy choice in the face of ambiguity.

Moreover, the critique enabled by this cognitive approach is free from the more radical forms of indeterminacy that various forms of postmodern legal analysis have been heir to. The cognitive approach does not consign the legal system to wide-open, wholly unpredictable or illegitimate vagaries of interpretation, bounded only by the whim or peculiar consciousness of the interpreter. Cognitive theory does not offer an anything-goes, no-right-answers approach. On the contrary, the interpretive options are confined to the ones that are inherent in the mass/multiplex image schema transformation. A “transfer,” a “debt,” an item of “property,” or the like is either a mass or a


154 Even staunch textualists such as Justice Antonin Scalia now take these insights for granted. See Antonin Scalia, Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, in A MATTER OF INTERPRETATION 10 (Amy Gutmann ed. 1997) (“It is only in this century, with the rise of legal realism, that we came to acknowledge that judges in fact “make” the common law . . . .”); see also Michael J. Reddy, The Conduit Metaphor: A Case of Frame Conflict in Our Language About Language, in METAPHOR AND THOUGHT 164 (Andrew Ortony, ed., 2d ed. 1993) (demonstrating that the common conception of language as an unproblematic medium of communication is founded largely on the metaphors through which we understand language). For a study of the role of politics in appellate judicial decisions where the law is not clear, see GARE THOMAS, ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006).

155 Beneath the surface of the Zohdi opinion as it stands, one can glimpse revealing hints of policy-based reasoning that might have been a subconscious influence on the judge's conviction that the statute had a plain meaning. "One more thing," he writes, and proceeds to characterize the entire idea of shielding charitable contributions as a "fiction" and to imply that there is something "absurd" about it. Zohdi, 234 B.R. at 384. One is left with the impression of an overall contempt with Congress's having meddled with the basic, longstanding (and pro-creditor) principles of fraudulent conveyance law. This impression is strengthened by the fact that the judge sua sponte awards prejudgment interest to the trustee. See id. at 385.
multiplex, not a ham sandwich.\textsuperscript{156} Ambiguity, even when systematic, is not grounds for a crisis of confidence in judicial legitimacy.\textsuperscript{157}

What keeps cognitive theory from opening itself to untrammeled free play is the fact that image schemas derive from fundamental aspects of recurrent bodily experience in the world.\textsuperscript{158} Within certain broad and highly useful bounds, each person's patterns of cognition are presumably the same as everyone else's. This is so because we all inhabit broadly similar kinds of bodies, with similar possibilities and limitations and purposes in the world, and because we are all therefore subject to the same broadly congruent patterns of experience. We all have broadly similar minds, operating in broadly similar ways, and we therefore draw the same broadly similar subconscious mental abstractions from our experiences.\textsuperscript{159}

Not only is this Article's subversive effect therefore limited, but it also has powerful affirmative aspects, of at least two kinds. First, I am showing that structurally identical problems of interpretation present themselves between different statutory provisions and even across wholly different legal disciplines. This structural unity can only enrich our understanding of each of the various legal issues, as insights gathered from one issue become available for cross-fertilization with the other issues. Thus, on a practical level, an understanding of, say, preference avoidance\textsuperscript{160} can lead to a better understanding of the dischargeability of student loans;\textsuperscript{161} an insight on property rights\textsuperscript{162} can lead to a fuller understanding of divisibility in contracts;\textsuperscript{163} all of the foregoing can be enriched by the fact that many basic normative controversies stem from competing views of society as mass and multiplex;\textsuperscript{164} and so on.

Second, the theory of mass and multiplex clarifies and demystifies the judicial enterprise, even while it makes it more challenging. The pervasiveness of ambiguity translates into a demand for judicial forthrightness. As shown in this Article, judges grappling with these issues cannot avoid making policy judgments, and by bringing the ambiguities to the fore I offer the judiciary an encouragement to forthrightly articulate those judgments. Once ar-

\textsuperscript{156}Returning briefly to the preference hypothetical in Part I B, in the end the trustee will be empowered to avoid either $400 or $300 - not $4000 or $79.95 or $0.

\textsuperscript{157}See Ken Kress, Legal Indeterminacy, 77 CAL. L. REV. 283 (1989).

\textsuperscript{158}See supra Part II A.


\textsuperscript{160}See supra Part I.

\textsuperscript{161}See supra Part III C.

\textsuperscript{162}See supra Part III D.1.

\textsuperscript{163}See supra Part III D.2.

\textsuperscript{164}See supra Part II B.
articulated, these newly revealed grounds of decision can become the subject of healthy discussion and further processing by the legal system. A frank acknowledgement of statutory ambiguity, followed by a forthright choice among the competing policy choices thereby made available—this, rather than mere application of a purportedly plain meaning, is judicial integrity. Indeed, as Karl Llewellyn shows in his treatment of the Grand Style of appellate judging, to grapple openly with policy-based reasoning is more consistent with judicial constraint and sound reasoning than to suppress it.\(^6\)

Overall, judges should be judges. And overall, an important part of being a judge is to acknowledge one’s own humanness: society would not be well served by judges who could be replaced by computers, and society is equally poorly served by judges who do not acknowledge their own human subjectivity. What is needed are decisions by thinking, experiencing, values-wielding human beings. It is a bromide to say that the legal profession is a life of the mind, and it is equally commonplace to say that law schools teach students how to “think like a lawyer.” But this Article shows that, to an important degree, lawyers and judges think in terms of the same cognitive patterns that ordinary people do.

In this modern era we have come far enough to know that law is not an artificial mode of reasoning, to recognize that judges are no more or less human than the rest of us, and even to accept that judicial minds work in much the same way as ordinary people’s minds. But until recently, the way ordinary people’s minds work has been a mysterious and neglected black box. Cognitive theory is one promising way of starting to open that box.

Ambiguity is not a bad thing—it is simply a feature of our language and of our patterns of cognition. Rather than letting the judicial system sweep ambiguities under the rug, let us insist that the system acknowledge and accept them. A healthy and realistic judicial system will recognize and embrace the fact that its decisionmaking processes are subject to the same subtleties and flexibilities as the rest of human thought.

\(^6\) See Karl N. Llewellyn, \textit{The Common-Law Tradition: Deciding Appeals} 61 (1960) ("Reason I use . . . to include . . . the conscious use of the court’s best powers to be articulate, especially about wisdom and guidance in the result."). For Llewellyn, 

'[r]eason' was closely associated with candour and openness. It is the converse of arbitrariness. A judge uses 'reason' when he makes articulate the premises of his reasoning, especially those premises which take the form of a \textit{value judgment} or of a \textit{statement of purpose or policy}. Thus the style of reason is the style of articulated reasons.