Sufficiently Rooted in Precedent and Policy

BENJAMIN WALTHER* & RYAN S. KILLIAN**

I. INTRODUCTION 287
II. FROM *SEGAL* TO PRESENT 289
A. Segal and the Birth of the "Sufficiently Rooted" Test *289*
B. Butner and Its Unsurprising Rule That State Law Generally Defines Property Interests *292*
C. Departing from Segal *294*
III. MODERN APPROACHES 296
A. The Accrual Approach *297*
B. The Sufficiently Rooted Approach *300*
C. Blended Approaches *303*
IV. IDENTIFYING THE CORRECT APPROACH 305
A. Under a Straightforward Legal Analysis, Segal's Sufficiently Rooted Test Controls *305*
B. The Sufficiently Rooted Approach Is Sound Policy *309*
1. Creditors' Interests and the Expansive Bankruptcy Estate 310
2. Uniform Treatment of Debtors and Creditors 311
V. CONCLUSION 317

I. INTRODUCTION

Courts across the country must routinely decide whether particular assets are part of a bankruptcy estate. There is no doubt that causes of action held by the debtor represent property interests that *may* be part of the bankruptcy estate.[1] The difficult question—the question

* Partner, Shook, Hardy & Bacon L.L.P.

** Associate, Shook, Hardy & Bacon L.L.P.

1. *See, e.g.*, United States v. Whiting Pools, Inc., 462 U.S. 198, 205 n.9 (1983).

courts openly disagree on—is *how to decide* whether any given cause of action *is* part of the bankruptcy estate. This Article identifies the tests in play and argues for the correct one. Precedent yields the answer: applying the test set forth in *Segal v. Rochelle*, causes of action belonging to a debtor should be part of the bankruptcy estate if "sufficiently rooted" in the pre-bankruptcy past.[2]

Since the Supreme Court articulated the sufficiently rooted test in *Segal*, Congress has overhauled the Bankruptcy Code.[3] This intervening change in the law opened the door for lower courts to second-guess the high court, if only inadvertently at first.[4] Instead of the sufficiently rooted test, these courts have applied one of two different approaches: an "accrual approach" or a "blended approach."

Under the accrual approach, a claim is part of the bankruptcy estate only if it formally accrues, as a matter of applicable state law, prior to the debtor's filing of the bankruptcy petition.[5] While courts introduced this approach without discussing *Segal*, subsequent courts have justified it by pointing to the Bankruptcy Reform Act of 1978 ("Bankruptcy Act"). While some courts faithfully apply *Segal* and others openly deviate, a third set of courts utilizes a "blended approach" that claims fidelity to *Segal* but finds a claim "sufficiently rooted" in the pre-bankruptcy past only if the claim formally accrues prior to the commencement of the bankruptcy.[6] In so doing, these courts, like courts applying the accrual approach, rely on state law to define the scope of the bankruptcy estate.

Segal remains the law of the land for the simple reasons that the Bankruptcy Act did not materially change the scope of the bankruptcy estate, and the Supreme Court, which claims the sole authority to declare its opinions overruled, has never overruled the case.[7] If that were not enough—and sometimes, in the real world, precedent is not enough—the bankruptcy policy that originally justified the sufficiently

---

2. Segal v. Rochelle, 382 U.S. 375, 379–80 (1966).

3. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified at 11 U.S.C., in scattered sections of 28 U.S.C., and in scattered sections of other titles).

4. *See infra* pp. 294–96.

5. *See infra* pp. 297–300.

6. *See infra* pp. 302–04.

7. *See infra* pp. 305–08.

rooted test remains bankruptcy policy today.[8] Thus, the test is correct not only from a formalist's standpoint but also from a pragmatist's perspective. After years of conflict, it is past time to authoritatively identify the correct test—the once and future test—the sufficiently rooted approach.

Part I begins with *Segal*, discussing subsequent Supreme Court cases that potentially impact that decision and identifying the point when lower courts began to deviate from the "sufficiently rooted" test. Part II fleshes out each of the three approaches in the context of products liability causes of action. As we demonstrate, products liability claims offer an ideal prism through which to view the problem because the state-specific laws governing claim accrual can lead to widely divergent outcomes in similar cases. Part III explains why, of the three approaches, the sufficiently rooted approach is correct, not just correct as a matter of precedent, but also as a matter of policy. Finally, Part IV briefly concludes.

II. FROM *SEGAL* TO PRESENT

A. *Segal and the Birth of the "Sufficiently Rooted" Test*

In 1966, the Supreme Court decided *Segal v. Rochelle* and its "difficult question of bankruptcy law"—whether loss-carryback tax refunds earned prior to a bankruptcy petition but obtained after the petition's filing belong to the bankruptcy estate or to the debtor.[9] This broad question stated by the Supreme Court implied two narrower questions: (1) "whether on the date the bankruptcy petitions were filed, the potential claims for loss-carryback refunds constituted 'property' as § 70a (5) employs that term"[10] and (2) if so, whether the loss-carryback refunds were "property 'which prior to the filing of the petition . . . [the bankrupt] could by any means have transferred.'"[11]

The answer to the broad question lay in section 70a of the Bankruptcy Act, which vested the bankruptcy trustee with title to certain "kinds of property" belonging to the bankrupt petitioner "as of the date

8. *See infra* pp. 308–17.

9. 382 U.S. 375, 376–78 (1966).

10. *Id.* at 379.

11. *Id.* at 378 (alteration in original).

of the filing of the petition."[12] Section 70a specifically included within its ambit "property, including rights of action, which prior to the filing of the petition [the bankrupt] could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered."[13]

For the more difficult narrow questions, the Supreme Court started from the proposition that the "purposes" of the Bankruptcy Act "must ultimately govern" bankruptcy courts' treatment of property.[14] Courts had already recognized as much: because section 70a(5) functioned primarily "to secure for creditors everything of value the bankrupt may possess in alienable or leviable form" as of the bankruptcy petition's filing, "the term 'property' ha[d] been construed most generously."[15] Another major purpose of the Bankruptcy Act, however, was to give the bankrupt a fresh start.[16] "Accordingly, future wages of the bankrupt do not constitute 'property' at the time of bankruptcy nor, analogously, does an intended bequest to him or a promised gift—even though state law might permit all of these to be alienated in advance."[17] From these two competing purposes sprang the applicable test: property acquired post-petition was nonetheless part of the bankruptcy estate if it was "sufficiently rooted in the pre-bankruptcy past."[18]

Under this rule, it did not matter if a property right could be described as merely "contingent."[19] Similarly, a property right "accruing" between the bankruptcy's commencement and termination was part of the bankruptcy estate if adequately connected to the past.[20] Indeed, the time at which the right formally accrued was functionally irrelevant under *Segal*. Thus, applying "the principles reflected in" *Segal*

12. *Id.* at 377 n.1 (citing 30 Stat. 565, *amended by* 11 U.S.C. § 110(a)(5) (1964)).

13. *Id.*

14. *Id.* at 379.

15. *Id.*

16. *Id.* at 380.

17. *Id.* at 379–80.

18. *Id.* at 380; *see also* Kokoszka v. Belford, 417 U.S. 642, 648 (1974) (applying the "sufficiently rooted" test).

19. *Segal*, 382 U.S. at 379; *see also In re* Dolard, 275 F. Supp. 1001, 1004 (C.D. Cal. 1967); *In re* Durham, 272 F. Supp. 205, 209 (S.D. Ill. 1967).

20. *See, e.g.*, Brangan v. United States, 373 F. Supp. 1050, 1052 (E.D. Va. 1973).

and other cases, the Supreme Court held in *Lines v. Frederick* that a right to "a bankrupt wage earner's vacation pay, accrued but unpaid at the time of the filing of his petition" was *not* part of the bankruptcy estate.[21]

Applying this test yielded results that varied considering the purposes of the Bankruptcy Act. Thus, in *Lines*, confronted with "wage earners whose sole source of income, before and after bankruptcy, [was] their weekly earnings," the Supreme Court observed that accrued vacation pay was intended "to support the basic requirements of life for them and their families during brief vacation periods or in the event of layoff" and, therefore, necessary to a fresh start.[22] The Fifth Circuit reached the same result for the same reason when confronted with wage-like pension payments it described as "periodic payments made during a time when the pensioner may well have no or few other sources of income."[23] In a case dealing with a farmer's alleged right to a tax refund that accrued after the bankruptcy petition had been filed, however, a trial court found that the right to the refund was "intimately connected with the treatment given the farm and stock in the bankruptcy proceedings" and, therefore, sufficiently rooted in the pre-bankruptcy past.[24]

Courts continued to apply *Segal* after Congress overhauled the Bankruptcy Act in 1978.[25] As amended, section 70a(5) was replaced by section 541.[26] While, given the circumstances, it is easy to imagine courts finding *Segal* abrogated, they did no such thing—and for good reason. *Segal*'s continued vitality flowed from two things. First, as written, the relevant provision defined property more broadly than it had in section 70a(5), now defining it as "all legal or equitable interests of the debtor in property as of the commencement of the case."[27]

21. Lines v. Frederick, 400 U.S. 18, 18–21 (1970) (per curiam).

22. *Id.* at 20.

23. Nunnally v. Nunnally (*In re* Nunnally), 506 F.2d 1024, 1026 (5th Cir. 1975).

24. *Brangan*, 373 F. Supp. at 1052.

25. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified at 11 U.S.C., in scattered sections of 28 U.S.C., and in scattered sections of other titles).

26. *Compare* 11 U.S.C. § 541 (2018), *with* Bankruptcy Act § 70(a)(5), 30 Stat. 565 (1964) (repealed 1978).

27. 11 U.S.C. § 541(a)(1).

Second, Congress stated clearly (albeit within legislative history), that the result in *Segal* was to be followed.[28]

While the new section 541 did not expressly mention causes of action as potential property held by the estate, the Supreme Court quickly adopted legislative history stating that section 541(a)(1) "includes all kinds of property, including tangible or intangible property, causes of action (see Bankruptcy Act § 70a(6)), and all other forms of property currently specified in section 70a of the Bankruptcy Act."[29] Thus, in addition to recognizing the continued eligibility of causes of action, the Supreme Court also confirmed the continuing influence of section 70a. Then, in 1992 the Supreme Court announced its reluctance "to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history,"[30] thus establishing the "[p]resumption that the Bankruptcy Act of 1978 preserved prior bankruptcy doctrines."[31] *Segal* and its sufficiently-rooted test seemed secure.

B. Butner and Its Unsurprising Rule That State Law Generally Defines Property Interests

In 1979, after the Bankruptcy Act of 1978 was passed but before it became effective, the Supreme Court decided *Butner v. United States*.[32] A dispute between a creditor/second mortgagee and trustee "over the right to the rents collected during the period between the mortgagor's bankruptcy and the foreclosure sale of the mortgaged property" raised the question of "whether the right to such rents is determined by a federal rule of equity or by the law of the State where the property is located."[33] The question implicated a circuit split

---

28. *See* S. REP. NO. 95-989, at 5868 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5868. ("The result of Segal v. Rochelle, 382 U.S. 375 (1966), is followed, and the right to a refund is property of the estate.").

29. United States v. Whiting Pools, Inc., 462 U.S. 198, 205 n.9 (1983) (quoting H.R. REP. NO. 95-595, at 367 (1977); S. REP. NO. 950989, at 82 (1978)).

30. Dewsnup v. Timm, 502 U.S. 410, 419 (1992).

31. William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 106 (1994).

32. Butner v. United States, 440 U.S. 48 (1979).

33. *Id.* at 49.

concerning the proper method of characterizing this type of property for purposes of bankruptcy proceedings.[34]

The Second, Fourth, Sixth, Eighth, and Ninth Circuits viewed "the question whether a security interest in property extends to rents and profits derived from the property as one that should be resolved by reference to state law."[35] Meaning, in these circuits, the result would vary with the relevant state law.[36] The Third and Seventh Circuits, however, applied a uniform "federal rule of equity that afford[ed] the mortgagee a secured interest in the rents even if state law would not recognize any such interest until after foreclosure."[37] The Supreme Court sided with the majority approach for straightforward reasons: "Property interests are created and defined by state law," and "[u]nless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding."[38] The case, in the end, was a simple one because it simply applied "the basic federal rule . . . that state law governs" the characterization of property to a particular type of property: rents and profits derived from a bankrupt mortgagor's mortgaged property.[39]

The short, unanimous opinion was written in a manner suggesting the justices did not think its question was particularly difficult or that the result required an extended defense. It is consistent with *Segal* itself, which recognized in a footnote that while federal law controls "[w]hat would constitute a 'transfer,'" state law would control "[w]hether an item could have been so transferred . . . , save that on rare occasions overriding federal law may control this determination or bear upon it."[40] Likewise, *Vanston Bondholders Protective Committee v. Green*, a case decided two decades before *Segal*, stated the rule even more clearly: "What claims of creditors are valid and subsisting obligations against the bankrupt at the time a petition in bankruptcy is filed, is a question which, in the absence of overruling federal law, is to be

34. *Id.* at 51–52.
35. *Id.* at 52.
36. *Id.* at 53.
37. *Id.*
38. *Id.* at 55.
39. *Id.* at 57.
40. Segal v. Rochelle, 382 U.S. 375, 381 n.6 (1966).

determined by reference to state law."[41] *Vanston*, in turn, relied on Supreme Court cases from 1909 and 1928.[42] While *Butner* did not cite these cases, these cases explain why *Butner* describes its own holding a mere application of the "basic federal rule."[43]

In light of the foregoing Supreme Court decisions, it is unsurprising that *Butner* did not have an immediate impact on courts' approach to section 541. Courts had no trouble applying *Segal*'s "sufficiently rooted" test in conjunction with *Butner*'s holding that state law created and defined property interests.[44] Indeed, given that the *Butner* rule actually pre-dated *Butner*, that the Bankruptcy Act of 1978 endorsed *Segal*, and that the Supreme Court went on to recognize that pre-amendment bankruptcy doctrines presumptively survive the Bankruptcy Act of 1978, it is hard to see how *Butner* could ever be used to undermine *Segal*. Eventually, however, that is just what happened, even if indirectly.

C. Departing from Segal

In 1996, a bankruptcy court in Texas decided *In re Swift*, holding that a tort claim belonging to the bankrupt was only part of the bankruptcy estate if it had accrued prior to the filing of the petition.[45] The decision did not cite *Segal* or *Butner*, though it seemed to channel the latter, reasoning:

> [S]tate law does not recognize as a legitimate interest in property an inchoate interest in a cause of action that is yet to accrue. Until a cause of action accrues, it simply does not exist under state law. And if state law does not

---

41. Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156, 161 (1946).

42. *See id.* (citing Sec. Mortg. Co. v. Powers, 278 U.S. 149, 153–54 (1928); Bryant v. Swofford Bros. Dry Goods Co., 214 U.S. 279, 290–91 (1909)).

43. *See* Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co., 549 U.S. 443, 450–51 (2007) (recognizing that *Butner* and *Vanston* are in accord).

44. *See, e.g.*, *In re* Weyland, 63 B.R. 854, 864 (Bankr. E.D. Wis. 1986); *see also* Ellwanger v. Budsberg (*In re* Ellwanger), 140 B.R. 891, 897 (Bankr. W.D. Wash. 1992).

45. Swift v. Seidler (*In re* Swift), 198 B.R. 927, 935 (Bankr. W.D. Tex. 1996).

> recognize it as an interest in property, neither does the Bankruptcy Code make it property of the estate.[46]

Swift wholly ignores the "sufficiently rooted" test, and its reasoning has no clear progenitor.[47] Between its lack of reliance on Supreme Court authority and its status as a mere bankruptcy court opinion, one might have expected the decision to wither on the vine. Indeed, *Swift* got off to an inauspicious start. The next year, in *In re Tomaiolo*, a bankruptcy court expressly "disagree[d]" with *Swift*, pointing out that it "contains no discussion of *Segal*, apparently because . . . *Segal* was not cited to the court as controlling authority."[48] The criticism continued, the court stating that rather than applying *Segal*:

> *Swift* instead relies upon decisions such as *In re Missionary Baptist Foundation of America*, 792 F.2d 502 (5th Cir. 1986), which is not directly on point and merely notes in passing that section 541(a) is "analyzed by reference to the applicable state law . . . ." *Id.* at 504. That is true. As we have seen, however, a debtor's property rights in a cause of action are not confined to rights necessary to form a matured claim. The court in *Swift* also seems to have been led astray by decisions such as *Wischan v. Adler* (*In re Wischan*), 77 F.3d 875 (5th Cir. 1996), holding that a claim which had accrued prepetition for purposes of the statute of limitations is property of the estate. *Wischan* does not stand for the proposition that such accrual is a *sine qua non* for rights to become estate property. Claims such as those present here have been included in the bankruptcy estate under various theories. *See Ellwanger v. Budsberg* (*In re Ellwanger*), 140

46. *Id.* (footnote omitted).

47. A 1992 decision applied the accrual test without even considering the possibility that there might be any other alternative. *See, e.g.*, Lawrence v. Jackson Mack Sales, Inc., 837 F. Supp. 771, 779–80 & n.13 (S.D. Miss. 1992), *aff'd*, 42 F.3d 642 (5th Cir. 1994). *Lawrence* did not cite *Segal* or *Butner*, and *Swift* did not cite *Lawrence*. *See* Scrivner v. Commercial Credit Loans, Inc., No. 96 C 8552, 1997 WL 312058, at *6 (N.D. Ill. June 5, 1997) (criticizing *Lawrence* as a case that "provides no justification for its holding other than the fact that no contrary cases were found").

48. *In re* Tomaiolo, 205 B.R. 10, 15 (Bankr. D. Mass. 1997), *aff'd*, No. 90-40350, 2002 WL 226133 (D. Mass. Feb. 6, 2002).

> B.R. 891 (Bankr. W.D. Wash. 1992) (bankruptcy estate includes prepetition malpractice claim, which at filing was contingent upon dismissal of debtor's appeal from adverse ruling); *Jones v. Hyatt Legal Services* (*In re Dow*), 132 B.R. 853 (Bankr. S.D. Ohio 1991) (bankruptcy estate includes malpractice claim for alleged negligent preparation of schedules filed with petition because section 541(a)(1) refers to the debtor's property interests "as of" case commencement).[49]

With *Swift* and *Tomaiolo*, the battle lines were drawn.[50] Though *Swift* attracted immediate criticisms,[51] it satisfied enough courts to birth a *bona fide* approach—the "accrual approach."[52] In later years, as courts tried to marry *Swift*'s intuitive appeal to the actual law, three distinct approaches emerged—the "accrual approach," the "sufficiently rooted" approach, and the "blended approach."[53]

III. MODERN APPROACHES

A debtor creates a "bankruptcy estate" when she files a Chapter 7 bankruptcy petition.[54] This estate consists of all of the debtor's "legal or equitable interests . . . in property as of the commencement of the case."[55] Courts apply section 541(a)(1) "broadly" in light of Congress's intention to "secure for creditors everything of value the bankrupt may possess in inalienable or leviable forms."[56] As a result,

49. *Id.* (citations in original).

50. *See, e.g.*, Scrivner v. Commercial Credit Loans, Inc., No. 96 C 8552, 1997 WL 312058, at *5 (N.D. Ill. June 5, 1997) (discussing the conflict between *Swift* and *Tomaiolo*).

51. *See, e.g.*, Richman v. Garza (*In re* Richman), No. 96-2156, 1997 WL 360644, at *2 (4th Cir. July 1, 1997) ("*Swift* . . . appears to go against the weight of authority on this issue, and this court is not persuaded by its rationale.").

52. *See* Cantu v. Schmidt (*In re* Cantu), 784 F.3d 253, 258 (5th Cir. 2015); *see also, e.g.*, *In re* Smith, 293 B.R. 786, 788–90 (Bankr. D. Kan. 2003).

53. *See* Murray v. 3M Co., 297 F. Supp. 3d 869, 873 (E.D. Ark. 2018); *see also* Sikirica v. Harber (*In re* Harber), 553 B.R. 522, 531 (Bankr. W.D. Pa. 2016).

54. 11 U.S.C. § 541(a)(1) (2018).

55. *Id.*

56. Segal v. Rochelle, 382 U.S. 375, 379 (1966); *see also, e.g.*, *In re* Fruehauf Trailer Corp., 444 F.3d 203, 211 (3d Cir. 2006).

section 541(a)(1)'s definition of "property" includes "all causes of action that the debtor could have brought at the time of the bankruptcy petition."[57] A debtor, therefore, loses standing to pursue any pre-petition claims when she files for bankruptcy because those claims rightfully belong to the bankruptcy trustee.[58]

The tricky question, then, is not whether a cause of action is considered property; it is *when* a cause of action is deemed to exist—and thus whether it should be classified as a pre-petition or post-petition claim. The three approaches all address this question of timing. While the various tests have been applied in a variety of contexts, the implications of their varying results are perhaps no more starkly realized than in the products-liability context.

A. The Accrual Approach

Courts applying the accrual test draw their authority from *Butner*.[59] *Butner* confirmed that, absent a contravening federal interest, state law defines property interests, but it said nothing about the reach of the bankruptcy estate. Yet, courts applying the accrual approach rely on *Butner*, reasoning that because: (a) the bankruptcy estate only includes property held by the petitioner at the time of the bankruptcy's commencement, and (b) state law determines the point in time at which a cause of action matures into a property right, then (c) a cause of action is part of the bankruptcy estate only if it has accrued by the time of the bankruptcy's commencement.[60]

As a general rule, these courts reason that a claim first comes into existence—and therefore belongs to the debtor—as soon as it

57. United States *ex rel.* Gerbert v. Transp. Admin. Servs., 260 F.3d 909, 913 (8th Cir. 2001); *see also* United States v. Whiting Pools, Inc., 462 U.S. 198, 205 & n.9 (1983) (noting that the Bankruptcy Act's legislative history indicates that Congress intended to include causes of action within section 541(a)'s expansive definition of property).

58. Erickson v. Baxter Healthcare, Inc., 94 F. Supp. 2d 907, 912–13 (N.D. Ill. 2000); s*ee, e.g.*, Garcia v. Bank of Am., N.A., No. 13-cv-383, 2014 U.S. Dist. LEXIS 158922, at *9, *12–13 (D. Minn. Feb. 5, 2014).

59. *See, e.g.*, *In re* Wagner, 530 B.R. 695, 701 (E.D. Wis. 2015) ("While federal law determines when a debtor's interest in property is property for purposes of section 541, state law governs whether the debtor has such an interest.").

60. *See, e.g.*, *In re* Holzenthal, 580 B.R. 868, 871–72 (Bankr. M.D. Fla. 2016*); see also In re* de Hertogh, 412 B.R. 24, 29 (Bankr. D. Conn. 2009).

becomes "legally enforceable" under state law.[61] "In most personal injury cases, determining exactly when an enforceable claim arises is not difficult because the elements necessary to state a claim occur at about the same time: a defendant's act causes a legally cognizable harm."[62] When a plaintiff is exposed to an allegedly defective medical product, however, the situation becomes more complex because the plaintiff does not experience an "immediately . . . appreciable injury."[63]

In these types of cases, courts applying the accrual test look to a state's statute of limitations laws to determine at what point the claim is cognizable under state law.[64] Courts focusing on the state's statute of limitations typically incorporate the state's discovery rule into their analysis.[65] As a result, courts applying the accrual test hold that a claim does not exist—and therefore is not property subject to the Bankruptcy Code—until the applicable state's limitations period starts to run.[66]

In re Wagner serves as a good example of the accrual approach.[67] In that case, the debtor received a hip implant device in February 2009 and filed for bankruptcy later that year.[68] In September

61. *In re Wagner*, 530 B.R. at 702.

62. *Id.* at 701.

63. *Id.* at 702.

64. *See id.*; *see also* Griggs v. Marion Hosp. Corp., No. 2004-cv-4241, 2005 U.S. Dist. LEXIS 15821, at *3 (S.D. Ill. July 28, 2005) ("The point at which a claim accrues for statute-of-limitations purposes would seem the logical analogue to our query [for section 541(a)(1) purposes].").

65. *See, e.g.*, *In re Wagner*, 530 B.R. at 705 ("[T]he 'discovery rule' adopted by the state of Wisconsin is the fairer and more predictable rule in determining whether a claim is property of the estate."); *see also In re* Smith, 293 B.R. 786, 788–90 (Bankr. D. Kan. 2003) (concluding that the debtor had standing to assert her claims because she could not have reasonably discovered the cause of her claims until after she had filed for bankruptcy).

66. *See, e.g.*, *In re Wagner*, 530 B.R. at 705. Some courts that appear willing to accept the accrual approach nonetheless take a different path with respect to the discovery rule. In *In re Webb*, the court ruled that the accrual approach mandates courts to assess only if the elements of a cause of action have occurred—regardless of whether they have been discovered by the debtor. *In re* Webb, 484 B.R. 501, 504 (Bankr. M.D. Ga. 2012). It therefore explicitly rejected incorporating the discovery rule into the accrual analysis. *Id.*; *accord* Putzier v. Ace Hardware Corp., 50 F. Supp. 3d 964, 983 (N.D. Ill. 2014); *see also In re* Macri, No. 06 C 4441, 2007 WL 1958576, at *2 (N.D. Ill. June 29, 2007).

67. *See generally In re Wagner*, 530 B.R. at 697–706.

68. *Id.* at 697.

2010—about a year after filing her bankruptcy petition—the hip implant manufacturer initiated a product recall.[69] Over the next few months, the debtor underwent several tests and ultimately had a revision surgery performed in January 2011.[70] When she subsequently filed a products-liability lawsuit against the hip manufacturer, the bankruptcy trustee moved to reopen the bankruptcy estate to collect the debtor's settlement proceeds.[71]

The bankruptcy court employed the accrual approach to determine whether the debtor's claims belonged to herself or the bankruptcy estate.[72] Invoking *Butner*, the court determined that state law controlled whether the debtor's claim existed prior to the time she filed for bankruptcy.[73] In looking to state law, the court turned to the state's discovery rule, explaining:

> The accrual theory is based on the general principle that a cause of action cannot arise until it becomes legally enforceable. Because an individual cannot state a claim until he or she suffers a provable harm due to an identifiable wrongful act, the claim does not arise until these elements are discoverable. Recognizing that claimants with inherently unknowable injuries are simply incapable of filing premature claims, Wisconsin courts have applied the "discovery rule."[74]

The court described this approach as the "fairer and more predictable rule in determining whether a claim is property of the estate."[75] A debtor, after all, "cannot be expected to predict and disclose possible future injury by each and every product he or she has previously used."[76]

---

69. *Id.*

70. *Id.*

71. *Id.* at 698.

72. *Id.* at 701–05.

73. *Id.* at 701 ("While federal law determines when a debtor's interest in property is property for purposes of section 541, state law governs whether the debtor has such an interest." (citing Barnhill v. Johnson, 503 U.S. 393, 398 (1992); Butner v. United States, 440 U.S. 48, 54–55 (1992))).

74. *Id.* at 702 (citations omitted).

75. *Id.* at 705.

76. *Id.*

Once the court determined it would apply the discovery rule, it briskly concluded that the claim was not part of the bankruptcy estate.[77] The court noted that the debtor did not discover that her hip implant was allegedly defective until nearly a year after she had filed her bankruptcy petition.[78] Without that information—and the concomitant injury associated with the revision surgery—she could not have maintained a cause of action prior to the time she filed her bankruptcy petition.[79] The claim, therefore, belonged to the debtor, rather than the bankruptcy estate.[80]

B. The Sufficiently Rooted Approach

Courts applying the "sufficiently rooted" test apply *Segal*, recognizing that Congress intended for the bankruptcy estate to acquire "[e]very conceivable interest of the debtor, [including all] future, nonpossessory, contingent, speculative, and derivative" interests.[81] Given the breadth of the estate, these courts conclude that the estate is entitled to any cause of action that is "sufficiently rooted in the pre-bankruptcy past"—regardless of when the claim accrues under state law.[82] These courts see no conflict between *Segal* and *Butner*—the

---

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. Tyler v. DH Capital Mgmt., Inc., 736 F.3d 455, 461 (6th Cir. 2013) (quoting Azbill v. Kendrick (*In re* Azbill), No. 06-cv-8074, 2008 Bankr. LEXIS 527, at *19–20 (B.A.P. 6th Cir. Mar. 11, 2008)).

82. *Id.* (quoting Segal v. Rochelle, 382 U.S. 375, 380 (1966)); *see also, e.g.*, *In re* Bolton, 584 B.R. 44, 53 (Bankr. D. Idaho 2018); *In re* Segura, No. 07-31907, 2016 WL 829830, at *3 (Bankr. N.D. Ohio Mar. 2, 2016). Without regard to formal accrual, some courts applying the "sufficiently rooted" test put dispositive or near-dispositive weight on the date of the injury. *See, e.g.*, Underhill v. Huntington Nat. Bank (*In re* Underhill), 579 F. App'x 480, 482–83 (6th Cir. 2014). The court in *Underhill* appeared to recognize that formal accrual was not necessary but required some form of "pre-petition predicates." *See id.* at 483 (reasoning that, in *Segal*, "the Court explained that the 'two key elements pointing toward realization of a refund existed at the time these bankruptcy petitions were filed: taxes had been paid on net income within the past three years, and the year of bankruptcy at that point exhibited a net operating loss'" (quoting Segal, 382 U.S. at 380)). A dissenting opinion effectively charged the majority with erroneously adopting the accrual approach, *id.* at 484–85 (Donald, J.,

former case defining the reach of the bankruptcy estate, the latter confirming the non-controversial proposition that state law generally defines property interests.[83]

Courts applying the *Segal* test in products-liability cases have uniformly agreed that a pre-petition injury will "root" a claim in the bankruptcy past, [84] but the test gives courts the opportunity to go even further. These courts hold that causes of action that *hypothetically* could have been brought pre-petition are also property of the estate, "even if the debtor[] w[as] unaware of the claim."[85] Given these boundaries, the *Segal* test effectively conveys all products-liability claims wherein the injury occurred pre-petition to the bankruptcy estate, regardless of whether the debtor could have reasonably discovered the cause of the injury until after the petition was filed.[86]

In re Borchert is illustrative of the sufficiently rooted approach.[87] In that case, the debtor began taking a prescription NSAID called Vioxx for his back pain in December 2003.[88] In August 2004, the debtor filed for bankruptcy, and two months later, he experienced a

---

dissenting), but the true disagreement here seems to be over what it means for a claim to be "sufficiently rooted" in the pre-bankruptcy past. *See id.*

83. *See, e.g.*, *In re* Purcell, 573 B.R. 859, 866 (Bankr. D. Kan. 2017) ("*Butner* and *Segal* do not conflict. Instead, they answer different questions—*Butner* answers *what* is property under state law, while *Segal* determines whether that interest *existed* before the debtor filed his bankruptcy petition.").

84. *Tyler*, 736 F.3d at 462.

85. *Id.* (quoting *In re* Michael, 423 B.R. 323, 330 (Bankr. D. Idaho 2009)).

86. *See In re* Carroll, 586 B.R. 775, 790 (Bankr. E.D. Cal. 2018) (finding that products liability claims had "germinated, sprouted, grew, blossomed, and became anchored prepetition" and were therefore part of the bankruptcy estate even though, under California's discovery rule, the claims had not accrued for purposes of the statute of limitations until the post-petition period); *In re* Borchert, No. 04-cv-65653, 2010 Bankr. LEXIS 140, at *12–13 (Bankr. N.D.N.Y. Jan. 8, 2010) (concluding that the debtor's products-liability claims were estate property even though the debtor did not have a heart attack until after he filed his bankruptcy petition because he had used the drug (Vioxx) for five months before filing his Chapter 7 petition); *In re* Richards, 249 B.R. 859, 861–62 (Bankr. E.D. Mich. 2000) (holding that the debtor's claims based on his post-petition asbestos diagnosis belonged to the bankruptcy estate because the debtor's pre-petition exposure to asbestos "rooted" the claim in the pre-bankruptcy past).

87. *See generally In re Borchert*, 2010 Bankr. LEXIS 140, at *12–13.

88. *Id.* at *2–3.

heart attack that he later alleged was caused by his Vioxx use.[89] When he filed suit against the Vioxx manufacturer, the bankruptcy trustee sought to reopen the bankruptcy estate to collect the debtor's settlement proceeds.[90]

The court began its analysis by noting that Congress intended to give the term "property of the estate" a broad definition that would encompass "all legal interests without exception . . . includ[ing] all legally recognizable interests although they may be contingent and not subject to possession until some future time."[91] It then explicitly rejected the accrual approach and turned its attention to a three-step process the *Riccitelli* court had devised in determining how to apply the sufficiently rooted test:

> (1) [D]etermine the extent to which the claim is rooted in the prebankruptcy past; (2) determine the extent to which it is entangled with the debtor's ability to make an unencumbered fresh start; and then (3) with both considerations in the balance, determine whether, in view of the purposes of the Bankruptcy Act (now the Bankruptcy Code), the claim is more properly categorized as prepetition property that should come into the estate or a post-petition asset that the Debtor should take free of the claims of prebankruptcy creditors. . . . *[T]his analysis does not turn on whether, under state law, the claim had accrued as of the petition date*.[92]

89. *Id.* at *2–4.

90. *Id.* at *4.

91. *Id.* at *6 (quoting *In re* Richards, 249 B.R. 859, 861 (Bankr. E.D. Mich. 2000)).

92. *Id.* at *8 (emphasis added) (quoting *In re* Riccitelli, 320 B.R. 483, 490–91 (Bankr. D. Mass. 2005)). While the *In re Borchert* court—as well as others—have referenced *Segal*'s invocation of the debtor's ability to make an "unencumbered fresh start," other courts have held that Congress's revisions to the Bankruptcy Act implicitly abrogated that portion of the *Segal* holding. *See, e.g.*, *In re* Brown, 601 B.R. 514, 518 (Bankr. C.D. Ill. 2019) ("There is little doubt under section 541 of the Bankruptcy Code, that the second part of *Segal*'s test, whether the property interest is so entangled with the debtor's fresh start that it should be excluded from the estate, is no longer a relevant factor.").

In applying this process, the court focused on the fact that "of the ten months [the debtor] had taken Vioxx (January through October 2004), seven of those months occurred prior to filing [the bankruptcy] petition (January through July 2004)."[93] Given that the majority of the debtor's Vioxx use occurred prepetition, the court ruled that the debtor's claims were sufficiently rooted in the prebankruptcy past and therefore belonged to the bankruptcy estate—even though he did not even experience his injury until two months after he filed his bankruptcy petition.[94]

C. Blended Approaches

Courts have struggled to reconcile the clear mandates of *Segal* with the modern trend toward the accrual approach. As a result, several courts have applied various "blended approaches" that purport to focus on the "sufficiency" component of *Segal*'s "sufficiently rooted" test.[95] These courts look at a variety of factors, but they all revolve around one central question: When did the debtor discover her alleged injury? This question—and the courts' attempts to analyze various factors related to this question—is simply a gloss over the accrual approach's incorporation of the discovery rule.

In re Harber illustrates. In that case, the debtor received two hip replacement implants in 2007 and 2008.[96] Approximately three years later, Mrs. Harber received a letter from her hospital informing

---

93. *In re Borchert*, 2010 Bankr. LEXIS 140 at *13.

94. *Id.* at *12–14. The *In re Richards* court reached a similar conclusion regarding a post-petition injury. In that case, the debtor claimed that his prepetition asbestos exposure had caused him to develop lung cancer. *In re* Richards, 249 B.R. 859, 861 (Bankr. E.D. Mich. 2000). He was not diagnosed with lung cancer until approximately seven months after he filed his bankruptcy petition. *Id.* The court ruled that all the alleged conduct had taken place prior to the time he filed his bankruptcy petition, and therefore, the claims premised on the post-petition injury were nonetheless sufficiently rooted in the bankruptcy past that they belonged to the bankruptcy estate. *Id.*

95. *See, e.g.*, *In re* Vasquez, 581 B.R. 59, 71–72 (Bankr. D. Vt. 2018); Hanawalt v. Hardesty (*In re* Hanawalt), No. 07-59138, 2017 Bankr. LEXIS 3437, at *11–14 (Bankr. S.D. Ohio 2017); *In re* Purcell, 573 B.R. 859, 862–67 (Bankr. D. Kan. 2017); Sikirica v. Harber (*In re* Harber), 553 B.R. 522, 531–33 (Bankr. W.D. Penn. 2016).

96. *Harber*, 553 B.R. at 525.

her that a "small number of patients with the hip implant [she] received have experienced problems that required additional care and potentially further treatment."[97] Shortly after receiving the letter, Mrs. Harber retained an attorney and joined a personal injury class action against the hip implant manufacturer.[98]

In January 2014, Mrs. Harber filed a Chapter 7 bankruptcy petition.[99] Ten months later, Mrs. Harber's physician informed her that he needed to perform a revision surgery because he had allegedly discovered that she had metal in her bloodstream due to the implant's metal-on-metal interfaces.[100]

Inexplicably, Mrs. Harber voluntarily dismissed her lawsuit against the hip manufacturer without prejudice in December 2014 and proceeded with the recommended revision surgery in January 2015.[101] In May 2015, Mrs. Harber's original products-liability attorney informed her and the bankruptcy trustee that he believed he could get the hip implant manufacturer to settle Mrs. Harber's claims if he refiled the recently dismissed lawsuit.[102] At that time, the trustee moved the bankruptcy court to reopen the case and filed a turnover motion seeking any assets that were recovered from Mrs. Harber's potential settlement.[103]

The bankruptcy court acknowledged that Mrs. Harber's claims "[u]ndoubtedly" had "roots" in her prepetition past.[104] After all, the debtor received her hip implant seven years before she filed her Chapter 7 petition, and she even filed a prepetition lawsuit based on the "*possibility* that the device could fail."[105] But the court concluded that those facts were not sufficient: "Although it would be expedient to end the inquiry here and find that these circumstances, on their own, satisfy the *Segal* test, it is not enough that a claim be 'rooted' in the pre-bankruptcy past. It must be 'sufficiently rooted.'"[106]

---

97. *Id.* (footnote omitted).
98. *Id.*
99. *Id.*
100. *Id.* at 526.
101. *Id.*
102. *See id.*
103. *Id.* at 526–27.
104. *Id.* at 532.
105. *Id.* at 533.
106. *Id.*

In assessing the "sufficiency" of the claim's "roots," the court stated that it needed to assess when each element of the claim had occurred—with the "most critical" factor revolving around when the debtor's injury had manifested.[107] Applying this rule, the court concluded that Mrs. Harber retained possession of her products-liability claim because she did not discover that her hip implant had caused her to develop increased levels of metal in her bloodstream until November 2014—nine months after she filed for bankruptcy.[108]

Despite the laudable gymnastics the court employed to claim it was balancing the accrual approach with *Segal*'s binding authority, the fact is that the *In re Harber* court paid only lip service to the Supreme Court's sufficiently rooted test. In that case, the debtor: (1) received her hip implant seven years before filing for bankruptcy, (2) discovered that her hip implant might be defective four years prior to filing her Chapter 7 petition, and (3) actually filed a personal injury lawsuit premised on her allegedly defective hip implant three years before declaring bankruptcy.[109] The court nonetheless concluded that her claims did not belong to the bankruptcy estate because her physician had not diagnosed her alleged injury until after she filed her petition.[110] By elevating the date that the debtor discovered her injury to the "most critical"—if not only—factor, the *In re Harber* court equated the "blended approach" with the discovery rule.

IV. IDENTIFYING THE CORRECT APPROACH

A. Under a Straightforward Legal Analysis, Segal's Sufficiently Rooted Test Controls

From a formalist perspective, it is easy to identify the correct approach. *Segal* is binding Supreme Court authority that was adopted by a Congressional act and is consistent with subsequent Supreme Court authority. Courts are not at liberty to depart from it.[111] As the

---

107. *Id.*

108. *See id.*

109. *Id.* at 525–27.

110. *Id.* at 533.

111. Rodriguez de Quijas v. Shearson/Am. Express., Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should

vast majority of circuit courts have held, it plainly provides the correct approach.[112] The issue of determining what test applies should be as simple as recognizing that *Segal* remains good law and following its precedent.

As amended with the Bankruptcy Act of 1978, the bankruptcy estate includes "all legal or equitable interests of the debtor in property *as of the commencement of the case*."[113] Based on this language, two circuit courts have held that *Segal* ceased being good law.[114] According to the Fifth Circuit in *In re Burgess*, this "temporal limitation [wa]s the key to deciding th[e] case"—and to finding *Segal* abrogated.[115] Likewise, in *In re Bracewell*, the Eleventh Circuit described the phrase as "critical language," an "explicit temporal limitation" that renders *Segal* inapplicable.[116] According to that court: "The *Segal* decision

---

follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

112. *See* Chartschlaa v. Nationwide Mut. Ins., Co., 538 F.3d 116, 122 (2d Cir. 2008); Majestic Star Casino, LLC v. Barden Dev., Inc. (*In re* Majestic Star Casino, LLC), 716 F.3d 736, 753 (3d Cir. 2013); Andrews v. Riggs Nat'l Bank (*In re* Andrews), 80 F.3d 906, 910 (4th Cir. 1996); Tyler v. DH Capital Mgmt., 736 F.3d 455, 461–62 (6th Cir. 2013); *In re* Meyers, 616 F.3d 626, 628 (7th Cir. 2010); Longaker v. Bos. Sci. Corp., 715 F.3d 658, 665 (8th Cir. 2013); Rau v. Ryerson (*In re* Ryerson), 739 F.2d 1423, 1426 (9th Cir. 1984); *In re* Barowsky, 946 F.2d 1516, 1518 (10th Cir. 1991).

113. 11 U.S.C. § 541(a)(1) (2018) (emphasis added).

114. *See* Burgess v. Sikes (*In re* Burgess),438 F.3d 493, 498 (5th Cir. 2006) (en banc) ("[A]lthough Congress has specifically approved of *Segal*'s result, *Segal*'s 'sufficiently rooted' test did not survive the enactment of the Bankruptcy Code.") (footnote omitted); Bracewell v. Kelley (*In re* Bracewell), 454 F.3d 1234, 1242 (11th Cir. 2006) (holding that *Segal*'s "sufficiently rooted" test cannot "trump the later-enacted, plain language of § 541(a)(1)"). Notably, while some lower courts have cited *Butner* to justify departing from *Segal*, *see, e.g.*, *In re* Brown, 601 B.R. 514, 519 (Bankr. C.D. Ill. 2019), neither the Fifth nor Eleventh Circuits took this tack, or relied on *Butner* in any significant respect. Given that the cases do not conflict, that is only proper. "If at all possible," arguably discordant "opinions should be harmonized." BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 300 (2016). Those courts that have used *Butner* to evade *Segal* make no attempt to harmonize them, and therefore fail to recognize that they address two entirely different questions.

115. *In re Burgess*, 438 F.3d at 496.

116. *In re Bracewell*, 454 F.3d at 1241–42.

told us how to define property under the old bankruptcy code, before it was amended in 1978 to include an explicit definition of property."[117]

Even putting aside Congress's stated intent to retain *Segal*, those decisions are unpersuasive. If anything, the modern Bankruptcy Code's approach to property is more expansive than it was prior to 1979.[118] Thus, the temporal limitation identified by the Fifth and Eleventh Circuits represents the only basis for their shared conclusion that the Bankruptcy Act of 1978 redrew the lines to abrogate *Segal.* Those courts failed to recognize, however, that the pre-amendment Bankruptcy Code contained *the same temporal limitation*, defining the bankruptcy estate to include all property "as of the date of the filing of the petition."[119] Thus, as the *Bracewell* dissent put it, "Congress did not materially alter the text of the statute."[120] And as the *Burgess* dissent put it, "[t]here is little or no support for" the conclusion that Congress abrogated *Segal* with the Bankruptcy Act of 1978.[121]

As illustrated above, the accrual approach emerged only because litigants failed to cite *Segal* and bankruptcy courts failed to recognize its applicability.[122] Despite this ignominious origin story, some courts have attempted to show that the accrual approach has supplanted the sufficiently rooted approach. The analyses simply don't hold up. For example, in *In re Medvedev*, the court opens by claiming that courts

---

117. *Id.* at 1242.

118. *See, e.g.*, Shirkey v. Leake, 715 F.2d 859, 863 (4th Cir. 1983); H.R. REP. NO. 95-595, at 368 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6324 ("Paragraph (1) has the effect of overruling *Lockwood v. Exchange Bank*, 190 U.S. 294 (1903), because it includes as property of the estate all property of the debtor, even that needed for a fresh start." (footnote omitted)).

119. 11 U.S.C. § 110(a) (1964); *see also* Jenkins v. A.T. Massey Coal Co. (*In re* Jenkins), 410 B.R. 182, 191 n.6 (Bankr. W.D. Va. 2008) (observing that, as amended, "the Code merely reworded the temporal requirement that was already present in the Act" and "the difference between the language used in the Act and the Code ('as of the commencement of the case') appears to be nothing more than a semantic one").

120. Bracewell v. Kelley (*In re* Bracewell), 454 F.3d 1234, 1250 (11th Cir. 2006) (Pryor, J., dissenting).

121. Burgess v. Sikes (*In re* Burgess), 438 F.3d 493, 512 (5th Cir. 2006) (Jones, J., dissenting).

122. *See In re* Tomaiolo, 205 B.R. 10, 15 (Bankr. D. Mass. 1997) (discussing *In re* Swift, 198 B.R. 927, 935 (Bankr. W.D. Tex. 1996)), *aff'd*, No. 90-40350, 2002 WL 226133 (D. Mass. Feb. 6, 2002).

applying the sufficiently rooted test "misread *Segal* and misapprehend the nature of a wrongful death action."[123] Then, instead of explaining how this is so, the court pivots to the claim that, actually, in light of the Bankruptcy Act of 1978, "[t]here is some doubt regarding the continued viability of a separate 'sufficiently rooted' standard for determining whether a claim is property of the bankruptcy estate."[124] This expression of "doubt" has no legs, forcing the court to promptly admit that Congress intentionally sought "to incorporate the result of *Segal* into the new law."[125] But then, after admitting that Congress adopted *Segal*, the court states that "*Segal*'s 'sufficiently rooted' language, which is rather ill-defined and subject to creative arguments regarding causation, was not adopted."[126] Thus, *In re Medveded* itself rebuts each of the claims that would support departing from *Segal* and bottoms out on one judge's dissatisfaction with the phrase "sufficiently rooted." Respectfully, this is not coherent analysis.

Finally, a person's knowledge of an asset is irrelevant to the question of whether that asset belongs to the bankruptcy estate.[127] One court applying the blended approach noted that "[b]ankruptcy and appellate courts . . . agree that property of the bankruptcy estate includes *accrued* causes of action, even if the debtors were unaware of the claims at the time they filed their bankruptcy petition."[128] But the accrual and blended approaches typically incorporate the discovery rule when identifying the point in time at which a claim accrues.[129] Under the discovery rule, accrual turns on when the plaintiff reasonably should have known of his or her claims.[130] Thus, by adopting the accrual approach and incorporating the discovery rule, these courts necessarily transmute knowledge from an irrelevant consideration to a necessary precondition.

---

123. Medvedeva v. James (*In re* Medvedev), No. 07-14535, 2010 WL 537637, at *6 (W.D. Wash. Feb. 9, 2010).

124. *Id.*

125. *Id.*

126. *Id.*

127. *See* 11 U.S.C. § 541 (2018).

128. Porrett v. Hillen (*In re* Porrett), 564 B.R. 57, 67 (D. Idaho 2016) (collecting cases).

129. *See, e.g.*, *In re* Smith, 293 B.R. 786, 789 (Bankr. D. Kan. 2003).

130. *See, e.g.*, *In re* Purcell, 573 B.R. 859, 867 (Bankr. D. Kan. 2017).

B. The Sufficiently Rooted Approach Is Sound Policy

Generally speaking, "[c]onsumer bankruptcy policy serves three policy objectives: to give debtors a fresh start, protect creditors' interests, and promote national uniformity of law."[131] The goal of providing the debtor with a "fresh start" is necessarily in tension with the goal of protecting creditor's interest,[132] a conflict directly addressed by *Segal*.[133]

131. Amber J. Moren, *Debtor's Dilemma: The Economic Case for Ride-Through in the Bankruptcy Code*, 122 YALE L.J. 1594, 1618 (2013).

132. *See, e.g.*, Johnson v. Edinboro State Coll., 728 F.2d 163, 164 (3d Cir. 1984); *see also* Moren, *supra* note 131, at 1618 ("The interest in protecting creditors' interests serves as an important policy counterweight to the fresh start.").

133. Segal v. Rochelle, 382 U.S. 375, 380 (1966) (finding the bankruptcy estate to include post-petition property that was both "sufficiently rooted in the pre-bankruptcy past *and* so little entangled with the bankrupts' ability to make an unencumbered fresh start" (emphasis added)). Thus, *Segal* "harmonizes" the Bankruptcy Code's competing goals of creditor protection and debtor rehabilitation. Andrews v. Riggs Nat'l Bank (*In re* Andrews), 80 F.3d 906, 910 (4th Cir. 1996). Some courts have indicated that *Segal*'s "sufficiently rooted" test remains in force, but not its "fresh start" component. *See, e.g.*, Johnson v. Taxel (*In re* Johnson), 178 B.R. 216, 218 (B.A.P. 9th Cir. 1995) ("The Code follows *Segal* insofar as it includes after-acquired-property 'sufficiently rooted in the prebankruptcy past' but eliminates the requirement that it not be entangled with the debtor's ability to make a fresh start." (quoting Rau v. Ryerson (*In re* Ryerson), 739 F.2d 1423, 1425–26 (9th Cir. 1984))); *see also* Johnston v. Hazlett (*In re* Johnston), 209 F.3d 611, 613 (6th Cir. 2000); Baer v. Montgomery (*In re* Montgomery), 219 B.R. 913, 916 (B.A.P. 10th Cir. 1998), *aff'd*, 224 F.3d 1193 (10th Cir. 2000). There is certainly strong legislative history to that effect. H.R. REP. No. 95-595, at 368 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6324 (stating that section 541 includes within the scope of the bankruptcy estate even property "needed for a fresh start"). Nonetheless, it cannot be gainsaid that the "fresh start" policy goal remains firmly ensconced in the Bankruptcy Code. *See* Schwab v. Reilly, 560 U.S. 770, 791 (2010) (acknowledging "the fundamental bankruptcy concept of a 'fresh start'" (citation omitted)). *See generally* Charles G. Hallinan, *The "Fresh Start" Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretive Theory*, 21 U. RICH. L. REV. 49, 50 (1986) (explaining the policy behind "fresh starts"). If *Segal* is outdated in any respect, it is that its conception of the bankruptcy estate was not expansive *enough*. *See* 1 BANKRUPTCY LAW MANUAL § 5:3 (5th ed. 2019) ("[T]he term 'property' in § 541 is intended to be broad and includes even those assets needed to give the debtor a fresh start.").

1. Creditors' Interests and the Expansive Bankruptcy Estate

The Bankruptcy Code's goal of "providing protection for the creditors of the insolvent debtor . . . is effectuated through statutory provisions that marshal and consolidate the debtor's assets into a broadly defined estate."[134] Thus, application of "*Segal* is consistent with the 'broad and liberal construction of the term "property" that has been adopted with a view to securing for creditors everything of value belonging to the bankrupt.'"[135] Indeed, the sufficiently rooted test was adopted precisely because "the term 'property' has been construed most generously" such that "an interest is not outside its reach because it is novel or contingent or because enjoyment must be postponed."[136] The already-expansive reach of the bankruptcy estate was not diminished after *Segal*; it was lengthened when the Bankruptcy Act of 1978 expanded the definition of property.[137]

Where the Supreme Court expanded the reach of the bankruptcy estate with the sufficiently rooted test, the accrual approach limits it. Under the accrual approach, a cause of action that is born when a pre-petition tortious act couples with a pre-petition injury resulting in a pre-petition right to recover will be excluded from the bankruptcy estate if, under the discovery rule, the claim does not accrue until after the petition has been filed.[138] In such circumstances, a creditor is denied its share of the recovery based on the purely fortuitous fact that the plaintiff didn't discover her injury until after filing for bankruptcy.[139] Thus, in products liability cases, the accrual approach allows debtors to "shiel[d] from creditors" a right to recovery that was, in every practical

---

134. *Andrews*, 80 F.3d at 909; *see also* Chappel v. Proctor (*In re* Chappel), 189 B.R. 489, 493 (B.A.P. 9th Cir. 1995) ("The legislative history of the Bankruptcy Code reveals that the concept of property of the estate is to be interpreted broadly. Similarly, the Supreme Court has affirmed that the scope of § 541(a)(1) is broad, covering all kinds of property, including tangible or intangible causes of action and all other forms of property previously specified in § 70(a) of the Bankruptcy Act." (citation omitted)).

135. Mendelsohn v. Ross, 251 F. Supp. 3d 518, 524 n.5 (E.D.N.Y. 2017) (quoting *In re* Robbins Converting Corp., 441 F.2d 1096, 1098 (2d Cir. 1971)).

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

137. *See, e.g.*, Howe v. Richardson (*In re* Howe), 232 B.R. 534, 537 (B.A.P. 1st Cir.), *aff'd sub nom.*, 193 F.3d 60 (1st Cir. 1999).

138. *See, e.g.*, *In re* Vasquez, 581 B.R. 59, 71 (Bankr. D. Vt. 2018).

139. *See* 11 U.S.C. § 726 (2018) (establishing how creditors are paid out of the bankruptcy estate).

sense, acquired pre-petition.[140] The law abhors a windfall,[141] and yet the accrual approach provides debtors with just that—at the expense of blameless creditors.

2. Uniform Treatment of Debtors and Creditors

The Constitution provides Congress with the "Power" to establish "uniform Laws on the subject of Bankruptcies throughout the United States."[142] This power is meant to ensure that bankruptcy law does not vary from state to state.[143] But it also confirms that, as a general matter, bankruptcy law should be unitary and consistent. Thus, while state law defines property interests,[144] the reach of the bankruptcy estate is a question of federal law.[145] And, as a normative matter, the question is one that *should* be decided by a single test—and not a test that varies from state to state or turns on fact questions like when a person should have known he was injured. *Butner* itself recognized the value in the "[u]niform treatment of property interests."[146] The "sufficiently rooted" test checks the appropriate boxes and simply represents the applicable federal law in determining whether causes of action are part of the bankruptcy estate.[147] The accrual and blended approaches,

---

140. *Cf.* Harris v. Viegelahn, 135 S. Ct. 1829, 1835 (2015) ("[W]hile a Chapter 7 debtor must forfeit virtually all his prepetition property, he is able to make a 'fresh start' by shielding from creditors his postpetition earnings and acquisitions.").

141. In this regard, the accrual and blended approaches turn the *Butner*'s rationale on its head. *See* Juliet M. Moringiello, *A Tale of Two Codes: Examining § 522(f) of the Bankruptcy Code, § 9-103 of the Uniform Commercial Code and the Proper Role of State Law in Bankruptcy*, 79 WASH. U. L.Q. 863, 911 (2001) ("Butner and its progeny . . . stress that the state law conceptions of property are important to uphold in bankruptcy to avoid debtors obtaining a windfall merely by reason of the happenstance of bankruptcy.").

142. U.S. CONST. art. I, § 8, cl. 4.

143. *See* Ry. Labor Execs' Ass'n v. Gibbons, 455 U.S. 457, 472 (1982). *See generally* Randolph J. Haines, *The Uniformity Power: Why Bankruptcy Is Different*, 77 AM. BANKR. L.J. 129, 151 (2003).

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

145. *See* United States v. Whiting Pools, Inc., 462 U.S. 198, 204–05 (1983).

146. *Butner*, 440 U.S. at 55.

147. *See* Segal v. Rochelle, 382 U.S. 375, 380 (1966); *cf.* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 543 (1991) ("It is simply in the nature of precedent, as a necessary component of any system that aspires to fairness and equality, that the substantive law will not shift and spring on [a case-by-case] basis.").

on the other hand, do not allow for uniform treatment of causes of action.

Under the accrual approach, two identical patients can receive two identically defective implants on the same day, suffer identical injuries from the defective product on the same day, declare bankruptcy on the same day, and yet have their products liability claims treated differently as a matter of bankruptcy law. And, just as unjustly, even if these perfectly identical persons have perfectly identical creditors, those creditors' rights will also be at the mercy of the accrual approach.[148] Under the accrual approach, what will matter is the point in time at which the plaintiffs knew or should have known of their injuries—knowledge that sometimes occurs in products liability cases when a patient sees an attorney advertisement,[149] gets a blood test,[150] or is informed by a doctor of the potential injury and its cause.[151] Thus,

---

148. Courts applying the accrual approach ignore the interests of the debtor, instead acting as if the formalistic accrual approach is simply correct and required as a matter of law, Holstein v. Knopfler (*In re* Holstein), 321 B.R. 229, 237–38 (Bankr. N.D. Ill. 2005), or insisting that the accrual approach is somehow more fair, *In re* Wagner, 530 B.R. 695, 705 (Bankr. E.D. Wis. 2015). We have already seen how the accrual test is wrong as a matter of law. Further, it is unfair only to someone who, incorrectly, views bankruptcy law "as a procedure geared principally toward relieving an overburdened debtor from 'oppressive' debt." Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L.J. 857, 857 (1982). As explained by Professor Jackson in his seminal Yale Law Journal article, "this discharge-centered view of bankruptcy is correct neither from an historical perspective nor from a realistic appraisal of the presence and operation of most of the provisions in the federal bankruptcy laws over the years." *Id.* Indeed, maximizing the size of the bankruptcy estate, while wholly inconsistent with a debtor-indulgent bankruptcy model, is the very first goal of the Bankruptcy Act, supporting Professor Jackson's conclusion that bankruptcy should be viewed "as a system designed to mirror the agreement one would expect the creditors to form among themselves were they able to negotiate such an agreement from an ex ante position." *Id.* at 860. *But see* Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 777 (1987) (defending a traditional conception of bankruptcy).

149. *See* Hovey v. Cook Inc., 97 F. Supp. 3d 836, 844 (S.D. W. Va. 2015) ("[A] jury could find that Ms. Hovey did not possess facts that would lead a reasonable person to further investigate into wrongdoing until 2013, when Ms. Hovey saw an Internet advertisement.").

150. *See, e.g.*, Stayanoff v. Biomet, Inc., No. 3:16-CV-271 RLM, 2018 WL 6605138, at *2–3 (N.D. Ind. Dec. 14, 2018).

151. *See, e.g.*, Degussa Corp. v. Mullens, 744 N.E.2d 407, 411 (Ind. 2001); Miller v. A.H. Robins Co., 766 F.2d 1102, 1105–06 (7th Cir. 1985).

as more fully shown below, the accrual approach results in non-uniform treatment of creditors and debtors.

While we have largely discussed the discovery rule, it is but one of at least four possible ways of determining when a claim accrues.[152] In Missouri, for example, a claim does not accrue until there has been a tortious act, an injury, and damages "capable of ascertainment."[153] For personal injury claims, courts have concluded that a plaintiff's damages are "capable of ascertainment" when: (1) the plaintiff's injury is diagnosed, and (2) a theory as to its cause is ascertainable.[154] "This is an objective test," and as a result, the courts refuse to delay accrual until the point "when the [p]laintiff discovered that her injury was caused by a defective product."[155] Instead, a plaintiff's claim accrues either (1) "when the 'medical community' became 'aware of the causation link' between the product and the injury," or (2) "a doctor diagnoses the plaintiff's condition as being caused by the defective product."[156]

In *Giles v. Carmi Flavor & Fragrance Co.*, a factory worker who welded equipment used to process butter flavoring contracted bronchiolitis obliterans.[157] Symptoms first manifested in 1999, and as early as 2001, the welder's physician was actively investigating whether the condition might be traceable to the plaintiff's exposure to

---

152. Frederick Davis, *Tort Liability and the Statutes of Limitation*, 33 MO. L. REV. 171, 187–88 (1968) (identifying "four events" that can dictate claim accrual: "the moment the defendant commits his wrong," "the moment the plaintiff sustains substantial injury or interference," "the moment that plaintiff's damages are substantially complete," and "the moment the plaintiff first becomes aware that he has been aggrieved").

153. MO. REV. STAT. § 516.100 (2019); *see also* Powel v. Chaminade Coll. Preparatory, Inc., 197 S.W.3d 576, 582 (Mo. 2006) ("[A] court *cannot* make the time the wrong is done or the technical breach of duty occurs the time when the cause of action accrues. Neither does it accrue as soon as damages occur. A third event must also take place before the claim accrues: in addition to a wrongful act, and in addition to resulting damages, the damages must also be *capable of ascertainment*.").

154. Lockett v. Owens-Corning Fiberglas, 808 S.W.2d 902, 907 (Mo. Ct. App. 1991); Englemen v. Johnson & Johnson, No. 5:10-cv-173, 2011 U.S. Dist. LEXIS 989, at *9 (E.D.N.C. Jan. 5, 2011) (applying Missouri law).

155. *Englemen*, 2011 U.S. Dist. LEXIS 989, at *9–10.

156. *Id.* at *10 (first quoting King v. Nashua Corp., 763 F.2d 332, 333 (8th Cir. 1985), then citing *Lockett*, 808 S.W.2d at 908).

157. 475 S.W.3d 184, 185 (Mo. Ct. App. 2015).

diacetyl—a chemical used in butter flavoring.[158] By the time the patient and doctor both "saw at least one newspaper article about the possible connection between butter flavoring and certain lung diseases,"[159] the claim would have accrued in jurisdictions that apply the discovery rule. As of 2005, the welder had switched doctors, finding a new doctor who (like the last one) was also concerned about the possible link between the diacetyl exposure and the plaintiff's illness—but ultimately concluded that the plaintiff was experiencing asthma.[160] Finally, in 2011, the plaintiff's attorneys referred the welder to a physician who "diagnosed him with bronchiolitis obliterans, caused by the exposure to diacetyl contained in butter flavoring."[161]

On appeal, the defendant argued that the plaintiff's claims were time-barred because the medical community was aware of the possible link between diacetyl and certain lung conditions before 2007 (when Missouri's five-year statute of limitations had run), pointing to several pre-2007 studies, journal articles, and other materials identifying the link been diacetyl and pulmonary disease.[162] The court, however, found that the pre-2007 studies showed that "scientific community [was] only beginning to piece together a connection" between the product and the injury.[163] The literature had not developed to the point that the plaintiff "could have maintained the action to a successful result prior to 2007."[164] Given the state of the literature, the court ruled that the defendants had "not met their burden of showing that [the plaintiff's] condition was capable of ascertainment prior to when it in fact was diagnosed in 2011."[165]

A court applying the accrual test to facts from the *Giles* case would have to conclude that the plaintiff's products-liability claims belonged to the debtor as late as 2011—years after the debtor's exposure to diacetyl, diagnosis of an injury, long-term treatment of that injury, and investigation into the link between the injury and diacetyl

158. *Id.*
159. *Id.*
160. *Id.* at 186–87.
161. *Id.* at 187 & n.5.
162. *Id.* at 193.
163. *Id.* at 194.
164. *Id.*
165. *Id.*

exposure.[166] If those same facts occurred in a state that employed the discovery rule, the products-liability claims would have likely belonged to the bankruptcy estate as of 2001. In other states, the claim would have accrued in 1999, when the injury happened. The multitude of possibilities is compounded when you recognize that choice-of-law battles may be fought over which substantive law provides the proper accrual test,[167] and courts are simply incorrect to suggest that it offers a more "predictable" method of defining the bankruptcy estate.[168] State law defines property interests, but it is not supposed to define the extent of the bankruptcy estate, which is exactly what happens—potentially with dramatic effect—when the accrual approach displaces the sufficiently rooted approach.

In contrast, the sufficiently rooted approach provides a more consistent and predictable outcome for bankruptcy cases. Although the sufficiently rooted approach requires a discretionary judgment, the range of potential outcomes is far narrower than that of the accrual test, and the results should hinge on considerations relevant to the bankruptcy action, as opposed to the random factual developments that can define a claim's accrual. Indeed, for courts of equity like bankruptcy courts, the judgment call of whether a claim is "sufficiently rooted" in the pre-bankruptcy past such that it *should* be included as part of the bankruptcy estate is the sort of judgment call that bankruptcy judges are often called on to make.[169]

Following *Segal* provides predictability in a broader sense, too. Lower courts are bound by Supreme Court decisions as a matter of

166. *See, e.g.*, Williamson v. Peters, No. 17-2356-CM, 2018 WL 780554, at *2 (D. Kan. Feb. 7, 2018).

167. *See, e.g.*, *id.*

168. *See In re* Wagner, 530 B.R. 695, 705 (Bankr. E.D. Wis. 2015) (describing the accrual approach, complete with Wisconsin's discovery rule, as "the fairer and more predictable rule in determining whether a claim is property of the estate").

169. *See* U.S. Nat. Bank in Johnstown v. Chase Nat. Bank of N.Y.C., 331 U.S. 28, 36 (1947) ("It has long been established that 'courts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity.'" (quoting Local Loan Co. v. Hunt, 292 U.S. 234, 240 (1934); Pepper v. Litton, 308 U.S. 295, 304 (1939)).

law[170] and also as a matter of policy.[171] Fealty to the rule of law requires adherence to precedent.[172] There is rarely virtue in second-guessing binding authority.[173] Deviations sow unpredictability, undermining the rule of law.[174] *Segal* provided the rule of decision in 1966, and although for decades there remained but one sure rule, now, in contravention of rule-of-law principles, three possibilities exist.[175] As Oliver Wendell Holmes recognized in 1897, attorneys are useful only to the extent they can tell their clients what the law is.[176] Predictability is particularly important in the bankruptcy context.[177] Debtors' attorneys should be able to advise clients on the extent of their obligation to disclose all potential causes of action upon the filing of the bankruptcy

---

170. Agostini v. Felton, 521 U.S. 203, 237 (1997). For a legal and historical justification of precedent's binding power, see GARNER ET AL., *supra* note 114, at 6–8.

171. Payne v. Tennessee, 501 U.S. 808, 827 (1991) ("Adhering to precedent 'is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right.'" (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting))). For "five practical arguments in defense of our system of precedent," see GARNER ET AL., *supra* note 114, at 9–12.

172. Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 478–79 (1987) ("The rule of law depends in large part on adherence to the doctrine of *stare decisis*.").

173. *See generally* Hon. Thomas M. Reavley & Ryan S. Killian, *Against the Rule of Judges*, 68 BAYLOR L. REV. 661 (2016).

174. *See id.* at 664 (describing "predictability" as "the *sine qua non* of the rule of law"); Ryan S. Killian, *Dicta and the Rule of Law*, 2013 PEPP. L. REV. 1, 6 (2013) ("[F]ew would deny that predictability is a vital rule of law ingredient." (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 73 (3d ed. 2000); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989))).

175. *See* Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 968 (1995) (describing as one of the "the customary characteristics of a system committed to the rule of law," a system with "no contradictions or inconsistency in the law").

176. *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897).

177. *See* Amber J. Moren, *Debtor's Dilemma: The Economic Case for Ride-Through in the Bankruptcy Code*, 122 YALE L.J. 1594, 1619–20 (2013) ("[U]niform [bankruptcy] laws . . . enhance the predictability of post-bankruptcy dispositions, serving the interests of both debtors and creditors by providing the predictability necessary to undergird a robust market for consumer loans.").

petition.[178] Failure to do so might mean the application of judicial estoppel and loss of the claim.[179] And yet, because courts have strayed from *Segal*, a basic and settled question has turned into a nettlesome and indeterminate one.[180]

V. CONCLUSION

The Supreme Court established the sufficiently rooted approach, which remains good law. A lower court, without considering any of the relevant Supreme Court authorities, devised its chief competitor, the accrual approach. That approach has been rationalized ever since but never persuasively justified. Finally, the blended approach, while it at least acknowledges the sufficiently rooted test, appears in practice to make accrual the dispositive question in every case. In so doing, it deviates from binding authority and allows state law to define the scope of the bankruptcy estate, sometimes with dramatic effect.

The sufficiently rooted test has the virtues of pedigree and wisdom. Lower courts' experiments in judicial resistance have not yielded a superior approach. The time has come for courts to emphatically reject the accrual and blended approaches, return to *Segal*, and develop an analysis that makes accrual one factor—but not always the dispositive factor—in deciding whether a cause of action is sufficiently rooted in the pre-bankruptcy past that it should be regarded as "property" under section 541.

---

178. *See* 11 U.S.C. § 521(a)(1) (2018); *see also In re* Coastal Plains, Inc., 179 F.3d 197, 208 (5th Cir. 1999) ("The duty of disclosure in a bankruptcy proceeding is a continuing one, and a debtor is required to disclose all potential causes of action." (quoting Youngblood Grp. v. Lufkin Fed. Sav. & Loan Ass'n, 932 F. Supp. 859, 867 (E.D. Tex. 1996))); *accord* Moldano v. Ahan (*In re* Modanlo), 342 B.R. 238, 246 (D. Md. 2006); Union Carbide Corp. v. Viskase Corp. (*In re* Envirodyne Indus., Inc.), 183 B.R. 812, 821 (Bankr. N.D. Ill. 1995).

179. *See, e.g.*, Superior Crewboats, Inc. v. Primary P & I Underwriters (*In re* Superior Crewboats), Inc., 374 F.3d 330, 335 (5th Cir. 2004).

180. *See* Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 877 (2003) ("[I]ndeterminacy opens the way to judicial discretion, and both the law and the Constitution are meant to be the master of those in authority, not the servant of their caprice.").