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## Sovereign Immunity Tests Bankruptcy's Least Contested Axioms

Deborah L. Thorne

Luke L. Sperduto

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## SOVEREIGN IMMUNITY TESTS BANKRUPTCY'S LEAST CONTESTED AXIOMS

*Deborah L. Thorne\**

*Luke L. Spurduto\*\**

### ABSTRACT

*Section 106 of the Bankruptcy Code expressly abrogates the sovereign immunity of governmental units with respect to fifty-nine other provisions of the Code. There are currently two distinct issues splitting circuit courts over the meaning of this provision. First, does section 106 waive the sovereign immunity of the Internal Revenue Service in avoidance actions brought against it by a bankruptcy trustee under section 544(b)? Second, are Native American Indian Tribes “governmental units” within the meaning of section 101(27), such that their sovereign immunity is abrogated to the extent set forth in section 106? Invoking conventional canons of statutory construction, this Article takes the minority position on both issues, arguing that the IRS may not be sued under section 544(b) and that Tribes are not governmental units within the meaning of the Code. Moreover, these issues illustrate a tension between two of bankruptcy’s least contested axioms: (1) creditors with legally similar claims should be treated similarly; and (2) bankruptcy should not adjust nonbankruptcy entitlements unless necessary. A textualist reading suggests that, when it comes to sovereign immunity, the Code cuts this tension by privileging the second axiom over the first. It is for Congress—not the judiciary—to change that if necessary.*

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\* United States Bankruptcy Judge for the Northern District of Illinois. The views expressed here are strictly personal views which have no bearing on any pending or future matters before the Bankruptcy Court for the Northern District of Illinois.

\*\* Corporate Restructuring Associate at Skadden, Arps, Slate, Meagher & Flom (UK) LLP. The views expressed here are strictly personal views which do not reflect those of Skadden, Arps or its partners or affiliates. The authors thank the editorial team at the *Emory Bankruptcy Developments Journal* for their help, Professor Douglas Baird for his generosity, Judge Martin Barash for his support, Lauren Spungen for her insights, and Gabrielle Pilgrim, Brittany Dinkins, and Conner Ahler for valuable research assistance. All errors are our own.

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## INTRODUCTION

Governments come in all shapes and sizes. In an incomplete but influential taxonomy, Article I of the Constitution distinguishes not only “the United States” and “the several States,” but also “foreign Nations,” “Indian Tribes,” and a certain “District.”<sup>1</sup> Whatever their obvious differences in the 1780s, today these different species of government all have two things in common: they all tax, and they all transact, as sovereigns. Taxation—like commerce—inevitably creates debtors and creditors. When financial distress ensues, there are a variety

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<sup>1</sup> U.S. CONST. art. 1, § 8. The United States Bankruptcy Code recognizes an even wider variety of governmental units, including any “political subdivision or public agency or instrumentality of a State” and any “department, agency, or instrumentality” of another recognized governmental unit. *See* 11 U.S.C. § 101(27), (40).

of postures in which governments may become party to proceedings in U.S. bankruptcy courts. For example, governments may be debtors seeking relief,<sup>2</sup> creditors seeking repayment,<sup>3</sup> entities obliged to turn over property to the bankruptcy trustee,<sup>4</sup> or recipients of an allegedly preferential or fraudulent transfer defending against an avoidance action.<sup>5</sup> No matter how it becomes a party in interest, however, a government retains its sovereign immunity in bankruptcy unless that immunity is waived by the government itself or by section 106 of the U.S. Bankruptcy Code (the “Code”).<sup>6</sup> This Article investigates the scope of section 106’s waiver of the sovereign immunity of the Internal Revenue Service (the “IRS”) and Native American Indian Tribes (“Tribes”).

Sovereign immunity is an ancient norm that prevents a tribunal from exercising authority over a sovereign without the sovereign’s consent.<sup>7</sup> In the United States, it operates as a jurisdictional defense that negates or constrains the court’s personal jurisdiction over the government.<sup>8</sup> There are nearly as many denunciations of this norm as there are justifications for it.<sup>9</sup> Rather than plumb

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<sup>2</sup> See, e.g., *In re Jefferson Cnty.*, 491 B.R. 277, 285, 296, 298 (Bankr. N.D. Ala. 2013); *In re City of Detroit*, 504 B.R. 97, 110 (Bankr. E.D. Mich. 2013) (“[T]he City may be a debtor under chapter 9 of the bankruptcy code.”); *In re City of Stockton*, 493 B.R. 772, 783 (Bankr. E.D. Cal. 2013) (discussing the “six essential elements” of chapter 9 eligibility for municipalities); 11 U.S.C. § 109(c).

<sup>3</sup> See, e.g., *Coughlin v. Lac du Flambeau Band of Lake Superior Chippewa Indians (In re Coughlin)*, 33 F.4th 600, 612–13 (1st Cir. 2022).

<sup>4</sup> See, e.g., *Krystal Energy Co. v. Navajo Nation (In re Krystal Energy Co.)*, 308 B.R. 48, 50 (D. Ariz. 2002).

<sup>5</sup> See, e.g., *Cook v. United States (In re Yahweh Ctr., Inc.)*, 27 F.4th 960, 966–68 (4th Cir. 2022); *Zazzali v. United States (In re DBSI, Inc.)*, 869 F.3d 1004, 1006–07, 1008, 1012–13 (9th Cir. 2017); *Subranni v. Navajo Times Publ’g Co. (In re Star Grp. Commc’ns, Inc.)*, 568 B.R. 616, 618 (Bankr. D.N.J. 2016); *In re Equip. Acquisition Res., Inc.*, 742 F.3d 743, 745–46, 749–50 (7th Cir. 2014).

<sup>6</sup> 11 U.S.C. § 106(a). Unless otherwise indicated, all statutory provisions refer to Title 11 of the U.S. Code.

<sup>7</sup> See *Alden v. Maine*, 527 U.S. 706, 767 n.6 (1999) (Souter, J., dissenting) (tracing sovereign immunity “from its origins in Roman sources” compiled in Justinian’s *Digest*); William Baude, *Sovereign Immunity and the Constitutional Text*, 103 VA. L. REV. 1, 4 (2017); Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1563 (2002); 1 FREDRICK POLLOCK & FREDERIC W. MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 500–02 (1895).

<sup>8</sup> See *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475 (1994) (“Sovereign immunity is jurisdictional in nature.”); *United States v. Mitchell*, 463 U.S. 206, 212 (1983) (“It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction.”); *United States v. Sherwood*, 312 U.S. 584, 586 (1941) (“[T]he terms of [the United States’] consent to be sued in any court define that court’s jurisdiction to entertain the suit.”). See generally Nelson, *supra* note 7, at 1559.

<sup>9</sup> For denunciations, see *infra* note 43. Justifications of sovereign immunity tend to rely on appeals to natural law, common law, the federal system established by the Constitution, or other pragmatic considerations. See *Alden v. Maine*, 527 U.S. 706, 762–801 (1999) (surveying alternative theoretical justifications for sovereign immunity); *Kawanakoa v. Polybank*, 205 U.S. 349, 353 (1907) (“A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal

the historical and philosophical depths of the doctrine, our investigation proceeds on the basis of two long-settled tenets of Supreme Court case law. First, both the IRS (as an agency of the federal government)<sup>10</sup> and Tribes (as “distinct, independent political communities” and “separate sovereigns pre-existing the Constitution”) possess “the common-law immunity from suit traditionally enjoyed by sovereign powers.”<sup>11</sup> Second, Congress can waive the immunity of the IRS or abrogate the immunity of Tribes in federal court, but only if it does so through an unequivocal expression of legislative intent.<sup>12</sup> Taking these tenets as given, the question becomes: Does section 106 unequivocally express Congress’s intent to waive the immunity of the IRS and Tribes with respect to the fifty-nine Code sections (the “Target Sections”) listed in section 106(a)(1)?<sup>13</sup> The textualist interpretations of the Code advanced in Parts I and II (below) suggest that it does not.

Because section 106 was amended in 1994 to overrule two Supreme Court decisions finding it insufficiently explicit,<sup>14</sup> one might have expected the meaning of the provision to have settled over the course of the ensuing twenty-eight years. To some extent, as applied to states, it has. *Central Virginia Community College v. Katz*, for instance, held that “in proceedings necessary to

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right as against the authority that makes the law on which the right depends.”); INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL § 5.17.5.2(2) (Mar. 20, 2018) (“The government retains sovereign immunity in order to protect the Treasury and its discretionary governmental functions.”).

<sup>10</sup> See *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 31, 43–45 (1992) (recognizing the sovereign immunity of the IRS).

<sup>11</sup> See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55–58 (1978) (quoting *Worcester v. Georgia*, 31 U.S. 515, 519 (1832)).

<sup>12</sup> *Nordic Vill.*, 503 U.S. at 37 (finding that the prior version of section 106 was not an “unequivocal expression” of intent to waive the federal government’s sovereign immunity); *Santa Clara Pueblo*, 436 U.S. at 58 (“It is settled that a waiver of sovereign immunity ‘cannot be implied but must be unequivocally expressed.’” (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976))).

<sup>13</sup> As discussed further in Part I.B, *infra*, section 106 explicitly empowers courts to “hear and determine any issue arising with respect to the application of [the Target Sections] to governmental units” and to “issue against a governmental unit an order, process or judgment under [the Target Sections] or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages.” 11 U.S.C. § 106(a).

<sup>14</sup> *Coughlin v. Lac du Flambeau Band of Lake Superior Chippewa Indians (In re Coughlin)*, 33 F.4th 600, 605 (1st Cir. 2022) (“Congress enacted § 106 in 1994 to overrule two Supreme Court cases, which held that a prior version of the section was insufficiently clear to abrogate state and federal sovereign immunity.”) (citing 140 CONG. REC. 27693 (Oct. 4, 1994)); *Hoffman v. Conn. Dep’t of Income Maint.*, 492 U.S. 96, 101 (1989) (expressing that section 106 did not express an “unmistakably clear” intent to abrogate states’ sovereign immunity (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985))); *Nordic Vill.*, 503 U.S. at 37; H.R. REP. NO. 103-835, at 42 (1994), as reprinted in 1994 U.S.C.C.A.N. 3340, 3351 (“This amendment expressly provides for a waiver of sovereign immunity by governmental units with respect to monetary recoveries as well as declaratory and injunctive relief. It is the Committee’s intent to make section 106 conform to the Congressional intent of the Bankruptcy Reform Act of 1978 waiving the sovereign immunity of the States and the Federal Government in this regard.”).

effectuate the *in rem* jurisdiction of the bankruptcy courts” section 106 does not need to abrogate states’ immunity, because states waived their own immunity in such proceedings by ratifying Congress’s bankruptcy power in the Constitution.<sup>15</sup> Nonetheless, when it comes to the sovereign immunity of the IRS and Tribes, interpretive challenges persist.<sup>16</sup>

There are currently two distinct issues splitting circuit courts over the meaning of section 106. First, does section 106 waive the IRS’s immunity to avoidance actions under section 544(b)? Under section 544(b), “the trustee may avoid any transfer . . . that is voidable under applicable law by a creditor holding an unsecured claim.”<sup>17</sup> Courts unanimously agree that, outside of bankruptcy, there is no applicable law under which an unsecured creditor could ever avoid its debtor’s transfer to the IRS, because the IRS enjoys immunity from such suits.<sup>18</sup> The minority of courts deduce that, for that reason, the trustee may *not* proceed under section 544(b) to avoid pre-petition transfers to the IRS.<sup>19</sup> The majority of courts instead believe that, notwithstanding the absence of any actual unsecured creditor who could bring the action outside of bankruptcy, the trustee *may* bring state-law avoidance actions against the IRS under section 544(b) because section 106 operates “[n]otwithstanding an assertion of sovereign immunity.”<sup>20</sup> As explained in Part I of this Article, the majority position is incompatible with the text of the Code.<sup>21</sup>

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<sup>15</sup> Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 378 (2006). *Katz* created a bankruptcy-specific exception to the general rule that Article I does not authorize Congress to abrogate a state’s sovereign immunity. *See* Allen v. Cooper, 140 S. Ct. 994, 1002 (2020) (noting that Article I of the Constitution does not authorize Congress to abrogate states’ sovereign immunity, except in bankruptcy); PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244, 2266 (2021) (Barrett, J., dissenting) (“We have recognized but one exception to this general limit on Congress’[s] Article I powers: the Bankruptcy Clause.” (citing Allen v. Cooper, 140 S. Ct. 994, 1002 (2020))).

<sup>16</sup> Following the work done by Professor Gibson, the interpretive challenges discussed here are merely the latest chapter in an ongoing series of attempts to understand the meaning of sovereign immunity in bankruptcy. *See, e.g.*, S. Elizabeth Gibson, *Congressional Response to Hoffman and Nordic Village: Amended Section 106 and Sovereign Immunity*, 69 AM. BANKR. L.J. 311 (1995); S. Elizabeth Gibson, *Sovereign Immunity in Bankruptcy: The Next Chapter*, 70 AM. BANKR. L.J. 195 (1996); *see also* Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 680 (1989) (“[T]hinking about the states may not be helpful to conversations about the tribes and the federal government.”).

<sup>17</sup> 11 U.S.C. § 544(b)(1).

<sup>18</sup> *Zazzali v. United States (In re DBSI, Inc.)*, 869 F.3d 1004, 1010 (9th Cir. 2017) (“[I]t is undisputed that there is no actual unsecured creditor who could pursue such a claim against the IRS outside of bankruptcy; the government’s sovereign immunity would preclude any such claim.”); *see also* INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL § 5.17.5 (Mar. 20, 2018) (providing “guidance on the principal types of judicial actions against the United States which revenue officers may encounter”).

<sup>19</sup> *See In re Equip. Acquisition Res. Inc.*, 742 F.3d 743, 748 n.3 (7th Cir. 2014).

<sup>20</sup> 11 U.S.C. § 106(a); *see also, e.g.*, *Cook v. United States (In re Yahweh Ctr., Inc.)*, 27 F.4th 960 (4th Cir. 2022); *Zazzali*, 869 F.3d at 1013 n.11.

<sup>21</sup> *See infra* notes 89–94 and accompanying text.

The second circuit-splitting issue is this: Are Tribes governmental units within the meaning of section 101(27), such that their sovereign immunity is abrogated to the extent set forth in section 106? Section 101(27) provides in full that the term “governmental unit”:

means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.<sup>22</sup>

Most courts find it undeniable that Tribes *are* “other . . . domestic government[s],” and therefore their sovereign immunity is abrogated to the extent set forth in section 106.<sup>23</sup> A minority of courts disagree. They acknowledge that while Tribes are certainly governments in many respects, there are straightforward readings of section 101(27) under which Tribes *are not* “other foreign or domestic government[s]” for bankruptcy purposes.<sup>24</sup> Moreover, the Supreme Court requires a valid abrogation of tribal immunity to be “unequivocally expressed” in “explicit legislation”—and elsewhere in the U.S. Code, it is.<sup>25</sup> Invoking two linguistic canons of statutory construction to interpret section 101(27), Part II argues that Tribes are not governmental units within the meaning of the Code, so their sovereign immunity is unaffected by section 106.

Many able commentators and practitioners have described these circuit splits in detail.<sup>26</sup> This Article builds on that existing body of scholarship by advancing

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<sup>22</sup> 11 U.S.C. § 101(27).

<sup>23</sup> See, e.g., *Coughlin v. Lac du Flambeau Band of Lake Superior Chippewa Indians (In re Coughlin)*, 33 F.4th 600, 605–06 (1st Cir. 2022); see also *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1057 (9th Cir. 2004); *Numa Corp. v. Diven*, No. 22-15298, 2022 WL 17102361 (9th Cir. Nov. 22, 2022). The Lac du Flambeau Band of Lake Superior Chippewa Indians filed a petition for certiorari asking the Supreme Court to reverse the First Circuit’s decision in *Coughlin*. As this Article goes to press, the Supreme Court has not yet decided whether it will hear the case.

<sup>24</sup> See, e.g., *Buchwald Cap. Advisors, LLC v. Sault Ste. Marie Tribe of Chippewa Indians (In re Greektown Holdings, LLC)* 917 F.3d 451, 459–60 (6th Cir. 2019). An appeal of the Sixth Circuit’s decision in *Greektown* was granted certiorari in 2019 but ultimately dismissed by agreement of the parties.

<sup>25</sup> Cf. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 787–88 (2014); *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 760 (1998); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58–59 (1978) (first citing *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 512 (1940); and then quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)).

<sup>26</sup> See generally, e.g., Joshua Santangelo, Comment, *Bankrupting Tribes: An Examination of Tribal Sovereign Immunity as Reparation in the Context of Section 106(a)*, 37 EMORY BANKR. DEV. J. 325 (2021); Bill Rochelle, *Split Heading to the Tenth Circuit on Sovereign Immunity for Section 544(b) Claims*, AM. BANKR.

textualist interpretations of the Code that support the minority position on both issues (that is, the IRS may *not* be sued under section 544(b) and Tribes are *not* governmental units within the meaning of section 101(27)). The central methodological assumption underlying the statutory interpretations advanced in Parts I and II is that “the statutory text is the only reliable indication of congressional intent.”<sup>27</sup> Parts I and II are exegesis, not policy. Interpreting the prior version of section 106 thirty years ago, Justice Scalia explained that “the ‘unequivocal expression’ of elimination of sovereign immunity that we insist upon is an expression in statutory text.”<sup>28</sup> In attempting to give effect to every word of the Code, the arguments in Parts I and II rely upon—but do not defend—this conception of textualism. This is a pure exercise in statutory interpretation, untethered from bankruptcy-specific principles, public policies, or value judgments about the role of debt in a free society. As much as textualists are welcome to critique the results of this exercise, those partial to a more purposive or dynamic jurisprudence<sup>29</sup> are equally welcome to critique the interpretive method upon which it relies.

Leaving that particular sectarianism aside, however, lawyers, legislators and jurists of all stripes may wonder about more than how to interpret a given statute.<sup>30</sup> They may also wonder whether the statute is reasonable public policy. The interpreter’s positive question (“What does the law require in this case?”) is not the policy maker’s normative question (“What would a reasonable law require?”).<sup>31</sup>

Regarding the normative question, sovereign immunity illustrates the tension between two of bankruptcy’s least contested axioms.<sup>32</sup> On one hand, the first

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INST: ROCHELLE’S DAILY WIRE (Sept. 20, 2021), <https://www.abi.org/newsroom/daily-wire/split-heading-to-the-tenth-circuit-on-sovereign-immunity-for-section-544b-claims>.

<sup>27</sup> Amy C. Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 112 (2010); *see also* United States v. Ron Pair Enters., Inc., 489 U.S. 235, 240–41 (1989) (“[A]s long as the statutory scheme is coherent and consistent, there is generally no need for a court to inquire beyond the plain language of the statute.”).

<sup>28</sup> United States v. Nordic Vill., Inc., 503 U.S. 30, 37 (1992) (quoting Hoffman v. Conn. Dep’t. of Income Maint., 492 U.S. 96, 104 (1989)).

<sup>29</sup> *See* Barrett, *supra* note 27, at 113 n.10 (collecting “a sampling of commentators urging” dynamic statutory interpretation).

<sup>30</sup> *See* Bank of N.Y. Mellon v. Jefferson Cnty (*In re* Jefferson Cnty.), 503 B.R. 849, 854 (Bankr. N.D. Ala. 2013) (“Some of what the law is about is words and their usage.”).

<sup>31</sup> *See* H.L.A. HART, *THE CONCEPT OF LAW* 185–86 (3d ed. 2012) (characterizing legal positivism by “the simple contention that it is no sense a necessary truth that laws reproduce or satisfy certain demands of morality”).

<sup>32</sup> *See generally* Douglas G. Baird, *Bankruptcy’s Uncontested Axioms*, 108 YALE L.J. 573 (1998). Professor Baird’s observations about bankruptcy as a closed or open system inform our discussion of what this Article calls “Axiom 2.” *See id.* at 589–92.



axiom provides that (as a policy matter) creditors holding legally similar claims (“similar creditors”) should be treated similarly in bankruptcy, without regard to other attributes of their identities or objectives (“Axiom 1”). This too is an ancient norm<sup>33</sup>—grounded in both justice and efficiency<sup>34</sup>—that appears explicitly throughout the Code and authoritative case law.<sup>35</sup> When it comes to sovereign immunity, Axiom 1 encourages the broadest possible reading of section 106 to allow both the IRS and Tribes to be sued in bankruptcy, because that is required in order to treat them as similar creditors are treated. On the other hand, the second axiom provides that unless the collectivization of creditors’ remedies requires otherwise, bankruptcy law should take nonbankruptcy entitlements as it finds them (“Axiom 2,” and, together with Axiom 1, the “Axioms”).<sup>36</sup> For instance, if Tribes enjoy sovereign immunity unless Congress unequivocally abrogates it,<sup>37</sup> and Congress has not unequivocally abrogated it in bankruptcy, then Axiom 2 suggests that (as a policy matter) Tribal immunity should not be abrogated in bankruptcy. Likewise, if the IRS cannot be sued under state fraudulent transfer laws outside of bankruptcy,<sup>38</sup> then Axiom 2

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<sup>33</sup> See ARISTOTLE, *Nicomachean Ethics*, in THE BASIC WORKS OF ARISTOTLE 935, 1006 (Richard McKeon ed., W.D. Ross trans., Random House 1941) (c. 384 B.C.E.) (“[T]his is the origin of quarrels and complaints—when either equals have and are awarded unequal shares, or unequals equal shares.”).

<sup>34</sup> David A. Strauss, *Must Like Cases Be Treated Alike?* 14–20 (U. Chi. L. Sch. Pub. L. & Legal Theory, Working Paper No. 24, 2002) (arguing that like cases should be treated alike for instrumental reasons, including predictability, workability, accountability and to prevent arbitrariness and discrimination).

<sup>35</sup> See, e.g., 11 U.S.C. §§ 1122(a), 1123(a)(4); *Begier v. Internal Rev. Serv.*, 496 U.S. 53, 58 (1990) (“Equality of distribution among creditors is a central policy of the Bankruptcy Code. According to that policy, creditors of equal priority should receive pro rata shares of the debtor’s property.”). *But see* *Pepper v. Litton*, 308 U.S. 295, 306 (1939) (Claims “obtained by collusion of the parties or . . . founded upon no real debt” are not entitled to “pari passu treatment with the claims of other creditors.”).

<sup>36</sup> See, e.g., *Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S. Ct. 713, 718 (2020) (state law determines ownership of corporate tax refunds); *Raleigh v. Ill. Dep’t of Revenue*, 530 U.S. 15, 20 (2000) (“Creditors’ entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the debtor’s obligation, subject to any qualifying or contrary provisions of the Bankruptcy Code.”); *Butner v. United States*, 440 U.S. 48, 55–56 (1979) (“Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding.”); see also THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 81 (1986) (arguing against interpretations of section 544(b) that “upset the relative value of rights that had already been fixed outside of bankruptcy” when doing so is not “necessary to assure the advantages of substituting collective for individual remedies”).

<sup>37</sup> See *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 787–88 (2014); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58–59 (1978) (first citing *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 512 (1940); and then quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)).

<sup>38</sup> *In re Equip. Acquisition Res.*, 742 F.3d 743, 745 (7th Cir. 2014) (“The federal government’s sovereign immunity prevents creditors from suing the IRS using state law.”); *Zazzali v. United States (In re DBSI, Inc.)*, 869 F.3d 1004, 1007 (9th Cir. 2004) (“An unsecured creditor who seeks to avoid such tax payments under Idaho law outside of bankruptcy would be precluded from doing so because of the government’s sovereign immunity.”).

suggests that (as a policy matter) the IRS should be immune from state fraudulent transfer actions in bankruptcy.

Though certain instantiations of these Axioms appear throughout the Code,<sup>39</sup> the Axioms themselves are not codified, positive law. They are more like general principles embraced for “their simplicity and the way they organize so many of the issues.”<sup>40</sup> Functionally, these Axioms promote the efficiency and integrity of the bankruptcy system as a whole and suggest certain features of reasonable bankruptcy law that distinguish it from unreasonable bankruptcy law. Like any two principles, however, these “Axioms can be more or less consistent with one another.”<sup>41</sup> Part III observes that when nonbankruptcy law treats similar creditors differently, bankruptcy’s least contested Axioms conflict. Sovereign immunity is a case in point. Because other creditors holding legally similar claims do not enjoy sovereign immunity in bankruptcy, affording immunity to Tribes and the IRS causes similar creditors to be treated differently, thus violating Axiom 1’s commitment to creditor parity. But preventing Tribes and the IRS from exercising their immunity in bankruptcy deprives them of a nonbankruptcy entitlement, thus violating Axiom 2’s deference to nonbankruptcy law. This is the conflict that tests the limits of bankruptcy’s least contested Axioms.

For better or worse, the IRS and Tribes have an immunity to suit that other creditors do not.<sup>42</sup> Whether or not the doctrine of sovereign immunity has any basis in the Constitution or reason<sup>43</sup> (and this Article intentionally expresses no view on that question), bankruptcy law must take the doctrine as-is, incorporating it into a collective proceeding committed to treating similar creditors similarly. A textualist reading of the Code achieves this by privileging Axiom 2 (deference to nonbankruptcy law) over Axiom 1 (creditor parity). The choice between Axioms, however, is not a matter of statutory interpretation but

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<sup>39</sup> See *infra* notes 179, 188–90, 196–200, and accompanying text.

<sup>40</sup> Baird, *supra* note 32, at 577.

<sup>41</sup> *Id.* at 574.

<sup>42</sup> See *supra* notes 18, 25, and accompanying text.

<sup>43</sup> See, e.g., Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1210 (2001) (“Sovereign immunity is an anachronistic relic and the entire doctrine should be eliminated from American law” because it “is inconsistent with three fundamental constitutional principles: the supremacy of the Constitution and federal laws; the accountability of government; and due process of law.”); Susan Randall, *Sovereign Immunity and the Uses of History*, 81 NEB. L. REV. 1, 2 (2002) (“The history of sovereign immunity in the United States is a history of mistakes.”); George W. Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 LA. L. REV. 476, 476, 493–94 (1952) (“The hodge-podge sporadic renunciation of governmental immunity has resulted in much injustice,” the Supreme Court has “abandoned any attempt to locate precisely the origins of the concept,” and yet “the matter rests—a confused, conflicting, but tenacious acceptance of an outmoded and undemocratic dogma.”).

of public policy. If Congress believes that creditor parity is more important than bankruptcy's deference to nonbankruptcy law, it should specify that the IRS can be sued under section 544(b) and that Tribes are governmental units, because the current language of the Code equivocates.

### I. THE IRS MAY NOT BE SUED UNDER SECTION 544(b)

Section 544(b) authorizes an avoidance action in bankruptcy on the grounds that, had there been no bankruptcy, the action could have been brought by one of the debtor's actual, existing unsecured creditors proceeding under nonbankruptcy law.<sup>44</sup> Whereas the Fourth and Ninth Circuits acknowledge the bankruptcy trustee's power to avoid a debtor's pre-petition payment to the IRS as a state-law fraudulent conveyance under section 544(b), the Seventh Circuit does not. A careful application of the rule against surplusage demonstrates that only the Seventh Circuit's interpretation gives effect to all statutory language. Before turning to the statutory interpretation arguments, however, consider section 544(b) in the context of fraudulent conveyance law more generally.

#### A. *Section 544(b) in Context*

Though it was not the first,<sup>45</sup> the Elizabethan Statute of Fraudulent Conveyances (also known as the Statute of 13 Elizabeth) of 1571 was the seminal and most enduring law to declare void those transfers made by a debtor with the intent to "hinder, delay or defraud" creditors.<sup>46</sup> By the early nineteenth century, the English statute had been recodified with scant modifications in every American state, and fraudulent conveyance law had already expanded to encompass the essential features that continue to define it today.<sup>47</sup> Voidable

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<sup>44</sup> See *In re Equip. Acquisition Res.*, 742 F.3d 743, 746 (7th Cir. 2014) ("[I]f the actual creditor could not succeed for any reason—whether due to the statute of limitations, estoppel, res judicata, waiver, or any other defense—then the trustee is similarly barred and cannot avoid the transfer."); *Acequia, Inc. v. Clinton (In re Acequia, Inc.)*, 34 F.3d 800, 809 (9th Cir. 1994) ("Like Prometheus bound, the trustee is chained to the rights of creditors when invoking § 544(b)." (quoting 5 COLLIER ON BANKRUPTCY, ¶ 544.03[1] (15th ed. 1994) (court's alterations omitted))).

<sup>45</sup> See Louis E. Levinthal, *The Early History of English Bankruptcy*, 67 U. PA. L. REV. 1, 11–12 (1919) (citing the Statute of 50 Edward III (1376) and the Statute of 2 Richard II (1379) as early laws that voided fraudulent conversions in which "debtors make feigned gifts and feoffments of their goods . . . by fraud and collusion" to the detriment of their creditors).

<sup>46</sup> See GARRARD GLENN, *THE RIGHTS AND REMEDIES OF CREDITORS RESPECTING THEIR DEBTOR'S PROPERTY* 49–54 (1915).

<sup>47</sup> See Isaac A. McBeth & Landon C. Davis III, *Bulls, Bears, and Pigs: Revisiting the Legal Minefield of Virginia Fraudulent Transfer Law*, 46 U. RICH. L. REV. 273, 277 (2011) ("Some states incorporated the doctrine as part of their common law tradition, while others enacted legislation reflecting identical or similar language to [the] Statute [of] 13 [Elizabeth].").

transfers included not only those through which a debtor intended to defraud creditors by placing her or his assets beyond their reach (as in the case of “actual” fraudulent transfers) but also those in which, regardless of her or his intent, a debtor received less than reasonably equivalent value in exchange (as in the case of “constructive” fraudulent transfers).<sup>48</sup> Moreover, such transfers were voidable even against good faith transferees who were otherwise legitimately entitled to them.<sup>49</sup> These essential features were reflected in early state fraudulent conveyance laws, in section 67(d) of America’s first enduring bankruptcy statute (the Bankruptcy Act of 1898), in the Uniform Fraudulent Conveyance Act (promulgated by the Uniform Law Commission in 1918) as well as subsequent versions of the model law, and in section 548 of the modern Code.<sup>50</sup>

Today there are two (nearly) parallel sets of fraudulent transfer regimes in the United States. The state law regime primarily comprises forty-six distinct codifications of the Uniform Voidable Transfer Act of 2014 (the “UVTA”) or its predecessor, the Uniform Fraudulent Transfer Act of 1984.<sup>51</sup> The federal regime comprises sections 544(b), 548, and 550 of the Code. Avoidance actions under these two regimes share most of their essential elements. For example, under both section 4(a) of the UVTA and section 548(a)(1) of the Code, a transfer by a debtor is voidable if (i) it was made with actual intent to hinder, delay, or defraud any creditor; or (ii) the debtor, while undercapitalized or overleveraged, received less than reasonably equivalent value in exchange for such transfer.<sup>52</sup> Similarly, under both section 5 of the UVTA and section 548(a)(1) of the Code, a transfer by a debtor is voidable if (i) the debtor

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<sup>48</sup> See Douglas G. Baird, *The Fraudulent Conveyance Origins of Chapter 11: An Essay on the Unwritten Law of Corporate Reorganizations*, 36 EMORY BANKR. DEV. J. 699, 700–02 (2020); see also Cook v. United States (*In re Yahweh Ctr., Inc.*), 27 F.4th 960, 963 n.1 (4th Cir. 2022) (“‘Constructive’ fraudulent transfers and obligations differ from ‘actual’ fraudulent transfers and obligations in that the actual intent to defraud the creditor is no longer at issue. Thus, unlike with an actual fraud claim, we focus on whether the debtor was truly adequately compensated for the transfer of property or the obligation incurred, i.e., receiving reasonably equivalent value.”). Since 1602, voidable constructive fraudulent transfers have included those marked by certain so-called “badges of fraud,” the most obvious of which is when the amount received by the debtor is less than reasonably equivalent to the amount transferred. See generally Emily Kadens, *New Light on Twyne’s Case*, 94 AM. BANKR. L.J. 1 (2020).

<sup>49</sup> See DOUGLAS G. BAIRD, *THE UNWRITTEN LAW OF CORPORATE REORGANIZATION* 13 (2022) (“[T]he presence of good faith on the part of those who received property from the debtor was not enough to insulate a transaction from the reach of the principle at the heart of the Statute of 13 Elizabeth.”).

<sup>50</sup> See Robert Rasmussen, Comment, *Guarantees and Section 548(a)(2) of the Bankruptcy Code*, 52 U. CHI. L. REV. 194, 198 n.16 (1985).

<sup>51</sup> Only Alaska, Louisiana, Maryland, and Virginia have not introduced or enacted the UVTA or the UFTA, though Maryland still uses the original Uniform Fraudulent Conveyance Act of 1918.

<sup>52</sup> Compare UNIF. VOIDABLE TRANSFERS ACT § 4 (NAT’L CONF. OF COMM’RS ON UNIF. STATE L.) (“Transfer or Obligation Voidable as to Present or Future Creditor”), with 11 U.S.C. § 548 (“Fraudulent transfers and obligations”).

received less than reasonably equivalent value for it, and the debtor was insolvent or became insolvent as a result; or (ii) the transfer is made to an insider under certain conditions.<sup>53</sup>

Notwithstanding these similarities, the state and federal regimes are not perfectly parallel, because they both diverge from and intersect with one another in important ways. They diverge when it comes to the limitation period. Whereas state statutes of limitation typically allow avoidance actions to be brought within four to six years of the date of the transfer (depending on the state), the federal regime only covers transfers that occurred within the two years preceding the debtor's bankruptcy petition date.<sup>54</sup>

The state and federal regimes intersect at section 544(b), a unique provision empowering the trustee to avoid any transfer that is voidable under applicable law by a creditor holding an allowable unsecured claim against the debtor. Applicable law is often, but not always, a particular state's fraudulent transfer act.<sup>55</sup> Under section 544(b), "[t]he burden is on the trustee to demonstrate the existence of an actual creditor with a viable cause of action against the debtor which is not time-barred or otherwise invalid."<sup>56</sup> The Ninth Circuit calls this "the 'actual creditor' or 'triggering creditor' requirement as it requires the existence of an actual creditor in whose shoes a trustee can stand."<sup>57</sup>

Since at least 1918, courts and commentators have wrestled with the extent of the trustee's avoidance power under section 544(b) (and its predecessor, section 67(b) of the Bankruptcy Act of 1898).<sup>58</sup> The specific rule laid down by Justice Holmes in *Moore v. Bay*<sup>59</sup> provides that "once avoidable pursuant to this

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<sup>53</sup> Section 5 of the UVTA deals with transfers and obligations that are only voidable as to present creditors, meaning the creditor's claim arose before the transfer was made or obligation incurred. In contrast, section 548 avoidance actions are brought by the trustee, and if the transferred property is also recoverable under section 550, it is recovered by the trustee for the benefit of the estate.

<sup>54</sup> See *In re Equip. Acquisition Res.*, 742 F.3d 743, 750 n.5 (7th Cir. 2014); 11 U.S.C. § 548(a).

<sup>55</sup> See Daniel J. Merrett & Mark G. Douglas, *Another Court Adopts Majority View in Approving Bankruptcy Trustee's Use of Tax Code Look-Back Period in Avoidance Actions*, JONES DAY BUS. RESTRUCTURING REV. (Feb. 2021), <https://www.jonesday.com/en/insights/2021/02/another-court-adopts-majority-view-in-approving-bankruptcy-trustees-use-of-tax-code-lookback-period-in-avoidance-actions> ("The longer look-back periods governing avoidance actions under various state laws significantly expand the universe of transactions that may be subject to fraudulent transfer avoidance. Indeed, . . . the look-back period may be much longer—[up to] 10 years—in bankruptcy cases where the Internal Revenue Service or another governmental entity is the triggering creditor," because the Internal Revenue Code and other federal statutes grant the government longer limitations periods within which to collect amounts owing to them.).

<sup>56</sup> Off. Comm. of Asbestos Claimants of G-I Holding, Inc. v. Heyman, 277 B.R. 20, 29 (S.D.N.Y. 2002).

<sup>57</sup> *Zazzali v. United States (In re DBSI, Inc.)*, 869 F.3d 1004, 1006 (9th Cir. 2017).

<sup>58</sup> See JACKSON, *supra* note 36, at 81 n.26.

<sup>59</sup> See *Moore v. Bay*, 284 U.S. 4 (1931).

provision, the transfer is avoided in its entirety for the benefit of all creditors, not just to the extent necessary to satisfy the individual creditor actually holding the avoidance claim.”<sup>60</sup> At the same time, however, the more general rule is that section 544(b):

confers . . . no greater rights of avoidance than the creditor would have if the creditor were asserting invalidity on its own behalf. Consequently, if the creditor is . . . barred from recovery because of the running of a statute of limitations prior to the commencement of the case, the [trustee] is likewise . . . barred.<sup>61</sup>

In *The Logic and Limits of Bankruptcy*, Professor Jackson points out that *Moore v. Bay*, which remains good law today, departs from the general rule by potentially allowing the trustee to recover more, and other unsecured creditors to receive more, than they otherwise would from certain “transactions that, although avoidable by *some* unsecured creditors under state law, are not avoidable by *all* unsecured creditors.”<sup>62</sup>

For instance, when the IRS (which can commence an action to collect taxes as late as ten years after the tax is assessed),<sup>63</sup> the U.S. Securities and Exchange Commission (which has a six-year statute of limitations for fraudulent transfer claims),<sup>64</sup> or the U.S. Department of Health and Human Services (which has six years to collect Medicare overpayments)<sup>65</sup> holds an allowable unsecured claim, the trustee may step into the shoes of that federal entity and invoke federal “applicable law” to avoid and recover for the benefit of the estate transfers so old that ordinary (i.e., nongovernmental) unsecured creditors would never be able to reach them outside of bankruptcy.<sup>66</sup>

While that particular use of the provision is not at issue in the most recent cases dividing the circuits, questions about how the trustee’s section 544(b)

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<sup>60</sup> Off. Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery (*In re Cybergenics Corp.*), 226 F.3d 237, 243 (3d Cir. 2000); *see also* PAH Litig. Tr. v. Water St. Healthcare Partners (*In re Physiotherapy Holdings, Inc.*), No. 13-12965, 2017 WL 6524524, at \*3 n.7 (D. Del. Dec. 21, 2017) (If the trustee subsequently recovers any of the voided transfer, “the trustee’s recovery is shared by all unsecured creditors, potentially including creditors who could not themselves avoid the transfer under state law.”).

<sup>61</sup> Zohar CDO 2003-1, Ltd. v. Patriarch Partners, LLC (*In re Zohar III, Corp.*), 631 B.R. 133, 160 (Bankr. D. Del. 2021) (quoting 5 COLLIER ON BANKRUPTCY ¶ 544.06[3] (16th ed. 2021)).

<sup>62</sup> JACKSON, *supra* note 36, at 83 n.28.

<sup>63</sup> *See* Mitchell v. Zagaroli (*In re Zagaroli*), No. 18-50508, 2020 WL 6495156, at \*1 (Bankr. W.D.N.C. Nov. 3, 2020).

<sup>64</sup> *See* 160 Royal Palm, LLC, v. Alibi, Ltd. (*In re 160 Royal Palm, LLC*), No. 18-19441, 2020 WL 4805478, at \*3 (Bankr. S.D. Fla. July 1, 2020).

<sup>65</sup> *See* Alberts v. HCA Inc. (*In re Greater Se. Cmty. Hosp. Corp. I*), 365 B.R. 293, 299 (Bankr. D.D.C. 2006).

<sup>66</sup> *See* Merrett & Douglas, *supra* note 55.

power relates to the actual triggering creditor's underlying avoidance action are front and center. Consider a typical fact pattern<sup>67</sup>: an S corporation makes tax payments to the IRS on behalf of its shareholders for three years; at the end of three years, the corporation files a bankruptcy petition; the bankruptcy trustee brings an action under section 548 to avoid the most recent tax payments and an action under section 544(b) to avoid the tax payments that occurred prior to section 548's two-year limitation period;<sup>68</sup> and the IRS consents to the section 548 action (because its sovereign immunity is waived by section 106(a)), but asserts that there is no viable section 544(b) action because the IRS is immune from any avoidance actions that could be brought under state law by the corporation's actual unsecured creditors. Does the IRS's immunity to state-law avoidance actions render it equally immune to section 544(b) actions that invoke state law as the "applicable law"? Or does section 106(a) empower the trustee to do what no unsecured creditor could do outside of bankruptcy (i.e., avoid and recover the older tax payments for the benefit of the estate)? The next Section argues that the answers to these questions are discernible directly from the text of the Code itself.

### B. *Statutory Interpretation*

Does the waiver of immunity in section 106(a) empower the trustee to proceed against the IRS under section 544(b) by invoking state law as the "applicable law"? The Fourth, Seventh and Ninth Circuits all agree that legislative history "has no bearing" on this question because the meaning of the statutory text is plain.<sup>69</sup> They simply disagree about what the plain meaning is.<sup>70</sup>

Section 106(a) provides in full that:

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<sup>67</sup> This fact pattern is based on the facts of *Equipment Acquisition and DBSI*.

<sup>68</sup> An S corporation is a pass-through entity for federal tax purposes; it is not liable for the taxes of its members. Therefore, payment of its members' taxes does not, by itself, reduce the S corporation's liabilities dollar-for-dollar. For that reason, the federal tax payments of pass-through entities are transfers for less than reasonably equivalent value, exposing the IRS to liability as the initial transferee of a potentially voidable fraudulent transfer. Similar reasoning does not apply to entities that are liable for their own federal taxes. See *Cook v. United States (In re Yahweh Ctr., Inc.)*, 27 F.4th 960, 968 (4th Cir. 2022) ("[T]he payment of a legitimate obligation reduces that obligation dollar for dollar and constitutes 'reasonably equivalent value.'"); *Se. Waffles, LLC v. U.S. Dep't of the Treasury (In re Se. Waffles, LLC)*, 702 F.3d 850, 858–59 (6th Cir. 2012) (finding that payment of tax penalties is not "within the ambit of the 'exchanges' targeted in the fraudulent-transfer laws").

<sup>69</sup> See *Yahweh Ctr.*, 27 F.4th at 966 ("The Bankruptcy Code, however, forecloses the government's position that sovereign immunity bars any action by an unsecured creditor under [state fraudulent transfer laws.]; *Zazzali v. United States (In re DBSI, Inc.)*, 869 F.3d 1004, 1013 (9th Cir. 2017); *In re Equip. Acquisition Res.*, 742 F.3d 743, 747 (7th Cir. 2014).

<sup>70</sup> See *Bank of N.Y. Mellon v. Jefferson Cnty. (In re Jefferson Cnty.)*, 503 B.R. 849, 855 (Bankr. N.D. Ala. 2013) ("The malleable and mutable meaning of words or imprecision in their use often causes disagreement for which invocation of the plain meaning principle does not facilitate achieving an agreed-upon outcome.").

Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:

(1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.

(2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.

(3) The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages. Such order or judgment for costs or fees under this title or the Federal Rules of Bankruptcy Procedure against any governmental unit shall be consistent with the provisions and limitations of section 2412(d)(2)(A) of title 28.

(4) The enforcement of any such order, process, or judgment against any governmental unit shall be consistent with appropriate nonbankruptcy law applicable to such governmental unit and, in the case of a money judgment against the United States, shall be paid as if it is a judgment rendered by a district court of the United States.

(5) Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.

The Fourth Circuit, the Ninth Circuit, and a majority of other courts that have considered this issue have held that this language precludes the IRS from raising sovereign immunity as a defense in section 544(b) actions (the “majority interpretation”).<sup>71</sup> The Seventh Circuit and a minority of bankruptcy courts have held that section 544(b) provides no viable cause of action against the IRS. They reason that section 544(b) empowers the trustee to avoid only those transfers that an actual unsecured creditor could avoid outside of bankruptcy, and there is no actual unsecured creditor who could proceed under state law to avoid a

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<sup>71</sup> See, e.g., *Yahweh Ctr.*, 27 F.4th at 966; *DBSI*, 869 F.3d at 1013 n.11.



fraudulent transfer to the IRS because the IRS is immune from such suits outside of bankruptcy.<sup>72</sup> The majority position disagrees. It reads section 106(a) as an unequivocal waiver—one that renders the IRS potentially liable under state avoidance laws, provided the action is brought by a bankruptcy trustee under section 544(b).

Thus, the primary disagreement concerns the proper interpretation of the interaction between section 106(a) and section 544(b). The majority interpretation is straightforward: section 106(a) waives the federal government's immunity from suit under section 544; therefore, the trustee can sue the IRS under section 544(b), and any interpretation to the contrary renders section 106(a) meaningless surplusage. The Seventh Circuit's interpretation—that the waiver of sovereign immunity in section 106(a) does not extend to section 544(b) actions—is supported by the following three arguments. First, a close reading of the fifty-eight other Target Sections “with respect to” which section 106(a) operates reveals that the waiver does not extend to every subsection of every Target Section. Rather, the waiver extends only to those subsections under which a court “may issue against a governmental unit an order, process, or judgment” or “may hear and determine any issue arising with respect to [its] application . . . to governmental units.”<sup>73</sup> In other words, the scope of the waiver in section 106(a) is limited to those subsections of the Target Sections that provide for a substantive claim for relief or cause of action against a governmental unit. Consequently, while section 106(a) clearly waives the IRS's immunity from any suit that could be brought against it under section 544, only section 544(a)—not section 544(b)—is covered by this waiver, because there are no such suits under section 544(b). Second, the Seventh Circuit's interpretation does not render section 106(a)'s application to section 544 meaningless surplusage because the federal government's immunity in section 544(a) actions is still waived, and the immunity of other governmental units (including foreign governments) in section 544(b) actions is still abrogated, by section 106(a). Third, extending section 106(a)'s waiver to section 544(b) flagrantly ignores several words, clauses, and entire sentences of the Code, so the majority interpretation generates more surplusage than it prevents.

As set out in further detail below, these three arguments rely on the rule against surplusage. Justice Antonin Scalia and Bryan Garner summarize this

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<sup>72</sup> See *Equip. Acquisition Res.*, 742 F.3d at 747 (explaining the importance of the “actual-creditor requirement”).

<sup>73</sup> 11 U.S.C. § 106(a)(2)–(3).

canon of statutory construction as follows: “If possible, every word and every provision is to be given effect (*verba cum effectu sunt accipienda*). None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.”<sup>74</sup> The Latin phrase, courtesy of the Roman jurist Ulpian, means: “Words are to be taken as having an effect.”<sup>75</sup> The Supreme Court often reiterates “the cardinal principal of interpretation that courts must give effect, if possible, to every clause and word of a statute.”<sup>76</sup> Moreover, “[t]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.”<sup>77</sup> With these authoritative admonitions in mind, each of these three arguments wields the anti-surplusage canon as a razor to confute interpretations that ignore the language of the Code.

*1. First Argument: The scope of the waiver in section 106(a) is limited to subsections that provide for a substantive claim for relief or cause of action against a governmental unit.*

Each of the Target Sections listed in section 106(a)(1) is referred to by section number alone. Many of the subsections of those Target Sections, however, do not have anything to do with governmental units. For example, it makes perfect sense for section 106(a)(1) to refer to section 105, because subsection 105(a) authorizes courts to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Code],” including orders and judgments against governmental units. At the same time, it makes no sense to presume that the waiver in section 106(a) extends to subsection 105(b), which does nothing but prohibit a court from appointing a receiver. There is no way such a prohibition could result in an order, process, or judgment against which a governmental unit could be immune, so any reading that extends section 106(a)’s waiver to subsection 105(b) (and other provisions

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<sup>74</sup> ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 174 (2012).

<sup>75</sup> *Id.* at 174 n.1.

<sup>76</sup> *Loughrin v. United States*, 573 U.S. 351, 358 (2014) (quoting *Williams v. Taylor*, 529 U.S. 362, 404 (2000)); see *Corley v. United States*, 556 U.S. 303, 314 (2009) (“[A] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.”).

<sup>77</sup> *Yates v. United States*, 574 U.S. 528, 543 (2015) (plurality opinion); Pa. Dep’t of Pub. Welfare v. Davenport, 495 U.S. 552, 562 (1990) (“Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.”). Even the Ninth Circuit acknowledges that “[i]t is a basic rule of statutory construction ‘that one provision should not be interpreted in a way which is internally contradictory or that renders other provisions of the same statute inconsistent or meaningless.’” *United States v. Powell*, 6 F.3d 611, 614 (9th Cir. 1993) (quoting *Hughes Air Corp. v. Pub. Util. Comm’n*, 644 F.2d 1334, 1338 (9th Cir. 1981)).

like it)<sup>78</sup> renders the waiver nugatory. Therefore, within the context of the Code as a whole, it is not anomalous to read section 106(a)'s reference to section 544 with applicability to subsection 544(a) only.

Perhaps the most compelling rebuttal to this first argument is that subsection 544(b) plainly does “provide a substantive cause of action” against at least some (if not all) governmental units, so the waiver must apply to that subsection.<sup>79</sup> The Ninth Circuit takes this rebuttal too far, however, when it infers the existence of a cause of action from the waiver. Because “[i]t would defy logic to waive sovereign immunity as to a claim which could not be brought against the government,” and the Code appears to waive sovereign immunity as to section 544(b) claims, therefore, says the Ninth Circuit, section 544(b) claims can be brought against the government.<sup>80</sup> This is precisely the same fallacy that caused the Ninth Circuit's decision in *Meyer v. Fidelity Savings*<sup>81</sup> to be overturned. There, the Ninth Circuit determined that Meyer had a *Bivens* action against the federal agency because a federal statute waived the agency's immunity.<sup>82</sup> The Supreme Court reversed, explaining that:

The Ninth Circuit's reasoning conflates two “analytically distinct” inquiries. The first inquiry is whether there has been a waiver of sovereign immunity. If there has been such a waiver, as in this case, the second inquiry comes into play—that is, whether the source of substantive law upon which the claimant relies provides an avenue for relief.<sup>83</sup>

A waiver of immunity cannot imply, much less create, a cause of action when the substantive law upon which the claimant relies does not do so.<sup>84</sup>

2. *Second Argument: Assuming that section 106(a) does apply to both subsections 544(a) and (b), the Seventh Circuit's interpretation still creates no meaningless surplusage.*

The federal government's immunity in section 544(a) actions is clearly waived by section 106(a).<sup>85</sup> Even if the IRS is immune to section 544(b) actions,

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<sup>78</sup> See, e.g., *In re Equip. Acquisition Res., Inc.*, 742 F.3d 743, 749 n.4 (7th Cir. 2014).

<sup>79</sup> *Zazzali v. United States (In re DBSI, Inc.)*, 869 F.3d 1004, 1014 (9th Cir. 2017).

<sup>80</sup> *Id.*

<sup>81</sup> *Meyer v. Fidelity Sav.*, 944 F.2d 562 (9th Cir. 1991).

<sup>82</sup> *Id.* at 572.

<sup>83</sup> *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 484 (1994).

<sup>84</sup> *Id.* at 486.

<sup>85</sup> See *In re Equip. Acquisition Res., Inc.*, 742 F.3d 743, 749 (7th Cir. 2014) (“28 U.S.C. § 2410 permits judgment lien creditors, execution creditors, and bona fide purchasers to quiet title to property on which the

the immunity of other governmental units (including foreign governments) in section 544(b) actions is still abrogated by section 106(a). Therefore, there is no statutory surplusage created by an interpretation that applies section 106(a)'s waiver to both sections 544(a) and (b) while at the same time denying that the IRS can be sued under section 544(b).

Although effective “[n]otwithstanding an assertion of sovereign immunity,” the waiver in section 106 applies only “with respect to” the Target Sections.<sup>86</sup> That means it does not waive sovereign immunity with respect to other Code sections or other “applicable law”<sup>87</sup> that the trustee may invoke. Specifically, section 106 does not waive the IRS’s immunity to state-law avoidance actions, because they are not even mentioned in the waiver. In order for the trustee or a creditor to proceed against the IRS under a Code section or state statute not mentioned in section 106, there must be a separate waiver of immunity that authorizes the proceeding. Any reading that makes one waiver do the work of two by ignoring language that expressly limits its scope plainly contravenes the “conservatism which is appropriate in the case of a waiver of sovereign immunity.”<sup>88</sup> The better interpretation of section 106 gives effect to the phrase “with respect to” by acknowledging the limits that phrase imposes on the scope of the waiver and honoring the IRS’s immunity to state-law avoidance actions.

3. *Third Argument: The majority interpretation creates meaningless surplusage by ignoring several words, clauses, and entire sentences of the Code.*

Section 544 includes certain particular words and clauses that must not be ignored.<sup>89</sup> In section 544(b), the majority interpretation ignores the phrases “the

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United States claims a lien—so there is no external sovereign-immunity obstacle to the trustee’s employing § 544(a) against the federal government.”).

<sup>86</sup> 11 U.S.C. § 106.

<sup>87</sup> 11 U.S.C. § 544(b).

<sup>88</sup> *See, e.g.,* United States v. Sherwood, 312 U.S. 584, 590 (“The section must be interpreted in the light of its function in giving consent of the Government to be sued, which consent, since it is a relinquishment of a sovereign immunity, must be strictly interpreted.”).

<sup>89</sup> Section 544, titled “Trustee as lien creditor and as successor to certain creditors and purchasers,” states in relevant part:

(a) The trustee . . . may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by—

- (1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien . . . , whether or not such a creditor exists;

trustee” and “voidable under applicable law by a creditor holding an unsecured claim that is allowable.” Note first that section 544(b) authorizes “the trustee” to avoid transfers; it does not authorize creditors to avoid transfers. Thus, even if section 106’s waiver of immunity does apply to section 544(b) actions by the trustee, it still does not waive the IRS’s immunity to actions by unsecured creditors proceeding under state law. The majority interpretation ignores the IRS’s immunity to actions brought by anyone other than “the trustee.” Note further that the majority interpretation gives no effect to the phrase “voidable under applicable law by a creditor holding an unsecured claim that is allowable,” because that interpretation empowers the trustee to avoid transfers that could never be voidable under state law by any unsecured creditor.

As a result, the majority interpretation also ignores the phrase “whether or not such a creditor exists,” which is repeated twice (and reiterated a third time, changing “creditor” to “purchaser”) in section 544(a). Those phrases are clearly “another part of the same statutory scheme” as section 544(b); in fact, they are part of the same Code section, so the rule against surplusage applies with special force. But section 544(b) conspicuously omits the phrase “whether or not such a creditor exists.”<sup>90</sup> If, as the majority position maintains, the IRS can be sued under section 544(b) “whether or not” an unsecured creditor exists—even though section 544(b) does not contain that phrase—then presumably there was no need for Congress to include that phrase in section 544(a) at all, because the effect of the statute would have been the same had it been omitted. In other words, the structure of section 544 strongly suggests that Congress gave the trustee the power to avoid only those transfers voidable by (a) certain *hypothetical secured creditors* and bona fide real property purchasers, and (b) certain *actual unsecured creditors* proceeding under applicable law. Because

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(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

(b) . . . the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable.

11 U.S.C. § 544.

<sup>90</sup> See *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (“Where Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (quotation marks and citations omitted).

section 544 itself does not grant the trustee the avoidance powers of a hypothetical unsecured creditor proceeding under applicable law, nothing in section 106 can be read to do so.<sup>91</sup>

Finally, as the United States has argued and bankruptcy courts have held, the majority interpretation ignores all of section 106(a)(5).<sup>92</sup> That provision limits section 106 by warning that “[n]othing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title . . . or nonbankruptcy law.”<sup>93</sup> In light of that language, the problem with section 544(b) actions against the IRS is not that the IRS is immune to such suits, but rather that no one has a right to bring them. As Justice Brandeis observed in another context: “The fundamental obstacle to recover is not the immunity of a sovereign to suit, but the lack of a substantive right to recover.”<sup>94</sup> In other words, ignoring section 106 momentarily, there is no substantive right or cause of action that empowers the trustee or an unsecured creditor to avoid and recover transfers from the debtor to the IRS that occurred more than two years before the petition. Consequently, any interpretation of section 106 that facilitates recovery of such transfers from the IRS creates a substantive claim for relief or cause of action not otherwise existing under the Code or nonbankruptcy law, thereby contravening section 106(a)(5).

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In contrast to the majority interpretation, the Seventh Circuit’s interpretation gives effect to all of the statutory text, better capturing the legislative intent behind sections 106 and 544. As discussed in the next Part, similar reasoning also supports the minority interpretation of section 101(27).

## II. TRIBES ARE NOT GOVERNMENTAL UNITS UNDER THE CODE

Whereas the First and Ninth Circuits have held that section 106(a) abrogates tribal immunity, the Sixth Circuit has held that it does not.<sup>95</sup> Their disagreement hinges on whether a Tribe is an “other foreign or domestic government” within

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<sup>91</sup> See *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 484–86 (1994) (finding that a waiver of sovereign immunity, on its own, does not create a cause of action unless “the source of substantive law upon which the claimant relies provides an avenue for relief”).

<sup>92</sup> See Brief for Appellant at 41, *In re Equip. Acquisition Res., Inc.*, 742 F.3d 743 (7th Cir. 2014) (No. 13-1480) (“The avoidance power sanctioned by the courts below *does* create a new cause of action in violation of § 106(a)(5).”); see also *Yield v. Montgomery Cnty. (In re Anton Motors, Inc.)*, 177 B.R. 58, 64 (Bankr. D. Md. 1995) (holding that such an interpretation violated section 106(a)(5)).

<sup>93</sup> 11 U.S.C. § 106(a)(5).

<sup>94</sup> *Turner v. United States*, 248 U.S. 354, 358 (1919).

<sup>95</sup> See *supra* notes 23–24.

the meaning of section 101(27). Before turning to the statutory interpretation arguments for the Sixth Circuit's position, consider tribal sovereign immunity in its historical context.

#### A. *Tribal Sovereign Immunity in Context*

Modern Tribes are not like any other governments. Their long, troubled relationship with the United States has left them a uniquely defeasible sovereignty, with powers of self-government (including sovereign immunity) that “Congress has plenary authority to limit, modify or eliminate.”<sup>96</sup> After four centuries of military and commercial negotiation, forced displacement, physical and cultural extermination, and coerced assimilation, today “[t]he special brand of sovereignty the tribes retain—both its nature and its extent—rests in the hands of Congress.”<sup>97</sup> Even a cursory survey of a small fraction of the relevant treaties, proclamations, legislation and case law suffices to illustrate Chief Justice Marshall's observation that “[t]he condition of the Indians in relation to the United States is perhaps unlike that of any other . . . [as it] is marked by peculiar and cardinal distinctions which exist no where [sic] else.”<sup>98</sup> Those peculiar distinctions distinguishing Tribes from other immunity-bearing sovereigns are exemplified by (1) the treaties and conflicts of the seventeenth and eighteenth centuries; (2) the pretense of legality that justified Indian removal in the nineteenth century; and (3) the way Congress and the Supreme Court now aim to protect tribal self-government.

##### 1. *Early Treaties Prefigured Subsequent Developments*

Having governed themselves continuously for centuries, indigenous Americans began entering into treaties, alliances, and transactions with colonial communities and European powers shortly after the Europeans arrived. In March of 1621, for example, the Wampanoag confederacy of Tribes (represented by their sachem, Massasoit Ousamequin) and the Plymouth Colony of Pilgrims (represented by their governor, John Carver) signed the Wampanoag-Pilgrim Peace Treaty.<sup>99</sup> Around the same time, early French explorers laid the

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<sup>96</sup> See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978); see also *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788–89 (2014) (“[T]ribes are subject to plenary control by Congress . . . . And the qualified nature of Indian sovereignty . . . plac[es] a tribe's immunity, like its other governmental powers and attributes, in Congress's hands.”).

<sup>97</sup> *Bay Mills Indian Cmty.*, 572 U.S. at 800.

<sup>98</sup> *Cherokee Nation v. Georgia*, 30 U.S. 1, 16 (1831).

<sup>99</sup> The peace was mutually beneficial enough to persist for over 50 years, outlasting the lives of its signatories, but when it broke Massasoit's son Metacom led an inter-Tribal alliance against the colonists in a

groundwork for the transatlantic fur trade by establishing commercial relations with the Algonquin, Huron and other peoples of the Laurentian valley.<sup>100</sup>

When conflicting British and French territorial ambitions finally erupted into battle in 1754, Tribes fought on both sides of the French and Indian War. Britain's victory in 1763 earned it nominal control over the eastern half of North America, but the leader of the Ottawa—Chief Pontiac—quickly massed an inter-Tribal coalition of indigenous nations to assert themselves against the Crown. Chief Pontiac's forces imposed such costly losses on British forts and settlements that King George III issued the Royal Proclamation of October 7, 1763, which reserved all of the Mississippi's eastern watershed (i.e., east of the River and west of the Appalachians) for Indian use and prohibited royal subjects from purchasing, settling, or taking possession of land there.<sup>101</sup>

This prohibition dealt a commercial blow to politically influential colonial land speculators like the Washingtons (George and John) and the Lees (Francis, Richard, Thomas, and William) whose investment in the Mississippi Land Company was thwarted by the Proclamation.<sup>102</sup> British refusal to grant the Company any land west of the Appalachians stoked revolutionary sentiment, prompting the American rebels to declare that King George III had “endeavored to prevent the population of these states.”<sup>103</sup>

As in earlier conflicts, Tribes fought on both sides of the Revolutionary War.<sup>104</sup> When Britain relinquished “all claims to the government, propriety, and territorial rights of [the United States] and every part thereof” in the Treaty of Paris, the Treaty precisely demarcated the geographic bounds of the new nation without mentioning its indigenous inhabitants.<sup>105</sup> Nonetheless, then-General Washington recognized that:

policy and economy point very strongly to the expediency of being upon good terms with the Indians, and the propriety of purchasing their Lands in preference to attempting to drive them by force of arms out

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war that killed thousands on both sides and destroyed many colonial towns and Tribal communities throughout New England. See generally LISA BROOKS, *OUR BELOVED KIN: A NEW HISTORY OF KING PHILIP'S WAR* (2018).

<sup>100</sup> See Cornelius J. Jaenen, *Indigenous-French Relations*, THE CANADIAN ENCYCLOPEDIA (Aug. 17, 2015), <https://www.thecanadianencyclopedia.ca/en/article/aboriginal-french-relations>.

<sup>101</sup> King George III, *The Royal Proclamation of October 7, 1763*, SOLON.ORG (Feb. 20, 1996), [https://www.solon.org/Constitutions/Canada/English/PreConfederation/rp\\_1763.html](https://www.solon.org/Constitutions/Canada/English/PreConfederation/rp_1763.html).

<sup>102</sup> See Mississippi Land Company Articles of Agreement (3 June 1763), in 7 THE PAPERS OF GEORGE WASHINGTON: COLONIAL SERIES 219–25 (W.W. Abbot & Dorothy Twohig eds., 1990).

<sup>103</sup> THE DECLARATION OF INDEPENDENCE para. 9 (U.S. 1776).

<sup>104</sup> See Isaac Makos, *Roles of Native Americans During the Revolution*, AM. BATTLEFIELD TR. (April 13, 2021), <https://www.battlefields.org/learn/articles/roles-native-americans-during-revolution>.

<sup>105</sup> See Treaty of Paris (1783) Gr. Br.- U.S., art. I, Sept. 3, 1783 U.S.T. 16.



of their Country . . . In a word there is nothing to be obtained by an Indian War but the Soil they live on and this can be had by purchase at less expence [sic], and without that bloodshed.<sup>106</sup>

While state delegates debated the new Constitution in Philadelphia, the Congress of the Confederation was busy in New York codifying Washington's "policy" into the Northwest Ordinance of 1787. In addition to establishing a federally controlled process for acquiring, settling and organizing the land of the Northwest Territory (i.e., around the Great Lakes), the Ordinance also provided that "[t]he utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and, in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress."<sup>107</sup> The First United States Congress (1789–91) reaffirmed the 1787 Ordinance in 1789, but that did not stop then-President Washington from dispatching General "Mad" Anthony Wayne to subdue the indigenous populations of the Northwest Territory by force. His ruthless scorched-earth campaigns coerced the leadership of the Wyandot, Delaware, Shawnee, Ottawa, Chippewa, Potawatomi, Miami, and other indigenous nations into signing the Treaty of Greenville in 1795, thereby ceding most of what later became Ohio to the United States.<sup>108</sup>

The terms of the Treaty of Greenville warrant consideration for the way they prefigure the unique conception of tribal land title advanced by Chief Justice Marshall shortly thereafter in *Fletcher v. Peck* (1810), *Johnson v. M'Intosh* (1823), and the so-called "Cherokee Cases" (1831 and 1832). Specifically, in Article 4 of the Treaty of Greenville, "the United States relinquish[ed] their claims to all other Indian lands northward of the river Ohio, eastward of the Mississippi," southwest of the Great Lakes, and not otherwise addressed by the Treaty. The Treaty further specified that, as used in Article 4, "the meaning of relinquishment is this:"

the Indian tribes who have a right to those lands, are quietly to enjoy them, hunting, planting, and dwelling thereon, so long as they please, without any molestation from the United States; but when those tribes, or any of them, shall be disposed to sell their lands, or any part of them, they are to be sold only to the United States; and until such sale, the United States will protect all the said Indian tribes in the quiet

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<sup>106</sup> Letter from George Washington to James Duane (September 7, 1783), in 2 DOCUMENTS OF UNITED STATES INDIAN POLICY (Francis Prucha ed., 1975).

<sup>107</sup> *Northwest Ordinance of 1787*, ARCHIVES.GOV § 14 art. 3 (May 10, 2022), <https://www.archives.gov/milestone-documents/northwest-ordinance>.

<sup>108</sup> WALTER L. HIXSON, AMERICAN SETTLER COLONIALISM 69–70 (2013).

enjoyment of their lands against all citizens of the United States, and against all other white persons who intrude upon the same. And the said Indian tribes again acknowledge themselves to be under the protection of the said United States, and no other power whatever.

In other words, under the terms of the Treaty, the Tribes could use the land, could sell it (but only to the United States), and had to acknowledge themselves to be “under the protection” of the United States. In return, “as the great means of rendering this peace strong and perpetual,” the United States gave them a quantity of goods worth \$20,000, some annuities (payable in “useful goods”), and a promise never to bother them.<sup>109</sup>

## 2. *An Extravagant Pretense Justified Indian Removal*

Consequently, Chief Justice Marshall was not writing on a blank slate when he held in 1810 that tribal rights to use land in Georgia (which were expressly reserved for the Tribes by the Royal Proclamation of 1763) were not “absolutely repugnant to” Georgia’s right to grant that same land to the New England Mississippi Land Company.<sup>110</sup> Eleven years later, in *Johnson v. M’Intosh*, the Chief Justice endorsed “the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others.”<sup>111</sup> This principle—that Tribes are considered mere occupants without any right to alienate their lands to anyone other than the United States—ostensibly rested on a doctrine of discovery embraced by all major European colonial powers of the era.<sup>112</sup> Despite this doctrinal pedigree, the Court acknowledged that its decision could not be justified by “natural right” or even by “the usages of civilized nations,” but only by appeal to national necessity, as it was “indispensable to that system under which the country has

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<sup>109</sup> Treaty of Greenville, art. IV, Aug. 3, 1795, [https://avalon.law.yale.edu/18th\\_century/greenvil.asp](https://avalon.law.yale.edu/18th_century/greenvil.asp). By similar terms in the Louisiana Purchase of 1803, the United States promised (to France) that they would respect “such treaties and articles as may have been agreed between Spain and the tribes and nations of Indians, until by mutual consent of the United States and the said tribes or nations, other suitable articles shall have been agreed upon.” See Louisiana Purchase Treaty, Fr.-U.S., art. VI, Apr. 30, 1803.

<sup>110</sup> *Fletcher v. Peck*, 10 U.S. 87, 142–43 (1810) (“[T]he nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the state.”).

<sup>111</sup> *Johnson v. M’Intosh*, 21 U.S. 543, 591 (1823).

<sup>112</sup> See Jill Norgren, *Protection of What Rights They Have: Original Principles of Federal Indian Law*, 64 N.D. L. REV. 73, 89–90 (1988). The doctrine of discovery maintained that the European nation that first discovered “unoccupied” land (that is, land not occupied by Europeans) had the exclusive right, against other European nations, to acquire and settle that land. *Id.* at 85.

been settled.”<sup>113</sup> “However extravagant the pretension of converting the discovery of an inhabited country into conquest,” that is the pretense underpinning the legality of all land title in the United States.<sup>114</sup>

The Indian Removal Act of 1830 authorized the federal government to negotiate with Tribes to acquire from them even the right to occupy their ancestral territory and remove them to lands west of the Mississippi. Immediately thereafter, the Supreme Court decided the Cherokee Cases. The first of these, *Cherokee Nation v. Georgia*,<sup>115</sup> held that the Cherokee Nation is not a “foreign state” for jurisdictional purposes under Article III.<sup>116</sup> Instead, the Cherokee and other Tribes are “domestic dependent nations”—a relation the Court compared to that of a ward to its guardian—that “occupy a territory to which [the United States] assert[s] a title independent of their will.”<sup>117</sup> The second case, *Worcester v. Georgia*,<sup>118</sup> established that states cannot exercise jurisdiction over tribal lands. Warming to his theme, Chief Justice Marshall emphasized that the “Cherokees acknowledge themselves to be under the protection of the United States, and of no other power” such as the states. “Protection,” he wrote, “does not imply the destruction of the protected.” In the face of President Jackson’s haste to get on with “Indian Removal” under the 1830 Act and states’ eagerness to develop their land, the Court insisted that “[t]he Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights.”<sup>119</sup> Inside those communities, state laws “can have no force.”<sup>120</sup>

A few years after these decisions, as a rogue faction of the Cherokee leadership was exchanging the Tribe’s ancestral homeland for a new parcel out

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<sup>113</sup> *Johnson*, 21 U.S. at 591.

<sup>114</sup> *Id.* at 591; *see also* Norgren, *supra* note 112, at 88 (“[W]hat the United States characterized as its ‘unique’ relationship with Indian nations [was] unique because, unable to conquer the tribes, the United States continued its nation to nation political dealings while at the same time asserting an unmitigated racial and cultural superiority.”).

<sup>115</sup> *Cherokee Nation v. Georgia*, 30 U.S. 1, 54 (1831).

<sup>116</sup> *Id.*; *see also* *United States v. Kagama*, 118 U.S. 375, 379 (1886) (summarizing the holding of *Cherokee Nation* as “the Cherokees were not a state or nation, within the meaning of the constitution”).

<sup>117</sup> *Cherokee Nation*, 30 U.S. at 13.

<sup>118</sup> *Worcester v. Georgia*, 31 U.S. 515, 542 (1832).

<sup>119</sup> *Id.* at 559.

<sup>120</sup> *Id.* at 561. *But see* *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2504–05 (2022) (States and federal government “have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country.”).

west and agreeing to relocation under the Treaty of New Echota,<sup>121</sup> Alexis De Tocqueville published the first volume of *Democracy in America*. He noted that:

The Spaniards were unable to exterminate the Indian Race by those unparalleled atrocities which branded them with indelible shame, nor did they even succeed in wholly depriving it of its rights; but the Americans of the United States have accomplished this twofold purpose with singular felicity; tranquilly, legally, philanthropically, without shedding blood, and without violating a single great principle of morality in the eyes of the world. It is impossible to destroy men with more respect for the laws of humanity.<sup>122</sup>

The ensuing century stretched De Tocqueville's sarcasm to its darkest register as the extravagant pretense of settling an open frontier bloodied U.S.-tribal relations. Notwithstanding the Supreme Court's ruling in *Worcester*, thousands of Cherokee died on the forced march from Georgia to what is now Oklahoma. Three hundred Dakota were sentenced to death following an uprising in Minnesota—after President Abraham Lincoln personally commuted some of the sentences, thirty-eight men were hanged on December 26, 1862, in the largest mass-execution in American history. Over 300 Lakota men, women and children were massacred by the U.S. Army at Wounded Knee Creek on December 29, 1890. It was during this era that the Supreme Court first recognized the federal government's new approach, “to govern [Tribes] by acts of Congress” and no longer by treaty.<sup>123</sup>

### 3. *Congress and the Supreme Court Now Aim to Protect Tribal Self-Government*

The Indian Reorganization Act of 1934 (the “IRA”) turned a page in this gruesome narrative by endeavoring “to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.”<sup>124</sup> Under the IRA, any Tribe “shall have the right to organize for its common welfare, and may adopt an appropriate constitution

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<sup>121</sup> Tim Alan Garrison, *Cherokee Removal*, NEW GA. ENCYCLOPEDIA (July 23, 2018), <https://www.georgiaencyclopedia.org/articles/history-archaeology/cherokee-removal/> (last visited Nov. 12, 2022).

<sup>122</sup> 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 455–56 (Henry Reeve trans., 6th ed., Boston, John Allyn, 1876) (1835).

<sup>123</sup> *United States v. Kagama*, 118 U.S. 375, 382 (1886) (discussing the Indian Appropriations Act of 1871, which provided that “no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty”).

<sup>124</sup> H.R. REP. NO. 73-1804, at 6 (1934).

and bylaws,” subject to the approval of the Secretary of the Interior.<sup>125</sup> Upon ratification by a majority of adult members of the Tribe and approval by the Secretary of the Interior, adoption of a tribal constitution under the IRA vests the Tribe with the following rights and powers: “[t]o employ legal counsel; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local governments.”<sup>126</sup> The IRA also authorizes Tribes to incorporate tribal corporations to conduct business with nontribal parties.<sup>127</sup> Courts have found that such corporations are “arms of the tribe that do not automatically forfeit tribal-sovereign immunity” by incorporating (though they can waive immunity voluntarily in their corporate charter or by agreement).<sup>128</sup>

Congress subsequently redoubled its efforts to promote tribal self-government by passing the Indian Civil Rights Act of 1968 (the “ICRA”),<sup>129</sup> the Indian Financing Act of 1974, and the Indian Self-Determination and Education Assistance Act of 1975.<sup>130</sup> The 1975 Act acknowledges “the Federal Government’s historical and special legal relationship with, and resulting responsibilities to, American Indian people” and declares Congress’s “commitment to the maintenance of the Federal Government’s unique and continuing relationship with, and responsibility to, individual Indian tribes.”<sup>131</sup>

Then, just as the Bankruptcy Reform Act of 1978 was making its way through Congress, the Supreme Court handed down its decision in *Santa Clara Pueblo v. Martinez*.<sup>132</sup> Finding that a suit against New Mexico’s Santa Clara Pueblo Tribe for declaratory and injunctive relief under the ICRA—brought in federal court by one of the Tribe’s own members—was barred by the Tribe’s sovereign immunity, the Court succinctly summarized the relevant doctrine: “It

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<sup>125</sup> 25 U.S.C. § 5123(a).

<sup>126</sup> 25 U.S.C. § 5123(e).

<sup>127</sup> Santangelo, *supra* note 26, at 336–37.

<sup>128</sup> *Memphis Biofuels, LLC v. Chickasaw Nation Indus. Inc.*, 585 F.3d 917, 921 (6th Cir. 2009); *American Vantage Cos. v. Table Mountain Rancheria*, 292 F.3d 1091, 1099 (9th Cir. 2002) (“A tribe that elects to incorporate does not automatically waive its tribal-sovereign immunity by doing so.”). See generally Sarah W. Konkright, *The Better Reading of Section 17 of the Indian Reorganization Act: A Rejection of Automatic Waiver of Tribal Sovereign Immunity in Memphis Biofuels*, 60 CATH. U. L. REV. 1175 (2011).

<sup>129</sup> *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62 (1978) (noting that the ICRA was “intended to promote the well-established federal policy of furthering Indian self-government” (quotations omitted)).

<sup>130</sup> See *Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991) (“These Acts reflect Congress’[s] desire to promote the ‘goal of Indian self-government, including its overriding goal of encouraging tribal self-sufficiency and economic development.’” (quoting *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987))).

<sup>131</sup> 25 U.S.C §§ 5301(a), 5302(b).

<sup>132</sup> See *Santa Clara Pueblo*, 436 U.S. 49.

is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed.”<sup>133</sup> Because Tribal immunity, like all other aspects of Tribal sovereignty, “is subject to the superior and plenary control of Congress[,] . . . without congressional authorization, the Indian Nations are exempt from suit.”<sup>134</sup> Moreover, the ICRA *does* expressly authorize civil actions against tribal officers for habeas corpus relief, making “the absence of clear indications of legislative intent” to provide other forms of relief against Tribes or their officers all the more evident.<sup>135</sup>

Justifying its reluctance to read an implied cause of action into the ICRA, the Court acknowledged that doing so “plainly would be at odds with the congressional goal of protecting tribal self-government.”<sup>136</sup> One of the reasons that goal belongs to Congress and not the judiciary is that:

relations with the Indian tribes have “always been . . . anomalous . . . and of a complex character.” *United States v. Kagama*, 118 U.S., at 381. Although we early rejected the notion that Indian tribes are “foreign states” for jurisdictional purposes under Art. III, *Cherokee Nation v. Georgia*, 5 Pet. 1 (1831), we have also recognized that the tribes remain quasi-sovereign nations which, by government structure, culture, and source of sovereignty are in many ways foreign to the constitutional institutions of the federal and state governments.<sup>137</sup>

Thus, precisely at the historical moment when the Code’s definition of “governmental unit” was taking shape at the Capitol, the Supreme Court clearly articulated the anomalous position of Tribes as the foundation of the “unequivocal expression” requirement.<sup>138</sup>

Two years after the Code came into force, the Court recognized that, in addition to their sovereignty over internal tribal affairs, Tribes also exercise “inherent sovereign power to . . . regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with

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<sup>133</sup> *Id.* at 58 (quotations omitted).

<sup>134</sup> *Id.* at 58 (quotations omitted).

<sup>135</sup> *Id.* at 60.

<sup>136</sup> *Id.* at 64.

<sup>137</sup> *Id.* at 71.

<sup>138</sup> See Molly Ivins, *Indian Woman, in Sex-Bias Case, Challenged Tribal Law for the Sake of Her Children*, N.Y. TIMES, May 16, 1978, at 21. Throughout the summer and fall of that year, the bills that became the Bankruptcy Reform Act of 1978 were amended many times before being signed by President Carter in November. See Kenneth N. Klee, *Legislative History of the New Bankruptcy Law*, 28 DEPAUL L. REV. 941, 951–54 (1979).

the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.”<sup>139</sup> Furthermore, it reiterated that:

[t]he common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance. Of course, because of the peculiar “quasi-sovereign” status of the Indian tribes, the Tribe’s immunity is not congruent with that which the Federal Government, or the States, enjoy. And this aspect of tribal sovereignty, like all others, is subject to plenary federal control and definition.<sup>140</sup>

Giving effect to this “necessary corollary”<sup>141</sup> of Tribal sovereignty, the Court has routinely upheld Tribal immunity from suits predicated on Tribes’ commercial conduct both on and off reservations, even though “other sovereigns d[o] not enjoy similar immunity for commercial activities outside their territory.”<sup>142</sup>

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Twenty-first century Tribes—acting through tribal governments and corporations chartered under the IRA—transact with nontribal entities, lend money to individuals, and operate their own businesses.<sup>143</sup> When lawsuits arising out of these activities are heard in bankruptcy court, Tribes that have not waived it may assert their sovereign immunity to negate the court’s personal jurisdiction over the Tribe.<sup>144</sup> For good or ill, the devastating history of U.S.-

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<sup>139</sup> *Montana v. United States*, 450 U.S. 544, 565 (1981).

<sup>140</sup> *Three Affiliated Tribes of Fort Berthold Rsrv. v. Wold Eng’g, P.C.*, 476 U.S. 877, 890–91 (1986) (citations omitted).

<sup>141</sup> *Id.* at 890.

<sup>142</sup> *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 800 (2014) (finding Tribe immune to state’s suit challenging off-reservation commercial operation of a casino); *see also* *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 760 (1998) (“Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation.”); *Okl. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509–10 (1991) (finding Tribe immune to State’s counterclaim seeking damages and injunctive relief for Tribe’s failure to collect state sales taxes on cigarettes sold by Tribe in its convenience store); *Puyallup Tribe, Inc. v. Wash. Dep’t of Game*, 433 U.S. 165, 172 (1977) (“Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe.”). *But see* *Foreign Sovereign Immunities Act of 1976*, Pub. L. No. 94-583, 90 Stat. 2891; *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611 (1992) (“[A] foreign state is not immune from suit in any case ‘in which the action is based upon a commercial activity carried on in the United States by the foreign state.’” (quoting 28 U.S.C. § 1605(a)(2))).

<sup>143</sup> *See, e.g., Coughlin v. Lac Du Flambeau Band of Lake Superior Chippewa Indians (In re Coughlin)*, 33 F.4th 600, 604 (1st Cir. 2022); *Buchwald Cap. Advisors, LLC v. Sault Ste. Marie Tribe of Chippewa Indians (In re Greektown Holdings, LLC)*, 917 F.3d 451, 453–54 (6th Cir. 2019).

<sup>144</sup> *See, e.g., Greektown*, 917 F.3d at 463; *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1056 (9th Cir. 2004).

tribal relations has left Congress the authority to determine the nature and extent of that immunity. Out of respect for that authority and the history behind it, “courts will not lightly assume that Congress in fact intends to undermine Indian self-government” by waiving tribal immunity, unless Congress unambiguously declares that intention.<sup>145</sup> In contrast, while the immunity of the states, foreign governments, or United States agencies that appear in bankruptcy may also be waived by Congress, none of those other immunity-bearing sovereigns is subject to Congress’s complete and plenary authority. That utter subjugation, along with the Supreme Court’s deference to congressional authority in that regard, makes Tribes unlike any “other foreign or domestic government.”<sup>146</sup>

### B. Statutory Interpretation

Unique as they may be, Tribes are undoubtedly governments.<sup>147</sup> Nonetheless, two canons of construction support the conclusion that Tribes are not “governmental units” within the meaning of section 101(27). Both *ejusdem generis*—the idea that a list of specific terms preceding a general term limits the meaning of the general term—and *in pari materia*—the principle that statutory language means what it means in other statutes on the same subject—suggest that the phrase “other foreign or domestic government,” as used in section 101(27), does not include Tribes. To put it bluntly: If section 106(a) is meant to abrogate Tribal immunity, why are Tribes not listed explicitly in the definition of “governmental unit” as they are when their immunity is abrogated elsewhere in the U.S. Code? The following arguments press this question to its logical conclusion.

1. *First Argument: Ejusdem generis suggests multiple possible readings of section 101(27), many of which imply that Tribes are not governmental units. Therefore, the abrogation of Tribal immunity is not unequivocally expressed.*

Justice Scalia and Garner summarize the *ejusdem generis* canon as follows: “Where general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned.”<sup>148</sup> For example, interpreting the Federal Arbitration Act’s reference to “seamen, railroad employees, or any other class of workers engaged in foreign

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<sup>145</sup> *Bay Mills Indian Cmty.*, 572 U.S. at 790 (2014).

<sup>146</sup> 11 U.S.C. § 101(27).

<sup>147</sup> See *Coughlin*, 33 F.4th at 605 (“[T]here is no real disagreement that a tribe is a government.”).

<sup>148</sup> SCALIA & GARNER, *supra* note 74, at 199.



or interstate commerce,” the Supreme Court applied *ejusdem generis* to conclude that “any other class of workers” does not literally include *all* workers, but only those actually engaged in the movement of goods.<sup>149</sup> The upshot is that the specifically listed items limit the meaning of the general words that follow them.

The rationale behind this limitation is the same one motivating Ulpian’s rule against surplusage: Words—be they specific or general—are to be taken as having an effect. If the meaning of the general words were not limited “to embrace only objects similar in nature to” the specific words that precede them, then the general words alone would suffice to convey the entire significance of the provision and the specific words would be unnecessary. Congress could have just drafted the Federal Arbitration Act to say: “*all workers engaged in foreign or interstate commerce.*” The fact that it included “seamen” and “railroad employees” suggests that those words are significant. *Ejusdem generis* reminds readers that the significance of the specific words is to distinguish the relevant from the irrelevant species of referents encompassed within the genus of the general words that conclude the list.

In the list that determines what does and does not constitute a “governmental unit” in bankruptcy, the specific words at the beginning are: “United States; State; Commonwealth; District; Territory; municipality; foreign state” and any “department, agency, or instrumentality of the [foregoing].”<sup>150</sup> The general words at the end are “other foreign or domestic government.”<sup>151</sup> Therefore, by the canon of *ejusdem generis*, the phrase “other foreign or domestic government” at the end of the definition does not include all foreign and domestic governments, but only foreign or domestic governments of the same “obvious and readily identifiable genus”<sup>152</sup> as the specifically listed governmental units at the beginning of the definition.

Tribes are not “similar in nature to,” let alone obviously or “readily identifiable” with, any of the governmental units specifically listed at the beginning of section 101(27). Putting aside the history of systematic oppression suffered by Tribes at the hands of those governmental units, the most germane difference is that Congress does not have “plenary authority to limit, modify or

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<sup>149</sup> *Cir. City Stores, Inc., v. Adams*, 532 U.S. 105, 114–15 (2001) (“[W]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.” (quoting NORMAN J. SINGER, 2A SUTHERLAND STATUTES & STATUTORY CONSTRUCTION § 47.18 (5th ed. 1994))).

<sup>150</sup> 11 U.S.C. § 101(27).

<sup>151</sup> *Id.*

<sup>152</sup> SCALIA & GARNER, *supra* note 74, at 199.

eliminate” the sovereignty of the United States, the several states, commonwealths, districts, territories, municipalities, or foreign states. For most of these kinds of governments, congressional authority is limited by the Constitution, international relations, or both. While Congress does have nearly plenary authority over America’s five inhabited Territories, those Territories are not recognized as immunity-bearing sovereigns. It is also true that Congress can waive the IRS’s immunity if it does so explicitly, but the legislature and the executive are co-equal branches of the same government, and the former’s authority over the latter is constrained by that equality. Tribes are the only sovereigns over which Congress exercises the anomalously plenary authority articulated by the Supreme Court.<sup>153</sup>

Ignoring that distinction, the Ninth Circuit begins its interpretation of sections 106(a) and 101(27) by reasoning as follows.

It is clear from the face of §§ 106(a) and 101(27) that Congress did intend to abrogate the sovereign immunity of *all* “foreign and domestic governments.” Section 106(a) explicitly abrogates the sovereign immunity of all “governmental units.” The definition of “governmental unit” first lists a sub-set of all governmental bodies, but then adds a catch-all phrase, “or other foreign or domestic governments.” 11 U.S.C. § 101(27). Thus, *all* foreign and domestic governments, including but not limited to those particularly enumerated in the first part of the definition, are considered “governmental units” for the purpose of the Bankruptcy Code, and, under § 106(a), are subject to suit.<sup>154</sup>

This passage is problematic for a number of reasons. First of all, why is the phrase “foreign and domestic governments” in quotes at the end of the first sentence? It does not appear in either of the cited provisions—or anywhere else in the U.S. Code for that matter. Are those scare quotes, meant to convey irony, skepticism, or derision of the quoted phrase? Or is the court quoting a source without citing it? Either way, this is not a sound foundation for the major premise of the unduly simplistic syllogism that follows: namely, section 106 abrogates the immunity of all foreign and domestic governments, Tribes are governments, and therefore section 106 abrogates the immunity of Tribes.

Punctuation aside, the quoted passage radically misunderstands *ejusdem generis*. As a result, the Ninth Circuit advances an interpretation that renders most of section 101(27) completely superfluous. If Congress had intended the

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<sup>153</sup> See *supra* notes 136–39 and accompanying text.

<sup>154</sup> *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1057 (9th Cir. 2004).

term “governmental unit” to encompass “*all* foreign and domestic governments,”<sup>155</sup> as the Ninth Circuit suggests, then section 101(27) would read simply: “*The term governmental unit means all foreign and domestic governments.*” Instead, the provision lists several governmental bodies, followed by a general, catch-all phrase. That means that the general, catch-all phrase cannot be given its broadest possible application, because “when the tagalong general term is given its broadest application, it renders the prior enumeration superfluous.”<sup>156</sup> Rather, the general, tagalong phrase applies only to things of the same type as the specifically listed things.<sup>157</sup> Consequently, as Chief Judge Barron points out in his *Coughlin* dissent, it is not at all clear from the face of sections 106(a) and 101(27) that Congress intended to abrogate the sovereign immunity of all foreign and domestic governments.<sup>158</sup>

Moreover, Chief Judge Barron’s dissent and the appellate briefs on this issue suggest multiple possible ways to populate the obvious and readily identifiable genus exemplified by the list of specific terms in section 101(27)—and not all of them include Tribes.<sup>159</sup> Other domestic governments would naturally include multistate and regional bodies such as the Multistate Tax Commission, the Gulf States Marine Fisheries Commission and the Port Authority of New York and New Jersey. To find that other domestic governments unequivocally includes Tribes when there are other interpretations available is to neglect both the text of the Code and the unique status of Tribes in the United States.

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<sup>155</sup> *Id.*

<sup>156</sup> SCALIA & GARNER, *supra* note 74, at 199–200.

<sup>157</sup> *Id.* at 199.

<sup>158</sup> *Coughlin v. Lac Du Flambeau Band of Lake Superior Chippewa Indians (In re Coughlin)*, 33 F.4th 600, 618 (1st Cir. 2022) (Barron, C.J., dissenting) (“[W]hen Congress describes a general class after first setting forth a more specific exemplary list—as Congress did in § 101(27)—there is often good reason to think that Congress included the list to make the general class more selective than the words that describe that class might otherwise suggest.”); *see also* Reply Brief for Petitioners at 9, *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, No. 22-227 (U.S. Nov. 22, 2022) (noting that a narrow construction of section 101(27) “is consistent with the fact that Congress amended § 106 in direct response to [the Supreme] Court’s decisions requiring clearer language to abrogate only the federal government’s and states’ sovereign immunity.”).

<sup>159</sup> *See Coughlin*, 33 F.4th at 615; Brief of Appellees at 21–25, *Buchwald Cap. Advisors, LLC v. Sault Ste. Marie Tribe of Chippewa Indians (In re Greektown Holdings, LLC)*, 917 F.3d 451 (6th Cir. 2019) (Nos. 18-1165, 18-1166); Joint Response Brief at 29–30, *Coughlin*, 33 F.4th 600 (No. 21-1153).

2. *Second Argument: In pari materia indicates that Congress does not consider Tribes foreign or domestic governments.*

“Statutes *in pari materia* are to be interpreted together, as though they were one law.”<sup>160</sup> Though Tribes are mentioned nowhere in the Code, both Tribes and sovereign immunity are addressed multiple times in other U.S. statutes. In an effort to interpret all such statutes as though they were one law, two regularities emerge.

First, when tribal immunity is abrogated by statute, Tribes are named explicitly in the statute.<sup>161</sup> When Tribes are not named explicitly in a statute, courts typically find that their immunity is not abrogated. That is, “[w]here the language of a federal statute does not include ‘Indian tribes’ in definitions of parties subject to suit or does not specifically assert jurisdiction over ‘Indian tribes,’ courts find the statute insufficient to express an unequivocal congressional abrogation of tribal sovereign immunity.”<sup>162</sup> For example, while the Fair and Accurate Credit Transactions Act of 2003 authorizes suits against “any individual, partnership, trust, estate, cooperative, association, government, or governmental subdivision or agency, or other entity,” the Seventh Circuit found that it does not authorize suits against Tribes because “the long-held tradition of tribal immunity . . . [means that] ‘any government’ is equivocal in this regard.”<sup>163</sup> Similar findings have been handed down by the Second Circuit with respect to the Copyright Act of 1976<sup>164</sup> and by the Eleventh Circuit with respect to the Americans with Disabilities Act of 1990.<sup>165</sup> In fact, the only appellate decisions finding tribal immunity abrogated by a statute that does not mention Tribes are *Krystal Energy* and *Coughlin*—both interpreting section 106.<sup>166</sup>

Second, when Tribes are mentioned elsewhere in the U.S. Code, they are not treated like a state or local government for sovereign immunity purposes. For starters, Title 25 of the U.S. Code—which deals explicitly with Tribes and

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<sup>160</sup> SCALIA & GARNER, *supra* note 74, at 252 (quoting *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184–85 (1988)).

<sup>161</sup> See *Buchwald Cap. Advisors, LLC v. Sault Ste. Marie Tribe of Chippewa Indians (In re Greektown Holdings, LLC)*, 917 F.3d 451, 460 (6th Cir. 2019) (collecting examples).

<sup>162</sup> *Bucher v. Dakota Fin. Corp. (In re Whitaker)*, 474 B.R. 687, 691 (B.A.P. 8th Cir. 2012).

<sup>163</sup> *Meyers v. Oneida Tribe of Indians*, 836 F.3d 818, 826 (7th Cir. 2016) (alteration in original).

<sup>164</sup> See *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357 (2d Cir. 2000).

<sup>165</sup> See *Fla. Paraplegic Ass’n, v. Miccosukee Tribe of Indians*, 166 F.3d 1126, 1131 (11th Cir. 1999).

<sup>166</sup> See *Greektown*, 917 F.3d at 460. *Greektown* mentions only *Krystal Energy*, since *Greektown* predates *Coughlin* by three years. See also *Numa Corp. v. Diven*, No. 22-15298, 2022 WL17102361 (9th Cir. Nov. 22, 2022) (an unpublished memorandum reiterating and applying the holding of *Krystal Energy*).

Native American Indian matters—defines “Indian Tribe” without reference to the word “government,” focusing instead on whether the “band, nation or other organized group or community . . . is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.”<sup>167</sup> Moreover, both Title 15 (dealing with commerce and trade) and Title 18 (dealing with criminal law) include provisions clarifying that they effectuate no abrogation of the sovereign immunity “of a State or local government or Indian tribe.”<sup>168</sup> If those provisions treated Tribes like other governments, the quoted language would be expected to mirror the more conventional syntax—that is, “State, local or tribal government”—used in immediately adjacent provisions that do not concern sovereign immunity.<sup>169</sup>

These two regularities suggest that Congress is perfectly capable of abrogating, or avoiding the abrogation of, tribal immunity through the use of unequivocal language. That is all the more reason to believe that when unequivocal language is absent, so is the requisite legislative intent to abrogate.

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Perhaps the strongest counterargument against the idea that “other foreign or domestic government” does not include Tribes is that canons of statutory construction cannot override the plain meaning of the text.<sup>170</sup> Textualism “eschews departures from the plain text.”<sup>171</sup> Here the text is plain because no one seriously believes that Tribes are not domestic governments. Therefore, this counterargument maintains, no reasoning from *ejusdem generis* or *in pari materia* can undermine the plain abrogation of tribal immunity.

This counterargument conflates the meaning of individual words and phrases in a text with the meaning of the text as a whole.<sup>172</sup> While the words “domestic

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<sup>167</sup> 25 U.S.C. § 5304(e); *see also* 25 U.S.C. §§ 1452(c), 5130(2).

<sup>168</sup> 15 U.S.C. § 378(c)(1); 18 U.S.C. § 1716E(h)(2).

<sup>169</sup> *See* 15 U.S.C. § 378(c)(2); 18 U.S.C. § 1716E(g).

<sup>170</sup> *Coughlin v. Lac Du Flambeau Band of Lake Superior Chippewa Indians (In re Coughlin)*, 33 F.4th 600, 608 (1st Cir. 2022) (The meaning of unambiguous text is not informed by “canons of construction that we use only to resolve ambiguity.”); *United States v. Ron Pair Enters.*, 489 U.S. 235, 240–41 (1989).

<sup>171</sup> Barrett, *supra* note 27, at 114.

<sup>172</sup> For a learned treatment of this distinction, see Paul Ricoeur, *The Model of the Text: Meaningful Action Considered as Text*, 38 SOC. RSCH. 529, 548–49 (1971) (A text is not “a mere sequence of sentences, all on an equal footing and separately understandable. A text is a whole, a totality . . . This [authorial] intention is something other than the sum of the individual meanings of the individual sentences. A text is more than a linear succession of sentences. It is a cumulative, holistic process. This specific structure of the text cannot be derived from that of the sentence. Therefore the kind of plurivocity which belongs to texts as texts is something other than the polysemy of individual words in ordinary language and the ambiguity of individual sentences. This plurivocity is typical of the text considered as a whole, open to several readings and to several constructions.”).

government” have one meaning when taken in isolation, they have a different meaning when understood as part of the Code, the U.S. Code, the Constitution, Supreme Court jurisprudence, and American history. To deny this is to embrace an obstinately sterile understanding of statutory language that—whatever its merits in the context of the specific facts before the First Circuit in *Coughlin* and the Ninth Circuit in *Krystal Energy*—distorts the statute’s natural meaning and decouples it from the legislative intent it is meant to convey.

Of course, it is important to remember that “uncertainty at the borderline is the price to be paid for the use of general classifying terms in any form of communication concerning matters of fact.”<sup>173</sup> Canons like *ejusdem generis* and *in pari materia* cannot eliminate that uncertainty, “for these canons are themselves general rules for the use of language, and make use of general terms which themselves require interpretation.”<sup>174</sup> Confronted with the task of interpretation in the face of that inevitable uncertainty, even devoutly textualist judges may be “guided by an assumption that the purpose of the rules which they are interpreting is a reasonable one.”<sup>175</sup> The next Part leaves textualism’s open questions open, turning instead to the Axioms that characterize what makes bankruptcy’s purposes reasonable.

### III. BANKRUPTCY’S AXIOMS CONFLICT

Bankruptcy’s least contested Axioms are distinct from the positive law that embodies them. While many instances of creditor parity (Axiom 1) and deference to nonbankruptcy law (Axiom 2) have been codified and affirmed in binding case law,<sup>176</sup> the principles are broader than these instances, so they can guide analysis of novel questions posed by developments in the positive law of bankruptcy. Useful as they may be, however, there is no logical or necessary hierarchy between the Axioms. When deference to nonbankruptcy law (Axiom 2) interferes with creditor parity (Axiom 1)—as it does in the case of sovereign immunity—neither the Axioms themselves nor any other principles of bankruptcy or jurisprudence can resolve the conflict. The choice between Axioms is inherently political.

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<sup>173</sup> HART, *supra* note 31, at 128.

<sup>174</sup> *Id.* at 128. This problem is not unique to linguistic canons or textualism; it applies to all efforts to interpret and understand language. See LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 198 (G.E.M. Anscombe trans., 2d ed. 1958) (1953) (“[A]ny interpretation still hangs in the air along with what it interprets, and cannot give it any support. Interpretations by themselves do not determine meaning.”).

<sup>175</sup> HART, *supra* note 31, at 204.

<sup>176</sup> See sources cited *infra* notes 179, 188–90, and 196–200.

A. *The Axioms Improve the Efficiency and Integrity of the Bankruptcy System*

The Axioms may be thought of as a response to the question: How should bankruptcy law treat creditors in order to maximize the efficiency and guarantee the integrity of the bankruptcy system as a whole? For purposes of this question, “efficiency” refers to both the allocative efficiency—that is, the extent to which the economic value of insolvent debtors is allocated to its highest-value use—and the productive efficiency—that is, the extent to which the same level of allocative efficiency could be achieved in less time or at a lower cost—of the bankruptcy system.<sup>177</sup> Likewise, “integrity” means both that bankruptcy law discourages abuse of its own procedures and that those procedures respect the constitutional framework of rights and powers governing relations between branches of the federal government, between the states and the United States, and between citizens and their governments. By treating similar creditors similarly and deferring to nonbankruptcy law on important matters, the bankruptcy system achieves greater efficiency and integrity than it otherwise would.

1. *Axiom 1: Similar creditors—that is, those holding legally similar claims—should be treated similarly in bankruptcy.*

One of the essential functions of any insolvency law is to allocate and distribute the debtor’s economic value to its creditors when their claims cannot be timely satisfied in full. Axiom 1 guides that allocation by specifying how creditors should be compared to one another for purposes of determining how much each should receive.<sup>178</sup> Namely, they should be compared by reference to their claims against the debtor’s estate, not by reference to any other aspects of their identity, status or objectives.<sup>179</sup> Under the Code, the most important features of claims that determine whether they are similar enough to warrant the same treatment include: whether the claims are unsecured (and if so, do they have priority under section 507?) or secured (and if so, by what and as of when?); and when the underlying debts were incurred (pre- or post-petition?) or paid (within two years of the petition, prior to that time, or not at all?). This disregard

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<sup>177</sup> See Luke Spurduto, *Three and a Half Rules for Tort Claims in (and out of) Chapter 11*, 95 AM. BANKR. L.J. 127, 153–54 & nn.129–31 (2021) (discussing two kinds of inefficiencies the Code is designed to minimize).

<sup>178</sup> See HART, *supra* note 31, at 159 (“[U]ntil it is established what resemblances and differences are relevant, ‘Treat like cases alike’ must remain an empty form. To fill it, we must know when, for the purposes in hand, cases are to be regarded as alike and what differences are relevant.”).

<sup>179</sup> See, e.g., 11 U.S.C. § 1122(a); Scott F. Norberg, *Classification of Claims Under Chapter 11 of the Bankruptcy Code: The Fallacy of Interest Based Classification*, 69 AM. BANKR. L.J. 119, 120 (1995) (“[T]he nature of the claim, not the nature of the claimholder, determines classification.”).

of creditors' identities is not to deny their legal and commercial existence outside their role as holders of claims against the debtor. Whether they are individuals, corporations or governments, creditors inevitably transact, conduct their affairs, and exercise their authority with regard to matters unrelated to their claims against the debtor. Axiom 1 says simply that those attributes (e.g., whether a creditor is a corporation or a government) and activities (e.g., operating, transacting, or taxing) are irrelevant for allocation purposes. The only thing that should determine how creditors are treated is the character of their claims against the debtor's estate; similar claims warrant similar treatment.<sup>180</sup>

The general idea behind Axiom 1—that similar cases are to be treated similarly—is fundamental to the Western legal tradition's conceptions of fairness, justice and law itself.<sup>181</sup> The reforms of Cleisthenes and the Athenian regime they founded, for example, embraced “the concept of *isonomia*: an exactly, mathematically equal distribution of [entitlements] for those deemed relevantly equal.”<sup>182</sup> The Twelve Tables of early Rome provided that both the assets and liabilities of a deceased's estate “shall be divided, according to law, among the heirs, proportionately to the share of the inheritance that each acquires.”<sup>183</sup> The *Codex* and *Digest* of Justinian suggest that the Roman state as

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<sup>180</sup> See *supra* note 179 and accompanying text. Infelicitously appropriating Henry Sumner Maine's terms, Axiom 1 identifies “Contract” not “Status” as the dimension along which creditors are compared in bankruptcy. While the underlying distinction Maine uses to describe “the movement of the progressive societies” is similar to the distinction at issue here, his terms are infelicitous because they are not broad enough to characterize the scope of Axiom 1, which also applies to creditors whose claims are not based in contract and who differ from one another in ways other than status. See HENRY SUMNER MAINE, *ANCIENT LAW* 96 (John Murray ed., Batoche Books 1999) (1861) (“If then we employ Status . . . to signify these personal conditions only, and avoid applying the term to such conditions as are the immediate or remote result of agreement, we may say that the movement of the progressive societies has hitherto been a movement *from Status to Contract*.”).

<sup>181</sup> See HART, *supra* note 31, at 159 (“The general principle latent in these diverse applications of the idea of justice is that individuals are entitled in respect of each other to a certain relative position of equality or inequality. This is something to be respected in the vicissitudes of social life when burdens or benefits fall to be distributed; it is also something to be restored when it is disturbed. Hence justice is traditionally thought of as maintaining or restoring a *balance* or *proportion*, and its leading precept is often formulated as ‘Treat like cases alike.’”); ARISTOTLE, *supra* note 33, at 1006 (“[T]his is the origin of quarrels and complaints—when either equals have and are awarded unequal shares, or unequals equal shares.”); see also HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 39 (1983) (“[A]s a matter of historical fact the legal systems of all the nations that are heirs to the Western legal tradition have been rooted in certain beliefs or postulates: that is, the legal systems themselves have presupposed the validity of those beliefs.”).

<sup>182</sup> Paul Cartledge, *Greek Political Thought: The Historical Context*, in *THE CAMBRIDGE HISTORY OF GREEK AND ROMAN POLITICAL THOUGHT* 11, 15 (Christopher Rowe & Malcolm Schofield eds., 2000); see also Kurt A. Raaflaub, *Poets, Lawgivers, and the Beginnings of Political Reflection in Ancient Greece*, in *THE CAMBRIDGE HISTORY OF GREEK AND ROMAN POLITICAL THOUGHT* 23, 47 (Christopher Rose & Malcolm Schofield eds., 2000) (“In principle, *isonomia* could mean both ‘equality before the law’ and ‘equality by law, equal shares, equal participation’ . . .”).

<sup>183</sup> The Twelve Tables also provided that after the third successive market day on which the extent of his liability was publicly announced, a debtor could be killed or sold into slavery abroad with his creditors entitled



a secured creditor was generally treated on par with others secured by the same assets.<sup>184</sup> The notion of a pro rata distribution of assets to similarly situated creditors re-surfaced in the early-Renaissance-era bankruptcy laws of powerful Italian city-states<sup>185</sup> and eventually made its way to England in 1542.<sup>186</sup>

Whatever the historical pedigree of that general idea may signify, specific protections of creditor parity appear throughout the modern Code.<sup>187</sup> The automatic stay prevents creditors from proceeding against a debtor or its assets during the pendency of a bankruptcy case, thereby precluding the disproportionately large recoveries that would otherwise accrue to creditors who hasten to enforce. The trustee's power to avoid certain transfers and recover the transferred assets helps ensure that distributions to creditors heed the Code's priority rules, rather than the debtor's whim.<sup>188</sup> Chapter 11 plans specify the treatment of claims by *class*—not on a claim-by-claim basis—and claims may be classed together only if they are “substantially similar.”<sup>189</sup> Finally, the priority

to share in the sale proceeds. Alternative readings of the provision suggest that, as an extreme deterrent, the debtor's body was to be literally cut to pieces by his creditors, but the language of the surviving text does not compel that gory reading. *See generally* M. Radin, *The Early Roman Law of Execution Against a Debtor*, 43 AM. J. PHILOLOGY 32 (1922) (citing and arguing against the gory reading).

<sup>184</sup> There was an exception for debts for unpaid taxes, which were secured automatically by a tacit pledge (*hypotheca*) of the debtor's entire property and with respect to which the state's interest primed other creditors. *See* Roger J. Goebel, *Reconstructing the Roman Law of Real Security*, 36 TUL. L. REV. 29, 58–62 (1961) (“If the state's pledge were later in time (and not privileged, as for taxes), it likewise would be subordinated to a prior private lien . . . [but] the state created a privileged position for any pledge to the fisc (tacit or contractual) for unpaid taxes. A purchaser from the treasury of this pledge enjoyed the same priority.”).

<sup>185</sup> Marta Lupi, *Ius Mercatorum and Statutes of Florence during the 14th and 15th Centuries: The Case of Bankruptcy*, 16 GLOSSAE: EUR. J. LEGAL HIST. 205, 217–18 (2019) (discussing three Florentine bankruptcy statutes that all provide for ratable distribution).

<sup>186</sup> *See* Levinthal, *supra* note 45, at 13–14 n.50 (providing documentary evidence for “the non-existence of rateable distribution prior to 1542” in English law, at which point it was introduced by the Act of 34 and 35 Henry VIII); *see also* 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA 567 (Melville M. Bigelow ed., 13th ed. 1886) (“[I]n equity, it is a general rule that equitable assets shall be distributed equally, and *pari passu*, among all creditors, without any reference to the priority or dignity of the debts.”).

<sup>187</sup> The Code is by no means unique among modern bankruptcy and insolvency regimes in this regard. *See* McGrath v. Riddell [2008] UKHL 21, [2008] 1 WLR 852 (appeal taken from England) (“The English and Australian laws of corporate insolvency have a common origin and their basic principles are much the same. The general rule is that after payment of the costs of liquidation and the statutory preferred creditors, the assets are distributed *pari passu* among the ordinary creditors.”); *Insolvency Assessment on Reorganisation Procedures*, EUR. BANK FOR RECONSTRUCTION & DEV. 80 (2022) (“Equal treatment is a pillar of insolvency law and . . . it is widely accepted and endorsed” in the EBRD's countries of operations.), [https://ebrd-restructuring.com/storage/uploads/documents/13472%20EBRD%20\(Insolvency%20Assessment%20Database%20REPORT%20ARTWORK\).pdf](https://ebrd-restructuring.com/storage/uploads/documents/13472%20EBRD%20(Insolvency%20Assessment%20Database%20REPORT%20ARTWORK).pdf).

<sup>188</sup> *See, e.g.*, Lawrence Ponoroff, *Bankruptcy Preferences: Recalcitrant Passengers Aboard the Flight from Creditor Equality*, 90 AM. BANKR. L.J. 329, 337, 340 n.52 (2016) (recovery of preferences promotes creditor parity).

<sup>189</sup> 11 U.S.C. §§ 1122–1123.

rules themselves are fixed “to enforce a distribution of the debtor’s assets in an orderly manner . . . in accordance with established principles rather than on the basis of the inside influence or economic leverage of a particular creditor.”<sup>190</sup>

Even some apparent departures from the Axiom ultimately serve to reinforce it. For example, at first glance the very notion of priority seems at odds with creditor parity. Provided, however, that the schedule of priorities is fixed in advance—before any debts are incurred—and it is enforced as expected, then even creditors who receive unequal shares enjoy parity in a different sense. Namely, they are treated equally under the law in the sense that they each receive the treatment they expect to receive in the event of insolvency. Like the Code’s notice rules, this kind of equal treatment is an element of due process to which all creditors are entitled.<sup>191</sup> Respect for due process preserves the integrity of the bankruptcy system by discouraging abuse of its rules and keeping those rules within the bounds of the Constitution.

Another faux counterexample concerns insiders. Particularly when it comes to voting on a chapter 11 plan, insiders of the debtor are treated differently than other creditors holding similar (or identical) claims,<sup>192</sup> which appears to violate Axiom 1. Actually, though, this apparent disparity serves to prevent insiders from appropriating an undue share of the debtor’s assets to the detriment of other creditors.<sup>193</sup>

In addition to being intuitively fair, the Code’s commitment to creditor parity also makes lending and restructuring more efficient. When extending credit, voluntary creditors can rely on the Code like an unstated “term in a lending agreement.”<sup>194</sup> By ensuring predictable outcomes in the event of insolvency, bankruptcy’s implementation of Axiom 1 reduces uncertainty, lending costs, and

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<sup>190</sup> H.R. REP. NO. 103-835, at 33 (1994), as reprinted in 1994 U.S.C.C.A.N. 3340, 3341, quoted in *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 465 (2017).

<sup>191</sup> See *United States v. Kras*, 409 U.S. 434, 446 (1973) (“[B]ankruptcy legislation is in the area of economics and social welfare. This being so, the applicable standard, in measuring the propriety of Congress’[s] classification, is that of rational justification.” (citations omitted)); *Hanover Nat. Bank v. Moyses*, 186 U.S. 181, 192 (1902) (Regarding procedural due process, “Congress may prescribe any regulations concerning discharge in bankruptcy that are not so grossly unreasonable as to be incompatible with fundamental law. . .”).

<sup>192</sup> See generally *U.S. Bank Nat’l Ass’n. ex rel. CWC Capital Asset Mgmt., LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 963 (2018).

<sup>193</sup> See *CWC Capital Asset Mgmt.*, 138 S. Ct. at 963; see also 11 U.S.C. § 1126(e); DOUGLAS G. BAIRD, *ELEMENTS OF BANKRUPTCY* 270 (Robert C. Clark et al. eds, 6th ed. 2014) (“Because of the fiduciary duties they owe to others, insiders’ conduct is necessarily subject to greater scrutiny than that of ordinary outside investors [at the voting stage].”).

<sup>194</sup> Barry Adler, Ben Polak & Alan Schwartz, *Regulating Consumer Bankruptcy: A Theoretical Inquiry*, 29 J. LEGAL STUD. 585, 586 (2000).

interest rates.<sup>195</sup> After a petition is filed, the classification of creditors by type of claim permits committees to negotiate on behalf of similarly situated creditors, streamlining proceedings. Additionally, the equal treatment of substantially similar claims in bankruptcy hardens the finality of the debtor's discharge because it prevents creditors from challenging the discharge injunction on due process grounds. Without a comprehensive and reliably final discharge, corporate debtors are more likely to be liquidated (than they would be otherwise), and all debtors are more likely to slide back into financial distress under the pressure of undischarged claims. Thus, Axiom 1's positive influence extends prior to, during and after bankruptcy proceedings.

2. *Axiom 2: Bankruptcy should not adjust nonbankruptcy entitlements unless necessary.*

Bankruptcy law does not create property rights, but it does respect existing property rights as much as possible. As the Supreme Court explained in *Butner v. United States*: "Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding."<sup>196</sup> The Code's reticence to create new rights is unmistakably embodied by section 106(a)(5),<sup>197</sup> and there are many Code provisions designed to preserve existing entitlements created and defined by nonbankruptcy law.<sup>198</sup> Axiom 2 entails both of these commitments: avoid creating new rights and preserve existing rights.

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<sup>195</sup> See *In re Lifschultz Fast Freight*, 132 F.3d 339, 347 n.5 (7th Cir. 1997) (noting that the uncertainty of lenders' recoveries increases interest rates); Alessio M. Paccas, *Illiquidity and Financial Crisis*, 74 U. PITT. L. REV. 383, 386 (2013) (observing that uncertainty in the lending market generally leads to an increase in interest rates).

<sup>196</sup> *Butner v. United States*, 440 U.S. 48, 55 (1979).

<sup>197</sup> Discussed *supra* Section I.B.

<sup>198</sup> See, e.g., 11 U.S.C. § 101(14A) (defining "domestic support obligation" by reference to nonbankruptcy law); 11 U.S.C. § 101(35A) (defining "intellectual property" by reference to nonbankruptcy law); 11 U.S.C. § 106(a)(4) (enforcement of a bankruptcy court's order, process or judgment against a governmental unit must comply with nonbankruptcy law); 11 U.S.C. § 108 (time limits for bringing certain actions are determined by reference to nonbankruptcy law); 11 U.S.C. § 346(k) (tax payments by the estate are determined by nonbankruptcy law, including "the Internal Revenue Code of 1986 and other applicable Federal nonbankruptcy law"); 11 U.S.C. § 363 (use, sale or lease of estate property by the trustee must comply with nonbankruptcy law); 11 U.S.C. § 365(h) (the rejection of a lease in a shopping center "does not affect the enforceability under applicable nonbankruptcy law" of certain lease provisions); 11 U.S.C. § 510(a) ("A subordination agreement is enforceable in a case under this title to the same extent that such agreement is enforceable under applicable nonbankruptcy law."); 11 U.S.C. § 511 (rate of interest on tax claims is determined by nonbankruptcy law); 11 U.S.C. § 723(a) (trustee's claims against the general partner(s) of a debtor that is a partnership are limited to the extent of the general partner(s)' personal liability for debts of the partnership under nonbankruptcy law). This is not an exhaustive list.

Of course, Axiom 2 is subject to the caveat that new rights may be created, and existing rights may be violated, when doing so is necessary to ensure successful bankruptcy proceedings. To that end, the automatic stay, the turnover requirements imposed on third parties holding property of the estate, and the discharges available to debtors who comply with relevant chapters of the Code all create new rights (for compliant debtors) and violate existing rights (of creditors).<sup>199</sup> Without those features, bankruptcy would not be worthwhile—they are necessary to successfully collectivize creditors' remedies and allocate the debtor's assets effectively. There are other Code provisions that embody this caveat in different ways,<sup>200</sup> but their reach is limited. By and large, Axiom 2 stands for the proposition that the rights of debtors, creditors and other parties in interest should be “afforded in federal bankruptcy court the same protection” they would have under nonbankruptcy law—no more and no less.<sup>201</sup>

Astute commentators have observed that Axiom 2 discourages forum shopping and bankruptcy abuse.<sup>202</sup> That is, by treating creditors in a bankruptcy proceeding as they would be treated if their debtor were not in bankruptcy, both debtors and creditors are discouraged from manipulating circumstances in order to seek or avoid bankruptcy. In that regard, Axiom 2 furthers the allocative efficiency of the bankruptcy system by letting decisions about asset allocation be determined in the forum best suited to do so, rather than the forum that offers the most perquisites to the debtor's most powerful stakeholder. Similarly, Axiom 2 facilitates expeditious and uniform administration of proceedings because bankruptcy judges do not have to reinvent the wheel when legal questions concerning nonbankruptcy law arise; rather, they can address such questions by considering how other federal or state judges would resolve them.

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<sup>199</sup> See, e.g., 11 U.S.C. § 362 (implementing the automatic stay); 11 U.S.C. § 524 (the discharge generally); 11 U.S.C. § 542 (turnover to the estate); 11 U.S.C. § 543 (turnover by a custodian); 11 U.S.C. § 727 (the chapter 7 discharge); 11 U.S.C. § 1141 (the chapter 11 discharge), 11 U.S.C. § 1228 (the chapter 12 discharge); 11 U.S.C. § 1328 (the chapter 13 discharge).

<sup>200</sup> See, e.g., 11 U.S.C. § 341(c) (certain creditors are permitted to appear unrepresented at the meeting of creditors, even if nonbankruptcy law requires them to be represented by an attorney); 11 U.S.C. § 522(c)(1) (nondischargeable debts for certain taxes, customs duties and domestic support obligations are enforceable against exempt property notwithstanding any nonbankruptcy law to the contrary); 11 U.S.C. § 541(c) (other than beneficial interests in trusts, a debtor's interests in property become property of the estate notwithstanding any nonbankruptcy law to the contrary); 11 U.S.C. § 1123 (the plan designates classes and treatment of classes notwithstanding nonbankruptcy law). As before, this is a partial list.

<sup>201</sup> *Butner*, 440 U.S. at 56.

<sup>202</sup> See, e.g., Douglas G. Baird & Thomas H. Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 U. CHI. L. REV. 97, 103 (1984) (“[T]he substantive rights of owners (be they large financial lenders, asbestos victims, or shareholders) should not turn on whether a debtor files a bankruptcy petition, dissolves under state law, or remains in business.”).

These efficiencies also indicate the Axiom's two-fold contribution to the integrity of the bankruptcy system. On one hand, it reduces incentives to use bankruptcy for ulterior purposes it was not designed to address. At the same time, deference to nonbankruptcy law minimizes the extent to which bankruptcy interferes with the constitutional balance of powers between state and federal governments, because (with limited exceptions)<sup>203</sup> that balance is respected in bankruptcy court just as it is under nonbankruptcy law.

*B. Sovereign Immunity Creates a Conflict Between the Axioms*

The Axioms can be applied as rules of decision to resolve the two circuit-splitting issues discussed in Parts I and II (above). However, because the Axioms are general, normative principles and not specific, positive law, the results of that application are independent of the textualist interpretations advanced in Parts I and II above. The textualist interpretations attempt to state what the law *is* (given the language of the Code and conventional canons of statutory construction); the Axioms, as rules of decision, indicate what the law *should be* in order to promote the efficiency and integrity of the bankruptcy system (notwithstanding the current language of the Code). Needless to say, law is not always as it should be.

For example, Axiom 1 diverges from the textualist interpretations advanced above insofar as creditor parity suggests that the IRS *should be* suable under section 544(b) and Tribes *should be* considered governmental units under section 101(27). In contrast, Axiom 2 aligns with the textualist interpretations advanced above insofar as deference to nonbankruptcy law suggests that the IRS *should not be* suable under section 544(b) and Tribes *should not be* considered governmental units under section 101(27). In that sense, a textualist reading of the Code's approach to sovereign immunity reveals a conflict between bankruptcy's least contested Axioms. To probe that conflict, consider each Axiom in turn.

If any creditor who receives a voidable transfer can be sued by the trustee under section 544(b), and the IRS receives a voidable transfer, then Axiom 1 insists that, as a policy matter, the trustee should be able to sue the IRS under section 544(b). That would treat the IRS on par with other creditors. Strict adherence to Axiom 1 would ignore the fact that, due to the IRS's sovereign immunity, transfers to the IRS are not voidable under nonbankruptcy law. The IRS's sovereign immunity is an attribute of the IRS itself, not a relevant legal

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<sup>203</sup> See *supra* notes 199–200 and accompanying text.

characteristic of its claim against the debtor. In avoidance actions under section 544(b), the relevant legal characteristics of the IRS's claim against the debtor are whether it was paid prior to the petition date within the limitations period prescribed by state law and whether it satisfies the other requirements to be voidable under state law. Axiom 1 maintains that these are the considerations that determine the extent of the trustee's power to sue the IRS—not the IRS's sovereign status as a taxing authority.

In short, respect for creditor parity (i.e., similar treatment for relevantly similar creditors) requires ignoring the IRS's sovereign immunity. Any other result makes lending to and restructuring the debts of S corporations and other pass-through entities less efficient. If they cannot rely on creditor parity, then voluntary creditors have to calculate and price in the risk that, in the event of financial distress, unique treatment for the IRS will effectively subordinate their claims against the debtor.<sup>204</sup> In light of the fact patterns in the cases splitting the circuits (two of which involved S corporations),<sup>205</sup> that consideration suggests that ignoring Axiom 1 (by respecting the IRS's immunity to section 544(b) actions) would be expected to increase the cost of borrowing for pass-through entities, all else equal. Moreover, ignoring Axiom 1 (by respecting the IRS's immunity to section 544(b) actions) shrinks the size of the bankruptcy estate available to satisfy the claims of the pass-through entity's other creditors. Thus, while treating the IRS on par with other similar creditors may stymie tax collection efforts, it would make bankruptcy proceedings more effective.

The same goes for Tribes. Creditor parity demands that their sovereign status be ignored. If an order can be entered against any creditor who violates the automatic stay,<sup>206</sup> who retains the debtor's property in violation of turnover obligations under section 542,<sup>207</sup> or receives a fraudulent transfer,<sup>208</sup> then Axiom 1 insists that, as a policy matter, it should be possible to enter an order against a Tribe that does those things. Any other result simply increases the cost of transacting with Tribes by pushing the risk of financial distress onto their counterparties (and the other creditors of Tribes' counterparties).

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<sup>204</sup> Depending on how common the problem is, one might even imagine lenders requiring a covenant whereby pass-through entity borrowers commit to not paying the federal tax liabilities of their members.

<sup>205</sup> See *supra* note 67 and accompanying text.

<sup>206</sup> See *Coughlin v. Lac Du Flambeau Band of Lake Superior Chippewa Indians (In re Coughlin)*, 33 F.4th 600, 603 (1st Cir. 2022).

<sup>207</sup> See *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1055–56 (9th Cir. 2004).

<sup>208</sup> See *Buchwald Cap. Advisors, LLC v. Sault Ste. Marie Tribe of Chippewa Indians (In re Greektown Holdings, LLC)*, 917 F.3d 451, 455 (6th Cir. 2019).

On the other hand, Axiom 2 insists that, as policy matter, if the IRS is immune from suit outside of bankruptcy, it should be immune from that same suit in bankruptcy (unless a waiver of immunity is necessary to collectivize creditors' remedies and allocate the debtor's assets effectively). Any other result simply encourages abuse of the bankruptcy system and unwittingly disturbs the balance of power between state and federal governments. Consider the look-back period within which transfers to the IRS are voidable. Under section 548—with respect to which section 106 waives the IRS's sovereign immunity—that period is two years prior to the petition. Under state law, that period is zero years, because the IRS is immune to suits under states' voidable transfer laws. If Axiom 2 were ignored—such that the IRS could be sued under section 544(b) by invoking a state's voidable transfer law despite the fact that it cannot be sued under that law outside of bankruptcy—presumably the relevant look-back period for section 544(b) actions against the IRS would be the one specified by the underlying state voidable transfer law.<sup>209</sup> Many states have a look-back period of four or six years, but there's nothing to prevent a state legislature from extending it even further. At the extreme, states could theoretically subsidize leveraged S corporations (and other pass-through entities) by allowing creditors to share in *all* federal tax payments made on behalf of the debtor's members, provided those creditors find an amenable bankruptcy trustee to bring the section 544(b) action for them. That would distort not only the federal regime for taxing pass-through entities but also the uniform application of bankruptcy law across the country.

Likewise, Tribes have a justified reliance interest in their sovereign immunity. If Tribes want to waive their own sovereign immunity (perhaps to facilitate credit transactions with nontribal entities), they are free to do so on a case-by-case basis or in one fell swoop by incorporating such a waiver into their governing documents. If they have not done so, however, Congress can abrogate tribal sovereign immunity outside of bankruptcy only if it does so unequivocally. In light of that nonbankruptcy law, honoring an equivocal abrogation in bankruptcy adjusts Tribes' nonbankruptcy entitlement in ways that are not necessary for successful bankruptcy proceedings. That violation of Axiom 2 casts a pall over Tribes' inherent sovereign authority to regulate their

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<sup>209</sup> A related riddle is how to identify which state's voidable transfer law is relevant to a section 544(b) action against the IRS when there is no actual triggering creditor whose rights are invoked by the trustee. *See, e.g., In re Equip. Acquisition Res., Inc.* 742 F.3d 743, 746 (7th Cir. 2014) (“[I]f the actual creditor could not succeed for any reason—whether due to the statute of limitations, estoppel, res judicata, waiver, or any other defense—then the trustee is similarly barred and cannot avoid the transfer.”); *Acequia, Inc. v. Clinton (In re Acequia, Inc.)*, 34 F.3d 800, 809 (9th Cir. 1994) (“Like Prometheus bound, the trustee is chained to the rights of [such] creditors . . .”).

commercial relationships with nontribal entities.<sup>210</sup> It also encourages those who transact with Tribes to use bankruptcy to recover property from Tribes that would not be recoverable in any other forum, inviting abuse of both tribal sovereignty and the bankruptcy system.

In sum, application of the Axioms to the questions splitting the circuits yields clear but conflicting results. To treat the IRS and Tribes the way relevantly similar creditors are treated, their sovereign immunity should be waived. Nonbankruptcy law, however, does not treat the IRS or Tribes the way it treats corporate or individual creditors. To respect the nonbankruptcy law of sovereign immunity, the IRS and Tribes should retain in bankruptcy whatever immunity to suit they enjoy outside of it. This conflict tests the limits of bankruptcy's least contested Axioms because they alone are incapable of resolving it.

### *C. The Choice Between Axioms is Inherently Political*

In fact, there is no principle of bankruptcy law, jurisprudence, or logic capable of adjudicating a conflict between these two Axioms. The tension between them poses political questions about the relationship between the state and the credit market, between governments' power to tax and their power to transact, and ultimately between the responsibilities of legislators and judges to make and apply reasonable bankruptcy laws. If "a coherent bankruptcy law must recognize how it fits into both the rest of the legal system and a vibrant market economy,"<sup>211</sup> how are legislators and judges to share responsibility for that coherence? It is beyond the scope of this Article to answer that question with any finality, but certain relevant trade-offs emerge from the foregoing analysis.

Recall that the strictly textualist interpretation of the Code advanced in Parts I and II brings the sovereign immunity of the IRS and Tribes into conflict with the ancient norm of creditor parity as it is reflected elsewhere in the Code. Judges who believe that this specific textualist interpretation accurately reflects congressional intent need only apply the Code as written and accept that sometimes creditor parity gives way to higher values. Other judges may find—perhaps on the basis of the legislative history of section 106 or bankruptcy's otherwise pervasive commitment to creditor parity—that the specific textualist interpretation advanced here is at odds with congressional intent. Those judges face a trade-off between activism and restraint: to legislate from the bench by interpreting the Code in accordance with a subtextual legislative intent or to

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<sup>210</sup> See *supra* notes 139–41 and accompanying text.

<sup>211</sup> Baird, *supra* note 32, at 577.



apply the language of the Code as written and leave it to Congress to address any resulting incoherence. The last round of Supreme Court decisions on section 106 demonstrates the Rehnquist Court's preference for restraint.<sup>212</sup>

Legislators seeking to reconcile bankruptcy's deference to nonbankruptcy law with its commitment to creditor parity face different trade-offs. Should the IRS's ability to collect taxes be subject to the claims of taxpayers' other creditors, or does the paramount imperative of tax collection outweigh the slightly higher borrowing costs imposed on S corporations and other pass-through entities by the Seventh Circuit's interpretation of section 544(b)? Should Tribes continue to be treated differently from all other kinds of governments in order to protect their sovereign authority to govern their commercial transactions with nontribal entities, or does the efficiency and integrity of the bankruptcy system demand that Tribes forfeit their immunity to the extent set out in section 106? Do the current circuit splits indicate a need for statutory reform to ensure that credit markets can rely on predictable outcomes in bankruptcy? There are no easy answers to these public policy questions. Nonetheless, were Congress to identify a reasonable resolution of these issues, it should not hesitate to clarify the Code's equivocations. Ameliorating ambiguity requires reiteration.

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<sup>212</sup> See *supra* note 14 and accompanying text.