EXTRATERRITORIAL AVOIDANCE ACTIONS UNDER THE U.S. BANKRUPTCY CODE

Absent a "clear indication" to the contrary, federal law applies "only within the territorial jurisdiction of the United States."[1] This rule, known as the "presumption against extraterritoriality,"[2] reflects the "commonsense notion that Congress generally legislates with domestic concerns in mind."[3] It also honors "a basic premise of our legal system" and of American foreign policy — that while "United States law governs domestically," it "does not rule the world."[4]

The presumption against extraterritoriality has proven troublesome for courts administering multinational bankruptcies. Among other things,[5] the Bankruptcy Code[6] contains tools — known as "avoidance" provisions — that allow bankruptcy trustees to reverse (or in bankruptcy jargon, "avoid") certain of a debtor's prebankruptcy transactions.[7] Creditors often seek to apply these provisions to potentially extraterritorial conduct.[8] U.S. courts, however, have not applied the presumption against extraterritoriality to these provisions consistently. The Supreme Court has yet to hear a case about the extraterritorial application of the Bankruptcy Code.[9] And in the interim, lower courts have split over whether the Code's avoidance provisions apply extraterritorially[10] and over the factors that can make otherwise avoidable transactions extraterritorial rather than domestic.[11]

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[1] Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010) (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991)).

[2] Smith v. United States, 507 U.S. 197, 204 n.5 (1993).

[3] Small v. United States, 544 U.S. 385, 388 (2005) (quoting *Smith*, 507 U.S. at 204 n.5).

[4] RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 335 (2016) (quoting Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 454 (2007)).

[5] Litigants have fought over whether other Bankruptcy Code provisions apply extraterritorially too. *See, e.g.*, Underwood v. Hilliard (*In re* Rimsat, Ltd.), 98 F.3d 956, 961 (7th Cir. 1996) (holding that the Bankruptcy Code's automatic-stay provisions, 11 U.S.C. § 362, apply extraterritorially). This Note focuses on the Code's avoidance provisions.

[6] 11 U.S.C. §§ 101–1532.

[7] *See generally id.* §§ 544(b), 547, 548, 550.

[8] For recent examples, see *King v. Export Development Canada (In re Zetta Jet USA, Inc.)*, 624 B.R. 461, 472–73 (Bankr. C.D. Cal. 2020); *In re Picard*, 917 F.3d 85, 95–100 (2d Cir. 2019); and *Emerald Capital Advisors Corp. v. Bayerische Moteren Werke AG (In re FAH Liquidating Corp.)*, 572 B.R. 117, 123–24 (Bankr. D. Del. 2017).

[9] *In re Zetta Jet*, 624 B.R. at 476.

[10] *Compare, e.g.*, Spizz v. Goldfarb Seligman & Co. (*In re* Ampal-Am. Isr. Corp.), 562 B.R. 601, 603 (Bankr. S.D.N.Y. 2017) (holding that the Code's avoidance provisions do not apply extraterritorially), *with* Weisfelner v. Blavatnik (*In re* Lyondell Chem. Co.), 543 B.R. 127, 155 (Bankr. S.D.N.Y. 2016) (holding that they do), *and* French v. Liebmann (*In re* French), 440 F.3d 145, 152 (4th Cir. 2006) (same).

[11] *Compare, e.g.*, *In re FAH Liquidating*, 572 B.R. at 124–25 (using center-of-gravity test to distinguish between domestic and foreign transactions), *and In re French*, 440 F.3d at 149–50 (similar), *with In re Picard*, 917 F.3d at 99 & n.9 (rejecting center-of-gravity test).

These splits are important, not least because avoidance actions with extraterritorial elements can involve billions of dollars.[12] Despite their importance, however, both splits are also curiously underanalyzed. Only a few published articles have considered whether the Code's avoidance provisions apply extraterritorially.[13] And there has been even less academic discussion of how, if the Code's avoidance provisions do *not* apply extraterritorially, courts should distinguish between foreign and domestic avoidance actions.[14]

This Note analyzes the second issue described above: the difference between "domestic" and "foreign" avoidance. It argues that transactions are "domestic" for avoidance purposes when and to the extent that they involve transfers made or obligations incurred within the United States. It also suggests, albeit more tentatively, that such transactions include but are not limited to all transfers by U.S. and foreign debtors from U.S. bank accounts. Because many typical business transactions *do* require transfers from U.S. bank accounts, the upshot is that many avoidance actions are "domestic" even if the Bankruptcy Code's avoidance provisions do not apply extraterritorially.

The Note proceeds in three Parts. Part I provides background on the Bankruptcy Code's avoidance provisions. Part II describes the contemporary presumption against extraterritoriality and argues that, as a general matter, a transaction is "domestic" to the extent that it involves transfers made or obligations incurred within the United States. Part III then discusses the details of *when* a transfer is made or an obligation is incurred in the United States, focusing on transfers of money from U.S. and foreign bank accounts, and concludes.

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[12] *See, e.g.*, *In re Lyondell*, 543 B.R. at 132–33 (describing $12.5 billion fraudulent transfer action arising out of extraterritorial merger); *In re* Purdue Pharma L.P., 633 B.R. 53, 87–92 (Bankr. S.D.N.Y.) (describing potential fraudulent transfer liability after controlling shareholders of Purdue Pharma L.P. transferred $11 billion from Purdue to spendthrift trusts in Jersey), *vacated on other grounds*, 635 B.R. 26 (S.D.N.Y. 2021). The split is also important from a doctrinal perspective, since it mirrors other puzzles concerning the extraterritorial application of the Securities Exchange Act, the Racketeer Influenced and Corrupt Organizations Act, and the Stored Communications Protection Act. *See* Aaron D. Simowitz, *The Extraterritoriality Formalisms*, 51 CONN. L. REV. 375, 389–96 (2019) (describing the puzzles).

[13] *Compare, e.g.*, Michael J. Colarossi, *An Uncertain Future: The Questionable Extraterritoriality of the Bankruptcy Code's Core Pre-Petition Avoidance Provisions*, 25 AM. BANKR. INST. L. REV. 229, 232 (2017) (arguing that the Code's avoidance provisions probably do not apply extraterritorially), *with* Edward R. Morrison, *Extraterritorial Avoidance Actions: Lessons from Madoff*, 9 BROOK. J. CORP. FIN. & COM. L. 163, 164 (2014) (presenting an argument that they do).

[14] Professor Aaron Simowitz notes only that this issue is unsettled, *see* Simowitz, *supra* note 12, at 392–94, and Michael Colarossi observes only that many courts (circa 2017) had adopted the center-of-gravity approach, Colarossi, *supra* note 13, at 248–50. The most recent edition of *Collier on Bankruptcy*, the standard bankruptcy treatise, endorses the center-of-gravity approach but without any sustained argument on its behalf. 5 COLLIER ON BANKRUPTCY ¶ 548.03[2](b) (Richard Levin & Henry J. Sommer eds., 16th ed. 2022).

I. Bankruptcy Background

In 1542, Parliament enacted the world's first cross-border bankruptcy statute. "[S]undry persons," it complained, had "fle[d] to parts unknown" after "craftily obtaining . . . great substance of other men's goods."[15] Creditors, meanwhile, could not reach these debtors through ordinary English process, since the King's writ would not run beyond England's shores.[16] So Parliament took a different approach. Henceforth, any debtor who "withdr[ew] . . . into any foreign realm" in "defraud of his creditors" would be outlawed and his English property forfeited.[17] Those who "willingly help[ed]" such debtors leave England, or who "convey[ed] their . . . goods" from English soil, would be imprisoned or fined as Parliament deemed "meet and convenient for their said offense or offenses."[18]

Debtors still move assets abroad today, but bankruptcy practice has changed since 1542. Instead of condemning recalcitrant debtors to outlawry, today's Bankruptcy Code allows a bankruptcy trustee to "avoid" — meaning "reverse" or "set aside" — transactions that would otherwise move assets beyond creditors' reach. The Code contains three principal avoidance provisions: section 548(a)(1)(A), which governs "actually fraudulent" transfers;[19] section 548(a)(1)(B), which governs "constructively fraudulent" transfers;[20] and section 547, which governs "preferences."[21]

Section 548(a)(1)(A), like the 1542 Act, is concerned with fraudulent or malicious transactions. It permits a bankruptcy trustee to avoid any "transfer . . . of an interest of [a] debtor in property," as well as "any obligation . . . incurred by [a] debtor," if the debtor "made such transfer or incurred such obligation" (1) "with actual intent to hinder, delay, or defraud" a creditor and (2) less than two years before filing for bankruptcy.[22] Suppose, for example, that a shepherd gifts sheep to his

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[15] An Act Against Such Persons as Do Make Bankrupt 1542, 34 & 35 Hen. 8 c. 4, § 1 (Eng.), *reprinted in* 3 STATUTES OF THE REALM 899, 899 (Dawsons of Pall Mall 1963) (1817) (spelling modernized).

[16] MICHAEL HIRST, JURISDICTION AND THE AMBIT OF THE CRIMINAL LAW 5 (2003) ("[T]he common law of England did not originally apply beyond the shores of the realm.").

[17] 34 & 35 Hen. 8 c. 4, § 5, *supra* note 15, at 901 (spelling modernized).

[18] *Id.* (spelling modernized).

[19] *See* 11 U.S.C. § 548(a)(1)(A).

[20] *See id.* § 548(a)(1)(B).

[21] *Id.* § 547. Under section 544(b) of the Code, a bankruptcy trustee may also "avoid any transfer of an interest of [a] debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an [allowable] unsecured claim." *Id.* § 544(b)(1). Section 544(b) does not create a standalone cause of action. Instead, it authorizes the bankruptcy trustee to pursue a cause of action that would otherwise be available to creditors under applicable non-bankruptcy law. *In re* Leonard, 125 F.3d 543, 544 (7th Cir. 1997); 5 COLLIER ON BANKRUPTCY, *supra* note 14, ¶ 544.06.

[22] 11 U.S.C. § 548(a)(1)(A).

brother on Monday and then declares bankruptcy on Tuesday.[23] If the shepherd made the gift in order to hide the sheep from creditors, the transaction is actually fraudulent and therefore voidable.[24]

Section 548(a)(1)(B), the Code's "constructive fraud" provision, extends section 548(a)(1)(A) to cases where a debtor honestly but unreasonably depletes his assets. Under section 548(a)(1)(B), a transfer or obligation is constructively fraudulent when it (1) is made for "less than . . . reasonably equivalent value," (2) occurs less than two years before bankruptcy, and (3) leaves the debtor insolvent or nearly so.[25] For example, suppose that a different shepherd borrows $100, buys $80 worth of sheep, and then transfers $20 to his cousin without consideration.[26] If bankruptcy follows within two years, the $20 payment is plausibly a constructive fraudulent conveyance. It is not made for "reasonably equivalent value," since the shepherd does not gain anything from it.[27] And it arguably renders the shepherd insolvent, since it leaves him with $100 in liabilities but only $80 in assets.[28]

Finally, rounding out the pack, section 547 restricts "preferential" transfers. A transfer is preferential when it (1) "benefit[s] a creditor" (2) "on account of an antecedent debt," is made (3) "while the debtor was insolvent" (4) less than ninety days before a bankruptcy filing, and (5) "enable[s] the creditor to receive a larger share of the estate than if the transfer had not been made"[29] in advance of bankruptcy. For example, suppose that a third shepherd — with $100 in sheep — owes $100 to the Bank of Southampton and $100 to the Bank of Northampton. If the shepherd tenders his sheep to Southampton in satisfaction of his debt the day before declaring bankruptcy, the tender is a voidable preference. The tender benefitted Southampton, was made on account of an antecedent debt within ninety days of bankruptcy, and occurred while the shepherd was insolvent. And it enabled Southampton to receive $100 rather than the $50 it would have gotten had the shepherd's estate been divided pro rata in bankruptcy.[30]

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[23] These are roughly the facts of *Twyne's Case* (1601), 76 Eng. Rep. 807; 3 Co. Rep. 80b. *See id.* at 810–12; 3 Co. Rep. 80b.

[24] *Id.* at 810–14; 3 Co. Rep. at 80b–81a.

[25] *See* 11 U.S.C. § 548(a)(1)(B).

[26] This, minus the sheep, is essentially the structure of a modern leveraged buyout (LBO) or recapitalization. *See, e.g.*, Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 980 (2017). Douglas G. Baird & Thomas H. Jackson, *Fraudulent Conveyance Law and Its Proper Domain*, 38 VAND. L. REV. 829, 850–53 (1985), offers a more detailed explanation of LBO mechanics.

[27] *See* Baird & Jackson, *supra* note 26, at 851.

[28] Only "arguably" because it can be difficult to tell when a debtor is in fact insolvent. Even in the simple example above, the debtor might argue that the discounted present value of his future cash flows (say, from selling wool from the sheep) exceeded $20. *See id.* at 852–53.

[29] Union Bank v. Wolas, 502 U.S. 151, 155 (1991); *see also* 11 U.S.C. § 547(b).

[30] *See, e.g.*, Off. Comm. of Unsecured Creditors of Arcapita Bank B.S.C.(c) v. Bahr. Islamic Bank (*In re* Arcapita Bank B.S.C.(c)), 575 B.R. 229, 234 (Bankr. S.D.N.Y. 2017).

As these examples suggest, sections 548 and 547 serve different purposes. Section 548 protects creditors, as a class, from asset stripping and other conduct that reduces net creditor recoveries.[31] By contrast, section 547 protects nonpreferred creditors from their preferred peers.[32] Such protection can be necessary to apportion a debtor's assets among creditors fairly, rather than "on the basis of the inside influence or economic leverage of a particular creditor."[33] It also helps ward off prebankruptcy races to the courthouse, wherein "individual creditors . . . rush to dismember the debtor" for fear that bankruptcy will otherwise leave them with nothing.[34]

And, like all statutes, neither section 548 nor section 547 pursues these purposes at all costs.[35] Most notably, section 548's two-year "lookback period" — the window before bankruptcy when a transaction is potentially avoidable — is comparatively short. Section 547's lookback period, at ninety days, is shorter still. These limitations on the trustee's avoidance powers reflect competing and equally important bankruptcy goals. For example, longer lookback periods increase litigation risk and thus the costs of transacting with distressed firms. Increased transaction costs can in turn deter value-creating projects, including mergers and acquisitions (M&A) or refinancing activity that might help a firm avoid bankruptcy.[36]

Finally, and unsurprisingly given the policy stakes, different nations have balanced these priorities differently. For example, Germany's lookback period for the German equivalent of intentional fraudulent transfers is ten years rather than two years, and its lookback period for constructive fraudulent transfers is four years rather than two years.[37] By contrast, Cayman Islands law does not prohibit constructively fraudulent transfers at all.[38] Germany has thus opted to protect creditors more vigorously than the United States, at the cost of increasing litigation risk. The Caymans have made a different policy choice.

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[31] *See, e.g.*, Bos. Trading Grp., Inc. v. Burnazos, 835 F.2d 1504, 1509 (1st Cir. 1987) (Breyer, J.); Emil A. Kleinhaus & Alexander B. Lees, *Debt Repayments as Fraudulent Transfers*, 88 AM. BANKR. L.J. 307, 308 (2014).

[32] Kleinhaus & Lees, *supra* note 31, at 308.

[33] Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 984 (2017).

[34] Bonded Fin. Servs., Inc. v. Eur. Am. Bank, 838 F.2d 890, 892 n.1 (7th Cir. 1988).

[35] *Cf., e.g.*, Rodriguez v. United States, 480 U.S. 522, 525–26 (1987) (per curiam).

[36] *See, e.g.*, Laura Femino, Note, *Ex Ante Review of Leveraged Buyouts*, 123 YALE L.J. 1830, 1839–42 (2014) (explaining how expansive conceptions of fraudulent conveyance liability can deter LBOs); WACHTELL, LIPTON, ROSEN & KATZ, DISTRESSED MERGERS AND ACQUISITIONS 12–17 (2019) (characterizing avoidance risk as a barrier to distressed M&A deals).

[37] Insolvenzordnung [InsO] [Insolvency Statute], Oct. 5, 1994, BUNDESGESETZBLATT, Teil I [BGBL I] at 2866, as amended, §§ 133–134 (Ger.), https://www.gesetze-im-internet.de/inso [https://perma.cc/XE9V-643P].

[38] LaMonica v. CEVA Grp. PLC (*In re* CIL Ltd.), 582 B.R. 46, 103 (Bankr. S.D.N.Y.), *amended by* No. 13-11272, 2018 WL 3031094 (Bankr. S.D.N.Y. June 15, 2018).

All this has two relevant implications. First, extending U.S. law to reach foreign entities or conduct can subvert the legitimate policy prerogatives of foreign governments. For example, suppose that U.S. bankruptcy courts applied American rather than German avoidance law to *all* transactions by German debtors. Given the United States's generous bankruptcy-eligibility rules, German debtors could then dodge Germany's fraudulent conveyance regime by declaring bankruptcy in the United States rather than Germany.[39] One presumes that German policymakers would not welcome this result.

Second, though, applying U.S. avoidance law with too *light* a touch can shortchange the substantive policy goals that *U.S.* avoidance provisions serve. For example, suppose that U.S. bankruptcy courts declined to apply U.S. avoidance law to any transaction with any link to the Cayman Islands. Sophisticated U.S. debtors might respond by routing every transaction through a Cayman Islands bank account, totally circumventing the Code's avoidance provisions. Such an outcome would leave creditors, including U.S. creditors, high and dry — or at least without protections that Congress decided to afford them.

II. "DOMESTIC" TRANSACTIONS AND THE PRESUMPTION AGAINST EXTRATERRITORIALITY

The presumption against extraterritoriality is one means by which American courts balance these competing priorities.[40] By ensuring that U.S. law does not stretch abroad as a matter of course, the presumption ensures that U.S. law does not "rule the world."[41] But by allowing courts to apply U.S. law to conduct with extraterritorial elements *sometimes*, the presumption also helps safeguard Congress's own legitimate policy objectives.[42]

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[39] Any debtor with "property in the United States" may enter into a U.S. bankruptcy proceeding, 11 U.S.C. § 109(a), and it is not difficult for a foreign debtor to, for example, open a U.S. bank account in the run-up to bankruptcy, *see, e.g.*, *In re* Northshore Mainland Servs., Inc., 537 B.R. 192, 201 (Bankr. D. Del. 2015). A German court could of course allow a German fraudulent conveyance action to proceed in Germany notwithstanding a contrary judgment by a U.S. bankruptcy court. *See, e.g.*, Zivilprozessordnung [ZPO] [Code of Civil Procedure], as amended, § 328, https://www.gesetze-im-internet.de/zpo [https://perma.cc/XYQ3-5EHU] (Ger.) (providing for nonrecognition of foreign judgment on public policy grounds and when foreign court lacks jurisdiction in accordance with German law). But this might disrupt an already-completed bankruptcy proceeding, create diplomatic frictions with the United States, and seem otherwise unappealing from the German point of view.

[40] It is not the only such means. Conflict-of-laws rules, forum non conveniens, and comity-based abstention doctrines also help courts balance these competing interests. *See, e.g.*, William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2079 tbl.1 (2015).

[41] RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 335 (2016) (quoting Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 454 (2007)).

[42] *See, e.g.*, William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. 1582, 1630–32 (2020) (describing "flexibility" of the presumption).

Contemporary extraterritoriality analysis involves two steps.[43] At the first step, courts ask whether a given statutory provision applies extraterritorially.[44] Courts presume that the answer is "no," but the presumption can be rebutted with a "clear, affirmative indication" of a statute's extraterritorial application.[45] Whether the Code's avoidance provisions apply or should be read to apply extraterritorially is disputed and outside the scope of this Note.[46]

Assuming that a statute does not reach extraterritorially, courts ask next whether a particular application of a statute would be foreign or domestic; the statute then applies only in "domestic" cases.[47] A statute's application is domestic if and only if "conduct relevant to the statute's focus occurred in the United States."[48] "The focus of a statute is 'the objec[t] of [its] solicitude,' which can include the conduct it 'seeks to "regulate,"' as well as the parties and interests it 'seeks to "protec[t]."'"[49]

The Supreme Court has yet to address the focus of the Code's avoidance provisions specifically, but its cases stand for five more general principles that are relevant here. These principles collectively establish that sections 547 and 548 focus on "transfers" and "obligations" made or incurred within the United States.

A. Principles for Assessing Statutory Focus

The Supreme Court's extraterritoriality cases reflect at least five general principles applicable to the Code's avoidance provisions. Two of these principles deal with statutory text; the remaining three bear on context and policy.

First, when a statute regulates conduct with harmful effects, the focus of the statute is typically the conduct rather than its effects. For example, the U.S. wire fraud statute makes it a crime to employ interstate wires as part of a "scheme or artifice to defraud."[50] In *Pasquantino v. United States*,[51] U.S. citizens had used interstate wires as part of a plot to defraud the Canadian government.[52] The Court held that their crime was domestic, even though it harmed Canadians rather than

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[43] *RJR Nabisco*, 579 U.S. at 337.
[44] *Id.*
[45] *Id.*
[46] *See supra* notes 9–12 and accompanying text.
[47] *RJR Nabisco*, 579 U.S. at 337. If a statute does apply extraterritorially, the analysis ends. When a statute applies equally to foreign and domestic conduct, it applies in every case; it does not matter whether the conduct to which it will apply is foreign or domestic. *See id.* at 337–38, 338 n.5.
[48] *Id.* at 337.
[49] WesternGeco LLC v. ION Geophysical Corp., 138 S. Ct. 2129, 2137 (2018) (alterations in original) (quoting Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 267 (2010)).
[50] 11 U.S.C. § 1343.
[51] 544 U.S. 349 (2005).
[52] *Id.* at 353.

Americans.[53] It explained that the wire fraud statute focused on the "use[of] U.S. interstate wires" rather than the consequences of successful wire fraud.[54]

Second, when a statute regulates a distinctive subset of malicious conduct, the statute generally focuses on the facts making the conduct distinctive and not the facts making it malicious. For example, section 10(b) of the 1934 Securities Exchange Act[55] forbids the use of "any manipulative or deceptive device" in "connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered."[56] In *Morrison v. National Australia Bank Ltd.*,[57] individuals acting in Florida had allegedly manipulated the financial statements of a company whose shares were listed in Australia.[58] The Court held that the manipulation did not trigger section 10(b).[59] According to the Court, section 10(b) proscribed *securities* fraud rather than fraud *simpliciter*.[60] As a result, it focused on U.S. transactions in securities and not U.S. behavior amounting to fraud.[61]

Third — and turning from text to context — "[i]f [a] statutory provision . . . works in tandem with other provisions," courts must assess its focus "in concert with those other provisions."[62] For example, section 284 of the Patent Act of 1952[63] creates a damages remedy for patent infringement.[64] In *WesternGeco LLC v. ION Geophysical Corp.*,[65] a firm had assembled and sold an infringing product abroad after manufacturing components for the product in the United States.[66] The Court held

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[53] *Id.* at 371.

[54] *Id.* Other cases offer variations on this theme. *See, e.g.*, *Morrison*, 561 U.S. at 267 (holding that section 10(b) of the Securities Exchange Act focuses on transactions in domestic securities, not domestic harm from securities frauds); Loginovskaya v. Batratchenko, 764 F.3d 266, 272–73 (2d Cir. 2014) (similar for section 22 of the Commodity Exchange Act); United States v. Sitzmann, 893 F.3d 811, 822 (D.C. Cir. 2018) (holding that drug-trafficking statute focused on domestic trafficking of drugs even if drugs were sold outside the United States). *But cf.* United States v. Harris, 991 F.3d 552, 559–60 (4th Cir. 2021) (holding that 18 U.S.C. § 2422(b), which criminalizes the use of interstate wires to entice minors into sexual activity, focuses on sexual activity by minors rather than use of interstate wires).

[55] 15 U.S.C. §§ 78a–78qq.

[56] *Id.* § 78j(b).

[57] 561 U.S. 247.

[58] *Id.* at 251–52.

[59] *Id.* at 273.

[60] *See id.* at 272.

[61] *Id.* In a similar vein, consider *Pasquantino v. United States*, 544 U.S. 349, 371 (2005), which held that the focus of the wire fraud statute was use of the wires rather than fraud. *See also* United States v. Hussain, 972 F.3d 1138, 1143–44 (9th Cir. 2020) (same and citing cases); Bascuñán v. Elsaca, 927 F.3d 108, 122–25 (2d Cir. 2019) (similar for mail and bank fraud).

[62] WesternGeco LLC v. ION Geophysical Corp., 138 S. Ct. 2129, 2137 (2018).

[63] 35 U.S.C. §§ 1–390.

[64] *Id.* § 284.

[65] 138 S. Ct. 2129.

[66] *Id.* at 2135.

that the patent holder could recover damages for the foreign sales.[67] Assessing section 284 in relation to the Patent Act as a whole,[68] the Court concluded that section 284 focused on "infringement."[69] Meanwhile, another provision of the Patent Act specified that manufacturing parts in the United States was "infringement" if the manufacturer assembled those parts into an infringing product overseas.[70] Thus, the "infringement" in *WesternGeco* had been domestic even though it consummated in foreign sales.[71]

Fourth, when Congress does not specify how courts should handle "conflicts with foreign laws and procedures,"[72] statutory foci that might provoke such conflicts are disfavored. For example, section 703 of the Civil Rights Act of 1964[73] forbids employment discrimination on the basis of race, religion, and national origin.[74] In *EEOC v. Arabian American Oil Co.*,[75] an employer hired an employee in Houston, transferred him to Saudi Arabia, and (allegedly) discriminated against him there.[76] The Court held that the discrimination fell outside section 703. It emphasized, inter alia, that Congress had "fail[ed] to address conflicts with the laws of other nations" within the Civil Rights Act.[77] Since reading section 703 to focus on something other than domestic discrimination might provoke such conflicts,[78] the Court held that section 703 focused on domestic discrimination rather than (for example) domestic employment contracts or employers *simpliciter.*[79]

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[67] *Id.* at 2137–38.

[68] *See id.* at 2137 (explaining that section 284 "provides a general damages remedy for the various types of patent infringement identified in the Patent Act").

[69] *Id.*

[70] *Id.* at 2137–38.

[71] *Id.* at 2138. For another example, see *United States v. Napout*, 963 F.3d 163, 179–80 (2d Cir. 2020), which held that the focus of a conspiracy statute was "coterminous with" that of the underlying offense giving rise to a criminal conspiracy, *id.* at 179 (quoting United States v. Hoskins, 902 F.3d 69, 96 (2d Cir. 2018)).

[72] Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 269 (2010) (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 256 (1991)).

[73] 42 U.S.C. §§ 2000a to 2000d-4a, 2000e to 2000h-6.

[74] *Id.* § 2000-e2(a)(1).

[75] 499 U.S. 244 (1991).

[76] *Id.* at 247.

[77] *Id.* at 256.

[78] For example, Saudi law categorically forbids employers from employing women "in hazardous operations or harmful industries," Labor and Workmen Law, Royal Decree No. M/21 art. 160, 6 Ramadan 1389 (Nov. 15, 1969), a rule that conflicts with U.S. law, *see* Int'l Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 199 (1991). When Congress revised the Civil Rights Act in 1991, it specified that the Act applied overseas but also provided a safe harbor for employers' attempts to comply with local law. *See* 42 U.S.C. §§ 2000e-1(b), (c)(1).

[79] *Arabian Am. Oil*, 499 U.S. at 256. *Morrison* also emphasizes this point. *See* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 269 (2010).

Fifth, and finally, statutes typically focus on more than "general corporate activity."[80] For example, in *Nestlé USA, Inc. v. Doe*,[81] Nestlé had allegedly violated international law norms putatively within the ambit of the Alien Tort Statute (ATS)[82] by aiding and abetting forced labor in Côte d'Ivoire.[83] Nestlé made "all major operational decisions" in the United States.[84] But the actual conduct that aided and abetted the forced labor, like "providing training, fertilizer, tools, and cash to overseas farms," had occurred in Côte d'Ivoire rather than America.[85] The Court held the focus of the ATS was on the actual conduct rather than the operational decisions, such that the ATS did not apply.[86] "[G]eneric allegations" of "corporate activity," the Court explained, "cannot alone establish domestic application of the ATS."[87]

Two follow-up comments are in order. First, like all exercises in statutory construction, determining a statute's focus or object of solicitude is a "holistic endeavor."[88] The Supreme Court's extraterritoriality cases do not indicate that any principle has lexical priority over any other principle, and the Court typically consults multiple principles (as well as common sense) in choosing between competing statutory foci. For example, *Morrison* held that section 10(b) focused on "purchase-and-sale transactions" rather than fraudulent conduct writ large because it was those transactions, specifically, that section 10(b) "s[ought] to 'regulate.'"[89] But the *Morrison* Court also emphasized that statutory context[90] and potential conflicts with foreign securities-fraud rules[91] supported its gloss on the statute.

Second, and more specifically, the fourth principle above — avoidance of conflict with foreign laws or procedures — will not itself rule out statutory foci with otherwise adequate textual and contextual support. *Morrison*, for example, seems to hold that transactions between foreigners involving U.S.-listed securities fall within the ambit of section

80 Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1937 (2021).
81 141 S. Ct. 1931.
82 28 U.S.C. § 1350.
83 *Nestlé*, 141 S. Ct. at 1935.
84 *Id.*
85 *Id.* at 1937.
86 *Id.*
87 *Id.*
88 *See, e.g.*, United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988) (Scalia, J.) ("Statutory construction . . . is a holistic endeavor.").
89 Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 266–67 (2010) (quoting Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co., 404 U.S. 6, 12 (1971)); *see id.* at 272–73 (rejecting a "significant and material conduct" test for this reason).
90 *See, e.g.*, *id.* at 268 (explaining that Securities Act of 1933 and Exchange Act of 1934 collectively formed a "comprehensive regulation of securities trading"); *id.* at 267 (noting that the preamble of the 1934 Exchange Act "sets forth as its object '[t]o provide for the regulation of securities exchanges'") (alteration in original) (quoting Securities Exchange Act of 1934, ch. 404, 48 Stat. 881).
91 *See, e.g.*, *id.* at 269–70.

10(b).[92] And yet a suit between two Frenchmen over fraud in the French sale of U.S.-listed securities would obviously create a risk of "conflict with foreign laws and procedures" if brought in the United States pursuant to U.S. law.[93] Having considered section 10(b)'s text and the structure of the 1934 Act, the *Morrison* Court evidently found that such risks were worth taking.[94]

Assigning a "focus" to a particular statutory provision, then, requires reading that provision's text in context. Here, both text and context establish that sections 547 and 548 focus on debtors' prebankruptcy "transfers" and "obligations."

B. The Focus of Sections 547 and 548

The Supreme Court has never discussed the focus of the Code's avoidance provisions in the context of the presumption against extraterritoriality, and lower courts have not always been clear as to what they take the provisions' focus (or foci) to be.[95] But three possibilities emerge from the lower court cases and associated commentary: sections 547 and 548 might focus on "transfers" and "obligations," on harm to creditors, or on the depletion of a bankrupt's estate.[96] Of these three possibilities, a focus on transfers and obligations is the most plausible.

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[92] *Id.* at 273 ("Section 10(b) reaches the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States."). The First and Ninth Circuits have read this language to state necessary and sufficient conditions of applicability for section 10(b). SEC v. Morrone, 997 F.3d 52, 59–60 (1st Cir. 2021); Stoyas v. Toshiba Corp., 896 F.3d 933, 950 (9th Cir. 2018). The Second Circuit has been more cautious, *see* Parkcentral Glob. Hub v. Porsche Auto. Holdings SE, 763 F.3d 198, 215–17 (2d Cir. 2014), but even the Second Circuit seems to acknowledge that section 10(b) applies to all transactions in U.S.-listed securities, *see id.* at 216.

[93] *Morrison*, 561 U.S. at 269. Among other things, such suits would make it difficult for French securities regulators to permit or authorize practices forbidden by section 10(b). *See id.* (citing briefs by foreign governments making this point).

[94] *Pasquantino*'s reading of the wire fraud statute, which allows prosecutors to target a variety of overseas conduct, offers a similar lesson. *See* Pasquantino v. United States, 544 U.S. 349, 371 (2005); Pierre-Hugues Verdier, *The New Financial Extraterritoriality*, 87 GEO. WASH. L. REV. 239, 246–64 (2019) (similar examples).

[95] *See, e.g.*, Emerald Cap. Advisors Corp. v. Bayerische Moteren Werke AG (*In re* FAH Liquidating Corp.), 572 B.R. 117, 124 (Bankr. D. Del. 2017) (assessing whether transfer was extraterritorial without considering statutory focus); Weisfelner v. Blavatnik (*In re* Lyondell Chem. Co.), 543 B.R. 127, 150–51 (Bankr. S.D.N.Y. 2016) (similar).

[96] *Compare In re* Picard, 917 F.3d 85, 100 (2d Cir. 2019) ("The relevant conduct . . . is the debtor's fraudulent transfer of property . . . ." (emphasis omitted)), *with* French v. Liebmann (*In re* French), 440 F.3d 145, 149–50 (4th Cir. 2006) (considering, inter alia, the "effects" of a transfer, including its effects on victim creditors), *and* Morrison, *supra* note 13, at 169 ("[T]he focus of" 11 U.S.C. § 550, a related provision, "is on acts that deplete the estate."). *French v. Liebmann (In re French)*, 440 F.3d 145, predates *Morrison*, which introduced the "focus" analysis, but subsequent courts have cited *In re French* as if it remained good law notwithstanding *Morrison*. *See, e.g.*, *In re FAH Liquidating*, 572 B.R. at 124; *In re Lyondell*, 543 B.R. at 152–53.

Starting with the statutory text, sections 547 and 548 focus more on transfers and obligations than on harm or estate depletion. Sections 547 and 548 both regulate transfers that meet the Code's avoidance criteria, and section 548 deals additionally with the "incurr[ence]" of "obligation[s]" meeting the same criteria.[97] "It is those transactions" that the Bankruptcy Code "seeks to 'regulate,'" and it is creditors injured by "those transactions" that "the [Code] seeks to 'protec[t].'"[98] As *Morrison* explains, these transactions are thus the presumptive focus of sections 547 and 548.[99]

Context confirms this view. Read as a whole and alongside their companions within the Bankruptcy Code, sections 547 and 548 are centrally concerned with whether particular transfers and obligations are or are not avoidable. Ancillary provisions within sections 547 and 548, for example, subject transactions between a debtor and the debtor's directors, officers, and affiliates to special scrutiny.[100] Next door, section 546 declares that certain transactions with grain producers, fishermen, and financial institutions are not avoidable.[101] And so on and so forth. Considered "in . . . context and with a view to their place" within the Bankruptcy Code,[102] sections 547 and 548 focus on domestic transfers and obligations.

At any rate, the two alternatives to this reading do not seem particularly compelling. For starters, and contrary to some courts' intimations,[103] sections 547 and 548 do not focus on injuries to creditors *simpliciter*. To be sure, the Code's avoidance provisions do help protect creditors from harm.[104] But *Morrison* and *Pasquantino* teach that statutes regulating injurious conduct generally focus on conduct, not injury. The federal wire fraud statute, for example, focuses on the use of U.S. wires rather than the harms of wire fraud.[105] And section 10(b) focuses on dealings in securities, not injuries to investors.[106]

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[97] 11 U.S.C. §§ 547(b), 548(a)(1)(A)–(B).

[98] *Morrison*, 561 U.S. at 267 (quoting Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co., 404 U.S. 6, 10, 12 (1971)).

[99] *See id.* at 266–67; *cf. Pasquantino*, 544 U.S.at 371 (similar for wire fraud).

[100] 11 U.S.C. §§ 547(b)(4)(B), 548(a)(1)(B)(ii)(IV).

[101] *Id.* § 546(d)–(e).

[102] *See* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 320 (2014) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)).

[103] *See, e.g.*, French v. Liebmann (*In re* French), 440 F.3d 145, 150 (4th Cir. 2006); Emerald Cap. Advisors Corp. v. Bayerische Moteren Werke AG (*In re* FAH Liquidating Corp.), 572 B.R. 117, 124 (Bankr. D. Del. 2017); *see also* Morrison, *supra* note 13, at 169.

[104] *See, e.g.*, *In re* Harris, 464 F.3d 263, 273 (2d Cir. 2006) (Sotomayor, J.) ("[T]he Bankruptcy Code's avoidance provisions . . . protect a debtor's estate from depletion to the prejudice of the unsecured creditor.") (citing *In re French*, 440 F.3d at 152).

[105] *See* Pasquantino v. United States, 544 U.S. 349, 371 (2005).

[106] *See* Morrison v. Nat'l Austl. Bank, 561 U.S. 247, 266–67 (2010). Because most large businesses have both U.S. and foreign creditors, advocates of focusing on creditor harm would also need

Nor, in the alternative, do sections 547 and 548 focus on the depletion of a debtor's assets or on a debtor's interests in property more broadly. True enough, the Code's avoidance provisions apply to "interest[s] of [a] debtor in property,"[107] and their purpose is "to preserve the property includable within the bankruptcy estate" and thereby facilitate orderly bankruptcies.[108] But the Code's avoidance provisions do not regulate *every* aspect of a debtor's relationship with his property; they apply only to transfers of property and obligations that encumber it.[109] And *Morrison* instructs that when a statute regulates a distinctive subset of malicious conduct, the statute focuses on the features making the conduct distinctive rather than the features making it malicious.[110] Just as section 10(b) focuses on transactions in securities rather than fraudulent conduct, then, sections 547 and 548 focus on transfers and obligations rather than property or depletion of an estate.

Focusing on property or depletion of a bankruptcy estate would also be odd for another, independent reason. If the Code's avoidance provisions focused on these effects of a transfer, then transactions would be avoidable under sections 547 and 548 only if they were made with or depleted a debtor's U.S. assets. But nowhere else does the Code give a debtor's U.S. property special treatment. In particular, a debtor's assets are subject to a bankruptcy court's jurisdiction "wherever" they are "located."[111] And all of a debtor's assets, whether located in the United States or abroad, are distributable pro rata to creditors in a liquidation.[112] Per *WesternGeco*, statutory context matters for ascertaining a statute's "focus."[113] And here, statutory context counsels against reading the Code to create a special avoidance regime for a debtor's U.S. assets.

Finally, although the issue should not be dispositive, focusing on U.S. transfers and obligations seems no more likely to create "conflicts with foreign laws and procedures" than focusing on harm to creditors or on

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to explain how courts should handle cases in which a single transaction harms creditors in the United States and overseas simultaneously. *Cf.* Moore v. Bay, 284 U.S. 4, 5 (1931) (dealing with a similar problem under what is now section 544 of the Bankruptcy Code).

[107] 11 U.S.C. §§ 547(b), 548(a)(1).

[108] Begier v. IRS, 496 U.S. 53, 58 (1990).

[109] For example, a debtor who burns down his house to spite his creditors does not do anything within the ambit of sections 547 and 548. There is no "transfer" made or "obligation" incurred and therefore nothing to be avoided. *See* 5 COLLIER ON BANKRUPTCY, *supra* note 14, ¶¶ 547.03[1], 548.03 (explaining that there is no avoidance absent a transfer or obligation).

[110] *Morrison*, 561 U.S. at 266.

[111] 11 U.S.C. § 541(a)(1) (defining a bankruptcy estate as being "comprised of . . . all legal or equitable interests of the debtor in property . . . wherever located and by whomever held"); H.K. & Shanghai Banking Corp. v. Simon (*In re* Simon), 153 F.3d 991, 996 (9th Cir. 1998) (explaining that "all" includes foreign property and citing cases).

[112] 11 U.S.C. § 726(b).

[113] WesternGeco LLC v. ION Geophysical Corp., 138 S. Ct. 2129, 2137 (2018).

property.[114] Certainly, focusing on U.S. transfers and obligations may cause U.S. law to apply to many transactions involving foreigners, particularly if (say) a transfer becomes a domestic transfer whenever it passes through domestic wires or banks.[115] But focusing on harm to creditors might render U.S. avoidance law applicable to any debtor with a single U.S. creditor, since by definition a fraudulent transfer or preference impairs (nonpreferred) creditors' recoveries from a bankruptcy estate. And focusing on property or depletion of a debtor's estate would trigger U.S. law whenever a transaction involved a debtor's U.S. assets. Thus, it seems far from clear that focusing on transfers and obligations would cause significantly more foreign conflict than would focusing on harm to creditors or on property.

One last point merits attention. Some courts have said that sections 547 and 548 focus on "transfer[s] that deplete[] the property . . . of the estate."[116] If this language is just meant as shorthand for sections 547 and 548's substantive requirements — that a transfer must render a debtor insolvent or otherwise reduce recoveries available to creditors to be voidable in the first place — then it is unremarkable. But if these courts mean to suggest that sections 547 and 548 focus *both* on transfers *and* on estate property, then their view falls afoul of the same objection that applies to the "property" view generally. The Code does not elsewhere distinguish between debtors' foreign and U.S. property, and a sensible construction of the Code's avoidance provisions should follow that pattern.

In short, sections 547 and 548 most plausibly focus on a debtor's "transfers" and "obligations." The next Part considers *when*, exactly, a debtor transfers property or incurs an obligation in the United States.

III. LOCATING TRANSFERS AND OBLIGATIONS

Some transfers and obligations are easy to situate geographically. A debtor who ships a piano from Maine to Maryland, for example, obviously moves the piano within the United States rather than Canada or Mexico. But consider a Dutch firm's cash acquisition of a Delaware corporation, funded through debt issued by the Dutch firm's Luxembourg subsidiary and secured by the assets of the entire corporate group. Does the deal take place in Delaware? The Netherlands? Luxembourg? Or somewhere else entirely?

[114] *Morrison*, 561 U.S. at 269 (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 256 (1991)).

[115] *See infra* Part III, pp. 2186–94.

[116] *E.g.*, Off. Comm. of Unsecured Creditors of Arcapita Bank B.S.C.(c) v. Bahr. Islamic Bank (*In re* Arcapita Bank B.S.C.(c)), 575 B.R. 229, 244 (Bankr. S.D.N.Y. 2017) (quoting Spizz v. Goldfarb Seligman & Co. (*In re* Ampal-Am. Isr. Corp.), 562 B.R. 601, 613 (Bankr. S.D.N.Y. 2017) ("[T]he focus of the . . . avoidance and recovery provisions is the initial transfer that depletes the property that would have become property of the estate.")).

Questions like these, which are perennial in the conflict of laws, have split lower courts across two axes. Doctrinally, courts in different circuits have developed different tests to distinguish "domestic" transfers and obligations from "foreign" ones. Some courts use a center-of-gravity test to assess whether a particular transaction is extraterritorial,[117] where a transaction's center of gravity turns on its "participants, acts, targets, and effects."[118] Other courts, mostly in the Second Circuit, have rejected the center-of-gravity approach.[119] These courts, however, have been less than forthcoming about the factors that make transactions domestic rather than foreign.[120]

More practically, even courts that have accepted the center-of-gravity approach have split on a crucial and recurring question — when, and under what circumstances, transfers of money from a debtor's bank accounts qualify as "domestic" transfers. Simplifying slightly, some decisions focus on the location of a transferor's bank account in analyzing the domesticity of a transfer of funds.[121] Others focus more on the domicile of the debtor.[122] And still others say that a bank transfer's status as domestic or extraterritorial turns on further facts about when and why the transfer in question was made.[123]

Clever debtors have invented countless ways of transferring property, and it would be impossible to analyze each method comprehensively. Instead, this Part focuses on transfers of money from bank accounts — which, anecdotally, seem to be implicated in the lion's share

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[117] Emerald Cap. Advisors Corp. v. Bayerische Moteren Werke AG (*In re* FAH Liquidating Corp.), 572 B.R. 117, 124 (Bankr. D. Del. 2017); *see, e.g.*, Weisfelner v. Blavatnik (*In re* Lyondell Chem. Co.), 543 B.R. 127, 149 (Bankr. S.D.N.Y. 2016); French v. Liebmann (*In re* French), 440 F.3d 145, 149–50 (4th Cir. 2006); *In re* Florsheim 336 B.R. 126, 131 (Bankr. N.D. Ill. 2005); Kriegman v. Cooper (*In re* LLS Am., LLC), No. 09-06194, 2012 WL 2564722, at *9 (Bankr. E.D. Wash. July 2, 2012).

[118] *In re FAH Liquidating*, 572 B.R. at 124 (quoting *In re French*, 440 F.3d at 150).

[119] *See, e.g.*, *In re* Picard, 917 F.3d 85, 99–100 (2d Cir. 2019) ("declin[ing] to adopt," *id.* at 99, center-of-gravity test); *In re Arcapita*, 575 B.R. at 247 (arguing that *Morrison*, 561 U.S. 247, "changed the legal landscape on this issue"); LaMonica v. CEVA Grp. PLC (*In re* CIL Ltd.), 582 B.R. 46, 95–96 (Bankr. S.D.N.Y.), *amended by* No. 13-11272, 2018 WL 3031094 (Bankr. S.D.N.Y. June 15, 2018) (applying both tests but only after noting doubt as to whether center-of-gravity test was consistent with *Morrison*).

[120] *See, e.g.*, *In re Picard*, 917 F.3d at 99 & n.9 (holding, without much explanation or elaboration, that a transfer is domestic whenever it originates from the U.S. bank accounts of a U.S.-domiciled debtor); *In re Arcapita*, 575 B.R. at 245–46, 249 (holding that a transfer between two foreign banks' U.S. bank accounts was domestic, without offering a clear rule for distinguishing foreign and domestic transfers).

[121] *See, e.g.*, *In re Arcapita*, 575 B.R. at 249 (so holding when transfer was sent from *and received into* U.S. bank account); *see also In re Florsheim*, 336 B.R. at 131 (treating location of bank accounts as an input into center-of-gravity test).

[122] *See, e.g.*, *In re Picard*, 917 F.3d at 99 & n.9 (treating debtor's status as a U.S. domiciliary and use of a U.S. bank account as factors counting in favor of domesticity); *In re Lyondell*, 543 B.R. at 149–51 (considering domicile of debtor under center-of-gravity approach without mentioning location of debtor's bank account).

[123] *E.g.*, *In re FAH Liquidating*, 572 B.R. at 124 (applying center-of-gravity test).

of litigated fraudulent conveyance cases.[124] It argues that courts should deem bank transfers to be "domestic" rather than extraterritorial when, and only when, they originate from U.S. bank accounts. Because many bank transfers *do* originate from U.S. bank accounts, the implication is that many transfers should fall within the ambit of sections 547 and 548 even if those provisions do not apply extraterritorially.

The Part proceeds in three sections. Section A introduces some guiding principles for localizing bank transfers. Section B argues against the center-of-gravity approach. Section C argues for the proposed account-based localization rule, and offers concluding remarks.

A. Guiding Principles

Under the Bankruptcy Code, "[t]he term 'transfer' means," inter alia, "each mode, direct or indirect . . . of disposing of or parting with — (i) property; or (ii) an interest in property."[125] Where transfers from bank accounts are concerned, the "property" transferred is a bank deposit. Thus, for bankruptcy purposes, transfers from bank accounts occur where a depositor "dispos[es] of" or "part[s] with" bank deposits.[126]

Bank deposits are not tangible objects, so assigning a location to the place where a depositor parts with a deposit requires courts to adopt some kind of legal fiction.[127] Existing law renders three such fictions at least somewhat plausible. *First*, a transfer might occur in the United States whenever it has a U.S. center of gravity. As mentioned above, several courts have adopted this center-of-gravity test in the extraterritoriality context.[128] These courts generally look to "all component events of [a] transfer[]," including the transfer's purpose and commercial backdrop, to assess whether the transfer's "connection to the United States is . . . sufficiently strong for the transfer to be considered" domestic rather than extraterritorial.[129]

Second, a transfer might occur in the United States whenever it originates from a U.S. bank account. Some cases from the Second Circuit arguably support this position.[130] Such a rule would also mesh well

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[124] For example, with the exception of *In re French* and *LaMonica v. CEVA Group PLC (In re CIL Ltd.)*, 582 B.R. 46, every case cited *supra* notes 117–123 involved a bank transfer.

[125] 11 U.S.C. § 101(54)(D)(i)–(ii).

[126] *Id.*

[127] *E.g.*, Peterson v. Islamic Republic of Iran, 627 F.3d 1117, 1131 (9th Cir. 2010).

[128] *See supra* p. 2187.

[129] Weisfelner v. Blavatnik (*In re* Lyondell Chem. Co.), 543 B.R. 127, 149, 151 (Bankr. S.D.N.Y. 2016) (second alteration in original) (quoting Maxwell Commc'n Corp. v. Societe General PLC (*In re* Maxwell Commc'n Corp.), 186 B.R. 807, 816 (Bankr. S.D.N.Y. 1995), *aff'd*, 93 F.3d 1036 (2d Cir. 1996)).

[130] *See, e.g.*, Off. Comm. of Unsecured Creditors of Arcapita Bank B.S.C.(c) v. Bahr. Islamic Bank (*In re* Arcapita Bank B.S.C.(c)), 575 B.R. 229, 245 (Bankr. S.D.N.Y. 2017) (holding that transfer between foreign banks was domestic when *both* banks used U.S. bank accounts to consummate

with other cases, decided outside bankruptcy, that treat transfers originating from U.S. bank accounts as U.S. transfers in extraterritoriality-related contexts.[131]

Third, a transfer might occur in the United States whenever it originates from a U.S.-domiciled *debtor*, even if the debtor executes the transfer through a foreign bank account. A few bankruptcy cases suggest or are at least compatible with this approach.[132] A debtor-based rule would also align the treatment of bank transfers under sections 547 and 548 with their treatment for tax and escheat purposes.[133]

Although choosing between these localization options necessarily requires some degree of practical judgment, that judgment should in turn be guided by three relevant principles. *First*, because the Bankruptcy Code defines "transfer" to mean "disposing of" or "parting with" property, it should be possible for an ordinary speaker of the English language to describe the place where deposits are "transferred" as the place where a debtor "disposes of" or "parts with" them.[134] Suppose, for example, that a French debtor with U.S. creditors transfers funds to a French supplier in France. The fact that the debtor has U.S. creditors, without more, should not render the transfer "domestic." After all, the presence or absence of a U.S. creditor does not bear on whether money was disposed of or parted with in the United States.

Second, all else equal, a plausible localization rule should classify most transactions in which the United States has a significant interest as "domestic" rather than "foreign." Suppose, for example, that a U.S. debtor wires funds to a U.S. creditor from a U.S. bank account. The transfer seems domestic, even if the debtor routes it through (say) a Cayman Islands intermediary. "Congress generally legislates with domestic concerns in mind,"[135] and making it too easy for debtors with U.S. contacts to evade the Code's avoidance provisions would slight the domestic interests that those provisions protect.

Third, and again all else equal, a rule for localizing bank transfers should *not* capture transactions with only tenuous ties to the United States. For example, suppose that a Chinese debtor wires funds from a Chinese bank account to an Irish creditor's account in Ireland but that the transfer — like the vast majority of international wire transfers —

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the transfer); *In re* Picard, 917 F.3d 85, 95–100 (2d Cir. 2019) (holding that transfer from U.S. bank account by U.S. domiciliary was domestic).

[131] *See infra* p. 2192.

[132] *E.g.*, *In re Picard*, 917 F.3d at 99; *cf. In re Lyondell*, 543 B.R. at 149–51.

[133] *See infra* p. 2192.

[134] 11 U.S.C. § 101(54)(D); *cf., e.g.*, Law v. Siegel, 571 U.S. 415, 421 (2014) ("[I]n exercising [its] . . . powers, a bankruptcy court may not contravene specific statutory provisions.").

[135] Small v. United States, 544 U.S. 385, 388 (2005) (quoting Smith v. United States, 507 U.S. 197, 204 n.5 (1993)).

is routed through a U.S. correspondent bank.[136] Such transfers seem foreign rather than domestic and should be treated as such. The presumption against extraterritoriality "would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in [a] case."[137] A localization rule that embraced all or nearly all international wire transfers would undermine the presumption against extraterritoriality under the guise of implementing it.

Here, the first principle above — respect for the Code's definition of "transfer" — rules out the center-of-gravity approach, or at least the more interesting versions of it. The second and third principles suggest that transfers are "domestic" when made directly or indirectly from U.S. bank accounts.

B. The Center-of-Gravity Approach

Many bankruptcy courts say that a bank transfer is domestic when it has a domestic center of gravity. Approaches differ, but most courts define a transfer's center of gravity based on at least six factors: (1) the domicile and (2) bank-account locations of the transferor; (3) the domicile and (4) bank-account locations of the *transferee*; (5) the purpose of the transfer; and (6) the transfer's broader commercial context.[138] Unfortunately, factors (4) through (6) seem difficult to reconcile with the Bankruptcy Code's definition of "transfer."

A number of center-of-gravity cases lean heavily on a transferee's domicile or bank-account location, as well as a transfer's purpose and commercial context, in fixing a transfer's center of gravity. *Emerald Capital Advisors Corp. v. Bayerische Moteren Werke AG (In re FAH Liquidating Corp.)*,[139] a recent Delaware case, is perhaps the clearest example. In *In re FAH Liquidating*, a U.S. car manufacturer — Fisker Automotive Holdings, Inc. — had entered into a supply contract with BMW in Germany.[140] The contract provided that BMW would produce auto parts for Fisker in Germany in exchange for payment in euros and contained German choice-of-law and choice-of-forum clauses.[141] Fisker then wired BMW twenty-two million euros from its U.S. bank account.[142] After applying the center-of-gravity test, the Bankruptcy

[136] *E.g.*, King v. Exp. Dev. Can. (*In re* Zetta Jet USA, Inc.), 624 B.R. 461, 495–96 (Bankr. C.D. Cal. 2020). For additional detail on the mechanics of wire transfer routing, see, for example, BENJAMIN GEVA, LAW OF ELECTRONIC FUNDS TRANSFERS §§ 4.01–.04 (release no. 29, 2021). *See also* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1394–95 (2018) (describing the "dollar-clearing" process, *id.* at 1394, which causes many foreign wire transfers to be processed through U.S. banks).

[137] Morrison v. Austl. Nat'l Bank Ltd., 561 U.S. 247, 266 (2010).

[138] *See* cases cited *supra* note 117.

[139] 572 B.R. 117 (Bankr. D. Del. 2017).

[140] *Id.* at 121–22.

[141] *Id.* at 124.

[142] *Id.* at 122.

Court for the District of Delaware held that the twenty-two-million-euro wire was foreign rather than domestic.[143] True, the court acknowledged, Fisker's wire "originated in the United States from a Delaware corporation."[144] But the transfer was received by BMW in Germany; it was intended to fund BMW's production of parts in Germany; and it was made pursuant to a contract requiring payment in euros and containing German choice-of-law and choice-of-forum clauses.[145] For these reasons, the court fixed the center of gravity of Fisker's wire in Germany rather than the United States.[146]

None of these facts, however, seem relevant given the Code's definition of "transfer." For starters, a transferee's domicile or the location of his bank account has little to do with where a transferor "disposes of" or "parts with" his property, at least as a matter of ordinary English.[147] After all, a transferor "disposes of" or "parts with" a bank deposit by *sending* funds, not by receiving funds or by causing funds to be received. For example, suppose that *A* attempts to send one million dollars to *B* but that the U.S. government intercepts and seizes the money before *B* receives it.[148] *A* has "parted with" or "disposed of" his funds, but *B* has not received a penny.

Nor does a transfer's purpose relate in any plausible way to the location where a depositor parts with or disposes of his deposits. *In re FAH Liquidating*, for example, suggests that Fisker's twenty-two-million-euro transfer was German rather than American because Fisker sent its wire in order to pay for BMW's German manufacturing.[149] But it does not follow that Fisker disposed of or parted with any property in Germany rather than in the United States. Suppose, by analogy, that BMW had agreed to manufacture cars for Fisker in exchange for a guided tour of Wilmington, Delaware. The tour's purpose, like Fisker's actual transfer, would be to compensate BMW for services rendered in Germany. But the tour itself would occur within the United States, in Wilmington.

Similarly, and finally, a transfer's broader commercial context — say, the presence of a foreign choice-of-law clause in a relevant contract — does not bear on where a debtor disposes of or parts with his assets. In *In re FAH Liquidating*, for example, Fisker had transferred euros under a contract with German choice-of-law and choice-of-forum clauses.[150] These facts, though, have no bearing on where Fisker's transfer itself

[143] *Id.* at 124.
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] 11 U.S.C. § 101(54)(D)(i).
[148] *Cf.* United States v. All Assets Held at Bank Julius, Baer & Co., 251 F. Supp. 3d 82, 95–96 (D.D.C. 2017).
[149] *In re FAH Liquidating*, 572 B.R. at 124.
[150] *Id.*

occurred. Suppose that two Iowans exchange euros in Des Moines after signing a contract with German choice-of-law and choice-of-forum clauses. By no stretch of the imagination does the exchange occur anywhere besides Iowa, euros notwithstanding.

In short, the Code's definition of "transfer" rules out localization rules predicated on the location of a transferee, the purpose of a transfer, or a transfer's broader context. To the extent that the center-of-gravity approach provides otherwise, it is mistaken.

C. Debtors and Bank Accounts

This leaves two final possibilities: a bank transfer might occur at the location of the transferor's bank account or at the transferor's own domicile. Both positions fit within the Code's definition of "transfer," but two practical considerations give the transferor-bank position a very slight advantage.

As a matter of ordinary English, both the transferor-bank and transferor-domicile views seem compatible with the Code's definition of "transfer." A person at least arguably "parts with" or "disposes of" an object in the place where the object is located at the time of its parting or disposal; for example, a Swedish tourist who hands dollars to a hot dog vendor in New York "parts with" cash in New York rather than Sweden. And the common law deems bank deposits to be "located" at a depositor's domicile for some purposes and at the site of the depositor's bank for other purposes.[151] Putting two and two together, a depositor might thereby "part with" his deposits either at his own domicile or at the location of his bank.

That said, the transferor-domicile rule faces two practical problems. First, if a transfer is extraterritorial whenever it originates from a foreign-domiciled entity, then clever debtors could always dodge U.S. avoidance law by operating their businesses through offshore entities.[152] This would leave many creditors with U.S. ties unprotected by the Code's avoidance provisions, particularly since U.S. citizens can easily incorporate in jurisdictions with weak avoidance regimes. For example, imagine that two U.S. citizens choose to operate their U.S. businesses

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[151] Bank deposits are debts owed by a bank to a depositor, Citizens Bank of Md. v. Strumpf, 516 U.S. 16, 21 (1995), and the situs of a debt is sometimes the situs of the debtor and sometimes the situs of the creditor, *see, e.g.*, Severnoe Sec. Corp. v. London & Lancashire Ins. Co., 174 N.E. 299, 300 (N.Y.) (Cardozo, C.J.) (citing cases), *amended by* 175 N.E. 345 (N.Y. 1931). "At the root of the selection" of one or another situs, then–Chief Judge Cardozo observed in *Severnoe*, "is generally a common sense appraisal of the requirements of justice and convenience in particular conditions." 174 N.E. at 300.

[152] *See, e.g.*, *Cayman Islands Offshore Company Formation*, OFFSHORE COMPANYCORP., https://www.offshorecompanycorp.com/company-formation/jurisdiction/cayman-islands [https://perma.cc/Y8DH-ZRXP] (offering to create Cayman Islands LLCs on behalf of American citizens within six days).

through a Cayman Islands LLC. Under a transferor-domicile rule, every bank transfer from this business would fall outside the scope of sections 547 and 548. That result seems surprising, and it would open a significant loophole in the Code's avoidance provisions.

Second, if a transfer is *domestic* whenever it originates from a *U.S.*-domiciled transferor, then U.S. law will apply to many overseas transactions with minimal U.S. ties. That also seems implausible, especially given the Supreme Court's admonition in *Nestlé* that "general corporate activity" in the United States cannot alone make conduct domestic.[153] For example, imagine that a U.S. debtor purchases cocoa beans from a merchant in Côte d'Ivoire using funds from an Ivorian bank account. The United States has *some* reasons to apply its own avoidance law to this transaction, since (for example) the purchase might deplete assets that would otherwise be available to U.S. creditors.[154] But these reasons seem relatively unconvincing, especially since enforcing any U.S. avoidance judgment would require clawing back funds paid to an Ivorian vendor from an Ivorian bank in Côte d'Ivoire.

By comparison, the transferor-bank rule's problems are less acute. First, just as a transferor-domicile rule would permit debtors to sidestep the Code's avoidance provisions by operating in the United States through a foreign entity, a transferor-bank rule would allow debtors to skirt those provisions by holding funds abroad. As a practical matter, however, "holding funds abroad" is not as simple as operating a business via a foreign corporation or LLC. Cross-border payments are inconvenient and expensive, so most U.S. businesses would not want to ask U.S. customers to pay money directly into a foreign bank account.[155] But if a business collects revenue from a U.S. bank account and then sweeps its profits into a separate account abroad, a U.S. bankruptcy court could treat subsequent transfers from the foreign account as having originated in the United States rather than overseas.[156] For example, suppose that

[153] Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1937 (2021).

[154] *See, e.g.*, Jay Lawrence Westbrook, *Avoidance of Pre-bankruptcy Transactions in Multinational Bankruptcy Cases*, 42 TEX. INT'L L.J. 899, 914 (2007) ("The United States has a substantial interest in protecting . . . American creditors of [an] American debtor from [a] fraudulent conveyance.").

[155] *See, e.g.*, COMM. ON PAYMENTS & MKT. INFRASTRUCTURES, BANK FOR INT'L SETTLEMENTS, CROSS-BORDER RETAIL PAYMENTS 3 (2018), https://www.bis.org/cpmi/publ/d173.pdf [https://perma.cc/G3V3-4C7N] ("[C]ross-border retail payments remain slow, costly and opaque . . . ."). By way of comparison, while it is not uncommon for foreign corporations to do business in the United States directly rather than through U.S. subsidiaries, the author of this Note is not aware of any foreign entity that accrues significant U.S. revenues without a U.S. bank account.

[156] *See, e.g.*, Buchwald Cap. Advisors LLC v. JP Morgan Chase Bank, N.A. (*In re* M. Fabrikant & Sons, Inc.), 447 B.R. 170, 186 (Bankr. S.D.N.Y. 2011) ("[U]nder appropriate circumstances, multiple transactions will be collapsed and treated as steps in a single transaction . . . ."), *aff'd*, 480 B.R. 480 (S.D.N.Y. 2012), *aff'd*, 541 F. App'x 55 (2d Cir. 2013); Orr v. Kinderhill Corp., 991 F.2d 31, 35 (2d Cir. 1993) (same and citing cases).

a business collects its sales revenue in a U.S. bank account, transfers the cash to a Cayman Islands bank account, and then pays a dividend to a U.S. shareholder that is fraudulent under U.S. but not Cayman Islands law. A U.S. bankruptcy court would have discretion to "collapse" the U.S. to Caymans to U.S. transaction into a single transfer, starting from the U.S. bank account and ending with the U.S. shareholder.[157] In that case, the transfer would be domestic notwithstanding the presence of an intermediary Cayman Islands bank.

Second, just as a transferor-domicile rule would render overseas transactions by U.S. domiciliaries domestic regardless of their U.S. ties, a transferor-bank rule treats transfers between foreigners as domestic whenever the transferor makes his transfer through a U.S. bank account. The latter consequence, however, is far from unusual. Suppose, to mimic a prior example, that a citizen of Côte d'Ivoire transfers funds from a U.S. bank account to a fellow Ivorian's Ivorian bank account. The transferor's transfer is already subject to U.S. asset-forfeiture rules and to the U.S. wire fraud statute, to offer only two examples.[158] An isomorphic transfer of stock would fall within section 10(b) of the Securities Exchange Act.[159] It would hardly be groundbreaking to add U.S. avoidance law into this mix.

Much more could be said about these issues, and it is not clear that the transferor-bank rule is optimal from a policy perspective. Rather, the point is that a transferor-bank rule is doctrinally and practically plausible — and potentially superior to its principal competitors too.

CONCLUSION

This Note has argued that, for presumption-against-extraterritoriality purposes, sections 547 and 548 of the Bankruptcy Code focus on "transfers" and "obligations" that are made or incurred within the United States. It has also suggested that bank transfers occur within the United States when they originate directly or indirectly from U.S. bank accounts. The latter rule, in particular, seems preferable to its two most prominent alternatives: the center-of-gravity approach and an approach localizing transfers at a debtor's domicile.

These conclusions are necessarily circumscribed. Knowing that bank transfers occur domestically when they originate from U.S. accounts does not much help with transfers of nonmonetary assets, and of course the Bankruptcy Code may well apply extraterritorially after all. Still, many transactions *do* involve the transmission of money from U.S. bank accounts. These transfers seem "domestic" notwithstanding the presumption against extraterritoriality.

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[157] *See, e.g.*, *Orr*, 991 F.2d at 35.

[158] *E.g.*, United States v. Daccarett, 6 F.3d 37, 54 (2d Cir. 1999) (seizure); Pasquantino v. United States, 544 U.S. 349, 371 (2005) (wire fraud).

[159] *See* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 272–73 (2010).