A New Approach to Executory Contracts

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I. Introduction and Summary

Few topics have bedeviled the bankruptcy community as much as the proper treatment of executory contracts under § 365 of the Bankruptcy Code.[1] The case law is "hopelessly convoluted" and a "bramble-filled thicket."[2] While many have struggled in the bootless task of providing coherence to the unwieldy corpus of case law and commentary, all would agree Jay Westbrook has been at the modern vanguard of this Sisyphean task.[3] (I assign Westbrook to the "modern" forefront, thereby relegating Vern Countryman, whose legacy in this domain rightly persists, to the annals of history, choosing as my perhaps arbitrary dividing line the adoption of the 1978 Bankruptcy Code.)[4]

Why have executory contracts proved so nettlesome? Under the Code, a large part of the damage is self-inflicted, resulting from unfortunate drafting that begat an ever-accumulating snowball of confused jurisprudence.[5] But there is also a salience bias (vividness bias, really) at work of disproportionate focus on the striking plight of the contractual counterparty who is aggrieved when a debtor deploys executory-contract rights under § 365—rights that accord the debtor certain powers in dealing with executory contracts otherwise unavailable at state law. (This bias underestimates the baseline unhappiness that bankruptcy inflicts upon all creditors equally and fairly.) Westbrook has relatedly noted that courts in their struggle to do equity under the Code sometimes resist these executory-contract powers.[6] In doing

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1. 11 U.S.C. § 365 (2012).

2. Cohen v. Drexel Burnham Lambert Grp., Inc. (*In re* Drexel Burnham Lambert Grp., Inc.), 138 B.R. 687, 690 (Bankr. S.D.N.Y. 1992) (citations omitted).

3. *See, e.g.*, Jay Lawrence Westbrook, *A Functional Analysis of Executory Contracts*, 74 MINN. L. REV. 227, 239 (1989).

4. 11 U.S.C. § 101 (2012). *See generally* Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 MINN. L. REV. 439, 442–44 (1973) [hereinafter Countryman I] (propounding a seminal test).

5. *See infra* note 21 and accompanying text.

6. Jay Lawrence Westbrook & Kelsi Stayart White, *The Demystification of Contracts in Bankruptcy*, 91 AM. BANKR. L.J. 481, 510–11 (2017) ("The problem with wild cards is that chance—sometimes found under the mask of equity—can favor either player.").

so, they gravitate to the textual restriction of § 365 to "executory" contracts.[7] Skeptical courts frequently conclude that a contract is not "executory"—and therefore cannot fall under § 365—to deny relief that strikes these courts as unseemly. Indeed, a judicial cottage industry in bankruptcy has developed on the definition of "executoriness" and concomitant scope of access to § 365.[8]

Countryman gets first credit for tackling the definitional challenge of what it means for a contract to be "executory" under the prior Bankruptcy Act. His eponymous test for executoriness is well cited in many opinions and is otherwise known as the "material breach" test.[9] Westbrook, albeit with characteristic gentility, upended that doctrinal framework by advocating an abolition of the concept of executoriness from the Code altogether and replacing it by (or subsuming it within) a "functional" analysis focused on debtor economic benefit.[10] His executoriness discussion, started three decades ago, and especially his back-and-forth on the topic with Michael Andrew, is canonical bankruptcy scholarship.[11]

The challenges of defining executoriness persist through today. The recent American Bankruptcy Institute's Commission on the Reform of Chapter 11 tasked a specific Expert Group to examine the Code's treatment of executory contracts.[12] The Group's first recommendation was to abolish the requirement of executoriness as a restriction on § 365.[13] (Yes, Westbrook was front and center on the group.) The Commission, however, stunned the insolvency community by not only rejecting the Group's recommendation, albeit in an apparently divided decision, but doubling down on executoriness:

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7. 11 U.S.C. § 365(a) (2012) (referencing "executory" contracts).

8. *See, e.g.*, AM. BANKR. INST., COMMISSION TO STUDY THE REFORM OF CHAPTER 11, 112 (2014) [hereinafter ABI REPORT] ("[C]ourt[s] on a case-by-case basis determine[] whether a particular contract is executory."); Westbrook & White, *supra* note 6, at 494–95 (noting that "courts continued to expand the application" of multiple executoriness tests "to more and more kinds of contracts").

9. Countryman I, *supra* note 4, at 460.

10. Westbrook, *supra* note 3, at 230.

11. *See generally* Michael T. Andrew, *Executory Contracts in Bankruptcy: Understanding "Rejection"*, 59 U. COLO. L. REV. 845, 849 (1988) [hereinafter Andrew, *Rejection*] (characterizing "the election to 'assume or reject' [as] the election to assume or not assume"); Michael T. Andrew, *Executory Contracts Revisited: A Reply to Professor Westbrook*, 62 U. COLO. L. REV. 1, 3 (1991) [hereinafter Andrew, *Reply to Westbrook*] (noting "contrary views on specific elements of Westbrook's analysis").

12. *See generally* ABI REPORT, *supra* note 8 (outlining "Recommended Principles" for the treatment of executory contracts in bankruptcy).

13. ADVISORY COMM. ON EXECUTORY CONTRACTS AND LEASES, ABI COMMISSION TO STUDY THE REFORM OF CHAPTER 11: EXECUTIVE SUMMARY REGARDING SECTION 365 ISSUES 1 (2013) [hereinafter ABI ADVISORY COMMITTEE] ("The Advisory Committee recommends eliminating the term 'executory' in favor of adopting the Functional Test which allows the trustee or debtor in possession . . . to keep beneficial contracts and reject burdensome ones based solely upon benefit/harm to the estate."), http://commission.abi.org/sites/default/files/ABI-365-Comm-Overview-Summary_(WEST_34307609_3).DOCX [https://perma.cc/2PH7-GCHJ].

it advocated its *retention* in the Code and the *codification* of the Countryman material breach test for definition.[14] In doing so, the Commission noted—without an apparent whiff of irony—that this decision would allow reliance on "well developed" case law.[15] To describe the executory-contracts precedents in bankruptcy as "well developed" (or even "vaguely helpful") skirts credulity.[16] Were the Commission's recommendations in any danger of attracting congressional attention, this linguistic legerdemain might be worrisome, but thankfully the dysfunction of our modern Congress has ridden to the rescue. Thus, the debate over the role (and very definition) of "executoriness" in bankruptcy law has not only been rekindled, but appears to be here to stay.

Acknowledging that the thrust of commentary heeds Westbrook's call to abolish executoriness as a gatekeeper to the § 365 powers,[17] I want to offer a novel approach and argue against that grain. Specifically, in this Article I will suggest not only that the fight should be called off, but that defeat should be conceded. Executoriness, for better or worse (mostly worse), is here to stay in the Code. My resignation may seem like Westbrook heresy, but there is a method to my madness. Here is my key contention: the impulse behind the resistance to the abolition of executoriness, reflected most recently by the ABI Commission's intransigence, is at root a reluctance (perhaps conscious, perhaps not) by elite lawyers to relinquish what they feel is a legal arbitrage opportunity to combat debtor power.[18] Namely, counterparties believe that the doctrinal fluidity of the concept of executoriness allows them wide latitude to argue a contract is executory when such a classification will accord them legal advantage over the debtor but in the next case argue that a similar contract is not executory when that contrary label will accord the leg up.[19] As such, executoriness's confusion and uncertainty is a feature rather than a bug.

Principled commentators like Westbrook decry this sneakiness, bemoaning the deadweight litigation loss. A clear, sensible rule defining executoriness should be established with a defensible normative foundation.

14. ABI REPORT, *supra* note 8, at 112.

15. *Id*. at 112, 115 (describing case law as a "valuable resource").

16. *See* Westbrook & White, *supra* note 6, at 497 ("[T]here was no thorough explanation of the majority recommendation or how it addresses the courts' frustration with executoriness analysis and their divergent conclusions.").

17. As far back as 1997, The National Bankruptcy Review Commission recommended deleting "executory" from § 365 to end the executoriness debates. NAT'L BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 454 (1997).

18. Economically, the ambiguity creates more of an option value than an arbitrage because there are not, of course, two separate markets, but I use arbitrage because I think it better captures the two-facedness of the evil presented.

19. Beyond the scope of this Article is a formal model of the role of risk aversion addressing why lawyers do not equally foresee enjoying the benefits of being the debtor's counsel with the offsetting § 365 power they so fear. Loss aversion is likely interacting with the vividness bias.

Countryman offered one; Westbrook had another.[20] My approach sidesteps this skirmish. Rather than fight on what the definition of executoriness should be in an effort to wipe out the grey zone, my tack is to blunt the arbitrage impulse *ab initio*. The way to do so is by taking seriously how the Code should treat a *non-executory contract*, the presumable residual category of a contract flunking the executoriness test (whatever test is selected). The treatment of non-executory contracts is woefully undertheorized in bankruptcy literature, and so I try to fill this unwelcome void.[21] Indeed, cases where executoriness is litigated simply end after a declaration of non-executoriness without any rigorous working-through of the consequences.[22] This is regrettable. Treating the structure and policies of the Bankruptcy Code holistically, I will try to show what should happen to a non-executory contract in bankruptcy, entirely outside the domain of § 365. My conclusion is that while non-executory contracts may be treated as formally distinct from executory contracts, *their functional outcomes will mimic those of executory contracts by synthetic replication through other Code provisions*. If my analysis holds and non-executory contracts, while different, garner largely similar treatment to executory contracts, then the pernicious opportunity for arbitrage from the executoriness game will collapse.

This Article will proceed as follows. First, it will offer an abbreviated explanation of the treatment of executory contracts under the Code, chronicling the development of the concept of executoriness and the subsequent challenges of its effects. Second, it will explain a new approach that embraces and makes its peace with executoriness by focusing on the proper treatment of non-executory contracts. Third, it will address some of the anticipated counterarguments to the new approach. Finally, it will offer a quick road test to demonstrate how the new approach would have more easily resolved a major litigated precedent in this field.

II. The Problem of Executoriness and the Traditional Approach(es)

A. The Genesis of Executoriness and § 365

1. The Historical Problem of Provability.—Insolvency systems have been wrestling with executory-contract rights for quite some time. For

20. *Compare infra* note 63 and accompanying text (Countryman), *with infra* note 73 and accompanying text (Westbrook).

21. "[O]ne rule that could be considered 'well-settled' is that once a contract has been determined to be 'non-executory,' there are no rules." Westbrook & White, *supra* note 6, at 498. Even Countryman, whose treatment of executory contracts is encyclopedic, at most indirectly intimated at the proper treatment of non-executory contracts. *See id.* at 519 (characterizing charitably Countryman's treatment of the issue as "implicit").

22. *See, e.g.*, *In re* Drake, 136 B.R. 325, 328 (Bankr. D. Mass. 1992) ("[T]he [a]greement cannot be deemed executory."); *see also* Westbrook & White, *supra* note 6, at 499 (collecting cases).

example, the 1898 Bankruptcy Act sometimes respected so-called *ipso facto* clauses that terminate contracts automatically (*ipso facto*) upon the insolvency of a party,[23] an outcome now banned under § 365.[24] But the origin of the problems of modern executory contracts has to do with statutory drafting that addressed a different issue—the now-abolished concept of *provability*. Under the Act, only some financial grievances against an insolvent debtor were "provable,"[25] which functioned as a sort of bankruptcy version of ripeness. Consider, for example, a debtor who ran over someone's foot. The victim might claim money is owing; the debtor–driver might deny liability. If no lawsuit had yet been commenced, let alone concluded with a monetary judgment of a debt owing, then the claim was not *provable* in the debtor's bankruptcy proceeding.[26] This could be a mixed blessing. It was initially bad for the creditors, because they could not participate in the division of the debtor's assets, but it was sometimes good as well, because if the debtor survived after bankruptcy (e.g., the debtor was an individual or a reorganized corporation), then the unprovable claim survived as well, continuing to haunt the debtor post-discharge.[27] But if the debtor were a corporation in liquidation, the provability bar was all bad news for the creditor.

What about contracts? To understand the impact of provability, we first need to understand what trustees did with contracts, and to understand that, we need to understand what they did with leases. As remains the case today, trustees were entitled to all the debtor's property (some would say, "vest in title," some would say, "control as a mere custodian"),[28] but they were also

23. *See, e.g.*, Irving Tr. Co. v. A.W. Perry, Inc., 293 U.S. 307, 311 (1934) (holding enforceable a provision that provided the "filing of the petition in bankruptcy was . . . a breach of the lease"). Even the old cases bristled at this doctrine and so cabined its reach at every turn. *See, e.g.*, Gazlay v. Williams, 210 U.S. 41, 48–49 (1908) (holding the *ipso facto* provision ineffective); *see also* Vern Countryman, *Executory Contracts in Bankruptcy: Part II*, 58 MINN. L. REV. 479, 522 (1974) [hereinafter Countryman II] (noting the old Act's "forfeiture provisions . . . are by their terms confined to leases"). I am leaving aside in this historical discussion the bizarre, now largely buried doctrine of "anticipatory breach" by bankruptcy. *See* Cent. Tr. Co. v. Chi. Auditorium Ass'n, 240 U.S. 581, 592 (1916) ("We conclude that proceedings, whether voluntary or involuntary, resulting in an adjudication of bankruptcy, are the equivalent of an anticipatory breach of an executory agreement.").

24. 11 U.S.C. § 365(e) (2012).

25. *See, e.g.*, Zavelo v. Reeves, 227 U.S. 625, 632 (1913) ("[O]nly provable debts are discharged.").

26. *See, e.g.*, Brown & Adams v. United Button Co., 149 F. 48, 53 (3d Cir. 1906) (holding that a claim for unliquidated damages that results from the injured property of another is not provable in bankruptcy).

27. *See* Countryman I, *supra* note 4, at 443 ("[U]nder § 17a of the Bankruptcy Act only provable debts are discharged.").

28. 11 U.S.C. § 541(a) (2012). While assignees under the Acts vested in the debtor's property outright, equity receivers (who preceded modern reorganizations) merely controlled debtor property as custodians. Quincy, Mo. & Pac. R.R. Co. v. Humphreys, 145 U.S. 82, 97 (1892) ("[The equity

free to abandon uneconomical assets.[29] The abandonment doctrine applied to leases of real property as well.[30] If the debtor had an ongoing ("unexpired") lease that was financially burdensome, the trustee could abandon it. Now, that raised a provability problem, especially when traditional real-property remedies are considered.[31] Under many states' property law, the rent covenant stemmed from the realty itself, and so dispossession terminated the prospective obligation to pay rent.[32] (The separate contractual promise to pay the rent prospectively, which the trustee might have breached by rejecting the lease, was a separate problem.)[33] In other words, while the bankruptcy system could get its head around a claim for unpaid back rent quite well (a debt owing to the creditor/landlord), it struggled with whether a claim for unpaid future rent triggered by the trustee's abandonment of an uneconomical long-term lease was provable, especially when the landlord had possession of the land returned by the debtor's vacating the premises.

Related uncertainty befell contracts. If the debtor were current on any invoices, would abandonment ("rejection") of the contract trigger a provable claim for breach of future expectation loss?[34] Case law initially struggled, much wanting to find that it should.[35] Congress tried to clarify the matter, beginning in 1933, to allow for more widespread provability. Starting with railroad receivership cases in § 77 of the Act (amended two years later), it allowed for a rejection counterparty to be "deemed . . . a creditor . . . to the extent of the actual damage or injury."[36] Section 77 begat 77B (extending the application beyond railroad reorganizations to corporations), which in turn begat Chapter X in 1938's Chandler Act's more general corporate reorganization "chapter" provisions.[37]

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receivers] were ministerial officers, . . . mere custodians.").

29. *See* Am. File Co. v. Garrett, 110 U.S. 288, 295 (1884) (recognizing the principle based on historical English practice).

30. *See, e.g.*, *Quincy, Mo.*, 145 U.S. at 102 (applying the abandonment doctrine to a long-term lease).

31. The provability problem extended to leases of personalty as well. *See* Countryman I, *supra* note 4, at 449–50 n.50 (collecting cases).

32. *E.g.*, William Filene's Sons Co. v. Weed, 245 U.S. 597, 601 (1918) ("Rent issues from the land.").

33. *See* Miller v. Irving Tr. Co., 296 U.S. 256, 258 (1935) ("Under the clause in question, it was, at the time the petition in bankruptcy was filed, uncertain, a mere matter of speculation, whether any liability ever would arise under it.").

34. The older Acts were more forgiving of contract provability than "pure tort." For example., § 63a(8) allowed for provability of "contingent contractual liabilities," but not tort claims, Schall v. Comers, 251 U.S. 239, 248–49, 253 (1920), absent reduction to judgment (or implied assumpsit), Davis v. Aetna Acceptance Co., 293 U.S. 328, 331 (1934).

35. *See, e.g.*, Irving Tr. Co. v. A.W. Perry, Inc., 293 U.S. 307, 310–11 (1934) (holding an *ipso facto* clause effective to terminate a lease and trigger a provable claim).

36. Bankruptcy Act, ch. 774, § 77, 49 Stat. 911, 914 (1935); *see also* Bankruptcy Act, ch. 204, § 77, 47 Stat. 1467, 1474 (1933) (allowing creditors of a railroad to file a petition).

37. Bankruptcy Act, ch. 424, § 77B, 48 Stat. 911, 915 (1934) (including "claims under

Similarly, in the liquidation context, 1934 amendments to the Act's § 63a(7) allowed for "claims for damages respecting *executory contracts* including future rents," which was rewritten in the Chandler Act for "claims for anticipatory breach of contracts, *executory in whole or in part*, including unexpired leases of real or personal property."[38] These amendments also resolved what was implicit from the abandonment doctrine: that the trustee could never be forced to take unwanted property; it was the trustee's election whether to assume or reject an unexpired lease,[39] and so Congress provided that *affirmative acknowledgment* was required to assume a lease, with the default in liquidation being deemed rejection after a period of time. Specifically, "[w]ithin sixty days after the adjudication, the trustee shall assume or reject any executory contract, including unexpired leases of real property. . . . Any such contract or lease not assumed or rejected within such time . . . shall be deemed to be rejected."[40] This explicit treatment of lease claims under § 63a(7) and contract claims under § 63a(9), albeit with slightly different language, solved the provability conundrum of postpetition repudiation ("rejection") damages for these unfinished transactions; they were henceforth all provable claims. This statutory introduction of the term "executory" made sense, of course, because only if a contract is *executory* (i.e., not completely "executed") can there be a claim for anticipatory repudiation upon the trustee's disclamation.[41] If the contract is fully performed, by contrast, there are no future obligations over which to fight about provability, only unpaid matured debts to be filed as claims.[42] Similarly, a lease needs to be *unexpired* for there to be a potential breach claim for unpaid future rents. An expired lease may have some back rent owing but again raises no provability issues; fully concluded transactions are unremarkable for provability. Thus, "executory" entered the U.S. bankruptcy

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executory contracts, whether or not such claims would otherwise constitute provable claims under this Act").

38. Bankruptcy Act, ch. 424, § 63a(7), 48 Stat. 911, 924 (1934) (emphasis added); Bankruptcy Act, ch. 575, § 63a(9), 52 Stat. 840, 873 (1938) (emphasis added).

39. *See* United States Tr. Co. v. Wabash W. Ry. Co., 150 U.S. 287, 299–300 (1893) ("The general rule . . . is undisputed that an assignee or receiver is not bound to adopt the contracts, accept the leases, or otherwise step into the shoes of his assignor, if in his opinion it would be unprofitable or undesirable to do so; and he is entitled to a reasonable time to elect whether to adopt or repudiate such contracts.").

40. Bankruptcy Act, ch. 575, § 70b, 52 Stat. 840, 880–81 (1938). Countryman chronicles how the judicially created doctrine of abandonment carried forth the English practice that "[i]t has long been a recognized principle of the bankrupt [sic] laws that the assignees were not bound to accept property of an onerous or unprofitable character." Countryman I, *supra* note 4, at 440 (quoting Am. File Co. v. Garrett, 110 U.S. 288, 295 (1884)).

41. *See* Andrew, *Reply to Westbrook*, *supra* note 11, at 34 n.155 (noting that under the equivalent U.K. Insolvency Act, a trustee may "disclaim" "any unprofitable contract," which has the effect of its exclusion from the estate) (citations omitted).

42. 11 U.S.C. § 502 (2012).

statutory lexicon through these Depression-era provisions that were designed to clarify the provability status of claims for unfulfilled future obligations triggered by a bankruptcy trustee's abandonment of financial detritus.

2. Provability's Solution and the Introduction of Executoriness (and § 365).—As part of Congress's bankruptcy overhaul resulting in the 1978 Code, the concept of provability was finally abolished with a wide definition of "claim" that covered all conceivable monetary obligations, such as contingent, unmatured, and unliquidated claims, like the tort cause of action above.[43] Everything was now a "claim" and hence both provable and dischargeable in a bankruptcy proceeding (no more haunting the discharged debtor with the financial sins of the past). With everything becoming provable, the very need for that term was eliminated.[44] Congress's intent in so doing was to corral every possible financial beef with a debtor into one forum and compel resolution with comprehensive finality.[45] This neater solution was widely praised and, had Congress just thought of it back in 1938, would have obviated the requirement for § 63a and the language of "executory" contracts.[46] Congress also consolidated the prior Chandler Act provisions into § 365, which now covers the estate's treatment of executory contracts and unexpired leases.[47] Section 365(a) provides: "[T]he trustee, subject to the court's approval, may assume or reject any *executory contract* or unexpired lease of the debtor."[48]

Note that § 365(a) codified the court's oversight role in the assumption

43. *Id.* § 101(5); H.R. REP. NO. 95-595, at 180 (1977) ("H.R. 8200[, the Bankruptcy Code,] abolishes the concept of provability in bankruptcy cases."). (Source text is entirely capitalized.).

44. Well, nearly everything. A painful strand of cases has emerged finding that executory contracts (usually leases) neither assumed nor rejected in a chapter 11 simply "ride through," saddling the debtor with an ongoing lease and the counterparty with an unprovable claim. *E.g.*, *In re* Bos. Post Rd. Ltd. P'ship, 21 F.3d 477, 484 (2d Cir. 1994) ("A debtor in Chapter 11 must either assume or reject its leases with third parties . . . . If the debtor does neither, the leases continue in effect and the lessees have no provable claim against the bankruptcy estate.").

45. *See* H.R. REP. NO. 95-595, at 309 ("By this broadest possible definition [of claim] . . . the Bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case.") (Source text is entirely capitalized.); S. REP. NO. 95-989, at 21–22 (1978) (using the same language); H.R. DOC. NO. 93-137, pt. 2, at 154–55 nn.1–5 (1973) (containing the proposed text).

46. *See, e.g.*, Westbrook & White, *supra* note 6, at 494 (describing the "Code['s] eliminat[ion of] the concept of 'provability'" as an "important change"); *see also In re* M.A.S. Realty Corp., 318 B.R. 234, 237 (Bankr. D. Mass. 2004) (describing the revision that eliminated provability as "a distinction of critical importance"); Cohen v. Drexel Burnham Lambert Grp., Inc. (*In re* Drexel Burnham Lambert Grp., Inc.), 138 B.R. 687, 706–07 (Bankr. S.D.N.Y. 1992) (describing the Code's abolishment of provability as a "structural innovation[]").

47. *See* Westbrook & White, *supra* note 6, at 492 ("These [statutory] origins are important because they reveal that Congress intended the statutory predecessor to section 365 to ensure that counterparties holding rejected contracts, including leases, would be paid and discharged.").

48. 11 U.S.C. § 365(a) (2012) (emphasis added).

or rejection of contracts, too, which in turn spawned jurisprudence over the standard by which the court ought to assess the debtor's decision (with a majority approach settling on a business judgment rule level of deference).[49] But even more important than § 365(a) was the power conferred on trustees and debtors under § 365(b). Unhelpfully phrased as a *restriction* on assumption, § 365(b)'s true import is to confer a *power* upon the debtor to cure contractual defaults.

> If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—(A) cures, or provides adequate assurance that the trustee will promptly cure, such default.[50]

This flex of preemptive federal law trumps general state contract law, because a material breach of contract ordinarily allows the aggrieved counterparty the self-help remedy of termination.[51] Section 365(b) overrides this and says notwithstanding the (material) breach of an executory contract, if the breach is cured pursuant to § 365(b), the debtor in federal bankruptcy may assume the contract and carry on under its benefits. The counterparty's self-help remedy of termination is scuttled.[52] This cure-and-assume power irritates contractual counterparties tremendously, of course, because the contracts those parties most want to terminate are bad deals that they made, which are by zero-sum game reasoning precisely the sorts of good deals that the debtor/trustee is anxious to assume. But for § 365(b), the debtor would be unable to do this in the face of a material breach at common law. Counterparties equally hate a debtor's rejection of an executory contract containing a good deal for the counterparty by the same logic.

Section 365's power is even worse for the counterparty, because it cannot even be "contracted around." For example, the parties' decision to say that a filing for bankruptcy *ipso facto* terminates the contract is explicitly invalidated.[53] And even seemingly *impossible-to-cure* breaches are, in some contexts, excused under § 365.[54] In sum, § 365 provides a powerful arrow in the debtor's quiver, according the debtor the option to "reshape" the

49. Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc. (*In re* Richmond Metal Finishers, Inc.), 756 F.2d 1043, 1046 (4th Cir. 1985) ("[The] question [of acceptance or rejection] must start with . . . deference mandated by the sound business judgment rule . . . .").

50. 11 U.S.C. § 365(b)(1) (2012).

51. 1 RESTATEMENT (SECOND) OF CONTRACTS § 237 (AM. LAW INST. 1981).

52. *See, e.g.*, *In re* Circle K Corp., 190 B.R. 370, 376 (B.A.P. 9th Cir. 1995) (noting how § 365(b) overruled such pre-Code cases as *In re Schokbeton Indus., Inc.*, 466 F.2d 171 (5th Cir. 1972), which held that breach precludes assumption and bankruptcy accords no power to cure).

53. 11 U.S.C. § 365(e)(1) (2012).

54. *Id.* § 365(b)(1)(A) (rescuing certain lease defaults).

bankruptcy estate with an option to assume valuable contractual rights,[55] either for performance by the debtor itself or for assignment to a third party for a price, notwithstanding the existence of a breach.[56]

B. Executoriness as a Restraint on § 365: The Creation of New Problems

Counterparty hostility to § 365 drives the annals of case law of litigants seeking to avoid its reach. And the key to their stratagem is textual seizure upon the statutory qualifier that only "executory" contracts are subject to § 365 and all her debtor powers. Aggrieved counterparties often insist that the debtor's contract is not an executory contract and hence cannot "enter" § 365. Important for explaining the chaotic case law in this area, the litigious counterparties are what might be called "equal opportunity executoriness critics." When the debtor had a good contract (and hence a bad one for the counterparty) it sought to assume, the counterparty would claim the contract was not executory and, therefore, could not avail itself of the cure and assumption powers of § 365.[57] But in cases in which the contract was burdensome for the debtor (and hence good for the counterparty), the counterparty would then argue that the contract was not executory and, therefore, could not be rejected.[58] Note the bizarre logic under this reasoning, as some courts blithely pronounced: if "the contract is not executory, . . . [it is] neither assumable nor capable of rejection."[59] A contract that neither can be assumed nor rejected creates an existential legal crisis, which some have described as "zombie" contracts that leave the debtor in a "legal limbo."[60] Many a court caught in the middle of an executoriness fight would make the initial decision, whether the contract was indeed executory or not, and then

55. ELIZABETH WARREN, JAY LAWRENCE WESTBROOK, KATHERINE PORTER & JOHN A.E. POTTOW, THE LAW OF DEBTORS AND CREDITORS 453–54 (7th ed. 2014).

56. Lest the uninitiated reader worry Congress went wild with § 365, she should be assuaged by the provisions that incorporate common law bars on assignment, such as an inability to assign "personal" contracts. *See* 11 U.S.C. § 365(c)(1) (2012).

57. Post v. Sigel & Co., Ltd. (*In re* Sigel & Co., Ltd.), 923 F.2d 142, 145–46 (9th Cir. 1991) (rejecting counterparty's argument that contract's non-executoriness precluded debtor assumption under § 365).

58. *E.g.*, Lycoming Engines v. Superior Air Parts, Inc. (*In re* Superior Air Parts), 486 B.R. 728, 738 (Bankr. N.D. Tex. 2012) ("[W]hen a contract is non-executory, the debtor remains bound to its obligations."); *In re* Spectrum Info. Techs., Inc., 193 B.R. 400, 403 (Bankr. E.D.N.Y. 1996) (noting creditor's objection that the "[a]greement is not an 'executory contract' . . . and, therefore, not subject to rejection").

59. *In re* Hawker Beechcraft, Inc., 486 B.R. 264, 276 (Bankr. S.D.N.Y. 2013). These cases are legion: "This Court has already ruled that the Settlement Agreement is not executory, and therefore the Debtor could not reject it. Likewise, since it is not an executory contract, the Debtor cannot assume it." *In re* Airwest Int'l, Inc., No. 86–00145, 1988 WL 113101, at *3 (Bankr. D. Haw. Oct. 12, 1988).

60. *See* Westbrook & White, *supra* note 6, at 482 ("We propose an end to zombie contracts and the obsolete notions that keep them upright by abolishing the 'material breach' rule."); Westbrook, *supra* note 3, at 239.

simply hide from the consequence of a finding of non-executoriness, presumably hoping the parties would just sort out amongst themselves what to do next in this limbo.[61] Court after court, right up to the circuit level, has continued to struggle.[62] And debtors, too, flounder over just what they can do in a world of uncertain executoriness.[63]

"Executoriness," a little textual throwaway from the Chandler Act era's amendments clarifying archaic provability issues, has now become the hook of one of bankruptcy law's most intractable (and pointless) sources of jurisprudential confusion—What is an "executory" contract in bankruptcy that the debtor can subject to § 365?[64]

C. Traditional Responses to Executoriness's Problems

1. Defining Executoriness: Countryman and the Material Breach Test.—This brings us back to Vern Countryman. Neither the Act nor the Code defined "executory," perhaps thinking it too obvious.[65] An important academic figure in the development of the 1978 Bankruptcy Code, Countryman propounded a widespread test that now bears his name for whether a contract is executory. Under Countryman's definition, a contract is executory if both parties have sufficient unperformed obligations so that either's discontinuance would constitute a material breach, hence the label "material breach" test.[66] Courts loved the test's seeming simplicity, although only a few openly recognized that it just pushed litigation onto the "materiality" prong.[67]

The material breach test does indeed work well for many simple

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61. *E.g.*, *In re* Interstate Bakeries Corp., 751 F.3d 955, 964 (8th Cir. 2014) (limiting itself to declaration of non-executoriness); *In re* S.A. Holding Co., LLC, 357 B.R. 51, 59 (Bankr. D.N.J. 2006) (same).

62. "Because § 365 applies only to executory contracts, a debtor-in-possession does not have the option of rejecting or assuming non-executory contracts and remains bound by the debtor's obligations under those contracts after the bankruptcy filing." Stewart Foods, Inc. v. Broecker (*In re* Stewart Foods, Inc.), 64 F.3d 141, 145 (4th Cir. 1995) (noting elsewhere in its opinion that the consequence of deemed continuation is the same as assumption).

63. *E.g.*, *In re* Sudbury, Inc., 153 B.R. 776, 776 (Bankr. N.D. Ohio 1993) (seeking to avoid unwelcome contract by arguing in the alternative *either* it was executory and would be rejected *or* it was non-executory and therefore incapable of assumption).

64. An interesting, but ultimately unhelpful, Supreme Court foray into this riddle is *Central Tablet Mfg. Co. v. United States*, 417 U.S. 673 (1974), which attempted to distinguish "executory" from "executed." *Id.* at 684–85, n.7.

65. In the adoption of the Code in 1978, Congress candidly admitted it had no definition of "executory." H.R. REP. NO. 95-595, at 347 (1977) ("Though there is no precise definition of what contracts are executory, it generally includes contracts on which performance remains due to some extent on both sides.") (Source text is entirely capitalized.).

66. Countryman I, *supra* note 4, at 460.

67. *See* Chattanooga Mem'l Park v. Still (*In re* Jolly), 547 F.2d 349, 350–51 (6th Cir. 1978) (noting that material breach test does "not resolve this [executoriness] problem"). The zenith of

contracts, but problems arise with more nuanced arrangements. Take, for example, option contracts, where the debtor merely holds a valuable option to purchase Blackacre for a favorable price. Lacking an obligation ever to exercise the option, the debtor could scarcely be said to commit a "material breach" (or any breach) should she decline to exercise it. Under the Countryman test, this option contract would not be executory and hence could not fall under § 365 with its power to assume.[68] Counterparty–optioners who made bad deals were quick to make this argument in their debtor's bankruptcy cases, convincing courts accepting the Countryman test that the debtor simply *could not assume the option* as it could not fall under § 365(a).[69] Other problematic examples abound, including the chimerical rights hanging over a departed employee with a noncompete clause in her (erstwhile) employment contract. Clearly the employer had no remaining obligations that could be materially breached, even though the employee clearly did. The Countryman test said the noncompete was no longer an executory contract, and thus the debtor *could not reject it* under § 365, meaning the debtor–employee remained somehow permanently saddled with a de facto nondischargeable obligation.[70] And so on. Indeed, courts often resorted to "analytical gymnast[ics]" to find contracts executory (or not) in order to bring them under (or outside) § 365's scope to achieve just results.[71]

2. Backlash: Westbrook's Call for Abolition.—The seminal scholar to confront the problems of the executoriness doctrine and the Countryman test was Westbrook, who advocated the simplest solution: abolishing the

confusion over "materiality" of remaining obligations—and hence the make-or-break point on executoriness—likely arises in the intellectual property cases with licensing agreements. Westbrook and White assemble a considerable footnote showing the demoralizing conflict in case law over materiality in this domain. *See* Westbrook & White, *supra* note 6, at 508 n.141, 504 n.125.

68. *E.g.*, Travelodge Int'l, Inc. v. Cont'l Props., Inc. (*In re* Cont'l Props., Inc.), 15 B.R. 732, 736 (Bankr. D. Haw. 1981) ("Since the Agreement is an option contract and not an executory contract, it cannot be assumed.").

69. *E.g.*, Intermet Realty P'ship v. First Pa. Bank (*In re* Intermet Realty P'ship), 26 B.R. 383, 388 (Bankr. E.D. Pa. 1983) ("There is no interest which could be termed an executory contract and assumed by the debtor.").

70. *See, e.g.*, *In re* Spooner, No. 11-31525, 2012 WL 909515, at *3 (Bankr. N.D. Ohio Mar. 16, 2012) (finding a noncompete contract not executory and hence un-rejectable).

71. Bronner v. Chenoweth-Massie P'ship (*In re* Nat'l Fin. Realty Tr.), 226 B.R. 586, 589 (Bankr. W.D. Ky. 1998). *Compare In re* Ichiban, Case No. 06-10316-RGM, 2014 WL 2937088, at *1–2 (Bankr. E.D. Va. June 30, 2014) (finding that seemingly trivial notice and appraisal provisions, while contingent, are sufficiently material for remaining ongoing obligations to render LLC agreement executory), *with In re* Knowles, No. 6:11-bk-11717-KSJ, 2013 WL 152434, at *4 (Bankr. M.D. Fla. Jan. 15, 2013) (contending that similar provisions are too remote to be material remaining obligations and so contract is non-executory). In *In re Drake*, 136 B.R. 325, 325 (Bankr. D. Mass. 1992), the trustee argued in the alternative that the employee–debtor's noncompete agreement was *either* non-executory and, therefore, could not be rejected *or* executory and, therefore, could be assumed and assigned!

executoriness requirement altogether and refocusing attention on the § 365(a) question whether the debtor's business decision to assume or reject a contract should survive judicial scrutiny.[72] For what one assumes was branding purposes, Westbrook felt compelled to style his abolitionist argument a "functionalist" approach to defining executoriness, even going so far as suggesting courts could fit his approach into existing case law.[73] More specifically, Westbrook initially said the test of whether a contract is executory is whether there is an economic benefit to assuming or rejecting it for the estate.[74] He then clarified in subsequent writing that the assumed precondition of the definition of executory is the historical common law definition—i.e., whether there was literally any performance, by any party, anywhere, left under the contract that still had to be done.[75] Stripped bare, Westbrook's position was not really an *interpretation* of executoriness at all; it was a compelling normative argument to purge the executoriness requirement.[76] Some courts bit,[77] but for many, it was a bridge too far.[78]

3. Doubling Down: The ABI Commission's Retrenchment.—Despite some enthusiastic takers, Westbrook's alternative never gained the traction of the Countryman test. True, the recent ABI Commission's Expert Group right out of the gates took Westbrook's abolitionist argument as its first recommendation for improvements to the Code on the topic of executory contracts.[79] The Commission, however, rejected this suggestion, preferring instead the "well developed" case law on executoriness, because it provides guidance to parties and courts.[80] In fact, the Commission recommended codifying the Countryman test into law, cheerfully burying the vexing questions of options, noncompetes, and other difficult contract cases into an

72. Westbrook, *supra* note 3, at 230 (advocating "abolishing the requirement of executoriness altogether").

73. *See id.* at 327 ("[T]he functional approach fits neatly within the existing structure and the detailed provisions of the Code.").

74. *Id*. at 253 (delineating "Net Value" calculus in bankruptcy).

75. 1 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1:19 (4th ed. 2007) (observing that courts identify an executory contract as "a contract, the obligation of which relates to the future, or a contract under which the parties have bound themselves to future activity that is not yet completed or performed.").

76. He eventually came clean. Westbrook & White, *supra* note 6, at 484 n.16 ("Functional Analysis was not an approach to determining executoriness, but a proposal to abandon executoriness all together as a threshold test.").

77. *See, e.g.*, *In re* Bayou Shores SNF, LLC, 525 B.R. 160, 168 (Bankr. M.D. Fla. 2014) (finding the contract executory under the functional approach and Countryman test).

78. *See, e.g.*, Butler v. Resident Care Innovation Corp., 241 B.R. 37, 44 (D.R.I. 1999) (criticizing functional analysis as "ignor[ing] the statutory mandate that the contract be executory").

79. *See* ABI ADVISORY COMMITTEE, *supra* note 13.

80. *See* ABI REPORT, *supra* note 8.

encyclopedic footnote to its report,[81] vying for the 2014 Understatement of the Year Award in admitting that courts "struggled" and the test produced inconsistencies.[82] But the decision was not just motivated by pedigree. Lying just beneath, or even at the surface, was a naked distributive concern: that § 365 accords too much power to the debtor, and so the executoriness wrinkle serves a "gating feature" function that allows some counterparties to win arguments on executoriness grounds that prevent a debtor from gaining access to § 365 and taking action that the counterparty dreads.[83]

Even leaving aside the vividness bias of the Commission's concern—focusing on the highly visible plight of the counterparty succumbing to the debtor's power under § 365 to the ignorance of the more diffuse benefit to all other stakeholders of the estate aided by that debtor's adroit treatment of a contract—the primary objection to the retention of executoriness as a "gating" valve is that the concept lacks normative coherence or principle. (Westbrook himself witheringly agrees.)[84] Similar gatekeeping could arise by saying the judge gets to flip a coin and each time it's heads the debtor can't use § 365. That, too, would reduce the power of the debtor, but not in a way that any well-designed legal system would consider tolerable. A principled way to reduce debtor leverage would be to accord greater discretion to the judge under § 365(a), perhaps tacking on an ability to deny rejection or assumption if it would be inequitable under the circumstances, but that's a topic for another day.[85] Nonetheless, the Commission has doubled down on executoriness, suggesting it should stay in the Code as a beacon for litigious contractual counterparties.[86]

III. A Better Approach to Executoriness: Taking Non-Executoriness Seriously

A. Sharpening the Debate

To find a way out of this mess, we need a new approach. Let us consider the two archetypal contracts for which the debtor is likely to face an executoriness challenge. As mnemonic, we can use aviary labels: first, the unwanted "albatross" that the debtor wants to drop like a hot potato but the counterparty seeks to cast as non-executory, hoping that doing so will stymie

81. *Id.* at 113 n.416.

82. *Id.*

83. *Id.* at 115 (bemoaning the "unfair[ness]" abolition of executoriness would visit on counterparties).

84. The Commission retained executoriness as a safety valve on debtor abuse "at the sacrifice of logic and, more importantly, predictable commercial results." Westbrook & White, *supra* note 6, at 486–87.

85. Westbrook and White would seem to agree. *Id.* at 486.

86. ABI REPORT, *supra* note 8, at 114 (noting litigation experience of some ABI Commissioners).

the debtor's rejection efforts by barring access to § 365 (and its rejection powers); and second, the coveted "golden goose" that the debtor is desperate to keep but the counterparty also seeks to cast as non-executory to similarly stymie the debtor's assumption by foreclosing § 365 (and its assumption powers). Think of a hot realty option to scoop up Blackacre for a song: it's a golden goose for the option holder; it's an albatross for the option granter.

1. The Easy Case: The Non-Executory Golden Goose (Without Default).—Let's start with the golden goose contract that the debtor wishes to keep, which, for even further simplicity, we'll assume is not in default. Suppose the counterparty challenges executoriness. If the debtor wins on the executoriness argument, the contract is assumed under § 365. If the debtor loses, the contract cannot be assumed under § 365. But what does that mean? The non-executory contract is still property—best thought of as a chose in action to sue for the debtor's rights under the contract.[87] More accurately, it is hybrid property conjoining the debtor's right to enforce the contract benefits with the deleterious obligations to perform that the counterparty can translate into a claim if breached under § 502.[88] Thus, formally, the contract-qua-hybrid property passes to the estate under § 541's capacious reach to "all legal or equitable interests of the debtor in property."[89] This allows the debtor to enjoy its economic benefit as property of the estate.[90] All this is done irrespective of § 365. Thus, at least in the absence of default, whether the contract is executory or not has no effect on the debtor's exploitation of the economic rights; § 365, and *a fortiori* "executoriness," is irrelevant.[91]

2. The Harder Case: The Non-Executory Albatross.—The albatross is where things start to get complicated. If the debtor wants to reject an unwanted contract, but the counterparty launches an executoriness challenge, the debtor faces more of a hurdle. Again, if the debtor wins, no problem and the contract is rejected under § 365(a). But if the counterparty succeeds in arguing the contract is non-executory and hence cannot be rejected under § 365, what happens? In a thoughtful historical discussion, Michael Andrew noted that under prior American and English practice, the undesirable

87. The Act provided for "rights of action arising upon contracts," 30 Stat. 565 (1898), *amended by* 66 Stat. 429 (1952), 11 U.S.C. § 110(a)(5) (1958), and "property, including rights of action," *id.*, as property of the estate.

88. Technically, the acceleration of all claims, 11 U.S.C. § 101(5) (2012), means that the liabilities crystallize as well so as to permit comprehensive discharge. But that is of no moment when the debtor wishes to assume.

89. *Id.* § 541(a)(1).

90. Countryman indirectly accepted this reasoning. Countryman I, *supra* note 4, at 458–59.

91. *See, e.g.*, Warner v. Warner (*In re* Warner), 480 B.R. 641, 652, 655 (Bankr. N.D.W. Va. 2012) (LLC agreement that was not executory still entered the bankruptcy estate under § 541); Ehmann v. Fiesta Inv., LLC (*In re* Ehmann), 319 B.R. 200, 206 (Bankr. D. Ariz. 2005) (same).

contract never entered into the bankruptcy estate in the first place—it was "excluded," because unless and until a receiver or an assignee accepted debtor property under the Act, the historical abandonment doctrine left the estate unscathed.[92] Whatever the historical accuracy of his argument (and it does appear accurate),[93] Andrew's "exclusionary" approach now seems outdated given the 1978 Code's intentional inclusivity through the expanded definition of claim, where *everything* is included in the estate to enable comprehensive resolution of financial distress.

Many courts struggle with the non-executory albatross, assuming that it nevertheless persists if it is unable to be rejected under § 365(a).[94] Yet a contract is still a contract, and even if it cannot be rejected under § 365, it can still be repudiated. Moreover, bankruptcy courts do not generally order specific performance against the trustee (due to the innocence of the other creditors from the debtor's prior acts).[95] Thus, for most contracts, the only real remedy for the counterparty from debtor repudiation is a breach claim for damages.[96]

Now, under formal rejection of an executory contract via § 365, the Code specifies that the counterparty has a provable unsecured damages claim relating back to the petition date.[97] But if the contract is non-executory and the debtor wants to repudiate, courts become flummoxed, most apparently implying (hoping?) that the debtor has to perform.[98] Andrew, of course, solves this problem by having the albatross never enter the estate in the first

92. *See* Andrew, *Rejection*, *supra* note 11, at 881 (noting that courts "excluded 'executory' contract and lease assets from the bankruptcy estate . . . absent an election by the trustee to accept them").

93. *E.g.*, Copeland v. Stephens (1818), 106 Eng. Rep. 218, 222 (KB) (holding title to leases and contracts does not pass to estate unless "accepted").

94. *E.g.*, *In re* Capital Acquisitions & Mgmt. Corp., 341 B.R. 632, 637 (Bankr. N.D. Ill. 2006) (finding LLC operating agreement non-executory and thus "enforceable" in bankruptcy).

95. *See, e.g.*, *In re* Pina, 363 B.R. 314, 333–35 (Bankr. D. Mass. 2007) (refusing to enforce prepetition injunctive judgment where it would harm unsecured creditors by diminishing size of bankruptcy estate); ABI REPORT, *supra* note 8, at 119 ("[R]ejection of an executory contract or unexpired lease should not . . . entitle the nonbreaching, nondebtor party to a right of specific performance.").

96. For simplicity, this Article will assume all breach claims are reducible to damages to avoid the sidebar of can-be-compelled-to-accept-monetary-judgment issues. 11 U.S.C. § 101(5)(B) (2012). Critically for bankruptcy, these damages will never be compensatory for the counterparty if paid with the general unsecured dividend. Thus, in an idealized contract world of frictionless damages awards, a counterparty would be economically indifferent to performance or breach-remedied-by-full-expectation damages. Not so in bankruptcy, where any damage award (absent priority) will be paid out for pennies on the dollar. Westbrook, *supra* note 3, at 253 (labeling, one feels gleefully, the discounted bankruptcy dividend as "little tiny Bankruptcy Dollars").

97. 11 U.S.C. § 365(g)(1) (2012).

98. *E.g.*, *In re* KBAR, Inc., 96 B.R. 158, 159–60 (Bankr. C.D. Ill. 1988) (holding Hardee's franchise agreement to be no longer executory and hence its covenants could not be rejected in bankruptcy but rather remained in full force).

place and so not be a problem for the trustee (but then presumably also being not provable, taking us back to the unhappy, old days). Yet, there is a plausible argument that cannot be ignored: if the debtor demurs performance of such a contract, the breach claim becomes an administrative charge against the estate *entitled to priority repayment*.[99]

The argument for priority status of a non-executory contract's abandonment damages goes something like this. Everyone agrees that if the debtor assumes an executory contract under § 365 and then subsequently breaches, the breach damages are administrative expenses of running the estate; that's in the Code.[100] Just as the trustee has to pay utility bills postpetition, if the trustee enters into a contract postpetition, so too does that business expense become a cost of running the estate that is entitled to administrative priority.[101] An assumed executory contract is no different from a new contract entered into postpetition: it's a cost of running the show that the trustee willingly incurs on the calculus that the benefits outweigh the burdens (the same way most trustees find paying the electric bill worth it to keep the lights on).

Following my formalism on the golden goose above, however, if the contract is somehow non-executory, it still has to go somewhere, under the doctrine of Conservation of Contractual Mass. It must, therefore, enter the estate under § 541 automatically. Thus, the trustee must dispose of it as *estate property* to get rid of it (in this case, repudiate the contract and give rise to a concomitant breach claim). Since this abandonment occurs postpetition, it must be another cost of running the estate (think of it as paying the garbage collector to haul off unwanted debris). Ergo, the breach damages are also an administrative expense, just as with an executory contract the trustee assumes but later breaches.[102] The only difference here from § 365 is that this de facto assumption prior to rejection is purely involuntary and never approved by the bankruptcy court.[103] This prospect of favored priority helps explain why a counterparty to an albatross seeks a declaration of non-executoriness. The first best position, of course, is to trick the court into thinking that exclusion from § 365 simply ends the discussion and the debtor is just out of luck and must go on performing forever; but the nearly as attractive fallback position

99. *See* 11 U.S.C. § 507(a)(2) (2012) (priority repayment status for administrative claims); *id.* § 365(g)(2) (conferring administrative status on post-assumption breach claims).

100. *Id.* § 365(g)(2).

101. *Id.* § 503(b)(1).

102. The counterparty tried this tack in *In re Airwest Int'l, Inc.*, No. 86–00145, 1988 WL 113101 (Bankr. D. Haw. Oct. 12, 1988), but the court held it was "premature" to adjudicate the priority claim pending assessment whether postpetition conduct by the debtor was tortious. *Id.* at *3.

103. *Compare* 11 U.S.C. § 541(a)(1) (no approval required for automatic vesting of the estate with all the debtor's property), *with id.* § 365(a) (requiring court approval for assumption).

is to say that if such a non-executory contract is rejected, the breach damages must be treated as administrative claims entitled to first priority payout.[104]

3. The Hardest Case: Non-Executory Golden Goose (with Default).—Finally, let us return to the golden goose, which we discovered is easy for the debtor to retain when we assume the absence of default. But if we relax that assumption and put the debtor in default, then we see the incentive to fight over executoriness. The power to cure defaults effectively neutralizes the state law contract rights of the counterparty to respond to a material breach with the self-help remedy of termination by forcing the counterparty to accept the debtor's cure and keep the contract alive.[105] This allows, by federal preemptive power of the Code, a debtor to resurrect a slain golden goose (or more precisely, resuscitate a mortally wounded one). If the contract is non-executory, however, and simply sitting in the debtor's lap under § 541, then unless we find a power elsewhere in the Code, there is *no cure power of § 365(b)* to preserve that contract's innate value to the debtor. Thus, we can encapsulate the golden goose problem as one of no express power to cure. And indeed, we can fret further by noting an *ipso facto* clause—providing for the contract to terminate automatically upon filing for bankruptcy—would also escape § 365(e)'s invalidation provision if the contract falls outside that subsection's scope as non-executory.

To summarize, there seemto be both primary and secondary counterparty advantages incentivizing executoriness challenges. For albatrosses, which the counterparty says are non-rejectable, the primary advantage is to trick a debtor or court into requiring performance, period, while the secondary advantage is priority status payment for breach damages in the event of non-performance/rejection/abandonment/repudiation—whatever we want to call it. The primary advantage to the counterparty for golden geese in arguing they are non-assumable is tricking the debtor into just giving up on the contract, while the secondary advantage is to block the cure power of § 365(b). I now seek to demonstrate through a proper understanding of the Code's text and structure that these claimed advantages are not just theoretically repugnant to the Code but *doctrinally unsupportable* (or at the very least, are not doctrinally preordained).

104. Note that absent recognized property rights, they will not prevail in an action against the debtor for specific performance in a bankruptcy court. For a good property rights analysis case, see *In re Walter Energy, Inc.*, No. 15–02741–TOM11, 2015 WL 9487718, at *6 (Bankr. N.D. Ala. Dec. 28, 2015). *See also In re* Plascencia, 354 B.R. 774, 780 (Bankr. E.D. Va. 2006) (holding that a recorded realty option created a non-rejectable property interest).

105. The muscular cure power of § 365(b) can be contrasted with the limited cases where cure is allowed at state law. *See, e.g.*, U.C.C. § 2-508 cmt. 2 (AM. LAW INST. & UNIF. LAW COMM'N 2014) (explaining the limited power to cure in sale-of-goods contracts if "circumstances" justify).

B. Entering the Debate: Working Through the Code on Non-Executoriness

We have above identified the three paradigmatic cases of non-executory contracts in ascending order of legal complexity and now turn to what I contend is their proper treatment under the Code if we take the concept of a non-executory contract seriously (i.e., not as a show-stopper whose declaration magically truncates further discussion).

As previously discussed, the first scenario is easy: a golden goose not in default. Consider, for example, a valuable unexpired option held by the debtor that the optioner wishes to evade. The optioner argues that the option cannot possibly be an "executory" contract due to its flunking the Countryman test (as there would be no material breach if the debtor did nothing until the end of time). The optioner then drops the second shoe and argues that because it is not executory, the option cannot fall under § 365 and, therefore, cannot be assumed under § 365(a). Poof! It disappears as a debtor asset. Commentators have struggled to shoehorn the option into the Countryman test,[106] but the simpler solution, *contra* Westbrook, is to concede that it is not an executory contract. As discussed above, however, it cannot just vanish. The unexpired option still exists as inchoate "property of the estate" under § 541,[107] just as a lien is an inchoate twig in the bundle of rights. As such, the debtor need do nothing with regards to this property. If the optioner ever asks the debtor whether the option is "assumed," the debtor can just respond she no more needs to assume the option than she needs to assume the drill press in the factory: it's all valuable property of the estate to be deployed in due course.[108]

106. Andrew, *Reply to Westbrook*, *supra* note 11, at 32–34. This is a frequent problem with insurance cases, in which the prepaid premium seems to discharge the insured's obligations, and so when the unexpired policy needs to be assumed, the debtor–insured will point to all the purportedly executory remaining duties to cooperate, i.e., to assure executoriness. *See, e.g.*, Pester Ref. Co. v. Ins. Co. N. Am. (*In re* Pester Ref. Co.), 58 B.R. 189, 191 (Bankr. S.D. Iowa 1985) (finding the contract to be executory).

107. *See, e.g.*, BNY, Capital Funding LLC v. U.S. Airways, Inc., 345 B.R. 549, 556 (Bankr. E.D. Va. 2006) ("As an unexercised option, the LOI was property of U.S. Airways's bankruptcy estate.").

108. Unlike § 365(a), § 541's automatic vesting of the non-executory golden goose will not give the counterparty definitive notice of its legal obligations—a policy some argue is an important bankruptcy one. *See, e.g.*, Westbrook & White, *supra* note 6, at 518 (asserting that notice to counterparties is necessary to promote fairness). But so what? What notice is needed for a happy counterparty whose contract is not in default—that the contract is continuing to be performed uneventfully as it has been all along? Let that tree fall in the forest! Accordingly, I am unsympathetic to the optioner in *Bronner v. Chenoweth–Massie P'ship* (*In re Nat'l Fin. Realty Tr.*), 226 B.R. 586 (Bankr. W.D. Ky. 1998). That optioner was left uncertain whether an option had been assumed or rejected after broken-off negotiations, mistakenly assuming/hoping it was rejected only to be surprised two years later when a third party exercised the option. *Id.* at 588–90. If the clear default rule is that contracts pass to the estate and remain there unless and until rejected under § 365 or abandoned under § 554, then the counterparty has legal certainty and knows it has a duty to pester.

1. Abandoning the Albatross.

*a. The Power.—*What about the converse situation of a burdensome contract that the debtor wants to run screaming from? Here, we might flip the debtor to be the optioner in the prior example, or consider an erstwhile employee–debtor laboring under a noncompete clause. The counterparty/option holder now argues that the contract flunks Countryman, so it cannot be rejected pursuant to § 365(a), because of course it doesn't fall under § 365's purview. Noncompete cases are notorious for accepting this view (probably because the court thinks the debtor is trying to pull a fast one by weaseling out of a noncompete clause), and so these cases simply say that the clause somehow "remains valid."[109] But the proper answer, doctrinally, lies again in remembering that, formally, the wart-laden contract is the property of the estate under § 541—but that the trustee can *abandon* the property under § 554, which provides that "[a]fter notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate."[110] To be sure, a contract is a curious hybrid form of property conjoining an asset (the chose in action to compel the benefit of the bargain) with a liability (a claim for the consideration the debtor owes). Abandonment of the property on the asset side of the ledger does not "vaporize[]" the counterparty's claim on the liability side,[111] of course, but that truism does not undermine the debtor's absolute power under § 554 to abandon the albatross. Once again, § 365 is never needed.[112] Courts seem to underappreciate the role of § 554 in this

109. Jenson v. Cont'l Fin. Corp., 591 F.2d 477, 482 (8th Cir. 1979) (holding that "the security agreement is not executory," and thus it "remains valid"); *see also, e.g.*, Meiburger v. Endeka Enters. (*In re* Tsiaoushis), 383 B.R. 616, 621 (Bankr. E.D. Va. 2007) (concluding that an operating agreement was not executory and thus its sections remained "valid and fully enforceable"); Ready Prod., Inc. v. Jarvis (*In re* Jarvis), No. 04-10806-JMD, 2005 WL 758805, at *5 (Bankr. D.N.H. Mar. 28, 2005) (finding the noncompete agreement non-executory and non-rejectable in granting employer–plaintiff injunctive relief against employee–debtor).

110. 11 U.S.C. § 554(a) (2012).

111. Sunbeam Prods. v. Chi. Am. Mfg., LLC, 686 F.3d 372, 377 (7th Cir. 2012).

112. I leave to one side the concern of seasoned practitioners of "inadvertent" assumption. True, automatic vesting under § 541 does not require an overt act, as does § 365, to check mistaken albatross acquisition, but neither does deemed rejection under § 365(d) protect against inadvertent rejection. In other words, there is no intrinsically "safe" default rule. The choice is between a default rule, with the attendant risks of carelessness, *see* Ebert v. DeVries Family Farm, LLC (*In re* DeVries), No. 12-04015-DML, 2014 WL 4294540, at *14 (Bankr. N.D. Tex. Aug. 27, 2014) (finding that because trustee never assumed, § 365(d) deemed executory contract rejected), or the ambiguous quagmire of no default specification, *see* Phx. Mut. Life Ins. Co. v. Greystone III Joint Venture (*In re* Greystone III Joint Venture), 995 F.2d 1274, 1281 (5th Cir. 1991) (holding that the chapter 11 debtor's leases continue—and the lessees have no provable claim against the bankruptcy estate—when the debtor neither assumes nor rejects its leases with third parties).

context.[113] Even courts that get to the right result do not seem to understand how they are getting there.[114]

b. The Claim.—Thus, the debtor can happily abandon a non-executory contract under § 554, without need to address § 365 and its executoriness gate at all. This, of course, is a breach (formally an anticipatory repudiation, but the result is the same). But that conclusion avoids the harder question of what befalls the counterparty's claim that is engendered by such a breach.[115] There are three possibilities: the counterparty has no claim; the counterparty has a general unsecured claim; or the counterparty has an administrative priority claim. The first possibility arises from the Swiftian reasoning that if § 365 does not apply, then presumably § 365(g)(1)'s conferral of the unsecured claim upon the aggrieved counterparty cannot kick in. One doubts the executoriness-denying counterparties intend this to be the logical consequence of their executoriness victory. Nor is it a plausible outcome because it would require de-coupling the contract's liabilities from its assets, a result unseemly to bankruptcy jurisprudence and common sense.[116]

Therefore, there must be some form of damages claim filable by the aggrieved counterparty for the rejection breach. But what sort of claim? Recall that if this were an *executory contract* breach claim, the Code's clear text of § 365(g)(1) designates it as a general unsecured one.[117] Why a

113. For example, *In re FBI Distribution Corp.* simply declares that the postpetition breach of a non-executory contract gives rise to an unsecured prepetition claim, a result I find congenial, but with no reference to § 554. Mason v. Official Comm. of Unsecured Creditors (*In re* FBI Distrib. Corp.), 330 F.3d 36, 48 (1st Cir. 2003).

114. Discussion of § 554 is frequently lacking in these cases. *See, e.g.*, *In re* Majestic Capital, Ltd., 463 B.R. 289, 301–02 (Bankr. S.D.N.Y. 2012) (using non-executoriness to prevent priority treatment of burdensome severance package, yet nonetheless "grant[ing] the motion to reject"); *In re* Exide Techs., 378 B.R. 762, 766 (Bankr. D. Del. 2007) (using non-executoriness to prevent debtor from having inadvertently assumed expensive retirement agreement). Andrew, in defending his exclusionary approach, embraces the abandonment power. *See* Andrew, *Rejection*, *supra* note 11, at 863 (noting that rejection and abandonment both result in "exclusion of an asset from the estate"). And in a footnote, he seems to agree with the core of my analysis. *Id.* at 890 n.165.

115. Andrew's "exclusionary" approach led to the cumbersome conclusion that such contracts would revert to the debtor (not estate) and plausibly give a claim against the debtor for breach that might not be discharged by the debtor's bankruptcy. Andrew, *Rejection*, *supra* note 11, at 863.

116. *See* Century Indem. Co. v. Nat'l Gypsum Co. Settlement Tr. (*In re* Nat'l Gypsum), 208 F.3d 498, 506 (5th Cir. 2000) ("Where the debtor assumes an executory contract, it must assume the entire contract, *cum onere*—the debtor accepts both the obligations and the benefits of the executory contract.").

117. 11 U.S.C. § 365(g)(1) (2012). What's interesting about § 365(g)(1) is that its retroactive designation of the claim as occurring prepetition, *id.* § 502(g), appears to be textually necessary to render the counterparty an estate "creditor." *Id.* § 101(10)(A). Would the non-executory breach counterparty, unable to rely on these relation-back provisions, not be able to be a "creditor"? Although little seems to ride on it for the debtor (as the counterparty still holds a dischargeable "claim," *id.* §§ 524(a)(2), 1141(d)(1)(A)), the counterparty may face some grief under § 726. But it

different result for a *non-executory* contract? Recall further the reasoning above that deems the breach as if the contract had been *assumed and then rejected by the estate*. Everyone agrees that that is a priority claim (a stance codified in § 365(g)(2)).[118] If, however, we accept the logic from the golden goose scenario above that a non-executory contract vests in the estate automatically by § 541 without need to resort to § 365 at all, then we are faced with the necessary sauce for the gander that to abandon it the debtor must abandon property *of the estate*—hybrid property that carries an appurtenant claim for damages. Thus, since the estate is doing the abandoning that gives rise to the breach claim, the breach claim should be a cost of the estate's doing business, and hence entitled to administrative priority.[119] Viewed this way, § 365(g)(1) is not so much the conferral of provability (that it historically was) but a dispensation withdrawing the presumptive administrative priority of an estate breach claim. Closing the textual circle on this reasoning, because § 365(g)(1) demotes the breach claim to "mere" unsecured status for executory contracts, the lack of a similar demotion clause elsewhere in the Code for non-executory contracts means, just as Andrew feared, that the breach claim against the estate could be deemed to trigger administrative expense priority.[120]

Textual checkmate? Hardly. The solution lies in fighting text with text. And here I have the advantage of the Code's actual language, which Countryman did not have in 1973. The incursion of expenses postpetition is a necessary condition for administrative expenses under § 503(b) of the Code.[121] But postpetition timing, while necessary, is not sufficient. Rather, we must take cognizance of the Code's insistence of administrative expenses being "actual" and "necessary,"[122] and as textually inclined courts inform us:

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appears to be of little moment: courts routinely consider the non-executory breach counterparty to have a claim under § 502 and seem to muddle through just fine. *See, e.g.*, *In re* FBI Distrib. Corp., *supra* note 113, at 48 (holding the postpetition breach of non-executory contract triggered the prepetition claim as a "contingent claim . . . [even though] the right to payment arises during the reorganization when the contingency occurs"); Stewart Foods, Inc. v. Broecker (*In re* Stewart Foods, Inc.), 64 F.3d 141, 143, 145 (4th Cir. 1995) (holding counterparty had prepetition claim for postpetition breach of stipulated non-executory contract).

118. Congress either caps this intrinsically beneficial claim or deems it administrative notwithstanding its lack of benefit (depending on one's perspective) for certain leases. 11 U.S.C. § 503(b)(7) (2012).

119. Andrew noted that the historic *Copeland* case may have been animated (wrongly, in his view) by this very concern. Andrew, *Rejection*, *supra* note 11, at 859–63 ("[The *Copeland* concept's] premise, that the estate would become liable merely by succeeding to a contract or lease, was not clearly correct.").

120. *Id.* at 860 ("The courts in these pre-statutory cases thus identified contracts and leases as assets having the perceived potential of imposing administrative liabilities *upon the estate* by virtue of its succession to the debtor's ownership.").

121. Section 503(b) deals with expenses of the estate, which are given priority under § 507(a)(2). 11 U.S.C. §§ 503(b), 507(a)(2) (2012).

122. *Id.* § (b)(1)(A). *See* Ford Motor Credit Co. v. Dobbins, 35 F.3d 860, 866–68 (4th Cir. 1994)

> The modifiers "actual" and "necessary" must be observed with scrupulous care[,] because [o]ne of the goals of Chapter 11 is to keep administrative costs to a minimum in order to preserve the debtor's scarce resources and thus encourage rehabilitation. In keeping with this goal, § 503(b)(1)(A) was not intended to saddle debtors with special postpetition obligations lightly or give preferential treatment to certain select creditors by creating a broad category of administrative expenses.[123]

Here, the trustee/DIP as fiduciary of the estate has no desire for the counterparty's services. They are not an insurance premium that preserves valuable property the estate wishes to realize. Nor are they taxes, that necessary evil levied on that valuable property, which are also explicitly provided for in § 503.[124] Rather, they are the dead hand of the past, clamoring for a leg up on other creditors, offending bankruptcy's policy of equality.[125] But what is even more important is that the estate *never* receives any benefit from the rejected contract and its related breach claim. This observation is critical to contrast the situation from that where the debtor affirmatively assumes an executory contract (thus enjoying some benefit from it) and then subsequently breaches it. There, the estate has, however fleetingly, enjoyed some "actual" and "necessary" usage of the contract and must pay the piper for its attendant costs in the event of breach.[126] With this non-executory

(holding that "actual and necessary" costs must stem from affirmative use, as opposed to mere passive possession, of estate property by the debtor *and* such use must provide concrete, as opposed to merely potential, benefit to the estate).

123. *Dobbins*, 35 F.3d at 866 (alterations in original) (internal citations and quotations omitted) (quoting General Amer. Transp. Corp. v. Martin (*In re* Mid Region Petroleum, Inc.), 1 F.3d 1130, 1134 (10th Cir. 1993)).

124. 11 U.S.C. § 503(b)(1)(B) (2012).

125. *See Dobbins*, 35 F.3d at 865 (quoting *In re* James B. Downing & Co., 94 B.R. 515, 519 (Bankr. N.D. Ill. 1988) ("The presumption in bankruptcy cases is that the debtor's limited resources will be equally distributed among the creditors. Thus, statutory priorities must be narrowly construed.")). A strand of jurisprudence has evolved involving environmental liabilities for burdensome property the debtor abandons postpetition under § 554. Some courts have not allowed administrative priority precisely because of the lack of benefit to the estate. *See, e.g.*, *In re* H.F. Radandt, Inc., 160 B.R. 323, 327 (Bankr. W.D. Wis. 1993) (Section 503 "mandate[s] that [administrative priority] be granted where necessary to 'preserve' the estate," and "preservation [would not] be accomplished by granting [administrative priority to environmental cleanup]"). But many have tagged the debtor with cleanup costs as an administrative priority. *See, e.g.*, United States v. LTV Corp. (*In re* Chateaugay Corp.), 944 F.2d 997, 1009–10 (2d Cir. 1991) ("If property on which toxic substances pose a significant hazard to public health cannot be abandoned, it must follow . . . that expenses to remove the threat posed by such substances are necessary to preserve the estate."). The complex issues of federal environmental policy and the interaction between CERCLA and the Code require caution with generalization from these cases.

126. *Dobbins*, 35 F.3d at 867 (collecting authority), focuses on the mere possession of creditor property versus affirmative use or conscious exploitation of resources. *Id.* (citations omitted) (noting that "a benefit to the estate results only from use of the . . . property" and "[t]hat which is actually utilized by a Trustee in the operation of a debtor's business is a necessary cost"). *Dobbins* and its ancestors/progeny have enjoyed more citations vigor than the Supreme Court's odd tort case of

contract, by contrast, the unwanted property automatically vested into the estate over the debtor's howling, and the debtor abandoned it at the first possible moment.[127] Accordingly, the seeming analogy between the assumed-and-subsequently-rejected (executory) contract and the automatically-vested-but-never-wanted-and-quickly-abandoned (non-executory) contract falls apart.[128] The simple conclusion is that because unwanted non-executory contracts never confer any benefit, ever, upon the estate, their breach damages upon rejection cannot find the textual anchor to avail themselves of § 503(b).[129] They are neither an "actual" nor "necessary" cost of "preserving" the estate. As such, the concern of presumed priority status collapses, permitting the debtor to abandon property of a contractual albatross under § 554.[130] Ample case law supports this proposition.[131]

2. Assuming the Golden Goose.—Previously, I have contended that a debtor need do nothing to "assume" an advantageous non-executory contract; it automatically vests its way into the estate through § 541. But for simplicity, that prior discussion assumed the contract was not in default. If we relax that assumption, the debtor faces a harder task. Recall both that (1) general state contract law permits a contract party facing material breach to walk away

Reading Co. v. Brown, 391 U.S. 471 (1968), which established the proposition, largely on policy grounds, that a postpetition tort damages claim should enjoy administrative priority. *Id.* at 485. Nearly all subsequent cases have cabined *Brown* to torts. *See, e.g.*, *In re* Lazar, 207 B.R. 668, 681 (Bankr. C.D. Cal. 1997) ("From *Reading* arose the general rule that the postpetition tort liabilities of a business that continues to operate in bankruptcy qualify for administrative expense priority as actual and necessary expenses for preservation of the estate.").

127. I have no problem with the debtor paying administrative priority expenses for intra-bankruptcy usage under the contract.

128. We might also draw indirect support from the Supreme Court's recent musings in *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 985 (2017) that priority provisions can be treated more flexibly in the context of reorganization when value is created for all creditors but less so in the context of final liquidation where claimed priority must be scrutinized especially rigorously.

129. The court in *Mason v. Official Comm. of Unsecured Creditors (In re FBI Distribution Corp.)*, 330 F.3d 36, 48–49 (1st Cir. 2003) embraced this logic. It disagreed that the breach claim on a non-executory contract should get administrative claim priority, because even though the contract was breached postpetition, and even though as a non-executory contract, it apparently was unrejectable and saddled the estate in perpetuity, it nonetheless did not confer any benefit on the debtor postpetition. *Id.* Accordingly, the breach claim was held to be a general unsecured claim (mimicking the outcome of § 365(g)(1) as if the contract had been executory and rejected), following my proposed analysis.

130. At least one court has adopted my approach of treating the "rejected" non-executory contract the same as if rejected under § 365. *See In re* Hawker Beechcraft, Inc., 486 B.R. 264, 277 (Bankr. S.D.N.Y. 2013) (awarding prepetition breach claim for damages for non-executory contract rejected by debtor); *see also In re* Majestic Capital, Ltd., 463 B.R. 289, 299 (Bankr. S.D.N.Y. 2012) (allowing the debtor to reject COO's employment contract even though "the contract was not executory" and denying administrative priority).

131. *See, e.g.*, *Dobbins*, 35 F.3d at 868 ("[I]t . . . strikes us as inequitable to tax unsecured creditors for a decline in the value of collateral when the decline does not result from a use that actually benefits the estate.").

from the contract in self-help and (2) bankruptcy law tries, absent a countervailing federal bankruptcy policy interest, to respect state law entitlements (such as contract remedies) to the maximum extent possible.[132] Thus, we start from an orientation that a contract in material default should be cancelable by the counterparty and not subject to any resuscitation in bankruptcy absent some special Code power.

Section 365, however, accords just such special power. Section 365(b)'s condition on assumption that requires cure necessarily implies a power to cure. The precise scope of the § 365 cure power is not free from textual doubt and warrants its own painful statutory exegesis,[133] but it would be absurd to suggest there is no power to cure implicit in § 365(b). Case closed for executory contracts. For non-executory contracts, which by definition cannot avail themselves of § 365(b) and its cure power, the power to cure must come from elsewhere.

a. Reorganization.—Fortunately for reorganization cases, the Code expressly confers a power to cure defaults in a plan of reorganization.[134] Thus, statutorily, there is no important difference between the power to cure executory contracts and non-executory contracts in reorganization cases.[135]

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132. Butner v. United States, 440 U.S. 48, 55, 57 (1979) (holding that state law should presumptively determine rights and obligations of debtors and creditors absent a countervailing federal bankruptcy policy evidenced by structure, text, and history of the Code).

133. *Compare In re* Claremont Acquisition Corp., Inc., 113 F.3d 1029, 1035 (9th Cir. 1997) (holding debtors may not assume or reject a contract that is impossible to cure), *with In re* Vitanza, No. 98-19611DWS, 1998 WL 808629, at *20, *24 (Bankr. E.D. Pa. Nov. 13, 1998) (allowing assumption despite impossible-to-cure default). *See also In re* Bankvest Capital Corp., 270 B.R. 541, 543 (Bankr. D. Mass. 2001) ("[P]enalty rate obligation and a nonmonetary default are two separate types of breaches which a debtor is not required to cure prior to assumption of a contract."). Congress tried to fix these provisions with BAPCPA, but it's unclear if it did. Risa Lynn Wolf-Smith, *Bankruptcy Reform and Nonmonetary Defaults—What Have They Done Now?*, AM. BANKR. INST. J., Aug. 2005, at 6, 35. ("[C]hanges made in the Bankruptcy Reform Act of 1994 left practitioners unsure about whether debtors' obligations to cure non-monetary defaults had been eliminated. The Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) has finally answered some of the questions, though the language is murky.").

134. 11 U.S.C. §§ 1123(a)(5)(G), 1322(c)(1) (2012).

135. There are discrepancies at the margin. For example, the general power to cure in § 1123(a)(1)(G) does not excuse penalties of the sort expressly excused from cure for executory contracts under § 365(b)(2)(D), but it is hard to imagine this wrinkle ever becoming a driver of future executoriness litigation. (A strand of case law unnecessary to resolve here struggles to reconcile §§ 365(b)(2) and 1123(d). *See, e.g.*, *In re* Sagamore Partners, Ltd., Bankr. Appeals, 512 B.R. 296, 306–313 (S.D. Fla. 2014) (attempting to harmonize § 365(b)(2) with § 1123(d)), *aff'd in part, rev'd in part and remanded sub nom*. *In re* Sagamore Partners, Ltd., Fed. Appx. 864 (11th Cir. 2015); *In re* Phx. Bus. Park Ltd. P'ship, 257 B.R. 517, 520–21 (Bankr. D. Ariz. 2001) (relying on § 365(b)(2) in addressing § 1123(d) and the 1994 amendments).) Of course, not everyone wants to cure in reorganization. In one unusual case, *Meilburger v. Endeka Enterprises LLC (In re Tsiaoushis)*, the reorganizing debtor *wanted* to *ipso facto* dissolve an LLC agreement and so argued that the LLC agreement was non-executory to avoid § 365(e)'s invalidation clause. 383 B.R. 616, 616–17 (Bankr. E.D. Va. 2007) (noting chapter 11 trustee's opposition to the LLC property

The harder problem, then, is in liquidation cases under chapter 7, where the non-executory contract finds no succor analogous to §§ 365, 1123, or 1322. And, indeed, there might be an inverse textual implication that the absence of these explicit textual cure provisions should be read to forbid it "interstitially" for chapter 7 debtors.

b. Liquidation.—The question of the chapter 7 debtor seeking to assume a defaulted non-executory golden goose is admittedly the thorniest for this analysis. I flag at the outset that this subset is a rare one. Most executoriness fights Westbrook and White unearthed in their comprehensive empirical study were in reorganization cases, and of the subset of liquidation cases, not one involved an assumption battle.[136] Nonetheless, abundant caution counsels that we press on to see if such a power can be found. And to tackle this question, we can initially divide the liquidation universe of contractual defaults into "*Ipso Facto*" Breaches and "Everything Else" Breaches.

i. Ipso Facto.—Consider first *ipso facto* defaults, where the sole breach of the contract is the very occurrence of bankruptcy. Does the Code permit the debtor to cure?[137] I think the answer is probably "yes" given § 541(c)(1).[138] That provision of the Code invalidates *ipso facto* clauses that would terminate a contract and thus prevent it from becoming property of the estate. So the federal hostility to *ipso facto* clauses is clearly established.[139]

The Code also invalidates *ipso facto* clauses and excuses them from the cure requirements of § 365(b).[140] Should this be taken as a textual signal that § 541 cannot be relied upon to do all the work of rescue from *ipso facto*

manager's motion contending that the operating agreement was executory). This case's odd posture makes it of limited helpfulness, alas, but still fun.

136. *See* Westbrook & White, *supra* note 6, at 536–61 app. (analyzing thirty-three cases in an appendix—only two of which involved liquidations, and none involved a debtor attempting to assume an executory contract where the counterparty objected on non-executoriness grounds).

137. Perhaps "ignore" is better than "cure," because what would "cure" even mean in this context—voluntarily dismissing the petition?

138. *See* 11 U.S.C. § 541(c)(1) (2012) ("[A]n interest of the debtor in property becomes property of the estate . . . notwithstanding any provision in an agreement . . . or applicable nonbankruptcy law— . . . (B) that is conditioned on the insolvency or financial condition of the debtor.").

139. Note the historical contrast from earlier bankruptcy laws where *ipso facto* clauses were honored; perhaps Congress over time bristled at the destruction of value. Countryman has an excellent historical discussion on courts' reluctance to give effect to *ipso facto* clauses, with fundamental disagreement over (a) whether the Act's respect of them with regard to unexpired leases should be cabined to leases or extended to all executory contracts, and (b) whether they could be respected only in straight bankruptcy (versus chapter reorganization) cases under the Act. Countryman II, *supra* note 23, at 521–27.

140. 11 U.S.C. § 365(b)(2) (2012) (excusing *ipso facto* default cure); § 365(e)(1) (invalidating *ipso facto* default clauses).

clauses? I don't think so. Even leaving aside the permissibility of Congress using some belt and suspenders to avoid negative implications (perhaps having some overlap between §§ 541(c)(2) and 365(b)(2)), if we really wanted to get down into the textual weeds, we could point to § 365(b)(2)'s nominally broader scope than § 541(c)(1)'s. For example, § 365(b)(2) expands the denigration of *ipso facto* terms to those triggered by postpetition finances.[141]

More importantly, if we step back from the text to consider the structure and purpose of the Code, it makes little sense to invalidate an *ipso facto* clause in an executory contract for purposes of getting the contract into the bankruptcy estate only to find that, but for § 365(b)(2), the same contract would be unassumable. What would the purpose of its entry into the estate have even been—to await inevitable rejection? But of course, if we take seriously the concept of a non-executory contract, then we immediately recall § 365 is of no moment because such a contract vests into the estate automatically by virtue of § 541, and it is quite clear that § 541(c)(1) invalidates the *ipso facto* clause at the vesting stage.[142] Accordingly, even for the chapter 7 debtor, who is accorded no textually explicit power to cure defaults, it seems uncontentious to claim that defaults on account of *ipso facto* clauses may be ignored and the federal bankruptcy policy of hostility toward them may comfortably preempt the state law contract right of automatic termination.[143]

ii. Everything Else.—The harder question, then, is the Everything Else world of defaults. Can they be cured for the chapter 7 debtor? After all, if a non-executory contract is a discrete "thing" that enters the estate irrespective of § 365, then that "thing" is a contract already in default. Assuming no stay violation,[144] presumably the counterparty has the right to

141. *Id.* § 365(b)(2).

142. This is the approach taken by *In re Denman*, 513 B.R. 720, 725, 727 (Bankr. W.D. Tenn. 2014) and *Movitz v. Fiesta Inv., LLC* (*In re Ehmann*), 319 B.R. 200, 206 (Bankr. D. Ariz. 2005).

143. A strand of LLC cases has tried to revivify state laws providing for *ipso facto* termination of contracts through the back door of § 365(c)(1), which bars assumption of contracts if assignment is prohibited by applicable non-bankruptcy law. 11 U.S.C. § 365(c)(1). These cases sneakily say that while the contract is not *ipso facto* terminated (per § 365(e)), it can never be assumed (per § 365(c)(1)), leading to the same result: killing the contract for the debtor. This proposition is contentious. *Compare, e.g.*, Nw. Wholesale, Inc. v. PAC Organic Fruit, LLC, 357 P.3d 650, 662–63 (Wash. 2015) (holding § 365(e)(1)'s prohibition against *ipso facto* clauses to be inapplicable), *with, e.g.*, Horizons A Far, LLC v. Webber (*In re* Soderstrom), 484 B.R. 874, 880 (Bankr. M.D. Fla. 2013) (holding § 365 applies if the contract is executory).

144. It is readily possible that a declaration of breach could be shown as an attempt to punish the debtor for stiffing the counterparty. *See, e.g.*, Pester Ref. Co. v. Ins. Co. of N. Am. (*In re* Pester Ref. Co.), 58 B.R. 189, 191 (Bankr. S.D. Iowa 1985) ("Even if the insurance contract was not treated as an executory contract, the unilateral act of INA to cancel the policy would be barred by the automatic stay of 11 U.S.C. § 362(a).").

exercise the termination right for self-help. Can the bankruptcy debtor, nonetheless, ram cure down the counterparty's throat? Here, I concede a need to resort to weaker textual footing, but I take solace in the Code's Last Refuge of the Textually Damned, § 105.[145]

Let's consider the situation in which it may arise. A debtor in liquidation is in default on a valuable contract the trustee wishes to assume, say, an LLC operating agreement, but the counterparty has successfully argued the contract is non-executory because remaining performance is only due on one side. The trustee promptly offers to cure, noting that the counterparty has incurred no financial harm on account of the default. Nonetheless, the counterparty recalcitrantly insists on its rights to terminate the contract, seizing upon the technical right of the default as an escape route from the unfavorable bargain. Just to close the loop, state law has no equitable doctrines of excuse that the hapless debtor can point out to stave off this churlish termination.[146] At wit's end, the trustee comes to the bankruptcy court and says, "Look, this contract has value for the creditors, it's no skin off the counterparty's nose because all defaults have been cured, and so I would like an injunction under § 105 preventing him from exercising his self-help remedy of termination." Could the bankruptcy court issue such relief?

This hypothetical presents sympathetic facts for just such a countervailing federal policy—the preservation of value for creditors with no offsetting harm to the counterparty (other than being made to live with the bad deal it made)—that warrants preempting the counterparty's state law self-termination rights.[147] Well before *Timbers*,[148] the Supreme Court accorded great latitude to bankruptcy courts to enjoin difficult creditors whose actions would imperil a bankruptcy proceeding's success.[149] And, of course, since the contract is being ratified by the estate, any subsequent breach damages would be entitled to administrative priority as a backstop,

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145. 11 U.S.C. § 105(a) (2012) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.").

146. *Cf., e.g.*, 1 RESTATEMENT (SECOND) OF CONTRACTS § 229 (AM. LAW INST. 1981) (establishing that a non-occurrence of a condition can be excused if the non-occurrence would result in disproportionate forfeiture).

147. Westbrook offers some initial insights into what fundamental bankruptcy policies might be (at least with respect to contracts), listing four basic policies. Westbrook & White, *supra* note 6, at 515–17. I accept these at face value and note that maximization of creditor value appears front and center on this policy list.

148. *See* United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 372, 377–78 (1988) (upholding the restriction of secured creditors' compensation for lost time value of their collateral).

149. The canonical case for this proposition is *Cont'l Ill. Nat'l Bank & Tr. Co. v. Chi. R.I. & P. Ry. Co.*, 294 U.S. 648, 678–79 (1935), although there was some debate over that holding's application to straight bankruptcy liquidation cases. *Id.* at 671–72. *See also* Countryman II, *supra* note 23, at 517 (discussing case law).

according the counterparty even more comfort.[150] As a final kicker, the debtor would note that under chapter 11, this surly creditor would be deemed to have supported the plan as unimpaired.[151] Indeed, on these facts, I would think the case for injunctive relief would be presumptively attractive; albeit requiring some hoops to jump through, cure would be allowed, by hook or by § 105 crook. If that is so, then even the hardest case of a non-executory contract—the non-*ipso facto* default of a chapter 7 debtor's contract—still can be cured under a properly purposive reading of the Code. It's not as textually straightforward as § 365(b), but the cure power is still there.

3. Summary.—Note what a thorough working through of the Code's application to a non-executory contract reveals: far from relying on § 365, the debtor or trustee has ample opportunity under the Code, perhaps with some creativity but surely on solid textual footing, to cure an attractive contract's default and thereby retain a golden goose. This means, crucially, that the power to cure actually requires no recourse to § 365(b) and thus no concomitant need to demonstrate executoriness: executory and non-executory contracts alike can be cured. And if that is correct, then I have succeeded in my underlying mission of eliminating the main functional difference in the treatment of executory versus non-executory contracts under the Code. Indeed, I am too modest. Not only have I collapsed the difference between executory and non-executory contracts under the Code regarding the ability to assume a golden goose, but I have also similarly collapsed the distinction regarding the rejection of an albatross, by dispatching the concern of priority repayment of § 554 abandonment damages. My mission accomplished, the counterparty has lost the primary foundation for the arbitrage opportunity, which means the *ex ante* incentives to litigate executoriness will dry up. Executoriness remains but it has lost all its sting.[152] As such, I no longer care about the definition of executoriness, and, more importantly, nor will anyone else.[153] This is perhaps a radical approach to

150. 11 U.S.C. § 365(g)(2) (2012).

151. *Id.* § 1124(2).

152. At worst, I have created a new boilerplate duty to tack on a footnote to every § 365 motion that says, "in the event this contract is found to be non-executory, the debtor retains its rights under § 541 and moves to abandon under § 554." (This is a trivial evil compared to *Stern v. Marshall*, 564 U.S. 462 (2011), this generation's fount of bankruptcy litigation.)

153. If pushed for my own definitional preference, I would revert to Williston's: "[A] contract, the obligation of which relates to the future, or a contract under which the parties have bound themselves to future activity that is not yet completed or performed." 1 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1:19 (4th ed. 2007). *See also* 3A WILLIAM COLLIER, COLLIER ON BANKRUPTCY ¶ 63.33, at 1935 (14th ed. 1940) ("All contracts to a greater or less extent are executory. When they cease to be so, they cease to be contracts.") (citing Williston). This approach has a pedigree in the legislative history to the Code, see *In re Norquist*, 43 B.R. 224, 225, 228 (Bankr. E.D. Wash. 1984) (citing Williston and stating "the Supreme Court in citing the legislative history appears to have agreed with the expression of Congress that a precise definition

executory contracts, but its elimination of senseless litigation should make it normatively attractive.

IV. Counterarguments

I anticipate several respectable counterarguments to this new approach, and so I offer this preemptive rebuttal.

A. Reading "Executory" Out of the Code?

This is a trick objection, because many, like Westbrook, *want* to read it out of the Code, so would see this as praise rather than criticism to my approach of taking the idea of a non-executory contract seriously. But I can see a deeply committed textualist bemoaning that I have rendered "executory" redundant, effectively redrafting § 365 as if the word had been deleted.[154]

This critique misses the mark. My treatment of non-executory contracts merely mimics the treatment of executory contracts under § 365, but does so through a distinct doctrinal route that respects the formal categorical difference. Now, whether this synthetic replication upsets the "structure" of the Code's "implicit policies" by creating near-redundancy is a separate attack, but as soon as we move into the structure and policies of the Code, I gain the theoretical high ground by pointing to the absolute absence of justification found anywhere in the Code (or anywhere else) to treat non-executory contracts differently from executory contracts.[155]

B. Evading § 365's Burdens?

My response to the prior criticism unfortunately runs right into the snare of this correlative complaint: if non-executory contracts merely mimic § 365 treatment, but don't exactly run through the § 365 gauntlet, then that means the burdensome provisions of § 365 (e.g., the adequate assurances of future performance as a precondition to assumption under § 365(b)(1)(C)), are simply excused for non-executory contracts. If so, I've turned executoriness

of an executory contract is inadvisable"), and Westbrook, too, finds it congenial. Westbrook & White, *supra* note 6, at 520 (explaining that "executory" should be understood in light of common law). Thus, I do not care about "truly" non-executory contracts in the sense of discussing sunsets after dark, Westbrook, *supra* note 3, at 243, just those contracts that flunk the Countryman test but still have unperformed aspects.

154. Similar angst enraged the district court in *Stewart*, which objected to the treatment of a non-executory contract's breach as a claim under § 502, because to do so would treat the contract as rejected under § 365(b), which was not allowed in its view—a holding that was promptly reversed on appeal. *See* Stewart Foods, Inc. v. Broecker (*In re* Stewart Foods, Inc.), 64 F.3d 141, 144–45 (4th Cir. 1995).

155. *See In re* ZRM-Oklahoma P'ship, 156 B.R. 67, 70–71 (Bankr. W.D. Okla. 1993) (emphasizing the importance of interpreting the Code in a "coherent and consistent" manner).

on its head by creating a reverse arbitrage where the *debtors* will now try to argue their contracts aren't executory to evade such requirements![156]

This concern, while logically articulable, is overstated for two interrelated reasons. First, to a considerable extent, the requirements of § 365(b)(1)(C) (and (b)(1)(B) for that matter) are largely redundant to contract rights under state law.[157] Consider by way of example the ubiquitous Uniform Commercial Code's sales provisions in Article 2. There, the insolvency of the buyer is listed as a categorical example of objective grounds for insecurity, and insecurity gives rise to the right to demand adequate assurance of future performance.[158] Second, recall that the foundation of the statutory power to allow nonconsensual cure (outside the reorganization context) is likely injunctive relief through § 105, and so, in fashioning that relief, a bankruptcy court would be loath to give the debtor a "freebie" of not having to provide assurances that her executory-contract-holding peer would, especially when such assurances are likely the required baseline at state law. (There certainly are no countervailing federal policies requiring *Butner*

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156. This appears to have happened in the cryptic *Bronner v. Chenoweth-Massie P'ship* (*In re Nat'l Fin. Realty Tr.*), 226 B.R. 586, 587–88 (Bankr. W.D. Ky. 1998), in which the receiver wrote a sloppy plan forgetting to assume a valuable option in chapter 11. *Id*. When the counterparty caught him and demanded evidence of assumption, he pivoted to say the contract was non-executory and so had not been presumptively rejected (as all executory contracts had been) under the plan. *Id*. The court agreed and the option, deemed non-executory, survived the plan, saving the receiver's bacon. *Id*. The counterparty's unsuccessful argument had sounded in notice, implying that absent such evidence of assumption the counterparty was right to infer deemed rejection and enjoy repose accordingly. *Id*. The counterparty's problem, however, is really in the Code's lack of default rules for executory contracts in non-chapter 7 cases. Westbrook and White imply that the option should have been deemed rejected under § 365(d), but I don't see how that's the case, unless this was a chapter 7 case, which it did not appear to be. *See* Westbrook & White, *supra* note 6, at 524. Section 365(d)(2) merely sets a deadline for the assumption/rejection decision, but, unlike § 365(d)(1), it does not specify the consequences of the failure to act. This results in a case law quagmire. *See, e.g.*, Phx. Mut. Life Ins. Co. v. Greystone III Joint Venture (*In re* Greystone III Joint Venture), 995 F.2d 1274, 1281 (5th Cir. 1991) (noting that a lease neither assumed nor rejected before a chapter 11 plan confirmation just rides through with the debtor still bound and with the creditor without a provable claim). Note § 365(p), which does provide a default rule in the case of inaction, interestingly does not textually restrict its application to unexpired leases. 11 U.S.C. § 365(p) (2012). Indeed, this is not the only provision of § 365 that does not apply on its face to executory contracts: § 365(o) would appear to apply only to *non-executory* contracts—and this is a subsection of § 365! *See id.* § 365(o):

> [T]he trustee shall be deemed to have assumed . . . and shall immediately cure any deficit under, any commitment by the debtor to a Federal depository institutions regulatory agency . . . to maintain the capital of an insured depository institution, and any claim for a subsequent breach of the obligations thereunder shall be entitled to priority under section 507.

157. *See* 11 U.S.C. § 365(b)(1)(B) (2012) (requiring compensation for breach damages before assumption); *id*. § 365(b)(1)(C) (requiring adequate assurance of future performance before assumption).

158. U.C.C. § 2-609 cmt. 3 (AM. LAW INST. & UNIF. LAW COMM'N 2002) ("[A] buyer who falls behind in 'his account' with the seller . . . impairs the seller's expectation of due performance.").

divergence from state law that spring to mind.) In short, I am not denying the risk,[159] but I think it likely the concern of seeking a declaration of non-executoriness as a bypass around § 365's conditions on assumptions will arise infrequently.

Finally, I should mention the cognate idea of "evading" judicial review under § 365(a).[160] Recall that the assumption—or rejection—of an executory contract requires court approval.[161] If non-executory contracts do not run through § 365, are non-debtor stakeholders stripped of their judicial oversight protection? Again, I think this concern is overstated, even leaving aside the implicitly heroic assumptions about the judicial role in a corporate decision largely governed by the business judgment rule. First, a non-executory contract that is rejected is abandoned under § 554, and that does require a court hearing even if it does not explicitly require "approval."[162] Few debtors will abandon a valuable contract for nefarious reasons, fess up to it in open court, and then sit back and stare a judge in the eyes and coolly sneer, "Nothing you can do about it because it isn't even your decision to approve!" No litigant has that much political capital to squander, and every judge has heard of § 105 and can trot out decisions intoning that bankruptcy courts are courts of equity.[163] Second, a non-executory contract in default that is assumed will require court blessing as well, either through the discretionary

159. One case where this has popped up is *BNY, Capital Funding LLC v. U.S. Airways, Inc.*, 345 B.R. 549 (Bankr. E.D. Va. 2006). There, the debtor was able to retain a contract to make a financial accommodation, despite the bar of § 365(c)(2), by successfully persuading the court that the contract was non-executory and hence fell outside § 365 and § 365(c)(2). *Id.* at 553, 555. Westbrook and White see this as an outrage, where U.S. Airways got out of § 365(c)(2) jail free, Westbrook & White, *supra* note 6, at 525, but I'm more ambivalent. Even leaving aside the court's point that the debtor had onerous financial conditions precedent to meet before exercise (not least of which was keeping current on the aircraft leases to the optioner), 345 B.R. at 555, I am not sure how much divergence from state law evasion of § 365(c)(2) would entail. If, as the *U.S. Airways* court conceded, the option was a contract (albeit a non-executory one), then the traditional contract defenses and excuses spring into action. Certainly it is an open question whether insolvency of the counterparty would discharge performance, either on grounds of material mistake, 1 RESTATEMENT (SECOND) OF CONTRACTS § 152 (AM. LAW INST. 1981), or frustration of purpose, *id.* §§ 265–68, especially if the subject matter of the contract was to make a loan. At a minimum, adequate assurances would be demandable as a condition to continuation. For a good background discussion of Congress' intent behind § 365(c)(2), see *In re Teligent*, 268 B.R. 723, 737 (Bankr. S.D.N.Y. 2001).

160. Section 365(a)'s requirement of court approval stems from a long history of courts inserting themselves into an oversight role under the Act. *See* Countryman II, *supra* note 23, at 556.

161. *See* Allegheny Ctr. Assocs. v. Appliance Store, Inc. (*In re* Appliance Store, Inc.), 148 B.R. 226, 232 (Bankr. W.D. Pa. 1992) (holding that § 365(a) superseded prior case law allowing assumption without court approval).

162. The § 554 hearing will also give notice to the counterparty definitively clarifying its contractual rights.

163. Adam J. Levitin, *Toward a Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime*, 80 AM. BANKR. L.J. 1, 1 (2006) ("A basic tenet of bankruptcy practice is that 'the bankruptcy court is a court of equity.'") (citations omitted).

power to confirm the plan of reorganization or the discretionary power to order the cure injunctively in liquidation. So all roads lead to court involvement; no wool will be pulled over judicial eyes.

C. *Forfeiting § 365's Benefits?*

Conversely, there is the reverse concern: that, other than the power to cure, there are other benefits to the debtor in § 365 that the non-executory-contract-holding debtor will not be able to access. Does my synthetic replication of § 365 through other provisions of the Code cover these benefits as well? Here, I think I have met my Waterloo and have to concede not. But it is a trivial Waterloo. The principal benefit in § 365, beyond the general power to cure addressed previously, is the excuse of an impossible-to-cure default for some forms of unexpired leases.[164]

Section 365(b)(1)(A)'s text is a mess, but it appears to excuse impossible-to-cure defaults of real property leases (and add on some extra requirements for what to do if that lease is non-residential).[165] The implication of the most likely reading of the drafting is that a debtor with an impossible-to-cure default on a personal property lease is just out of luck: the impossibility precludes cure, and non-cure precludes assumption. Here, I am forced to concede an apparent benefit unique to § 365; the debtor outside § 365 has no similar salvation. That said, the problem appears trivial when we, for the first time, confront § 365's application both to unexpired leases and to executory contracts. While "executoriness" has generated a litigation minefield, "unexpired" has not. Parties (and courts) are less likely to disagree whether a lease is over or not; one anticipates an empty set of litigants fighting over whether and how the debtor can cure the defaults of an *expired* lease.[166]

164. There is the boondoggle damage claim under §§ 507(a)(2) and 502(b)(7) for certain nonresidential real property leases, 11 U.S.C. §§ 507(a)(2), 502(b)(7) (2012), but leases interest me less than contracts for the reasons given in the text. If pressed, I could parse the debtor's power to sidestep "cure[]" with "provid[ing] adequate assurance" of "prompt[]" cure as a possible benefit accorded by the Code unavailable at state contract law, but that's too fine a pinhead upon which to dance. *Id.* § 365(b)(1)(A).

165. A plausible reading is that § 365(b) does the opposite and declares that impossible-to-cure defaults on real property leases are just lethal, period, for the debtor seeking assumption, but that nonresidential leases are saved from the fire if the specified conditions are met. This interpretation requires ascribing to Congress an intent to render residential leases harder for debtors to assume than nonresidential ones, a reading of § 365(b) that skirts absurdity.

166. Although, they do fight the *timing* of when the defibrillators have to come off. *See* 11 U.S.C. § 541(b)(2) (2012) (excluding from estate nonresidential real property leases that expire under their own timing provisions).

D. Inapplicability of Other § 365 Provisions?

There are surely other differences that would arise from whether or not a contract falls under § 365, but it is difficult to say *ex ante* which way they cut, let alone predict whether they will birth a new fount of arbitrage. For example, the sixty-day deemed rejection rule is clearly one that would only apply to executory contracts under § 365,[167] but it's hard to say with any confidence whether this will cause many executoriness fights. It surely does sometimes,[168] but it seems likely that whatever incentive effect it has is dwarfed by the status quo's preoccupation with the make-or-break excutoriness question of power to assume/reject *vel non*.[169]

The two most significant wild cards are the special rules within § 365 for real estate contracts and intellectual property agreements.[170] The real estate rules are easier: the special property-like remedy accorded by § 365(i)(2) likely maps many states' real property rules for vendees in possession.[171] (Somewhat ironically, a vendee who has moved into full possession is likely to have tendered full payment and may not be in an executory contract at all.) And because it is such a rarely litigated provision of the Code, it is unclear whether § 365(j)'s rules for vendees not-yet-in-possession intend to strip property rights if state law grants an equitable property remedy under a conversion doctrine. Accordingly, it is difficult to assess whether there is a material (or any) inside-versus-outside § 365 difference here, let alone whether executoriness fights will be prevalent as a consequence.[172]

The hardest prediction pertains to the intellectual property rules of § 365(n). It is difficult to score § 365(n)'s ancillary provisions.[173] Even Westbrook throws up his hands and concedes they largely (if not identically)

167. *Id.* § 365(d)(1).

168. It came up in *Ebert v. DeVries Family Farm, LLC* (*In re Devries*), No. 11-43165-DML-7, 2014 WL 4294540, at *4 (Bankr. N.D. Tex. Aug. 27, 2014) (trustee who missed sixty-day deadline to assume tried to argue that the LLC operating agreement was non-executory so it would not be deemed rejected).

169. *See, e.g.*, Foothills Tex., Inc. v. MTGLQ Inv'rs, L.P. (*In re* Foothills Tex., Inc.), 476 B.R. 143, 155 (Bankr. D. Del. 2012) (conceiving the debtor's entire adversary proceeding to turn on whether the contract was executory).

170. 11 U.S.C. § 365(i)(2) (2012) (special counterparty remedies for vendees in possession); *id.* § 365(j) (vendees out of possession); *id.* § 365(n)(1) (intellectual property licensees).

171. *See, e.g.*, Nickels Midway Pier, LLC v. Wild Waves, LLC (*In re* Nickels Midway Pier, LLC), 341 B.R. 486, 496–97 (D. N.J. 2006) (relying on state law to determine that § 365(i) was inapplicable).

172. The closest case I could find to mentioning this issue was *In re Nickels Midway Pier, LLC*, which mused in dicta on the preemptive scope of § 365 and its interaction with state law specific performance remedies (and more specifically, the separate provision of the Code defining "claim"). *Id.* at 498–99.

173. 11 U.S.C. § 365(n)(1)(B) (2012) (allowing some licensees to retain rights to licensed IP or supplementary agreements in return for continued royalty payments).

track preexisting non-bankruptcy contract rights.[174] Review of the case law involving § 365(n) where executoriness is disputed shows an unsurprising focus on the rejection *vel non* question (i.e., can the license be rejected or not).[175] There do not appear to be many secondary disputes over attempts to avoid perceived burdens of these ancillary provisions.[176] Moreover, there are a host of other intellectual property disputes (e.g., trademarks) that do not even fall under this subsection's scope.[177] In sum, loath as I am to end on an equivocal note, in all honesty I cannot say whether these residual issues will drive ongoing executoriness disputes; I can just share empirical skepticism that they are likely to be meaningful.[178]

V. A (Very Quick) Road Test Case Study

In closing, let us take a brief road test to see how the new approach would have better served a famous bankruptcy case, *Exide*.[179] In *Exide*, the bankruptcy court (affirmed by the district court) held the debtor's burdensome trademark assignment contract to be executory and allowed its rejection as a key step of the reorganization plan.[180] The counterparty appealed all the way up to the Third Circuit, which reversed and said the debtor's contract was not executory under the Countryman test and hence could not be rejected.[181] The poor bankruptcy court was left with a reorganized debtor that was now saddled with a trademark license that it thought had been cancelled but was now apparently binding.[182] Under the

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174. Westbrook & White, *supra* note 6, at 532, 533 n.246. Westbrook indeed brands any divergence from state law in § 365(n) (and cognate subsections) "congressional mistakes." Westbrook, *supra* note 3, at 331 n.434.

175. *See, e.g.*, Lewis Bros. Bakeries Inc. v. Interstate Brands Corp. (*In re* Interstate Bakeries Corp.), 751 F.3d 955, 961–64 (8th Cir. 2014) (applying the Countryman test to uphold the objection that the license could not be rejected as it was non-executory). This case presents the wonderful surreality of the debtor's attempt first to reject the contract, and then subsequent withdrawal of that motion and substitution of a motion to assume it. *Id.* at 959. Nonetheless, the counterparty's resistance persisted in both postures! *Id.* at 964.

176. One example is *Szilagyi v. Chi. Am. Mfg., LLC* (*In re Lakewood Eng'g & Mfg. Co.*), 459 B.R. 306 (Bankr. N.D. Ill. 2011), in which the parties fought over the scope of the waiver provisions of § 365(n)(2)(C). *Id.* at 341. But there was no challenge to executoriness in that case, which was conceded. *Id.* at 342.

177. 11 U.S.C. § 101(35A) (2012).

178. *Cf.* Westbrook & White, *supra* note 6, at 511 (noting that the focus of executoriness fights is whether debtors can assume/reject the contract).

179. *In re* Exide Techs., 607 F.3d 957 (3d Cir. 2010).

180. *Id.* at 961.

181. *Id.* at 964 ("Because the Agreement is not an executory contract, Exide cannot reject it.").

182. The debtor's backup argument that the contract had nonetheless been dealt with under the plan as a claim was rejected by an angry remand court that invoked judicial estoppel, finding the debtor's conduct end-runny. Exide Techs. v. Enersys Del., Inc. (*In re* Exide Techs.), Bankr. No. 02-11125 (KJC), Adv. No. 10-52766 (KJC), 2013 WL 85193, at *1, *7–8 (Bankr. D. Del. Jan. 8, 2013) (noting that the complaint was filed "in an attempt to circumvent" the Third Circuit ruling).

functional approach, of course, it could have been rejected. Executoriness's definition was not just fatal, but unclear in its application to the various courts that faced the issue. Under my approach, the debtor would not have cared. What the debtor could have done as soon as it realized it was in dodgy executoriness terrain, which it did,[183] was simply tack a footnote onto its § 365 rejection motion saying that in the alternative, the motion was to abandon burdensome property of the estate under § 554 to which it would not accord any damages priority status. As such, either by § 365(g)(1) or by § 502, the debtor would have paid off a monetary claim to the licensee and moved on, as it hoped, with its reorganized life. All this would have been independent of whether the Third Circuit adhered to Countryman, decided to overrule it in favor of Westbrook, or took some new path (of which there is no shortage of options).[184]

VI. Conclusion

The ABI Commission has made clear that executoriness is here to stay. Since it is, we should stifle its arbitrage-inducing tendencies by demonstrating how § 365's key functional outcomes can be replicated by carefully applying other provisions of the Bankruptcy Code to non-executory contracts, the residual category of agreements that flunk whatever test of executoriness is governing circuit law. This new approach will redirect the executoriness litigation energy to more productive fields. This path does not follow Westbrook directly. It does better: it honors him for having shown us the right way.

183. *Id*. at *4.

184. *See, e.g.*, *In re* Riodizio, Inc., 204 B.R. 417, 424 (Bankr. S.D.N.Y. 1997) (following neither Countryman nor Westbrook).