

## Against Bankruptcy Exceptionalism

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*Bankruptcy courts conceive of their mission differently than other courts do. For the Supreme Court, bankruptcy cases are ordinary statutory cases to be resolved “clearly and predictably using well established principles of statutory interpretation.” Many bankruptcy judges, though, believe that bankruptcy courts serve a distinctive mission for which ordinary adjudicative methods do not suffice. Often, that mission is characterized using the language of equity. Judges and commentators alike have observed that among the most spoken words in the bankruptcy courts are: “the bankruptcy court is a court of equity.” Others have contended that bankruptcy necessitates “creativity and flexibility,” pursuant to which bankruptcy courts have broad authority to formulate orders that promote the ends of bankruptcy. Within the world of bankruptcy, in other words, it is commonly understood that bankruptcy is a special field that requires an exceptional approach—one rooted in the norms, commitments, and assumptions that underlie the values of the bankruptcy community.*

*I examine this disjunction and consider whether there is any principled justification for bankruptcy exceptionalism. I explain the sources of the disjunction and show how the bankruptcy courts’ exceptional approach has driven outcomes in the ongoing Purdue Pharma opioid crisis bankruptcy saga and other hotly contested and socially consequential cases. I conclude that there are many singular aspects of bankruptcy but none that justify treating it specially. Bankruptcy is distinctive, but it is not exceptional.*

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INTRODUCTION .....	1926
I. DESCRIBING BANKRUPTCY EXCEPTIONALISM.....	1936
A. Exceptionalism in the Bankruptcy Courts.....	1939
1. Third-party releases.....	1942
2. Substantive consolidation and recharacterization. ....	1943
B. The Supreme Court.....	1946
C. Assessing the Divide .....	1956
II. UNDERSTANDING BANKRUPTCY EXCEPTIONALISM.....	1957
A. Explaining Bankruptcy Exceptionalism .....	1958
1. Specialization. ....	1958
2. Incentives. ....	1961
B. The Consequences of Bankruptcy Exceptionalism .....	1964
1. Entrenched advantage. ....	1964
2. Venue shopping. ....	1969
3. Limited appeals.....	1972
4. <i>Purdue</i> : an illustration.....	1974
III. JUSTIFYING BANKRUPTCY EXCEPTIONALISM.....	1978
A. Statutory Evolution.....	1979
1. Equity in history. ....	1979
2. Text.....	1981
3. Legislative history and congressional intent. ....	1982
B. Expertise.....	1986
C. Bankruptcy’s Unusual Features.....	1989
1. Public interests.....	1989
2. Complexity and change.....	1991
3. Federal common law. ....	1994
IV. BEYOND BANKRUPTCY EXCEPTIONALISM.....	1997
A. Fixing Bankruptcy Exceptionalism.....	1997
B. After Bankruptcy Exceptionalism .....	2005
CONCLUSION .....	2010

## INTRODUCTION

Bankruptcy courts are different than other courts. Black letter constitutional law tells us as much: bankruptcy judges are not Article III judges with life tenure but are instead a subsidiary “unit” of the district court.<sup>1</sup> But it is also true on a more fundamental level. Bankruptcy judges view their task of adjudication differently than other judges in the courts of the United States.

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<sup>1</sup> 28 U.S.C. § 151; *Stern v. Marshall*, 564 U.S. 462, 473–75, 485–87, 500–01 (2011); *Wellness Int’l Network, Ltd. v. Sharif*, 575 U.S. 665, 668–71 (2015).

Bankruptcy law, and bankruptcy cases, are said to serve an especially—perhaps uniquely—equitable mission.<sup>2</sup> In the words of one recent decision, bankruptcy law promotes “rough justice.”<sup>3</sup> Instead of “stringent requirements,” it favors “flexible tests that increase the likelihood that a plan can be negotiated and confirmed.”<sup>4</sup> Interpreting the Bankruptcy Code requires courts to maintain a careful “balance” between this valuable flexibility and concern for the rights of the parties.<sup>5</sup> So explained Judge Thomas Ambro of the U.S. Court of Appeals for the Third Circuit, himself a former bankruptcy lawyer, while resolving an appeal arising out of the long-running bankruptcy saga of the Tribune media conglomerate.<sup>6</sup> The list of similar decisions is long indeed. Thus, the bankruptcy process is said to prize creativity and flexibility,<sup>7</sup> giving bankruptcy courts space to formulate orders that promote the ends of bankruptcy.<sup>8</sup> Empirical research has found that such views, while by no means universal among bankruptcy judges, are widely shared.<sup>9</sup> In other words, bankruptcy is said to be a special field that requires an exceptional approach.

A bankruptcy judge has multiple potential options for justifying a decision responsive to the values expressed by Judge Ambro in *In re Tribune Co.*<sup>10</sup> One possible framework centers around the familiar notion of judicial discretion. By any measure,

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<sup>2</sup> See Harvey R. Miller & Ronit J. Berkovich, *The Implications of the Third Circuit's Armstrong Decision on Creative Corporate Restructuring: Will Strict Construction of the Absolute Priority Rule Make Chapter 11 Consensus Less Likely?*, 55 AM. U. L. REV. 1345, 1346–47 (2006). Harvey Miller is one of the most prominent bankruptcy lawyers in modern legal history. See Ellen Rosen, *A Lawyer Finds He Can Go Home Again*, N. Y. TIMES (Mar. 9, 2007), <https://www.nytimes.com/2007/03/09/business/09law.html>.

<sup>3</sup> *In re Tribune Co.*, 972 F.3d 228, 245 (3d Cir. 2020).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> See Miller & Berkovich, *supra* note 2, at 1346–47.

<sup>8</sup> *In re Lehman Bros. Holdings*, 487 B.R. 181, 190 (Bankr. S.D.N.Y. 2013), *rev'd* 508 B.R. 283 (S.D.N.Y. 2014); see also, e.g., *In re Jevic Holding Corp. (Jevic III)*, 787 F.3d 173, 184 (3d Cir. 2015) (“[I]t would make sense for the Bankruptcy Code . . . to leave bankruptcy courts more flexibility in approving settlements than in confirming plans of reorganization.”), *rev'd sub nom.*, *Czyzewski v. Jevic Holding Corp. (Jevic IV)*, 137 S. Ct. 973 (2017).

<sup>9</sup> Diane Lourdes Dick, *Equitable Powers and Judicial Discretion: A Survey of U.S. Bankruptcy Judges*, 94 AM. BANKR. L.J. 265, 269–73, 279–81, 284–95 (2020).

<sup>10</sup> 972 F.3d 228 (3d Cir. 2020).

discretion is an essential part of bankruptcy judging;<sup>11</sup> the Bankruptcy Code<sup>12</sup> itself incorporates numerous provisions that relatively straightforwardly confer discretion upon the bankruptcy judge to reach appropriate outcomes.<sup>13</sup> Yet this does little to set bankruptcy judges apart from judges in other fields who may also frequently be tasked with exercising discretion and applying broad, open-textured statutory provisions.<sup>14</sup>

This Article focuses on the ways that bankruptcy judges approach judging in ways that are different from other courts—what this Article calls bankruptcy exceptionalism.<sup>15</sup> Judges may do so while drawing on many different legal tools and concepts. Thus, bankruptcy judges frequently explain that their creative decisions serve to fill gaps in the Code.<sup>16</sup> Or a bankruptcy judge might supplement the Code with atextual remedies or practices

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<sup>11</sup> See, e.g., Laura N. Coordes, *Narrowing Equity in Bankruptcy*, 94 AM. BANKR. L.J. 303, 305, 325 (2020).

<sup>12</sup> 11 U.S.C. §§ 101–1532.

<sup>13</sup> See, e.g., 11 U.S.C. § 362(d)(1) (allowing a court to grant relief from an automatic stay for cause); *In re Indian River Estates, Inc.*, 293 B.R. 429, 433 (Bankr. N.D. Ohio 2003) (“As used in § 362(d)(1), the term ‘cause’ is a broad and flexible concept which permits a bankruptcy court, as a court of equity, to respond to inherently fact-sensitive situations.”); 11 U.S.C. § 510(c)(1) (noting that the bankruptcy court may subordinate claims “under principles of equitable subordination”); see also 11 U.S.C. § 349(a) (allowing courts to, for cause, order that the dismissal of a case not undo orders entered prior to dismissal); § 350(b) (allowing courts to reopen closed cases for cause); 11 U.S.C. § 552(b)(1) (allowing courts to order that secured creditors’ security interest not extend to postpetition proceeds or products of collateral “based on the equities of the case”); 11 U.S.C. § 1104 (allowing courts to appoint Chapter 11 trustees or examiners for cause); 11 U.S.C. § 1112(b) (allowing courts to dismiss or convert Chapter 11 cases for cause). The Bankruptcy Code uses the standard for “cause” or “good cause” over forty times. See generally 11 U.S.C. §§ 101–1532. It uses the word “equity” or some derivative thereof—including “equitable concepts, interests, principles and remedies”—thirty-three times. Alan M. Ahart, *The Limited Scope of Implied Powers of a Bankruptcy Judge: A Statutory Court of Bankruptcy, Not a Court of Equity*, 79 AM. BANKR. L.J. 1, 26 (2005).

<sup>14</sup> Arguably, Judge Ambro’s opinion in *Tribune* itself falls within this category; Judge Ambro was faced with deciding how to apply the Bankruptcy Code’s mandate that the Code “not discriminate unfairly” against different classes of creditors. *Tribune*, 972 F.3d at 232.

<sup>15</sup> I define this more fully in Part I.A.

<sup>16</sup> 2 COLLIER ON BANKRUPTCY ¶ 105.01 (Richard Levin & Henry Sommer eds., 16th ed. 2022) (“Section 105 gives the bankruptcy court the power to fill in gaps and further the statutory mandates of Congress in an efficient manner.”); see also *In re IFS Fin. Corp.*, 417 B.R. 419, 448 (Bankr. S.D. Tex. 2009) (“Section 105 is better read as authority to fill gaps Congress left unanswered so that the Rules and Code operate consistent with their purposes.”); *In re Greenwich Sentry, L.P.*, 534 F. App’x 77, 80 (2d Cir. 2013) (“But § 105(a) does confer authority to ‘fill the gaps left by the statutory language.’” (quoting *In re Smart World Techs., LLC*, 423 F.3d 166 (2d Cir. 2005))).

that are nonetheless said to further the Code's objectives.<sup>17</sup> In other cases, judges forgo the most natural reading of the Code in favor of one that produces more practical results.<sup>18</sup> There is a unifying theme to such apparently disparate practices. That theme is a singular—and widely recognized—commitment among bankruptcy judges to give effect to the assumptions and norms that underpin bankruptcy law even when inconsistent with the conventional principles that federal courts use to read statutes and decide cases, all of which are founded on the notion that bankruptcy is a special field with its own distinct needs.<sup>19</sup> Bankruptcy

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<sup>17</sup> See, e.g., *In re Nortel Networks, Inc.*, 532 B.R. 494, 553–54 (Bankr. D. Del. 2015) (“[B]ankruptcy courts have ‘broad authority’ to provide appropriate equitable relief . . . and ‘to craft flexible remedies that, while not expressly authorized by the Code, effect the result the Code was designed to obtain.’” (quoting Official Comm. of Unsecured Creditors of Cybergenics Corp. *ex. rel.* Cybergenics Corp. v. Chinery, 330 F.3d 548, 568 (3d Cir. 2003))); see also *In re Vujovic*, 388 B.R. 684, 693 (Bankr. E.D.N.C. 2008); *In re Official Comm. of Unsecured Creditors for Dornier Aviation (N. Am.), Inc.*, 453 F.3d 225, 231 (4th Cir. 2006) (discussing recharacterization, discussed in Part I.A.2).

<sup>18</sup> Professor Laura Coordes has described the practice of “equitable interpretation” in which, given an ambiguity in the Code, the bankruptcy court chooses the interpretation that best advances the purposes of bankruptcy law. Coordes, *supra* note 11, at 316–17. One bankruptcy-specific example is the practice, on which bankruptcy courts are split, of approving substantial contribution claims in Chapter 7 cases. The Bankruptcy Code recognizes that in some cases, creditors may make efforts to recover property or otherwise advance the interests of the bankruptcy estate in ways that benefit all creditors. The Code counts some such claims as administrative expenses—claims for which the creditor may be reimbursed on a priority basis, provided that the bankruptcy court shall allow “administrative expenses . . . including . . . the actual, necessary expenses . . . incurred by . . . a creditor . . . in making a substantial contribution in a case under chapter 9 or 11 of this title.” 11 U.S.C. § 503(b)(3)(D). Applying ordinary principles of statutory interpretation, this enumeration of Chapters 9 and 11 in Section 503(b) supports a strong negative inference that such substantial contribution claims are available *only* in Chapters 9 and 11, and not in Chapter 7. See, e.g., *In re Concepts Am., Inc.*, 625 B.R. 881, 885 (Bankr. N.D. Ill. 2021). Some courts have disagreed. The leading case, *In re Connolly N. Am., LLC*, 802 F.3d 810 (6th Cir. 2015), exemplifies equitable interpretation. The court described the “overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction.” *Id.* at 814 (citing *Bank of Marin v. England*, 385 U.S. 99, 103 (1966)). The result that substantial contribution claims are unavailable in Chapter 7 was “not compel[led]” by the statutory text. *Id.* at 816. An expansive reading of the statute was therefore possible—one that “look[ed] at 816 to the overall intent and purpose of the Code.” *Id.* at 816, 818. And the policy considerations for granting a substantial contribution claim were very strong: the creditor had spent substantial sums seeking the removal of a Chapter 7 trustee whose dereliction of duty had gravely harmed the estate. *Id.* at 817, 819. Other decisions reaching the same conclusion do not bear the hallmarks of equitable interpretation: they focus simply on the nonexclusive nature of the list of administrative expenses in Section 503 and the Code’s use of the word “including” at the head of the section. See, e.g., *In re Javed*, 592 B.R. 615, 619–22 (Bankr. D. Md. 2018); *In re Maust Trans., Inc.*, 589 B.R. 887, 897–99 (Bankr. W.D. Wash. 2018).

<sup>19</sup> Cf. DOUGLAS G. BAIRD, *THE UNWRITTEN LAW OF CORPORATE REORGANIZATIONS* ix–xiv (2022).

judges seek to do justice, as they understand justice in the distinctive context of bankruptcy. For all the complexity of the Bankruptcy Code, bankruptcy is a realm of unwritten law.<sup>20</sup> That means that “much of what matters most” in understanding how bankruptcy judges decide cases “still is not in print.”<sup>21</sup>

Whether this is the right approach to bankruptcy law is a debate that has high stakes. This Article argues that bankruptcy exceptionalism exacerbates corrosive trends within the bankruptcy system that cannot readily be corrected by other courts, especially in the field of corporate reorganizations. Bankruptcy is a fiercely competitive process. Bankruptcy exceptionalism entrenches the advantage of sophisticated repeat players, especially incumbent ones.<sup>22</sup> Those parties know how to frame disputes in a way that is likely to persuade a bankruptcy judge that some exceptionalist remedy is necessary. All too often, they can maximize their chances of prevailing in these efforts by picking the judge before whom they will argue, ensuring them a decision maker that shares the same assumptions about how cases should be resolved.<sup>23</sup> At the same time, appellate review of bankruptcy judges’ decisions is difficult to obtain and frequently deferential. This Article therefore argues that, over time, a willingness on the part of bankruptcy judges to embrace exceptionalist remedies will cause the substance of the law to tilt in favor of those more adept at maneuvering within the bankruptcy system, at the expense of the less powerful, able, or sophisticated.

This dynamic is readily illustrated by the hotly contested opioid-crisis-driven bankruptcy of Purdue Pharma.<sup>24</sup> Notwithstanding the adamant opposition of some stakeholders, the Purdue Pharma bankruptcy concluded with a bankruptcy court order that released members of the Sackler family, Purdue’s owners, from any and all civil liability relating to the opioid crisis in exchange for a contribution from the Sacklers to the bankruptcy

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<sup>20</sup> See generally *id.*

<sup>21</sup> Vincent S.J. Buccola, *Unwritten Law and the Odd Ones Out*, 131 YALE L.J. 1559, 1562 (2022) (book review).

<sup>22</sup> See *id.* at 1575–76 (describing the dichotomy between incumbent and legacy players in a case).

<sup>23</sup> See Adam Levitin, *Purdue’s Poison Pill: The Breakdown of Chapter 11’s Checks and Balances*, 100 TEX. L. REV. 101, 150–52 (2022).

<sup>24</sup> Jan Hoffman, *Purdue Pharma Is Dissolved and Sacklers Pay \$4.5 Billion to Settle Opioid Claims*, N.Y. TIMES (Sept. 1, 2021); <https://www.nytimes.com/2021/09/01/health/purdue-sacklers-opioids-settlement.html>; *In re Purdue Pharma, L.P. (Purdue I)*, 633 B.R. 53 (Bankr. S.D.N.Y. 2021), *vacated*, *In re Purdue Pharma, L.P. (Purdue II)*, 635 B.R. 26 (S.D.N.Y. 2021).

case.<sup>25</sup> The order was not unexpected: the procedural history of *In re Purdue Pharma*<sup>26</sup> readily illustrates the steps that sophisticated repeat-player litigants can take to increase the odds both that exceptionalist remedies are granted and that the content of those remedies aligns with their own interests and their expectations for how the bankruptcy process should work. The *Purdue* result was consistent with the commitments ascribed to bankruptcy law by the bankruptcy community, which strongly favor resolving complex commercial cases via value-maximizing compromise.<sup>27</sup> But, in addition to raising serious questions regarding distributive justice, such outcomes come with substantially less process and scrutiny than is the norm in other civil litigation contexts. In light of this dynamic, this Article posits that bankruptcy exceptionalism needs justification. And, indeed, *Purdue* also shows us that alternative approaches are available via the recent and decidedly nonexceptionalist decision of the district court vacating confirmation of the plan and finding the better interpretation of the Bankruptcy Code to be that the bankruptcy court has no authority to approve nonconsensual third-party releases.<sup>28</sup> Thus, this Article asks whether bankruptcy really is special in a way that justifies exceptionalism, and it answers that question with a firm no.

A first place to look in formulating that answer is the concepts on which bankruptcy judges draw when they seek to give effect to bankruptcy's unwritten norms and the values of the bankruptcy community.<sup>29</sup> The most notable of those is equity. The language of equity pervades bankruptcy.<sup>30</sup> Bankruptcy judges and scholars alike have observed that among the most spoken words in the bankruptcy courts are: “[T]he bankruptcy court is a court

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<sup>25</sup> See *Purdue I*, 633 B.R. at 95, 114.

<sup>26</sup> 633 B.R. 53 (Bankr. S.D.N.Y. 2021), *vacated*, *In re Purdue Pharma, L.P. (Purdue II)* 635 B.R. 26 (S.D.N.Y. 2021).

<sup>27</sup> See, e.g., Walter Blum & Stanley Kaplan, *The Absolute Priority Doctrine in Corporate Reorganizations*, 41 U. CHI. L. REV. 651, 664 (1974).

<sup>28</sup> See generally *Purdue II*, 635 B.R. 26.

<sup>29</sup> One way of describing this collection of norms, assumptions, and values is as a distinctive bankruptcy culture. See, e.g., Buccola, *supra* note 21, at 1563. I find this notion of a bankruptcy culture useful, but, by using that descriptor, I do not mean to invoke the broader literature on the sociology of law and the legal profession.

<sup>30</sup> A search for the term “bankruptcy court’/s ‘court of equity” in Westlaw produces over 2,300 results, while a search within only bankruptcy court opinions for the phrase “court of equity” produces more than 2,800.

of equity.”<sup>31</sup> The precise meaning of these words remains the subject of much debate.<sup>32</sup> Some judges fully embrace the notion that equity allows them to do justice creatively.<sup>33</sup> Thus, for one former bankruptcy judge, the bankruptcy court “is justifiably famous as the ultimate court of equity in commercial contexts and [ ] is known for favoring substance over form.”<sup>34</sup> Other bankruptcy judges stress the need for caution and restraint in the application of equity even as they acknowledge that the concept has *some* particular meaning in bankruptcy cases.<sup>35</sup> In the introduction to a recent symposium of bankruptcy judges and scholars, Judge Michelle Harner gave this summary of the current state of the debate:

The language of the Bankruptcy Code and Supreme Court precedent unquestionably continue the tradition of bankruptcy courts as courts of equity. That general proposition does not, however, end the inquiry. Questions remain concerning the appropriate scope of the bankruptcy courts’ equitable powers. Some commentators continue to debate whether the bankruptcy courts should even have equitable powers, while others suggest that changes are needed to vest the bankruptcy courts with more flexibility in the exercise of such powers.<sup>36</sup>

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<sup>31</sup> See, e.g., Marcia S. Krieger, “*The Bankruptcy Court Is a Court of Equity*”: *What Does That Mean?*, 50 S.C. L. REV. 275, 275 n.1 (1999). Judge Marcia Krieger observed that in her experience, “the frequency of reference to the bankruptcy court as a court of equity is second only to introductions, ‘May it please the Court’ or ‘Good morning (afternoon), Your Honor.’” *Id.*; see also, e.g., Adam Levitin, *Towards a Federal Common Law of Bankruptcy*, 80 AM. BANKR. L.J. 1, 1 (2006); Michelle M. Harner & Emily A. Bryant-Álvarez, *The Equitable Powers of the Bankruptcy Court*, 94 AM. BANKR. L.J. 189, 189 (2020); Coordes, *supra* note 11, at 309.

<sup>32</sup> Some critics of bankruptcy exceptionalism reject the notion that the descriptor has any validity. See, e.g., Dick, *supra* note 9, at 288 (quoting one bankruptcy judge to argue that “bankruptcy courts are ‘statutory courts, not courts of equity’”); Krieger, *supra* note 31, at 310 (“Describing the bankruptcy court as a court of equity is traditional and convenient, but it is not accurate.”); see also Ahart, *supra* note 13, at 1 (arguing that “a bankruptcy judge has scant prerogative to invoke inherent powers, formulate federal common law or imply private rights of action under the Bankruptcy Code, and *no* general equitable power” (emphasis in original)).

<sup>33</sup> E.g., Dick, *supra* note 9, at 291–92.

<sup>34</sup> Randolph J. Haines, *The Conservative Assault on Federal Equity*, 88 AM. BANKR. L.J. 451, 455 (2014).

<sup>35</sup> Dick, *supra* note 9, at 293.

<sup>36</sup> Harner & Bryant-Álvarez, *supra* note 31, at 199, 201; see also, e.g., Manuel D. Leal, *The Power of the Bankruptcy Court: Section 105*, 29 S. TEX. L. REV. 487, 490 (2017) (“There is general agreement that Congress has expressly granted very broad powers in



Scholarship is in broad accord. Again, scholars are far from consensus on what it means for the bankruptcy court to be a court of equity—words that have become “muddled over time.”<sup>37</sup> But the notion that there is something distinctive about how bankruptcy cases are handled pervades bankruptcy scholarship. Defenders of bankruptcy exceptionalism may argue that an “expansive” bankruptcy power is necessary given the special difficulties of managing companies in financial distress.<sup>38</sup> Even scholars that reject the notion that bankruptcy courts have the general equitable power to “do justice as the situation requires” still argue that there remains “a particular purpose for equity in bankruptcy” that may ease problems that might otherwise arise when “applying a static statute to changing circumstances.”<sup>39</sup> Thus, equitable powers might permit the judge “to choose from among the contextually justifiable meanings of the statute to advance” the broader purposes of the Bankruptcy Code.<sup>40</sup>

The Supreme Court’s bankruptcy jurisprudence has not been the focus of quite as much scholarly attention.<sup>41</sup> Even so, scholars have commented on a disjunction between the Supreme Court’s approach to bankruptcy and that of the bankruptcy courts.<sup>42</sup> For the Supreme Court, bankruptcy cases should be decided using the same tools and in the same fashion as cases in any other statutory

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section 105 to judges exercising federal bankruptcy jurisdiction. Accordingly, some courts have construed this power expansively while others have applied it restrictively.”).

<sup>37</sup> Coordes, *supra* note 11, at 325.

<sup>38</sup> See Jonathan C. Lipson, *Debt and Democracy: Towards a Constitutional Theory of Bankruptcy*, 83 NOTRE DAME L. REV. 605, 611 (2008); see also *id.* at 677 (“Bankruptcy exceptionalism makes sense because our system needs a larger way to manage failure in the presence of competing constitutional rules, standards, norms, and values.”).

<sup>39</sup> Coordes, *supra* note 11, at 325–26 & nn.170–71.

<sup>40</sup> *Id.*

<sup>41</sup> One commentator has argued that the thrust of the Supreme Court’s jurisprudence is to narrow and constrain the bankruptcy system. See RONALD MANN, *BANKRUPTCY AND THE U.S. SUPREME COURT* 231–34 (2017). Most (but not all) bankruptcy commentators are critics of the Supreme Court’s approach. See Daniel J. Bussel, *Textualism’s Failures: A Study of Overruled Bankruptcy Decisions*, 53 VAND. L. REV. 887, 917 (2000). See generally Alan Schwartz, *The New Textualism and the Rule of Law Subtext in the Supreme Court’s Bankruptcy Jurisprudence*, 45 N.Y.L. SCH. REV. 149 (2001). But see Megan McDermott, *Justice Scalia’s Bankruptcy Jurisprudence*, 207 UTAH L. REV. 939, 954 (2017). This may not be a phenomenon specific to bankruptcy. Lee Dembart & Bruce A. Markell, *Alive at 25? A Short Review of the Supreme Court’s Bankruptcy Jurisprudence*, 78 AM. BANKR. L.J. 373, 395–96 (2004) (“Ask any lawyer . . . if he or she likes the decisions the Supreme Court has handed down in his or her specialty. Our guess is that most of the answers would be unprintable.”).

<sup>42</sup> See, e.g., Levitin, *supra* note 23, at 175 n.312.

field.<sup>43</sup> The special ends of bankruptcy do not justify approaching bankruptcy cases any differently.<sup>44</sup> Supreme Court Justices across the Court's ideological spectrum have endorsed this more constrained view of bankruptcy adjudication. Thus, largely without observation or comment from those outside of the bankruptcy space, bankruptcy courts have begun to use different rules of adjudication from other federal courts—a mismatch in secondary rules that deserves further inquiry.<sup>45</sup> This Article explores the reasons for the division between the bankruptcy courts on the one hand and the Supreme Court on the other. It queries whether bankruptcy law or the Bankruptcy Code incorporate some set of special features that either justify the bankruptcy courts continuing to work differently from other courts or allow for bankruptcy cases to be decided using different tools and principles than those used elsewhere in the federal courts.

The Article concludes that bankruptcy *is* distinctive. But it is not special in this way. Bankruptcy cases generally are not structured like other legal disputes, and the docket of specialist bankruptcy judges has little in common with the generalist docket of their counterparts in the federal district courts. Nonetheless,

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<sup>43</sup> *E.g.*, *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801–02 (2019) (applying “traditional” nonbankruptcy principles “straightforwardly to the bankruptcy discharge context”); *City of Chicago v. Fulton*, 141 S. Ct. 585, 590 (2021) (basing decision on dictionary definitions of words “stay,” “act,” and “exercise”); *Baker Botts LLP v. ASARCO LLC*, 135 S. Ct. 2158, 2164 (2015) (deciding a bankruptcy dispute over attorneys’ fees based on the “basic point of reference when considering the award of attorney’s fees . . . the bedrock principle known as the American Rule” (quoting *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252–53 (2010))); *Law v. Siegel*, 571 U.S. 415, 422 (2014) (citing to a “normal rule of statutory construction” (quoting *Dep’t of Revenue of Ore. v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994))); *RadLAX Gateway Hotel v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (citing to a “well established canon of statutory interpretation.”) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992)).

<sup>44</sup> *See Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1665 (2019) (“The Code of course aims to make reorganizations possible. But it does not permit anything and everything that might advance that goal.”); *Fulton*, 141 S. Ct. at 595 (Sotomayor, J., concurring) (“Ultimately, however, any gap left by the Court’s ruling today is best addressed by rule drafters and policymakers, not bankruptcy judges.”).

<sup>45</sup> *See* H.L.A. HART, *THE CONCEPT OF LAW* 97 (2d ed. 1994) (describing the rules of adjudication as one of the three categories of secondary, top-level legal rules and stating that the rules of adjudication explain “the procedure to be followed” in applying primary rules). Depending on how it is formulated, bankruptcy might contribute distinct components to the overall rule of recognition. *See id.* at 94–97 (describing secondary rules of adjudication and recognition); Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621, 659 (1987) (proposing that the rule of recognition in the United States incorporates “the prevailing standards of interpretation” that “determine what congressional legislation means”).

these distinctions do not justify the use of different rules of adjudication in bankruptcy than are used elsewhere. Bankruptcy courts are frequently called upon to decide questions of state law alongside questions of federal bankruptcy law. Equally, federal district courts and courts of appeals must frequently decide bankruptcy issues alongside all of the other legal issues with which they are presented; nonbankruptcy federal courts decide cases on appeal from bankruptcy courts and hear cases in which bankruptcy courts lack constitutional authority to enter final judgments. Each court should understand that the tools it should use in its decision-making processes are the same, whatever the category of case before it. In that sense, although bankruptcy has many singular features, it is not exceptional. Even if one rejects strong claims of bankruptcy exceptionalism, however, the Bankruptcy Code allows considerable space for decision-making that is responsive to the special context of bankruptcy cases—results that one might view as consistent with the “equitable” mission of bankruptcy.

Part I of this Article describes the disjunction between bankruptcy courts and—in particular—the U.S. Supreme Court’s approach to bankruptcy. It acknowledges that much of what makes up bankruptcy exceptionalism, including claims that bankruptcy judges may exercise broad equitable powers, remains controversial. Nonetheless, it shows that exceptionalism is pervasive in the bankruptcy courts. Part II searches for explanations for the persistence of exceptionalism in bankruptcy. It finds answers in the specialized nature of both the bankruptcy courts and the bankruptcy practitioners that argue in them, and in the difficult and complex dilemmas that bankruptcy judges frequently face. It also shows how these two factors skew the substance of the exceptionalist remedies that bankruptcy judges approve: as sophisticated repeat-player litigants continue to push the envelope, they highlight or create exigencies that support the approval of remedies favorable to them and normalize practices originally intended only for unusual cases. Part III examines potential justifications for bankruptcy exceptionalism. Although it concludes that many of the justifications proffered for bankruptcy judges’ exceptionalist approach cannot stand, it acknowledges the ways in which bankruptcy remains distinct from other fields of law. Part IV concludes with suggestions for ways that the pervasiveness of bankruptcy exceptionalism might be reduced and brief thoughts on the consequences of rejecting it.

## I. DESCRIBING BANKRUPTCY EXCEPTIONALISM

Perhaps the “most socially important bankruptcy case” in Chapter 11 history is the bankruptcy of Purdue Pharma.<sup>46</sup> Purdue, the manufacturer of OxyContin, is alleged to have fueled the ongoing opioid crisis via aggressive and deceptive marketing of its products.<sup>47</sup> Purdue has not admitted that it is liable on all of the claims leveled against it,<sup>48</sup> but it has reached a criminal plea agreement with the federal government that acknowledged that it failed to prevent misuse of its products and engaged in some unlawful marketing practices.<sup>49</sup> Purdue has also publicly apologized to “everyone . . . who’s been impacted by the opioid crisis”<sup>50</sup> and has committed to “directing as much of the value of [its] assets as possible to combatting the opioid crisis.”<sup>51</sup> Bankruptcy was the forum for deciding how that happened and how much Purdue’s victims would be compensated. Purdue’s plan of reorganization, confirmed on September 1, 2021, resolves opioid litigation claims asserting trillions of dollars of damages via trusts that will direct a total of around \$5.75 billion to abate the crisis and compensate victims.<sup>52</sup> The stakes in *Purdue* are immensely high, both materially, for opioid-crisis victims, and systemically, as the federal legal system grapples with how to deal with questions of enormous social importance.

Much about Purdue’s bankruptcy was likely foreign and opaque to outsiders.<sup>53</sup> But the focus of attention has been the effect of the bankruptcy case on the potential liabilities of members of the Sackler family, Purdue’s owners and, for many, the public face of the opioid crisis.<sup>54</sup> A generalist observer reading the Bankruptcy Code could be forgiven for querying why there might be any effect at all. So it would be, after all, in ordinary civil litigation, where a verdict against Purdue would not fix the outcome

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<sup>46</sup> Levitin, *supra* note 23, at 103.

<sup>47</sup> See, e.g., Debtors’ Informational Brief at 36, *Purdue II*, 65 B.R. 26 (No. 19-23649).

<sup>48</sup> See *id.* at 1–2.

<sup>49</sup> See generally U.S. Dept. of Just., *Plea Agreement with Purdue Pharma L.P.* (Oct. 20, 2020), <https://perma.cc/U69U-B5X9>.

<sup>50</sup> Disclosure Statement for Fifth Amended Joint Chapter 11 Plan at 134, *Purdue II*, 65 B.R. 26 (No. 19-23649) (Dkt. 2983) [hereinafter *Purdue Disclosure Statement*].

<sup>51</sup> *Id.* at 2.

<sup>52</sup> *Id.* at 34. Individual claimants are likely to receive amounts ranging from \$3,500 to \$48,000, less costs of administration of the trusts and certain other specified deductions. *Id.* at 2–3, 8–9.

<sup>53</sup> See Levitin, *supra* note 23, at 105; PATRICK RADDEN KEEFE, *EMPIRE OF PAIN: THE SECRET HISTORY OF THE SACKLER DYNASTY* 405, 415–16, 421–24 (2021).

<sup>54</sup> See Levitin, *supra* note 23, at 103.

on separate, unadjudicated claims against the Sacklers.<sup>55</sup> Even so, the centerpiece of Purdue's plan of reorganization was a settlement incorporating a third-party release in favor of the Sacklers.<sup>56</sup> In other words, following a contribution by the Sacklers to the bankruptcy case, creditors of Purdue were ordered to give up their claims against the Sacklers as part of the resolution of Purdue's own liabilities even though, in most cases, creditors will still receive only cents on the dollar on their claims against Purdue.<sup>57</sup> After an extensive confirmation hearing, the bankruptcy court confirmed Purdue's plan in a thorough and detailed opinion.<sup>58</sup> Yet for all that was at stake, few in the bankruptcy world had any doubt before the court issued its opinion as to what the result would be. Purdue's plan straightforwardly cohered with deeply rooted norms within the bankruptcy community on the best approach to resolving complex bankruptcy disputes and likewise reflected the direction in which Purdue, as debtor in possession, had been steering the case from the beginning.<sup>59</sup>

Nonetheless, even among bankruptcy scholars and practitioners, what Purdue and similarly situated debtors have done is controversial. Defenders of third-party releases argue that they permit complex Chapter 11 cases to be resolved more efficiently. Thus, in *Purdue*, the debtors' attorneys argued that the alternative would be costly and uncertain litigation against the Sacklers under which many claimants might not recover.<sup>60</sup> Critics are troubled by the indeterminacy of the procedure; on the one hand, claimants of the Sacklers will not have the same opportunity to prove their claims before a jury as they would in ordinary civil litigation, while on the other, the Sacklers' affairs will not be subjected to the rigorous scrutiny that Chapter 11 ordinarily prescribes for debtors.<sup>61</sup> Either way, resolution of this critical policy

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<sup>55</sup> *Id.* at 103–04.

<sup>56</sup> See Hoffman, *supra* note 24; Jan Hoffman & Mary Williams Walsh, *Judge Clears Purdue Pharma's Restructuring Plan for Vote by Thousands of Claimants*, N.Y. TIMES (May 26, 2021), <https://perma.cc/53VK-S3FM>; *Purdue I*, 633 B.R. at 58–61.

<sup>57</sup> Purdue Disclosure Statement, *supra* note 50, at 41, 275–77.

<sup>58</sup> See generally *Purdue I*, 633 B.R. 53.

<sup>59</sup> See, e.g., Levitin, *supra* note 23, at 104–06.

<sup>60</sup> See Hoffman & Walsh, *supra* note 56.

<sup>61</sup> Levitin, *supra* note 23, at 104; Lindsey D. Simon, *Bankruptcy Grifters*, YALE L.J. 1154, 1189–90 (2022). Such characterizations of *Purdue* by scholars are also consistent with defenses of the bankruptcy court's decision offered by bankruptcy practitioners. See, e.g., Betsy L. Feldman, *Bankruptcy Can Establish True Peace: The Importance of Non-*

conundrum turns on a legal mechanism that is a post hoc creation of bankruptcy judges and practitioners<sup>62</sup> rather than a process contemplated by Congress when it enacted the Bankruptcy Code. In the view of the district court, however, this was a bridge too far. In a rare successful appeal of a Chapter 11 confirmation order, the district court rejected the idea that “questionable” statutory authority could support such releases even when they play a key role in resolving “unique” cases.<sup>63</sup>

In the bankruptcy world, it is the district court’s decision, not the proceedings in bankruptcy court, that is the outlier. Everywhere in bankruptcy, judges alter rights, create remedies, and steer cases out of fidelity to unwritten norms that seek to advance what those within the bankruptcy culture understand to be the better and more efficient functioning of the bankruptcy system. Various scholars have attempted to describe and systemize these norms.<sup>64</sup> Judges that do this operate based on an understanding that bankruptcy is special: it is a unique field of law that requires its own distinctive approach. As a purely theoretical matter, bankruptcy exceptionalism might take many different forms. Bankruptcy could hold that certainty and predictability necessities for a successful bankruptcy system and thus that the Bankruptcy Code should be interpreted using an anomalously strict variant of plain meaning textualism.

In practice, U.S. bankruptcy lauds flexibility, creativity, and pragmatism over technicalities of process and form; in commercial cases, these values serve the substantive goal of getting to a value-maximizing negotiated deal.<sup>65</sup> Exceptionalist decisions in

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*Consensual Third-Party Releases in Purdue Pharma’s Chapter 11 Case*, 30 NORTON J. BANKR. L. & PRAC. 1 (2021):

While the national press has suggested that the third-party releases proposed in the Purdue [C]hapter 11 plan of reorganization . . . are extraordinary, this type of release is actually now fairly standard in large [C]hapter 11 cases, especially when, as in the Chapter 11 Cases, the released parties have agreed to contribute significant consideration to channeling trusts that will fund recoveries for creditors.

<sup>62</sup> This mechanism has been endorsed by a number of courts of appeals. See *In re Johns-Manville Corp.*, 97 B.R. 174, 181 (Bankr. S.D.N.Y. 1989); Levitin, *supra* note 23, at 104; Simon, *supra* note 61, at 1171 (discussing how “[t]he common use of non-debtor releases and channeling injunctions did not appear overnight” and flagging the 1980s *Johns-Manville* asbestos decision as the leading precedent).

<sup>63</sup> *Purdue II*, 635 B.R. at 37. As the district court noted, rules reflecting bankruptcy exceptionalism for “unique” cases seldom remain so constrained. See *id.*

<sup>64</sup> See generally, e.g., BAIRD, *supra* note 19, at 2–5.

<sup>65</sup> See, e.g., Buccola, *supra* note 21, at 1564; Troy McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 798 (2010).

bankruptcy prioritize fidelity to these precepts—and the overall goal of making sure that the bankruptcy system fulfills the purposes for which it was created—over close adherence to statutory text, concern that cases before bankruptcy judges be decided using the same tools as elsewhere, and at least some niceties of process. This Part describes such bankruptcy exceptionalism and contrasts it with a generalist approach to bankruptcy—in particular, that of the Supreme Court in its own bankruptcy jurisprudence.

#### A. Exceptionalism in the Bankruptcy Courts

Bankruptcy is the platypus of U.S. law.<sup>66</sup> It is part ordinary civil litigation, part complex litigation, and part something quite different again. It is not quite private law and not quite public law. It incorporates both state and federal law and both statutory and common law rules. In short, it does not look quite like anything else. Bankruptcy judges recognize this. Keeping all the wheels on the bus in the complex, fast-moving world of bankruptcy is thought to require not just a special skill set among bankruptcy judges, but also a special approach to judging. This Article dubs this notion bankruptcy exceptionalism (though it is not the only article to use this term<sup>67</sup>). It is primarily focused on *methods*: that is, on the idea that judges in bankruptcy cases must do their job in a different way or use different tools than judges in other federal civil cases.

Frequently, the language of bankruptcy exceptionalism is the language of equity.<sup>68</sup> Bankruptcy courts regularly find that “it is axiomatic that bankruptcy courts are courts of equity, empowered to invoke equitable principles to achieve fairness and justice in

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<sup>66</sup> I am indebted to Professor Adam Levitin for this comparison.

<sup>67</sup> See, e.g., Lipson, *supra* note 38, at 611.

<sup>68</sup> A Westlaw search of bankruptcy court decisions between January 1, 2015, and December 31, 2020, for the term “‘bankruptcy court’ /s ‘court of equity’” produced 112 results. All but one accepted the notion that the bankruptcy court was a court of equity. One decision, *In re Colon*, 558 B.R. 563 (Bankr. D.P.R. 2016), concluded that “[t]he notion that bankruptcy courts are courts of equity may now be more an illusory construct than a judicial precept.” *Id.* at 568. The remainder of the decisions generally split between those in which the bankruptcy court relied on equitable powers or its special equitable status in reaching its conclusion, and those in which it acknowledged its equitable powers but nonetheless concluded that it did not have authority to order the relief requested or that it was not warranted on the facts of the case. The two categories were of roughly equal size.

the reorganization process.”<sup>69</sup> This power encompasses “broad authority to modify creditor-debtor relationships” so that “substance will not give way to form and that technical considerations will not prevent substantial justice from being done.”<sup>70</sup> Once a party has filed for bankruptcy, equity empowers the court “to delve behind the form of transactions and relationships to determine the substance.”<sup>71</sup> “Windfalls” “are not bankruptcy concepts” and the bankruptcy court “cannot countenance” such a type of inequitable result.<sup>72</sup> And “as courts of equity,” bankruptcy courts “may always consider the presence of bad faith on the part of one of the parties when fashioning relief.”<sup>73</sup> This dynamic was illustrated in one recent high-profile bankruptcy decision permitting Johnson & Johnson to turn to a bankruptcy court to resolve legacy asbestos liabilities: “[T]his Court stands prepared to employ its limited equitable authority under § 105(a) to facilitate and assist Debtor and all tort claimants to achieve a fair and just result, consistent with the social policies and objectives intended by Congress in enacting the Bankruptcy Code.”<sup>74</sup>

Bankruptcy judges described their view in much the same way in a private survey. Professor Diane Lourdes Dick secured responses from fifty-one bankruptcy judges and found that judges could be divided into four broad camps with different views on the scope of the bankruptcy court’s equitable power and the discretion afforded to bankruptcy judges.<sup>75</sup> The results cannot be generalized and do not support inferences about what proportion of bankruptcy judges may belong to each camp.<sup>76</sup> Dick distinguished between bankruptcy judges’ attitudes toward the incorporation of equity in decisions and the availability of inherent equitable powers within bankruptcy and judges’ attitudes toward the exercise

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<sup>69</sup> *In re Republic Airways Holdings*, 598 B.R. 118, 144 (Bankr. S.D.N.Y. 2019) (quotation marks omitted). Note that this court rejected an argument for resort to equity. *Id.* at 144–45.

<sup>70</sup> *In re Lyondell Chem. Co.*, 544 B.R. 75, 92 (Bankr. S.D.N.Y. 2016) (quotation marks omitted) (first quoting *United States v. Energy Res. Co.*, 495 U.S. 545, 549 (1990); and then quoting *Pepper v. Litton*, 308 U.S. 295, 305 (1939)) (describing the bankruptcy court’s equitable power to recharacterize debt as equity).

<sup>71</sup> *In re DBSI Inc.*, 593 B.R. 795, 829 (Bankr. D. Idaho 2018).

<sup>72</sup> *In re Physiotherapy Holdings, Inc.*, 2017 WL 5054308, at \*7 (Bankr. D. Del. Nov. 1, 2017).

<sup>73</sup> *In re Macco Props., Inc.*, 540 B.R. 793, 887 n.477 (Bankr. W.D. Okla. 2015).

<sup>74</sup> *In re LTL Mgmt, LLC*, 2022 WL 596617, at \*24 (Bankr. D.N.J. Feb. 25, 2022).

<sup>75</sup> Dick, *supra* note 9, at 265.

<sup>76</sup> *Id.* at 266. Dick does not disclose how many responses she assigned to each cluster. See generally *id.*



of judicial discretion.<sup>77</sup> Some judges rejected the notion that the bankruptcy court retained substantial or wide-ranging equitable powers today, although these judges disagreed on whether judicial discretion should play an expansive role in bankruptcy today.<sup>78</sup> Other bankruptcy judges embraced the notion that the bankruptcy court retains equitable powers today: within that group, Dick distinguished between those judges that viewed the primary scope for exercising those powers to be procedural matters and those that believed equity might create substantive law or remedies beyond the confines of the Bankruptcy Code, at least so long as specific provisions of the Code are not contradicted.<sup>79</sup> Equity might advance substantive goals, such as “fairness,” “preventing ‘harsh outcomes’” or “making things ‘right,’” or address process or system-oriented concerns such as “flexibility” or “stopping parties from ‘gaming the system.’”<sup>80</sup> Many judges who believed that the bankruptcy court possessed equitable powers nonetheless emphasized in their responses that it was important that those powers be exercised with caution, or in ways that were “thoughtful,” “judicious,” “measured,” and “balanced.”<sup>81</sup>

Decisions that alter the parties’ positions based not on any specific authorization provided by the Bankruptcy Code but instead on the residue of bankruptcy judges’ equitable or inherent power can straightforwardly be characterized as reflecting bankruptcy exceptionalism. Such decisions are not rare. They include remedies that are routinely authorized by the bankruptcy courts. This Section next describes two clusters of precedent surrounding practices commonplace in the bankruptcy court and generally (although not universally) sourced in the bankruptcy court’s inherent or equitable powers.

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<sup>77</sup> *Id.* at 269–73.

<sup>78</sup> *Id.* at 270.

<sup>79</sup> *Id.* at 271–72.

<sup>80</sup> Dick, *supra* note 9, at 291.

<sup>81</sup> *Id.* at 293. These qualifiers may not tell the whole story. Bankruptcy judges may emphasize that they invoke equitable powers cautiously and only after careful thought but nonetheless do so with more frequency than other federal courts or in ways that those courts would view as exceeding their authority. Other judges that disclaim reliance on equity, either to rule in ways that are “creative” or to secure flexibility to achieve a desired outcome in an individual case, may nonetheless enter orders or grant remedies that originate in the bankruptcy courts’ equitable or inherent powers even as they have become routine features of bankruptcy practice.

### 1. Third-party releases.

The Bankruptcy Code's provisions are directed towards resolving the liabilities of debtors. A key component of that resolution is the discharge: an end-of-case order forbidding further attempts to collect on the debtor's pre-petition liabilities.<sup>82</sup> The Code provides that discharge of a debtor's obligation "does not affect the liability of any other entity" for the debt.<sup>83</sup> In many cases, though, debtors will want to ensure that related entities—often corporate affiliates or the debtor's own directors and officers—are protected from its disappointed creditors. Congress has created a mechanism by which liabilities of third parties could be channeled to a single, debtor-backed trust in asbestos mass-tort bankruptcies, but it has never created any similar mechanism for non-asbestos cases.<sup>84</sup> It has become increasingly common in large commercial cases for bankruptcy courts to effect the debtor's goal by ordering the release of creditors' claims against such non-debtor entities.<sup>85</sup> Although recognizing that the Code does not specifically authorize them, many courts have concluded that these releases are "not inconsistent" with the Code and so may be granted pursuant to the court's general equitable powers.<sup>86</sup> In many cases, the bankruptcy court's decision to order the release is buttressed by a finding of consent; that said, such consent typically embodies the "rough justice" values of bankruptcy and may mean simply that the creditor has failed to affirmatively opt out of granting the release.<sup>87</sup> In other cases, the release is ordered nonconsensually. Bankruptcy courts have developed various standards to assess the propriety of nonconsensual third-party

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<sup>82</sup> 11 U.S.C. § 524(a).

<sup>83</sup> 11 U.S.C. § 524(e).

<sup>84</sup> 11 U.S.C. § 524(g).

<sup>85</sup> Harlin Hale, Aubrey Edkins, & Nicole Hay, *Set Me Free: Shared Policy Concerns on Nonconsensual Third-Party Releases*, 35 AM. BANKR. INST. J. 26, 26 (Sept. 2016). See also generally Dorothy Coco, *Third-Party Bankruptcy Releases*, 88 FORDHAM L. REV. 231 (2019).

<sup>86</sup> See, e.g., *In re Dow Corning*, 280 F.3d 648, 658 (6th Cir. 2002); Coco, *supra* note 85, at 239–42 (collecting cases). In fairness, some courts have largely disclaimed reliance on equitable powers when approving even nonconsensual third-party releases, arguing instead that the Bankruptcy Code, fairly interpreted, permits bankruptcy judges to authorize them. See, e.g., *In re Airadigm Commc'ns, Inc.*, 519 F.3d 640, 656–57 (7th Cir. 2008). Yet it is at best questionable whether courts that have reached such conclusions have engaged with the task of interpreting the Bankruptcy Code in a way that is consistent with the Supreme Court's methodology.

<sup>87</sup> See Mark McDermott & Cameron Fee, *Consensual Third-Party Releases Under § 1141: An Emerging Analytical Framework*, 39 AM. BANKR. INST. J. 22, 22, 47 (2020).

releases.<sup>88</sup> Typical are the *In re Continental Airlines*<sup>89</sup> factors described by the Third Circuit, which examine (1) whether the release is fair; (2) whether the release is necessary to the reorganization; and (3) whether fair consideration has been given by the released parties in exchange for the release.<sup>90</sup>

*Purdue* is not the only case in which third-party releases are controversial. Indeed, they are among the major flashpoints in contemporary commercial bankruptcy practice. Courts of appeals have split on the permissibility of nonconsensual third-party releases; several circuits prohibit them entirely.<sup>91</sup> Longtime scholarly concern has highlighted issues as basic as whether the bankruptcy court has subject matter jurisdiction mandatorily to resolve a claim running against a nondebtor.<sup>92</sup> However, in the Delaware and New York bankruptcy courts, historically the nation's busiest commercial bankruptcy courts, they are a routine feature of practice.<sup>93</sup>

## 2. Substantive consolidation and recharacterization.

Among the pragmatic norms of the bankruptcy community is a commitment to substance over form. Substantive consolidation and recharacterization are two equitable doctrines that give effect to that principle. Substantive consolidation is a decision by a bankruptcy court to treat the assets and liabilities of two separate debtors (or, less frequently, a debtor and a nondebtor) as if they were the assets and liabilities of a single entity.<sup>94</sup> It somewhat resembles (but is more comprehensive than) the state law remedy of piercing the corporate veil, and it is invoked in similar cases: where two formally separate entities have in practice operated as alter egos of each other to the detriment of creditors.<sup>95</sup> An extensive body of case law sets forth the tests that bankruptcy courts

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<sup>88</sup> *Coco*, *supra* note 85, at 242–45.

<sup>89</sup> 203 F.3d 203 (3d Cir. 2000).

<sup>90</sup> *Id.* at 214, 244.

<sup>91</sup> *Coco*, *supra* note 85, at 237–39.

<sup>92</sup> See, e.g., Ralph Brubaker, *Bankruptcy Injunctions and Complex Litigation: A Critical Reappraisal of Non-Debtor Releases in Chapter 11 Reorganizations*, 1997 U. ILL. L. REV. 959, 1068–80 (1997). For a collection of scholarship addressing third-party releases, see Simon, *supra* note 61, at 1170–71 nn.76–81.

<sup>93</sup> See, e.g., *Purdue II*, 635 B.R. at 37.

<sup>94</sup> NORTON BANKRUPTCY LAW AND PRACTICE, § 21:3 (3d ed. 2008).

<sup>95</sup> *Id.* at § 21:5.

are to apply in deciding whether to order substantive consolidation;<sup>96</sup> these cases typically acknowledge that it is nowhere authorized in the Bankruptcy Code but find that it serves “to ensure the equitable treatment of all creditors.”<sup>97</sup>

Recharacterization is a similar remedy that runs instead against a purported creditor. It involves a finding that an obligation formally styled as a debt is really an equity stake in the debtor that the investor has disguised as a claim in order to improve its position. With exceptions, the Code presupposes that any claim valid under state law is also valid in bankruptcy.<sup>98</sup> Some courts of appeals, therefore, have limited the bankruptcy court’s ability to recharacterize debt as equity to cases in which applicable state law would authorize the same remedy.<sup>99</sup> Other courts have recognized a broader federal recharacterization doctrine that, in bankruptcy, is rooted in the bankruptcy court’s equitable powers.<sup>100</sup> The question is significant enough to have drawn Supreme Court attention; procedural complications with the case the Justices originally accepted, however, have meant that the split persists.<sup>101</sup>

An analysis of bankruptcy exceptionalism, though, cannot stop with decisions that squarely invoke the court’s equitable powers. A bankruptcy court decision need not do so to meet the standard described at the beginning of this Section: fidelity to the norms of bankruptcy culture over generalist rules of adjudication. Some bankruptcy courts may intentionally sculpt decisions to omit any reference to equity for fear of reversal.<sup>102</sup> In other cases, influenced by bankruptcy culture, a bankruptcy judge may simply approach the task of giving meaning to a provision of the Bankruptcy Code quite differently than another federal judge would.

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<sup>96</sup> *Id.*

<sup>97</sup> *In re Augie/Restivo Baking Co.*, 860 F.2d 515, 518 (2d Cir. 1988). See NORTON BANKRUPTCY LAW AND PRACTICE, *supra* note 94, at § 21:3–4.

<sup>98</sup> 11 U.S.C. § 502(b).

<sup>99</sup> See, e.g., *In re Lothian Oil, Inc.*, 650 F.3d 539, 542–44 (5th Cir. 2011).

<sup>100</sup> See, e.g., *In re Dornier Aviation (N. Am.) Inc.*, 453 F.3d 225, 231 (2006) (“[R]echaracterization is well within the broad powers afforded a bankruptcy court in § 105(a.)”; *In re TransCare Corp.*, 602 B.R. 234, 243 (Bankr. S.D.N.Y. 2019) (quoting *Pepper v. Litton*, 308 U.S. 295, 305 (1939)).

<sup>101</sup> Danielle D’Onfro, *Surprise Dismissal of Bankruptcy Case Seemingly Prompted by Change in Claim Ownership*, SCOTUSBLOG (Aug. 11, 2017), <https://perma.cc/R3E7-M85L>.

<sup>102</sup> See Dick, *supra* note 9, at 292 (quoting one judge as saying, “I have never once said that I was doing anything in the name of ‘equity.’ That will get you a sure reversal”).

Substance over form, then, matters when analyzing bankruptcy exceptionalism.<sup>103</sup>

One important qualification: though creativity and flexibility are prized, neither equity nor exceptionalism in bankruptcy mean the Chancellor's foot.<sup>104</sup> Various critics of bankruptcy exceptionalism have forcefully rejected the notion that bankruptcy judges hold a "roving commission to do equity."<sup>105</sup> Such critiques are compelling—and fairly target some particularly ad hoc decision-making practices that occur within bankruptcy—but do not fully grapple with what comprises bankruptcy exceptionalism. Much more typical is the use of equity to incrementally supplement the Bankruptcy Code in order to allow for practices that the Code itself does not describe or authorize (but, equally, does not expressly forbid) and that bankruptcy judges believe to be necessary in order for bankruptcy cases to succeed. Thus, advocates of third-party releases claim that they are a vital part of modern Chapter 11 practice because they are necessary to efficiently resolve complex cases in which the debtor's affairs are entangled with third parties whose cooperation is essential or whose financial support is needed to get the reorganization off the ground;<sup>106</sup> indeed, all the commonly applied tests for assessing the validity of third-party releases incorporate some kind of necessity standard.<sup>107</sup> Substantive consolidation and recharacterization prevent litigants from relying on too-clever prebankruptcy planning to frustrate others' rights. Each of these remedies is applied in a manner consistent with iteratively developed precedent, not simply according to the case-by-case whims of the bankruptcy

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<sup>103</sup> So it is, for example, with the bankruptcy court approach to filling gaps in the statutory text, discussed *infra* nn. 140–146 and accompanying text.

<sup>104</sup> The seventeenth-century legal scholar John Selden complained of equity's uncertainty. In his words:

Equity is A Roguish thing, for Law wee have a measure know what to trust too. Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower soe is equity. Tis all one as if they should make the Standard for the measure wee call A foot, to be the Chancellors foot; what an uncertain measure would this be; One Chancellor has a long foot another A short foot a third an indifferent foot; tis the same thing in the Chancellor's conscience.

H. Jefferson Powell, "Cardozo's Foot": *The Chancellor's Conscience and Constructive Trusts*, 56 L. & CONTEMP. PROBS. 7, 7 (1993) (quoting TABLE TALK OF JOHN SELDEN 43 (Frederick Pollock ed., 1927)).

<sup>105</sup> *United States v. Sutton*, 786 F.3d 1305, 1308 (5th Cir. 1986).

<sup>106</sup> See, e.g., Mary Grace Diehl, *The Case for Third Party Releases*, ABI VIEWS FROM THE BENCH: GREAT DEBATES (Oct. 17, 2017).

<sup>107</sup> *Coco*, *supra* note 85, at 242–45.

judge. This is entirely consistent with bankruptcy judges' characterizations of their own jurisprudence as "cautious," "measured," and "thoughtful."<sup>108</sup> Any successful critique of bankruptcy exceptionalism must, in turn, be sophisticated and careful.

## B. The Supreme Court

Fully understanding bankruptcy exceptionalism requires a comparison to an alternative, nonexceptionalist approach to bankruptcy law. In contrast to the bankruptcy courts, the Supreme Court's bankruptcy jurisprudence is generalist. It rejects—or at least, it claims to reject<sup>109</sup>—the idea that bankruptcy cases should be approached differently than any others. Because the dominant adjudicatory methodology of the contemporary Supreme Court is textualism, textualism also describes the Supreme Court's bankruptcy cases (with the important clarifications detailed in this Section). At the outset, because denominations like "textualist" or "purposivist" remain charged terms—and because, notwithstanding Justice Elena Kagan's claim of textualist unity,<sup>110</sup> the various Justices of the Supreme Court have different and at times sharply conflicting approaches to statutory interpretation—it is important to note that the Court's bankruptcy decisions are *not* usually ideologically driven.<sup>111</sup> Among the forty-four bankruptcy cases that the Supreme Court has decided since 2000, only three reflect a clean liberal-conservative ideological split; two of those three, *Stern v. Marshall*<sup>112</sup> and *Virginia Community College v. Katz*,<sup>113</sup> are as much constitutional law cases as bankruptcy cases, fixing bankruptcy's place within the

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<sup>108</sup> Dick, *supra* note 9, at 293.

<sup>109</sup> Critics of the Supreme Court's bankruptcy jurisprudence have claimed that it is nonetheless motivated by a special hostility to bankruptcy. *See, e.g.,* MANN, *supra* note 41, at 231.

<sup>110</sup> Harvard Law School, The 2015 Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes, YOUTUBE (Nov. 25, 2015), <https://www.youtube.com/watch?v=dpEtszFT0Tg&themeRefresh=1>.

<sup>111</sup> KENNETH N. KLEE, BANKRUPTCY AND THE SUPREME COURT 44 (2008) (noting that the partisanship of the Justices does not predict voting patterns in bankruptcy cases but suggesting an exception in cases in which the debtor is adverse to the government, in which Republican-appointed Justices are more likely to favor the debtor).

<sup>112</sup> 564 U.S. 462 (2011). Chief Justice John Roberts wrote an opinion for the Court; Justice Stephen Breyer wrote a dissent for himself and Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan.

<sup>113</sup> 546 U.S. 356 (2006). Justice John Paul Stevens wrote an opinion for the court; Justice Clarence Thomas wrote a dissent for himself, Chief Justice Roberts, and Justices Antonin Scalia and Anthony Kennedy.

broader federal legal system.<sup>114</sup> Nonetheless, recognizing that sharp differences persist on the Supreme Court on underlying issues of statutory interpretation and broader ideology, it is worth clarifying that this Article attempts to describe—as it does with the bankruptcy courts—the center of gravity of the Supreme Court’s approach, to which exceptions and caveats will continue to apply.

The most notable recent comment of the Supreme Court on the task of judging in bankruptcy cases came in 2014. *Law v. Siegel*<sup>115</sup> concerned a Chapter 7 liquidation of an individual debtor.<sup>116</sup> Even though the case concerns consumer bankruptcy, it illustrates much about broader conflicts over exceptionalism that carry over to the commercial bankruptcy context. In principle, liquidation is a straightforward process. The Chapter 7 debtor turns over all of his property that is not protected by an enumerated list of state or federal exemptions to a court-appointed trustee.<sup>117</sup> The trustee sells that property and distributes any cash realized to the debtor’s creditors; in exchange, the debtor receives a discharge of most categories of debt owed at the time the bankruptcy case was filed.<sup>118</sup>

Debtor Stephen Law’s case was complicated by California’s homestead exemption, which at the time protected \$75,000 in equity in an individual debtor’s primary residence.<sup>119</sup> The exemption entitled Law to be paid the first \$75,000 realized from the sale of his home by the Chapter 7 trustee (after payment of mortgage or other secured creditors) before any of the sale proceeds could be

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<sup>114</sup> The third, *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365 (2007), raised a straightforward bankruptcy issue that does implicate debates over bankruptcy exceptionalism: Could the bankruptcy court’s broad authority under Section 105(a) of the Code to prevent abuse of process allow the court to take a shortcut by disregarding a bad faith debtor’s statutory right to convert a Chapter 7 case to Chapter 13 as a sanction for misconduct rather than waiting until after conversion to Chapter 13 to dismiss the case? *Id.* at 367–68. Justice Stevens wrote a pragmatic opinion, joined by the Court’s liberals and Justice Kennedy, so holding; Justice Samuel Alito, writing for the Court’s conservatives, viewed this as an impermissible gloss on the Code’s provisions. *Id.* The dispute was smoothed over with a later unanimous opinion of Justice Scalia, narrowly characterizing *Marrama* as a case holding that the bankruptcy court “may be authorized to dispense with futile procedural niceties in order to reach more expeditiously an end result required by the Code.” *Law v. Siegel*, 571 U.S. 415, 426 (2014).

<sup>115</sup> (*Law IV*) 571 U.S. 415 (2014).

<sup>116</sup> *Id.* at 418.

<sup>117</sup> 11 U.S.C. §§ 522, 704.

<sup>118</sup> 11 U.S.C. §§ 704, 726–27.

<sup>119</sup> CAL. CIV. PROC. ANN. § 704.730(a)(1); see *Law*, 571 U.S. at 417–18.

used to satisfy general unsecured creditors. An important corollary, though, was this: if the debtor had less than \$75,000 in equity in his home, then there would be no reason for the trustee to sell the property at all, because no money could be raised to satisfy creditors' unsecured claims. Law claimed that this was true in his case: two mortgages encumbering his home meant he owned no equity in it and that the trustee therefore had no reason to sell it.<sup>120</sup>

The problem was that Law had lied. One of the two mortgages that Law described was a complete fiction: a scheme of Law's to ensure that his house remained unsold.<sup>121</sup> Law claimed that the mortgage secured a loan from a person named Lili Lin.<sup>122</sup> Law's story evolved over time, but the bankruptcy court's bottom-line conclusion was that Lili Lin did not exist. She and the loan were both inventions of Law.<sup>123</sup> Proving this, though, not only took years of litigation but also cost the trustee over \$500,000 in attorneys' fees.<sup>124</sup> Sale of the property would *still* produce nothing for creditors (because the trustee would first be entitled to reimbursement of his fees) and would leave the trustee severely out of pocket. The bankruptcy court thus ordered that the trustee could, upon sale of the property, surcharge Law's \$75,000 homestead exemption, so that the maximum amount of money possible could go towards compensating the trustee for his efforts to uncover Law's fraud.<sup>125</sup>

The policy arguments in favor of the bankruptcy court's decision are practically unimpeachable. Law was a fraudster who had engaged in a yearslong campaign of deceitful litigation in the bankruptcy court, all aimed at ensuring he kept every dollar of equity in his home rather than the limit of \$75,000 to which he was entitled. Surcharging his exemption meant that, his campaign having failed, he could not simply walk away financially none the worse for his efforts. First the Ninth Circuit bankruptcy appellate panel and then the Ninth Circuit itself affirmed the

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<sup>120</sup> *Law*, 571 U.S. at 418–19.

<sup>121</sup> *Id.*

<sup>122</sup> *In re Law (Law I)*, 401 B.R. 447, 449 (Bankr. C.D. Cal. 2009), *rev'd sub nom. (Law IV)*.

<sup>123</sup> *Id.* at 450–53.

<sup>124</sup> *Id.* at 453.

<sup>125</sup> *Id.* at 455.



bankruptcy court's decision in brief, unanimous opinions.<sup>126</sup> Doing so “protect[ed] the integrity of the bankruptcy process.”<sup>127</sup>

The Supreme Court unanimously reversed.<sup>128</sup> The lower courts below had not relied on any specific statutory authorization.<sup>129</sup> Instead, the bankruptcy appellate panel had concluded that the bankruptcy court could fashion the relief granted as an “equitable remedy.”<sup>130</sup> “Exceptional circumstances” could justify a surcharge when necessary to ensure a fair outcome.<sup>131</sup> The Supreme Court took a wholly different approach to the problem—one that sharply cabined the ability of the bankruptcy court to rely on equitable principles to resolve disputes. To the extent that the bankruptcy court retained any general equitable powers, those had to give way to the statutory text.<sup>132</sup> Here, the Bankruptcy Code's statement that the debtor “may exempt” any property protected by a state law exemption gave the debtor the statutory right to decide whether to invoke an exemption.<sup>133</sup> And text came first. While not disclaiming the possibility that the bankruptcy court possessed some degree of residual equitable power, the Court emphasized that equity could not displace other specific Bankruptcy Code provisions.<sup>134</sup>

*Law* has dramatic facts that seem far afield from the highly professionalized world of Chapter 11 megacases like *Purdue*. Moreover, some commentators—including some bankruptcy judges—have suggested in retrospect that *Law* was an obvious case: a straightforward example of a Code violation not comparable to more nuanced uses of equity to fill gaps or supplement the Code without contradicting it.<sup>135</sup> Both of these assumptions need further interrogation.

First, *Law* neatly encapsulates the two sides of the divide that this Article addresses: the divide between a bankruptcy court concerned with equitable outcomes and its ability to fashion rules

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<sup>126</sup> See *In re Law (Law II)*, 2009 WL 7751415, at \*10 (9th Cir. B.A.P. Oct. 22, 2009); *In re Law (Law III)*, 435 F. App'x 697, 698 (9th Cir. 2011).

<sup>127</sup> *Law III*, 435 F. App'x at 698.

<sup>128</sup> *Law IV*, 571 U.S. at 428.

<sup>129</sup> *Id.* at 420.

<sup>130</sup> *Law II*, 2009 WL 7751415 (9th Cir. B.A.P. Oct. 22, 2009), at \*5; see also *Law III*, 435 F. App'x at 698.

<sup>131</sup> *Law II*, 2009 WL 7751415, at \*5.

<sup>132</sup> *Law IV*, 571 U.S. at 422.

<sup>133</sup> *Id.* at 424.

<sup>134</sup> *Id.* at 422.

<sup>135</sup> Dick, *supra* note 9, at 294. Surveyed bankruptcy judges endorsed *Law* by a ratio of two to one. *Id.* The decision also had its critics. *Id.* at 293.

promoting better administration of bankruptcy cases, and a Supreme Court determined to ensure that the bankruptcy courts' orders do not stray too far from the text of the statute they apply. The description of ordinary and constrained statutory interpretation the Supreme Court gives in *Law* is more fulsome than is found in many of its recent Chapter 11 decisions, but it is entirely consistent with what the Court has said and done in those cases.<sup>136</sup>

Second, the bankruptcy court's decision in *Law v. Siegel* was less out of step with the center of gravity of the bankruptcy courts' approach to deciding cases than today's characterizations of it as a "straightforward" case might suggest.<sup>137</sup> An at least plausible analogy can be made to Chapter 11 decisions authorizing third-party releases, which illustrates the broader point that bankruptcy judges identify mandates and gaps in the Code—and thus implied prohibitions or permissions to resort to equity—differently than the Supreme Court does. The legal discussion in the opinions below is cursory; an earlier but inapposite Ninth Circuit decision was cited for the proposition that equitable surcharge of an exemption may be authorized if necessary to protect the integrity of the bankruptcy system.<sup>138</sup> But the Supreme Court briefing sketches out the argument those courts might have made: that, while the statute nowhere authorizes equitable surcharge of an exemption, it also nowhere prohibits it, "contain[ing] no directive requiring courts to allow an exemption regardless of the circumstances."<sup>139</sup> For some bankruptcy courts, the lack of such an express prohibition might leave enough interstitial space for the court to impose such a remedy if the facts warrant it.<sup>140</sup> This is in substance the reasoning of a number of decisions authorizing

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<sup>136</sup> See *Mission Prod. Holdings Corp. v. Tempnology*, 139 S. Ct. 1652, 1665 (2019); *Jevic IV*, 137 S. Ct. at 987; *RadLAX Gateway Hotel v. Amalgamated Bank*, 566 U.S. 639, 646–49 (2012). Again, this reflects cross-ideological consensus: these opinions were written, with no substantive dissents, by Justices Kagan, Breyer, and Scalia, respectively.

<sup>137</sup> *But see* Dick, *supra* note 9, at 294.

<sup>138</sup> *Cf. generally* *Law II*, 2009 WL 7751415; *Law III*, 435 F. App'x 697.

<sup>139</sup> *Law IV*, 571 U.S. at 423 (alterations and quotation marks omitted). Indeed, as the trustee argued before the Supreme Court, the Code does not even say that the debtor "shall" be entitled to assert exemptions; it says that the debtor "may" exempt the property listed in Section 522. *Id.* at 424.

<sup>140</sup> Thus, some judicial critics of the Supreme Court's decision in *Law* in Dick's survey argued that it was "strained" and "myopic." Dick, *supra* note 9, at 295. Others focused more directly on the decision's practical consequences and the need for judges to have tools to punish abuse, and others argued that Section 522 should not be permitted to override the "purpose and spirit of the whole." *Id.* at 295–96.

third party releases. For those courts, the Code provides no answer either way as to whether a judge may release a creditor's claim against a nondebtor; it leaves space, therefore, for the bankruptcy court to deploy equity and order the release.<sup>141</sup>

For the Supreme Court in *Law*, of course, interstitial space simply did not exist. The Code gave the debtor a right to exemptions and thus prohibited the surcharge.<sup>142</sup> But the Court's additional reasoning, considering the consequences had there been no straightforward prohibition, further illustrates the disjunction in approach between the Supreme Court and bankruptcy courts. For many bankruptcy courts, whether in a case like *Law* or a commercial case authorizing a third-party release, finding a gap in the Code allows them to resort to equitable power to craft remedies necessary to fulfilling bankruptcy's broader purposes. But the Supreme Court looked to fill any gap by examining the immediately surrounding statutory text, finding that the exhaustive list of specified exceptions to the debtor's exemption right meant that Congress must have already specified all the exceptions that it intended should apply.<sup>143</sup> In other words, ordinary axioms of statutory interpretation—here, the rule that any general permissions within a statute must yield to more specific provisions—sufficed to close the gap.<sup>144</sup>

Looking at substance over form, statutory gaps are a key example of the disjunction in methodology between the Supreme Court and bankruptcy courts. By any measure, the Bankruptcy Code contains gaps: places where the Code offers no direct answer to how a question arising in litigation should be resolved. Take one example recently recognized by the Supreme Court: The Code protects a discharged debtor with an injunction, but it does not specify the standards to be used to enforce that injunction.<sup>145</sup> Yet, as in *Law*, bankruptcy courts are more likely to find that there is a gap in the Code; at an extreme, the absence of an express prohibition may be counted as a “gap” concerning whether some remedy may be authorized. Having found a gap, bankruptcy courts

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<sup>141</sup> See, e.g., *Dow Corning*, 280 F.3d at 656.

<sup>142</sup> *Law*, 571 U.S. at 422 (citing 11 U.S.C. § 522(b), (k)).

<sup>143</sup> *Id.* at 424.

<sup>144</sup> *Id.* at 421.

<sup>145</sup> *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801–02 (2019).

are more likely to resort to equity to fill it.<sup>146</sup> Even if both bankruptcy courts and the Supreme Court aver that equitable powers in bankruptcy may be exercised only as permitted by the text of the Code itself, they may mean quite different things by that statement.

Context demands an acknowledgement that the approach of the Supreme Court has changed. *Pepper v. Litton*<sup>147</sup> is a Supreme Court case from a different era, but it is still routinely cited in bankruptcy matters today.<sup>148</sup> Then, Justice William O. Douglas, writing for a unanimous court, confronted a problem remarkably similar to that later addressed in *Law*. A claim had been asserted against a business debtor by an insider, and a lawsuit in state court had confirmed that the claim was enforceable. The Bankruptcy Act provided that such a claim “duly proved” “shall be allowed.”<sup>149</sup> But the facts readily disclosed that the claim was spurious—a creation of the debtor’s controlling shareholder to try and ensure that he, rather than the debtor’s legitimate creditors, had first right of priority to the debtor’s assets in bankruptcy.<sup>150</sup> In contrast to his successors seventy-five years later, Justice Douglas believed the ability to upset such a fraudulent scheme to be an inherent feature of bankruptcy practice.<sup>151</sup> Fundamental to the bankruptcy court’s authority was the fact that “courts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity.”<sup>152</sup> Resorting to equitable powers could serve important ends: that “fraud will not prevail, that substance will not give way to form, that technical considerations will not prevent substantial justice from being done.”<sup>153</sup> Irrelevant in bankruptcy was “how technically legal each step” of the scheme at issue may have been under otherwise-applicable law; the exercise of bankruptcy court’s equity jurisdiction required that it be

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<sup>146</sup> Dick, *supra* note 9, at 272 (discussing the notion that equity in bankruptcy is a tool for filling gaps); Coordes, *supra* note 11, at 303, 318–19 (same).

<sup>147</sup> 308 U.S. 295 (1939).

<sup>148</sup> A Westlaw search finds 248 citing references in federal courts since 2010; over 60% of those citations (155 of 248) are citations in bankruptcy court opinions.

<sup>149</sup> Chandler Act, ch. 575, Pub. L. No. 696, § 57, 52 Stat. 866 (1939) (repealed 1978). As a technical matter, the bankruptcy referee in *Pepper* found that the insider held a judgment void under state law, but it also found that the creditor was estopped from contesting the validity of the judgment. *In re Dixie Splint Coal Co.*, 31 F. Supp. 290, 291, 295 (W.D. Va. 1938).

<sup>150</sup> *Dixie Splint*, 31 F. Supp. at 295; *Litton v. Pepper*, 100 F.2d 830, 831 (4th Cir. 1939).

<sup>151</sup> *Pepper*, 308 U.S. at 304–12.

<sup>152</sup> *Id.* at 304 (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 240 (1934)).

<sup>153</sup> *Id.* at 305.

overturned in order to fully serve the purposes of the bankruptcy laws.<sup>154</sup>

In the modern era, though, the best characterization of the Supreme Court's bankruptcy opinions is that they demonstrate what has sometimes been called structural or holistic textualism.<sup>155</sup> This form of textualism emphasizes the need to comprehend the statute's overall structure.<sup>156</sup> Precisely because of the potential for gaps in the Code, this approach is particularly well suited to bankruptcy.<sup>157</sup> Structural textualism calls for these gaps to be filled with principles derived from the statute's text and structure.<sup>158</sup> More is involved than the kind of "robotic" application of statutory text that defenders of bankruptcy's uniqueness have criticized as ill-suited for the bankruptcy context.<sup>159</sup> At the same time, the Supreme Court is much less likely than the bankruptcy courts (and, to some extent, than the district courts and courts of appeals) to embrace outcomes in bankruptcy cases that substantially deviate from the underlying statutory text and emphasize the need for bankruptcy court flexibility that can promote the broader policy goals of the bankruptcy system. This approach might best be summed up by a concluding observation of Justice Antonin Scalia in *RadLAX Gateway Hotel v. Amalgamated Bank*.<sup>160</sup> He underscored that the Court's unanimous decision in

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<sup>154</sup> *Id.* at 312.

<sup>155</sup> See George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321 (1995) (describing and labelling "structural textualism").

<sup>156</sup> *Id.* at 347–54.

<sup>157</sup> See generally, e.g., *Taggart*, 139 S. Ct. 1795; *Harris v. Viegelahn*, 575 U.S. 510 (2015). In *Taggart*, the Court addressed Section 524 of the Bankruptcy Code, which "operates as an injunction" against attempts to collect discharged debt, and Section 105(a), which provides general authority to enter orders carrying out other provisions of the Bankruptcy Code. 139 S. Ct. at 1801. The Code does not say specifically "[i]n what circumstances [] these provisions permit a court to hold a creditor in civil contempt for violating a discharge order." See *id.* In *Harris*, the Court addressed the debtor's right to convert a bankruptcy case from Chapter 13 to Chapter 7. 575 U.S. at 513. The Code does not say what happens to funds that the Chapter 13 trustee is holding at the time of conversion. Compare *id.* with *In re Harris*, 757 F.3d 468, 478 (5th Cir. 2014) (finding "little guidance" in the Bankruptcy Code and thus "turn[ing] to considerations of equity and policy."), *rev'd*, 575 U.S. 510 (5th Cir. 2014).

<sup>158</sup> Taylor, *supra* note 155, at 347–54. Thus, in *Taggart*, the Court applied "longstanding interpretative principle" to find that the Bankruptcy Code incorporated the "old soil" of traditional nonbankruptcy standards for determining when a party could be held in civil contempt. 139 S. Ct. at 1801. In *Harris*, in contrast to the Fifth Circuit below, the Court filled the gap based both on its understanding of the "statutory design" of Chapter 7 and what it meant for the Chapter 13 trustee's services to be "terminated" upon conversion. 575 U.S. at 518–20.

<sup>159</sup> See Levitin, *supra* note 31, at 81, 87.

<sup>160</sup> 566 U.S. 639 (2012).

what it analyzed as a fairly unremarkable—indeed, “easy”—statutory interpretation case reflected that “[t]he Bankruptcy Code standardizes an expansive (and sometimes unruly) area of law, and it is our obligation to interpret the Code clearly and predictably using well established principles of statutory construction.”<sup>161</sup>

To add some color to what structural textualism means in the bankruptcy context, this Section will conclude with an examination of *Czyzewski v. Jevic*,<sup>162</sup> the Supreme Court’s most significant bankruptcy decision in recent years.<sup>163</sup> *Jevic* exemplifies structural textualism. Once again, the Supreme Court rejected a reading of the Bankruptcy Code adopted in each of the decisions below. In *Jevic*, far more so than in *Law*, it is fair to say that the Bankruptcy Code provided no clear answer to the dispute at hand. *Jevic* was a commercial Chapter 11 case that involved a structured dismissal. In brief, the *Jevic* bankruptcy estate was deeply insolvent, and so the majority of the parties wanted to conclude the case with a quick settlement approved by the bankruptcy court in an order dismissing the case rather than a full-blown plan of reorganization.<sup>164</sup> Such case-ending settlements are now not uncommon, but neither the statutory text nor any other evidence suggests that they were contemplated by Congress when enacting the Code.<sup>165</sup> Indeed, the Code provides very little textual guidance either about the contents of settlements—beyond requiring bankruptcy court approval<sup>166</sup>—or about the contents of dismissal orders resolving bankruptcy cases. Regarding the latter, the Code states only that “cause” is required for the bankruptcy court to depart from the norm that the parties should be restored to the prepetition status quo.<sup>167</sup> The dispute in *Jevic* arose because the proposed settlement deviated from the distributional priorities that would apply if a plan were proposed, or if

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<sup>161</sup> *Id.* at 649.

<sup>162</sup> 137 S. Ct. 973 (2017).

<sup>163</sup> *Id.*

<sup>164</sup> *See id.* at 981.

<sup>165</sup> *See id.* at 979, 982 (“Although the Code does not expressly mention structured dismissals, they appear to be increasingly common.” (quoting AM. BANKR. INST., COMMISSION TO STUDY THE REFORM OF CHAPTER 11: 2012–2014 FINAL REPORT AND Recommendations 270 n.973 (2014) (quotation marks omitted)).

<sup>166</sup> 11 U.S.C. § 363(b).

<sup>167</sup> 11 U.S.C. § 349(b).

the case were converted to a Chapter 7 liquidation.<sup>168</sup> General unsecured creditors were to receive a distribution while the petitioners, former employees of the debtor with a senior right of priority, were to receive nothing.<sup>169</sup> Each of the lower courts found within the structure of the Bankruptcy Code a principle that *ordinarily* distributions in a settlement should follow the Code's usual priority scheme, but that the special circumstances of this case justified a deviation from that principle.<sup>170</sup> Specifically, the bankruptcy court had heard testimony from the entities providing the funds for the settlement that they would only agree to the deal if the employees were skipped over in this way.<sup>171</sup> The lower courts all believed that the Code's ordinary rules had sufficient flexibility to allow for a ruling ensuring that the case concluded with some creditors receiving something rather than all creditors receiving nothing.<sup>172</sup>

The Supreme Court disagreed. It did not rule that because the Code contained no provisions authorizing case-ending settlements as an alternative to a plan, they were impermissible. But it did conclude that the bankruptcy court's discretion to authorize such settlements was firmly cabined by other provisions of the Code.<sup>173</sup> In the places where the Code expressly provided a way of exiting a bankruptcy case, the priority system was fundamental.<sup>174</sup> An affirmative signal from Congress within the text of the statute would be necessary to conclude that there existed some other pathway out of bankruptcy allowing the court to dispense with those priorities.<sup>175</sup> Absent consent, any ad hoc scheme for resolving a bankruptcy case had to follow those same priorities; an end run around the Code's provisions could not be tolerated.<sup>176</sup> Nor could the settlement be saved by defending it as a rare exception to bankruptcy's ordinary principles, to be approved in the

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<sup>168</sup> *Jevic IV*, 137 S. Ct. at 981–82.

<sup>169</sup> *Id.* at 981.

<sup>170</sup> *Id.* at 982.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Jevic IV*, 137 S. Ct. at 983–87.

<sup>174</sup> *Id.* at 984. A procedure-focused dissent expressed no opinion on the merits. *Id.* at 987–88 (Thomas, J., dissenting).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 986.

bankruptcy court's sound discretion only after careful study: instead, "Congress did not authorize a 'rare case' exception," while the courts "cannot 'alter the balance struck by the statute.'"<sup>177</sup>

### C. Assessing the Divide

Although not all endorse it, bankruptcy scholars are close to consensus that *some* kind of bankruptcy exceptionalism exists, whether typified by the claim that the bankruptcy court is a "court of equity" with broad equitable powers, by a distinctly equitable flavor of statutory interpretation, or in some other form. The previous Section detailed the Supreme Court's rejection of exceptionalism. The disjunction appears clear. Nevertheless, some correction may be warranted. Conflict between the Supreme Court and lower courts is not limited to bankruptcy, or even to fields such as patent law that are similarly small and highly specialized.<sup>178</sup> The Supreme Court frequently finds itself at odds with lower courts that focus heavily on the "equities" of a case, engage in overtly results-oriented reasoning, adopt purposivist approaches to statutory interpretation, or decide that some legal field or question has a special significance that requires an out of the ordinary approach to adjudication. Empirical research finds significant methodological variance among members of the bench.<sup>179</sup> A disjunction in approaches between bankruptcy courts and the Supreme Court, then, may itself be unexceptional.

The key difference between bankruptcy and other fields of law, under this theory, is that bankruptcy has a well-developed language—that of equity—to explain and justify decisions that vary from the Supreme Court's preference for ordinary application of general legal principles to statutory cases. In the process, such decisions, and the principles that animate them, become more readily identifiable. One way in which bankruptcy courts may deploy equity is via "equitable interpretation": in a situation in which the Bankruptcy Code is capable of multiple reasonable interpretations, the bankruptcy judge may choose the interpretation that best serves her understanding of the purposes of the Code.<sup>180</sup> That is not how the Supreme Court approaches bank-

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<sup>177</sup> *Id.* at 987 (quoting *Law IV*, 134 S. Ct. at 1198).

<sup>178</sup> Part II.A.1 discusses specialization.

<sup>179</sup> Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench*, 131 HARV. L. REV. 1298, 1301–05 (2018).

<sup>180</sup> Coordes, *supra* note 11, at 316–17.



ruptcy cases; it relies on traditional tools of statutory interpretation “all the way down,” finding the best meaning of the statute according to ordinary methods rather than selecting among possible meanings.<sup>181</sup> A bankruptcy court practicing equitable interpretation may stand out because it invokes the bankruptcy court’s equitable or inherent powers and tests its decision against the Supreme Court’s admonition in *Law v. Siegel* that such powers may not be used in contravention of the Bankruptcy Code. A federal district court using the same tools may do so entirely without reference to equity, simply presenting its preferred reading of the applicable statute, and so fail to signal in the same way that there is anything exceptional about its decision.

Recontextualizing bankruptcy exceptionalism in this way may narrow the gap somewhat between the bankruptcy courts and other courts, but it does not eliminate it. The Supreme Court was not tilting at windmills when it described its task in *RadLAX* as being to “standardize” an “unruly” area of the law.<sup>182</sup> Practitioners, judges, and scholars all agree that bankruptcy is different from ordinary civil litigation—indeed, different also from other types of complex litigation like class actions.<sup>183</sup> The features that make bankruptcy look different also shape the contours of bankruptcy law and practice. Insofar as other lower federal courts engage in similar types of decision-making as bankruptcy courts without using the same exceptionalist language of equity, the task of measuring bankruptcy exceptionalism becomes more complex. Nonetheless, under one frame or another, bankruptcy exceptionalism is understood and accepted by enough participants in the bankruptcy system that it does not seem tenable to conclude that it exists on paper alone.<sup>184</sup>

## II. UNDERSTANDING BANKRUPTCY EXCEPTIONALISM

This Part addresses two questions: First, why do bankruptcy judges continue to use their own alternative tools of adjudication notwithstanding the Supreme Court’s insistence that bankruptcy cases are statutory cases that do not necessarily implicate any special or distinguishing principles? Second, what consequences

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<sup>181</sup> See, e.g., *City of Chicago v. Fulton*, 141 S. Ct. 585, 590–91 (2021).

<sup>182</sup> *RadLAX*, 566 U.S. at 649.

<sup>183</sup> See Douglas G. Smith, *Resolution of Mass Tort Claims in the Bankruptcy System*, 41 U.C. DAVIS L. REV. 1613, 1629–31 (2008).

<sup>184</sup> See *supra* Part I.B.

flow from this? Two key features of bankruptcy practice are apparent; they are distinct but operate in combination and serve to reinforce each other. The specialization of bankruptcy courts and practitioners encourages the development of distinctive bankruptcy norms. And the incentives with which those participants are routinely faced skews bankruptcy norms towards an outcome-oriented, “rough justice” approach. Part II.A discusses these characteristics of bankruptcy. Part II.B explains that these same features have troubling normative implications. Having established grounds for skepticism, the following Part will consider whether any attribute of bankruptcy practice can serve to justify bankruptcy exceptionalism.

## A. Explaining Bankruptcy Exceptionalism

### 1. Specialization.

The most readily apparent explanation for bankruptcy exceptionalism is the structure of the bankruptcy court itself. The bankruptcy court is one of the few specialist federal courts.<sup>185</sup> Formally, the bankruptcy court is a “unit” of the district court;<sup>186</sup> constitutional structure means that the bankruptcy court’s decisions even in routine matters remain subject to district court approval.<sup>187</sup> In practice, the automatic reference of bankruptcy matters to the bankruptcy courts means that bankruptcy judges are all but wholly responsible for developing bankruptcy jurisprudence in the first instance.<sup>188</sup> Bankruptcy judges themselves are frequently former bankruptcy practitioners or scholars;<sup>189</sup> they reach the bench via a highly competitive merit-selection process that, in most circuits, heavily prizes deep immersion in bankruptcy issues.<sup>190</sup> Bankruptcy judges maintain unusually close

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<sup>185</sup> See, e.g., Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1111 (1990); RICHARD A. POSNER, REFLECTIONS ON JUDGING 93–95 (2013) [hereinafter POSNER, REFLECTIONS].

<sup>186</sup> 28 U.S.C. § 151.

<sup>187</sup> *Exec. Benefits Ins. Agency v. Arkison*, 573 U.S. 25, 37 (2014); *Wellness Intern. Network, Ltd. v. Sharif*, 575 U.S. 665, 694 (2015) (Roberts, C.J., dissenting).

<sup>188</sup> See 28 U.S.C. § 157(a).

<sup>189</sup> Ralph R. Mabey, *The Evolving Bankruptcy Bench: How Are the ‘Units’ Faring?*, 47 B.C. L. REV. 105, 107 (2005).

<sup>190</sup> See MALIA REDDICK & NATALIE KNOWLTON, IAALS, A CREDIT TO THE COURTS: THE SELECTION, APPOINTMENT AND REAPPOINTMENT PROCESS FOR BANKRUPTCY JUDGES 7–18 (2013). One federal district court judge involved in the bankruptcy judge selection process observed that:

links with bankruptcy practitioners, who are often repeat performers (and may also be former colleagues, co-counsel, or opposing counsel),<sup>191</sup> are very familiar with each judge on a court, and share a common legal culture.<sup>192</sup> Specialization permits bankruptcy judges to “develop more extensive knowledge” of their field than could a federal district judge charged with managing a bankruptcy docket in addition to his own.<sup>193</sup> And specialization and repetition, taken together, may “change the way [judges] think.”<sup>194</sup>

Specialist judges like bankruptcy judges may “formulate doctrine for their specialized jurisdiction without having to rethink broader principles.”<sup>195</sup> The bankruptcy judge, confronted only with bankruptcy disputes, may reshape the law to ensure that her decisions effectively—in the view of the judge—carry out the mission of the bankruptcy courts and Bankruptcy Code without the need to consider whether those decisions cohere with other substantive areas of law. Indeed, for proponents of specialist courts, this is precisely their strength: the ability to more readily to “adapt[ ]” and “rebalanc[e]” existing law to respond to changed circumstances.<sup>196</sup> Specialization may, equally, lead judges to develop a distinct model of how bankruptcy law functions that is more likely to resist contradictory signals from Supreme Court decisions than that of a judge with little prior commitment to bankruptcy as a field.<sup>197</sup>

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Bankruptcy law is so specialized that the interview becomes a more detailed discussion of law than interviews I've been involved with for other types of legal positions. Frankly, when we had hypotheticals, I was usually lost. I could judge whether the individual seemed to know what they were talking about, but I didn't know the law.

*Id.* at 12.

<sup>191</sup> *Cf. id.* at 7 (describing a preference within some merit-selection panels for local appointments of bankruptcy judges).

<sup>192</sup> See Lynn M. LoPucki & William C. Whitford, *Bargaining Over Equity's Share in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 137 U. PA. L. REV. 125, 154, 156–58 (1990).

<sup>193</sup> Jeffrey J. Rachlinski, Chris Guthrie & Andrew J. Wistrich, *Inside the Bankruptcy Judge's Mind*, 86 B.U. L. REV. 1227, 1229 (2006).

<sup>194</sup> *Id.*

<sup>195</sup> RICHARD A. POSNER, HOW JUDGES THINK 264 (2008).

<sup>196</sup> *Id.*

<sup>197</sup> Thus, by way of example, Dick's survey reports that bankruptcy judges did not welcome the prospect of further guidance from the Supreme Court on how bankruptcy courts' equitable powers should be understood. See Dick, *supra* note 9, at 296 (noting that 59% of judges wanted no additional guidance, while only 16% of judges wanted more guidance). The Supreme Court and appellate courts did not “really understand how our system

There is broader support for the pairing of specialization and exceptionalism as concepts. Other specialized federal courts, as well as federal courts addressing fields of practice with highly specialized in-groups of practitioners, reflect exceptionalist practices.<sup>198</sup> The U.S. Court of Appeals for the Federal Circuit and the Supreme Court have long been engaged in a “tug-of-war” over the interpretation of patent law.<sup>199</sup> Patent cases are overrepresented on the Supreme Court’s docket, and many of the Court’s patent decisions sharply rebuke the Federal Circuit.<sup>200</sup> Scholars characterize the Supreme Court’s project as one of “disciplining patent exceptionalism,”<sup>201</sup> suggesting that the Federal Circuit became more expansive in recognizing patent rights than the Supreme Court was prepared to tolerate and more ready to embrace formalistic tests and bright-line rules than the Supreme Court believed was legally justified.<sup>202</sup> The Federal Circuit enjoyed “disproportionate exposure to a bar that is pro-patent,” developing a tendency to see patent rights “as a relatively unalloyed good” rather than a source of trade-offs, raising concerns of capture.<sup>203</sup> The Supreme Court, taking a generalist view, has been concerned enough to rein in patent law by applying transcendent, nonpatent

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works on the ground,” were likely further to restrict the bankruptcy courts unhelpfully, and would likely “confuse matters more.” *Id.*

<sup>198</sup> In the context of patent law, Professor Tejas Narechania has noted that claims of exceptionalism are generally under siege by a generalist Supreme Court. See Tejas N. Narechania, *Certiorari, Universality, and a Patent Puzzle*, 116 MICH. L. REV. 1345, 1390–91 (2018). In addition to patent law, scholars have discussed exceptionalism in tax law, immigration law, and admiralty law. See Ernest A. Young, *It’s Just Water: Toward the Normalization of Admiralty*, 35 J. MAR. L. & COMM. 469, 517–19 (2004). See generally, Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537 (2006); David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583 (2017).

<sup>199</sup> Steven Seidenberg, *Tug-of-War over Interpretations of Patent Law Continues Between Federal Circuit and SCOTUS*, ABA J. (Jan. 1, 2016).

<sup>200</sup> Narechania, *supra* note 198, at 1346, 1349, 1363–81.

<sup>201</sup> *Id.* at 1349 & nn.17–18 (collecting sources).

<sup>202</sup> Peter Lee, *The Supreme Assimilation of Patent Law*, 114 MICH. L. REV. 1413, 1415–25 (2016); see also *Bilski v. Kappos*, 561 U.S. 593, 603 (2010) (rejecting the Federal Circuit’s adoption of a “machine-or-transformation” test as the “sole test” for deciding whether a process is patentable and stating that doing so “violate[d] [ ] statutory interpretation principles”); *Mayo Collab. Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 92 (2012) (invalidating patent claims while emphasizing the need to “hesitate before departing from established general legal rules”); *Nautilus, Inc. v. Biosig Instruments, Inc.*, 572 U.S. 898, 913 (2014) (reversing and remanding a decision that had upheld a patent, holding that the Federal Circuit had “invoked a standard more amorphous than the statutory definiteness requirement allows”).

<sup>203</sup> Arti Rai, *Engaging Facts and Policy: A Multi-Institutional Approach to Patent System Reform*, 103 COLUM. L. REV. 1035, 1110–15 (2003).

principles to resolve patent cases, albeit with the potential cost of imposing standards that are not as well-suited for the practical resolution of patent cases.<sup>204</sup> So too in bankruptcy. The direction of travel has been the opposite to that seen in patent cases; instead of rejecting formalist, bright-line rules, the Supreme Court has rejected claims that bankruptcy law incorporates a special degree of flexibility. In each case, though, the Supreme Court's intentions—whether realized or not—have been to restore generally applicable principles and methodologies to a purportedly exceptional field.<sup>205</sup>

Associating specialization with exceptionalism does not establish whether claims of exceptionalism are justified. Claims of exceptionalism may not stand or fall together. Judge Richard Posner, for example, has described the specialization of the bankruptcy courts as a success but has been critical of the specialized patent law jurisprudence developed by the Federal Circuit.<sup>206</sup> Nor does recognizing the specialized nature of bankruptcy practice require accepting the normative claim that bankruptcy judges should play a prominent role in developing bankruptcy law because of their greater knowledge or expertise.<sup>207</sup> This Section observes simply that the bankruptcy courts' structure and relationship both to practitioners and to other courts provides fertile ground for an exceptionalist model of bankruptcy law to emerge.

## 2. Incentives.

A second contributing factor explaining bankruptcy exceptionalism is that bankruptcy judges may be faced with different sets of incentives than other federal judges. In consumer cases, this dynamic is easy to understand. Dick's survey reveals, intuitively, that some judges felt particularly moved to use equitable powers in consumer cases.<sup>208</sup> Judges in consumer cases are faced with struggling individuals driven by "human survival."<sup>209</sup> Simply put, orders that a consumer debtor—who, unlike in an appellate court, the bankruptcy judge has likely seen and heard from in

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<sup>204</sup> Lee, *supra* note 202, at 1425, 1452.

<sup>205</sup> See *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801–02 (2019); *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1665 (2019); see also *Narechania, supra* note 198, at 1386–90.

<sup>206</sup> Posner, *supra* note 185, at 90–93.

<sup>207</sup> See *infra* Part III.B.

<sup>208</sup> Dick, *supra* note 9, at 293–94.

<sup>209</sup> *Id.*

person—must give up a car or vacate a home are unpleasant for a judge to enter.<sup>210</sup> Bankruptcy judges, of course, following the mandates of the Code, do enter such orders routinely. Nevertheless, some judges recognize that the interests of equity—understood as fairness, compassion, and due process—are implicated especially strongly in such cases. Thus, judges are more likely to be solicitous of unrepresented or unsophisticated parties, breaking ties in their favor, affording second chances where possible, and looking for “intellectually honest” ways to help.<sup>211</sup>

Judges in commercial bankruptcies also are faced with unique clusters of incentives. In a way that is quite different from most other types of litigation, a judge overseeing a corporate reorganization must grapple with the fact that proceedings in front of her will either succeed or fail. The consequences of a judge’s decisions are markedly visible in bankruptcy. Bankruptcy cases do not present themselves as confined zero-sum disputes between plaintiffs and defendants, one of whom must prevail on any given claim. At the extreme, a company seeking bankruptcy protection may reorganize successfully as a going concern, continuing to operate and thus generating value that enhances the recoveries of all creditor groups. A judge that takes a narrower view of her authority and therefore stands in the way of an arrangement that key constituencies in the case argue is a necessary component of a reorganization may be accused by proponents of frustrating an outcome that could be Pareto superior, condemning the business instead to be sold off in parts in a liquidation sale that generates minimal value for any stakeholders. Particularly if the judge shares the problem-solving ethic of reorganization practice, her incentive is to grant approval rather than risk taking the blame for dooming the case.

And the success or failure of a reorganization implicates many more social interests than the financial recovery of creditor groups.<sup>212</sup> Some models of bankruptcy exceptionalism are expressly predicated on the need for the bankruptcy judge to consider the multiple public interests that are implicated in reorganization cases, such as the debtor’s current employees’ interests in

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<sup>210</sup> *See id.* at 285.

<sup>211</sup> *Id.* at 284–85, 291, 293–94.

<sup>212</sup> *See McKenzie, supra* note 65, at 773–76.

continued employment, or the community's interest in a vital local business or in the particular services that it provides.<sup>213</sup> The Bankruptcy Code today does not acknowledge such public interests. The Code could, of course, be amended to recognize the bankruptcy judge's authority to consider public interests.<sup>214</sup> In addition potentially to channeling the judge's own instincts regarding the social consequences of her decisions, such an amendment could enhance transparency by requiring an explanation from the judge in each case where she weighs the various interests presented.<sup>215</sup> Yet it is unlikely that, without such a provision, judges would close their eyes to public interests. Defenders of incorporating public interests in the Code argue that doing so would allow judges "to surface these concerns and weigh them transparently, rather than strain to consider them in an oblique way."<sup>216</sup>

In sum, although all bankruptcy judges understand that their task is to be a neutral arbiter of disputes before them, bankruptcy judges nonetheless face pressure to reach decisions that make successful reorganizations more likely or that protect other valued public interests. This pressure is exacerbated to the extent bankruptcy judges are concerned with reputation. Bankruptcy judges do not have life tenure; instead, they are appointed for fourteen-year terms with the potential for reappointment. A reputation for reorganization successes has the potential to aid a bankruptcy judge that seeks reappointment.<sup>217</sup> Bankruptcy judges may also simply care about their reputation within the close-knit bankruptcy community.<sup>218</sup> Exposure to the consequences of "failure" primes bankruptcy judges to be sympathetic to proposals for creative solutions to difficult reorganization problems. Reinforcing that priming, the "chief audience" of those

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<sup>213</sup> *E.g.*, Jay Lawrence Westbrook, *Equity in Bankruptcy Courts: Public Priorities*, 94 AM. BANKR. L.J. 203, 213–17, 222–24 (2020).

<sup>214</sup> *Id.* at 222–23.

<sup>215</sup> *See id.*

<sup>216</sup> *Id.* at 224.

<sup>217</sup> *See McKenzie, supra* note 65, at 795 (explaining that courts of appeals' reappointment decisions are heavily influenced by the bankruptcy bar's opinion of judges' performance).

<sup>218</sup> As the previous Section discussed, bankruptcy judges are often drawn from that community. Whether consciously or unconsciously, judges who have worked as practitioners attempting to wrangle the complex circus of a reorganization may identify with those now attempting the same task in their courtrooms.

judges is the bankruptcy bar.<sup>219</sup> That bar prides itself on its creative, problem-solving approach to bankruptcy law and most celebrates judges that think in similar fashion.<sup>220</sup>

## B. The Consequences of Bankruptcy Exceptionalism

### 1. Entrenched advantage.

Taking stock, bankruptcy is a field of specialist practice in which judges face unique pressures to rule in ways that match the perceived needs of the parties before them. The danger, most clearly presented in the world of large commercial cases, is that this process produces results that are skewed in favor of the most influential parties. Bankruptcy is, by its very nature, a competitive process in which litigants fight over distributional issues. Those disputes range beyond fights over how value is divided up under a settled set of rules: litigants contest the contents and application of the rules themselves in an ever-evolving process of rent seeking.<sup>221</sup> Bankruptcy exceptionalism expands the playing field for such contests by substituting the primacy of written rules for a more flexible and creative adjudicatory methodology that has as its first concern furthering the unwritten norms and commitments of bankruptcy.<sup>222</sup> At the same time, corporate bankruptcy has become increasingly dominated by sophisticated repeat litigants.<sup>223</sup> Those are the parties best placed to take advantage of increased room to maneuver in the bankruptcy space and to understand and respond to the incentives that drive bankruptcy judge decision-making. As a consequence, repeat litigants stand the best chance of skewing bankruptcy law in their favor in ways that are difficult to correct.<sup>224</sup>

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<sup>219</sup> McKenzie, *supra* note 65, at 798.

<sup>220</sup> *Id.* Harvey Miller, at one time the dean of the New York commercial-bankruptcy bar, described the creative, outcome-oriented approach of the early bankruptcy bar as a point of pride at a time when bankruptcy practitioners were outsiders in the New York corporate law world. Yonah Jeremy Bob, *The Jewish King of U.S. Corporate Bankruptcy*, JERUSALEM POST (Feb. 12, 2014), <https://perma.cc/VL9F-JBTF>.

<sup>221</sup> Mark J. Roe & Frederick Tung, *Breaking Bankruptcy Priority: How Rent-Seeking Upends the Creditors' Bargain*, 99 VA. L. REV. 1236, 1237 (2013).

<sup>222</sup> See Buccola, *supra* note 21, at 1564–72 (describing a model of bankruptcy culture based on unwritten rules).

<sup>223</sup> See Roe & Tung, *supra* note 221, at 1276; Douglas Baird, *Chapter 11's Expanding Universe*, 87 TEMPLE L. REV. 975, 975–76 (2015).

<sup>224</sup> See Roe & Tung, *supra* note 221, at 1276; Buccola, *supra* note 21, at 1574–75 (describing how unwritten law enhances the ability of incumbents to shortchange legacy creditors).



Bankruptcy practitioners are skilled at framing and presenting disputes in ways that create considerable pressure to find that their preferred solutions are necessary. Over time, creative remedies that were originally countenanced only with reluctance as solutions to rare and difficult cases were deemed necessary in progressively more routine litigation.<sup>225</sup> The Supreme Court recognized this in *Jevic*, rejecting the notion that facts could justify an exception to ordinary rules of priority.<sup>226</sup> The Supreme Court could take a bird's-eye view of the legal system, understanding that a "rare case" exception risks becoming a "more general rule."<sup>227</sup> Yet understandably enough, this was not the first concern of the courts below. As explained in Part I.B above, *Jevic* concerned a priority-skipping structured dismissal. The debtor had no assets left but a proposed \$3.7 million settlement of a litigation claim.<sup>228</sup> Under the usually applicable priority rules, the first claims to be paid would be those of the debtors' former employees, which have a special statutory right of priority over other unsecured claims.<sup>229</sup> The defendants, though, explained that they would only agree to a settlement if the employees' claims were skipped over and the proceeds were paid only to creditors with junior rights of priority, and that without a settlement, no creditors would receive anything.<sup>230</sup> The Supreme Court was prepared to speculate that a Chapter 7 trustee might still find a pathway to greater recoveries for creditors absent the settlement, and, implicitly, were that not so, to countenance a Pareto-inferior result in the case before it for the sake of the correct legal rule.<sup>231</sup> The bankruptcy court did not view this priority skip with favor, but it

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<sup>225</sup> See, e.g., Frederick Rudzik, *A Priority Is a Priority Is a Priority—Except When it Isn't*, 34 AM. BANKR. INST. J. 16, 79 (2015) ("[O]nce the floodgates are opened, debtors and favored creditors can be expected to make every case that 'rare case.'"). As much has happened with third-party releases, discussed in Part I.A, *supra*. What began as a remedy for "extraordinary cases," *Continental Airlines*, 203 F.3d at 212, is now commonplace. See Simon, *supra* note 61, at 1173–76.

<sup>226</sup> *Jevic IV*, 137 S. Ct. at 986.

<sup>227</sup> *Id.* (citing Rudzik, *supra* note 225, at 79).

<sup>228</sup> *Id.* at 981.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> See *Jevic IV*, 137 S. Ct. at 986 (arguing that the record provided "equivocal support" for the conclusion that, absent the settlement, no creditors would receive anything). The bankruptcy court may have been right; since the Court's decision in March 2017, litigation has continued, and no additional funds have yet been secured to pay either the employees or other creditors. See Status Report, *In re Jevic Holding Corp.* (Bankr. D. Del. Dec. 21, 2020) (No. 08-11006), Dkt. 1911.

viewed the likely alternative as unacceptably nihilistic.<sup>232</sup> Judge Brendan Shannon, presiding over the case in the bankruptcy court, heard in-person testimony that the settlement on offer was “the best possible and achievable result[ ],”<sup>233</sup> and preferred the practicality of “a meaningful return [as compared to] zero.”<sup>234</sup> It is not hard to see why, faced with this dilemma, Judge Shannon would feel compelled to allow creditors something rather than nothing.

The nub, though, is that it is in large part *because* Judge Shannon and the settlement proponents all agreed that he could depart from usual rules in service of that end that the dilemma arose in the first place. Consider the underlying dynamics in more detail. The litigation defendants were a private equity firm, Sun Capital, and a bank, CIT Group. Sun Capital had acquired Jevic in a leveraged buyout financed by CIT Group.<sup>235</sup> The failure of the leveraged buyout prompted Jevic’s bankruptcy. As Jevic filed for Chapter 11, it fired almost all its employees, including a group of over one thousand truck drivers.<sup>236</sup> Those truck drivers, fired without notice on the eve of bankruptcy, plainly had claims against Jevic for violation of the Worker Adjustment and Retraining Notification Act<sup>237</sup> (WARN Act).<sup>238</sup> Equally plainly, Jevic, deeply insolvent, could not satisfy those claims. So the drivers also sued Sun, alleging that because it controlled Jevic, it was also liable on the WARN Act claims.<sup>239</sup> And Sun wanted to ensure that anything it paid to settle the separate litigation against it in

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<sup>232</sup> The bankruptcy court described such settlements as “neither favored nor commonplace.” Oral Mem. Approving Settlement at 9, *In re Jevic Holding Corp.* (Bankr. D. Del. Dec. 4, 2012) (No. 08-11006), Dkt. 1519 [hereinafter *Jevic Oral Memorandum*]. The Third Circuit, affirming Judge Brendan Shannon in a split decision, framed its reasoning in precisely these terms. *Jevic III*, 787 F.3d at 185 (“We doubt that our national bankruptcy policy is quite so nihilistic and distrustful of bankruptcy judges” as to require such “an economically ugly result.” (quoting Counsel for the United States Trustee at App. 1327)).

<sup>233</sup> Transcript Regarding Motion to Dismiss at 32, *In re Jevic Holding Corp.*, (Bankr. D. Del. Nov. 27, 2012) (No. 08-11006), Dkt. 1514. With the exception of the dissenting employee creditors and the U.S. Trustee, attorneys from each constituency in the case told Judge Shannon that they had “[done] the best that [they] could in a . . . situation that could have resulted in a total meltdown,” *id.* at 104, “in fulfillment of [their] fiduciary duty . . . the best we could have accomplished,” *id.* at 152, the product of two years’ work, *id.* at 156, with “unrefuted [sic] testimony that . . . there’s really [no other] alternatives left” but the settlement or a zero-return conversion, *id.* at 160.

<sup>234</sup> *Jevic Oral Memorandum*, *supra* note 232, at 14.

<sup>235</sup> *Jevic IV*, 137 S. Ct. at 980.

<sup>236</sup> *In re Jevic Holding Corp. (Jevic II)*, 2014 WL 268613, at \*1 (D. Del. Jan. 24, 2014).

<sup>237</sup> Pub. L. No. 100-379, 102 Stat. 890 (1998) (codified at 29 U.S.C. §§ 2101–2109).

<sup>238</sup> *See Jevic IV*, 137 S. Ct. at 980.

<sup>239</sup> *Id.*

Jevic's bankruptcy did not go to the drivers, who it expected would plough that money back into the WARN Act litigation against Sun.<sup>240</sup> The bankruptcy court believed that a finding of necessity would allow it to approve the deal that Sun, CIT, and the remaining creditors had cut to pay the employees nothing. But that finding of necessity was grounded in Sun's insistence that there could be no deal without the priority skip: Sun both created and benefited from the exigency. Had the parties been clear from the beginning that there was no special-case exception to ground the priority skip, they would have had to find an alternative solution.<sup>241</sup> Perhaps they might have agreed that the bankruptcy-litigation settlement proceeds should be held in escrow until after the drivers' WARN Act litigation was concluded—as ultimately happened several years before the Supreme Court finally resolved the litigation over the original structured dismissal. One can rather suspect that many bankruptcy judges would prefer for their hands to be tied in this way rather than be faced with the task of untangling inevitably self-interested claims that any given case requires its own special solution.<sup>242</sup>

The key insight in *Jevic* is not that Sun behaved badly. Rather, it is that Sun—along with the junior creditors who seized the opportunity to recover a greater share of the settlement proceeds—behaved entirely rationally and in accordance with its own interests given the lack of legal constraints. Fights over priority are one of the core dynamics of bankruptcy.<sup>243</sup> That is not solely a consequence of bankruptcy exceptionalism. There is plenty of room for rent seeking even within the constraints of a strictly interpreted Chapter 11. Even so, bankruptcy exceptionalism, at least as it exists in the world of Chapter 11 today, provides

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<sup>240</sup> *Id.* at 981.

<sup>241</sup> The structured dismissal was defended on the grounds that it might make settlements of such difficult bankruptcy cases more likely. *See Jevic III*, 787 F.3d at 185. But the likelihood that any dispute settles is mainly a function of the predictability of the outcome at trial. William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 271 (1976). Rather than making settlement more likely, it is to be expected that shifting the substantive rule of decision in favor of one party or another will simply skew the contents of any negotiated settlement toward the favored party.

<sup>242</sup> A colleague of Judge Shannon's on the Delaware bankruptcy court, though, has lamented that the Supreme Court's constraints "take[] money away from creditors and keep[] it in the hands of the purchaser." Oral Memorandum Denying Settlement Motion at 245, *In re Constellation Enters., LLC* (Bankr. D. Del. May 18, 2017) (No. 16-11213), Dkt. 967.

<sup>243</sup> *Roe & Tung*, *supra* note 221, at 1246.

more opportunities for parties to push the envelope. Inevitably, those most familiar with the bankruptcy process will be those that can do this most effectively.<sup>244</sup>

An inelegant and reductive, but nonetheless instructive, way of summing up this dynamic might be to say that bankruptcy exceptionalism pits the judge against the key players in a case in a game of chicken. To the extent that bankruptcy exceptionalism might authorize some remedy that the key parties driving a bankruptcy case believe to be in their own interests, their incentive is to insist to the bankruptcy judge that the remedy is a must-have: that without the tools of bankruptcy exceptionalism, the case will collapse in a way that leaves every stakeholder worse off. Bankruptcy judges, of course, do push back on these claims. Not every request for a nonconsensual third-party release is approved. In *Purdue*, Judge Robert Drain made clear that he had grave doubts about an earlier request of Purdue and the Sacklers for a broader third-party release applying not just to opioid-crisis-related claims but to any of the company's products.<sup>245</sup> But bankruptcy judges generally do not want to be responsible for a value-destroying liquidation or a similar bankruptcy "failure" if a workable solution that is plausibly within the authority of the court to approve is available. In many, therefore, the proponents win, as the judge accepts the argument that an exceptional remedy is necessary to keep the case on track. Over time, though, the law ratchets in judges' discretion: a body of precedents may accrue to support even remedies approved initially with great reluctance and only for "unique" cases—until eventually, they may become a routine feature of bankruptcy practice.<sup>246</sup>

In the case studies that this Article has focused on, the parties disfavored by bankruptcy exceptionalism have been involuntary creditors—like the tort creditors of *Purdue* and the former

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<sup>244</sup> Bankruptcy's tight-knit nature may abet this in the New York and Delaware courts that hear a large proportion of the most complex cases. Judges in those courts are especially likely to be drawn from the ranks of the most sophisticated bankruptcy practitioners and may unconsciously find it easier to relate to practitioners from the same world. See *supra* note 218.

<sup>245</sup> See Rick Archer, *Sacklers Agree To Forgo Non-Opioid Ch. 11 Releases*, LAW360 (Aug. 27, 2021), <https://perma.cc/B6TT-3LLS>; Transcript of August 18, 2021 at 280, *Purdue I*, 633 B.R. 53 (No. 3602) ("I think the parties should take away today, though, that I do have some concerns about the breadth of these releases" and "there are points that I think need to be addressed"); Transcript of August 18, 2021 at 248, *Purdue I*, 633 B.R. 53 (No. 3602) ("What is the basis for insisting on a release that covers non-opioid product activities related to Purdue[?]").

<sup>246</sup> *Purdue II*, 635 B.R. at 37 ("When every case is unique, none is unique.").

employees of *Jevic*. Disaggregated and potentially small-dollar creditors face particularly severe hurdles in pushing back against counterbalancing bankruptcy's biases. In many cases though, such creditor groups will not play a significant role. The key contests that bankruptcy judges must police are those between sophisticated financial creditors. Professor Vince Buccola neatly explains that the entrenched advantage of debtors and a core group of repeat players also carries over to these cases.<sup>247</sup> The key division is between "reorganizers"—those who will invest in the debtor going forward and to whom the debtor is therefore seeking to pay a return—and "legacy creditors" towards whom the debtor has no need to act solicitously.<sup>248</sup> Involuntary creditors like the Purdue-opioid-crisis victims are certainly legacy creditors, but so are many others, including any financial creditor unable or unwilling to do business with the debtor going forward.<sup>249</sup> Many of the substantive and procedural protections built into the Bankruptcy Code serve to protect the interests of legacy creditors.<sup>250</sup> Bankruptcy culture, in prioritizing value maximization, has an institutional bias against stakeholders when those stakeholders are not useful for that purpose.<sup>251</sup> These, then, are the entities against whom bankruptcy exceptionalism is deployed, as exceptionalism's creative problem-solving ethic enables judges to make end runs around stakeholders' rights and the protections that the Code might otherwise have offered them.<sup>252</sup>

## 2. Venue shopping.

Any tilt in substantive law in favor of bankruptcy's sophisticated repeat litigants is exacerbated by the bankruptcy bar's control over when and where cases are heard. Bankruptcy's liberal venue rules mean that debtors have considerable leeway to choose the court in which they file.<sup>253</sup> Venue is statutorily proper if one entity among a corporate family of debtors—which may number dozens of entities in large cases—has been incorporated in a district for a period as short as a few months.<sup>254</sup> Though bankruptcy

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<sup>247</sup> Buccola, *supra* note 21, at 1573–79.

<sup>248</sup> *Id.* at 1573–74.

<sup>249</sup> *Id.* at 1564.

<sup>250</sup> *Id.* at 1574.

<sup>251</sup> *Id.* at 1574–76.

<sup>252</sup> Buccola, *supra* note 21, at 1575–77.

<sup>253</sup> McKenzie, *supra* note 65, at 780.

<sup>254</sup> 28 U.S.C. § 1408.

courts may order venue transfers in cases that involve particularly egregious efforts to manufacture venue, such transfers are rare.<sup>255</sup> Many debtors' tangible connections to the district in which they file are minimal; incorporation of an affiliate in Delaware has been the basis for venue in many of the megabankruptcy cases filed in that district—including cases, such as the ongoing Boy Scouts bankruptcy case, in which the affiliate was created apparently solely for the purpose of enabling a local bankruptcy filing.<sup>256</sup>

For some time, the trend in bankruptcy was for litigants to exert even greater control over forum selection. From the 1980s through 2019, most large cases were filed in two courts: the Southern District of New York and the District of Delaware.<sup>257</sup> Defenders of the concentration of cases in New York and Delaware argued that debtors preferred these venues because the local benches were composed of commercially sophisticated judges who could be trusted to resolve disputes quickly and efficiently.<sup>258</sup> Those judges, for example, would be familiar with the package of motions filed as a matter of routine on the first day of a large commercial case, and understand the need to rule on them at high speed.<sup>259</sup> Debtors filing in Wilmington, Delaware or Manhattan, though, would know only that their case would be presided over by one of the judges on the District of Delaware or Southern District of New York panel.<sup>260</sup> Today, cases are increasingly likely to be forum shopped into districts in which quirks of local filing rules mean that debtors know precisely which judges will preside over them. Recent hotspots for large, complex cases have been White Plains, New York (where debtors could know that their case will be assigned to Judge Robert Drain of the

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<sup>255</sup> 28 U.S.C. § 1412; *see, e.g., In re Patriot Coal Corp.*, 482 B.R. 718 (Bankr. S.D.N.Y. 2012) (transferring the venue of a debtor and ninety-nine subsidiaries from New York to Missouri when the only connection to New York was that two brand-new subsidiaries had been incorporated in New York fewer than six weeks before the filing).

<sup>256</sup> Levitin, *supra* note 23, at 153–55.

<sup>257</sup> *Id.* at 151. In the 1980s, New York was the most common venue; in the 1990s, it was superseded by Delaware. Kenneth M. Ayotte & David A. Skeel, Jr., *Why Do Distressed Companies Choose Delaware? An Empirical Analysis of Venue Choice in Bankruptcy* 4 (Oct. 18, 2004).

<sup>258</sup> *See, e.g.,* Harvey Miller, *Chapter 11 Reorganization Cases and the Delaware Myth*, 55 VAND. L. REV. 1987, 1992–95 (2002); David A. Skeel, Jr., *Bankruptcy Judges and Bankruptcy Venue: Some Thoughts on Delaware*, 1 DEL. L. REV. 1, 19–21 (1998).

<sup>259</sup> Miller, *supra* note 258, at 1993.

<sup>260</sup> Although in the early 1990s only one bankruptcy judge sat in Delaware, the expansion of that court eliminated debtors' ability to pick an individual judge. *See* Levitin, *supra* note 23, at 151 n.214.

Southern District of New York) and Houston, Texas (where debtors know that their case will be assigned either to Chief Judge David Jones or Judge Marvin Isgur of the Southern District of Texas).<sup>261</sup> *Purdue* was one such case: although it had no other concrete connection with Westchester County, Purdue changed its corporate address from Manhattan to White Plains six months before filing its Chapter 11 case, ensuring that the case would be presided over by Judge Drain.<sup>262</sup> In what may be the beginning of a course correction, the Southern District of New York recently changed its rules to require random assignment of the largest and most complex cases.<sup>263</sup> The Eastern District of Virginia, which previously similarly permitted debtors to shop cases in front of the two judges within its Richmond division, has done similarly.<sup>264</sup> But there remains room for debtors to select favored forums where they can have confidence that the key features of their proposed reorganizations will pass muster.

Although not the thesis of this Article, some critics of permissive bankruptcy-venue rules view this dynamic, at least implicitly, as a form of corruption.<sup>265</sup> Bankruptcy judges are said to compete for prestigious megacases and the respect of the bankruptcy community that can be earned by facilitating reorganization successes in those cases.<sup>266</sup> Thus, it is argued, judges make sure that it is known that they will grant remedies and enter orders that practitioners believe to be important.<sup>267</sup> Bankruptcy judges firmly reject the notion that they act with any kind of improper motive

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<sup>261</sup> *Id.* at 63–67; Jonathan Randles, *Companies Lease Offices in New York Suburb to Pick Bankruptcy Judge*, WALL ST. J. (Aug. 13, 2020), <https://www.wsj.com/articles/companies-lease-offices-in-new-york-suburb-to-pick-bankruptcy-judge-11597311001> (discussing company efforts to select White Plains, New York as a venue).

<sup>262</sup> See Levitin, *supra* note 23, at 153–70. Purdue claimed, somewhat implausibly, that it chose White Plains because it is convenient to the company's corporate headquarters in Stamford, Connecticut. *Id.* at 157.

<sup>263</sup> Assignment of Cases and Proceedings (Bankr. S.D.N.Y. Dec. 1, 2021) (No. 1073-1).

<sup>264</sup> Order Establishing Assignment Protocol for Mega Chapter 11 Cases (Bankr. E.D. Va. Nov. 30, 2021) (No. 21-21).

<sup>265</sup> LYNN LOPUCKI, *COURTING FAILURE* 137–40 (2006); Lynn M. LoPucki, *Chapter 11's Descent into Lawlessness*, 96 AM. BANKR. L.J. 247, 254–59 (2022).

<sup>266</sup> LoPucki, *supra* note 265, at 254–59.

<sup>267</sup> *Id.* at 22. Professor Lynn LoPucki focused his critique most prominently on judges that adopt procedures that leave professionals confident that substantial fee claims will be approved, *id.* at 279–82, but also argued that substantive bankruptcy law doctrines have influenced forum shopping, *id.* at 304–08 (arguing that critical-vendor orders and Section 363 sales are examples of orders that professionals wish to be confident that they can secure).

when making decisions.<sup>268</sup> They have good grounds to do so. The overwhelming likelihood is that bankruptcy judges, notwithstanding their diverging opinions, each seek fairly and neutrally to apply the law according to their best lights.<sup>269</sup> Even so, choice of forum has the potential to substantially impact how the case unfolds. And for that reason (and entirely naturally given fiduciary obligations to clients<sup>270</sup>), the sophisticated bankruptcy bar considers which forum will be most beneficial to its clients.<sup>271</sup> Indeed, a 2018 report from the National Conference of Bankruptcy Judges found that forum shopping had spread from the largest commercial chapter cases to middle market and smaller bankruptcies.<sup>272</sup> No matter the attitudes of judges, lawyers' decisions to select forums with judges that follow favored methodologies impact the substance of bankruptcy law—in particular, driving it towards the flavor of bankruptcy exceptionalism most amenable to the repeat players that hold case-filing decisions in their hands.<sup>273</sup>

### 3. Limited appeals.

When bankruptcy courts do err, their mistakes cannot be corrected easily. That is because bankruptcy practice incorporates one additional exceptional feature: the multifaceted insulation of

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<sup>268</sup> NAT'L CONF. OF BANKR. JUDGES, NCBJ SPECIAL COMMITTEE ON VENUE: REPORT ON PROPOSAL FOR REVISION OF THE VENUE STATUTE IN COMMERCIAL BANKRUPTCY CASES 26–27 (2018).

<sup>269</sup> Some judges—most notably Chief Judge Jones and Judge Isgur in Houston—have frankly acknowledged that they seek to attract large cases. See Levitin, *supra* note 23, at 152; Mark Curriden, *Meet the Judge Who Saved the Texas Bankruptcy Practice*, THE TEXAS LAWBOOK, HOUS. CHRON. (Sept. 1, 2020), <https://perma.cc/4RPV-9MSJ>. But they characterize their efforts as assuring debtors of predictability and procedural efficiency, not any kind of substantive legal advantage. See also Levitin, *supra* note 23, at 152–53. Sometimes case competition may be entirely benign: LoPucki, perhaps the sharpest critic of bankruptcy forum shopping, noted that case competition encourages judges to treat litigants courteously and to schedule hearings in a timely and convenient fashion. LOPUCKI, *supra* note 265, at 17.

<sup>270</sup> See, e.g., Miller, *supra* note 258, at 1989 (“Failure to select the most available and favorable venue may violate an attorney’s responsibilities to the client.”).

<sup>271</sup> Because I consider the motives of the bar, not of bankruptcy judges, I regard it as less important how the debtor is able to judge shop and do not draw a distinction between judges that seek complex cases, as in the Southern District of Texas, and judges that have not done so but that debtors may select because a quirk of judicial geography, as in White Plains.

<sup>272</sup> NCBJ, *supra* note 268, at 27.

<sup>273</sup> “[A] small pool of law firms are involved in the venue decision for the vast majority of high-profile bankruptcy cases.” Samir Parikh, *Modern Forum Shopping in Bankruptcy*, 46 CONN. L. REV. 159, 196 (2013).



bankruptcy court decisions from appellate review.<sup>274</sup> Bankruptcy appeals are rare.<sup>275</sup> In commercial cases, most participants in the bankruptcy system, including bankruptcy judges, prize consensual resolution of bankruptcies<sup>276</sup>—a practice that, whatever its advantages, affords fewer opportunities to develop case law at the appellate level.<sup>277</sup> Consumer debtors may find appeals of bankruptcy court decisions to be cost prohibitive, while creditors may conclude that the amounts at stake in individual cases do not warrant the costs of litigation. Even in larger commercial cases, stakeholders seek to minimize professional fees that must be paid out of the bankruptcy estate, reducing unsecured creditor and shareholder recoveries.<sup>278</sup>

When an appeal is pursued, an appellant faces obstacles to effective review of a bankruptcy court's decision. Bankruptcy is a multifaceted process that aggregates many individual controversies; some bankruptcy court rulings that occur as the case unfolds may not qualify as final decisions that a disappointed party may appeal.<sup>279</sup> Speed is highly prized in the Chapter 11. Appeal, even when available as a matter of law, may be unattractive or impractical simply because the exigencies of the debtor's financial circumstances need to be resolved on a much faster timeline than the courts of appeals can accommodate—and most bankruptcy appeals must first be heard in the district court or by a bankruptcy appellate panel before they even reach the court of appeals.<sup>280</sup> And a party may also forego appeal because the rest of the case remains with the bankruptcy judge and the party fears that the bankruptcy judge may retaliate against an appellant in its other decisions.

Finally, even when a case arrives at an appellate court, the Bankruptcy Code's many open-textured standards mean that appellate review is often limited and deferential.<sup>281</sup> Sometimes it is

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<sup>274</sup> Levitin, *supra* note 23, at 143–50.

<sup>275</sup> Brook E. Gotberg, *Restructuring the Bankruptcy System: A Strategic Response to Stern v. Marshall*, 87 AM. BANKR. L.J. 191, 237 (2013); McKenzie, *supra* note 65, at 782–84.

<sup>276</sup> Jonathan M. Seymour & Steven L. Schwarcz, *Corporate Restructuring Under Relative and Absolute Priority Default Rules: A Comparative Assessment*, 2021 U. ILL. L. REV. 1, 8–10 (2021).

<sup>277</sup> McKenzie, *supra* note 65, at 783.

<sup>278</sup> *Id.* at 788.

<sup>279</sup> See *Bullard v. Blue Hills Bank*, 575 U.S. 496, 501, 505–09 (2015); Levitin, *supra* note 23, at 147–48.

<sup>280</sup> Levitin, *supra* note 23, at 145.

<sup>281</sup> McKenzie, *supra* note 65, at 777–78.

unavailable altogether. The courts of appeals—although not, so far, the Supreme Court—have endorsed exceptionalism in the bankruptcy appellate space via equitable mootness, a doctrine that insulates commercial Chapter 11 plans from appellate review where the plans are substantially consummated in the time between the bankruptcy court’s decision and the appeals court’s consideration of the case, and thus the appellate court finds that granting relief would inequitably disrupt the reorganization.<sup>282</sup> Even when review is available, its utility may be diminished by judges’ attitudes toward bankruptcy law. Many nonbankruptcy judges simply “hate [bankruptcy], they don’t want anything to do with it.”<sup>283</sup> Judges that do not find bankruptcy issues interesting or important may be less likely to thoughtfully engage with bankruptcy courts’ reasoning and are more likely to simply affirm their decisions as the product of a more expert (and more interested) decision-making.<sup>284</sup> Lacking appellate review thus embeds bankruptcy exceptionalism and its consequences within the law.

#### 4. *Purdue*: an illustration.

In sum, at least where uncorrected on appeal, bankruptcy exceptionalism has distributional consequences. *Purdue* illustrates this. From the beginning, the conflict teed up by *Purdue*’s bankruptcy was whether both states and individual claimants would keep or lose the right to pursue claims against the Sackler family in thousands of lawsuits, asserting claims that seek damages in the trillions of dollars for the Sacklers’ alleged role in the opioid crisis. *Purdue* persuaded a bankruptcy judge to take that right from claimants—even though many of them might have assumed that they would be able to pursue their claims through to trial. That assumption ran into one of the key unwritten commitments at the heart of Chapter 11 culture: that getting speedily to a value-maximizing deal supported by a critical mass of stakeholders is of paramount importance, and that niceties of process may be overridden in service of that goal.

Critics of the *Purdue* bankruptcy have painted a troubling picture of the fruit of those commitments in that case. In essence,

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<sup>282</sup> *Id.* at 790–91; Levitin 2022, *supra* note 23, at 51–52.

<sup>283</sup> Melissa B. Jacoby, *Superdelegation and Gatekeeping in Bankruptcy Courts*, 87 TEMP. L. REV. 875, 875 & n.3 (2015).

<sup>284</sup> See Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. REV. 384, 428 (2012).

releases for the Sackler family in *Purdue* depended on two findings: that third-party releases of the Sacklers were necessary to confirm a plan of reorganization that resolves Purdue's own liabilities; and that the Sackler family had made a contribution to Purdue's bankruptcy of sufficient value to merit the release.<sup>285</sup> Both findings were committed to the sound discretion of the bankruptcy judge. But Purdue could be reasonably confident, even before Judge Drain ruled, that it would prevail on both issues.

The first finding was, in effect, an assumption of the case since its inception, when Judge Drain ordered litigation against the Sacklers outside of his court to be halted on the grounds that such a stay was necessary for an orderly reorganization. Purdue could make that assumption in large part because it is now an assumption of exceptionalism-driven Chapter 11 culture that a confirmed plan of reorganization in almost any complex megacase will incorporate third-party releases because such releases are a necessary part of getting to a value-maximizing deal. Purdue's releases are more aggressive than is typical because they allow no means for dissenting creditors to opt out. They remain in step with broader trends in bankruptcy practice.<sup>286</sup> The second finding necessary to support the third-party release was that the Sacklers' approximately \$4.5 billion contribution to the bankruptcy case warranted the release.<sup>287</sup> Bankruptcy's deal-focused culture again tilted the scales in favor of such a finding. To be sure, in *Purdue*, after a lengthy battle, many—though not all—of the states' attorneys general that originally objected to the adequacy both of the Sacklers' financial contribution and their disclosures about their own finances and the management of Purdue pronounced themselves satisfied.<sup>288</sup> But critics can fairly complain that the focus of bankruptcy's *unwritten* law on promoting a deal, here by allowing the liabilities of separate but associated parties to be swept into a case, means that many of the safeguards that bankruptcy's *written* law incorporates to prevent exploitation by

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<sup>285</sup> *Purdue I*, 633 B.R. at 58–59; see *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 142–43 (2d Cir. 2005) (setting out applicable standards).

<sup>286</sup> See Simon, *supra* note 62, at 1171–76 (describing the general expansion of non-debtor relief from its origin in asbestos-related cases to its central role in large Chapter 11 cases).

<sup>287</sup> *Purdue I*, 633 B.R. at 110–11.

<sup>288</sup> Becky Yarak, *OxyContin Maker Purdue Wins More States' Backing for Sackler Settlement*, WALL ST. J. (July 8, 2021), <https://www.wsj.com/articles/oxycontin-maker-purdue-wins-more-states-backing-for-sackler-settlement-11625757098>.

a sophisticated debtor are absent.<sup>289</sup> The Sacklers were not debtors. That means that they were not subject to the same rigorous regimes of disclosure and constraints on continued dealing with valuable assets that Chapter 11 creates.<sup>290</sup> Equally, although the Bankruptcy Rules authorize taking discovery from a nondebtor beneficiary of a release,<sup>291</sup> that is neither as automatic nor as straightforward as taking discovery from a debtor.<sup>292</sup> Finally, although the fates of individual members of the Sackler family are at the heart of the current controversy, the full list of released parties includes hundreds of affiliated entities.<sup>293</sup> Simply as a matter of logistics (but consistent with bankruptcy culture), the court's analysis of necessity and sufficiency for many of these individual entities had to be abbreviated.

Purdue's lawyers' skillful management of the case only served to increase its chance of prevailing on these issues. As this Section explained, Purdue picked its own judge.<sup>294</sup> Judge Drain is a well-respected judge who has experience managing large, complex bankruptcies.<sup>295</sup> But he is also a former corporate restructuring practitioner<sup>296</sup> deeply immersed in the small world of Chapter 11 restructuring and its culture. Just by reading his prior rulings, Purdue could be confident that it had secured a judge who believed that he had the authority to approve reorganization plans that resolved bankruptcy cases with third-party releases of those entities.<sup>297</sup> Purdue was also able to fix the course

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<sup>289</sup> Simon, *supra* note 61, at 1183.

<sup>290</sup> *Id.* at 1164.

<sup>291</sup> The Bankruptcy Rules allow the court to approve the examination of any entity on "any matter which may affect the administration of the debtor's estate." FED. R. BANKR. PROC. 2004(b).

<sup>292</sup> Simon, *supra* note 61, at 1209–10.

<sup>293</sup> Purdue Disclosure Statement, *supra* note 50, at 275–77.

<sup>294</sup> See *supra* nn. 260–262 and accompanying text.

<sup>295</sup> Simon, *supra* note 61, at 1182 n.148; Levitin, *supra* note 23, at 165–66.

<sup>296</sup> Randles, *supra* note 261.

<sup>297</sup> Levitin, *supra* note 23, at 79. The significance of Purdue's choice of Judge Drain on this point is debatable. The Second Circuit has never considered whether a bankruptcy court has the authority to extend an automatic stay to a nondebtor. But it has at least suggested that bankruptcy judges may, upon appropriate findings of necessity, authorize third-party releases. See *Metromedia*, 416 F.3d at 141–43. Although the district court on appeal took a quite different approach, most bankruptcy judges within the Second Circuit would likely have concluded, looking to *Metromedia*, that approval of nonconsensual third-party releases had been blessed by higher authority. (That said, the Second Circuit simultaneously emphasized its hostility to third-party releases.) Although bankruptcy courts consider the factors set forth by the courts of appeals, they do not always follow the associated guidance that third-party releases should be "truly unusual," 416 F.3d at 143. And the relevant tests are sufficiently open-textured that individual judges may give effect to

of the bankruptcy early in the case, gaining the bankruptcy court's approval for a settlement with the federal government that places substantial pressure on creditors not to oppose confirmation even of a deeply flawed plan.<sup>298</sup> But the ultimate outcome in *Purdue* remains unclear. In an exceptionally thorough expedited appeal, Judge Colleen McMahon of the Southern District of New York examined the legal grounds for nonconsensual third-party releases with a depth of scrutiny not previously deployed by any reviewing court in that circuit, rejecting the arguments that any individual provision of the Code authorized such releases and that any source of "residual power" could support them absent specific authorization.<sup>299</sup> An appeal to the Second Circuit has followed.<sup>300</sup> And the position in the Second Circuit is unclear: although that court has precedent suggesting that nonconsensual third-party releases might be permissible in unique cases, it has never squarely approved such a release.<sup>301</sup> The *Purdue* appeal may offer some much needed clarity.

None of this is to say that there is no case to be made for the results that bankruptcy exceptionalism can achieve. Even in *Purdue*, proponents told a compelling story. A third-party release offered the Sacklers an opportunity to buy global peace. No settlement scheme without the coercive channeling mechanics of modern Chapter 11 bankruptcy could offer as much; arguably, therefore, no other settlement effort could secure the same consideration from the Sacklers. And—even if some claimants would nevertheless prefer to have their day in court—the *Purdue* plan offers one clear advantage over requiring litigation to judgment: the prospect of getting money in the hands of individual opioid crisis victims quickly. Byzantine as their structure may be, and limited as the proposed compensatory payments are,<sup>302</sup> the settlement trusts to which the Sacklers will contribute offer a concrete prospect of recovery to those actually hurt by the Sacklers' alleged misconduct, as well as the direct funding of other initiatives to

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their own views while still respecting precedent. Without speculating as to *Purdue*'s motives, there is enough daylight among bankruptcy judges' approaches to these issues for the choice of judge to be a useful potential tool for debtors that value third-party releases.

<sup>298</sup> Levitin, *supra* note 23, at 37–39.

<sup>299</sup> *Purdue II*, 635 B.R. at 114.

<sup>300</sup> *Id.*; Order Conditionally Granting Debtors' and Allied Parties' Motion for a Certificate of Appealability, *In re Purdue Pharma, L.P.* (S.D.N.Y. Jan. 7, 2022), 2022 WL 121393 (certifying interlocutory appeal to Second Circuit).

<sup>301</sup> See *Metromedia*, 416 F.3d at 141–43; *Purdue II*, 635 B.R. at 100–02.

<sup>302</sup> See Hoffman & Walsh, *supra* note 56.

abate the opioid crisis.<sup>303</sup> Litigation, in contrast, might take years, with the size of any jury verdict entirely uncertain. In the meantime, the claimants, Purdue, and the Sacklers will have spent millions of dollars on litigation costs that might otherwise have been directed toward compensating victims. Finally, the claimants best positioned to prevail in litigation are the state government plaintiffs. But any funds that state governments would collect in a judgment against either Purdue or the Sacklers would go to the state's general funds, with no guarantee that state legislatures will direct them towards compensating victims—or, indeed, towards any end connected with the opioid crisis at all. The nonconsensual third-party releases that are incorporated in *Purdue's* plan are both legally doubtful and deeply problematic from a policy perspective. Nonetheless, one must take seriously the warning of Purdue's attorneys that the alternative would have been a free-for-all in which "lawyers would make billions and the claimants potentially get little to nothing, and it's years and years away."<sup>304</sup>

Ultimately, the goal of this Section is simply to make clear that bankruptcy exceptionalism is not an unalloyed good—indeed, there are persuasive reasons to be skeptical of it. The factors that make bankruptcy exceptionalism at least potentially harmful are deeply rooted: the structure of the bankruptcy court itself; the distinctive norms and assumptions shared by bankruptcy practitioners; the policy dilemmas frequently presented to bankruptcy judges in live bankruptcy disputes; the lack of effective appellate oversight over many bankruptcy court decisions; and, perhaps most of all, the amenability of bankruptcy law to influence by sophisticated, repeat-player institutional litigants and their attorneys. None of these concerns is easily redressed. Understanding bankruptcy exceptionalism's potential to do harm renders more urgent an answer to the question of whether any special feature of bankruptcy law actually serves to justify bankruptcy exceptionalism in the first place. That is the focus of the next Part.

### III. JUSTIFYING BANKRUPTCY EXCEPTIONALISM

Bankruptcy exceptionalism may be explained, at least in part, by the effects of specialization, success pressure, and case

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<sup>303</sup> See Purdue Disclosure Statement, *supra* note 50, at 2–3.

<sup>304</sup> Hoffman & Walsh, *supra* note 56.

competition on judicial psychology, but it cannot be justified without more. A justification of bankruptcy exceptionalism would show that there is some characteristic of bankruptcy that makes it special, or that bankruptcy courts and bankruptcy law are different enough from other courts and other fields of law that the deep and persistent disjunction that separates bankruptcy courts from other federal courts should not be of concern. This Part considers whether roots in equity, the text of the Code itself, legislative history, or the expertise of bankruptcy judges can serve to justify bankruptcy exceptionalism. For the most part, it rejects each of these arguments. It does find that bankruptcy cases have some distinctive features that set them apart from ordinary civil litigation. Even so, these are differences more of degree than of kind. They cannot convincingly establish that what separates bankruptcy from other legal fields is enough to require that bankruptcy has its own rules of adjudication. The Part concludes with some thoughts on the consequence of this rejection of bankruptcy exceptionalism for bankruptcy practice.

#### A. Statutory Evolution

##### 1. Equity in history.

Bankruptcy exceptionalism is closely linked with the language of equity. The bankruptcy court frequently finds itself confronted with the plea that it “is a court of equity.”<sup>305</sup> Claims about bankruptcy’s historical roots in equity are at the heart of Justice William Douglas’s conviction in *Pepper* that bankruptcy values substance over form, takes care that fraud shall not prevail, and sets aside consideration of what is technically legal in favor of what is substantially just.<sup>306</sup> If some special historical feature of the bankruptcy system supports seeing the bankruptcy courts as “courts of equity” of this nature, then bankruptcy exceptionalists could justify a broader, more fairness-oriented approach to adjudication in bankruptcy than is the case in other courts. But several commentators have carefully traced the roots of the notion that bankruptcy courts are courts of equity and have found no history that supports claims of exceptionalism in bankruptcy

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<sup>305</sup> Krieger, *supra* note 31, at 275 n.1.

<sup>306</sup> *Pepper*, 308 U.S. at 304–05.

practice today.<sup>307</sup> Simply put, Justice Douglas, and others judging in the tradition of *Pepper*, read too much into those words.<sup>308</sup>

Thus, though the linkage between bankruptcy and equity can be traced almost back to the beginnings of U.S. bankruptcy law,<sup>309</sup> courts discussing the role of equity were concerned with addressing technical questions of jurisdiction rather than with sourcing substantive legal rules in the concept of a “court of equity.”<sup>310</sup> *Morgan v. Thornhill*,<sup>311</sup> an early case under the Bankruptcy Act of 1867, is typical.<sup>312</sup> First, the Supreme Court made clear that equity’s role was limited; the text of the 1867 Act exhaustively set out the role of equity: “Independent of the Bankrupt Act the District Courts possess no equity jurisdiction whatever.”<sup>313</sup> Second, it applied equitable principles to decide a technical question of procedure: when a party could appeal to the Supreme Court in a case arising under the “general superintendence” jurisdiction of the circuit courts.<sup>314</sup> “Decrees in equity,” under that “general superintendence” jurisdiction, were not subject to interlocutory appeal.<sup>315</sup> It seems likely that later Supreme Courts simply misunderstood these early cases, finding bankruptcy to be more generally suffused with equitable principles in a way that affected the substantive legal rules that courts hearing bankruptcy cases should apply.<sup>316</sup>

None of the early history is directly applicable to contemporary bankruptcy law. The bankruptcy courts’ jurisdiction is created by federal statute and is not defined in equitable terms.<sup>317</sup>

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<sup>307</sup> Krieger, *supra* note 31, at 298–301; Ahart, *supra* note 13, at 11–23; *see also* Levitin, *supra* note 31, at 6–7, 64–65, 83–86.

<sup>308</sup> *See* Levitin, *supra* note 31, at 7 (describing a “later judicial misreading of dicta in [ ] early cases” (first citing Krieger, *supra* note 31, at 298–301; and then citing Ahart, *supra* note 13, at 18)).

<sup>309</sup> The first bankruptcy law (enacted in 1800 but repealed three years later) made no material reference to equity. Bankruptcy Act of 1800, ch. 19, 2 Stat. 19, *repealed by* Act of Dec. 19, 1803, ch. 6, 2 Stat. 248. The Bankruptcy Act of 1841 (another short-lived enactment that was repealed less than two years after passage) linked bankruptcy and equity by providing that the district courts should have jurisdiction in bankruptcy matters and that “the said jurisdiction to be exercised summarily, in the nature of summary proceedings in equity.” Bankruptcy Act of 1841, ch. 9, § 6, 5 Stat. 440, 445.

<sup>310</sup> *See* Ahart, *supra* note 13, at 15–16.

<sup>311</sup> 78 U.S. 65 (1870).

<sup>312</sup> *Id.* at 80.

<sup>313</sup> *Id.*

<sup>314</sup> *Id.* at 79–80.

<sup>315</sup> *Id.* at 81.

<sup>316</sup> Ahart, *supra* note 13, at 18 (describing *Barton v. Barbour*, 104 U.S. 126, 134 (1881), as the source of the misunderstanding); *see also* Krieger, *supra* note 31, at 299.

<sup>317</sup> 28 U.S.C. § 1334; Ahart, *supra* note 13, at 22–23.



That is hardly surprising given the merger of law and equity that reduced the focus of Congress and the federal courts on the kinds of thorny questions that vexed the nineteenth century Supreme Court.<sup>318</sup> In Judge Krieger's words, though, the language of equity in bankruptcy still serves as a kind of Pandora's box, exercising considerable influence over bankruptcy court decision-making in ways that its originators did not intend.<sup>319</sup>

## 2. Text.

Frequently coupled with reliance on equity is Section 105(a) of the Bankruptcy Code. This is a sort of necessary and proper clause for bankruptcy judges, providing that “[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.”<sup>320</sup> Section 105(a) is said to codify equitable or inherent powers of the bankruptcy court within the modern statutory scheme. Bankruptcy judges that cannot find an alternative textual basis within the Code for a decision may conclude that Section 105(a) nonetheless authorizes them to act.<sup>321</sup> Although often treated as coextensive, some bankruptcy judges identify Section 105(a) as a related source of power exercised side by side with the court's equitable or inherent authority.<sup>322</sup> Together, they enable bankruptcy courts to “craft flexible remedies that, while not expressly authorized by the [Bankruptcy] Code, effect the result the Code was designed to obtain.”<sup>323</sup>

Yet, standing alone, Section 105(a) is a thin reed to support such an expansive power. One need not be a textualist to conclude that finding equitable powers of any scope in Section 105(a) “stretches” the provision's text—it hardly reads as a grant of general equitable powers.<sup>324</sup> A better comparison is the All Writs Act,<sup>325</sup> perhaps its closest nonbankruptcy analog, and that Act's

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<sup>318</sup> See Krieger, *supra* note 31, at 301.

<sup>319</sup> See *id.*

<sup>320</sup> 11 U.S.C. § 105(a).

<sup>321</sup> *Purdue* provides a recent example: the decisions extending the bankruptcy automatic stay to Purdue's nondebtor affiliates were described by the district court as a “section 105(a) injunction.” *In re Purdue Pharma, L.P.*, 619 B.R. 38, 57–58 (S.D.N.Y. Aug. 11, 2020) (order affirming preliminary injunction).

<sup>322</sup> See, e.g., *In re Freeman-Clay*, 578 B.R. 423, 435 (Bankr. W.D. Mo. 2017).

<sup>323</sup> *In re Trokie*, 590 B.R. 663, 673 (Bankr. M.D. Pa. 2018) (quoting Official Comm. Of Unsecured Creditors of Cybergenics Corp. v. Chinery, 330 F.3d 548, 568 (3d Cir. 2003)).

<sup>324</sup> See Levitin, *supra* note 31, at 32–33.

<sup>325</sup> 38 Stat. 1156 (1911) (codified at 28 U.S.C. § 2851).

legislative history.<sup>326</sup> That analogy suggests that Section 105(a) authorizes a limited selection of procedural remedies, such as the right to issue injunctions in order to make effective some other provision of the statute—powers that the All Writs Act equally confers on other federal courts.<sup>327</sup> It does not support a claim that bankruptcy courts have equitable or inherent powers to any exceptional degree.

### 3. Legislative history and congressional intent.

To the extent that equity and text can provide any support for claims of bankruptcy exceptionalism today, there must be other indicia that otherwise questionable claims to create equitable or general inherent powers in bankruptcy should be treated as authoritative. The strongest arguments for doing so draw on Congress's intentions when enacting the Bankruptcy Code in 1978.

There are two primary indicia in the traditional sources of legislative history that suggest that Congress intended to equip the bankruptcy courts with uncodified equitable power. The first is in the House Report's discussion of what is now Section 510(c), which empowers a bankruptcy court to subordinate a claim "under principles of equitable subordination."<sup>328</sup> The House Report stated that Section 510(c) was intended to codify *Pepper* and other New Deal-era cases in which the Supreme Court approved modifying the substantive nonbankruptcy rights of creditors or shareholders in the name of equity.<sup>329</sup> A claim of codification is inconsistent with the notion that there are general and residual equitable powers. But the House Report also said that the bankruptcy court "will remain a court of equity," and Section 510(c) is not intended to limit its power in any way.<sup>330</sup> As an example of a permitted use of equity, the House Report turned again to *Pepper*, stating that Section 510(c) does not "preclude a bankruptcy court from completely disallowing a claim in appropriate circumstances," as "the court's power is broader than the general doctrine of equitable subordination, and encompasses subordination

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<sup>326</sup> Levitin, *supra* note 31, at 32–33.

<sup>327</sup> *Id.* at 34.

<sup>328</sup> 11 U.S.C. § 510(c).

<sup>329</sup> H.R. REP. NO. 95-595 (1977), at 359, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6315.

<sup>330</sup> *Id.*

on any equitable grounds.”<sup>331</sup> Second, in more limited fashion, discussing Section 105(a), the House Report drew on the analogy to the All Writs Act.<sup>332</sup> Reproducing that statute’s grant of authority in Section 105 served the goal “of continuity from current law and ease of reference,” but it also served “to cover any powers traditionally exercised by a bankruptcy court that are not encompassed by the All Writs Statute.”<sup>333</sup> At least some subset of noncodified powers—those that are “traditional”—appear to have been intended by Congress to be incorporated into the Bankruptcy Code.<sup>334</sup>

A plausible broader inference of these references is that Congress in 1978—or, at least, the Code’s drafters—was fully aware of the conception of bankruptcy as a field uniquely suffused with equitable principles and approved of that understanding. In the Code, Congress thus incorporated not just the subset of traditional noncodified powers and remedies alluded to in the legislative history to Section 105(a), but the whole exceptional framework of the New Deal–era Supreme Court that encouraged courts presiding over bankruptcy cases to coin new equitable powers and remedies.<sup>335</sup> Very few courts today would embrace in full the approach of Justice Douglas in *Pepper*; that decision loosely interpreted the relevant statutory provisions in a way that would no longer pass muster.<sup>336</sup> Instead, modern-day bankruptcy exceptionalists begin from the proposition that equity may not contradict or replace specific statutory commands.<sup>337</sup> Even so, a conclusion that Congress intended the Bankruptcy Code to embrace the spirit of *Pepper* is at least consonant with the notion that the equitable power today serves to allow bankruptcy courts to fill gaps between the Code’s provisions.

There are also counterindicia. The House Report specifically identified one provision of federal law as “giv[ing] the bankruptcy

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<sup>331</sup> *Id.*

<sup>332</sup> *Id.* at 6273.

<sup>333</sup> *Id.* at 6274.

<sup>334</sup> See Levitin, *supra* note 31, at 57.

<sup>335</sup> As this Part has suggested, the view that bankruptcy is a field suffused with equitable principles that can alter substantive legal rights should be characterized as a New Deal–era framework rather than one rooted in the early years of the bankruptcy statutes. Judge Alan Ahart tracked the history of equitable disallowance and found that much of Justice Douglas’s reasoning did not appear in any preceding case. See Alan M. Ahart, *Why the Equitable Disallowance of Claims in Bankruptcy Must Be Disallowed*, 20 AM. BANKR. INST. L. REV. 445, 446–51 (2012).

<sup>336</sup> See *id.* at 450–51.

<sup>337</sup> Dick, *supra* note 9, at 271–72.

court the powers of a court of equity, law, and admiralty.”<sup>338</sup> This grant of power, “in addition to any power granted” under the All Writs Act or Section 105(a), “is necessary to enable the bankruptcy court to exercise [its increased] jurisdiction and its powers under the [B]ankruptcy [C]ode.”<sup>339</sup> Yet the statutory provision in question, 28 U.S.C. § 1481, was repealed by Congress in 1984; the legislative history for that later amendment indicates Congress sought to “enhance the control of Article III courts over [Article I] bankruptcy courts.”<sup>340</sup> Even in the legislative history materials for the 1978 Code, Congress elsewhere emphasized its desire to constrain bankruptcy judges. The House Report explained that the Code sought to remove any managerial function from bankruptcy judges because, in managing a case “[n]o matter how fair a bankruptcy judge is, his statutory duties give him a certain bias.”<sup>341</sup> Finally, Judge Alan Ahart provided a challenge to reliance on the legislative history of Section 510. Judge Ahart noted that a proposed Senate amendment restyled Section 510 as a provision governing both subordination *and* disallowance.<sup>342</sup> It would have expressly authorized disallowance of claims “in accordance with the equities of the case.”<sup>343</sup> The final version of the Section, described by congressional leaders as a compromise, did not include this language.<sup>344</sup> The apparently deliberate decision to reject language authorizing the bankruptcy courts to disallow claims for equitable reasons substantially undermines the persuasiveness of the House Report’s suggestion that such powers were still implicitly conferred upon the bankruptcy court.

A distinct group of powers, worth separate treatment, is what the House Report called the “traditional” powers of the bankruptcy court. These are uncodified powers that nevertheless were accepted features of bankruptcy practice under the Bankruptcy Act;<sup>345</sup> the drafters’ chief example was the power to disallow the claim of a creditor inequitably abusing the bankruptcy process.<sup>346</sup> A remarkable irony for proponents of legislative history is that, while post-1978 bankruptcy courts at one time split over whether

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<sup>338</sup> H.R. REP. NO. 95-595 (1977), at 448, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6404.

<sup>339</sup> *Id.*

<sup>340</sup> Ahart, *supra* note 13, at 22; S.R. REP. NO. 98-55 (1983), at 18.

<sup>341</sup> H.R. REP. NO. 95-595 (1977), at 4, *reprinted in* 1978 U.S.C.C.A.N. 5963, 5966.

<sup>342</sup> Ahart, *supra* note 335, at 454.

<sup>343</sup> *Id.*

<sup>344</sup> *Id.* at 455.

<sup>345</sup> Levitin, *supra* note 31, at 58.

<sup>346</sup> H.R. REP. NO. 95-595 (1977), at 316, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6274.

to recognize a doctrine of equitable disallowance, the consensus following *Law* is that the Code does not authorize such a practice.<sup>347</sup> Bankruptcy Act practice, though, is marshalled to buttress other routine features of modern Chapter 11 practice. Most prominently—although not without disagreement—critical vendor orders, which authorize the immediate payment of the claims of creditors important enough to scuttle a reorganization, have been described as outgrowths of a necessity-of-payments doctrine that developed in railroad receivership cases.<sup>348</sup>

The gamut of powers that fall under the label “traditional” does not permit of easy definition; bankruptcy practice has never been uniform.<sup>349</sup> But defining these powers as traditional also avoids the need to make exceptional claims about bankruptcy. Thus, the Supreme Court fits within its bankruptcy jurisprudence a pre-Code-practice doctrine: the Bankruptcy Code should not be read to alter past bankruptcy practice absent a clear signal that that was what Congress wished to do.<sup>350</sup> And that doctrine may be justified in generalist terms. Among well-recognized canons of construction is the principle that Congress is assumed to know the common law background against which it legislates and that congressional legislation is not intended to change the common law unless it does so clearly.<sup>351</sup> Cases from the early history of the Code present the pre-Code practice doctrine as an application of a “normal rule of statutory construction” that “if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.”<sup>352</sup> This complicates claims about bankruptcy exceptionalism. The day-to-day presence of traditional powers or pre-Code practices within bankruptcy practice may make it unusual; even so, practices that are

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<sup>347</sup> See 4 COLLIER ON BANKRUPTCY ¶ 502.03[11] (16th ed. 2021) (collecting cases).

<sup>348</sup> Alan Resnick, *The Future of the Doctrine of Necessity and Critical-Vendor Payments in Chapter 11 Cases*, 47 B.C. L. REV. 183, 184 (2005).

<sup>349</sup> Levitin, *supra* note 31, at 58.

<sup>350</sup> *Cohen v. de la Cruz*, 523 U.S. 213, 221 (1998). As with most facets of the Court’s bankruptcy jurisprudence, this notion has been embraced across the Court’s ideological spectrum. See *id.* (O’Connor, J., for a unanimous court); *Hall v. United States*, 566 U.S. 506, 518 (2012) (Sotomayor, J.); *BFP v. Resol. Tr. Corp.*, 511 U.S. 531, 542 (1994) (Scalia, J.); *Dewsnup v. Timm*, 502 U.S. 410, 419 (1992) (Blackmun, J.); *United Savings Ass’n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 373 (1988) (Scalia, J.).

<sup>351</sup> ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 318 (2012). This is an exception to the skepticism of some Justices regarding legislative history. McDermott, *supra* note 41, at 994–99.

<sup>352</sup> *Midatlantic Nat’l Bank v. N.J. Dep’t of Env. Prot.*, 474 U.S. 494, 501 (1986); *Kelly v. Robinson*, 479 U.S. 36, 47 (1986).

grounded in generalist canons do not accord with the notion that bankruptcy practice is exceptional.<sup>353</sup>

## B. Expertise

The specialization of bankruptcy practice described in Part II.A.1 contributes to a second and different potential normative defense of bankruptcy exceptionalism: that bankruptcy judges are uniquely well placed to create special rules for bankruptcy cases, in ways that we understand and embrace in other contexts. One potential analogy is to administrative agencies.<sup>354</sup> Agencies are similarly charged by Congress with responsibility for some special area of law, and generally—but not universally—characterized as having significant expertise and institutional competence.<sup>355</sup> Within constraints, the Supreme Court has recognized administrative agencies’ authority to resolve ambiguities and fill gaps in congressional enactments and has mandated deference to agencies’ understandings of those enactments.<sup>356</sup> Notwithstanding challenges, the Supreme Court has continued to tolerate administrative agencies exercising this broad zone of discretion.<sup>357</sup> As a policy matter, *Chevron* deference is defended as respecting agencies’ expertise and institutional competence, as a source of flexibility and responsiveness in statutory implementation,<sup>358</sup> or, alternatively, as reflecting a delegation of rulemaking power from Congress to agencies.<sup>359</sup>

Bankruptcy judges, of course, also possess expertise in administering the Bankruptcy Code.<sup>360</sup> Nonexceptionalist models of

<sup>353</sup> Cf. Jonathan H. Choi, *The Substantive Canons of Tax Law*, 72 STAN. L. REV. 195, 245–46 (2020) (discussing a similar model of tax exceptionalism).

<sup>354</sup> See Douglas G. Baird & Anthony Casey, *Bankruptcy Step Zero*, 6 SUP. CT. REV. 203, 203–04 (2012) (proposing and exploring this analogy).

<sup>355</sup> *Id.* at 223.

<sup>356</sup> *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (describing statutory ambiguities and gaps as implicit delegation to agencies and requiring judicial deference to agency interpretations in such circumstances); *King v. Burwell*, 576 U.S. 473, 485 (2015) (same).

<sup>357</sup> Baird & Casey, *supra* note 354, at 204; see, e.g., *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (affirming *Auer* deference); *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 296 (2013) (applying *Chevron*). But see *Pereira v. Sessions*, 138 S. Ct. 2105, 2121 (2018) (Alito, J., dissenting) (describing *Chevron* deference as “important, frequently invoked, once celebrated, and now increasingly maligned” and suggesting that the Court is ignoring it).

<sup>358</sup> See, e.g., Baird & Casey, *supra* note 354, at 223; Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2089 (1990).

<sup>359</sup> *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001); *King*, 576 U.S. at 485 (2015).

<sup>360</sup> Baird & Casey, *supra* note 354, at 223; Pardo & Watts, *supra* note 284, at 424–25.

bankruptcy give inconsistent effect to that expertise by subjecting bankruptcy court decisions to de novo review;<sup>361</sup> a model of bankruptcy exceptionalism based on the agency analogy would place exceptionalism front and center as one of the strengths of the bankruptcy system. Bankruptcy practice has changed enormously in the decades since the Code's introduction. Even setting aside shifts in practice, bankruptcy cases are "complex and not particularly amenable to inflexible rules."<sup>362</sup> Agency interpretations of statutes are adaptable to new situations; bankruptcy court authority to update applicable rules could be similarly recognized.<sup>363</sup> Thus, to the extent the analogy holds, bankruptcy exceptionalism is justifiable as a delegation of policy- and lawmaking authority to bankruptcy courts' comparable to the authority that *Chevron* and other deference doctrines confer upon agencies.<sup>364</sup> Formalizing deference doctrines for bankruptcy would be complicated substantially by the fact that bankruptcy courts must routinely adjudicate core, constitutionally protected property rights created by state law.<sup>365</sup> Safeguarding these rights is at the heart of the Supreme Court's recent decisions limiting the constitutional authority of the bankruptcy courts.<sup>366</sup> But Bankruptcy judge expertise and institutional competence might justify a partial regime of exceptionalism, under which bankruptcy judges are afforded deference in matters that concern bankruptcy-only rights and remedies.<sup>367</sup>

Even so, the analogy cannot support bankruptcy exceptionalism.<sup>368</sup> Although bankruptcy judges may have the expertise of administrative agencies, at no point have they been subject to the kind of accountability that is said to ground *Chevron* deference.<sup>369</sup> Indeed, as the product of a merit-based appointment process rather than political appointment, they are perhaps "among the

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<sup>361</sup> Pardo & Watts, *supra* note 284, at 425–30.

<sup>362</sup> Baird & Casey, *supra* note 354, at 223.

<sup>363</sup> *Cf.* Pardo & Watts, *supra* note 284, at 443–45.

<sup>364</sup> *Cf. id.* at 401–11 (arguing that bankruptcy courts engage in residual policymaking in a fashion similar to an agency).

<sup>365</sup> Baird & Casey, *supra* note 354, at 204.

<sup>366</sup> *Id.*

<sup>367</sup> *Cf. id.* at 228–29.

<sup>368</sup> Professors Douglas Baird and Anthony Casey acknowledged the limits of the analogy. *See id.* at 222.

<sup>369</sup> *See* Baird & Casey, *supra* note 354, at 223. *See generally* *Chevron*, 467 U.S. 837.

least politically accountable entities.”<sup>370</sup> Meanwhile, agency policymaking promotes uniformity;<sup>371</sup> responsibility for the creation of bankruptcy law is fractured among over three-hundred bankruptcy judges that often sharply differ on legal and policy issues.<sup>372</sup> Judges on the same court can routinely differ on the permissibility of different kinds of exercises of equitable power.<sup>373</sup> In this respect, bankruptcy exceptionalism serves exactly the opposite interest to Supreme Court deference to administrative agencies.<sup>374</sup>

The comparison to agency expertise is well-taken. Yet delegating to the bankruptcy courts remains problematic.<sup>375</sup> Cognizant of the anomaly that bankruptcy courts have undertaken a substantial policymaking role even as they remain within the judiciary, some scholars have proposed an administrative reinvention of bankruptcy.<sup>376</sup> One model proposes granting rulemaking powers to the Executive Office of the U.S. Trustee (EOUST), which holds a supervisory and oversight role in bankruptcy case administration.<sup>377</sup> This might allow for the formalization via rulemaking of interstitial doctrines like substantive consolidation that bankruptcy courts currently administer via their equitable powers.<sup>378</sup> But it would not address the need that some bankruptcy judges see to invoke equity in service of more tailored and individualized results in difficult cases.<sup>379</sup> Practically, it must contend with the fact that the relationships between bankruptcy

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<sup>370</sup> Baird & Casey, *supra* note 354, at 223; *see also* Executive Benefits Ins. Agency v. Arkison, 573 U.S. 25, 37 (2014); Wellness Intern. Network, Ltd. v. Sharif, 575 U.S. 665, 694 (2015) (Roberts, C.J., dissenting).

<sup>371</sup> Pardo & Watts, *supra* note 284, at 435.

<sup>372</sup> *Id.*

<sup>373</sup> *See* Coco, *supra* note 85, at 252 (describing differences among Delaware judges’ approaches to third-party releases).

<sup>374</sup> The Supreme Court has largely adopted a delegation rather than an expertise rationale for *Chevron* deference. But this also provides scant support for deference to bankruptcy courts, given how parsimonious the Supreme Court has been recently in concluding that Congress has effectively delegated its legislative power to fill in gaps in a statute. *See King*, 576 U.S. at 486; *NFIB v. Dept. of Labor*, 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring); *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022).

<sup>375</sup> Pardo & Watts, *supra* note 284, at 445 (“[T]he considerations that generally tip in favor of delegating policymaking powers to administrative agencies . . . do not similarly tip in favor of delegating policymaking in the bankruptcy arena to the courts.”).

<sup>376</sup> *Id.* at 386–91, 445–52.

<sup>377</sup> *Id.* at 452.

<sup>378</sup> *See* Part I.C.

<sup>379</sup> *Cf.* Dick, *supra* note 9, at 291.



judges and the EOUST are not without significant friction. Indeed, the EOUST is often an *opponent* of what it views as bankruptcy courts' too-frequent resort to various non-Code remedies.<sup>380</sup> A more radical approach would be to eliminate the bankruptcy court system altogether.<sup>381</sup> The full merits of such a proposal are beyond the scope of this Article. But its radical nature brings into relief the size of the gap between the practices of modern bankruptcy courts and those of other entities that openly engage in rule and policymaking. Even if agency-style policymaking best describes what bankruptcy courts are doing in their exceptionalist decisions, the analogy to agencies cannot legally justify such practices in the current bankruptcy system.

### C. Bankruptcy's Unusual Features

The chief remaining justification for bankruptcy exceptionalism is that bankruptcy cases simply look different. Although perhaps the simplest potential justification, it is not without weight. Indeed, the special nature of bankruptcy proceedings is a theme that runs through other arguments for exceptionalism.<sup>382</sup> But such claims must be carefully scrutinized. Many features that make bankruptcy law distinctive nonetheless fail to make it unique.

#### 1. Public interests.

A first stab at an argument that bankruptcy is unique might focus on the social interests that many bankruptcy cases implicate. Here, some caution is warranted. An argument that bankruptcy law should embrace exceptionalism because "equity-focused" or results-oriented judging is necessary to promote successful reorganizations or further other important interests is, in essence, an argument that bankruptcy exceptionalism produces good outcomes. Yet it is probably the case in any area of law that

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<sup>380</sup> Lindsey Simon, *The Guardian Trustee in Bankruptcy Courts and Beyond*, 98 N.C. L. REV. 1297, 1311–12 (2020) ("For example, the U.S. Trustee has actively objected to the propriety of expansive third-party releases in Chapter 11 plans."); Alexandra Dugan, Leah Fiorenza, Katie Good & Monique D. Hayes, *Corporate Bankruptcy Panel—Unpacking Jevic: An Attempt to Put the Structure Back in Structured Dismissals*, 34 EMORY BANKR. DEV. J. 319, 335 (2018) (noting that the U.S. Trustee frequently objects to critical-vendor motions); Nan Roberts Eitel, T. Patrick Tinker & Lisa L. Lambert, *Structural Dismissals, or Cases Dismissed Outside of Code's Structure*, 30 AM. BANKR. INST. J. 20 (2011) (criticizing structured dismissals).

<sup>381</sup> Pardo & Watts, *supra* note 284, at 455.

<sup>382</sup> Baird & Casey, *supra* note 354, at 223.

results-oriented decision-making can promote good outcomes. A proponent of bankruptcy exceptionalism must argue why bankruptcy should embrace what other fields have not.

Bankruptcy cases, to be sure, frequently implicate many pressing interests that range far beyond the immediate financial consequences to the parties. Even a routine commercial bankruptcy case has the potential to be life altering for many who will never step inside the courtroom (and to whom, even if they were to do so, the Code as written gives little or no standing to be heard). Some of the affected interests are readily ascertainable—as with the employment interests of the debtors’ workers—but some are less tangible, as with the broader social interest of the community in the ongoing business.<sup>383</sup> Perhaps also included might be interests that the Bankruptcy Code does recognize, but affords small weight or protection notwithstanding their great social importance—such as the interest of pension holders, who find themselves close to the back of the Code’s distribution queue.<sup>384</sup> Almost all bankruptcy cases implicate public interests to some extent, and in some cases, their import may be magnified many times over, as with bankruptcies of hospitals, nonprofits, or other businesses that provide essential services.<sup>385</sup> A long tradition within bankruptcy scholarship has emphasized the potential consequences of bankruptcy law for such interests.<sup>386</sup> These interests do not, however, make bankruptcy unique. The harms with which bankruptcy judges are frequently confronted are really consequences of default, financial distress, and business failure rather than of bankruptcy specifically.<sup>387</sup> As such, they may be presented in numerous contexts elsewhere in the federal courts, whether pursuant to litigation over business closures under the WARN Act, litigation over collective bargaining, litigation over foreclosures and lending and debt collecting practices in the consumer context, and in other public law litigation.

The point of this Article is not to argue that bankruptcy should not be concerned with societal interests. Bankruptcy

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<sup>383</sup> Professor Jay Westbrook described these as the “public interests” implicated by bankruptcy. Westbrook, *supra* note 213, at 203, 213–17, 222–24.

<sup>384</sup> *Id.* at 220–21.

<sup>385</sup> Laura Coordes, *Reorganizing Healthcare Bankruptcy*, 61 B.C. L. REV. 419, 421–23 (2020).

<sup>386</sup> See Elizabeth Warren, *Bankruptcy Policymaking in an Imperfect World*, 92 MICH. L. REV. 336, 353–56 (1993).

<sup>387</sup> Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. CHI. L. REV. 815, 818 (1987).

scholars have debated since the early years of the Code whether a bankruptcy system that takes special account of public interests would be better<sup>388</sup> or whether the bankruptcy system should be more disinterested. Those in the latter camp have expressed concerns with the dangers that may flow from the additional freight that a public-interest focus would add to the bankruptcy system's load—for example, inefficient forum shopping as parties seek to take advantage of the divergence in substantive legal rules between bankruptcy courts and state courts, or the potential for unpredictability to increase the cost of credit.<sup>389</sup> This Article could not hope to resolve conundrums that have been the focus of decades of bankruptcy scholarship, and it does not seek to align itself fully with either camp. This long-running debate intertwines itself with the fate of bankruptcy exceptionalism insofar as bankruptcy exceptionalism is defended as a tool to vindicate social interests implicated by bankruptcy but not protected in the Code as written.<sup>390</sup> But bankruptcy exceptionalism does not map onto this debate: a proponent of disinterested or “procedural” bankruptcy law may nonetheless believe bankruptcy law incorporates an exceptionalist corpus of unwritten bankruptcy principles.<sup>391</sup> As it touches the debate over bankruptcy and public interests, this Article's more limited suggestion is this: bankruptcy exceptionalism is often justified, whether explicitly or implicitly, on the understanding that bankruptcy needs its own different rules mode of judging because bankruptcy is special. Public interests may be frequently visible in bankruptcy court, but they do not make bankruptcy special.

## 2. Complexity and change.

Two remaining variants of the claim that bankruptcy is special focus on the complexity and instability of bankruptcy proceedings.

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<sup>388</sup> See generally, e.g., Westbrook, *supra* note 213; Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775 (1987); Warren, *supra* note 386.

<sup>389</sup> See Douglas G. Baird, *Bankruptcy's Uncontested Axioms*, 108 YALE L.J. 573, 579–80 (1998); Baird, *supra* note 387, at 825–28.

<sup>390</sup> Although amendment of the Code to make it explicit that bankruptcy judges may consider public interests (as Westbrook suggests in *Equity in Bankruptcy Courts: Public Priorities*, see generally Westbrook, *supra* note 213) would still leave bankruptcy practice looking sharply different from other types of federal civil litigation, it would not implicate bankruptcy exceptionalism of the sort described by this Article.

<sup>391</sup> Cf. generally Baird, *supra* note 19.

The first is the claim that bankruptcy cases are uniquely complex. Large corporate bankruptcy cases may involve thousands of participants and multiple creditor classes. Bankruptcy may therefore look meaningfully different from even other forms of complex litigation, like class actions, that limit participants to similarly situated or at least aligned-in-interest parties.<sup>392</sup> Professor Jay Westbrook colorfully characterizes bankruptcy litigation as holding the same relationship to ordinary civil litigation as a city does to a single street.<sup>393</sup> Meanwhile, once a bankruptcy has commenced, every facet of the business's operation is subject to bankruptcy court oversight. Except in rare cases, the bankruptcy court cannot simply trust an independent trustee or administrator appropriately to manage the business; it must be prepared to resolve any disputes that arise. The debtor's prepetition management presumptively remains in control of the business; because their interests are necessarily different from those of creditors, any facet of management's work may become a subject of dispute and require bankruptcy court intervention. What those disputes might be, Congress could not possibly foresee in advance.<sup>394</sup> The timeline of bankruptcy is different too: the court is not faced with the task of adjudicating the fallout over some already past event, as with a typical contract or tort claim, but instead it must respond to and guide events that are playing out in real time with an operating business (or a living consumer debtor). Each of these facets of complexity, in turn, means that bankruptcy courts need greater flexibility than other courts to craft solutions that fit the facts of the case.<sup>395</sup> Bankruptcy practitioners and judges tend to assume, in other words, that the complex circus of a Chapter 11 case requires a more nimble and light-footed approach than what they view as the comparatively simple and ponderous world of nonbankruptcy civil litigation.

The second variant is the often-linked observation that bankruptcy practice has changed substantially since Congress enacted the Bankruptcy Code in 1978.<sup>396</sup> In commercial bankruptcy, the

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<sup>392</sup> Thus, for example, mass tort claims frequently find themselves within the bankruptcy system because other potential vehicles for resolution, such as class actions, struggle to deal with the fact that mass tort cases inherently involve a conflict of interest between presently injured victims and those who will only later develop some injury. See Smith, *supra* note 183, at 1629–31.

<sup>393</sup> Westbrook, *supra* note 213, at 205.

<sup>394</sup> Levitin, *supra* note 31, at 83–84.

<sup>395</sup> *Id.*

<sup>396</sup> *Id.* at 64.

identity and relative position of many of the participants has changed: for example, while the Uniform Commercial Code once rendered this impossible, it is now commonplace for firms to enter bankruptcy with all of their assets encumbered by a lien held by a single senior secured creditor.<sup>397</sup> Those secured creditors now have substantially more control over the reorganization process than what was once the case; the common view of corporate bankruptcy holds that these creditors increasingly attempt, with considerable success, to wield that power to enhance their own recoveries.<sup>398</sup> Where once creditors of a bankrupt business expected to continue to do business with the debtor, and were therefore incentivized to negotiate on plans for a reorganization, a robust market in claims trading now allows for trade and other relationship creditors to exit the bankruptcy case and be replaced by financially focused investors who are primarily concerned with a short term recovery.<sup>399</sup> Above all else, the focus in the Chapter 11 practice of today is on speed; both debtors and secured creditors attempt to push through the bankruptcy case at ever-faster rates. Arguably, therefore, as the nature of bankruptcy and the task of the bankruptcy court have changed over the years, so must its rulings. Debtors and creditors have expectations of the bankruptcy process that the bankruptcy court must accommodate; if they do not, then the ability of businesses successfully to reorganize will be placed jeopardy.<sup>400</sup>

As with bankruptcy's proximity to public interests, these observations can take a defense of bankruptcy exceptionalism only so far. They do serve to meaningfully separate bankruptcy from other fields, but do not wholly distinguish it. Perhaps more importantly, Congress knew that bankruptcy cases were complex and that bankruptcy courts require flexibility. The legislative history shows, equally, that Congress understood that bankruptcy practice under the preceding Bankruptcy Act of 1898 and

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<sup>397</sup> FINAL REPORT AND RECOMMENDATION OF THE ABI COMMISSION TO STUDY THE REFORM OF CHAPTER 11, 12 (2014) [hereinafter ABI REPORT].

<sup>398</sup> Harvey Miller, *Chapter 11 in Transition – From Boom to Bust and Into the Future*, 81 AM. BANKR. L.J. 375, 390 (2007).

<sup>399</sup> ABI REPORT, *supra* note 397, at 12; Miller, *supra* note 398, at 390.

<sup>400</sup> Scholarly examination of change as it relates to bankruptcy exceptionalism most commonly examines commercial bankruptcy, but there have also been changes in consumer bankruptcy. Perhaps most notably, the typical consumer debtor carries far more debt than his predecessor in the early 1980s. See TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT* 243 (2020).

Chandler Act of 1938<sup>401</sup> had changed substantially while those Acts were in effect.<sup>402</sup> There is no reason to believe that Congress did not anticipate that the same would occur under the Bankruptcy Code. Congress drafted the Bankruptcy Code to incorporate flexibility and to allow bankruptcy courts to exercise significant discretion. The Code permits courts to approve or deny many remedies for good cause, or based on other, equally malleable standards. Indeed, in a number of places, it commands that decisions be made “according to the equities of the case”<sup>403</sup> or “in the interests of justice.”<sup>404</sup> The case for flexibility and creativity in interpreting these provisions is clear. By their very nature, bankruptcy judges must develop standards to apply them. In effect, they do so in the same way that other federal judges develop standards in applying common law statutes.<sup>405</sup> That is quite different from a conclusion that Congress more generally delegated the power to update the Code by supplementing its provisions with others.

### 3. Federal common law.

The best case for bankruptcy exceptionalism is that the Bankruptcy Code as a whole should function the same way that these open-textured provisions do. Depending on how this delegation is framed, the Bankruptcy Code could be said to join the Sherman<sup>406</sup> and Taft-Hartley Acts<sup>407</sup> as common law statutes, or—as Professor Adam Levitin has argued—bankruptcy law could join admiralty law and foreign relations law as fields amenable to federal common lawmaking.<sup>408</sup> In some ways, this is bankruptcy exceptionalism without the exceptionalism: many, if not all, of the non-Code rights and remedies to which bankruptcy exceptionalism has given rise could persist, and bankruptcy courts could continue to use their expertise to “temper[ ] the rigidity of the Code, just as equity once tempered the rigidity of English common

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<sup>401</sup> 52 Stat. 840 (codified at 11 U.S.C. et seq.).

<sup>402</sup> H.R. REP. NO. 95-595, at 8, *as reprinted in* 1978 U.S.C.C.A.N. 5963, 5969 (“The system as it operates today was not enacted in its present form. It has evolved over the past 80 years from a far different system.”).

<sup>403</sup> 11 U.S.C. § 502(j).

<sup>404</sup> 11 U.S.C. § 557(f)(1).

<sup>405</sup> Levitin, *supra* note 31, at 86.

<sup>406</sup> 26 Stat. 209 (1890) (codified at 15 U.S.C. §§ 1–7).

<sup>407</sup> Pub L. No. 80-101, 61 Stat. 136 (codified at 29 U.S.C. §§ 141–197).

<sup>408</sup> *Cf. id.* at 67.

law,”<sup>409</sup> but each of these practices would find a generalist justification in the Supreme Court’s precedents on common lawmaking.<sup>410</sup>

The problem is that the case for treating bankruptcy law—or the Bankruptcy Code as a whole (as opposed to specific provisions of the Code)—as a common law field or statute seriously strains both case law and analogies to existing fields.

First, for bankruptcy law to qualify as federal common law, it must be necessary to protect some “uniquely federal interest.”<sup>411</sup> Yet bankruptcy seems quite different from those few areas that the Supreme Court placed in that category when it suggested that test in *Texas Industries, Inc. v. Radcliff Materials, Inc.*<sup>412</sup> Those areas are: the “rights and obligations of the United States,” its relationships with foreign states, disputes between different states, and admiralty law.<sup>413</sup> Moreover, on one of the few occasions where the Court has since recognized an area of law as implicating a “uniquely federal interest,” it has explained that federal common law served to displace state law when it conflicted with some federal policy or interest.<sup>414</sup> Bankruptcy needs no additional help displacing conflicting state law; it is already the exclusive province of federal law.<sup>415</sup> Indeed, the justification, at least implicitly, for such federal common lawmaking seems to be the need to

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<sup>409</sup> *Id.* at 84.

<sup>410</sup> Levitin’s own model of bankruptcy is in many ways nonexceptionalist; he rejected the notion that either equity or Section 105(a) empowers judges to update the Bankruptcy Code. *Id.* at 83.

<sup>411</sup> *Id.* at 71 (discussing *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981)). A useful, though imperfect, analogy is the statutory canon of construction of ejusdem generis, which holds that a general catchall provision following a set of specific examples should be construed such that the catchall applies only to things of the same kind as the enumerated examples. *Cf.* SCALIA & GARNER, *supra* note 351, at 199.

<sup>412</sup> 451 U.S. 630, 641 (1981).

<sup>413</sup> *Tex. Indus.*, 451 U.S. at 641.

<sup>414</sup> *Boyle v. United Tech. Corp.*, 487 U.S. 500, 505 (1988) (finding defense procurement to be a uniquely federal interest).

<sup>415</sup> U.S. CONST. art I, § 8, cl. 4. Nor does it seem to be enough that the Bankruptcy Code was enacted pursuant to a federal grant of power to regulate bankruptcies; *Texas Industries* found that the antitrust laws do not qualify under this kind of federal interest even though they were enacted pursuant to Congress’s power to regulate interstate commerce. 451 U.S. at 640–42. Levitin suggested that bankruptcy may qualify because of the Constitution’s demand for a *uniform* federal bankruptcy law, Levitin, *supra* note 31, at 73–64, but this also does not fit neatly into the existing landscape. Bankruptcy is paired in Article I, Section 8 with naturalization, which even more plainly than bankruptcy demands a uniform federal rule, yet naturalization as a whole is not governed by federal common law. *Cf.* Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 NYU L. REV. 493, 535 (2001) (discussing

ensure that there is some rule of decision for cases, even in the absence of a federal statute, where state law cannot suitably be applied, rather than the need specifically for federal *judicial* law-making to supplement any laws that Congress enacts.<sup>416</sup>

Second, the Bankruptcy Code itself may be a federal common law statute: one pursuant to which Congress authorized courts to create law.<sup>417</sup> Here, Levitin relies chiefly on the same legislative history that supporters of broad bankruptcy court equitable powers invoke (and which this Article has suggested provides only weak support for exceptionalism).<sup>418</sup> Trouble arises again when comparing the Bankruptcy Code to the universe of recognized common law statutes. Justice John Paul Stevens influentially suggested that “Congress phrased some older statutes in sweeping, general terms, expecting the federal courts to interpret them by developing legal rules on a case-by-case basis in the common law tradition.”<sup>419</sup> The Sherman Act, as enacted, comprised a few short sentences in length; Section 1983, similarly, has developed a body of common law to implement its largely nonspecific terms.<sup>420</sup> Whether the traditionally recited criteria really serve effectively to demarcate which statutes qualify is open to question.<sup>421</sup> Rather than an on-off toggle pursuant to which something either is or is not a common law statute, a nuanced approach might recognize more limited delegations to courts where silence or ambiguities intersperse themselves in other statutes.<sup>422</sup> This dovetails to some extent with recognizing as common law statutes individual components of the Bankruptcy Code—such as

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the emergence of federal common law to give content to one specific, open-textured provision of the INA: the requirement that a naturalizing citizen be of “good moral character”). In practice, of course, bankruptcy exceptionalism promotes disunity, as different courts (and different judges on the same court) embrace non-Code practices to differing degrees.

<sup>416</sup> Cf. Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 627–30 (2006) (describing a theory of federal common law as providing law when state lawmaking is expected to be biased).

<sup>417</sup> Levitin, *supra* note 31, at 74; *Tex. Indus.*, 451 U.S. at 642.

<sup>418</sup> Levitin, *supra* note 31, at 74–77; *supra* Part III.C.

<sup>419</sup> *Guardians Assoc. v. Civ. Serv. Comm’n*, 463 U.S. 582, 641 & n.12 (1982) (Stevens, J., dissenting).

<sup>420</sup> Margaret H. Lemos, *Interpretive Methodology and Delegations to Courts: Are “Common-Law Statutes” Different?*, in *INTELLECTUAL PROPERTY AND THE COMMON LAW* 89, 95–96, 101 n.74 (Shyam Balganeshe ed., 2013).

<sup>421</sup> *Id.* at 91–95.

<sup>422</sup> *Id.* at 6.



Section 510(c)'s grant of power to subordinate claims "under principles of equitable subordination,"<sup>423</sup> or Section 552(b)'s authorization to withhold from a secured creditor the proceeds of a security interest "based on the equities of the case."<sup>424</sup> But absent a broader shift in courts' thinking, the Bankruptcy Code as a whole has little claim to be treated as part of this category.

#### IV. BEYOND BANKRUPTCY EXCEPTIONALISM

This Article has shown that exceptionalism pervades the bankruptcy system and has argued that bankruptcy exceptionalism both lacks legal justification and exacerbates corrosive dynamics that trouble the commercial bankruptcy space. This Part first offers suggestions for ways to reduce the footprint of bankruptcy exceptionalism and then offers some additional brief thoughts on how bankruptcy judges should approach cases in a world after bankruptcy exceptionalism.

##### A. Fixing Bankruptcy Exceptionalism

There is no easy fix to bankruptcy exceptionalism. It reflects deep-rooted assumptions shared by many participants in the bankruptcy system, with many of these assumptions predating the Bankruptcy Code itself.<sup>425</sup> Even focusing on the large commercial cases where bankruptcy exceptionalism is most corrosive, there will be no single effective solution. Nonetheless, there are likely ways that the influence and impact of exceptionalist thinking in bankruptcy can be reduced.

The most direct pathway is appeal. More Supreme Court engagement could check bankruptcy courts' tendency to approach the Code in ways that would not pass muster with the Court. This is not a straightforward cure. The Supreme Court has already recognized bankruptcy law's "unruly" nature,<sup>426</sup> yet exceptionalism persists. In part, this is because at least some bankruptcy judges have a tendency to read Supreme Court decisions narrowly. Even as the Supreme Court prohibits some exceptional remedy, bankruptcy courts may conclude that they remain em-

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<sup>423</sup> 11 U.S.C. § 510(c).

<sup>424</sup> 11 U.S.C. § 552(b)(1).

<sup>425</sup> See Baird, *supra* note 19, at ix–xiv.

<sup>426</sup> RadLAX Gateway Hotel v. Amalgamated Bank, 566 U.S. 639, 649 (2012).

powered to authorize another that has essentially the same effect.<sup>427</sup> Moreover, the Supreme Court often frames its own bankruptcy decisions in narrow terms, concerned about unintended consequences<sup>428</sup> for a system with which none of the Justices have firsthand experience. And the Court has previously turned away challenges to some of the starkest exemplars of exceptionalism in bankruptcy practice, including third-party releases and equitable mootness, suggesting that it does not believe reining in bankruptcy courts to be as pressing a priority as, for example, its ongoing efforts to constrain the Federal Circuit's exceptionalist views of patent law.<sup>429</sup>

No matter how engaged the Supreme Court becomes, it can never review more than a handful of bankruptcy court decisions. Appellate review in the lower courts that is both more available and less deferential would allow for readier correction of excesses in bankruptcy court. Judge McMahon's decision in the *Purdue* case readily illustrates what that review might look like. Some doctrinal hurdles to appellate review could be eliminated by the Supreme Court or, potentially, by Congress. One obvious target is equitable mootness.<sup>430</sup> This judge-created abstention doctrine holds that courts of appeals may decline to grant relief in an otherwise-meritorious (and constitutionally live) appeal because doing so would be inequitable—usually because it would require unscrambling an already consummated plan of reorganization, especially when doing so would harm third parties that relied on the plan.<sup>431</sup> Equitable mootness is different from constitutional mootness: one district court explained that the distinction is that “equitable mootness is the ability of a district court to simply dismiss a bankruptcy appeal if it is *unwilling* to alter the outcome, not because it necessarily is *unable* to do so.”<sup>432</sup>

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<sup>427</sup> Cf. *In re Nuverra Env'tl Sols., Inc.*, 834 F. App'x 729, 737 (3d Cir. 2021) (Krause, J., dissenting).

<sup>428</sup> See, e.g., *City of Chicago v. Fulton*, 141 S. Ct. 585 (2021); *Jevic*, 137 S. Ct. at 985–86; *Law*, 571 U.S. at 426.

<sup>429</sup> *Supra* notes 199–202 and accompanying text.

<sup>430</sup> The Supreme Court was asked to review whether equitable mootness should be constrained or abolished in *Hargreaves v. Nuverra Environmental Solutions*, 142 S. Ct. 337 (2021).

<sup>431</sup> See, e.g., *Tribune*, 799 F.3d at 278–79; *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 144–45 (2d Cir. 2005).

<sup>432</sup> *In re Frontier Commc'ns. Corp.*, 2021 WL 2333627, at \*6 (S.D.N.Y. June 8, 2021) (emphasis in original) (citing *In re UNR Indus.*, 20 F.3d 766, 769 (7th Cir. 1994)).

Courts of appeals have increasingly criticized equitable mootness because it is inconsistent with federal courts' "virtually unflagging obligation" to exercise jurisdiction.<sup>433</sup> Nonetheless, both district courts and courts of appeals continue to dismiss appeals from bankruptcy court orders confirming plans<sup>434</sup> on the grounds that they are equitably moot.<sup>435</sup> Numerically, the number of appeals that fall to equitable mootness is not large. Nonetheless, those appeals include a number of cases with the potential significantly to impact bankruptcy law.<sup>436</sup> That is to be expected given that sophisticated debtors in complex, high-stakes cases are likely to be particularly aggressive in pursuing equitable mootness: indeed, in complex megacases, a motion to dismiss an appeal as equitably moot is more or less routine. Eliminating equitable mootness, as some courts of appeals judges have suggested,<sup>437</sup> would reduce the effectiveness of envelope-pushing tactics in which parties seek exceptional remedies from bankruptcy courts knowing that, if the plan can be quickly consummated following confirmation by the bankruptcy court, even an appellate court that believes the plan's legality to be questionable may be reluctant to upset what has already occurred.

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<sup>433</sup> *In re Pac. Lumber Co.*, 584 F.3d 229, 240 (5th Cir. 2009) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 819 (1976)); see also *Tribune*, 799 F.3d at 278; *In re Charter Commc'ns., Inc.*, 691 F.3d 476, 481 (2d Cir. 2012).

<sup>434</sup> District courts have attempted to further expand equitable mootness to other types of bankruptcy court orders, including appeals from Chapter 7 liquidations and from other case-ending orders in Chapter 11, like the structured dismissal approved in *Jevic*. *In re Jevic Holding Corp.*, No. 8-1106, 2014 WL 268613, at \*4 (Bankr. D. Del. Jan. 24, 2014). Courts of appeals have been hostile to such attempts to expand the doctrine. *In re Semcrude, L.P.*, 728 F.3d 314, 317 (3d Cir. 2013) ("Equitable mootness comes into play in bankruptcy (so far as we know, its only playground) after a plan of reorganization is approved."); *In re Bodenheimer*, 592 F.3d 664, 668–69 (5th Cir. 2009) ("It is questionable whether the doctrine of equitable mootness applies to Chapter 7 bankruptcy liquidations.").

<sup>435</sup> Appeals dismissed on the grounds of equitable mootness from January through August 2021 include *In re Wilmington Tr., N.A. v. Lord & Taylor LLC*, No. 3:20cv878, 2021 WL 3089105, at \*7 (E.D. Va. July 22, 2021) (dismissing a case as both constitutionally and equitably moot); *In re Windstream Holdings, Inc.*, No. 20 CV 4276, 2021 WL 2581301, at \*5 (S.D.N.Y. June 23, 2021); *Frontier*, 2021 WL 2333627, at \*9; *Clark v. Council of Unit Owners of 100 Harborview Drive Condo.*, 857 F. App'x 729 (4th Cir. 2021) (per curiam); *In re Heather Hills Estates, LLC*, 628 B.R. 701, 705 (M.D. Fla. 2021); *In re Cordero*, No. 19-502, 2021 WL 1093620, at \*8 (D. Haw. Mar. 22, 2021); *Paradise Unified Sch. Dist. v. Fire Victim Tr.*, No. 20-5414, 2021 WL 428629, at \*6 (N.D. Cal. Feb. 8, 2021); *Nuverra*, 834 F. App'x at 733–36.

<sup>436</sup> See, e.g., *Nuverra*, 834 F. App'x at 737 (Krause, J., dissenting) (explaining that the decision involved a series of important questions, including the proper scope of the Supreme Court's landmark ruling in *Jevic*).

<sup>437</sup> See, e.g., *id.*

At the other end of the spectrum, eliminating equitable mootness has at least some potential to increase the availability of appellate review in smaller commercial cases. Unsophisticated parties may get tripped up because one of the key requirements necessary to avoid equitable mootness is that an appellant seek a stay of a bankruptcy court order confirming a plan.<sup>438</sup> Because bankruptcy and appellate courts almost never grant such stays—and debtors invariably oppose stays on the basis that additional time in bankruptcy will be gravely harmful to their businesses<sup>439</sup>—the requirement chiefly serves as a potential trap for unwary appellants. For less well-resourced parties, the cost of pursuing appeal would be at least modestly reduced, because appellants would no longer need to seek emergency stays of consummation of the plan at the same time as they pursued an appeal. Finally, although the rhetoric of courts of appeals has increasingly emphasized the limits of the doctrine, it is troubling that district courts continue to find appeals from small and comparatively simple commercial disputes to be equitably moot.<sup>440</sup>

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<sup>438</sup> See, e.g., *Metromedia*, 416 F.3d at 144–45.

<sup>439</sup> See *Tribune*, 799 F.3d at 289 (Ambro, J., concurring):

Stays are costly to estates: in order to operate a business without court supervision and in order to sell shares on the public markets, entities must emerge from bankruptcy with prepetition liabilities restructured or discharged. Thus every day that a company remains in bankruptcy is a day when it will have a hard time attracting the investors, employees, and, in some industries, customers that it needs to exist and prosper.

Judge Ambro suggested threading this needle by requiring appellants to post a *super-sedeas* bond. *Id.* at 289. In a large commercial case, though, the potential cost of remaining in bankruptcy may be enormous. A bond is likely to be either flatly unaffordable for any but the most deep-pocketed appellants or inadequate for the frustrated debtor that must wait for the appellate courts to do their work before emerging from bankruptcy. The required bond for one appellant in *Tribune* was fixed at \$1.5 billion. *Id.* at 276. Understandably, no bond was posted. *Cf. id.*

<sup>440</sup> Judge Krause, the sharpest critic of equitable mootness currently on the federal bench, observed that “[i]n the nearly twenty years since we [recognized equitable mootness], it has proved highly problematic, with district courts continuing to dismiss appeals in the simplest of bankruptcies.” *In re One2One Commc’ns., LLC*, 805 F.3d 428, 438 (3d Cir. 2015). Very few of the appeals listed in note 435 involve cases as complex or sums as large as in a case such as *In re MPM Silicones, LLC*, 874 F.3d 787, 805 (2d Cir. 2017), which the Second Circuit held straight-forwardly not to be equitably moot. (In the interest of disclosure, I note that I participated in this litigation while in practice, representing appellant Bank of Oklahoma.) At one extreme of the spectrum, the District of Hawaii in *In re Cordero* found to be equitably moot an appeal from a dispute between the trustee of an individual debtor’s bankruptcy estate and his nondebtor spouse over the sale of real estate that the couple owned. No. 19-00502, 2021 WL 1093620, at \*8 (D. Haw. Mar. 22, 2021).

A full examination of the implications of eliminating equitable mootness is beyond the scope of this Article. If equitable mootness is not eliminated, it still could be usefully cabined. Most importantly, as critics have suggested, reviewing courts should focus carefully on whether *some* relief, albeit imperfect, could be granted even in a complex case in which unscrambling a whole plan is at best unfeasible and at worst impossible.<sup>441</sup> That may often mean issuing an order for disgorgement from a party that has benefited from an unlawful provision in a plan or confirmation order to a successful appellee.<sup>442</sup> Reviewing courts could also eliminate the requirement that an appellant has been diligent in seeking a stay when analyzing whether an appeal is equitably moot. Given the rarity with which stays are granted, this requirement likely serves little purpose and could be eliminated without causing substantial harm. Finally, district courts and courts of appeals should not use equitable mootness as a reason to avoid considering the merits of appeals. The better approach is to consider equitable mootness *last*—only after a court has established what facets of a plan are legally problematic and has the clearest sense of what steps would be necessary to fashion a remedy on remand. Although that would do nothing to alter a plan proponent's incentives to argue for equitable mootness in an individual case, it would avoid equitable mootness serving to stymie the broader development of bankruptcy law.<sup>443</sup>

At root, the fundamental concern in bankruptcy appeals is speed. The controversy over equitable mootness reflects this. Debtors argue that it is essential quickly to resolve their financial distress and that time spent in bankruptcy is wasted value that could have repaid creditors' claims. Litigants dissatisfied with the deal struck in bankruptcy must make one or both of an unattractive pair of arguments: either the whole case must be held up pending appeal, or a deal based on which a reorganized debtor may have been operating for months or years by the time of an appellate decision must be revisited and potentially unscrambled entirely. There are exceptions: rather than risk an after-the-fact upset, Dow Corning spent nine years in bankruptcy waiting for

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<sup>441</sup> See, e.g., *One2One*, 805 F.3d at 450 (Krause, J., concurring).

<sup>442</sup> *MPM Silicones*, 874 F.3d at 438.

<sup>443</sup> Thus, in *Metromedia*, the Second Circuit found that a bankruptcy court had insufficiently scrutinized a third-party release in a plan of reorganization before finding, nonetheless, that the appeal was equitably moot. 416 F.3d at 143.

its plan to become final and unappealable.<sup>444</sup> But, in general, making appellate relief in bankruptcy more effective will also require making it quicker.<sup>445</sup> Again, Purdue's bankruptcy can serve as a partial model. The district court expedited the proceedings before it, issuing a comprehensive decision less than two months following entry of the confirmation order.<sup>446</sup> Although ordinary rules of appellate procedure provided for remand to the bankruptcy court, the district court then certified the case for interlocutory appeal to the Second Circuit and required appellants to seek expedited review before that court also.<sup>447</sup>

Some more comprehensive changes to achieve the necessary speed are radical, including the creation of a specialized federal court of appeals to hear appeals from bankruptcy cases, just as the Federal Circuit does for patent claims.<sup>448</sup> Again, the full implications of such a proposal are beyond the scope of this Article, but some concerns at least are apparent. Judges appointed to permanent positions on a Federal Court of Bankruptcy Appeals would likely be drawn from the bankruptcy bar or—even if generalists when appointed—might come over time to identify with bankruptcy culture, substantially reducing their effectiveness as a check on bankruptcy exceptionalism. For that reason, Levitin has proposed that judges from the other courts of appeals serve rotating stints on this new court.<sup>449</sup> Yet a steady inflow of new judges without any experience deciding bankruptcy cases is also potentially problematic, as judges that feel they have little understanding of the bankruptcy system may be unduly deferential in their approach to reviewing bankruptcy court decisions. Moreover, anecdotal evidence that many Article III judges dislike deciding bankruptcy issues suggests that the dynamics of establishing such a court and securing generalist judges to serve in such a potentially unattractive role may be difficult.<sup>450</sup> These proposals are

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<sup>444</sup> *Dow Corning Emerges from Bankruptcy*, NBC NEWS (June 1, 2004), <https://perma.cc/2SNX-BG5J>.

<sup>445</sup> Levitin, *supra* note 23, at 84.

<sup>446</sup> *See generally Purdue II*, 635 B.R. 26.

<sup>447</sup> *See Order Conditionally Granting Debtors' and Allied Parties' Motion for a Certificate of Appealability, In re Purdue Pharma, L.P.* (S.D.N.Y. Jan. 7, 2022), 2022 WL 121393.

<sup>448</sup> Levitin, *supra* note 23, at 174–76 (proposing a court of appeals that would hear appeals only from commercial bankruptcy cases); Samir D. Parikh, *Modern Forum Shopping in Bankruptcy*, 46 CONN. L. REV. 159, 204 (2013).

<sup>449</sup> Levitin, *supra* note 23, at 176.

<sup>450</sup> *Cf. supra* notes 282–284 and accompanying text.

worth further study. With little immediate prospect of their realization, though, this Article will suggest one more modest change.

Ordinarily, bankruptcy appeals must first pass through the district court or a bankruptcy appellate panel before reaching the court of appeals. As courts of appeals judges have themselves noted, district courts are particularly likely to be deferential to bankruptcy court findings.<sup>451</sup> Title 28 of the U.S. Code already permits direct certification of appeals from the bankruptcy court to the court of appeals in a limited set of circumstances, including when “an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken.”<sup>452</sup> This remains a rarely deployed procedure even though the statutory grant of authorization is broad enough to permit direct certification in a broad range of cases in which speed is necessary for bankruptcy court’s decisions effectively to be reviewed.<sup>453</sup> Bankruptcy and district courts should be far readier to accept requests for direct certification, or to propose it on their own initiative, than is the case in current practice.

Since the problems that bankruptcy exceptionalism creates likely cannot be addressed via changes to bankruptcy appellate rules and procedures alone, Congress and the court should consider other changes. Frequently paired with proposals for reform of bankruptcy appeals (such as the creation of a new federal circuit court) are proposals to reform bankruptcy venue rules.<sup>454</sup> Bankruptcy venue reform—and, in particular, reforms that prevent the extremely granular kind of judge selection of recent years—could prevent sophisticated repeat parties from ensuring that the judges that oversee their cases are in sympathy with their own exceptionalist views of bankruptcy law and receptive to their requests for flexible and creative remedies. Venue reform would not be without costs: New York and Delaware, in particular, have historically been so dominant as venues for large commercial cases that many bankruptcy judges sitting in smaller courts have no experience handling the kinds of exceptionally

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<sup>451</sup> *One2One*, 805 F.3d at 438 (Krause, J., concurring).

<sup>452</sup> 28 U.S.C. § 158(d)(2)(A)(iii).

<sup>453</sup> *Cf.* Levitin, *supra* note 23, at 175 (suggesting direct appeal from the bankruptcy court to a new Federal Court for Business Bankruptcy Appeals). To be sure, for review of interim orders like debtor-in-possession financing motions or sale procedures to be effective, courts of appeals would have to be willing to expedite these direct appeals.

<sup>454</sup> Levitin, *supra* note 23, at 174–76; Parikh, *supra* note 448, at 199–208.

complex megacases where exceptionalism has its most problematic effects. The granularity of the newest forms of venue shopping, though, is a signal that change in some degree is necessary.

Again, of course, this is only a partial solution. Ultimately, this Article has argued that bankruptcy exceptionalism reflects the values of the bankruptcy community. Altering such deep-rooted values is a perhaps unfeasibly large task. As a first step in that direction, though, this Article proposes one more modest change to current practice. There is no uniform process for appointment of bankruptcy judges: each court of appeals administers its own merit-selection process.<sup>455</sup> The standards that these courts use may change over time: for example, the Seventh Circuit, for example, used to appoint many new bankruptcy judges with no history of bankruptcy practice, but it has increasingly chosen candidates with deep roots in the bankruptcy bar.<sup>456</sup> Most bankruptcy judges, though, have been bankruptcy practitioners<sup>457</sup>—and this is especially likely to be the case in courts like New York and Delaware that have especially busy complex Chapter 11 dockets. It is of course useful to have bankruptcy judges that have deep expertise on bankruptcy issues. But it would likely be beneficial for courts of appeals to ensure, for each bankruptcy court that they oversee, that appointments of specialists are balanced with appointments of lawyers drawn from other areas of practice. As with judges on any court, the fact that one judge on a court has reached a conclusion on any given issue does not guarantee that her colleague will not decide a similar case in a sharply different way in the future.<sup>458</sup> Nonetheless, nonbankruptcy lawyers on the bankruptcy bench could serve as a check on at least some of the exceptionalist instincts of judges and lawyers more deeply steeped in bankruptcy culture—or, failing that, signal to the higher courts when intervention is necessary to resolve splits in precedent that have developed among bankruptcy judges.

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<sup>455</sup> Reddick & Knowlton, *supra* note 190, at 7.

<sup>456</sup> *See id.* at 15.

<sup>457</sup> *See, e.g.*, Reddick & Knowlton, *supra* note 190, at 14–15; Mabey, *supra* note 189, at 107.

<sup>458</sup> Commentators have noted disagreement among the bankruptcy judges in the District of Delaware on the outer bounds of what is permissible for third-party releases. *See Coco, supra* note 85, at 252.



## B. After Bankruptcy Exceptionalism

Turning to the consequences of a rejection of bankruptcy exceptionalism, how should a bankruptcy court approach tasks such as considering the scope of any equitable or inherent powers available to it, reviewing non-Code practices, or adjudicating a claim that turns on a creative interpretation of the Bankruptcy Code?

The first, obvious step is to ask whether a party is asking for a result that generalist principles of law would still permit. Non-Code practices that have clear roots in pre-Code common law are on stronger ground, because they are consistent with the generalist principle that Congress legislates against the background of preexisting common law.<sup>459</sup> At the same time, pre-Code practice has weaknesses as a source of law.<sup>460</sup> Understanding the scope of pre-1978 practices sufficiently well to draw inferences regarding practice today is challenging; the historical record is not always accessible, and then, as today, bankruptcy practice varied widely from location to location.<sup>461</sup> Moreover, even in cases in which a clear and consistent pre-1978 practice can be identified, historical practices do not always reflect the complexity of post-1978 reorganizations.<sup>462</sup> Pre-Code practice becomes a somewhat thin reed to support modern day practices in the bankruptcy court. Bankruptcy courts should examine arguments relating to pre-Code history searchingly and seek evidence of continuous or broad acceptance of practices in analogous cases before embracing them today.

A first example of the challenges that this would present is determining whether critical vendor orders (CVOs) meet these standards.<sup>463</sup> Paying a creditor's prebankruptcy claim at the outset of a case needs some legal justification, even if the debtor's relationship with the vendor is "critical," because early payment in full de facto leaps the creditor to the top of the priority list. *Jevic*, while prohibiting end-of-case priority-skipping distributions, left these in place.<sup>464</sup> First, bankruptcy courts must decide whether CVOs are supported by specific provisions of the Code or whether they are best understood as an exercise of inherent or

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<sup>459</sup> See *supra* notes 345–353 and accompanying text.

<sup>460</sup> See, e.g., Levitin, *supra* note 31, at 64–65.

<sup>461</sup> *Id.* at 64.

<sup>462</sup> *Id.*

<sup>463</sup> See *supra* note 348 and accompanying text.

<sup>464</sup> *Jevic IV*, 137 S. Ct. at 985.

equitable power.<sup>465</sup> To date, the distinction has not been of importance. If an exercise of inherent power, CVOs likely stand or fall based on the strength of their roots in pre-Code practice. Historical discussions of the practice focus on a doctrine of necessity recognized in railroad reorganization cases rather than in more closely analogous cases under Chapter X or Chapter XI of the Act.<sup>466</sup> The weaker the historical support for a practice, the more reason to question how neatly it coheres with the Code provisions to which it is grafted. CVOs, preferring the claims of some creditors over others, sit at best uneasily with the Code's priority scheme; courts should search stringently for a hook to authorize them that coheres with generalist tools of adjudication.<sup>467</sup>

Elsewhere, the Bankruptcy Code incorporates many open-textured and explicitly discretion-conferring provisions.<sup>468</sup> To the extent that the Bankruptcy Code functions in any place like a common law statute, it is through these provisions. Provisions that call for the bankruptcy court to grant or deny relief "based on the equities of the case"<sup>469</sup> or "under principles of equitable subordination"<sup>470</sup> seem hard to read other than as delegations to the bankruptcy courts to give content to the statute by developing workable standards and precedent. The only alternative would be a "Chancellor's foot" style of jurisprudence in which nothing but a bankruptcy judge's reaction to an individual case would determine the outcome. Levitin has incorporated these provisions into his federal common law model of the Bankruptcy Code. Yet federal common law operates differently here to elsewhere in Levitin's model because its primary function is to constrain bankruptcy judges, guiding and channeling their interpretations of

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<sup>465</sup> Compare *In re Just For Feet, Inc.*, 242 B.R. 821 (D. Del. 1999) (authorizing a critical vendor pursuant to Section 105(a)), with *In re Kmart Corp.*, 359 F.3d 866, 872 (7th Cir. 2004) (Easterbrook, J.) (suggesting a limited basis for authorizing CVOs pursuant to Section 363(b)(1)), and *In re Windstream Holdings Inc.*, 614 B.R. 441, 456 (S.D.N.Y. 2020) (authorizing a critical vendor pursuant to a combination of Sections 363(b)(1) and 105(a)).

<sup>466</sup> James Sprayregen, James A. Stempel, Laura Davis Jones, Debra L. Grassgreen & Samuel Blatnick, *Down, But Not Out: The Status of Critical Vendor Payments Post-Kmart*, 23 AM. BANKR INST. J. 26, 55, 60 (2004); Travis N. Turner, *Kmart and Beyond*, 63 WASH. & LEE L. REV. 431, 443–46 (2006).

<sup>467</sup> Levitin, *supra* note 31, at 79 (suggesting that critical vendor orders "actually authorize[ ] a significant deviation from the Code's priority scheme").

<sup>468</sup> See *supra* note 13.

<sup>469</sup> 11 U.S.C. § 552(b).

<sup>470</sup> 11 U.S.C. § 510(c).

otherwise-open-ended provisions; it does not serve to expand the bankruptcy court's power.<sup>471</sup>

Substance over form is important in analyzing consistency with generalist methods of adjudication. As Part I explained, both the Supreme Court and the bankruptcy courts on occasion find gaps in the Bankruptcy Code that must be filled. Bankruptcy courts, though, are more likely to find that a gap exists, and more likely to find that the gap should be filled by reference to special and unwritten bankruptcy principles. Moving beyond bankruptcy exceptionalism requires some skepticism of bankruptcy court claims to be filling gaps in the Code, whether styled as uses of equity or federal common law making. Sometimes, the “gap” is illusory, as in *Law*; the fairest interpretation of the Code is that it already resolves the dispute at issue, even if the result does not appear in explicit language and must be determined by inference.<sup>472</sup> In other cases, a gap truly does exist.<sup>473</sup> Even so, the Supreme Court fills gaps in such cases not by reference to equity but with its best efforts to find answers in the surrounding statutory scheme and generally applicable legal principles. Ultimately, because of the multifaceted nature of bankruptcy, it is always possible that a bankruptcy court will be faced with a situation that Congress simply did not anticipate, and for which the Code's provisions provide no answer. Rejecting bankruptcy exceptionalism should not mean denying the bankruptcy court the ability to craft a remedy in such circumstances. Nonetheless, the notion that bankruptcy law contains gaps is not sufficient to justify setting aside generalist methods of adjudication and reaching for bankruptcy-only tools and principles.

Many in the bankruptcy world are scared of intervention by the Supreme Court. Even critics of perceived excesses of bankruptcy exceptionalism argue that more frequent intervention by the Supreme Court in bankruptcy law—and, presumably, by extension, broader adoption of the Supreme Court's generalist approach to bankruptcy issues—will harm bankruptcy law.<sup>474</sup> Supreme Court decisions are feared for being too “rigid,” “robotic,”

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<sup>471</sup> Cf. Levitin, *supra* note 31, at 82.

<sup>472</sup> *Supra* Part I.B.

<sup>473</sup> See generally, e.g., Taggart v. Lorenzen, 139 S. Ct. 1795 (2019).

<sup>474</sup> See, e.g., Levitin, *supra* note 23, at 175 & n.313 (suggesting that “the Supreme Court's textualist approach is poorly suited to the complex ecosystem of bankruptcy law”).

and “mechanical” to meet the needs of bankruptcy courts.<sup>475</sup> To make a difference, ending bankruptcy exceptionalism must result in some hard edges. But it should not require “rigidity” or “robotic” applications of the Code to the facts of bankruptcy cases. *Jevic* serves as an example. The Court in that case did not reject the atextual practice of resolving Chapter 11 cases via a settlement incorporated in a dismissal order; in dicta, it went even further, suggesting that it might approve other atextual transactions that serve a “significant Code-related objective[ ].”<sup>476</sup> Space for innovation is preserved within an approach to statutory interpretation that still has at its root the task of giving effect to the statute that Congress enacted, applying structural textualism to test whether any proposed innovation is consistent with the design and structure of the Code as a whole rather than any individual provision. Careful application of ordinary statutory interpretation principles will still allow bankruptcy courts to reach results not anticipated by Congress but that remain consistent with the statutory text.

Take some concrete examples. Without bankruptcy exceptionalism, the kind of third-party release contemplated in *Purdue* likely could not stand. Applying ordinary principles of statutory interpretation, the best reading of the statute is that Section 524(e), which provides that “discharge of a debt of the debtor does not affect the liability of any other entity on . . . such debt,” prohibits courts from authorizing third-party releases; that conclusion is strengthened by a negative inference from Section 524(g), which provides a tightly constrained mechanism for channeling third-party liability only applicable in asbestos cases.<sup>477</sup> Does that mean that bankruptcy cases in which a debtor’s affairs are deeply intertwined with some other nondebtor entity can no longer conclude with a global resolution of the whole corporate family’s affairs?

The better answer is no. In the spirit of *Jevic*, while it likely violates the statutory scheme to force a creditor to grant a release not contemplated by the Code, nothing stops a creditor from

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<sup>475</sup> See *id.*; Levitin, *supra* note 31, at 13; Coordes, *supra* note 11, at 317; Dick, *supra* note 9, at 294–95; Daniel J. Bussel, *Textualism’s Failures: A Study of Overruled Bankruptcy Decisions*, 53 VAND. L. REV. 887, 917 (2000).

<sup>476</sup> *Jevic IV*, 137 S. Ct. at 985.

<sup>477</sup> 11 U.S.C. § 524(e), (g).

agreeing to release her claims.<sup>478</sup> A truly consensual third-party release will still pass muster. This conclusion gives rise to a multiplicity of questions better explored elsewhere. Because under existing law in most circuits that allow them, a nonconsensual third-party release (as in *Purdue*) requires a more stringent showing than a consensual third-party release, bankruptcy courts have already begun to untangle the demarcating lines of consent.<sup>479</sup> Courts would have to resolve what counts as consent to such a release. That is not a simple task; bankruptcy judges even on a single court already differ over whether an opportunity to opt out suffices or whether a creditor must affirmatively opt-in.<sup>480</sup> Similarly, questions over the degree of coercion acceptable from debtors will become more pressing, such as whether or when a plan may include a death trap providing that a creditor that refuses to consent to a release forfeits any right to a distribution under the plan. Shifting the focus of the judicial inquiry into third-party releases from the permissibility of nonconsensual releases to the robustness of creditor consent should have the benefit of reducing the need for concern over the substantive fairness or unfairness of the releases that are approved.

A similarly nuanced picture emerges from examining the flip side of bankruptcy exceptionalism. Tools like third-party releases are innovative remedies that debtors may propose to facilitate reorganizations. But as in *Pepper*, bankruptcy courts sometimes wish to innovate remedies in order to respond to litigants' misbehavior. In substance, the remedy that Justice Douglas authorized in *Pepper* was equitable disallowance: the bankruptcy court's power to refuse to recognize in the bankruptcy case a creditor's right that remains valid under state law.<sup>481</sup> *Law* killed off equitable disallowance.<sup>482</sup> But bankruptcy courts are not powerless to deal with fraudsters like Scott Litton. Section 510 of the Bankruptcy Code still expressly authorizes equitable *subordination*—sending a claim to the back of the priority line for payment.<sup>483</sup> Unless a debtor is solvent, a claim that is sent to the back of the line

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<sup>478</sup> *Jevic IV*, 137 S. Ct. at 978, 984 (assuming that a consensual priority-skipping structured dismissal would pass muster).

<sup>479</sup> *Coco*, *supra* note 85, at 240.

<sup>480</sup> *Id.* at 250–53.

<sup>481</sup> *Supra* Part I.B. In *Pepper*, the “creditor” was an alter ego of the debtor; that fact pattern would often (but need not) ground instances of equitable disallowance. *Pepper*, 308 U.S. at 296–97.

<sup>482</sup> See, e.g., *In re Madoff*, 515 B.R. 117, 157 (Bankr. S.D.N.Y. 2014).

<sup>483</sup> 11 U.S.C. § 510(c).

will have the same distributional outcomes as one that is disallowed entirely (although the claim holder will still keep other rights in the bankruptcy case like the right to vote on a plan). The Code does not define “principles of equitable subordination,” so their content is left to federal common law; existing standards already neatly encompass fact patterns like *Pepper*, in which an alter ego of the debtor is employed fraudulently to try to usurp value from legitimate creditors.<sup>484</sup>

### CONCLUSION

Over thirty years ago, two titans of the bankruptcy space joined in a still-influential debate over bankruptcy policy.<sup>485</sup> That debate, though seminal, is largely orthogonal to this Article’s inquiry into what adjudicative tools the bankruptcy judge should use when seeking to implement the Bankruptcy Code and advance bankruptcy’s purposes as she understands them.<sup>486</sup> Indeed, support for bankruptcy exceptionalism in one form or another may be found among scholars from both camps. It is noteworthy, though, because then-Professor Elizabeth Warren defended a view of bankruptcy policy that she described as “dirty, complex, elastic, [and] interconnected,” which sought neither comprehensively to predict outcomes nor to “fully articulate all the factors relevant to a policy decision.”<sup>487</sup> The same might be said of this Article’s thesis, which offers a “dirty, complex” view of bankruptcy exceptionalism that is as epistemically cautious as Warren’s earlier model of bankruptcy policy.

Bankruptcy exceptionalism is understandable. The small and at times isolated world of bankruptcy will naturally develop its own legal culture. Equally naturally, bankruptcy culture will evolve to incorporate assumptions about what the bankruptcy system is for and what is needed for that system to work well. These assumptions will influence the practitioners and judges that make up the bankruptcy world, especially because bankruptcy cases are often hard cases in which all parties—including the bankruptcy judge—face intense pressure to “succeed.” Thus emerges the legal regime described at the beginning of this

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<sup>484</sup> See COLLIER ON BANKRUPTCY, *supra* note 347, at ¶ 510. Indeed, *Pepper* “[a]id[ed] the groundwork for the doctrine of equitable subordination.” *Id.* at ¶ 510.05[3][d].

<sup>485</sup> Warren, *supra* note 388, at 811; Baird, *supra* note 387, at 815.

<sup>486</sup> *But see* Part III.C.1 (discussing the debate’s relevance to whether public priorities can justify bankruptcy exceptionalism).

<sup>487</sup> Warren, *supra* note 388, at 811.

Article, in which bankruptcy cases are driven by unwritten law: a commitment by judges and practitioners to give effect to the assumptions and norms animating bankruptcy culture even at the expense of consistency with normal understandings for how to decide cases shared by other federal courts. Yet bankruptcy exceptionalism—at least as it exists today in the United States—is not harmless. While, of course, the flexibility and creativity that bankruptcy practitioners celebrate as vital for bankruptcy to fulfil its purposes will lead to good outcomes in some cases, those same features also tilt the scales in bankruptcy disputes even further in favor of the sophisticated repeat players that already dominate.

Bankruptcy exceptionalism needs some kind of justification. At the heart of bankruptcy exceptionalism is the notion that bankruptcy law is special: that there is something different about bankruptcy that means ordinary rules do not apply. That is true whether the proponent of bankruptcy exceptionalism argues that bankruptcy law should take account of the consequences of bankruptcy cases for broader society, as Westbrook does, or whether he argues that bankruptcy law incorporates unwritten principles seeking to create a bargaining environment that will more efficiently bring parties to a deal, as Baird does. The task of justifying bankruptcy exceptionalism, therefore, is in essence one of explaining what it is that makes bankruptcy special.

This Article suggests, though, that bankruptcy is not special. To be sure, it has its distinctive features. Even if the Bankruptcy Code's history and text and bankruptcy judges' special expertise cannot support claims that bankruptcy requires a special approach, there is something to be said for the argument that bankruptcy assigns judges a more complex and disparate task than that faced by most other federal judges. That alone, though, does not justify contemporary bankruptcy practice's all-too-frequent resort to exceptionalism when resolving bankruptcy disputes. The Bankruptcy Code is one federal statute among many. Bankruptcy judges should approach bankruptcy disputes expecting to decide them in the same manner that a federal judge would any other statutory case. The good news for bankruptcy is that confining bankruptcy judges to generalist tools still leaves much that the distinctive norms of bankruptcy and the values of the bankruptcy community can do, and many ways in which they can influence the work of bankruptcy courts.

Bankruptcy scholars might hope to derive additional benefits from rejecting bankruptcy exceptionalism. More closely unifying bankruptcy adjudication with other fields would allow bankruptcy to more readily inform the work of other courts. Bankruptcy is perhaps the most significant illustration of the need for a structural approach even within textualist statutory interpretation: one dedicated to ensuring that all of the different parts of a statute work together, and cabining judges' use of policy and principles to effecting Congress's policy, as found in the statute's text and structure. The Supreme Court does not always get bankruptcy cases right, but some of its best and most important recent bankruptcy decisions reflect exactly this type of structural analysis. Such cases, and bankruptcy more broadly, might better inform and sharpen debates across the gamut of the federal courts' civil-litigation dockets if generalist observers more clearly understood that they need not look past bankruptcy cases based on the assumption that courts in that space are doing something different from those everywhere else.