FOR BANKRUPTCY EXCEPTIONALISM

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A Response to Professor Jonathan M. Seymour's Against Bankruptcy Exceptionalism.

Introduction

In his recent article, *Against Bankruptcy Exceptionalism*, Professor Jonathan M. Seymour argues that bankruptcy courts have wrongly bucked the Supreme Court's trend toward textualism. Bankruptcy courts believe that they need to approach the Bankruptcy Code pragmatically in light of the unique dynamics inherent in bankruptcy practice and therefore adopt purposivist, equitable, or "rough justice" approaches to facilitate that kind of pragmatism—an attitude that Professor Seymour calls "bankruptcy exceptionalism." Professor Seymour's argument runs along two different axes: approaches to statutory interpretation and bankruptcy courts' powers. The more a court strays from the Code's text, the more power it will be able to exercise, and that power soon gets out of hand. Exceptionalist interpretations aren't reserved for "rare cases." Nontextualist approaches to the Code, rather, beget interpretations that are initially deemed "exceptions," but snowball into strategies that every seasoned bankruptcy lawyer will turn to when possible. Professor Seymour bemoans this development and asks whether anything about bankruptcy law or practice justifies bankruptcy exceptionalism. He doesn't think so.

In this Essay, I argue that bankruptcy law is exceptional, and bankruptcy exceptionalism begins with the Code. Even within its own confines, the Bankruptcy Code cloaks bankruptcy courts with unparalleled powers. For example, the Code imposes automatic stays on many attempts to obtain property from the estate, modifies parties' prepetition agreements, and allows debtors to sell their assets free and

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clear of any claims or interests that might encumber those assets.[1] These powers are unrivaled in the federal and (certainly) state arsenals.

Bankruptcy courts are vested with these powers to address the complex dynamics that give rise to, and inhere in, bankruptcy proceedings. Bankruptcy courts must shepherd the parties toward achieving a resolution that works for most, if not all, of them. Implementing those solutions may require bankruptcy courts to find some play in the Code's text. By the same token, bankruptcy proceedings give parties the opportunity to act opportunistically; that is, to engage in activity that squanders value ex post and is hard to detect ex ante. Bankruptcy exceptionalism allows bankruptcy courts to attack this kind of opportunistic behavior. And in my view, the Supreme Court's opinion in *Czyzewski v. Jevic Holding Corp.* (2017) reflects the Court's recognition that bankruptcy cases are exceptional and legitimizes bankruptcy exceptionalism.

It's true that creative interpretations come at a cost. Professor Seymour rightly notes that parties can use bankruptcy courts' lax attitude toward the Code's text to normalize harmful or costly practices. But they can do so even within the Code's text. While we may recoil at abuses of the bankruptcy process, we should tackle those abuses as they arise, not by abandoning bankruptcy exceptionalism.

I. Against Bankruptcy Exceptionalism

As Professor Seymour defines it, bankruptcy exceptionalism is the idea that bankruptcy judges are right to adopt a purposivist or equitable method of interpreting the Bankruptcy Code in order to advance bankruptcy law's core goals. Common justifications for bankruptcy exceptionalism include (a) bankruptcy courts' doctrinal (if not historical) status as courts of equity; (b) Section 105(a) of the Bankruptcy Code; (c) the legislative history of, and Congress's intent in enacting, the Code; (d) bankruptcy judges' expertise in interpreting the Code and managing bankruptcy cases; and (e) the unique features that characterize bankruptcy cases.

The problem is, the Supreme Court has repeatedly said otherwise. On Professor Seymour's retelling, in decision after decision, the Supreme Court unanimously smacked down creative bankruptcy

[1] Though Professor Seymour's analysis seemingly applies to both individual and business debtors, the dynamics he identifies and decries as pernicious arise almost solely in business cases. My response therefore centers on business cases, and as such, I refer to commercial debtors alone when I use the term "debtor" or "debtors."

exegesis in favor of "structural textualism": that is, "comprehend[ing] the statute's overall structure" and filling gaps in the text "with principles derived from the statute's text and structure." Professor Seymour also finds each of the justifications for bankruptcy exceptionalism lacking: (a) the status of bankruptcy courts as courts of equity is dubious; (b) Section 105(a) is not designed to bear the weight of exceptionalist readings of the Code; (c) the Code's legislative history and congressional intent is muddy at best; (d) much like what we see in administrative law cases, expertise doesn't give experts a pass on ignoring statutory text; and (e) bankruptcy cases are insufficiently unique to justify bankruptcy exceptionalism.

Professor Seymour recognizes that bankruptcy cases are unique but posits that they aren't unique enough to justify bankruptcy exceptionalism. He has three kinds of "bankruptcy cases are unique" arguments in his crosshairs: (1) bankruptcy cases implicate numerous, varying public interests that bankruptcy judges have to balance; (2) the Bankruptcy Code is something of a common law statute that invites courts to interpret it equitably in light of changing circumstances; and (3) bankruptcy cases are uniquely complex. All three variants fail to persuade him, largely because there is insufficient evidence to show that Congress intended bankruptcy courts to use their discretion when interpreting all of the Code's provisions. After all, Professor Seymour notes, the Code only uses open-ended phrases such as "according to the equities of the case" or "in the interests of justice" in specific provisions, suggesting that Congress invited bankruptcy courts to gin up creative interpretations only for those provisions.

In addition to having (purportedly) no justification, Professor Seymour shows how bankruptcy exceptionalism can quickly get out of hand. The story goes like this. A company in Chapter 11 may require a creative solution to continue operating as a going concern that the Code neither expressly permits nor forbids. As the company's keeper, the bankruptcy judge will interpret the Code in an unorthodox way that authorizes the company's proposed solution but will reserve this interpretation for rare cases. With the successful new tactic on display, seasoned bankruptcy attorneys will frame their clients' cases as "rare" cases that call for a similarly extraordinary interpretation. Next thing you know, rare cases are run of the mill—or so Professor Seymour says.

And who benefits from this departure from the Code's text? In Professor Seymour's view, experienced bankruptcy professionals and "reorganizers," not "legacy creditors." Professor Seymour warns that seasoned bankruptcy professionals will come to know what the off-the-

menu items are and will use that institutional knowledge to their clients' advantage. "Reorganizers"—i.e., distressed firms and their lenders who are willing to contribute new value to the firms as going concerns—stand to gain, too, according to Professor Seymour, because these bankruptcy exceptionalist interpretations of the Code ratify firms' reorganization strategies when those strategies are only dubiously approved by the Code. Permitting exceptional solutions also comes at the cost of enforcing provisions of the Code that were crafted to protect legacy creditors, who were previously entangled in a firm's affairs and are unable or unwilling to provide distressed firms with additional value. On Professor Seymour's account, condoning bankruptcy exceptionalism means coming to terms with rare cases becoming ever more common, with benefits consistently accruing to reorganizers and not to legacy creditors.

In Professor Seymour's view, quashing bankruptcy exceptionalism requires Congress and the federal court system to take a few steps in a new direction, such as making bankruptcy appeals more available and less deferential—which, in turn, requires modifying the doctrine of "equitable mootness"—and reforming the practice of "venue shopping," where bankruptcy practitioners finagle their way into their favorite bankruptcy judge's courtroom. The upshot of Professor Seymour's article is that bankruptcy exceptionalism is a costly practice that should be quickly retired.

II. Bankruptcy Exceptionalism, In and Out of the Code

Professor Seymour recognizes that bankruptcy proceedings are uniquely complex. Creditors are placed in a precarious position by the debtor's bankruptcy filing and must scrutinize the debtor's prepetition and postpetition transactions. What's more, the bankruptcy court must review those transactions in real time and sign off on them before the debtor may proceed with those transactions. Professor Seymour doesn't take these unique features of bankruptcy proceedings to justify bankruptcy exceptionalism; rather, in his view, the Code contains limited, explicit provisions that invite judges to use their discretion.

What I think is missing from Professor Seymour's account is that bankruptcy proceedings are designed to resolve systemic incomplete contracting. There are numerous causes and sources of financial distress that may impel a debtor to seek bankruptcy relief. Though a debtor and a creditor can address some of the issues that are likely to crop up over the course of their contractual relationship, they can't predict every kind of financial distress that each party might face. Consequently, the parties are unable to allocate their entitlements for all of those scenarios ex ante, let alone do so in a way that is value maximizing. And what goes for one debtor-creditor

relationship goes for all the others. Left to their own devices and without bankruptcy proceedings, creditors would attempt to advance their own interests, but in doing so, would likely squander value by hampering, or straight-up liquidating, a firm that would have greater value as a reorganized going concern enterprise.

The Bankruptcy Code alleviates this incomplete contracting problem by vesting bankruptcy courts with extremely muscular powers that allow them to alter the parties' prepetition entitlements. Those powers aren't boundless, of course, but they are unrivaled in the federal and state arsenals. An analysis of bankruptcy exceptionalism should grapple with these powers and the gargantuan issues they're designed to ameliorate.

A. Bankruptcy's Exceptional Powers in the Code

Let's look at a few examples. First among these powers is the automatic stay, which is designed to "protect debtors from all collection efforts while they attempt to regain their financial footing," subject to numerous exceptions. The automatic stay has a vast scope, staying various kinds of actions aimed at improving one's rights to the debtor's property. Obtaining the stay's sweeping relief requires very little on the debtor's part. As the name suggests, the stay automatically kicks in when the debtor files its bankruptcy petition. It's worth highlighting how unique this kind of relief is. It's unilateral; the debtor receives the automatic stay's protection solely by filing its bankruptcy petition. The debtor doesn't need to make any showing as to why it should receive the stay's benefit. And the stay is "applicable to all entities" seeking to improve their positions vis-à-vis the debtor's assets or otherwise fortify their rights as against the debtor and other creditors.

This kind of relief is unparalleled. The closest analogy to the automatic stay would arguably be a nationwide preliminary injunction. When a court issues a nationwide preliminary injunction, parties, including governmental entities, must stop engaging in the activity that the court enjoins until the injunction is lifted. In a very broad sense, the automatic stay operates similarly; parties are prohibited from undertaking a wide range of activities that would perfect their rights against the debtor or would undercut the debtor's rights against third parties. Both the automatic stay and nationwide preliminary injunction are powerful tools that can grind commercial and governmental activity to a halt. But the analogy between these kinds of relief quickly breaks down. Courts have occasionally issued nationwide injunctions, but that practice has generated a fierce

academic debate.[2] What's more, as the Supreme Court clarified, a preliminary injunction of any kind is an "extraordinary and drastic remedy," and to obtain it, the moving party has to show that the four traditional factors for issuing injunctions weigh in its favor. Not so with the automatic stay, which stays "all entities" seeking to enforce their rights against the debtor simply because the debtor filed a bankruptcy petition.

Another exceptional aspect of the Bankruptcy Code is the fact that it alters parties' prepetition contractual agreements and does so in various ways. So-called ipso facto clauses—clauses that deprive the debtor of the ability to use or retain its property, or that allow a creditor to exit a contract with a debtor, upon the debtor's bankruptcy filing—are generally unenforceable. Under ordinary contract principles, by contrast, ipso facto clauses are usually enforceable.

Bankruptcy courts further alter prepetition contractual arrangements in another more radical way. Bankruptcy courts discharge a debtor's prepetition obligations pursuant to a plan of reorganization, in which the plan binds all of the relevant parties and the obligations not addressed by the plan are discharged. Like the automatic stay, the bankruptcy discharge is as powerful as it is routine. Few (if any) statutory schemes radically alter parties' agreements ex post, even though the agreements don't run afoul of any public policy ex ante. And the Supreme Court previously held that state statutes that attempt to discharge debtors' obligations are preempted by federal bankruptcy law.

Lastly, consider the trustee's (or debtor in possession's) authority to sell the estate's property free and clear of any interests in the property, so long as certain conditions are met, such that the party can be forced to accept a "money satisfaction" for the interest that will be left behind. What makes this power unique, again, is that it is both immense and ubiquitous. The debtor has multiple ways in which it can sell the encumbered property free and clear of a creditor's interest in the property, even if it doesn't get the creditor's consent. This is an incredibly mighty tool, and one that has become increasingly relevant in contemporary Chapter 11 practice. And no wonder—the Bankruptcy Code allows debtors in possession to sell their assets with a flexibility and freedom that is far from guaranteed by nonbankruptcy law. For example, under Section 9-315(a) of the Uniform Commercial Code—adopted in every state and Washington, D.C.—a security interest

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[2] *Compare, e.g.*, Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017), *with* Amanda Frost, *In Defense of Nationwide Injunctions*, 93 NYU L. REV. 1065 (2018).

travels with sold collateral unless the secured party permits the debtor to sell the collateral free and clear of the lien.

B. From Bankruptcy's Exceptional Powers to Bankruptcy Exceptionalism

The unique powers available to debtors in bankruptcy cases further suggest that bankruptcy exceptionalism may be an appropriate approach to interpreting the Bankruptcy Code. True, the fact that the Bankruptcy Code grants bankruptcy courts these sweeping powers doesn't entail that bankruptcy exceptionalism should be used to make bankruptcy courts more powerful yet. And fidelity to the text has its benefits, too. A stable text leads to clearer rules as to how claimants' entitlements are treated in bankruptcy, fixes exit options from the bankruptcy bargaining table,[3] and respects the particular policy choices (including tradeoffs between debtors and creditors) that Congress embedded in the Code.

Insisting that bankruptcy courts adopt a textualist bent, however, neglects the opportunism that can easily creep into bankruptcy cases precisely because of their unique complexity. As I have previously argued, bankruptcy cases are paradigmatic examples of what Lon Fuller called "polycentric problems," in which each problem's subparts are in tension with each other: addressing one subpart has ramifications for how one can address the remaining subparts. Bankruptcy cases are paradigmatic polycentric problems in that they are complex issues with multiple sub-issues, and resolving each of those sub-issues—such as determining whether a particular creditor's claim should be subordinated, or whether a prepetition transfer is avoidable as a preference or fraudulent conveyance—has important ramifications for how the parties want to address, and how the bankruptcy court must resolve, the remaining sub-issues. Moreover, these polycentric problems arise because parties to bankruptcy cases come to those bankruptcy cases with conflicting rights. Bankruptcy law ordinarily takes nonbankruptcy entitlements as a given, but the entire premise of bankruptcy law is that enforcing those entitlements may be socially wasteful. Bankruptcy law is fundamentally concerned with resolving the tensions between competing creditors' claims and doing so in a way that maximizes the estate's value and social welfare.

Bankruptcy proceedings, then, are characterized by a web of incomplete, competing arrangements between the debtor and its creditors, where the name of the game is to maximize value

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[3] *See* DOUGLAS G. BAIRD, ROBERT H. GERTNER & RANDAL C. PICKER, GAME THEORY AND THE LAW 232–37 (1994).

considering the parties' necessarily incomplete contracts. Unsurprisingly, then, bankruptcy proceedings are saturated with transaction costs. But it is on the parties, not the court, to reach a mutually beneficial arrangement. Doing so needs to be responsive to the Code's explicit contours, of course, but facilitating a deal among the parties—especially one that would avoid a knockdown drag-out fight between them—may require a healthy dose of bankruptcy exceptionalism. And Professor Seymour acknowledges this, as well. Even though he criticizes the third-party releases of the Sacklers in *In re Purdue Pharma L.P.* (Bankr. S.D.N.Y. 2021), he recognizes that the third-party releases may have been an essential ingredient in crafting the best resolution to the case that one could hope for, especially when one considers the alternatives (i.e., endless litigation that would enrich the parties' lawyers and compensate only a handful of victims).

While Professor Seymour highlights how bankruptcy exceptionalism gives greater leeway to bankruptcy insiders, bankruptcy courts can also use bankruptcy exceptionalism to narrow the set of strategies from which insiders may choose. This is especially important for combatting opportunism in bankruptcy proceedings. Opportunism is ex post value-capturing behavior that is difficult to define and detect ex ante. While opportunism may lurk behind nearly every legal dispute, bankruptcy proceedings are particularly susceptible to opportunistic behavior precisely because they attempt to resolve polycentric and conflicting rights problems. Facing a complex web of conflicting rights, parties may propose clever maneuvers that allow them to capture value at other parties' expense. Those proposals may fit comfortably within the Bankruptcy Code's text, even if the text neither commands that result nor explicitly invites the judge to weigh the equities of the case. The risk, of course, is that approving the proposal will make bankruptcy proceedings, which are already saturated with transaction costs, ever more costly. Blessing these value-capturing tactics will induce parties to guard themselves more carefully in bankruptcy proceedings, increasing monitoring costs and making dealmaking even harder. Bankruptcy exceptionalism permits bankruptcy judges to interpret the Code with these risks in mind. If we want bankruptcy judges to shun "clever" tactics, we should allow them to use fundamental bankruptcy principles to hold that such tactics are too clever by half.

Though Professor Seymour reads it as a paradigm of bankruptcy anti-exceptionalism, I read the Supreme Court's decision in *Jevic* as championing bankruptcy exceptionalism in an effort to constrain the parties' opportunistic strategy. There, the Supreme Court held that the Bankruptcy Code did not sanction "structured dismissals" that depart from the absolute priority rule. In the Court's view, the absolute

priority rule—which requires a class of claim or interest holders be paid in full before any lower-priority class of claim or interest holders be paid anything at all—is "fundamental to the Bankruptcy Code's operation." As such, if Congress wanted to depart from it, the Court reasoned, it would have done so explicitly in the Code's text. Section 1112(b) of the Bankruptcy Code, which governs dismissing Chapter 11 cases, does not explicitly permit bankruptcy courts to dismiss cases while violating the absolute priority rule. By the same token, Section 349(b) "seek[s] a restoration of the prepetition financial status quo" and doesn't contemplate altering the absolute priority rule.

The Court recognized that Section 349(b) allows a judge to depart from the prepetition status quo "for cause" when dismissing a bankruptcy petition. In the Court's view, that simple phrase does not give bankruptcy courts the authority to alter the absolute priority rule when dismissing bankruptcy cases. But the Court was also careful to distinguish structured dismissals from other kinds of distributions that contravene the absolute priority rule, such as first-day wage orders and critical vendor payments. Those payments certainly skirt the absolute priority rule, but they facilitate the debtor's reorganization and improve the creditors' lot. Not so with structured dismissals, where the parties walk away with whatever they are given under the dismissal's terms and the debtor, by definition, doesn't reorganize.

Making an exception for "rare" cases, as the lower courts did, wouldn't do either. Allowing structured dismissals that violate the absolute priority rule would risk altering bargaining dynamics among creditors, allowing collusion between the debtor and its favorite parties, and making settlements between the parties harder to reach. To the extent that a bankruptcy court dismisses a Chapter 11 petition, it must do so according to the absolute priority rule.

The Supreme Court certainly relied on the Code's text in reaching its conclusion in *Jevic*, but it hardly began with it. Strictly speaking, the Code's absolute priority provisions have little to do with the dismissal provisions in Sections 1112(b) and 349(b), and nothing within the Code's text or structure suggests that the absolute priority rule is the fundamental policy in light of which other provisions of the Code must be interpreted. One could, then, plausibly read "for cause" in Section 349(b) to allow the kind of structured dismissal contemplated in *Jevic*. The Court rejected that argument, but did so against a strong policy background, not classic canons of statutory interpretation: the absolute priority rule is the baseline as a matter of policy; departing from that baseline requires a clear statement from Congress or proof that departing from the baseline will facilitate corporate reorganizations' other goals; and departing from the baseline

in this instance wasn't expressly allowed and would undermine those goals. In this way, the Court employed a bankruptcy exceptionalist approach to reject an opportunistic tactic.

III. Beyond Bankruptcy Exceptionalism

If bankruptcy exceptionalism is justified, what does that mean going forward? One thing that it doesn't mean is that every exceptionalist interpretation of the Code is a good one. Like "structurally textualist" interpretations of the Code, a bankruptcy exceptionalist interpretation of the Code can be better or worse than other proposed interpretations in light of the Code's text and history, the policies implicated in the case, and the facts of the case.

Jevic highlights this point, too. Just because there is an exceptionalist interpretation of the Code doesn't mean that it is the only exceptionalist interpretation and that, all things considered, it is the best interpretation. This raises another point: there can be reasonable disagreement over how best to interpret the Code in light of its text, history, and purposes. But reasonable disagreement is a dime a dozen when it comes to statutory interpretation, regardless of which tools one uses.

Professor Seymour points to numerous alleged shortcomings in contemporary Chapter 11 practice, and to the extent that these are issues that we should address, we should do so head on. Pinning the blame on bankruptcy exceptionalism is a blunderbuss approach to a problem, or set of problems, that call for tailored solutions. But Professor Seymour nevertheless identifies one problem that I'm not sure can be resolved in a targeted way: that an interpretation of the Bankruptcy Code, if successful, can take on a life of its own. Once parties see that a particular interpretation of the Code successfully gives a party extraordinary relief on the grounds that it is a "rare" case, they will argue for that interpretation in future cases and frame those cases as "rare" ones, too. A single case in which an interpretation of the Code provides extraordinary relief snowballs until it becomes—simply by virtue of how commonly it is granted—ordinary relief.

Professor Seymour pins the blame on bankruptcy exceptionalism, with the idea being something to the effect of "give them an inch and they'll take a mile." I don't think it's quite right to fault bankruptcy exceptionalism for this. Success begets success, and bankruptcy insiders will continue to find forums in which they can successfully advocate for their clients' interests. That reality is independent of bankruptcy exceptionalism and ties more towards attorneys' fiduciary obligations to best (and ethically) advance their clients' respective interests. And in any event, identifying the costs of

bankruptcy exceptionalism—costs that are not unique to bankruptcy—doesn't highlight the benefits that bankruptcy exceptionalism brings or the costs of not having it.

I think the proper source of mischief here is not bankruptcy exceptionalism, but rather "necessity." Whatever approach one adopts to interpreting the Bankruptcy Code, parties may pressure courts to do a whole slew of things on the grounds that doing so is necessary to a successful reorganization. Even ardent textualist judges may relent if they believe that a particular proposal is the only course of action for the debtor and its estate, even if it's questionable whether the Bankruptcy Code permits that course of action. The ardent textualist, for example, may invoke the absurdity canon and claim that she shouldn't strictly hew to the Bankruptcy Code's text when doing so would lead to a firm's failure to reorganize.

Determining when extraordinary relief is "necessary" is uniquely challenging in bankruptcy cases given their information and timing dynamics. Parsing the extraordinary from the ordinary cases is the core challenge because bankruptcy judges are often provided limited information that the parties have carefully curated. To be sure, that's not a unique challenge in bankruptcy cases. Civil litigation cases, too, are premised on the idea that judges will have to make decisions based on the information that the parties tailor and present to them. And like nonbankruptcy judges in the civil litigation setting, bankruptcy judges will have to rule based on the information that the parties provided. But bankruptcy case dynamics exacerbate this challenge. Distressed firms have a limited amount of cash to carry them through bankruptcy proceedings; the more time a bankruptcy judge spends analyzing whether the debtor is entitled to the relief that it's seeking, the less time the debtor has to implement that relief (assuming the judge grants it). Delay may spell doom for a firm's ability to successfully reorganize, leaving the failed firm's blood on the bankruptcy judge's hands. So a bankruptcy judge must use incomplete information to decide whether a debtor genuinely requires extraordinary relief; mull that question over for too long, however, and the relief may be too little and too late. How best to tackle this challenge is beyond the scope of this Essay, but Professor Seymour rightly draws our attention to it.

Conclusion

Professor Seymour identifies and attacks bankruptcy exceptionalism, expressing skepticism that there's any good reason for bankruptcy courts (and practitioners, for that matter) to believe that bankruptcy proceedings are in any way exceptional. Good outcomes may arise from sticking to or bucking the text, but that tradeoff is

apparent in nearly every domain of statutory law. Justifying bankruptcy exceptionalism requires more.

Bankruptcy exceptionalism is justified because bankruptcy law is exceptional. The Code provides bankruptcy courts with unparalleled powers in order to help untangle the messy, intertwined affairs between a debtor and its stakeholders so that the debtor's value is maximized as a going concern. That messiness requires both creativity and restraint. Parties should come up with creative solutions to the complex web of problems that brought the debtor into bankruptcy in the first place, but courts should reject those solutions when they would allow some parties to opportunistically capture value at the expense of others. Contrary to the picture that Professor Seymour paints, bankruptcy exceptionalism giveth and bankruptcy exceptionalism taketh away.

Professor Seymour's concerns about bankruptcy exceptionalism largely turn out to be concerns about policies. To the extent we want to change those policies, we can reform them as needed in a tailored way. Professor Seymour also rightly identifies the worrying trend that exceptional remedies will become mundane. Right as he is to identify this issue, it's not an issue with bankruptcy exceptionalism as much as it's an issue about asymmetric information between bankruptcy litigants and bankruptcy courts. Resolving that issue will require further work on how best to mitigate this informational asymmetry. In the end, there is good reason to think that bankruptcy proceedings are indeed exceptional, and it is our task to police only that which is exceptionally bad.

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