The Bankruptcy Tribunal

by

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INTRODUCTION

The United States Bankruptcy Code (the Code)[1] and the Federal Arbitration Act (FAA)[2] are powerful statutory schemes. Each one demands a broad scope of influence and preempts many other fields of law, state and federal. The capacious nature of these statutes creates a challenging tension when they come into conflict. On the one hand, bankruptcy law is in its very essence a collective multiparty dispute resolution procedure that cannot be waived or altered by private contract. On the other hand, the FAA embodies a general federal policy in favor of allowing parties to contract into private dispute resolution procedures.

This Symposium focuses on resolving that tension. Doing so requires an examination of important questions about the scope and operation of bankruptcy law.[3] In our view, the interaction between the FAA and the Code is a version of a familiar and fundamental bankruptcy problem: When, and under what circumstances, should parties be allowed to opt in or out of the "bankruptcy tribunal" for the resolution of bankruptcy and bankruptcy-related matters?

This Article develops a general principle for thinking about that bankruptcy-tribunal problem in the corporate bankruptcy context. As a defini-

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[1]11 U.S.C. §§ 101-1532.

[2]9 U.S.C. §§ 1-16.

[3]The existing literature and case law on the bankruptcy-arbitration tension is flawed. For example, the analysis often focuses without good reason on bankruptcy law's core/non-core distinction and the allocation of power between a district court and bankruptcy court. At other times, it suggests that the analysis turns on an incomplete analysis about a debtor's right to reject executory contracts. The work of our fellow panelists addresses these gaps. *See* Robert M. Lawless, *Reframing Arbitration & Bankruptcy*, 96 Am. Bankr. L.J. 701 (2022); Stephen J. Ware, *Arbitration Agreements as Executory Contracts in Bankruptcy After* Mission Prod. Holdings, Inc. v. Tempnology, LLC, 96 Am. Bankr. L.J. 769 (2022).

tional matter, we use "bankruptcy tribunal" to mean a federal court applying the Code and following the procedures commonly associated with bankruptcy cases as opposed to courts in other jurisdictions or in federal courts presiding over cases not brought under the Code. A more formal way to say the same thing is that, in the United States,[4] a bankruptcy tribunal is a court exercising jurisdiction under 28 U.S.C. § 1334.[5]

We consciously avoid the term "bankruptcy court," which creates a false distinction between a bankruptcy proceeding in a United States Bankruptcy Court and a bankruptcy proceeding in a United States District Court. For our purposes here, the District Court and the Bankruptcy Court are constituent parts of the same bankruptcy tribunal and function in the same role when presiding over bankruptcy matters.[6]

Our general principle is that the bankruptcy tribunal should be the exclusive tribunal to resolve a dispute if sending that dispute elsewhere would thwart the Code's purpose of providing a collective forum where parties can coordinate to resolve multiparty disputes that involve distressed firms.[7] When a case is brought into the bankruptcy tribunal, bankruptcy rules displace a substantial portion of non-bankruptcy law and private ordering. Because bankruptcy law's essential function is coordinating a collective mutiparty resolution, the displacement of private ordering is predominantly procedural and requires coordination even when that coordination conflicts with

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[4]While our focus is on the United States, the principle we present is generally applicable. We discuss issues related to cross-border bankruptcies *infra* at Part III.c.

[5]Section 1334 provides district courts with original and exclusive jurisdiction over cases arising under the Code. 28 U.S.C. § 1334(a). It also provides original non-exclusive jurisdiction over proceedings arising under the Code or arising in or related to cases under the Code. A separate provision, specifically 28 U.S.C. § 157, allows for those cases to be referred to bankruptcy judges.

[6]To be sure, there are important distinctions between the powers of those courts with respect to issuing final judgments in bankruptcy cases and proceedings. *See* Stern v. Marshall, 564 U.S. 462 (2011). *See also* Ralph Brubaker, *Non-Article III Adjudication: Bankruptcy and Non-Bankruptcy, With and Without Litigant Consent*, 33 EMORY BANKR. DEV. J. 11 (2016) (describing the history and implications of the Supreme Court's precedents on the Article III powers of bankruptcy courts). But, aside from those distinctions, United States Bankruptcy Courts and United States District Courts hearing bankruptcy cases and proceedings under 28 U.S.C. §1334 are functioning in the same role. The Article III questions from the *Stern* line of cases deal not with the choice of a specific tribunal (whether a matter belongs outside the bankruptcy system altogether) but rather with the allocation of decision-making power between actors within one federal tribunal. Namely, which decisionmaker within a specific federal district court has the power to render a final judgment? Article III questions would go away if all bankruptcy cases were decided by the District Courts. But the bankruptcy tribunal questions on which we focus here would remain. For a deeper analysis of the Article III problem, see generally Anthony J. Casey & Aziz Z. Huq, *The Article III Problem in Bankruptcy*, 82 U. CHI. L. REV. 1155 (2015).

[7]Our analysis focuses on corporate, not consumer, bankruptcy. Our fundamental point that bankruptcy purpose should drive rules with regard to the tribunal problem holds in both contexts. But the purpose question for consumer bankruptcy is distinct, and the distinction may lead to different answers in different contexts. For example, with regard to arbitration in consumer bankruptcy, the fresh start principle argues even more strongly against enforcement of arbitration clauses.

the procedures that would exist under non-bankruptcy law.[8] To bring the parties toward one global resolution, bankruptcy law brings their substantive claims into the bankruptcy tribunal and subjects them to one set of mandatory procedural rules.

The FAA, on the other hand, has no similarly broad unifying purpose. It embodies a preference for private ordering of procedure. It reflects the view that parties should be able to choose for themselves whether future disputes should be resolved through arbitration. But that is the same private ordering of procedure that bankruptcy law must displace to achieve its collective coordinating purpose. This creates an inherent conflict.[9] Subordinating the Code to the FAA allows a two-party option to avoid the bankruptcy tribunal. The purpose of bankruptcy law is to address the collective action problems that arise when a firm is in financial distress. Any two parties could use a private arbitration provision to remove from the bankruptcy tribunal a dispute that affects the rights of other parties. Such a removal would be the equivalent of allowing those two parties to force all other claimants to waive their right to have their claims collectively resolved in the bankruptcy tribunal. That is fundamentally inconsistent with the Code's purpose of coordinating multilateral behavior. As a result, our analysis suggests that the Code must generally trump the FAA in order to remain effective. An alternative rule would gut the Code of its essential function. But the opposite is not true. The FAA still has effect and covers a large and important sphere of contractual disputes even when subordinated to the Code.

As we move beyond arbitration and look at bankruptcy law more broadly, we suggest that all questions about whether parties can keep certain disputes out of the bankruptcy tribunal—not just those involving arbitration—can and should be resolved by looking to bankruptcy's essential purpose of providing a forum to coordinate the resolution of multiparty disputes. This Article examines the bankruptcy tribunal question in its various forms to show the broad relevance of our principle. For example, tribunal choice is at the heart of questions about arbitration,[10] forum selection, third-party re-

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[8]On the importance of procedure to the theory of bankruptcy law, see Charles W. Mooney, Jr., *A Normative Theory of Bankruptcy Law: Bankruptcy as (Is) Civil Procedure*, 61 WASH. & LEE L. REV. 931 (2004); Pamela Foohey, *Jevic's Promise: Procedural Justice in Chapter 11*, 93 WASH. L. REV. ONLINE 128 (2018).

[9]Our co-panelist, Professor Lawless, provides an excellent discussion of the idea of inherent conflict in the bankruptcy-arbitration case law. *See* Lawless, *supra* note 3.

[10]*See In re* Anderson, 884 F.3d 382, 390 (2d Cir. 2018) (denying arbitration and noting that shifting a case out of the bankruptcy court would undermine the purpose of bankruptcy law); Kara J. Bruce, *Vindicating Bankruptcy Rights*, 75 MD. L. REV. 443, 446–47 (2016) ("[N]o matter how powerful class arbitration waivers may be outside of bankruptcy, courts have broad discretion to prohibit bankruptcy claims from being resolved in arbitration if arbitration would create an inherent conflict with bankruptcy law or necessarily jeopardize important objectives of the Bankruptcy Code."); Stephen J. Ware, *Bankruptcy Law's*

leases,[11] and the use of entity partitions and voting structures (golden shares and director seats). For each of these examples, the question whether a proceeding should be inside or outside the bankruptcy system is really a question about governing law and procedure and whether certain parties should be able to opt out of the bankruptcy's mandatory collective procedures. The questions should be resolved by asking how enforcing a contractual agreement to opt out of bankruptcy affects the collective proceedings. If enforcement would implicate only the interests of the parties to the contract, the contractual opt-out should be respected. On the other hand, if enforcement could prevent third parties from availing themselves of the collective proceeding bankruptcy provides, bankruptcy considerations should prevail and the opt-out should be denied.

An additional implication of our framework is that in some situations the law should not only prohibit opt-out but should also reach out coercively and bring additional disputes into the bankruptcy tribunal. For example, bankruptcy courts might need the authority to order third-party releases when doing so reduces the opportunism that arises among stakeholders entangled in a distressed debtor's web of relationships.

This Article proceeds in four parts. Part I presents the debate about bankruptcy law's purpose and how it relates to questions about the bankruptcy tribunal and identifies areas of general agreement about bankruptcy's essential collective nature, particularly with regard to coordinating behavior among those with claims against the bankruptcy estate. Part II describes the bankruptcy-tribunal problem in the arbitration context. Part III outlines our general principle and applies it to various other bankruptcy tribunal contexts. Part IV considers the more difficult question of when the bankruptcy purpose test justifies expanding the bankruptcy tribunal's authority to reach disputes that do not directly involve the debtor.

Treatment of Creditors' Jury-Trial and Arbitration Rights, 17 ABI L. REV. 479, 482–85 (2009) (describing the conflict between bankruptcy and arbitration).

[11]Adam J. Levitin, *Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 TEX. L. REV. 101, 104 (2022) (criticizing a debtor's ability to choose its tribunal through forum shopping and third-party releases); Lindsey D. Simon, *Bankruptcy Grifters,* 131 YALE L. J. 1154, 1160 n. 16 (2022) (identifying tribunal choice by "bankruptcy grifters" as major new problem for bankruptcy law); Joshua M. Silverstein, *Hiding in Plain View: A Neglected Supreme Court Decision Resolves the Debate Over Non-debtor Releases in Chapter 11 Reorganizations*, 23 EMORY BANKR. DEV. J. 13, 20 (2006) (arguing that non-consensual releases are permitted by the Code); Lauren E. Fischer, *Extracting Consideration from Settling Officers and Directors After* Ortiz v. Fibreboard, 2002 ANN. SURV. OF BANK. L. 8, 24 (2002) (arguing that non-consensual releases are permitted when released defendants are contributing significant funds to the trust account in exchange for the release); Fouad Kurdi, *A Question of Power: Non-Consensual Third-Party Releases in Chapter 11 Plans*, 25 J. BANKR. L. & PRAC. ART. 6 (2016) (arguing that the Code prohibits non-consensual injunctions).

I. BANKRUPTCY PURPOSE

The purpose of bankruptcy is a sensible starting point for understanding the interaction between the Code and the FAA. In our view, adjudication in the bankruptcy tribunal should be mandatory if adjudication elsewhere would undermine the reasons for having a bankruptcy system. Thus, to decide whether to allow parties to opt out of the bankruptcy tribunal, one should first determine whether the dispute in question implicates matters that justify the use of bankruptcy law in the first place.

Answering that question requires a theory of what bankruptcy law is intended to do. Bankruptcy law is generally viewed as a special system for collectively resolving certain disputes involving financially distressed firms. Without bankruptcy law, those disputes would be decided along with everything else in the conventional state or federal tribunals. But why do we need a special system? This is a question to which there is no general agreement. Bankruptcy lawyers and scholars all have strong views on the matter. We certainly do. But we do not attempt to answer that question in this piece. Rather, we seek to identify some areas of general agreement. And then noting areas of potential disagreement, we discuss how one's views about bankruptcy's purpose can change how one answers different bankruptcy tribunal questions.

There are some things on which most people agree. For instance, as our co-panelist Professor Bob Lawless points out, bankruptcy law is inherently collective.[12] That idea is hard to contest. Lawless goes on to note that bankruptcy, as a doctrinal matter, is an in rem process for collectively resolving the rights multiple claimants have in the bankruptcy estate. With an in rem view of bankruptcy, it seems clear to us that no two parties can use a private arbitration agreement to remove a dispute that directly affects the rights that other parties have in the property of the estate. Such a removal would be the equivalent of allowing those two parties to force all other claimants to waive their right to have claims collectively resolved in the bankruptcy tribunal.

We think the Code's purpose at least includes the scope that Lawless has identified in case law. We believe this to be an area of general agreement. Most bankruptcy theories include as a central goal the coordination of behavior among claimants with regard to the property in the bankruptcy estate (narrowly defined). One might think of this as the minimum purpose of bankruptcy law, rejected only by the strongest contractarians who also reject the argument that bankruptcy law is even necessary in the first place.

In other words, while scholars disagree about why financial distress gives rise to contracting failures and collective action problems and how broadly

[12] *See* Lawless, *supra* note 3.

bankruptcy law should reach, they do agree that bankruptcy law's minimum function is to preserve the property of economically sound but financially distressed businesses. They also generally agree that to do so, there needs to be a system that enjoins creditor collection efforts and pauses or blocks the specific performance of certain private agreements involving distressed firms.

This idea of minimum bankruptcy purpose can get us pretty far in answering some bankruptcy tribunal questions. We argue below that it covers most of the ground for the bankruptcy-arbitration question. As we move beyond arbitration and look at bankruptcy law more broadly, differences in how one views bankruptcy's purpose do matter. Our view of the purpose of the Code is, however, broader than the in rem doctrine that Lawless describes. A properly designed bankruptcy system encompasses more than claims against an in rem estate and should provide an efficient forum in which to collectively resolve the various other multiparty disputes that are related in some essential way to a financially distressed firm.[13] Others, like Professor Vince Buccola, would likely favor limiting the bankruptcy tribunal to the property of the estate.[14] Buccola has argued that bankruptcy law is justified because entitlements that are normally treated as property rights outside of financial distress are better treated as liability rules when financial distress arises. And Professor Alan Schwartz, who favors a strong contractarian approach to bankruptcy, would further limit the bankruptcy tribunal to situations in which voluntary contracting fails.[15] Others still would focus more on substantive law and argue for a bankruptcy purpose that places a premium on minimizing interference with state law.

In the remainder of this Article, we discuss how one's view about the scope of bankruptcy purpose informs which cases will be brought before the bankruptcy tribunal and which will not.

II. THE TRIBUNAL PROBLEM IN THE ARBITRATION CONTEXT

The tension between the FAA and the Code is one version of the question of when—and how—parties can choose the tribunal in which to resolve bankruptcy-related matters. When a party wants to arbitrate a question that would otherwise be heard in the bankruptcy tribunal, that party is seeking to opt out of the collective bankruptcy system to bilaterally resolve a dispute

[13]One of us has argued that bankruptcy is best understood as a solution to incomplete contracting. *See* Anthony J. Casey, *Chapter 11's Renegotiation Framework and the Purpose of Corporate Bankruptcy*, 120 COLUM. L. REV. 1709, 1715 (2020).

[14]Vincent S.J. Buccola, *Bankruptcy's Cathedral: Property Rules, Liability Rules, and Distress*, 114 NW. L. REV. 705, 724 (2019).

[15]Alan Schwartz, *A Contract Theory Approach to Business Bankruptcy*, 107 YALE L.J. 1807, 1809 (1998).

that could implicate the rights of all stakeholders. Those who object want to keep the question within the bankruptcy tribunal's power.

Courts deciding these bankruptcy-arbitration questions take varied approaches to reconciling the tension between the FAA and the Code. Some compel arbitration of bankruptcy-related disputes,[16] while others hold that the "Code is in 'inherent conflict' with arbitration" and find that to be "enough [for the Code] to displace the Arbitration Act."[17] Generally, the analytical approaches taken by these courts can be thought of as applying one of four possible tests:

> 1) **The Contract Test**: Courts treat the question as a pure contract dispute, allowing arbitration when a party can point to a clear arbitration agreement;[18]
> 2) **The Statutory Language Test**: Courts deny motions to arbitrate when they find that the specific language of the Code gives bankruptcy courts sole authority to issue a certain type of relief;[19]
> 3) **The Core/Non-Core Test**:[20] Courts identify a set of matters that are "core" to bankruptcy and hold that those matters cannot be resolved through arbitration;[21] and
> 4) **The Bankruptcy Purpose Test**: Courts ask whether compelling arbitration would undermine the purpose of bankruptcy law and deny motions that would interfere with the Code's goal of providing a coordinating forum in which to collectively resolve multiparty disputes that involve a financially distressed debtor.[22]

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[16]*See, e.g., In re* Willis, 944 F.3d 577 (5th Cir. 2019) (applying state contract law to order arbitration of loan dispute in chapter 7 bankruptcy); *In re* Lazarus Holdings, LLC, 816 Fed. App'x 417 (11th Cir. 2020) (granting motion to compel arbitration in suit debtor brought against damages arising from a construction contract).

[17]*In re* Belton v. GE Cap. Retail Bank, 961 F.3d 612 (2d Cir. 2020), *cert. denied sub nom.* GE Cap. Retail Bank v. Belton, 141 S. Ct. 1513, 209 L. Ed. 2d 252 (2021). *See also In re* Henry, 944 F.3d 587 (5th Cir. 2019) (prohibiting arbitration to enforce student loan debt that had been discharged in bankruptcy); *In re* Anderson, 884 F.3d 382 (2d Cir. 2018) (holding that the discharge provisions are "core" components of the Code and that the compelling arbitration may "seriously jeopardize a particular core bankruptcy proceeding").

[18]*Willis,* 944 F.3d at 580 (applying state contract law to determine arbitrability).

[19]*Anderson*, 884 F.3d at 391 (stating that the discharge injunction is "enforceable only by the bankruptcy court and only by a contempt citation").

[20]For a full description of the incoherence of this test, see Professor Lawless's contribution to this Symposium. *See* Lawless, *supra* note 3.

[21]*In re* Laubenstein, 2:20-CV-765-SPC, 2021 WL 857142 (M.D. Fla. Mar. 8, 2021) (affirming denial of arbitration motion based on a core/non-core analysis).

[22]*In re* Cuker Interactive, LLC, 20-CV-01854-CAB-BLM, 2021 WL 196468, at *2 (S.D. Cal. Jan. 20, 2021) (affirming denial of arbitration motion and noting that "a bankruptcy court has discretion to decline to enforce an otherwise applicable arbitration provision only if arbitration would conflict with the under-

Courts often treat the Core/Non-Core Test and the Bankruptcy Purpose test as related. The questions are, however, distinct. As Professor Lawless explains, the Core/Non-Core Test—while it sometimes approximates the right answer—has no theoretical grounding as a test for arbitrability and often misses the mark.[23] On the other hand, the bankruptcy purpose test addresses the bankruptcy tribunal question head on and provides easy answers to most arbitration questions. We turn now to that analysis.

Arbitration provisions are hard to distinguish from other private agreements in which a debtor attempts to waive the right to file for bankruptcy. Such waiver provisions are generally prohibited because they conflict with the minimal functioning of bankruptcy as a collective resolution mechanism.[24]

Creditors that can veto a bankruptcy filing can extract value by making themselves immune to the collective proceeding. They can take actions outside of bankruptcy that benefit them at the expense of other creditors. If a debtor has the ability to grant a creditor that right, it can be bribed to do so at the expense of other creditors. Doing so harms the creditors as a group and creates bad incentives for the debtor's managers.

Moreover, when one creditor can veto a bankruptcy that would otherwise create value for the creditors as a group, it can demand a bribe in order to consent to the bankruptcy. That one creditor can use its hold-up power to demand full repayment, or at least additional repayment beyond what it would have received in a bankruptcy. That demand, in turn, can lead to the destruction of value. For example, the creditor might succeed in extracting the hold-out payment, or—if parties miscalculate in their bargaining—the creditor may receive no payment and veto the bankruptcy, destroying value for everyone. Bankruptcy waivers thus threaten to undermine the collective resolution that bankruptcy law seeks to facilitate.

Arbitration provisions are similar to contractual bankruptcy waivers. While they might not directly prohibit a filing, they are private contracts that, if enforced in bankruptcy, can carve out identified matters to be immune from bankruptcy's collective process.

The fact that the FAA embodies a general federal preference for private ordering of procedure provides little in the way of argument for allowing arbitration agreements to displace bankruptcy's collective mandate. The essential means by which bankruptcy law operates is the displacement of that

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lying purposes of the Bankruptcy Code.") (*quoting In re* EPD Inv. Co., LLC, 821 F.3d 1146, 1150 (9th Cir. 2016)).

[23]*See* Lawless, *supra* note 3.

[24]*See, e.g.*, United States v. Royal Bus. Funds Corp., 724 F.2d 12, 15 (2d Cir. 1983) (noting the general rule against bankruptcy waivers). *See also* Yiming Sun, *The Golden Share: Attaching Fiduciary Duties to Bankruptcy Veto Rights*, 87 U. CHI. L. REV. 1109, 1114-16 (2020) (discussing the general prohibition on bankruptcy waivers).

very same private procedural ordering when financial distress arises. If the FAA occupies the same space as the Code, it would render the Code superfluous: a mandatory process designed to prevent bilateral opt-out could be entirely circumvented through arbitration. The Code, on the other hand, can be read to cover the full space of financial distress without gutting the FAA's relevance elsewhere.

This observation suggests that bankruptcy law should usually trump the FAA. This is consistent with Professor Lawless's contribution to this Symposium.[25] At a minimum, arbitration should be prohibited when it undermines the bankruptcy process with regard to claims involving property of the bankruptcy estate. That follows from the fact that the absolute priority rule is intended to determine how to distribute property when the firm cannot pay all its creditors, and the automatic stay is intended to make sure that creditors cannot exercise their foreclosure rights to seize property to which they are not entitled. Resolving some claims in arbitration could allow creditors to jump the line and receive property that would otherwise go to secured creditors or creditors with a priority claim.

Consider for example, other procedural enforcement rights that bankruptcy prohibits. When a secured creditor has a non-bankruptcy right to foreclose on property, it is denied the procedural remedy of immediate foreclosure. The creditor is promised the value of its collateral, but the remedial means of recovering that value are changed by the bankruptcy filing. Similarly, when a debtor is in possession of the property of another, bankruptcy law governs the owner's procedural rights to retrieve the property. A true owner will ultimately prevail in recovering the property, but the process of doing so runs through the bankruptcy court.[26]

Arbitration provisions are no different. The party seeking arbitration is entitled to its underlying claim and whatever value that brings, but it is hard to see how the arbitration provision (or the FAA) takes the determination of rights away from the bankruptcy tribunal. That would place arbitration provisions above even property rights.[27]

More broadly, our view suggests that the Code trumps the FAA with

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[25]*See* Lawless, *supra* note 3. Many differences in our views can be explained by the fact that Professor Lawless is presenting a doctrinal and precedent analysis where we are focused more on general principles of how the law should address the bankruptcy tribunal question.

[26]*See* DOUGLAS G. BAIRD, ELEMENTS OF BANKRUPTCY 203–04 (7th ed. 2022) (Baird uses the example of a dry cleaner debtor who files for bankruptcy while in possession of your shirt. He notes that the automatic stay prohibits you from retrieving your shirt from the cleaner "for as long as it takes to sort out" ownership.). *See also In re* Plastech Engineered Prods., Inc., 382 B.R. 90 (Bankr. E.D. Mich. 2008) (temporarily denying a motion to lift the stay, thus allowing a debtor to remain in possession of property of another party because repossession would disrupt the reorganization).

[27]All of this suggests that arbitration provisions are not themselves claims or executory contracts but more akin to the procedural remedies that bankruptcy law routinely suspends.

regard to any claim that can affect the collective proceedings of the bankruptcy tribunal. This would include avoidance actions the debtor brings to augment the estate and the arbitration of discharge. Because bankruptcy's minimum purpose is about coordination, the consolidation of decisions before one tribunal is of central importance. That includes the resolution of disputes as they arise as well as subsequent proceedings related to that resolution. Using pre-filing arbitration agreements to allow a new tribunal to determine the validity and scope of the bankruptcy tribunal's judgments undermines that centralized coordination. A creditor should not be allowed to arbitrate its postpetition attempts to collect prepetition debt.[28]

Of course, in any particular case, arbitration might not affect the collective proceedings. In those cases, the court can allow arbitration, just like it can lift the stay under § 362(d) for any party in interest.

In other areas, to which we turn next, the questions are closer. While the bankruptcy purpose test remains the best theoretical approach, it requires harder-to-reach agreement about the full scope of bankruptcy's purpose.

III. THE BANKRUPTCY TRIBUNAL IN OTHER CONTEXTS

Identifying bankruptcy's minimum purpose goes a long way in answering many bankruptcy tribunal questions. Parties should be prohibited from using contracts to evade bankruptcy when doing so worsens the collective action problem with regard to the bankruptcy estate. Opt-out should usually be prohibited where parties are attempting to choose a separate tribunal to resolve disputes directly related to property in the bankruptcy estate, at least when such opt-out will jeopardize coordination with other claimants.

In this section we apply this minimum purpose to the various tribunal questions. We start with golden shares and entity partitions and then turn to cross-border insolvency. In the final subsection, we discuss venue shopping, which poses different problems that do not fall squarely into the bankruptcy tribunal analysis.

A. Golden Shares

Bankruptcy courts have long struggled with the decision whether to enforce "golden share" arrangements. The term golden share refers to an equity interest, such as a share of preferred stock, that gives the holder special rights, including the power to decide whether a firm can file for bankruptcy. By requiring a vote of the golden share to approve a filing, the arrangement gives

[28]*See In re* Henry, 944 F.3d 587, 592 (5th Cir. 2019) (noting "the purpose of the [Bankruptcy] Code, including the goal of centralized resolution of purely bankruptcy issues, is the need to protect creditors and reorganizing debtors from piecemeal litigation, and the undisputed power of a bankruptcy court to enforce its own orders") (*quoting In re* Nat'l Gypsum Co., 118 F.3d 1056, 1069 (5th Cir. 1997)).

the holder of the share a veto right.[29]

The question might seem simple. Golden shares, like other waivers, conflict with the collective nature of bankruptcy proceedings. But things are more complicated than that. With a bankruptcy waiver, the debtor agrees not to file for bankruptcy. With a golden share, one can argue that the debtor has agreed to nothing. The parties have merely defined the debtor's internal decision-making process.

This complication arises when the debtor is an artificial legal entity. When an artificial entity (rather than a natural person) purports to file a voluntary bankruptcy petition, there needs to be a process by which to identify that entity's will to file. The default rule for most corporations is that the board of directors has the power to make that filing decision. But that is just a default rule. The ability to change that rule—as with most matters of corporate governance—is determined by state corporation law.[30]

The relevant state law generally gives businesses wide latitude in allocating their authority over such matters. For example, Delaware law provides business entities (especially those that are closely held) great flexibility in arranging their governance rules. And the case law suggests that golden shares that allocate filing authority to one class of shareholders are valid.[31] From there, the corporation can issue those shares to a particular creditor to grant that creditor a right to block any voluntary bankruptcy.[32]

Golden shares are thus controversial because they pit federal bankruptcy policy against state control of corporate governance. While federal courts have long held that firms cannot contractually waive their right to file for bankruptcy—finding such waivers to be "against public policy"[33]—someone has to have the power to decide whether a firm will file a voluntary bank-

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[29]For an excellent and thorough analysis of the law and policy related to golden shares, see Sun, *supra* note 24, at 1118–30.

[30]*See* Price v. Gurney, 324 U.S. 100 (1945) (looking to state law to determine who has power to make filing decision for a corporation). The same is true for other business organizations such as limited liability companies.

[31]*See, e.g., In re* Franchise Servs. of N. Am., Inc., 891 F.3d 198 (5th Cir. 2018) (describing golden share and other similar arrangements and noting that arrangements that are consistent with state law will generally be upheld). *See generally* Sun *supra* note 24 (exploring the various legal implications and questions posed by golden share arrangements).

[32]Other creditors would still retain the ability to file an involuntary case. But such filings are rare and the important point is that the firm's managers and other shareholders have given up their ability to control the decision to initiate a voluntary bankruptcy petition.

[33]*In re* Huang, 275 F.3d 1173, 1177 (9th Cir. 2002) ("It is against public policy for a debtor to waive the prepetition protection of the Bankruptcy Code."). *See also* United States v. Royal Bus. Funds Corp., 724 F.2d 12, 15 (2d Cir 1983) (noting the "general rule[ ] that a debtor may not agree to waive the right to file a bankruptcy petition."); *In re* Intervention Energy Holdings, LLC, 553 B.R. 258, 266 (Bankr. D. Del. 2016) ("Federal courts have consistently refused to enforce waivers of federal bankruptcy rights.").

ruptcy petition. And it has always been a fundamental principle of corporate law that the allocation of such authority is governed by state law.

The tension between state law and bankruptcy policy is more difficult here than in other contexts because the debtor's existence as a debtor entity is defined by state law. On the one hand, if state law gives golden shareholders the authority to set the will of the corporation, any rule allowing other stakeholders to file a petition is a rule allowing someone other than the debtor to make the filing decision. That is akin granting those stakeholders the right to initiate an involuntary bankruptcy.

On the other hand, if state law respects golden share provisions of corporate charters, creditors can easily evade bankruptcy law's anti-waiver rules. Instead of demanding a contract that prohibits a debtor firm from filing a bankruptcy petition, the creditor can demand a golden share from the debtor. Once again, there exists an opportunity for a loophole that could undermine the collective purpose of the bankruptcy tribunal.

Golden shares cases, like the arbitration cases, involve a subset of a firm's stakeholders that want to affirmatively opt out of the bankruptcy tribunal. As a generic policy matter, the issue is not much different from contractual waivers or arbitration clauses. But it is doctrinally messier because it implicates the state law governing the internal decision-making of the debtor.

Golden shares raise many of the same issues as bankruptcy waivers. Creditors can use these devices to hold up bankruptcy filings and extract value for themselves. Moreover, a golden share can create opaque veto rights that are hard for the market to account for outside bankruptcy. Thus, the ability to block bankruptcy permits precisely the type of conduct that bankruptcy law is designed to prevent, allowing individual parties to engage in collection efforts that can harm the enterprise as a whole.

In assessing the enforceability of golden shares, courts have generally considered whether a party is a "bona fide equity holder," which means that the party owns a meaningful stake in the company.[34] Under this test courts will sometimes tolerate golden shares that operate as bankruptcy waivers. Creditors, including those that own many shares, can use their golden shares to protect their interests as creditors and thus extract value that belongs to other stakeholders.[35] A better test would consider whether a creditor with a

[34]*Franchise Servs.*, 891 F.3d at 209 ("[F]ederal bankruptcy law does not prevent a bona fide equity holder from exercising its voting rights to prevent the corporation from filing a voluntary bankruptcy petition just because it also holds a debt owed by the corporation and owes no fiduciary duty to the corporation or its fellow shareholders.").

[35]As Yiming Sun has pointed out, however, the bona fide equity holder rule leads to what she calls "false negatives," because there will be situations where a creditor owns a substantial equity stake and still uses its blocking rights to protect its interests as a creditor. *See* Sun, *supra* note 24, at 1122.

golden share is vetoing a bankruptcy filing to protect its interest as a creditor, or whether it is acting in the interest of the enterprise.

One way to accomplish this without legislative intervention, as argued by one commentator, would be for state corporation law to impose a duty of controlling shareholder or some other fiduciary duty upon the holder of the golden share.[36] Even though the Fifth Circuit rejected this idea,[37] it is generally consistent with the principles behind controlling shareholder duties.[38]

That said, fiduciary duties generally offer weak protection, and a more direct approach would be to allow the bankruptcy tribunal (perhaps through a special preliminary proceeding) to review challenges to the exercise of the veto power of a golden share. Such a proceeding could allow the bankruptcy tribunal to determine the extent to which the exercise conflicts with bankruptcy's purpose. To be clear, the Code does not provide for such a proceeding, which would require the tribunal to conduct a proceeding in the absence of a bankruptcy petition. As a result, this approach would require legislation to create the special proceeding.[39]

Here theoretical differences about bankruptcy's purpose do matter. Those who favor a limited in rem view of bankruptcy law or a limited Creditors' Bargain theory that emphasizes the importance of the *Butner* principle should balk at the idea of interfering with the state laws allocating governance authority.[40] With a broader view of bankruptcy's purpose as a procedural solu-

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[36]*See id.* at 1112–13.

[37]*Franchise Servs.*, 891 F.3d at 212–14 (concluding that the holder of the golden share was not a controlling shareholder under Delaware law).

[38]After all, the holder of the golden share has been granted governance authority and has control over a decision that affects the value of the entire firm. It is supplanting the default authority of the board of directors to act as agent on behalf of the corporation in making the decision. It is hard to see how a party exercising that governance role would not owe a fiduciary duty under conventional understandings of corporate governance.

[39]While a bankruptcy court might try to invoke its equitable power to create this proceeding, it is not clear how the case would get before the judge or whether it would have subject matter jurisdiction without further legislation. This represents a general asymmetry in bankruptcy law: cases that are improperly initiated can be dismissed by motion, but there is often no procedural remedy when a bankruptcy case should have been but was not initiated.

[40]The Creditors' Bargain theory asserts that the purpose of bankruptcy is to vindicate the hypothetical agreement creditors would have reached if they were in a position to bargain with each other and write their own rules before entering into their relationships with the debtor. *See* Douglas G. Baird & Thomas H. Jackson, *Fraudulent Conveyance Law and Its Proper Domain*, 38 VAND. L. REV. 829, 835–36 (1985) ("The ambition of the law governing the debtor-creditor relationship should provide all the parties with the type of contract that they would have agreed to if they had had the time and money to bargain over all aspects of their deal."); Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L.J. 857, 860 (1982) (stating that bankruptcy law should "mirror the agreement one would expect the creditors to form among themselves were they able to negotiate such an agreement from an ex ante position."). The *Butner* principle is a closely related idea that the primary purpose of bankruptcy law is to respect non-bankruptcy entitlements. *See* THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 20–33 (1986); Douglas G. Baird & Thomas H. Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protec-*

tion to incomplete contracting or a broad equitable mechanism for collective resolution of financial distress, one might support a less formalistic approach with a flexible standard of review that invalidates golden shares that operate as disguised bankruptcy waivers even when doing so interferes with state law allocations of authority.

B. Opt-Out by Entity Partitions

There are various ways that parties can create bankruptcy opt-outs. Some of these are invisible to the outside world. Such methods are problematic under most theories of bankruptcy law. Legal entities, however, provide a more visible and discrete asset-based opt-out right that other creditors can anticipate and price when doing business with a firm. To be sure, any opt-out right can be abused. But they also have benefits.

In particular, partitioning assets can often improve creditor monitoring and allow investors with different expertise and different risk preferences to tailor their relationship with a debtor and its assets. These partitions can prevent the debtor from acting opportunistically and shifting risk to redistribute value.[41] They can also serve as powerful financial penalties that substitute for costly monitoring in some cases.[42] On the other hand, they can be used to redistribute value from one creditor to another.[43]

The result is a complex balancing problem that turns largely on one's theory of bankruptcy's purpose. A minimalist who treats bankruptcy as an in rem proceeding should view opt-out by entity partition as totally fine. After all, for them, bankruptcy is simply about coordinating claims against the bankruptcy estate, and the estate is defined by legal entities. A purely in rem procedure would take the limitation of the estate as it is defined by non-bankruptcy law. Any call to bring value from nondebtor legal entities into the bankruptcy, without a clearly defined avoidance action, is surely an expansion of bankruptcy scope beyond the property of the estate.

Similarly, a Creditors' Bargain theorist who puts heavy weight on the *Butner* principle would likely call for respecting opt-out by entity partition. The alternative is a call for the bankruptcy law to disregard non-bankruptcy

tion of Secured Creditors in Bankruptcy, 51 U. Chi. L. Rev. 97, 110 (1984) (stating that bankruptcy is about "recognizing nonbankruptcy entitlements").

[41]Anthony J. Casey, *The New Corporate Web: Tailored Entity Partitions and Creditors' Selective Enforcement*, 124 Yale L.J. 2680, 2741 (2015) (explaining how certain entity partitions can limit debtor misbehavior and risk shifting and create tailored enforcement mechanisms).

[42]Douglas G. Baird & Anthony J. Casey, *No Exit? Withdrawal Rights and the Law of Corporate Reorganizations*, 113 Colum. L. Rev. 1, 9–10 (2013) (describing the use of asset partitions as state contingent right to remove an asset from a going concern in order as monitoring substitute).

[43]Ken Ayotte, *Disagreement and Capital Structure Complexity*, 49 J. Legal. Stud. 1 (2020) (modeling the strategic use of capital structure and asset partitions); Richard Squire, *Strategic Liability in the Corporate Group*, 78 U. Chi. L. Rev. 605 (2011) (explaining that asset partitions can be combined with cross-guaranties to extract value).

property rights because property rights and the ownership of those rights are defined on the bases of legal entities.

A theory focusing on incomplete contracting again suggests a more flexible standard. Under that view, one might argue that tribunal opt-outs should be allowed when they are achieved through "a particular, discrete, and visible way" that permits "investors as a group . . . to both limit the risk of bargaining failure and at the same time enjoy the disciplining effect that a withdrawal right brings with it."[44] While most entity partitions will satisfy this criteria—at least in the absence of involuntary creditors—exceptional cases may arise where ex post opportunism can only be prevented by disregarding the entity partitions.[45]

C. Cross-Border Insolvency and Chapter 15 Recognition

Questions of cross-border insolvency[46] and the recognition of foreign insolvency proceedings present a twist on the bankruptcy tribunal problem. Each jurisdiction's insolvency system is an independent bankruptcy tribunal subject to separate substantive and procedural rules. The choice between tribunals is not one of opting out of bankruptcy law's reach but of choosing which bankruptcy law will govern a dispute. We have written elsewhere about that choice and the challenges that are created in designing rules to allow choice while limiting the potential for abuse.[47]

One form of abuse could be the use of international forum choice to disguise a bankruptcy waiver. For example, a debtor might agree that it could only file in a forum where the procedures were equivalent to no forum at all or in a forum that would refuse to hear the case. Rules allowing debtors to choose among international forums could protect against this sort of abuse by requiring forum selection provisions to provide the debtor the option to file in at least one jurisdiction that provided a minimum level of collective restructuring procedures. Courts could refuse to enforce forum selection provisions that do not meet this requirement.

There is one additional wrinkle in the context of cross-border insolvency, which presents questions similar to those we discussed in the context of arbitration cases. Cross-border cases, like arbitration, create the possibility of

[44]*See* Baird & Casey, *supra* note 42, at 48.

[45]Some might argue that controversial treatment of entities in the bankruptcy of General Growth Properties fits this description. *See* Casey, *supra* note 13, at 1759–61.

[46]We use the term "insolvency" broadly here. While some jurisdictions distinguish between insolvency and bankruptcy, our theory of bankruptcy tribunals applies broadly to collective judicial proceedings addressed at financial distress.

[47]Anthony J. Casey & Joshua C. Macey, *Bankruptcy Shopping: Domestic Venue Races and Global Forum Wars*, 37 Emory Bankr. Dev. J. 101 (2021) (exploring the challenges of domestic venue shopping and global forum shopping and proposing a system of ex ante commitment mechanisms).

breaking the case into smaller units of dispute where some issues are decided in one tribunal and others are decided in a different one.

Returning to our main theme, this creates a challenge for insolvency law because it interferes with the collective coordination and consolidation of dispute resolution. If parties can or are required to proceed in several bankruptcy tribunals, they may have some assets subject to one set of rules and other assets subject to a second set. Even worse, sometimes the same assets may be subject to conflicting rules and conflicting judgments.

This is a problem under any theory of bankruptcy law and directly undermines the minimum purpose of collective coordination. This supports calls for liberal cross-border recognition and a universalist approach to cross-border insolvency.

D. Domestic Venue Shopping

A related question is whether debtors should be able to choose the domestic venue within the federal judicial system in which to file for bankruptcy. The Code currently gives debtors wide discretion to file for bankruptcy in the venue of their choice.[48]

For decades, critics have argued that liberal venue selection rules lead to opportunistic behavior. The claim is that debtors will choose districts for pernicious reasons, and that liberal venue selection rules have created a race to the bottom as bankruptcy judges compete for blockbuster cases. Others have offered more benign reasons for venue shopping and argued that venue choice increases judicial predictability and improves the efficiency of the bankruptcy process.[49] Recently, criticism of the venue selection rules for bankruptcy cases have escalated, with commenters expressing concern that Purdue Pharma was able to "hand pick" its judge when it filed in the Southern District of New York.[50]

The venue decision is different from the other questions we have discussed. The issue here is not opt-out or mandatory bankruptcy rules but rather choice of the judge or court within the United States bankruptcy tribunal.

Choice of venue does not allow individual stakeholders to opt out of the

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[48]Debtors can file in any federal district where it has its "domicile, residence, principal place of business in the United States, or principal assets in the United States" or where an affiliate of the debtor has a pending bankruptcy case. 28 U.S.C. § 1408.

[49]*See, e.g.*, Jared A. Ellias, *What Drives Bankruptcy Forum Shopping? Evidence from Market Data*, 47 J. Legal Stud. 119, 145–47 (2018) (noting greater predictability of outcomes in certain jurisdictions); Robert K. Rasmussen & Randal S. Thomas, *Timing Matters: Promoting Forum Shopping by Insolvent Corporations*, 94 Nw. U. L. Rev. 1357, 1357–63 (2000); David A. Skeel, Jr., Bankruptcy Judges and Bankruptcy Venue: Some Thoughts on Delaware, 1 Del. L. Rev. 1, 1–5 (1998) (arguing in favor of ex ante venue choice).

[50]*See* Levitin, *supra* note 11, at 1082.

bankruptcy process. It instead simply allows parties to select the particular district in which to file. That does not directly raise issues of coordination and collective action. But the choice of venue does allow a form of itemized opt-out and opt-in. Venue shopping debtors can select from a menu of different courts based on which rules they like or dislike. This option allows small tailoring of the bankruptcy tribunal and raises issues about judicial expertise, bias, and incentives.

When the venue choice is made in advance and known to all creditors, it can encourage debtors to choose the venue that best serves bankruptcy's purposes. On the other hand, when the venue choice is made at the time of filing, it can be abused by managers to extract value. Large differences in the way courts apply the law can sometimes change the outcome of a case, and shopping at the time of filing allows a debtor to choose the most manager friendly rules.

In previous work, we proposed that firms be allowed to prospectively commit to a system for deciding where to file for bankruptcy.[51] This approach has the benefit of allowing all of a firm's stakeholders to participate in the selection of the bankruptcy venue. While the firm might pick a selection method in which only a subset of stakeholders votes on the district, it should face pressure to adopt the optimal selection method because its capital costs will increase when firms commit to suboptimal process for selecting a bankruptcy venue.

In the end, venue shopping is not a direct question of tribunal opt-out. But venue shopping raises many of the same issues as tribunal opt-outs. The venue-shopping debtor chooses which rules govern the bankruptcy proceeding. Venue shopping can be beneficial if debtors file in districts that are known to offer quick and predictable forums. When that is the case, liberal venue selection rules benefit all parties. Venue shopping can, however, raise concerns about opportunism that closely relate to the opt out question we have explored in this Article. For example, if debtors file opportunistically to benefit management or other favored constituencies, then liberal venue selection rules appear to raise the same issues as bankruptcy opt-outs. As with other tribunal questions, the guiding principle should be whether the choice undermines the collective proceedings. Bankruptcy purpose tells us little about which venue debtors should choose, but it might tell us a lot about *how* the debtor should make (and commit to) that choice.

IV. FORCE-INS AND THIRD-PARTY RELEASES

The harder question is whether the bankruptcy purpose test ever justifies expanding the scope of bankruptcy tribunal to bring in other parties or dis-

[51] *See* Casey & Macey, *supra* note 47.

putes. This is the opposite of opt-out; it is force-in. This question comes up in the context of third-party releases, which raises the question whether bankruptcy courts possess authority to coercively bring non-bankruptcy disputes into the bankruptcy process.

The questions so far have involved cases where the parties try to opt out of the bankruptcy process or carve out certain issues that the bankruptcy tribunal cannot reach. But the questions run in the other direction as well. Can the law ever reach out and coercively bring additional disputes into the bankruptcy tribunal? Disputes over non-consensual third-party releases take this form and raise questions about whether the bankruptcy tribunal has the power to resolve claims against entities that have not themselves filed for bankruptcy.

Much of the literature on third-party releases has focused on the statutory question whether the Code authorizes them, particularly when the releasing party has not consented to the release.[52] Can parties be forced to collectively resolve their disputes in the bankruptcy tribunal even when those disputes do not directly involve the debtor as a party?

The statutory analysis, which turns on how one reads certain sections of the Code and whether one infers general unstated powers consistent with the Code's purpose as a whole, has created a split among courts.[53] There is an equally deep split among scholars, judges, and practitioners on policy questions. Should the bankruptcy tribunal possess the authority to reach out and bring claims before it by authorizing non-consensual third-party releases? Scholars who favor releases argue that courts should have that authority and should, in some cases, authorize releases to facilitate efficient global settlements that would otherwise be untenable.[54] Such settlements, proponents argue, can expand the value available to the bankruptcy estate while compensating the releasing parties. On the other side, many challenge that third-party releases are subject to abuse.[55] Ralph Brubaker, for example, has argued that third-party releases impermissibly redistribute value from nondebtor creditors to other parties like the debtor and their creditors.[56]

[52]Disagreement on this question centers on how to interpret §§ 105(a) and 524(e) of the Code. *See* Kate Inman, *All Debts Are Off?—Can the Bankruptcy Process Be Used to Release the Debts of Nondebtor Parties*, 49 FLA. L. REV. 631, 631–32 (1997).

[53]*See, e.g.*, *id.* (explaining that the Second, Fourth, and Eleventh Circuits find authority for injunctions enforcing non-consensual third-party releases in § 105(a); the Sixth and Seventh Circuits find additional authority in § 1123(b)(6); whereas the Fifth, Ninth, and Tenth Circuits do not allow non-consensual third-party releases, reasoning that § 524(e) prohibits the discharge of a debt of a nondebtor); Brian A. Abramson, et al., *Revisiting the Propriety of Third-Party Releases of Nondebtors*, 18 J. BANKR. L. & PRAC. 4 Art. 6 (2009) (summarizing the current circuit split on the issue).

[54]*See* Anthony J. Casey & Joshua Macey, *In Defense of Chapter 11 in Mass Tort Cases*, U. CHI. L. REV. (forthcoming 2023).

[55]*See* Levitin, *supra* note 11, at 1082; Simon, *supra* note 11, at 1154.

[56]*See*, Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 YALE. L.J.F.

The debate about third-party releases is different from the other tribunal problems: while golden shares and arbitration raise questions about whether parties should be able to opt out of the bankruptcy system, non-consensual third-party releases are about whether a dispute that would ordinarily be resolved outside bankruptcy can be brought into the bankruptcy tribunal even when one party objects.

For those taking a broad view of bankruptcy's purpose of facilitating collective resolution, third-party releases are consistent with the Code if the bankruptcy tribunal is competent in adjudicating these claims and policing abuse. In many circumstances, parties that are involved in a bankruptcy will be in a position to block—or at least delay—the confirmation of a bankruptcy plan. Stakeholders might do this for a few reasons. Third-party releases provide a way to negotiate a global settlement even in the face of hold outs.

In certain circumstances, non-consensual third-party releases are therefore consistent with the bankruptcy purpose test because they can lead to efficient reorganizations that would otherwise be blocked or delayed. One of us has put it this way in a prior article:

> Third-party releases are easiest to justify when the release affects a large group of similarly situated creditors and a supermajority are willing to accept the plan in which they are subject to a third-party release. . . .When a supermajority of creditors sees the wisdom of the settlement and votes in favor of it, they likely believe that the benefits of the plan of reorganization compensate them for what they are losing by virtue of the release. If each of the creditors is as well positioned as the others to value the release, the collective wisdom of the supermajority is more likely to reflect the benefits of accepting the plan than the views of a small minority.[57]

Supermajority voting rules, compensation, and disclosure and discovery procedures are key to limiting abuse of third-party releases. Still these releases are likely inconsistent with more formalist or strict approaches that view the bankruptcy tribunal's power to interfere with state law or exercise power beyond the property of the estate as limited.

960 (2022) (arguing for the prohibition of nondebtor releases); Ralph Brubaker, *Bankruptcy Injunctions and Complex Litigation: A Critical Reappraisal of Non-Debtor Releases in Chapter 11 Reorganizations*, 1997 U. ILL. L. REV 959 (questioning the policy justifications and judicial authority behind nondebtor releases).

[57]Douglas G. Baird, Anthony J. Casey, & Randall C. Picker, *The Bankruptcy Partition*, 166 U. PA. L. REV. 1675, 1688 (2018).

CONCLUSION

Under most theories of bankruptcy, the justification for making bankruptcy mandatory suggests that bankruptcy should cover situations in which a party can extract value by holding up the reorganization process. Some might seek to limit that mandate further by reference to an in rem estate or substantive state law. As a policy matter, the need for limitation arises if the bankruptcy tribunal cannot create safeguards to protect non-bankruptcy expectations. But those expectations can be protected even in a tribunal that broadly reaches to capture cases from other tribunals.

If the tribunal can be trusted to adhere to its purpose, namely to bring in cases that implicate the need for collective resolution and to apply procedures aimed toward achieving that collective resolution, then there is little concern with expanding that tribunal's authority. Of course, there are conflicting views on whether this can be said of the bankruptcy tribunal. Importantly, however, those conflicting views have nothing to do with general policies of private arbitration, or whether a particular claim is against the debtor. The debate that really matters is about trust in the bankruptcy tribunal and how broadly one views its power in pursuing bankruptcy's collective resolution mandate.