BANKRUPTCY IN CONFLICT

by

Jonathan M. Seymour[*]

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INTRODUCTION

Bankruptcy is a powerful tool. It is also highly indeterminate. Bankruptcy judges face the difficult task of giving effect to a sometimes loosely-written code replete with open-textured provisions.[1] Those same features of bankruptcy, though, allow for considerable space to ensure that cases are resolved consistent with a strong sense of the underlying—but uncodified—core objectives that bankruptcy seeks to serve, as well as the shared norms of the members of the bankruptcy community about the best functioning of the system.[2]

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[*] Associate Professor, Duke University School of Law. I thank Stuart Benjamin, Melissa Jacoby, Jon Petkun, and Steven Schwarcz for helpful comments and conversations. I thank Garret Hoff, Ethan Knox, and Jack Townsend for valuable research assistance.

[1] Jonathan Seymour, *Against Bankruptcy Exceptionalism*, 90 U. CHI. L. REV. 1924, 1928 & n.13, 2006 (2022); *see* Rafael Pardo & Kathryn Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. REV. 384, 392, 401-411 (2012) (describing and illustrating gaps that Congress has left in the Code); Laura Coordes, *Narrowing Equity in Bankruptcy*, 94 AM. BANKR. L.J. 303, 315-318, 322-25 (2020) (describing how statutory interpretation in bankruptcy requires "equitable interpretation.").

[2] Seymour, *supra* note 1, at 1988; Pardo & Watts, *supra* note 1, at 411-413

Whether one celebrates bankruptcy's indeterminacy as central to bankruptcy's utility as a flexible problem-solving tool, criticizes it as unmooring bankruptcy from its statutory roots, or empowering the repeat players that dominate the commercial bankruptcy world, it is a reality with which bankruptcy scholars and commentators must grapple.[3] Hence Harvey Miller's (one of the greatest bankruptcy lawyers of the past decades) claim that bankruptcy has a particular need for "enlightened and flexible construction," and "present⟦s⟧ circumstances that call for creative thinking and constructions that serve the process of reorganization."[4] This symposium asks when the Bankruptcy Code should "win" conflicts with other law. In fact, in the hands of bankruptcy's tight knit community of practitioners and judges, the needs of bankruptcy often do "win" when faced with actual or perceived conflict with norms, objectives, or even substantive rules from outside the world of bankruptcy.[5] Indeed, it is remarkable how much may be accomplished by judges and lawyers in the name of servicing

(bankruptcy courts frequently engage in "residual" judicial policymaking due to "substantial gaps" in the Code).

[3] Thus former bankruptcy judge Robert Drain, in posing the question "⟦I⟧s there something that distinguishes the Bankruptcy Code and case law applying it from federal practice generally, specifically by encouraging flexibility and creativity," responded that "to experienced bankruptcy practitioners and judges, the answer is so clear as to be laughable, like the title of James Thurber's essay, *Is Sex Necessary?*" Hon. Robert Drain (Ret.), 2023 Harvey R. Miller Lecture at Columbia Law School: Creativity in Bankruptcy, https://www.law.columbia.edu/news/archive/retired-bankruptcy-court-judge-robert-d-drain-84-delivers-second-annual-harvey-r-miller-59-lecture (September 20, 2023). At the same time, Judge Drain noted the need to avoid "overstepping the boundaries of that flexibility … ⟦and⟧ being too creative … in administering the Bankruptcy Code." *Id.*

[4] Harvey Miller & Ronit Berkovich, *The Implications of the Third Circuit's* Armstrong *Decision on Creative Corporate Restructuring*, 66 AM. U. L. REV. 1345, 1346-47 (2006).

[5] Because what is at stake include fundamental and multi-faceted questions about the nature of bankruptcy law and practice, there are many other possible ways to frame this discussion. I have suggested that it is best characterized as a commitment of bankruptcy culture and the bankruptcy community to "bankruptcy exceptionalism." *See* Seymour, *supra* note 1, at 1928-30, 1941. Scholars – including in the ABLJ's richly argued 2020 symposium – have also discussed the connection between these ideas and bankruptcy's pervasive use of the language of equity; although the meaning of "equity" in bankruptcy is a broader question, it seems clearly to be related. *See, e.g.*, Coordes, *supra* note 1, at 303; Hon. Bruce Markell, *Courting Equity in Bankruptcy*, 94 Am. Bankr. L.J. 227, 228-229, 256-262 (2020) (suggesting answers to what it might mean to say that the bankruptcy court "is a court of equity.").

bankruptcy's objectives,[6] and how infrequently bankruptcy sees significant external pushback, especially given the bankruptcy court's place in the American constitutional firmament as a non-Article III court.[7]

A first challenge here is explaining why bankruptcy so often "wins" conflicts in this way. Reasons seem tightly bound up in bankruptcy's specialization. District and appellate court judges may refrain from interfering too much with bankruptcy court decisions—and even Supreme Court justices may sometimes tread cautiously—because there is a shared belief that bankruptcy is a specialized field that is the preserve of experts, best suited to discerning the needs of the system and furthering its particular goals. Outsiders often say that bankruptcy judges know what they are doing so well (and others know it so little) that it is best not to interfere too much.[8] There is, of course, truth here. Bankruptcy judges are subject-matter experts in a way that, broadly, is untrue for Article III judges.[9] Fair readings of the

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[6] *See, e.g.*, Melissa Jacoby, *Unbundling Business Bankruptcy*, 101 N.C. L. REV. 1703, 1704-11 (2023) (describing potency of bankruptcy tools); *see also*, *e.g.*, *In re* SGL Carbon, 200 F.3d 154, 165-66 (3d Cir. 1999) (chapter 11 offers debtors "considerable powers . . . than can impose significant hardships on particular creditors" such that debtor's exercise of those powers must be "justified"); *In re* LTL Mgmt, LLC, 64 F.4th 84, 110 (3d Cir. 2023) (limits on access to chapter 11 required given its "ability to redefine fundamental rights of third parties.").

[7] Bankruptcy judges are not Article III judges, a reality that the Supreme Court has explained constrains their leeway to make decisions without the sign-off of district court judges. *See* Stern v. Marshall, 564 U.S. 462, 469, 482-503 (2011); Wellness Intern. Network, Ltd. v. Sharif, 575 U.S. 665, 677-78 (2015). Indeed, supervision by Article III courts is "key" to the constitutionality of the whole bankruptcy edifice. *In re* City of Detroit, Mich., 838 F.3d 792, 806, 811 (6th Cir. 2016). For all that, Article III judges are not heavy-handed in their interventions in the bankruptcy space. *See* Seymour, *supra* note 1, at 1972-74 (describing insulation of bankruptcy court decisions from appellate review); DOUGLAS BAIRD, ELEMENTS OF BANKRUPTCY 29 (7th ed. 2022) ("The practical effect of all of this is to grant the bankruptcy judge enormous power."); Troy McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 772 (2010) (bankruptcy adjudication is "expansive" yet not "held in firm check" by appellate courts).

[8] *Cf.* Douglas Baird & Tony Casey, *Bankruptcy Step Zero*, 6 SUP. CT. L. REV. 203, 216 (2012) (suggesting that "in the absence of an unambiguous statute, much ⟦might be⟧ sensible left to case-by-case adjudication," instead of by appellate courts with "little expertise with respect to reorganizing large corporations."); RICHARD POSNER, HOW JUDGES THINK 263-64 (2008) (discussing specialized judges).

[9] Pardo & Watts, *supra* note 1, at 424; *see also*, *e.g.*, Allen v. Ollie's Bargain Outlet, Inc., 37 F.4th 890, 896 (2022) (suggesting that "⟦g⟧eneralist Article III judges" must

Bankruptcy Code disclose normative commitments important to the resolution of bankruptcy cases but not plainly stated in the text.[10] But there is also much to challenge. This paper makes three observations about the specialization of bankruptcy's institutions and the consequences that we should ascribe to it.

First, specialization risks overdiagnosis of problems that call out for solutions deployed from the toolkit from which the specialist makes their living, as the rest of the world recedes into the distance much like—in Judge Goldblatt's comparison—the *New Yorker*'s *View of the World* beyond Ninth Avenue.[11] Or, to phrase things differently, as hammers see only nails, too do the specialists of bankruptcy identify ordinary legal problems as problems unique to bankruptcy. Outsiders, meanwhile, may fail to realize how far familiar and generally applicable legal principles can sensibly continue to operate distant from terrain that they know.[12] And that is all the more so given the nature of bankruptcy practice. Bankruptcy lawyers know—though many outsiders do not grasp—that much of the work of the bankruptcy judge is adjudicating and facilitating the resolution of garden-variety state law disputes. Bankruptcy adds an additional layer of complexity, but we at least should be hesitant to find that it fundamentally changes the legal landscape.

Second, given the recent trajectory of the Supreme Court's constitutional and administrative law jurisprudence, ascribing legal consequences to specialization has become increasingly fraught. Important

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approach questions – here extrapolation from statistical data – differently than "trained experts").

[10] *See* DOUGLAS BAIRD, THE UNWRITTEN LAW OF CORPORATE REORGANIZATIONS x, (2022).

[11] *In re* Yellow Corp., No. 23-11069, 2024 WL 1313308, at *13 (Bankr. D. Del. Mar. 27, 2024) ("Some argue that bankruptcy judges tend to place an outsized premium on the importance of the sphere with which they are most familiar.") *& id.* at 13 n.81 (bankruptcy law is perceived "much like the New Yorker magazine cover of a View of the World from Ninth Avenue, with the imperatives of the bankruptcy case appearing prominently in the front and center, while everything else is of receding importance as it fades into the distance.") (citing Seymour, *supra* note 1); *View of the World from 9th Avenue & Steinbergian Cartography*, Saul Steinberg Found., https://saulsteinbergfoundation.org/essay/view-of-the-world-from-9th-avenue/.

[12] *Cf., e.g.*, Taggart v. Lorenzen, 587 U.S. 554, 560-61 (2019) (finding that the tricky problem of determining the requisite state of mind to hold a creditor to have violated the discharge injunction could be solved by transplanting the "old soil" of civil contempt).

earlier accounts of what makes bankruptcy adjudication qualitatively different from other kinds of federal judicial decision-making have focused on an analogy to executive agencies.[13] Just as courts defer to specialized and expert agency administrators, so too might they defer to specialized bankruptcy judges.[14] The problem for such theories is that the Supreme Court is currently engaged in a far-reaching project to remake the law of deference in agency adjudication.[15] Some deference based on agency expertise remains, but it is deference that agencies can never be sure of enjoying.[16] The primary conceptual question in the Supreme Court's analysis today is the extent to which the agency has been delegated power from Congress—not an idea that translates easily to bankruptcy law.[17] Large swathes of the federal judiciary, meanwhile, are traditionally celebrated for their resistance to specialization.[18] And at least some of the reasons why we are said to prefer that federal district court judges remain generalists rather than subject-matter experts seem to pertain in bankruptcy just as much as in other parts of the federal civil litigation docket.[19]

Finally, having regard to Judge Goldblatt's admonition,[20] there is reason to be cautious about claims that bankruptcy's needs must "win" over others. Many federal statutes seek comprehensively to regulate particular fields through statutory schemes that, as with the Bankruptcy Code, reflect underlying normative commitments from Congress. Sometimes—unlike the Code—strong statements of purpose anchor the text of the statute itself.[21]

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[13] Baird & Casey, *supra* note 3; Pardo & Watts, *supra* note 1.

[14] *Id.*

[15] Loper Bright v. Raimondo, 144 S. Ct. 2244 (2024); *see* Christopher Eckhardt, *A Major Question for Administrative Law*, 73 CATH. U. L. REV. 570, 576-82.

[16] Loper Bright, 144 S.Ct. at 2259 (discussing *Skidmore* deference).

[17] *Cf. id.* at 2263 (describing statutes that, unlike the Bankruptcy Code, "expressly delegate" authority to an agency to give meaning to particular terms).

[18] *See generally* Hon. Jack Weinstein, *The Roles of a Federal District Court Judge*, 76 BROOK. L. REV. 439 (2011); Hon. Diane Wood, *Generalist Judges in a Specialized World*, 50 SMU L. REV. 1755 (1997).

[19] Weinstein, *supra* note 18, at 440 ("Assignment by type of case is not desirable because it ignores the Article III judge's strength as a generalist in the law."); Wood, *supra* note 18, at 1767 (explaining "powerful arguments against fundamentally changing the role of Article III judge" from generalist to specialist.).

[20] *Supra* note 11 and accompanying text.

[21] *See* Kevin Stack, *The Enacted Purposes Canon*, 105 IOWA L. REV. 283 (2019).

The National Labor Relations Act (NLRA) is one example.[22] In *Epic Systems Corp. v. Lewis* in 2018,[23] though, the Supreme Court, was faced with a choice over whether to give effect to the NRLA's guarantee to the right to concerted activity, or instead to the Federal Arbitration Act's (FAA) broad provisions regarding the enforceability of arbitration agreements.[24] The Court's opinion said little about the underlying core objectives of the statute.[25] It provided rather a story of "textual and contextual clues" that permitted the Court to find that the FAA's rule controlled.[26] Little in *Epic Systems* looks different to any other statutory interpretation case from the Supreme Court. And *Epic Systems* is a useful case study illustrating a broader pattern. For the Supreme Court, text and ordinary principles of general law are the basis for resolving conflicts between conflicting bodies of specialized law even when Congress has made explicit those bodies' underlying objectives.

For these reasons, the answer to when bankruptcy should "win" in a conflict with nonbankruptcy law is "it depends." Arbitration, once again, provides a helpful example. The answer as to when exactly the bankruptcy court should permit a claim to be fixed by an arbitrator rather than resolved by the ordinary claims allowance process is far from obvious.[27] This paper cannot answer such difficult individual questions. But it does suggest that great caution is warranted in assessing claims that bankruptcy's specialist objectives require its norms to prevail over others.

The structure of this paper tracks the three observations that I have described above. Part I begins by describing what I call the Ninth Avenue problem: the tendency of bankruptcy lawyers—and other specialists—to view the needs of bankruptcy in the foreground while other legal issues recede into the background. It then suggests some preliminary reasons why both bankruptcy and nonbankruptcy lawyers might find this dynamic concerning. Part II considers how analysis of bankruptcy's special objectives is affected by the Supreme Court's discussion of the role of expertise in *Loper Bright v. Raimondo. Loper Bright's* abrogation of *Chevron* deference

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[22] 29 U.S.C. § 151.

[23] 584 U.S. 497 (2018).

[24] *Id.* at 502.

[25] *Id.* at 503, 511-16.

[26] *Id.* at 516.

[27] *See In re* Yellow Corp., No. 23-11069, 2024 WL 1313308, at *11-15 (Mar. 27, 2024).

for administrative agencies also has consequences for how we should understand the power of bankruptcy judges to use bankruptcy policy in decisions interpreting the Code. Part III shows how the Supreme Court has approached the task of resolving conflicts between statutes, leaving little scope for courts to consider policy objectives. It concludes, though, by suggesting that one concept from civil proceduralist literature—Judith Resnik's description and analysis of managerial judging—may be a more fruitful lever to look to for opportunities to incorporate a sense of bankruptcy's objectives into everyday bankruptcy decision-making.

I. BANKRUPTCY AND GENERALISM

A. The View from Ninth Avenue

Bankruptcy lawyers—understandably and in many ways justifiably—celebrate the potential of bankruptcy.[28] Bankruptcy is deployed in a diverse range of scenarios to further a dizzying array of objectives.[29] Theoretical

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[28] Drain, Harvey R. Miller Lecture, *supra* note 3 (describing Harvey Miller's achievements in *Texaco* and other cases); Miller & Berkovich, *supra* note 4, at 1346-47 ("Bankruptcy reorganizations present socio-economic circumstances and processes that are layered with multiple parties and diverse interests . . . effort has been devoted to achieving the confirmation of a reorganization plan that would rehabilitate a debtor's business and maximize the value of the debtor's estate for the benefit of its economic stakeholders.").

[29] Currently and most prominently, this presents itself in the debate between bankruptcy practitioners and scholars, and some other scholars of civil litigation as to whether bankruptcy is the best available forum to resolve mass tort cases. *See, e.g.*, Andrew Bradt et al., *Dissonance and Distress in Bankruptcy and Mass Torts*, 91 FORDHAM L. REV. 309 (2022) (discussing Fordham Law Review symposium of aggregate litigation and bankruptcy scholars and practitioners); Tony Casey & Josh Macey, *In Defense of Chapter 11 for Mass Torts*, 90 U. CHI. L. REV. 973 (2023); Abbe Gluck et al., *Against Bankruptcy: Public Litigation Values Versus the Endless Quest for Global Peace in Mass Litigation*, YALE L.J.F. 525, 532 (2024). The debate is hugely important. Even so, the strength of feeling with which bankruptcy lawyers will defend their terrain is striking, as in Judge Kaplan's forceful conclusion to his decision denying motions to dismiss the first LTL bankruptcy. *In re* LTL Mgmt, LLL, 637 B.R. 396, 429-30 (Bankr. D.N.J. 2022). Only occasionally do we see this zealous advocacy for bankruptcy from generalist lawyers. *See, e.g.*, Harrington v. Purdue Pharma, L.P., 144 S. Ct. 2071, 2092 (2024) ("In many cases, there is no workable alternative other than bankruptcy for achieving fair and equitable recovery for mass-tort victims. . . . [B]ankruptcy 'provides the *only* forum in the U.S. legal system where a unified and complete resolution of mass-tort cases can reliably occur in a manner that results in a

accounts of bankruptcy center around its utility as a powerful but imprecise tool to maximize value through solving collective action problems.[30] By serving these goals, bankruptcy can achieve many socially beneficial outcomes: bankruptcy rehabilitates businesses that might otherwise fail due to excessive debt;[31] preserves jobs;[32] facilitates the untangling of complex and messy business failures;[33] compensates victims;[34] and saves on litigation costs as disputes are resolved collectively in the bankruptcy forum rather than piecemeal in state or federal district court.[35] When bankruptcy is

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fair recovery and distribution for all claimants.'" (Kavanaugh, J., dissenting) (quoting New York City Bar Association Amicus Br.)).

[30] The classic account is THOMAS JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 1-13 (1986).

[31] FINAL REPORT AND RECOMMENDATION OF THE ABI COMMISSION TO STUDY THE REFORM OF CHAPTER 11, 8-9 (2014) [hereinafter ABI REPORT] (describing "rescue and rehabilitate" policy of American bankruptcy law); *cf.* Baird, *supra* note 7, at 58-61 (describing conceptual limitations of notion that chapter 11 provides a "fresh start" to businesses).

[32] Zachary Liscow, 116 COLUM. L. REV. 1461, 1494, 1500 (2016) (arguing that an efficient bankruptcy system will sometimes seek to preserve jobs); *In re* HBA East, Inc., 87 B.R. 248, 259 (Bankr. E.D.N.Y. 1988) (quoting from legislative history to explain that Congress intended chapter 11 to be able to "restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders."); *but see* Matthew Bruckner, *The Virtue in Bankruptcy*, 45 LOYOLA U. CHI. L.J. 233, 269-70 (2013) (arguing that "[a] number of creditors bargain theorists do not recognize that job preservation is an important goal that can be achieved through our bankruptcy system" or that "the bankruptcy system is [not] the appropriate forum to deal with such issues."); Jay Westbrook, *Equity in Bankruptcy Courts: Public Priorities*, 94 AM. BANKR. L.J. 203, 214 (2020) ("[W]e in the United States have lost our emphasis on the role of Chapter 11 in preserving jobs.").

[33] *See, e.g.*, Yesha Yadav & Robert Stark, *The Bankruptcy Court as Crypto Market Regulator*, 96 S. CAL. L. REV. 1479, 1532-33 (2024) ("[B]ankruptcy is, functionally, administering the clean-up of large segments of the crypto ecosystem," albeit in a way that sometimes "imposes on those courts a responsibility far outside of their usual functions and capabilities."); Saul Levmore, *Rethinking Ponzi-Scheme Remedies In and Out of Bankruptcy*, 92 B.U. L. REV. 969, 970-980 (2012) (describing and critiquing bankruptcy's role in the Ponzi scheme "cleanup process").

[34] *See* Harrington v. Purdue Pharma, L.P., 144 S. Ct. 2071, 2093-94 (2024) (Kavanaugh, J., dissenting); *In re* LTL Mgmt, LLC, 637 B.R. 396, 430 (Bankr. D.N.J. 2022) ("The Court remains steadfast in its belief that justice will best be served by expeditiously providing critical compensation through a court-supervised, fair, and less costly settlement trust arrangement.").

[35] *LTL Mgmt.*, 637 B.R. at 430; *see also Purdue*, 144 S. Ct. at 2094.

working at its best, it can be a Pareto superior solution to the problem of financial distress.[36] Bankruptcy's powerful tools unlock substantial additional value that would not be available in other fora.[37] At the same time, bankruptcy's respect for pre-existing state-law rights means—and least typically and in theory—that every stakeholder recovers at least as much as they would have had the parties proceeded elsewhere.[38]

In ways that need not be repeated in detail here, bankruptcy practice is also narrow. Most bankruptcy practitioners are specialists. Bankruptcy judges are most frequently drawn from the ranks of bankruptcy practice. The community is small—no more than 345 bankruptcy judges sit nationally; only a handful of those judges sit on the courts that handle the bulk of the largest cases that set the trends of practice.[39] Similarly, although thousands

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[36] *Cf.* Harvey Miller, Keynote Address, *Bankruptcy and Reorganization Through the Looking Glass of 50 Years*, Amer. Coll. Of Bankr. (2010) https://www.americancollegeofbankruptcy.com/file.cfm/68/docs/Harvey%20Miller%20Keynote%20Address%202010.pdf (explaining the benefits of the "reorganization paradigm" as "better than liquidation as it preserved going concern value, protected industries and jobs, and, generally, projected greater recoveries for impaired creditors.").

[37] *Cf.* Melissa Jacoby & Ted Janger, *Tracing Equity: Realizing and Allocating Value in Chapter 11*, 96 TEX. L. REV. 673, 706-708 (describing the "bankruptcy premium").

[38] *Cf.* 11 U.S.C. §§ 1129(a)(7), (b)(2); *see, e.g.*, Raleigh v. Ill. Dep't of Rev., 530 U.S. 15, 20 (2000); *In re* Costas, 555 F.3d 790, 797 (9th Cir. 2009) (explaining that bankruptcy "largely respects substantive state law rights, neither granting a creditor new rights in the debtor's property nor taking any away.").

[39] 28 U.S.C. § 152 (authorizing appointment of bankruptcy judges for each district); *see, e.g.*, Tony Casey and Josh Macey, *Bankruptcy Shopping: Domestic Venue Races and Global Forum Wars*, 37 EMORY BANKR. DEV. J. 463, 470-80 (2021) (describing emergence at different points of "attractive" and "popular" districts in which to file); Adam Levitin, *Judge Shopping in Chapter 11 Bankruptcy*, 2023 U. ILL. L. REV. 378-80 (describing consolidation of megacases into a small number of districts). Prof. Levitin's data does not reflect quite how quickly trends move – or, stated in more pessimistic fashion –quite how few key players need to change behavior in order materially to affect megacase distribution on a national basis. In the time since publication of his article in 2023, the Southern District of Texas has seen a significant fall in complex case filings following the resignation of Judge David R. Jones. Akiko Matsuda, *Houston Sees Drop in Large Bankruptcy Filings Following Ethics Scandal*, WALL ST. J. (Aug. 2, 2024), https://www.wsj.com/articles/houston-sees-drop-in-large-bankruptcy-filings-following-ethics-scandal-af844ded. Correspondingly, the Bankruptcy Court for the District of New Jersey has seen a large increase in complex chapter 11 filings. Laura Coordes & Hon. Joan Feeney, *The History of Bankruptcy Venue Choices and the Evolution of Magnet Courts for Chapter 11 Cases*, 36 CAL. BANKR. J. 333, 333-334 (2024).

of lawyers practice bankruptcy across the country, a small vanguard of leading firms are reckoned to be particularly influential in setting the direction of the law.[40] And the bankruptcy community is also cohesive. Ties between bench and bar remain close.[41] The bar is both "unified" and "organized," with a shared commitment to the Bankruptcy Code and to the ideals behind it.[42] This is deep-rooted. Many have written—sometimes positively, sometimes critically—about the foundational role that "bankruptcy culture" plays in bankruptcy practice.[43]

At the same time, the bankruptcy community can be isolated. As much as bankruptcy lawyers celebrate their specialized practice, nonbankruptcy lawyers can be scared to touch it.[44] For nonbankruptcy lawyers, bankruptcy can be a byword for complexity and abstruseness; a Code replete with subtly interlocking principles that cannot readily be understood in isolation and, equally, that operate according to a logic very much their own.[45]

Indeed, among lawyers from other fields, bankruptcy aversion is real.[46] Practitioners' guides warn generalist lawyers of the intricacies of bankruptcy.[47] Nonbankruptcy judges that are hardened veterans of tricky

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[40] Ronnie Greene et al., *How Kirkland Uses Court Shopping to Get an Edge in Bankruptcy*, BLOOMBERG LAW (Aug. 6, 2024).

[41] Seymour, *supra* note 1, at 1958; McKenzie, *supra* note 7, at 797.

[42] McKenzie, *supra* note 7, at 802-03.

[43] *See, e.g.*, Seymour, *supra* note 1, at 1939-43, 1961-69; Stacey Steele, *The Collapse of Lehman Brothers and Derivative Disputes: The Relevance of Bankruptcy Cultures to Roles for Courts and Attitudes of Judges*, 30 LAW CONTEXT: A SOCIO-LEGAL J. 51, 56-62 (2014); Miller & Berkovich, *supra* note 4, at 1347-48; Lynn LoPucki & William Whitford, *Bargaining over Equity's Share in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 139 U. PA. L. REV. 125, 154 (1990); Gluck et al., *supra* note29, at 527, 533 ("Scholars who argue the Code could easily be amended to require more process understate the incompatibility of the goals and the strength of the bankruptcy culture."), *but see* Tony Casey & Josh Macey, *Bankruptcy by Another Name*, 133 YALE L.J. FORUM 1016, 1020 (2024) (criticizing notion of an "ethereal 'bankruptcy culture' that ruthlessly pursues efficiency").

[44] *See* Pardo & Watts, *supra* note 1, at 428.

[45] *Cf.* Baird, *supra* note 10, at x (sketching the unwritten principles animating corporate reorganization law).

[46] *Cf.* Melissa B. Jacoby, *Superdelegation and Gatekeeping in Bankruptcy Courts*, 87 TEMP. L. REV. 875, 875 & n.3 (2015) (quoting a district court judge as saying his colleagues "hate [[bankruptcy]], they don't want anything to do with it.").

[47] *See, e.g.*, 1 BANKRUPTCY PRACTICE HANDBOOK § 3:20 (2d ed. 2023) (bankruptcy practice requires "an intimate grasp of the Byzantine intricacies of the rules applicable to bankruptcy cases.").

problems of statutory interpretation nonetheless are the source of periodic commentary remarking on the depths of the morass that they must plumb when confronted with a bankruptcy issue.[48] And this pattern extends from decisions from the early years of the Code where courts were grappling with the intricacies of a brand-new statute, through to cutting-edge decisions from appellate courts today. In 1984, the Fifth Circuit in *AWECO* all but threw up its hands trying to navigate through "a field of law as narrow and arcane as bankruptcy law" but was able to find a safe harbor using "principles of fairness and equity."[49] The Ninth Circuit, meanwhile, has observed that "[t]he Bankruptcy Code is a complex, sometimes nearly opaque statute, and the rules of construction we must apply to its dimmer aspects are themselves arcane, even contradictory at times."[50] In the Supreme Court, Justice Scalia described one typical example of a Code provision containing a forest of rules and exceptions as "meticulous—not to say mind-numbingly detailed,"[51] while Justice Gorsuch in *Purdue Pharma* gestured to the "hundreds of interlocking rules" that make up the Code.[52] All of this makes nonbankruptcy lawyers somewhat shy of intervening.[53]

From these realities flow what we might refer to as the Ninth Avenue

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[48] *See*, *e.g.*, Harris v. Anthem Co., No. 22-00002, 2023 WL 5177284, at *5 (S.D. Ind. Aug. 11, 2023) ("[T]he Court acknowledges that bankruptcy law is specialized, complex, and potentially confusing to someone with no expertise in that area."); Matthews v. Potter, No. 05-02748, 2008 WL 4346319, at *5 (N.D. Ill. Mar. 24, 2008), *vacated*, 316 F. App'x 518 (7th Cir. 2009) ("The Court acknowledges that deciphering the oft-arcane language of bankruptcy law can be difficult.").

[49] *In re* AWECO, Inc., 725 F.2d 293, 295 (5th Cir. 1984).

[50] *In re* Mark Anthony Const., Inc, 866 F.2d 1101, 1108 (9th Cir. 1989).

[51] Law v. Siegel, 571 U.S. 415, 424 (2014).

[52] Harrington v. Purdue Pharma, L.P., 144 S. Ct. 2071, 2077 (2024).

[53] The courts of appeals reverse decisions below in bankruptcy matters somewhat less often than in other types of civil litigation—for the twelve months prior to June 2023, at a rate of 13% in private civil litigation as against 8% in bankruptcy. U.S. COURTS, JUDICIAL FACTS AND FIGURES U.S. COURTS OF APPEALS––DECISIONS IN CASES TERMINATED ON THE MERITS, BY CIRCUIT AND NATURE OF PROCEEDING, TABLE B-5 (June 30, 2023), https://www.uscourts.gov/statistics-reports/statistical-tables-federal-judiciary-june-2023. An accurate comparison is difficult because the vast majority of bankruptcy matters that reach the courts of appeals have already passed through one layer of appellate review in the district court or bankruptcy appellate panel. *See generally* Jonathan Seymour, *Bankruptcy Appeal Barriers*, 82 WASH. & LEE L. REV. _ (forthcoming 2025) (manuscript at 15-17).

or *Yellow Corp.* problem. In *Yellow*, Judge Goldblatt was confronted with a conflict between the Bankruptcy Code and the Multiemployer Pension Plan Amendments Act (MPPAA). The Bankruptcy Code provides that objections to claims "shall" be resolved by the bankruptcy judge, while the MPPAA provides that disputes over an employers' liability for withdrawing from a pension plan—the substance of the *Yellow* creditors' claims—"shall" be subject to arbitration.[54] Judge Goldblatt worked as best as he could to harmonize those provisions, consistent with the Supreme Court's directives that a court faced with conflicting statutes "may not throw up its hands and simply choose to follow the directive that it prefers," and should be seeking to "respect congressional policy choices" rather than "adopting the judge's preferred policy."[55] Controlling precedent did not pick either arbitration or bankruptcy as a perpetual "winner" of that conflict.[56] Judge Goldblatt thus concluded that the best path forward was to find that, in balancing the factors supporting and opposing a grant of relief from the automatic stay to allow the creditors to initiate arbitration, the MPPAA's choice to adopt an arbitration framework should be entitled to "substantial weight," creating a presumption in favor of arbitration of withdrawal liability claims.[57] That presumption, though, could be rebutted by a showing that the "imperatives of the bankruptcy case" required resolution in the bankruptcy forum.[58]

Judge Goldblatt ultimately concluded that the bankruptcy imperatives in *Yellow* overcame any presumption in favor of arbitration.[59] But he did so cautiously. In any situation in which a bankruptcy judge is prompted to weigh concerns about the smooth running of the bankruptcy system as against the concerns of other nonbankruptcy legal regimes, he warned, the judge may naturally conclude that the interests of bankruptcy are more significant.[60] "[B]ankruptcy judges tend to place an outsized premium on the importance of the sphere with which they are most familiar," just as the New Yorker's cartoon of a Manhattanite thinks in great detail about the

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[54] *In re* Yellow Corp., No. 23-11069, 2024 WL 1313308, at *2 (Bankr. D. Del. Mar. 27, 2024).

[55] *Id.* at *11.

[56] *Id.* at *7.

[57] *Id.* at *13.

[58] *Id.*

[59] *Id.*

[60] *Id.*

topography of the city but sees the rest of the country and world blurrily, inaccurately, and far in the background.[61] In *Yellow*, the danger was an outsize belief in the importance of resolution in the bankruptcy forum and a too-dismissive attitude to the alternative possibility of arbitration, which the moving party at least claimed could occur on the same timeline and with the same broad level of participation from interested parties as in bankruptcy court.[62]

The big picture idea is that immersion in bankruptcy practice colors the way that everyone in the space sees the world. Or, as Robert Lawless has put it, "not surprisingly, judges who have spent their career practicing or judging within our specialized bankruptcy system think its policies are pretty darn important."[63] Arguably, the negative influence of the Ninth Avenue problem is a key factor explaining recent cases in which the Supreme Court has sharply upset bankruptcy practice. Problems that judges confront across federal civil litigation may sometimes, when they arise in bankruptcy, be perceived as bankruptcy-specific problems that require flexion of bankruptcy doctrine or the creation of new bankruptcy rules in order to find solutions.[64] Thus, the Second Circuit, for many years, recognizing "the policy of finality in bankruptcy sales,"[65] held that § 363(m) created a limit on jurisdiction prohibiting almost any appellate review of a consummated § 363 sale.[66] Instead of focusing on bankruptcy policy, the Supreme Court, reversing the Second Circuit, observed that "Congressional statutes are replete with directions to litigants that serve as 'preconditions to relief'" and gathered a broad range of precedents from different substantive areas of law showing that limits of the kind found in § 363(m) are not jurisdictional.[67]

Elsewhere, because perceived needs of the bankruptcy system loom at

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[61] *Id.* at *13 & n.81.

[62] *Id.* at *14.

[63] Robert Lawless, *Reframing Arbitration and Bankruptcy*, 96 AM. BANKR. L.J. 701, 714 (2022).

[64] Taggart v. Lorenzen, 587 U.S. 554 (2019), is an additional example in the consumer context that I discuss briefly in Seymour, *supra* note 1, at 1953-54 & nn.157-58.

[65] *In re* Gucci, 105 F.3d 837, 840 (2d Cir. 1997); United States v. Salerno, 932 F.2d 117, 123 (2d Cir. 1991).

[66] *See Gucci*, 105 F.3d at 840 and, *e.g.*, *In re* WestPoint Stevens, Inc., 600 F.3d 231, 248 (2010).

[67] MOAC Mall Holdings LLC v. Transform Holdco LLC, 598 U.S. 288, 297-301 (2023).

the forefront, bankruptcy practitioners may resort to glosses on statutory text or general legal principles that do not hold up when subjected to generalist scrutiny.[68] In *Truck Insurance Exchange v. Kaiser Gypsum*, the Supreme Court abrogated the doctrine of insurance neutrality that defenders argued was necessary to control participation in bankruptcy proceedings and prevent derailing of plans by "peripheral parties."[69] The Supreme Court saw nothing to this effect in the text of § 1109(b) of the Code, granting standing to a "party in interest," and found it at least instructive that the term "party in interest" had been used in other statutes without carrying with it any such limitation.[70]

Even a careful analysis by bankruptcy specialists may disclose the kind of bankruptcy-in-the-foreground thinking that *Yellow* describes. Conceivably, it may be too aggressive to say, as Judge Goldblatt does, that the cost-saving involved in estimating a claim as opposed to arbitrating in a deeply insolvent case could by itself overcome any presumption in favor of arbitration.[71] Saving litigation costs and thus increasing creditor recoveries is very much forefront of mind in bankruptcy, while the bankruptcy system is—perhaps sometimes dubiously—celebrated for its economy.[72] Economy, in turn, is said to serve the ultimate goal of value maximization. And the language of value maximization is second-nature to bankruptcy lawyers - although so distinctive for nonbankruptcy litigation commentators that speaking of value maximization can serve as a "tell" that someone is from the bankruptcy community.[73]

What this means is that bankruptcy lawyers, may have so much internalized value maximization as a core policy objective that they overlook the ways in which the Bankruptcy Code compromises it against other

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[68] In the consumer context, *cf. Bartenwerfer v. Buckley*, 143 S.Ct. 665 (2023) (holding that BAP and bankruptcy court's conclusion that an innocent co-debtor spouse could discharge a debt obtained by her husband's fraud was inconsistent with the statutory text).

[69] Truck Ins. Exch. v. Kaiser Gypsum Co., 144 S.Ct. 1414, 1427 (2024).

[70] *Id.* at 1424-25 & n.4.

[71] *In re* Yellow Corp., No. 23-11069, 2024 WL 1313308, at *13 (Bankr. D. Del. Mar. 27, 2024).

[72] *See, e.g.*, *In re* LTL Mgmt, LLC, 637 B.R. 396, 430 (Bankr. D.N.J. 2022) ("The Court remains steadfast in its belief that justice will best be served by expeditiously providing critical compensation through a court-supervised, fair, and less costly settlement trust arrangement.).

[73] Bradt et al., *supra* note 29, at 318 ("[Bankruptcy] Judge Dorsey wants to maximize, estimate, and expedite. [District] Judge Saris said she does not focus on preserving value.").

values. Title 28's Judiciary and Judicial Procedure Code (Judiciary Code) provides for a right to a jury trial in district court for personal injury and wrongful death claims.[74] Here, any interest in efficiency is overridden by Congress's desire to ensure that litigants may access their ordinary and preferred forum. Similarly, although bankruptcy judges may pass in the first instance on *Stern* claims, they cannot (at least as a technical legal matter) wrest from the plaintiff the right to de novo review in the district court before final judgment is entered.[75] It is at least an open question whether advancing what the Supreme Court has pronounced to be a strong interest in enforcing agreements to arbitrate is a value important enough to be another such exception to concerns for judicial economy.[76]

A bigger-stakes illustration of the Ninth Avenue problem within the bankruptcy context can be illustrated using the writings of judges and scholars on the contested issue of whether bankruptcy or multi-district litigation (MDL) is better suited for resolving mass torts cases.[77] The best way to understand mass tort bankruptcies, as against mass tort MDL and other aggregate litigation, is as parallel systems working to resolve the same problem, even deploying some of the same tools in service of their goals.[78] Indeed, at the end of the day, both are devices for reaching (hopefully) fair

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[74] 28 U.S.C. §§ 157(b)(5), 1411(a).

[75] Executive Benefits Ins. Agency v. Arkison, 573 U.S. 25 (2014). A *Stern* claim is a claim that falls within the list of statutorily core proceedings in § 157 of the Judiciary Code, but as to which the bankruptcy court cannot constitutionally enter final judgment because the claim is made of the "stuff of the traditional actions at common law tried by the courts at Westminster in 1789" such that the claimant has a right to determination by an Article III judge. Stern v. Marshall, 564 U.S. 462, 484 (2015).

[76] Shearson/American Exp. v. McMahon, 482 U.S. 220 (1987); *but cf.* Morgan v. Sundance, 596 U.S. 411, 418 (2022) (explaining that courts should not "invent special, arbitration-preferring … rules" but instead try to "make arbitration agreements as enforceable as other contracts.").

[77] The Ninth Avenue problem, of course, is not a phenomenon isolated to bankruptcy. Indeed, it may be easier for bankruptcy lawyers to perceive in other spaces. I have elsewhere briefly discussed the tussle between the Federal Circuit and the Supreme Court over the applicability of general legal principles to patent law. The Federal Circuit, seeing the efficient litigation of the patent law system in the foreground, spent some years creating patent-specific and patent-favorable brightline rules; it did not reach into legal background though, to check the consistency of those rules with generalist legal principles. Seymour, *supra* note 1, at 1960.

[78] *See* Bradt et al., *supra* note 28, at 314.

and efficient settlements of plaintiffs' claims.[79] Yet it is remarkable not just how opaque the bankruptcy world is to many aggregate litigation experts, but also how distant many in the bankruptcy world are from the terrain of nonbankruptcy aggregate litigation.[80] Thus, Professors Bradt, Clopton, and Rave note the "differences in values—and in the rhetoric that illustrate[s] those values"—that can be seen from the two camps.[81] Bankruptcy lawyers emphasize the critical importance of value maximization, while nonbankruptcy proceduralists posit a messier set of trade-offs that find independent value in maintaining the ordinary adversarial process and the need for individual buy-in.[82]

One can see a similar conflict of values in the recent sharp exchange between professors Tony Casey and Josh Macey, defending bankruptcy, and proceduralist scholars Abbe Gluck, Elizabeth Burch, and Adam Zimmerman, criticizing the resort to bankruptcy by mass tort defendants.[83] Casey and Macey begin with an account of why bankruptcy is the optimal forum for resolving mass tort cases that, as they themselves later explain, "started from a different fundamental theory of civil litigation" than the proceduralists.[84] They claim—entirely consistently with the most valued precepts of bankruptcy lawyers—that the optimal litigation system "is the one that most efficiently gives parties whatever compensation they are legally owed." [85] Proceduralists, though, are likely to see this account of core litigation values as reductive at best. Indeed, foundational works in the proceduralist canon have long offered more capacious accounts of key litigation values.[86] Casey and Macey's second defense of bankruptcy argues

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[79] *Id.* at 314.

[80] By aggregate litigation, civil procedure scholars mean any proceeding in which multiple claims held by many plaintiffs are consolidated into a single forum for resolution; that includes bankruptcy, but also nonbankruptcy proceedings like class actions or MDL. Jack Zarin-Rosenfeld, *Built for Business: The Commercial Need for Aggregate Litigation*, 55 CONN. L. REV. 431, 435-37 (2023).

[81] *Id.* at 313-14.

[82] *Id.* at 314, 316, 318.

[83] Casey & Macey, *In Defense*, *supra* note28; Gluck et al, *supra* note 28; Casey & Macey, *Another Name*, supra note 43.

[84] Casey & Macey, *Another Name*, *supra* note 43, at 1018.

[85] *Id.*

[86] *See*, *e.g.*, Frank Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights*, 1973 DUKE L.J. 1153, 1172-77 (discussing dignity values, participation values, deterrence values, and effectuation values). Nor does the difference

that it is a superior venue for mass tort cases even on the terms of their critics.[87] They may be right.[88] I try here only to show how different the analytical starting points of those in the bankruptcy community may be even from others tackling, in essence, the same problem. Bankruptcy and nonbankruptcy lawyers, to some and at some times, "might seem to hail from different planets."[89]

B. Some Preliminary Concerns

1. Theoretical Concerns

The previous section describes what may strike many as an unsurprising reality. We know that bankruptcy lawyers and aggregate litigation lawyers, for example, are usually different people. We know that the bankruptcy community largely attends different conferences, focuses on a different statutory framework, pays attention to different cases, and reads different treatises and scholarship than counterparts doing other types of civil litigation. Indeed, once upon a time, bankruptcy stood even further apart from neighboring fields than it does today.[90] It is hardly surprising that bankruptcy lawyers think about the law differently or that the way that they approach legal problems is heavily informed by bankruptcy's deep-rooted culture and a desire to see that tricky problems confronted every day by the bankruptcy system are resolved fairly and efficiently in line with bankruptcy's values. Nonetheless, there is actually more of an intellectual puzzle here to confront than appears at first glance. It is not only with mass

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appear to be one solely of methodology. Michelman's basic account of litigation values includes values frequently discussed by law and economics scholars – such as deterrence values – that do not feature in Casey and Macey's initial account of mass tort bankruptcy.

[87] Casey & Macey, *Another Name*, *supra* note 43, at 1019-20.

[88] My point here is not to say that bankruptcy scholars are incorrect in claiming that bankruptcy is better suited than alternatives for resolving mass tort cases. In fact, I largely agree with them.

[89] Bradt et al., *supra* note 28, at 314.

[90] Bruce Carruthers & Terrence Halliday, *Professionals in Systemic Reform of Bankruptcy Law*, 74 AM. BANKR. L.J. 35, 53 (2000) (bankruptcy was once a "legal backwater"); Seymour, *supra* note 1, at 1964 & n.220. Judge Drain is one of a number of commentators to have noted that bankruptcy was a field in which Jewish lawyers, who were discriminated against by large law firms, could work. Drain, Harvey R. Miller Lecture, *supra* note 3.

tort bankruptcy and aggregate litigation that what goes on in and outside of bankruptcy is closely linked. If we understand bankruptcy in its proper place in the American legal system, we may wonder why it is so separate from cousin fields.

Begin with a proposition of hornbook law. Bankruptcy takes state-law rights as it finds them. Unless some federal interest requires otherwise, property interests valid outside bankruptcy carry over into bankruptcy.[91] The Supreme Court has returned to this principle again and again in interpreting the Bankruptcy Code and giving content to bankruptcy law.[92] And just as bankruptcy is substantively limited by its reliance on state-law inputs, so too has a dominant strand of bankruptcy scholarship long taught that bankruptcy should be restrained in its goals and methods—in what Douglas Baird, in his contribution to this symposium, has dubbed bankruptcy minimalism and is also sometimes called bankruptcy proceduralism.[93] In strong formulations of this view, bankruptcy is essentially an internal branch of civil procedure.[94] It provides an alternate procedure to ordinary state debt-collection law to address the collective action problems that arise when a dispersed body of creditors seeks payment from a debtor that does not have the assets to pay all in full.[95]

Our usual conception of appropriate procedural rules is that they exist in service of substantive law, rather than the other way around.[96] Procedure, to be sure, is both essential to and inextricable from substantive rights; it makes little sense to speak of having a tort claim unless a plaintiff has some means of enforcing that claim.[97] For the most part, though, procedural rules do not exist to change the basic, underlying entitlements that parties have under substantive law; the Supreme Court has taught as much in over eight decades of its *Erie* jurisprudence.[98] To be sure, inside or

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[91] Butner v. United States, 440 U.S. 48, 55 (1979).

[92] *See*, *e.g.*, Travelers Cas. & Sur. Co. of Am. v. Pacific Gas & Elec. Co., 549 U.S. 443, 451 (2007); Raleigh v. Ill Dept. of Rev., 530 U.S. 15, 20 (2000); Nobelman v. Am. Sav. Bank, 508 U.S. 324, 329 (1993); Barnhill v. Johnson, 503 U.S. 393, 398 (1992).

[93] Douglas Baird, *Bankruptcy Minimalism*, 98 AM. BANKR. L.J. _ (forthcoming 2024); Douglas Baird, *Bankruptcy's Uncontested Axioms*, 108 YALE L.J. 573, 576 (1998).

[94] Charles Mooney, *A Normative Theory of Bankruptcy Law: Bankruptcy As (Is) Civil Procedure*, 61 WASH. & LEE. L. REV. 931, 937 (2004).

[95] *Id.* at 951; Baird, *Axioms*, *supra* note 93, at 581-82.

[96] Mooney, *supra* note 94, at 938.

[97] *Id.* at 939.

[98] Erie R.R. v. Tompkins, 304 U.S. 64 (1938); Shady Grove Orthopedic Assocs., P.A.

outside of bankruptcy, the line between substance and procedure is notoriously fuzzy, as evidenced by both the messiness of doctrine and the fractiousness of academic debate.[99] Nonetheless, there is at least some tension between this broadly conservative view of bankruptcy on the one hand, and bankruptcy's willingness to deploy robust, hard-edged principles in service of its own strong sense of mission. The degree of dissonance should not be overstated. Within academia, civil proceduralists have a strong sense of identity as a field of scholarship;[100] civil procedure, meanwhile, pursues its own internal set of objectives.[101] Civil proceduralists, though, likely would not speak of civil procedure "winning" in case of a conflict between their objectives and those of substantive law. Not all bankruptcy lawyers are committed to the bankruptcy proceduralism framework.[102] But for those that are, there is some need for caution as to the number and types of norms that bankruptcy incorporates into its unwritten law and the vigor with which it enforces them.

2. Practical Outcomes

Shifting from theoretical to more concrete observations, we may again have reason to query the degree of separation between bankruptcy and other fields. Much of what bankruptcy judges do day-to-day is to determine disputes of 'ordinary' state law. Bankruptcy practice today celebrates its particular and distinctive mission and ethos of value maximization, and the ways in which that sets it apart from other types of civil litigation. But bankruptcy practitioners also celebrate the degree to which bankruptcy remains—unlike many other legal specializations—a refuge for legal generalists. Bankruptcy lawyers and judges deal with every type of legal

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v. Allstate Ins. Co., 559 U.S. 393, 406 (2010).

[99] Jay Tidmarsh, *Procedure, Substance, and* Erie, 64 VAND. L. REV. 877, 878 (2011); Paul MacMahon, *Proceduralism, Civil Justice, and American Legal Thought*, 34 U. PA. J. INT. L. 545, 563, 565 (2013). Within bankruptcy, procedural theorists have from the beginning acknowledged the need to make at least some changes to nonbankruptcy rights in order to successfully solve the collective action problems associated with financial distress. Mooney, *supra* note 94, at 944, 947.

[100] McMahon, *supra* note 99, at 565.

[101] FED. R. CIV. P. 1.

[102] Baird, *Axioms*, *supra* note 93, at 582-83.

question that is thrown off from the business of a reorganizing company.[103] Bankruptcy courts daily decide whether or not lenders hold valid security interests pursuant to Article 9 of the Uniform Commercial Code;[104] the scope of noteholders' contract rights;[105] the nature of the fiduciary duties that officers and directors owe corporations;[106] and whether the debtor in fact has the rights asserted in assets claimed as property of the estate.[107] And, as Pamela Foohey explains, the same is also true of consumer bankruptcy: judges resolve disputes about mortgage accounting, FCRA and FDCOA disputes about debt collection and loan servicing, and the scope of state-law exemption regimes.[108] A further, broader category of claims includes those that are creations of the Code and unequivocally the stuff of bankruptcy law, but nevertheless closely related to or interconnected with nonbankruptcy counterparts. Thus, in *Taggart v. Lorenzen*, the Supreme Court understood the elements of a claim for violation of the discharge injunction under § 524 to track those of a nonbankruptcy action for civil contempt.[109] And in *Husky v. Ritz*, the Court understood § 523's exception to discharge for claims based on "actual fraud" with reference to the historic, common law meaning of the term.[110]

On paper, we might read the statutory scheme to say that there is something ill-suited to bankruptcy about deep immersion into state or nonbankruptcy federal law. The Judiciary Code provides that the reference "shall" be withdrawn where a district court judge finds that the dispute "requires consideration of both title 11 and other laws of the United States

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[103] Thus, both as a practitioner and now as a teacher, I have found it an appealing advertisement for bankruptcy practice that one might come across virtually any issue – including countless issues that are not 'bankruptcy law' per se.

[104] *E.g.*, *In re* MTE Holdings, 631 B.R. 690 (Bankr. D. Del. 2021).

[105] *E.g.*, *In re* TPC Group, Inc., No. 22-10493, 2022 WL 2498751 (Bankr. D. Del. July 6 2022).

[106] *E.g.*, *In re* Nobilis Health Corp., Nos. 19-12264, 21-51183, 23-50486, 2024 WL 2965204 (Bankr. D. Del. June 12, 2014).

[107] *E.g.*, *In re* Genesis Global Holdco, LLC, 658 B.R. 31 (Bankr. S.D.N.Y. 2024).

[108] Pamela Foohey, *The Periphery of Bankruptcy Law: The Importance of Non-Bankruptcy Issues in Consumer Bankruptcy Cases*, 98 AM. BANKR. L.J. _ (forthcoming 2024) ("Within the problems that people bring to bankruptcy courts are a host of legal issues that directly implicate laws other than the Bankruptcy Code.").

[109] Taggart v. Lorenzen, 587 U.S. 554, 561 (2019).

[110] Husky Intern. Elecs., Inc. v. Ritz, 578 U.S. 355, 360 (2016).

regulating organizations or activities affecting interstate commerce."[111] In giving meaning to § 157 of the Judiciary Code, courts have suggested that withdrawal of the reference is appropriate when a bankruptcy court might otherwise need "to engage itself in the intricacies of nonbankruptcy law, as opposed to a routine application of a non-Bankruptcy Code federal statute to the facts of the case."[112] This part of section 157, though, has been read extremely narrowly.[113] In practice, we know that withdrawal of the reference is rare.[114] When faced with complex nonbankruptcy issues—as they are all the time—bankruptcy judges roll up their sleeves and jump in.

The natural inclination of the bankruptcy community is to seek to resolve nonbankruptcy-in-bankruptcy issues according to the needs of bankruptcy, deepening the divide between bankruptcy and nonbankruptcy law. Many of the examples of 'ordinary' state law decisions given above are—or were, until Supreme Court intervention—subject to uncodified bankruptcy glosses that override nonbankruptcy law in pursuit of outcomes more in keeping with bankruptcy's values. Thus, bankruptcy courts today split on whether they may 'recharacterize'– and thus send to the very bottom of the priority stack for payment—a secured loan that applicable state law would hold to be valid and enforceable, because bankruptcy, with its commitment to substance over form, holds the true nature of the underlying transaction to have been an equity contribution.[115] Bankruptcy judges short circuit the ordinary process of deciding whether a debtor has property interests in an asset when they order substantive consolidation of the debtor's estate with another entity in pursuit of the goal of "equitable

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[111] 28 U.S.C. § 157(d).

[112] *In re* Ames Dept. Stores Inc., 512 B.R. 736, 741 (S.D.N.Y. 2014) (quotations omitted).

[113] *See, e.g.*, *In re* Highland Capital Mgmt. L.P., Nos. 19-34054, 21-03003, 2021 WL 2850562, at *4 (Bankr. N.D. Tex. 2021); *but see* Casey & Macey, *Another Name*, *supra* note 43, at 1033 & n.81 (collecting cases).

[114] CHARLES TABB, THE LAW OF BANKRUPTCY 448 (2020) ("[T]he right to withdraw is almost never exercised in fact . . .").

[115] *In re* Dornier Aviation (N.A.), Inc., 435 F.3d 225, 233 (4th Cir. 2006); PEM Entities LLC v. Levin, 655 F. App'x 971 (2061); *but see In re* Fitness Holdings Intern., Inc., 714 F.3d 1141, 1148 (9th Cir. 2013) (explaining that an "equitable approach is inconsistent with Supreme Court precedent requiring us to determine whether a party has a . . . 'claim' . . . by reference to state law.").

treatment of all creditors."[116] And, at least until the Supreme Court's decision in *Law v. Siegel*,[117] bankruptcy judges would sometimes refuse to recognize creditors' claims valid under applicable state law where the claim was the product of inequitable conduct and no other appropriate remedy was available.[118]

The divide persists because of the instinctive deference that bankruptcy receives from those outside bankruptcy culture. Again, on paper, we see a wholly different set of assumptions from those actually shared by parties on the ground. Any question of law decided by a bankruptcy judge is to be reviewed de novo by each court to which it is appealed. Even further than this, when a district court is dealing with a *Stern* claim, it reviews the entirety of the bankruptcy court's findings of fact and conclusions of law de novo.[119] Judge Drain, though, observes that, "I think that most district judges . . . understand that bankruptcy is different, and they're quite deferential to bankruptcy judges when they're applying the Bankruptcy Code. If bankruptcy judges explain why they're applying the Code the way they are in a bankruptcy context, generally, they get affirmed."[120] And although it can be hard concretely to understand the prevalence of this kind of deference sub silentio, empirical studies of nonbankruptcy courts' approach to bankruptcy matters provide some useful indications. There is at least some evidence, for example, that courts of appeals panels are more likely to assign the task of writing an opinion in a bankruptcy matter to a colleague that has previously been a bankruptcy judge.[121] Likewise, in circuits that maintain bankruptcy appellate panels, circuit court judges are more likely to choose to cite an opinion from a BAP than from a generalist district court judge, and to do so more quickly and in greater depth.[122] Indeed, nonbankruptcy judges may be so accustomed to the idea that bankruptcy judges are experts that they assume expertise even as to questions that

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[116] *See, e.g.*, *In re* Bonham, 229 F.3d 750, 764 (9th Cir. 2000).

[117] Law v. Siegel, 571 U.S. 415 (2014).

[118] *See, e.g.*, *In re* Wash. Mut., Inc., 461 B.R. 200, 357 (Bankr. D. Del. 2011); *In re* Adelphia Comms. Corp., 365 B.R. 24, 73 (Bankr. S.D.N.Y. 2007).

[119] Executive Benefit Ins. Agency v. Arkison, 573 U.S. 25, 31 (2014).

[120] Drain, Harvey R. Miller Lecture, *supra* note 3.

[121] Jonathan Remy Nash, *Expertise and Opinion Assignment on the Courts of Appeals*, 66 FLA. L. REV. 1599, 1657 (2014).

[122] Jonathan Remy Nash & Rafael Pardo, *An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review*, 61 VAND. L. REV. 1745, 1803-06 (2008).

bankruptcy judges rarely rule on.[123]

At least for some, the situation that this Part has begun to describe will seem troubling. One way of confronting this tension is to seek to narrow the gap between bankruptcy and other fields. If bankruptcy does not actually possess features that materially set it apart from other law—if the ways in which it looks unlike other litigation are distinctions rather than differences—then it makes sense to reject methods of adjudication that do not line up with what we would find in those other contexts, including adjudication highly sensitive to the norms and goals of bankruptcy culture. This is the stance that I sketched out in *Against Bankruptcy Exceptionalism*.[124] But it is possible to push back even without taking the standpoint that bankruptcy is unexceptional. Another pathway, therefore, may concede that bankruptcy is special—or, at a very minimum, specialized and distinctive—and that it has both values and interests that need to be considered differently in bankruptcy as compared to other fora. Nevertheless, this need not cause to follow the consequences that some in the bankruptcy world might instinctively argue for. Notwithstanding bankruptcy's exceptional features, it has no claim to special treatment from those outside the bankruptcy world.

II. BANKRUPTCY AND EXPERTISE

Untangling the puzzle of bankruptcy's separation requires some additional examination of the role of expertise in bankruptcy law, practice, and culture. The last Part explained descriptively how bankruptcy's

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[123] Thus, Harvey Miller argues that "bankruptcy judges are not investment bankers and may not possess the financial expertise or the independent resources to determine plan feasibility." Harvey Miller, *Chapter 11 Reorganization Cases and the Delaware Myth*, 55 VAND. L. REV. 1987, 2002 (2002). At least in the chapter 13 context, though, the Supreme Court has said that it assumes bankruptcy judges are independently scrutinizing chapter 13 plans for compliance with the Bankruptcy Code even absent creditor objection. United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 276-77 (2010). Indeed, even as to much simpler chapter 13 plans, this is a dubious assumption. Jacoby, *supra* note 46, at 881; *cf. In re* Walkabout Creek Ltd., 460 B.R. 567, 577 (Bankr. D.C. 2011) (suggesting that "bankruptcy judges have only limited familiarity with how often a loan goes into default" and the Supreme Court has required bankruptcy courts to engage in "guesswork" in setting a *Till* rate).

[124] Seymour, *supra* note 1, at 1989-97.

specialization leads to the Ninth Avenue problem, or the bankruptcy community's tendency to see complex legal problems specifically through the lens of bankruptcy. It also showed that the bankruptcy community's preference is to seek to deploy solutions that match with its own conception of how the bankruptcy system—rather than the American legal system as a whole—should operate. Finally, it showed the level of deference which actors in the bankruptcy system are frequently afforded by nonbankruptcy colleagues. In acknowledging that these are practical realities, though, it queried how far they made sense. Bankruptcy exists quite closely (at least) to some cousin fields. Foundational theoretical frameworks describe bankruptcy as serving procedural rather than substantive goals. Bankruptcy judges decide routine common law and nonbankruptcy statutory claims every day.

At least some bankruptcy practitioners and commentators (and perhaps, once again, just as many from outside the bankruptcy world) will view these realities not as concerning but as desirable. Whether implicitly or explicitly stated, expertise plays a substantial role in informing and justifying such concepts of bankruptcy. Everyone agrees that bankruptcy judges are experts.[125] The attractions of giving leeway to those who know a field best are plain. We might assume, for example, that expert bankruptcy judges are more likely to get tricky and contestable questions of bankruptcy law right than generalist judges who must routinely be brought up to speed both on the substance of the complex and interconnected provisions of the Code

[125] *See, e.g.*, Pardo & Watts, *supra* note 1, at 424-25 ("Much like how specialized administrative agencies are experts in their own field, bankruptcy judges are 'expert in bankruptcy law.'"); Evan Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 871-72 (1994) ("[B]ankruptcy judges enjoy greater expertise with respect to the subject matter."). Generalist federal judges say so too, most clearly in a line of cases holding that district courts should be reluctant to withdraw the reference in a bankruptcy case from their "expert" colleagues. *See, e.g.*, *In re* Pruitt, 910 F.2d 1160 (3d Cir. 1990) ("statutory objective" of "using expertise of bankruptcy judges"); *In re* CIS Corp., No. 91-6366A, 1992 WL 176482 (S.D.N.Y. July 17 1992) (bankruptcy court is better placed than district court to determine whether an action is core); U.S. Life Ins. Co. v. Selman, No. 98-00003, 1998 WL 278259 (W.D. Va. May 26, 1998) ("Core bankruptcy proceedings are best resolved in bankruptcy courts. Bankruptcy judges have more expertise in such proceedings."); *see also*, *e.g.*, *In re* Kumar, No. 15-21159, 2016 WL 7178984, at *4 (S.D. Fla. 2016) ("Appellant should have raised [this] issue before the bankruptcy court, which has specialized knowledge of these matters.")

itself and on the way in which bankruptcy practice puts the Code to use.[126] Just as using experts promotes accuracy, it may also promote efficiency, as particular kinds of issues become familiar to the judge with a specialized bankruptcy docket in a way that might not be the case if the judge were grappling with the entire vast range of legal questions that come before the federal courts.[127] Equally, because expert bankruptcy judges are closer to the everyday realities of bankruptcy practice, deferring to them can make bankruptcy lighter on its feet—more able to adapt itself to be responsive to new challenges.[128]

There is thus real power to a story of bankruptcy law centered around its reliance on expert decision-makers. In the previous section, I tried temporarily to leave to one side arguments about whether the task entrusted to the bankruptcy judge is so unlike that of other federal judges so as to justify a methodological exceptionalism that gives effect to the purposes underlying the Code. Expertise-based theories of exceptionalism may be intertwined with but do not depend on claims that bankruptcy is different. Such theories can suggest that there is nothing inherently implausible about generalist judges handling bankruptcy cases alongside the rest of their caseloads—a model that some non-US legal systems adopt.[129] The task of the judge in bankruptcy is not so different from the task of a generalist judge that hears other civil cases that the generalist is unsuited for the role. Instead, proponents may argue that because bankruptcy has specialized and expert judges to deploy, it should leverage them fully. Bankruptcy is like any other field in having an underlying theoretical framework and its own distinctive policy objectives; although the Bankruptcy Code is broader than many other statutes, legislation across the board may have an internal logic much more accessible to those that specialize in the subject-matter.[130] Doing the work

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[126] *Cf.* Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 NYU L. REV. 1, 1-2 (1989) (describing transsubstantive arguments in favor of specialized courts to promote accuracy, stability, and efficiency in complex areas of law).

[127] *Id.*

[128] *Cf.* Lynn LoPucki, *Corporate Charter Competition*, 102 MINN. L.REV. 2101, 2132 (2018) ("Because Delaware has specialized courts, it can deliver flexible law that its courts adjust at the time they apply it.").

[129] In Canada, for example, bankruptcy jurisdiction belongs to the ordinary provincial courts of first instance. Jacob Ziegel, *Canada's Phased-In Bankruptcy Law Reform*, 70 AM. BANKR. L.J. 383, 389 (1996).

[130] Take, for example, Douglas Baird's claim that the unwritten principles of bankruptcy

of synthesizing and applying such a set of unwritten but underpinning theoretical principles is difficult. Bankruptcy judges are uniquely well placed to discern and apply unwritten principles in the context of bankruptcy, just as a tax court is to do so for the Internal Revenue Code, or the Court of International Trade is for the laws and treaties governing cross-border commerce. Appellate or other generalist courts that want to apply the best understanding of the law should pay great attention to the opinions of their expert colleagues. And those expert judges may deploy their understanding of the statute's logic and objectives to reach decisions that do not neatly sit with ordinary theories of statutory interpretation or with transsubstantive doctrines or precedents.

I began briefly to unpack expertise-based theories in prior work.[131] I try here, though, to consider them in some additional detail—especially given that they sit within a legal terrain that, even in a few short years, has sharply shifted.

A. The Uneasy Fit of Expertise and Constitutional Structure

Expertise-based theories of methodological exceptionalism run into difficulties. As a first observation, the Supreme Court's Article III jurisprudence makes clear that it jealously guards the role of the ordinary federal courts in determining federal law. Matters which are "the subject of a suit at the common law, or in equity, or admiralty" may not, at least in general, be "withdraw[n] from judicial cognizance" in the Article III courts.[132] Once the "basic judicial nature" of responding to claims about a litigant's harms is implicated, basic principles of constitutional structure require the Article III courts to engage.[133] On this depends "the integrity of the system of separated powers and the role of the Judiciary in that

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law and practice can be traced through a coherent line of evolution to the Statute of Elizabeth. Baird, *supra* note 10, at x. The principles Baird claims ground modern bankruptcy practice are distinct to bankruptcy. But, as Baird argues, there is nothing unusual about making use of internal organizing principles to understand various areas of law. *Id.* at xiii ("In every arena, judges must make sense of the various bits and pieces of the law. They need to find organizing principles that allow them to see a coherent picture.").

[131] Seymour, *supra* note 1, at 1986-89.

[132] Stern v. Marshall, 564 U.S. 462, 484 (2011) (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 284 (1856)).

[133] Saul Zipkin, *A Common Law Court in a Regulatory World*, 74 OHIO ST. L.J. 285, 320 (2013).

system."[134] In bankruptcy, that means that litigants have the constitutional right to a final determination by an Article III judge of claims not falling within the corpus of "public rights" that Congress may allocate away from the judicial branch.[135] More broadly, though, courts teach that supervision by the Article III courts is fundamental to the constitutionality of the whole bankruptcy edifice.[136]

For the energy spent on litigating *Stern* and its progeny, one might reasonably ask whether the Article III cases really matter. At times, it seems that they have been reduced to little but empty formalisms. *Stern* tells us, to be sure, that a bankruptcy court may not enter final judgment on Vickie Marshall's state law counterclaim, [137] yet the constitutional problem is cured if the bankruptcy judge instead issues proposed findings of fact and conclusions of law to the district court.[138] District court judges, in turn, routinely endorse bankruptcy court recommendations without edits.[139] Even if the debtor-plaintiff must jump through an additional procedural hurdle to secure an enforceable judgment, the true decision-maker—and thus, the likely contents of the decision—have not changed.[140] The *Stern*-as-empty-formalism account would argue that, although much disruption ensured in the wake of *Stern*, once lawyers and judges have figured out the right form of pleading or order for any dispute under the new rules, little bite to the rules it created is left. That is consistent with the *Stern* majority's somewhat defensive protest that its "narrow" decision "does not change all that much" about the division of labor between bankruptcy courts and

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[134] *Stern*, 564 U.S. at 503.

[135] *Id.* at 486.

[136] *In re* City of Detroit, Mich., 838 F.3d 792, 806, 811 (6th Cir. 2016) ("Article III supervision of bankruptcy judges is key to the constitutionality of the bankruptcy-court system").

[137] Stern v. Marshall, 564 U.S. 462, 469 (2011).

[138] Executive Benefits Ins. Agency v. Arkison, 573 U.S. 25, 36 (2014).

[139] Laura Bartell, *Stern Claims and Article III Adjudication – The Bankruptcy Judge Knows Best?*, 35 EMORY BANKR. DEV. J. 13, 14, 40 (2019).

[140] Since *Wellness* both holds that a bankruptcy court may also enter final judgment when a litigant impliedly consents to bankruptcy court adjudication, and takes a relatively broad view of when bankruptcy judges may construe such consent, the debtor-plaintiff may not even face this additional procedural hurdle. Wellness Inter. Network, Ltd. v. Sharif, 575 U.S. 665, 684-85 (2015).

district courts.[141] Arguably, though, such a minimalism account of *Stern* fails to take seriously what the Supreme Court was trying to achieve in its Article III jurisprudence.

Rather, taking the Court seriously requires recognizing that the Supreme Court's conception that the Article III courts have an indispensable role to play in finally determining bankruptcy disputes also says something about the methods that the Court expects to be used to decide those disputes. *Stern* does not insist on entry of final judgment by a district court simply because the Supreme Court wishes for bankruptcy courts to have an Article III rubber stamp. Such an arrangement would hardly be consistent with Justice Roberts's claim that district courts in such situations are acting as "guardian[s] of individual liberty and separation of powers."[142] Rather, the Supreme Court says that district courts are the "experts" at resolving types of claims like Vickie Marshall's counterclaim.[143] In other words, it expects district courts to go about the task of deciding *Stern* claims using the same generalist tools of adjudication that they would use in deciding any other civil claim.

That insight, though, cannot be cabined to *Stern* claims. But for the posture in which they arise, *Stern* claims look just like any other claim in bankruptcy. Had Pierce rather than Vickie Marshall been the debtor in bankruptcy, Vickie's tort claim would have been statutorily and constitutionally core.[144] And the result would be the same if the claim that Pierce asserted against Vickie in her own bankruptcy had been one that could not be adjudicated without resolving Vickie's claim.[145] If the Supreme Court expects that *Stern* claims in bankruptcy are to be decided using ordinary legal tools, it must expect the same thing for all of the other times that state law rights are determined in bankruptcy. The two are too closely intertwined to think otherwise. So concluding, though, leaves little role for the bankruptcy judge's expertise to play in decisions.

B. The Supreme Court's Intervention

A further strong signal that the Supreme Court pays little to attention

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[141] *Stern*, 564 U.S. at 502.
[142] *Id.* at 495.
[143] *Id.* at 494.
[144] *Id.* at 497.
[145] *Id.*

to expertise when considering how to resolve legal conflicts comes from the Supreme Court's recent and dramatic intervention into statutory interpretation and administrative procedure in *Loper Bright*.[146] Traditional understandings of *Chevron* deference have relied heavily on the significance of agency expertise.[147] The Supreme Court in *Chevron* instructed the federal courts to defer to agency interpretations of ambiguous statues at least in part because "agencies ⟦were⟧ more likely to get the answer right, given their expertise."[148]

Although *Loper Bright* continues to counsel "respect" for agency views of the law, it otherwise makes clear that the world has changed. The views of the experts cannot "supersede" the independent judgment of the Article III courts.[149] Any question of the "final 'interpretation of the laws' ⟦is to⟧ be 'the proper and peculiar province of the courts.'"[150] Even when a statute is ambiguous, the Court believes that it must have a "best meaning," that such meaning was "fixed at the time of enactment," and that the Article III courts, once again, are the experts in finding that best meaning.[151] The tools to use in finding best meaning are the tools of everyday statutory interpretation.[152] For the most part, it makes no difference that the question of law at issue concerns complex or technical subject-matter; such is "the ordinary diet of the law."[153] If the agency's reading of the law is different from the "best" reading of the Article III courts, "it is not permissible."[154]

Other outcomes are possible. With a clear statutory signal a court may conclude that Congress meant to depart from the usual rule that the Article III judiciary decides questions of law and instead delegate to an agency the

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[146] Loper Bright Enters. v. Raimondo, 133 S. Ct. 2244 (2024).

[147] Chevron, U.S.A., Inc. v. Nat. Res. Defense Council, Inc., 467 U.S. 837 (1984); Evan Criddle, *Chevron*'s Consensus, 88 BU L. Rev. 1271, 1286-88 (2008); *see, e.g.*, Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 651 (1990); *In re* New Times Secs. Servs., Inc., 371 F.3d 68, 82 (2d Cir. 2004); Hardin v. Bur. of Alcohol, Tobacco, Firearms and Explosives, 65 F.4th 895, 899 (6th Cir. 2023).

[148] *Cf.* Arangure v. Whitaker, 911 F.3d 333, 341 (6th Cir. 2018) (Thapar, J.) (citing *Chevron*, 467 U.S. at 844-45, 865).

[149] *Loper Bright*, 144 S.Ct. at 2258.

[150] *Id.* at 2247 (quoting The Federalist No. 78 (A. Hamilton)).

[151] *Id.* at 2266, 2271, 2273.

[152] *Id.* at 2266.

[153] *Id.* at 2267.

[154] *Id.* at 2266.

power to give meaning to a statute.[155] And *Skidmore* deference persists: courts acknowledge agencies' "body of experience and informed judgment,"[156] and may find an agency's interpretation of the law a "informative"—though not binding—"to the extent it rests on factual premises within the agency's expertise."[157] But the short term consensus is that *Loper Bright* marks a sharp departure, if not exactly from the path that the Supreme Court has been on in recent years, at least from traditional understandings of the relationship between agencies and courts.[158]

Loper Bright translates to bankruptcy. For all that the Supreme Court's decision was partisan and controversial, it is possible to take principles from it that apply, in a measured way, in the bankruptcy space —and, potentially, that do so with less of the controversy that has attended the Supreme Court's remaking of administrative law. In some ways, administrative agencies provide a particularly useful comparison to the world of bankruptcy. One potential response to the argument that bankruptcy litigation should be treated, for methodological purposes, like other types of civil litigation, is to say that bankruptcy judges really are required to do quite different work than other federal judges.[159] Bankruptcy judges conduct surgeries, not autopsies: they must keep pace in real time with all of the legal issues thrown off by a reorganizing company, all while steering the parties toward the ultimate end goal of a value-maximizing negotiated deal.[160]

There are reasons to be skeptical of that response, though. Federal district court judges must also sometimes be surgeons.[161] Federal judges supervise organizations as complex as school systems and prisons, making decisions, for example, about the number of prisoners that a prison system must release in order to remedy constitutional violations.[162] Federal court-

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[155] *Id.* at 2263.

[156] *Id.* at 2277 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

[157] *Id.* (quoting Bur. of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89, 98 n.8 (1983)).

[158] Thus the dissent's stare decisis analysis in *Loper Bright* described it as a "massive shock to the legal system." *Id.* at 2307 (Kagan, J., dissenting).

[159] *See* Seymour, *supra* note 1, at 1992 (describing argument that bankruptcy cases are "uniquely complex").

[160] *Id.*

[161] Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 377 (1982) ("[J]udges actively supervise the implementation of a wide range of remedies designed to desegregate schools and to reform prisons and other institutions.").

[162] Brown v. Plata, 563 U.S. 493 (2011).

overseen desegregation orders were once a critical tool for reshaping school systems across the country; many remain active today.[163] At best, arguments that highlight the bankruptcy judge's role in managing crises in real time can show that bankruptcy judging exists at a somewhat different point along a spectrum that requires judges at different times to decide particular kinds of disputes or address particular kinds of controversies. And what conclusions to draw from this may be quite muddy. A non-exceptionalist is likely to argue that more is necessary to show that bankruptcy can justifiably deploy its own approach to administering the Bankruptcy Code. Even so, many bankruptcy practitioners may fairly argue that this difference between bankruptcy and nonbankruptcy litigation, albeit a difference of degree rather than kind, is nonetheless sufficient to justify variations in methodological approach.[164]

Much more than with federal district court judges, though, matters that exhibit the features that are said to make bankruptcy special are squarely within the everyday diet of administrative agencies. Bankruptcy courts and agencies both oversee "complex and interdependent regulatory" regimes that they "know . . . inside-out," and that present continual "trade-offs between competing goods."[165] Agencies, as with bankruptcy courts, must make things work in real time, and must deal with a multiplicity of fact patterns that the statute provides no clear guidance on how resolve and that Congress could never have anticipated at the time that it legislated. Indeed, bankruptcy scholars have long explored the analogy between the work of bankruptcy courts and agencies.[166] Douglas Baird and Tony Casey note differences but also parallels.[167] Bankruptcy courts, unlike agencies, typically make decisions by formal adjudications and render opinions that have the force of law.[168] Bankruptcy court and agency decision-making, though, share a preference for "flexibility, expertise, and institutional competence."[169]

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[163] *See* Yue Qiu & Nikole Hannah-Hones, *A National Survey of School Desegregation Orders*, PROPUBLICA (Dec. 23, 2014), https://projects.propublica.org/graphics/desegregation-orders.

[164] *Cf.* Seymour, *supra* note 1, at 1992.

[165] Loper Bright Enters. v. Raimondo, 133 S. Ct. 2244, 2294 (2024) (Kagan, J., dissenting).

[166] *See, e.g.*, Coordes, *supra* note 1, at 321.

[167] Baird & Casey, *supra* note 8, at 2013.

[168] *Id.*

[169] *Id.*

Baird and Casey argue that bankruptcy cases, like the remit of agencies, are "highly complex and not particularly amenable to inflexible rules" or "top-down directives."[170] Pardo and Watts argue that such features in fact render bankruptcy policymaking *better* suited to an administrative agency than courts, and sketch out proposals for how policymaking power might be transferred away from courts to a federal bankruptcy agency.[171] After *Loper Bright*, these arguments seem to point in the other direction. At least when legal questions arise, the statutes that authorize agency action are, for the most part, to be interpreted using the ordinary legal tools of statutory interpretation notwithstanding the agency's preference, based on its expertise, for a different reading. So too with the Bankruptcy Code.

Of course, many will reasonably argue that *Loper Bright* was wrongly decided and should not reflect the law on judicial deference to agency interpretations of ambiguous statutes. Ultimately, I do not intend here to take a position on whether *Loper Bright* or its critics are correct.[172] The point is that if *Loper Bright* is the law of the Administrative Procedure Act, it seems that similar principles must likewise be the law of the Bankruptcy Code. Indeed, key arguments that proponents of *Chevron* deference have made against the pathway the Supreme Court took in *Loper Bright* fail to translate to the bankruptcy space.[173] Pardo and Watts identify six interests

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[170] *Id.*

[171] Pardo & Watts, *supra* note 1, at 445.

[172] Indeed, I try to make no normative claims about administrative law at all, and ask for "forgiv[[eness]]" to the extent that I have inevitably failed to reflect the complexity of these deep and longstanding debates in this short section. *Cf.* Bradt et al, *supra* note 28 (asking that bankruptcy scholars are "forgiving" of any superficialities in understanding of civil proceduralists commenting on bankruptcy law). I have claimed that what I call "non-exceptionalism" *is* a better way to approach unsettled questions of bankruptcy law than one that gives significant deference either to bankruptcy's distinctive culture or to the (admittedly expert) actors that are immersed in it. As this Part argues, though, even one who believes that the dissenters in *Loper Bright* should have carried the day may find that the same reasoning does not obtain in bankruptcy.

[173] One set of arguments regarding *Chevron* deference for agencies that it is difficult to know how to translate into the bankruptcy context is the claim that deference entrenches "systematic bias." Loper Bright Enters. v. Raimondo, 133 S. Ct. 2244, 2285 (2024) (Gorsuch, J., concurring). As courts defer to agencies, they entrench a bias in favor of the government and against private parties challenging the government. Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. LAW. REV. 1187, 1211-12 (2016). Bias is at least a less prominent concern in bankruptcy. *Chevron* required deference to agency interpretation of statutes in cases in which the agency itself was a party to the litigation. The notion that

that are served by broad delegation to administrative agencies.[174] The first, expertise, we can grant as equally attributable to bankruptcy judges.[175] The last, flexibility, is at least better served by emphasizing the role of creative judging sensitive to bankruptcy culture than by *Loper Bright*'s ideal of a statutory text with a meaning "fixed at the time of enactment."[176] The other interests, though, largely fail to translate. In particular, a desire for uniform outcomes—an interest recognized, although dismissed, by the Court in *Loper Bright*– tends to point against a significant role for bankruptcy culture in adjudications.[177] Uniformity is best achieved by the promulgation of precedents from higher appellate courts, rather than decisions from individual bankruptcy judges which may sometimes vary as to important questions even among judges on the same court. Likewise, defenders of *Chevron* deference such as Justice Kagan argue that administrative agencies are democratically accountable in a way that judges are not.[178] And because

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agencies are democratically accountable carries with it the notion that agencies will have their own policy objectives that they will try to entrench via statutory interpretation. Bankruptcy judges, in contrast, are entrusted with the neutral task of adjudication; they are not parties to the case and are not charged with implementing an agenda by political superiors. For all that, I have suggested that bankruptcy judges face considerable pressure to make decisions consistent with the objectives of bankruptcy culture and the preferences of the bankruptcy bar, in a dynamic at least reminiscent of claims that courts like the Federal Circuit have been captured by the interests of their chief constituents. Seymour, *supra* note 1, at 1960-64.

[174] Pardo & Watts, *supra* note 1, at 445.

[175] *Id.* at 424. Pardo and Watts query this, though, suggesting that the number of actors within the bankruptcy system means that "subject-matter expertise in bankruptcy is highly diffuse and polyphonic, with no single institution serving as the clear locus of expertise." *Id.* at 430. We might, for example think of the Office of the U.S. Trustee as similarly expert specialists in the administration of bankruptcy cases. Judges and the United States Trustee, though, frequently butt heads. Seymour, *supra* note 1, at 1989.

[176] *Cf.* Pardo & Watts, *supra* note 1, at 443 (describing how the benefits of flexibility are invoked by proponents of congressional delegation of policymaking). Pardo & Watts argue, though, that bankruptcy judge adjudication cannot serve flexibility interests as well as agency adjudication; at the very least, bankruptcy courts are bound by precedent. *Id.* at 444.

[177] *Cf. id.* at 434 (describing uniformity as a benefit of congressional delegation of policymaking); Loper Bright v. Raimondo, 144 S.Ct. 2244, 2267 (2024).

[178] *Loper Bright*, 144 S.Ct. at 2294 (Kagan, J., dissenting); *cf.* Pardo & Watts, *supra* note 1, at 432 (describing democratic accountability as a benefit of congressional delegation of policymaking).

agencies consider public comments and make rules with prospective effect rather than retroactively resolve cases and controversies, delegation to administrative agencies serves principles of transparency and clarity that, again, do not translate to the bankruptcy context.[179]

III. BANKRUPTCY AND CONFLICTS

The Supreme Court thus gives bankruptcy exceptionalism little to work with in crafting an argument that bankruptcy judges should be able to adjudicate cases in a way—based on their presence on the ground and their deep understanding of the bankruptcy space—that is sensitive to their best sense of bankruptcy's underlying policies and purposes. The objectives of the bankruptcy system carry no special weight when some aspect of bankruptcy law comes into conflict with nonbankruptcy rules. This Part shows that the Supreme Court's approach to resolving conflicts between the provisions and objectives of different fields of law is markedly different from the instincts of many in the bankruptcy community. Once again, policy objectives matter less than ordinary tools of statutory interpretation. The principles that ground the statutory scheme do matter, but only to the extent that Congress has given effect to them through its enactment of the statutory text viewed as a whole.

I do not mean to overstate the divide between what the Supreme Court wants and what bankruptcy judges do. Critiquing methodological exceptionalism is not the same thing as suggesting that bankruptcy judges view themselves as unbound by the statutory text or are searching for something other than their view of its best meaning. Justice Scalia had a point when he suggested that bankruptcy is a more "unruly" area of law than many with which the Supreme Court contends; for all that, it is important not to caricature the way that bankruptcy judges decided cases.[180] For all that, bankruptcy judges report being "cautious," "careful," "judicious," and "measured" when considering questions like how to use equitable power to

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[179] *Cf.* Pardo & Watts, *supra* note 1, at 439-43 (comparing accessibility and transparency of administrative agencies to bankruptcy courts).

[180] *Cf.* RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 649 (2012) ("The Bankruptcy Code standardizes an expansive (and sometimes unruly) area of law, and it is our obligation to interpret the Code clearly and predictably using well established principles of statutory construction.").

gloss the Code.[181] They do not tear up the text, make decisions based on pure policy, or cavalierly sweep aside legal constraints to reach a preferred outcome. The difference instead is in center of gravity. Bankruptcy judges may have a different view to the Supreme Court on how soon and how far a judge may go to bring in her proper sense of statutory purpose given the bounds of the text. Although disputes can, of course, frequently be resolved without looking beyond the four walls of the Code, bankruptcy judges are at least occasionally prepared to view the Code instead as a source of limits, and to ask what residual space is left to exercise discretionary or equitable power once those limits are faithfully given effect. Judge Drain, for example, has characterized one view of bankruptcy as:

> Limited by the plain language of the Code, where it is indeed plain, and fulfilling certain basic principles such as the fair treatment of the different types of claims, the maximization of value and preservation of jobs, the fresh start, and the prevention or redress of behavior harmful to creditors, the parties and ultimately the court can find authority to resolve financial distress by viewing the Code as a flexible instrument.[182]

Cautious and conservative as this might sound compared to bankruptcy's New Deal era heyday, this Part will show that, given the Supreme Court of today, such an approach by itself is methodologically exceptional.

Once, even the Supreme Court viewed things differently. *Pepper v. Litton* is a famous example of the power that bankruptcy once had to ensure that its policy commitments carried the day.[183] It is an useful opening point because of how starkly it illustrates one potential pole in this debate: a court that is sharply concerned to furthering the objectives of bankruptcy law, as those are understood through the lens of uncodified common law principles and maxims that are at the heart of bankruptcy practice. In a conflict between state law and the policy of the applicable statutes—the 1898

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[181] Diane Lourdes Dick, *Equitable Powers and Judicial Discretion: A Survey of U.S. Bankruptcy Judges*, 94 AM. BANKR. L J. 265, 293 (2020).

[182] Drain, Harvey R. Miller Lecture, *supra* note 3.

[183] Pepper v. Litton, 308 U.S. 295 (1939).

Bankruptcy Act and 1938 Chandler Act, predecessors to the modern Code—bankruptcy policy won the day resoundingly.[184]

The conflict was a simple one. Under Virginia state law, Scott Litton held an enforceable judgment for payment of a salary claim against the corporation of which he was the controlling shareholder.[185] And, just as with the Code today, the Chandler Act left to state law whether a creditor's claim should be allowed.[186] The claim, though, was part of a "planned and fraudulent scheme" to ensure that the claim of a lessor went unpaid.[187] Justice Douglas, in reviewing that scheme, concluded that though it was conceivably "technically legal,"[188] permitting it to stand would squarely conflict with "ancient" precedents of debtor-creditor law—the same principles of fraudulent conveyance law traceable back to the Statute of Elizabeth that Douglas Baird explains are at the historical core of the unwritten law of bankruptcy.[189] Those principles required scrutiny of whether the creditor had unfairly taken an advantage in the circumstances surrounding the assertion of its claim—even if the text of the Chandler Act did not.[190] Accordingly, "[j]udges could do whatever was necessary to protect the process."[191] Disallowing or subordinating claims was merely one instance of broad-ranging power to ensure that the objectives of the bankruptcy laws were not frustrated by sharp practice from controlling stakeholders.[192] And where state law appeared to tolerate such misbehavior, or otherwise stood in conflict with the proper running of the bankruptcy system, it had to give way.

Bankruptcy judging today, therefore, looks quite different from the "heavy hand" of Justice Douglas in *Pepper v. Litton*. Even if contemporary Supreme Court precedent were to permit it, few would claim that the objectives of the Bankruptcy Code are so muscularly instantiated into

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[184] Bankruptcy Act of 1898, ch, 541, Pub. L. No. 55-541, 30 Stat. 544 (1898); Chandler Act, ch. 575, Pub. L. No. 696, 52 Stat. 840 (1939).

[185] *Id.* at 296. Grounds to set aside the judgment apparently existed, but the trustee and the sole creditor that the trustee represented were estopped from challenging it. *Id.* at 300.

[186] Chandler Act, ch. 575, Pub. L. No. 696, § 57(d), 52 Stat. 866 (1939) ("Claims which have been duly proved shall be allowed."); *cf.* 11 U.S.C. § 502.

[187] *Pepper*, 308 U.S. at 297-99.

[188] *Id.* at 312.

[189] *Id.* at 297; Baird, *supra* note 10, at 78-79.

[190] Baird, *supra* note 10, at 79.

[191] *Id.* at 85.

[192] *Id.* at 79.

federal law as to override any conflicting mandates of nonbankruptcy law, no matter how clearly stated. Instead, the best accounts of how bankruptcy judges may purposively give effect to the Code's underlying but unwritten policy commitments focus on particular situations when those commitments may come to the fore. Ambiguity is a common theme. Laura Coordes shows how bankruptcy courts may deploy equity when faced with a provsion of the Code that is "capable of multiple reasonable meanings;" it may choose an "equitable meaning"—that is to say, one that "ensure⟦s⟧ that the statute, as applied, carrie⟦s⟧ out its purpose" when that meaning is "contextually supported by the language."[193] Consistent with the notion that creative and flexible interpretation in bankruptcy is designed to let the specialized and expert bankruptcy community ensure that bankruptcy law develops consistent with the community's own understanding of bankruptcy's purposes, Coordes argues that doing so "allow⟦s⟧ for considered judgment from a human being—and in the case of bankruptcy, a human being who is an expert in bankruptcy law—rather than a mechanical application of the statutory text."[194] Jurisprudentially, we might describe this ambiguity-centered approach as somewhat Hartian. Bankruptcy judges look for the place where the rules of recognition run out and judges must make new law, making choices by using all the tools available to them.[195]

Even if we view the argument above from the Supreme Court's perspective, this is not plainly wrong. Supreme Court decisions not infrequently find and give effect to policy as it is expressed through the text of the statute.[196] I have previously noted that this is particularly true of the Supreme Court's bankruptcy jurisprudence.[197] Equally, textualists often emphasize that context matters, just as they acknowledge that statutory texts are not so determinate as to leave the interpreter entirely without play in the joints when construing them,[198] or that courts' decisions must "nihilistic⟦ally⟧" embrace even catastrophic policy consequences that Congress cannot be thought to have intended in service of fidelity to the

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[193] Coordes, *supra* note 1, at 316-17.

[194] *Id.* at 317.

[195] *Cf.* H.L.A. HART, THE CONCEPT OF LAW 145 (2d ed. 1994).

[196] Seymour, *supra* note 1, at 1953.

[197] *Id.*

[198] Tara Grove, *Which Textualism?*, 124 HARV. L. REV. 265, 279-85 (2020); Richard Re, *The New Holy Trinity*, 18 GREEN BAG 407, 417-18 (2015).

statutory text. [199]

But textualism's fluidity cannot not be overstated. Ambiguity provides at best very limited license to make policy choices. First, building on the preceding section's discussion of *Loper Bright*, the Supreme Court no longer holds that gaps in statutes governing administrative agencies provide those agencies with license reasonably to fill the gaps based on their view of the statute's design and purposes.[200] Just because Congress has used ambiguous language in a statute does not mean that it is inviting the administering entity to make its own policy calls when giving meaning to the text.[201] Congress may sometimes choose to delegate law or policymaking authority, but an ambiguity is not by itself such a delegation.[202] In other words, ambiguities are treated no differently than any other situation that the court confronts: "The very point of the traditional tools of statutory construction—the tools courts use every day—is to resolve statutory ambiguities."[203] What this means in practice is that the Supreme Court is likely to read down or ready away the ambiguity, concluding that the statute still has a best meaning.[204] The Court teaches, for example, that "congressional silence often reflects an expectation that courts will look to the common law to fill gaps in statutory text."[205] Indeed, it can be quite creative in so doing, searching for "helpful guidance" from analogous contexts.[206] The Court is highly skeptical of attempts at resolving ambiguities or filling gaps that instead look to broad

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[199] *Cf. In re* Jevic Holding Corp., 787 F.3d 173, 185 (3d Cir. 2015), rev'd, 580 U.S. 451 (2017) (concluding that "national bankruptcy policy" is not so "nihilistic" to require the conclusion that the text of the Bankruptcy Code, fairly interpreted, prohibits priority-skipping structured dismissals in every case). The Supreme Court, of course disagreed, reversing the Third Circuit.

[200] *Compare*, *e.g.*, Lopez v. Davis, 531 U.S. 230, 242 (2001) (asking whether the agency has "filled the statutory gap 'in a way that is reasonable in light of the legislature's revealed design.'") *with* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2266 (2024) ("[C]ourts use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity.").

[201] Loper Bright Enters. v. Raimondo, 133 S. Ct. 2244, 2266 (2024).

[202] *Id.*

[203] *Id.*

[204] *See, e.g.*, SAS Institute, Inc. v. Iancu, 584 U.S. 357 (2018); SCA Hygiene Prods. Aktiebolag v. First Quality Baby Products, LLC, 580 U.S. 328 (2017).

[205] Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 447 (2003).

[206] *Id.* at 448 (using common law of master-servant relationships to help understand ADA's use of term "employee" even though the case dealt "with a new type of business entity that has no exact precedent in the common law.").

invocations of statutory purpose.[207] Ambiguity and statutory gaps, in the Supreme Court's view, are a much less common than the bankruptcy community might think. And ambiguity also has much less significant effects than bankruptcy exceptionalism would hold. Bankruptcy lawyers may sometimes assume that an ambiguity or gap means they have arrived in the Hartian penumbra; the Supreme Court rarely thinks so.[208]

The Supreme Court's approach to conflicts between statutes tracks its approach to ambiguity. In *Epic Systems v. Lewis*, the Court identified exactly what it feared were it to permit agencies steeped in one particular field to weigh policy interests when determining how to resolve an apparent conflict with another statute.[209] Lacking "any particular interest or expertise with a second statute, ⟦it⟧ might . . . seek to diminish the second statute's scope in favor of a more expansive interpretation of its own - effectively 'bootstrap⟦ping⟧ itself into an area in which it has no jurisdiction.'"[210] The majority opinion in *Epic Systems* thus reads as a relatively dry analysis of statutory text. That is so despite an exceptionally strong statement *in the statutory text itself* of the purposes that the National Labor Relations Act seeks to serve—declaring in its opening section that "⟦i⟧t is hereby declared to be the policy of the United States to eliminate . . . obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining"—of a kind that is wholly absent from the Bankruptcy Code.[211] Rather than thinking about statutory purpose, the Court resorts to the ejusdem canon to suggest that collective litigation is not the kind of protected activity included in the NRLA's catch-all provisions.[212] The Court's opinion examines the remaining provisions of the NRLA and finds no references to rules governing collective litigation.[213] It compares to other

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[207] *Id.* at 446-47; Dutra Group v. Batterton, 588 U.S. 358 (2019). As Justice Gorsuch explained in his *Purdue Pharma* opinion, no statute pursues a single policy at all costs. The question is always how far the statute has implemented any given policy, and how far it has made exceptions to serve other competing ends. Harrington v. Purdue Pharma L.P., 144 S. Ct. 2071, 2084 (2024).

[208] *Cf. supra* note 195 and accompanying text (discussing H.L.A. Hart's rule of recognition).

[209] Epic Systems v. Lewis, 584 U.S. 497, 520 (2018).

[210] *Id.*

[211] 29 U.S.C. § 151.

[212] *Epic Systems*, 584 U.S. at 512.

[213] *Id.* at 513.

statutes that do include such specific provisions.[214] And it resorts to the broader, contextual canon that a statute usually does not "hide elephants in mouseholes."[215] It is this combination of "textual and contextual clues" that resolves the case.[216] Here, as with statutory ambiguities, and as with the Court's skepticism of delegation to experts, there is little reason to suppose that bankruptcy will be treated any differently. In approaching all of these tasks, and, more broadly in determining the scope for bankruptcy judges to give effect to bankruptcy's underlying purposes in their decision-making, bankruptcy is simply 'ordinary' law.

Describing bankruptcy as 'ordinary' law may seem frustrating and unsatisfying to observers who know that the proceedings that they will see walking into a bankruptcy courtroom will look (and even feel) very different from those in the district courtroom up the stairs or down the street. It is fair to seek legal frameworks that can explain these intuitive distinctions. One possibility is for bankruptcy scholars to engage more closely with the rich literature developed by civil proceduralists on managerial judging.[217] Managerial judging reflects the reality that judges' roles in administering litigation and managing cases is as critical as their role as adjudicator.[218] The judge's oversight of a myriad of nonadjudicative matters—such as deciding the pace at which the case will proceed, regulating how much discovery will take place, and deciding which parties are essential to the case and when they should be heard—all have important consequences for the outcome of litigation.[219] Managerial judging in bankruptcy will, by necessity, look very different in the work of the judge as manager in much other civil litigation. Whether that makes bankruptcy exceptional remains an open question. Just as the work of judge in bankruptcy as manager looks distinctive, so too will the managerial work of a judge in a pro se civil rights case look very different from the managerialism of a judge in a complex commercial dispute. In other words, it may be the managerial nature of modern judging—which inherently invites judges to exercise enormous discretion in achieving just and efficient

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[214] *Id.* at 514.

[215] *Id.* at 515.

[216] *Id.* at 516.

[217] Resnik, *supra* note 161, at 378; *see, e.g.*, Samuel Issacharoff & Troy McKenzie, *Managerialism and its Discontents*, 43 REV. LITIG. 1, 2 (2023).

[218] Resnik, *supra* note 161, at 378.

[219] *See* Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 WASH. U.L. REV. 1027, 1027 (2013).

resolutions—that makes all areas of law seem almost sui generis.

Although civil proceduralists have debated the extent to which federal judicial management should be more rulebound, managerial judging—especially in bankruptcy – remains highly compatible with judicial creativity.[220] The judge as manager must of course still operate within the constraints of the Bankruptcy Code, but there remains a looseness to those constraints less present in the judge's role as adjudicator. Many decisions around case management are committed wholly to judicial discretion.[221] And notably, managerial creativity is particularly prized in the types of complex nonbankruptcy civil litigation that similarly require the judge to act as circus ringleader.[222] Because bankruptcy is so focused on the process of negotiating a deal, meanwhile, managerial judging concerns aspects of the judicial role that are absolutely central to the case.[223] Steering the parties toward an efficient settlement has been at the heart of conceptions of managerial judging from the earliest days of scholarship on the subject.[224] Thinking through the role of the bankruptcy judge as manager, and comparing her tasks to those of her district judge colleagues across the hallway, will be an essential part, therefore, of understanding bankruptcy's role in the broader American civil litigation system.

CONCLUSION

Bankruptcy lawyers naturally think that bankruptcy is important and, just as naturally, are strongly attuned to its purposes and objectives, as well as the deeper unwritten principles that underlie the Bankruptcy Code. They

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[220] Steven Baicker-McKee, *Reconceptualizing Managerial Judges*, 65 AM. U.L. REV. 353, 360-65, 385 (2015).

[221] *Id.*

[222] Abbe Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 NYU L. REV. 1, 58 (2021) ("MDL's hallmarks of unbridled creativity and innovation are highly prized among MDL judges. The JPML even awards an 'MDL Spirit Award.' The consistent message is that these mega-proceedings need different procedures than the Federal Rules currently offer, but that special MDL rules might not suffice because each case is so different.").

[223] Judge Klein describes core aspects of managerial judging in his interview for this symposium. Nancy Rapaport, *A Life in Service: Interview with the Hon. Christopher Klein*, _ AM. BANKR. L.J. _ (2024).

[224] Resnik, *supra* note 161, at 380.

have good reason, as this symposium suggests, to hope that those objectives will "win" when the Bankruptcy Code stands in conflict with nonbankruptcy law. But it is not a simple matter to determine when that is so. The intuitive answer that it will depend on the strength of the policy interests that bankruptcy law has is one wholly rejected by the Supreme Court. Equally – regardless of whether or not one views bankruptcy as "exceptional" or not – the Court has signaled that, in resolving such questions, it will place little weight on those features of bankruptcy law that render it distinct from other types of civil litigation. Legal conflicts will require careful statute-by-statute parsing, to be resolved using ordinary tools of statutory interpretation. The conclusion that there is nothing special to see when considering how bankruptcy judges must resolve legal conflicts, though, says nothing about the vast range of managerial tasks that the bankruptcy judge must undertake. It is worth thinking through whether the judge's duties as manager are a place where creativity and flexibility may more fruitfully be deployed in service of bankruptcy's underlying objectives.

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