Revisiting, Reframing, and Revitalizing Bankruptcy Scholarship

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A great luxury of an academic career is the implicit permission – indeed, the explicit expectation – to reconsider settled ideas. For instructors, the opportunity arises every academic year. To fairly address the probing questions of each new crop of law students, to catalyze their learning and expand their understanding, law professors must stay on the cutting edge of legal innovations. This requires not only familiarity with established theories, but also awareness of new arguments and thoughtful reflection on how those arguments fit within the larger legal context. As in every field of inquiry, the acquisition of knowledge is iterative, requiring scholars to revisit prior conclusions, both their own and those made by others. The most exciting breakthroughs in our understanding of the world come in moments when researchers successfully disprove a long-accepted theory, demonstrating that recognized limitations or explanations of the world simply no longer apply.

Often these breakthroughs come about aided by technological innovations or shifting cultural norms. In the field of social science, where observations and experiments involve people and institutions, changes in societal values and expectations also play a major role in knowledge creation and development. As the needs and capabilities of society change, so does our understanding of how to fulfill societal goals. Law is susceptible to social changes, albeit balanced against the bulwarks of statutory and judicial precedent. Thus, new insights are always possible, even in long-established, deeply theorized, and broadly researched subjects.

This edition marks the 100th anniversary of the *American Bankruptcy Law Journal* (*Journal*).[1] Originally formed to report on annual conferences organized and attended by bankruptcy referees under the 1898 Bankruptcy Act, the publication quickly expanded its base of readership and the substance of its content. Articles in the *Journal* responded to legal developments over time to increase readers' understanding of those developments, their implications, and their relevance to the broader practice of law.

From the perspective of observers reading the *Journal* in 1926, modern bankruptcy law would be virtually unrecognizable. The speed and precision of today's practice – aided by word processors, electronic communication, and the assistance of artificial intelligence – would defy the imagination of the *Journal*'s first contributors. Likewise, the widespread application of bankruptcy law to individual consumer debt, complex corporate conglomerates, and cross-border cases would be staggering to its early readers. Many of the early ideas, theories, and explanations detailed in its first publications are hopelessly out of date, replaced by a new understanding of the law that reflects subsequent changes in substance and practice.

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[1] The publication was known as the *Journal of the National Association of Referees in Bankruptcy* until 1971. *History of the American Bankruptcy Law Journal* (https://www.ablj.org/history-of-the-american-bankruptcy-law-journal/)

The contrast between snapshots at either end of a 100-year-period is striking, but the evolution of ideas is continuous. Those of us steeped in bankruptcy and commercial law scholarship can observe incremental changes on a year-to-year basis, as new practices develop and are embraced or discarded, sometimes overturned or upheld by court precedent and other times enacted or explicitly rejected by legislative intervention. Often practitioners are at the heart of these changes. When advocating for clients, they may test the limits of accepted legal understanding and thereby help to shape the law. Certainly judges also play a central role, as their opinions form the framework of the common law system. For scholars, doctrinal shifts may be traceable through our academic writings, as we recognize innovations, anticipate developments, and advocate for reforms to advance societal goals. It's awfully satisfying to be right in such predictions and particularly gratifying to be heard in our advocacy. But most scholars would concede that they are not infallible; it's a sign of scholarly maturity to recognize and revisit prior conclusions that need correcting.

In this introduction to the Symposium edition of the *Journal*, I reconsider a familiar typology within corporate bankruptcy scholarship concerning the law's underlying purpose. This typology was formative in the development of my understanding of the field, yet the more I studied what purported to be a static division, the more I came to appreciate its dynamic character. I begin by describing the typology and tracing its evolution before suggesting a new framework for analyzing corporate bankruptcy scholarship. I argue that contemporary scholarship is better understood as reflecting a myriad of perspectives which blend and amplify each other as often as they conflict. I conclude with summaries of the articles contributed by our Symposium participants: Melissa Jacoby, Bruce Markell, John Pottow, and Robert Rasmussen.

Revisiting Prior Scholarship

I had the honor of publishing my very first article in the *Journal* over a decade ago.[2] I wrote about the implications of *Stern v. Marshall*,[3] the infamous Supreme Court case in which a 5-4 majority found the congressional grant of authority to bankruptcy judges unconstitutionally broad.[4] The relevant statute was a product of compromise by a Congress that saw a need to promote bankruptcy referees but was disinclined to appoint hundreds of new judges with lifetime tenure under Article III.[5] Without such Article III status, the *Stern* opinion concluded, bankruptcy courts could not exercise the "judicial Power of the United States," which the Court interpreted to include an entry of final judgment on state common law claims.[6]

A veritable firestorm of objections to the bankruptcy court's authority ensued. The opinion provoked a great deal of consternation as practitioners, judges and commentators grappled with its implications. How much would the Supreme Court's

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[2] Brook E. Gotberg, *Restructuring the Bankruptcy System: A Strategic Response to* Stern v. Marshall, 87 AM. BANKR. L.J. 191 (2013).
[3] 564 U.S. 462 (2011).
[4] *Id.* at 487.
[5] 28 U.S.C. § 157.
[6] Stern, 564 U.S. at 487.

limitation on the bankruptcy court's authority impact its ability to function? Could bankruptcy courts still issue final adjudications in common avoidance actions, like fraudulent conveyance and preference claims?[7] How much additional work would the district court be expected to take on? What would this do to the speed and efficiency of bankruptcy cases? Could the parties consent to bankruptcy court jurisdiction in the interests of a speedier resolution?

Happily, the furor and the dismay were largely unnecessary, as the actual impact of the *Stern* decision on the bankruptcy system proved to be minimal. A few years later, the Supreme Court confirmed that bankruptcy courts could adjudicate *Stern* claims with parties' knowing and voluntary consent,[8] a contingency that covered most relevant cases. Where the parties did not consent, the bankruptcy court's opinion could serve as a "report and recommendation," which the district court could swiftly review and – in most cases – rapidly accept.[9] There was no need to "restructure the bankruptcy system," as my provocative article suggested. So much for my carefully crafted scholarly solution.

I would certainly not write the same article today.[10] My view of the law has changed: I would likely not make the same policy recommendations, even if presented with another constitutional challenge to the bankruptcy court's authority. When imagining the best approach to such a crisis, I would be mindful of considerations I was not cognizant of before. I would approach the problem from a more informed perspective than I had as an emerging scholar. Indeed, reading that article now is nearly as painful as reviewing my first semester's teaching evaluations. But it does serve as a helpful signpost to reflect on what I have learned and how my analysis would be different today, with the benefits of greater exposure to ideas, increased reflection, and more career experience.

Evolving Views of the Purpose of Bankruptcy

Part of my analysis in that early piece involved consideration of how two prevailing scholarly schools of thought would respond to the *Stern* dilemma. I refer to the famous debates over corporate law between two leading scholars in the field, Elizabeth Warren and Douglas Baird, which began in the 1980s, peaked in the 1990s,

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[7] In the aftermath of the *Stern* decision, the Ninth Circuit overturned its own precedent to conclude that a bankruptcy court could not issue a final determination on a fraudulent conveyance claim. *In re* Bellingham Ins. Agency, 707 F.3d 553, 561 (9th Cir. 2012) (overturning *In re* Mankin, 823 F.2d 1296 (9th Cir. 1987). Some commentators reasoned that the same logic should also apply to preference actions. *See, e.g.*, Ralph Brubaker, *A "Summary" Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction After* Stern v. Marshall, 86 AM. BANKR. L.J. 121, 180 (2012). I thought not. *See* Brook E. Gotberg, *Preferences are Public Rights*, 2013 WIS. L. REV. 1355 (2013).

[8] Wellness Intern. Network, Ltd. v. Sharif, 575 U.S. 665 (2015).

[9] Courts effectively adopted proceedings already in place for so-called "non-core" proceedings. *See* 28 U.S.C. § 157(c).

[10] In the article, I observed that many scholars had advocated for simply granting bankruptcy judges Article III status to avoid the constitutional issue identified by the *Stern* majority. I queried whether the more appropriate response might be instead to transition much of the work currently done by bankruptcy judges to administrative agencies and grant a limited number of bankruptcy judges Article III status to deal with more complex cases in the first instance.

and largely fizzled out over the next decade when Warren left academia to pursue a career in politics. At one point, Baird used the terms traditionalist and proceduralist to describe how the differing sets of "bankruptcy axioms" held by scholars informed how they approached corporate bankruptcy policy.[11] In my article, I expanded on Baird's analysis, drawing on the work of subsequent bankruptcy scholars to query how each camp would most logically respond to *Stern*.

Reviewing the work of many excellent scholars and sorting them neatly into two buckets for the purpose of assigning them a logical position on an issue of the day was an appealing exercise for a young academic. But this reduction was also perilous – it virtually assured that many carefully developed scholarly opinions would be oversimplified and quite possibly mischaracterized. It was also myopic in its application to the problem introduced by *Stern*, which is not really a question of corporate bankruptcy law but of judicial authority in all bankruptcy proceedings. I am dubious that my analysis of the two camps was accurate at the time I wrote it. I am increasingly skeptical that the original terminology illuminates the intellectual disagreements that existed between scholars more than it obscures them. And I am sure that the clean divide I described then does not reflect the current state of legal scholarship regarding corporate bankruptcy.

That is not to say that there aren't systematic, deeply rooted differences in the ways that scholars view the purpose of bankruptcy law – particularly corporate bankruptcy law – and how it should function. These differences clearly exist and are manifested in the literature. Scholars often disagree because they hold competing, even incompatible views of bankruptcy's perceived purpose and function: this is why they draft contradictory law review articles, present competing perspectives on educational panels, and draft amicus briefs on either side of a legal issue.[12]

But the partition of scholars into camps of traditionalist and proceduralist thinkers is long overdue for a reexamination, particularly as some prominent scholars have exited and others have entered the debate. The relevant legal theories, which were still in relative infancy during the 1980s and 1990s, have matured. Scholarly methodologies have been developed and have tested these theories across a wide range of topics. Rather than placing scholarship on corporate bankruptcy into separate camps entrenched on either side of a single divide, we might better understand it as a complex river system, composed of multiple tributaries and channels that diverge, converge, and intermingle across distinct policy questions. Like a river, it is fed and replenished with new ideas, conceptions, and theories, whose circulation prevents intellectual stagnation and reshapes the course of the debate over time.

The Old Traditionalist/Proceduralist Divide

[11] Douglas G. Baird, *Bankruptcy's Uncontested Axioms*, 108 YALE L. J. 573, 576 (1998).
[12] Bankruptcy scholars penned opposing amicus briefs presented to the Supreme Court in *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204 (2024) and *Official Committee of Asbestos Claimants of Bestwall LLC v. Bestwall LLC*, 2026 WL 1513280 (June 1, 2026) (denying cert), as two recent high-profile examples.

The terminology for the traditionalist and proceduralist camps is most easily traced back to Baird, although other scholars have used the same or similar terms.[13] Unfortunately, inconsistent application lends itself to considerable confusion as to how the terms should be understood and to whom they should apply. As Baird adroitly observed, "[s]orting legal scholars into distinct camps is a dangerous business," insofar as successful academics have views that are complex and modulated, and individuals may hold particular positions to a greater or lesser degree.[14] And although the labels he adopted subsequently caught on in the literature, they provide only a weak signal of the underlying beliefs, ideas, and scholarly approaches they are supposed to distinguish.

In an essay written some years prior to Baird's work, Rasmussen observed that the "traditional view of bankruptcy" concerned itself with social justice rather than efficiency, and that scholars holding this traditional view had a tendency to criticize wealth maximization as an animating principle.[15] He defended his own approach to corporate bankruptcy – which he termed the "economic" approach – against bankruptcy theorists who would justify existing nonutilitarian laws.[16] Like Baird, Rasmussen assigned the label of traditionalist to those scholars who had not (yet?) adopted the new conceptions that a law-and-economics view of corporate bankruptcy law could bring to the table. Perhaps that is why the term acquired a mildly pejorative cast.[17] Rhetorically, it worked to characterize non-economic scholars as stodgy, old-fashioned, and out of touch. In comparison, Baird's and Rasmussen's ideas are made to seem progressive, modern, and innovative. But the term traditionalist never described a coherent intellectual movement. Instead, the label served primarily as a residual category for all scholars who did not identify with the burgeoning theoretical movement. As a consequence, it came to encompass commentators with widely divergent views about corporate bankruptcy law's purposes and operation.

The camp inhabited by Baird and Rasmussen was distinctive in that it was characteristically rooted in the theories of law and economics. It expressed unwavering confidence in the power of markets to regulate, and a conviction that the law should not interfere with the successful operation of those markets.[18] After Thomas Jackson introduced the idea that bankruptcy's priority scheme could be justified by a hypothetical model where creditors negotiated *ex ante* how distribution would operate in the event of insolvency – the "creditors' bargain,"[19] – Baird, Jackson, Rasmussen and others worked together and with other like-minded scholars to expand understanding

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[13] *See* WARREN ET AL., THE LAW OF DEBTORS AND CREDITORS (8th ed., 2021) at 897 (suggesting that "functionalists" might be a better term than "traditionalists").
[14] Baird, *Bankruptcy's Uncontested Axioms*, *supra* n. 11, at 576.
[15] Robert K. Rasmussen, *An Essay on Optimal Bankruptcy Rules and Social Justice*, 1994 U. ILL. L. REV. 1 (1994).
[16] *Id.*
[17] Edward J. Janger & Adam J. Levitin, *The Proceduralist Inversion – A Response to Skeel*, 2020 YALE L.J. FORUM 335, 336.
[18] *Id.* at 578.
[19] Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L. J. 857 (1982)

and discussion of the model.[20] Within a few years, literature advocating a minimalist view of bankruptcy, so as to preserve creditors' *ex ante* expectations and facilitate market forces, was prevalent. Baird identified this literature as falling into a proceduralist camp because of its focus on bankruptcy as establishing procedure to facilitate the creditors' bargain, rather than introducing substantive law.[21] But scholarship promoting bankruptcy on the model of the creditors' bargain was not committed to procedure as an end in itself; rather, it evaluated both procedural and substantive rules according to the broader goal of efficiency and wealth maximization. Charles Mooney would eventually develop a normative theory of bankruptcy law as a kind of civil procedure, but his views were not as widely adopted.[22]

At its core, the traditionalist/proceduralist typology was intended to explain how scholars were using new theories to challenge preexisting beliefs. But the terminology purported to impose a collective identity on scholars that did not really exist. Baird's common scholarly foil, Warren, never adopted the "traditionalist" label, and in her writing – putting aside co-authored works – she consistently described her own views in the singular first person. Nor were her views "traditional" in any meaningful sense. To the contrary, she challenged prevailing assumptions about bankruptcy using unprecedented empirical methodologies. Her work was most impactful in the area of consumer bankruptcy, a subject with which most law-and-econ scholars failed to meaningfully engage.[23] Put simply, Warren never claimed to represent a traditionalist camp, or really any camp at all. She did observe where her opinions departed from Baird's with regard to corporate bankruptcy policy, but owned that she lacked the "coherent, unified view of bankruptcy" developed by Baird.[24] Instead, she observed, "I see bankruptcy as a more complex and ultimately less confined process than does Baird."[25]

Modern Scholarship Evades Clear Bucketing

A survey of modern bankruptcy scholarship does reveal recognizable patterns of agreement and disagreement. But a forced sorting of scholarly opinions into two distinct camps *is* dangerous, and certainly not as straightforward as I imagined when I was an emerging scholar. Although the paradigm introduced by Jackson and Baird was

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[20] *See, e.g.,* Douglas G. Baird & Thomas H. Jackson, *Fraudulent Conveyance Law and Its Proper Domain*, 38 VAND. L. REV. 829, 836 (1985); Douglas G. Baird & Thomas H. Jackson, *Bargaining After the Fall and the Contours of the Absolute Priority Rule*, 55 U. CHI. L. REV. 738 (1988); Thomas H. Jackson & Robert E. Scott, *On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain*, 75 Va. L. Rev. 155 (1989); Douglas G. Baird, Anthony J. Casey & Randal C. Picker, *The Bankruptcy Partition*, 166 U. Penn. L. Rev. 1675 (2018).

[21] Baird, *Bankruptcy's Uncontested Axioms*, *supra* n. 11, at 578.

[22] Charles W. Mooney, Jr., *A Normative Theory of Bankruptcy Law: Bankruptcy as (Is) Civil Procedure*, 61 WASH. & LEE L. REV. 931 (2004).

[23] *See* TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, AS WE FORGIVE OUR DEBTORS (1999) (using empirical analysis to challenge conventional wisdom regarding consumer bankruptcy filers); David A. Skeel, Jr., *Vern Countryman and the Path of Progressive (and Populist) Bankruptcy Scholarship*, 113 HARV. L. REV. 1075, 1113 (2000).

[24] Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 777 (1987)

[25] *Id.* at 778.

disruptive and groundbreaking at the time, their ideas have been disseminated and adopted so much since that they influence much of modern bankruptcy scholarship, to a greater or lesser degree. Barry Adler has observed that almost all bankruptcy scholars "were Jacksonians once," favoring the view that corporate bankruptcy is a structure to facilitate the collective action of creditors.[26] Put another way, most scholars considering issues of corporate bankruptcy law will consider the economics of the issue, including questions of wealth maximization and efficiency. But they may nevertheless differ on how those economics should inform bankruptcy policy.

In Jackson's early work establishing the model of the creditor's bargain, he leaned into the idea that federal bankruptcy law should avoid disrupting the legal expectations of creditors as much as possible.[27] This became known as the *Butner* principle, after a Supreme Court case that observed the following: "Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding."[28] Jackson gave an elegant explanation for such a rule: Creditors establish their rights and negotiate in the shadow of bankruptcy law. They are more likely to reach efficient outcomes in those negotiations when bankruptcy preserves the substantives entitlements they bargained for. Otherwise, parties will structure their affairs in anticipation of a possible bankruptcy redistribution, creating strategic behavior and potentially inefficient results.[29]

Subsequent scholars have raised challenges to Jackson's interpretation of the *Butner* principle. For example, Adler has pointed out that Jackson's assumption of creditors' *ex ante* negotiation and adjustment largely ignores the position of nonconsensual creditors, such as tort victims, who have no ability to bargain and may have externalities imposed upon them by other creditors through contractual agreements.[30] Edward Janger has argued that Jacksonian rhetoric, as applied to preserving the rights of secured creditors, has actually upset the balance of non-bankruptcy entitlements by giving security interests more favorable treatment in bankruptcy than they would have under state law and thereby creating the incentive to forum shop into bankruptcy.[31] Juliet Moringiello reads *Butner* to require only that property rights are defined by state law as of the date of bankruptcy absent another compelling federal interest, not that federal bankruptcy law – authorized in the U.S. Constitution – is somehow constrained against adjusting those rights.[32] In fact, she argued, there may be a strong federal interest in limiting the rights of secured creditors

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[26] Barry E. Adler, *The Creditors' Bargain Revisited*, 166 U. PA. L. REV. 1853, 1854 (2018).
[27] Jackson, *Non-Bankruptcy Entitlements*, *supra* n. 19.
[28] Butner v. United States, 440 U.S. 48, 55 (1979).
[29] *See* THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY, 21 (1986).
[30] Barry A. Adler, *The Questionable Axiom of* Butner v. United States, BANKRUPTCY LAW STORIES (Robert K. Rasmussen, ed., 2007).
[31] *See* Edward J. Janger, *The Logic and Limits of Liens*, 2015 U. Ill. L. Rev. 589.
[32] Juliet M. Moringiello, *When Does Some Federal Interest Require a Different Result?: An Essay on the Use and Misuse of* Butner v. United States, 2015 U. Ill. L. Rev. 657, 659.

to proceeds of estate property, although any policy supporting such an interest should take into account the costs of upsetting creditor expectations.[33]

On the one hand, all three scholars might merit inclusion in a proceduralist camp – to the extent one exists – by virtue of their engagement with economic arguments regarding the impact of bankruptcy policy on creditors' *ex ante* expectations.[34] But on the other hand, it makes little sense to describe them as occupying a common camp with Jackson and other creditors' bargain scholars, with the inherent implication that they all take a common view towards the purpose and scope of bankruptcy. As their scholarship shows, they have clear misgivings and explicit disagreements with Jackson on the nature of *Butner*, even when using the creditors' bargain approach. Drawing camp boundaries or handing out team jerseys to individual scholars is therefore both challenging and likely misleading. Generally, their arguments stand on their own merits and must be dealt with accordingly.

A review of prominent bankruptcy literature provides a myriad of further examples, undermining the belief that there is today any readily identifiable dividing line between so-called traditionalist and proceduralists scholars. Trying to determine the extent to which scholars adhere to Jackson's view of non-bankruptcy entitlements would quickly give rise to objections regarding the use of definitions: What counts as "non-bankruptcy"? What is an "entitlement"? In his attempt to identify uncontested bankruptcy axioms for each side, Baird argued that traditionalists were more inclined to rely on courts, rather than markets, without considering the *ex ante* effects of permitting such judicial discretion.[35] But it cannot be said today that scholars who prefer a market-based approach to corporate bankruptcy law today reject the exercise of judicial discretion. Even a naïve sorting of scholars who support the theoretical approach of law and economics – an early dividing line between proceduralists and traditionalists – is likely to mislabel modern bankruptcy scholars who might find themselves in opposite camps based on other metrics.

What are the Non-Bankruptcy Entitlements to be Preserved?

Jackson introduced the model of the creditors' bargain to justify respecting non-bankruptcy entitlements, specifically security interests, in the collective bankruptcy process.[36] As he explained, individual collection efforts against an insolvent debtor create a common-pool problem in which creditors expend resources attempting to obtain priority over one another. Bankruptcy improves this outcome by reducing strategic costs, increasing the aggregate pool, and providing administrative efficiencies.[37] Prior to a debtor's insolvency, creditors can negotiate with the debtor for those rights *ex ante* by obtaining security interests. Unsecured creditors can adjust for the greater risk of nonpayment resulting from asset encumbrance by charging a higher

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[33] *Id.* at 663.
[34] Adler was explicitly identified by Baird as a member of the proceduralist camp in his essay on the subject. Baird, *Bankruptcy's Uncontested Axioms*, *supra* n. 11, at 576, n. 11.
[35] *Id.* at 579.
[36] Jackson, *Non-Bankruptcy Entitlements*, *supra* n. 19, at 858.
[37] *Id.* at 861.

interest rate. Secured creditors will also adjust by charging a lower interest rate, to account for the greater likelihood of repayment.[38] By preserving these prebankruptcy entitlements, bankruptcy respects the risk allocations creditors have already priced into their lending decisions and thereby promotes more efficient credit markets. Jackson challenged bankruptcy scholarship to do more to consider the impact of bankruptcy rules on non-bankruptcy entitlements, removing deviations from his normative model wherever possible.[39] But time has shown that scholars may disagree on what and how non-bankruptcy entitlements should be respected.

1. Absolute Priority Rule

One might generalize Jackson's idea regarding non-bankruptcy entitlements to say that bankruptcy law should preserve the rights of senior creditors over junior creditors, consistent with creditors' prebankruptcy understanding of their entitlements. The most recognized manifestation of that principle is the absolute priority rule, which holds that a confirmable Chapter 11 plan must ensure that creditors are paid the full value of their claim before any junior claims receive anything, unless the senior class of creditors consents to different treatment.[40] Indeed, some scholars conclude that adherence to the absolute priority rule is just good bankruptcy policy, because departures from it lead to market distortions.[41] Insofar as all of these scholars approach the topic from a law and economics perspective, relying on market efficiencies, they should be easily recognizable as falling within a proceduralist camp, if such a thing exists.

But many scholars with a vested interest in the law and economics approach to bankruptcy policy, including Baird, have explicitly rejected a fundamentalist view of the absolute priority rule.[42] These scholars instead argue that smart bankruptcy policy would reserve an option value for junior creditors in reorganizations, especially where valuation is difficult or uncertain.[43] Anthony Casey is a particularly prominent advocate of so-called relative priority. He recognizes a junior creditor's non-bankruptcy entitlement to the future value of the firm, should it exceed the face value of the senior

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[38] *Id.* at 868-87.
[39] *Id.* at 907.
[40] *See* 11 U.S.C. § 1129(b).
[41] *See* Barry E. Adler & Ian Ayres, *A Dilution Mechanism for Valuing Corporations in Bankruptcy*, 111 YALE L.J. 83, 88 (2001); Lucian Arye Bebchuk, *Ex Ante Costs of Violating Absolute Priority in Bankruptcy*, 57 J. FIN. 445, 452-53 (2002) (violations to the absolute priority rule encourage shareholders to choose excessively risky projects, increase leverage, or pay out dividends in anticipation of a possible bankruptcy subsidy); Alan Schwartz, *A Normative Theory of Business Bankruptcy*, 91 VA. L. REV. 1199, 1204-05 (2005) (bankruptcy law should be committed exclusively to reduce capital costs and violations of the absolute priority rule encourage rent seeking by junior creditors).
[42] Douglas G. Baird, *Priority Matters: Absolute Priority, Relative Priority, and the Costs of Bankruptcy*, 165 U. PA. L. REV. 785, 788 (2017). For an operational critique of Baird's position, *see* Mark J. Roe & Michael Simkovic, *Absolute Priority, Relative Priority, and Valuation Uncertainty in Bankruptcy*, 173 U. PENN. L. REV. 389 (2025) (arguing that a relative priority standard complicates valuation making dealmaking and judicial resolution in Chapter 11 cases more difficult).
[43] Baird, *Priority Matters, supra* n. 42, at 788; Anthony J. Casey, *The Creditors' Bargain and Option-Preservation Priority in Chapter 11*, 78 U. CHI. L. REV. 759, 764 (2011).

debt. As he explains, extinguishing this right in bankruptcy through the absolute priority rule would fail to fully respect non-bankruptcy rights.[44]

What is truly fascinating about this apparent fissure in the scholarship is that it superficially aligns law-and-econ scholars like Baird and Casey with progressive scholars frequently associated with Warren, who would certainly find themselves in different camps under a naïve sorting of traditionalists and proceduralists. Jacoby and Janger are fairly described as Warren protégés, although both also have professional connections with Baird and would count him as an early mentor. Influential scholars in their own rights, they have challenged the implications of the absolute priority rule in cases where a senior creditor claims the entire value obtained through a bankruptcy asset sale.[45] They see a distinction between asset-based claims and those based on firm-value, and argue that references to "equity" in the Bankruptcy Code require courts to police that line.[46] In doing so, the courts would preserve some value for junior creditors, deriving justification not only from the Bankruptcy Code, but from the underlying state laws regarding security interests.[47] Though grounded in different theoretical commitments and adopting different implementations, both approaches tend toward the same practical outcome.[48] As explored in greater depth below, both also rely on judicial discretion.

2. Tort Claims, Present and Future

Measuring the scope of non-bankruptcy entitlements also becomes more complicated when the rights at issue arise not from contract but rather as a matter of tort. Historically, bankruptcy law dealt only with a debtor's contractual obligations and other claims already reduced to judgment.[49] The modern Bankruptcy Code expanded the definition of claims to include a right to damages based on injuries in tort that have not been reduced to judgment, much less litigated, or even yet realized.[50] These so-called "future claims" are real harms that have not yet manifested at the time of the bankruptcy filing, such as exposure to carcinogenic materials that has not yet produced a cancer diagnosis. The long latency period of some diseases caused by exposure to toxic materials means that large numbers of affected individuals might only realize their harms long after the conclusion of bankruptcy proceedings for the liable party. If they are not included in bankruptcy proceedings – particularly liquidation proceedings and asset sales – they risk losing any hope of recovery.

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[44] Casey, *Option-Preservation*, *supra* n. 43, at 764.
[45] Melissa B. Jacoby & Edward J. Janger, *Tracing Equity: Realizing and Allocating Value in Chapter 11*, 96 TEX. L. REV. 673, 683 (2018).
[46] *Id.* at 678.
[47] *Id.*
[48] *Id.* at 681. There is some seed of Jacoby & Janger's argument to be found in Baird & Jackson's earliest writing on the topic. *See* Baird & Jackson, *Bargaining After the Fall*, *supra* n. 20, at 782 ("[A] secured creditor with a security interest in specific 'hard' assets should be treated as having a claim to the asset's liquidation value. Its secured claim should reach no further.").
[49] Bankruptcy Act of 1898, §§ 1(9). Claims had to be "provable in bankruptcy," which required fixed liability as evidence by a judgment or an instrument in writing.
[50] 11 U.S.C. § 101(5); *In re* Johns-Manville Corp., 534 B.R. 553, 556 (Bankr. S.D.N.Y. 2015).

Future claims are not recognized under non-bankruptcy law.[51] Yet, despite the stated proceduralist commitment to preserving non-bankruptcy entitlements and reported allergy to substantive bankruptcy rights, the inclusion of future claims as part of the 1978 amendments to bankruptcy law was accepted by scholars across the board. In fact, scholars like Casey and Joshua Macey of the Chicago school of thought have wholeheartedly advocated for bankruptcy as a solution to many of the problems posed by mass torts, including the treatment of future claims.[52] On the other hand, progressive scholars more closely affiliated with Warren have pushed back against resolving mass tort claims in bankruptcy.[53] Pamela Foohey and Christopher Odinet have argued that debtor-initiated bankruptcy proceedings may deprive tort claimants of procedural justice.[54] Jacoby has written an entire book advocating for a return in bankruptcy's focus to "just debts," arguing that bankruptcy "is best matched with contractual obligations" and a poor vehicle to resolve mass tort claims.[55]

Jacoby's musings that bankruptcy's focus might be best limited to contractual obligations might again superficially resonate with avowed members of the camp who have identified themselves as "contractualists."[56] Those scholars have argued for minimizing bankruptcy law – even eliminating the Bankruptcy Code – in favor of permitting private parties to contract into optimal bankruptcy choices.[57] For example, Rasmussen argued that bankruptcy law should be seen as a default contract term, alterable by contracting parties.[58] But even while advocating for increasing creditors' ability to contract *ex ante* around otherwise mandatory bankruptcy rules, known contractualist scholars like Alan Schwartz have argued that tort claims should be protected in bankruptcy.[59]

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[51] *See* Metro-North Commuter Railroad Co. v. Buckley, 521 U.S. 424 (1997) (ruling that an employee negligently exposed to asbestos by his employer could not recover unless and until he manifested symptoms of asbestosis).
[52] Anthony J. Casey & Joshua C. Macey, *In Defense of Chapter 11 for Mass Torts*, 90 U. CHI. L. REV. 973, 1016 (2023) (describing the bankruptcy process as the "least-bad option" for future claimants); *see also* Anthony J. Casey & Joshua C. Macey, *Bankruptcy by Another Name*, 133 YALE L. J. F. 1016 (2024).
[53] *See, e.g.*, Pamela Foohey & Christopher K. Odinet, *Silencing Litigation Through Bankruptcy*, 109 VA. L. REV. 1261 (2023).
[54] *Id.* at 1265-66 (arguing that the motivation behind many mass tort bankruptcy filings is bypassing procedural justice and discounting claims).
[55] MELISSA JACOBY, UNJUST DEBTS (2024) at 241-44.
[56] *See* Alan Schwartz, *A Contract Theory Approach to Business Bankruptcy*, 107 YALE L. J. 1807, 1810 (1998) (forwarding claims that implicitly assume that bankruptcy systems exist only to solve the creditors' coordination problem).
[57] *See, e.g.,* Barry E. Adler, *Finance's Theoretical Divide and the Proper Role of Insolvency Rules,* 1109 ("[I]n principle, pre-insolvency contracts can provide for a division of an insolvent firm, and at lower cost than a bankruptcy proceeding."); Barry E. Adler, *The Law of Last Resort*, 55 VAND. L. REV. 1661 (2002); Robert K. Rasmussen, *Debtor's Choice: A Menu Approach to Corporate Bankruptcy*, 71 TEX. L. REV. 51, 53 (1992) (arguing that bankruptcy law should not be considered a mandatory rule and the firm's investors should determine whether a firm can seek reorganization). For a critique of the proposals to submit bankruptcy rules to private ordering, *see* Susan Block-Lieb, *The Logic and Limits of Contract Bankruptcy*, 2001 U. ILL. L. REV. 503.
[58] Rasmussen, *Debtor's Choice*, *supra* n. 57, at 53.
[59] Schwartz, *A Contract Theory*, *supra* n. 56, at 1810, n. 15. Schwartz does not say just how tort claims should be protected. *Id.*

Perhaps ironically, the primary objection to resolving mass tort claims through bankruptcy proceedings raised by many scholars, including Jacoby, is that it denies tort claimants their full procedural rights.[60] Indeed, Jacoby's objections on this score encompass not only the treatment of mass tort victims, but also the use of judicial discretion to facilitate a bypassing of non-bankruptcy procedural constraints. Along the same vein, an article by Janger and Adam Levitin noted, "[t]o the extent that law-and-economics scholars view bankruptcy as 'merely procedure' in service of contract, they undervalue the crucial importance of process itself."[61] At the very least, differing opinions about the treatment of mass tort claims – including future claims – raises some ambiguity as to who may rightly claim the title of a proceduralist in bankruptcy scholarship.

What Is the Judicial Role?

When scholars complain about lack of procedural fidelity in bankruptcy proceedings, the actors most often targeted for criticism are bankruptcy judges. Although legislators also take their share of the heat, scholars tend to home in on judicial willingness to confirm plans that apparently sidestep procedural protections as the primary source of objection. Lynn LoPucki, a co-author of Warren's, recently engaged in a debate with the contractophile Rasmussen, writing with Roye Zur, over a blindingly fast plan confirmation in a pre-packaged bankruptcy. LoPucki spoke out against what he perceives is a race to the bottom among bankruptcy judges, who use their discretion to accommodate debtors and other case proponents to the detriment of other parties.[62] They do so, LoPucki has warned for decades,[63] because lax venue rules permit parties to shop for particular judges, and these judges compete with each other to attract high-profile cases.[64] Not so, Rasmussen replied, and the case LoPucki pointed to as a prime example of the problem instead illustrates "the best of the bankruptcy system."[65] There, the bankruptcy judge had approved a wealth-maximizing agreement while simultaneously creating a "novel order" to protect parties that were not part of the deal.[66] One might say that the bankruptcy judge had "shepherded" the case through – a role Baird reported should be celebrated by traditionalists and disfavored by

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[60] *See* Foohey & Odinet, *Silencing Litigation*, *supra* n. 53 at 1263.
[61] Janger & Levitin, *Proceduralist Inversion, supra* n. 17, at 336. Janger and Levitin suggest that the positions of the proceduralists and traditionalists have been inverted. As evidence, they point to an article by David Skeel, *Distorted Choice in Corporate Bankruptcy*, 130 YALE L.J. 366 (2020). Skeel observed that some distortion of the voting process in Chapter 11 is defensible as necessary to overcome holdout problems and proposed some rules of thumb for judges to use in exercising their discretion to permit such distortion. *Id.* at 396. In their critique of Skeel's work, Janger and Levitin acknowledge that although he has long identified with the school of law-and-economics, "Skeel has never been a classic 'proceduralist.'" Janger & Levitin, *Proceduralist Inversion*, *supra* n. 17 at 336, 354. Embedded in this concession is the perspective for which I have argued here – scholars should not be so cleanly categorized.
[62] Lynn M. LoPucki, *Chapter 11's Descent into Lawlessness*, 96 AM. BANKR. L. J. 247 (2022).
[63] LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS (2005).
[64] LoPucki, *Chapter 11's Descent into Lawlessness*, *supra* n. 62, at 250.
[65] Robert K. Rasmussen & Roye Zur, *The Beauty of Belk*, 97 AM. BANKR. L.J. 438, 439 (2023).
[66] *Id.*

proceduralists.[67] But LoPucki and Rasmussen have not switched camps; rather, their scholarly channels have crossed.

The discretion of which LoPucki condemned and Rasmussen approved was used to permit contractual bargaining among the most powerful players in a Chapter 11. The tendency to view this contractual bargaining with skepticism or with approbation is consistent with both scholars' previous positions, suggesting that the clean divide posited to exist between proceduralists and traditionalists over judicial discretion does not hold, at least not in modern debates. Baird's stated objection to judicial discretion arose in the context of the judge using his discretion to permit a reorganization over the objection of creditors to preserve jobs.[68] In this context, Baird suggested, the traditionalists would have the judge "work[] with all the players to move them towards bankruptcy's substantive goals," whereas proceduralists "see the judge as a disinterested arbiter."[69] But if the judge instead uses discretion to facilitate bargaining among creditors, that may be a different matter for scholars who tend to favor markets.[70]

The appropriate role of the bankruptcy judge was a prominent feature of the debate over nonconsensual third-party releases, an issue recently brought before the Supreme Court.[71] In some circuits, applicable caselaw enabled a bankruptcy judge to confirm a plan that would trade creditors' rights to pursue actions against third parties in exchange for those third parties' financial contributions to the debtor's bankruptcy plan, binding even non-consenting creditors to release their claims against the third parties. Judges who approved these plans did so for the sake of the deal, which presumably maximized repayment for all creditors, including tort victims. Scholars like Casey spoke out in strong support of the practice, using arguments that would be cited extensively in the Supreme Court's dissenting opinion.[72] Scholars like Jacoby and Bruce Markell, on the other hand, condemned nonconsensual third-party releases as legally and morally illegitimate.[73]

Baird's statement that market-friendly scholars would disapprove of judges exercising their discretion to overcome market outcomes was correct, but his observation cannot be extended to presume that this group will condemn judicial discretion generally. It is universally agreed that bankruptcy judges fulfill an important role, but in exercising their discretion they may also draw criticism. The criticism is likely to come from different scholars depending on the way the discretion is exercised.

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[67] Baird, *Uncontested Axioms*, *supra* n. 11, at 579.
[68] *Id.*
[69] *Id.*
[70] *See, e.g.,* Skeel, *Distorted Choice*, *supra* n. 61, at 396 (suggesting that courts should permit distortions to creditor vote in Chapter 11 when courts determine that the distortion is necessary to encourage reorganization).
[71] Harrington v. Purdue Pharma L.P., 603 U.S. 204 (2024).
[72] *See* Harrington v. Purdue Pharma L.P., Brief of Amici Curiae Law Professors in Support of Respondents (No. 23-124); Harrington v. Purdue Pharma L.P., 603 U.S. at 234-38.
[73] Harrington v. Purdue Pharma, Amicus Brief on Nonconsensual Nondebtor Releases in Chapter 11 Bankruptcy Reorganizations (No. 23-124) (Markell was represented along with scholars Ralph Brubaker and Jonathan M. Seymour); Melissa B. Jacoby, *The Moral Limits of Bankruptcy Law*, N.Y. TIMES (June 4, 2024).

Those superficially affiliated with the proceduralist camp are at least as open to the exercise of judicial discretion as anyone else. Indeed, scholars who advocate for a market approach to corporate bankruptcy law appear largely agnostic on the topic of forum shopping into jurisdictions where judges work to facilitate creditor bargains.[74] They do not abjure judicial discretion generally, only insofar as it fails to vindicate the creditors' bargain.[75]

What Methodology is Most Effective at Divining Truth?

One of the original observed divides between the two supposed camps, and part of what Baird was responding to in his article setting out their respective positions, was the different methods used by the two groups in analyzing corporate bankruptcy law. Whereas the law-and-economics crowd tended to use theoretical models, expanding on logical assumptions and mathematical proofs, scholars like Warren and LoPucki were dedicated to an empirical approach, testing real world outcomes arising out of particular policies and practices. Baird acknowledged the "first-rate" empirical work that had been done, but also warned that empirical studies were unlikely to resolve then-existing debates about corporate reorganization.[76]

In so cautioning, Baird was not minimizing the importance of empirical studies, which scholars of all theoretical leanings have used to great impact. Jared Ellias has been particularly active with empirical research in recent years, and while he uses the language of markets and considers creditor agreements, he has also argued – challenging some of the contractualist assumptions of scholars like Baird and Rasmussen – that overreliance on the market has paved the way for destructive opportunism by shareholders.[77] Stephen Lubben has also engaged in influential empirical work and analysis, in which he considers creditor interactions and incentives to negotiate, questioning the efficiency of given legal rules in a manner entirely consistent with law-and-econ literature.[78] Edward Morrison is not only a prominent empiricist but also a frequent co-author of Baird's. One of Morrison's notable studies used empirical evidence to challenge the assumption of a continuation bias in Chapter 11

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[74] *See* Anthony J. Casey & Joshua C. Macey, *Bankruptcy Shopping: Domestic Venue Races and Global Forum Wars*, 37 EMORY BANKR. DEV. J. 463, 469, 473 (2021) (expressing agnosticism on the harms of forum shopping); Jared A. Ellias, *What Drives Bankruptcy Forum Shopping? Evidence from Market Data*, 47 J. LEG. STUD. 119 (2018) (finding that the market is better at predicting the outcomes of bankruptcy cases in New York and Delaware, consistent with the hypothesis that the law in those jurisdictions is more predictable). In contrast, Warren – now acting in her position as a legislator - has called for limits to forum shopping. *See* Bankruptcy Venue Reform Act of 2021, S. 2827 (117th Cong.).

[75] *See, e.g.,* Baird, Casey & Picker, *Bankruptcy Partition*, *supra* n. 20, at 1676 (discussing how a bankruptcy judge might appropriate exercise discretion in policing the partition between the bankruptcy estate and outside interests).

[76] Baird, *Bankruptcy's Uncontested Axioms*, *supra* n. 11, at 573-74.

[77] *See, e.g.,* Kenneth Ayotte & Jared A. Ellias, *Bankruptcy Process for Sale*, 39 YALE J. REG. 1 (2022) (observing that bankruptcy process sales are consistent with a creditors' bargain theory of cost savings but may also shut out creditors and lead to inefficient outcomes); Jared A. Ellias & Robert J. Stark, *Bankruptcy Hardball*, 108 Cal. L. Rev. 745, 759-60 (2020) (arguing for an increase in judicial oversight to constrain opportunism by those in control of distressed corporations).

[78] *See*, e.g., Stephen J. Lubben, *The 'New and Improved' Chapter 11*, 93 KEN. L.J. 839 (2004) (challenging the efficiency of the "new chapter 11" characterized a control rights model).

cases. He observed that judges play an important role in determining when a business should be shut down, and that they appear to do good work in this regard.[79] Even Baird and Rasmussen have turned to empirical evidence to support their argument that Chapter 11 had become a mechanism for implementing a going concern sale – what they termed the "end of bankruptcy."[80]

Empirical studies are not the sole domain of scholars who look with skepticism on the creditors' bargain theory, and theoretical models are not the exclusive intellectual property of scholars favoring the market. In fact, even taking a law-and-economics approach to bankruptcy law does not mandate conclusions consistent with Baird's view of bankruptcy purposes. In an article considering the benefits of using bankruptcy proceedings to preserve even unprofitable firms during a time of high unemployment, Zachary Liscow used arguments regarding efficient legal rules to advocate for a non-market outcome in bankruptcy.[81] Such an anathema to Baird's stated proceduralist position was much more in keeping with the values the traditionalist camp was said to espouse.

There are other examples that might be instructive to the core point: scholars do not fit neatly into predesignated molds. The two vying camps identified years ago are especially ill-suited to encapsulate modern scholarly perspectives. As new ideas have been introduced and tested, scholars have grappled with their implications and incorporated them into a continual search for knowledge and understanding. Not only is the designation of traditionalist and proceduralist camps unduly restrictive, such a framing may also make the disagreements among bankruptcy scholars seem more distinct and more adversarial than they truly are.

Tribute to Jay Westbrook

In his scholarly exchanges with Warren, Baird observed that few in either the group of proceduralists or traditionalists paid much attention to the other.[82] The perceived methodological divide, as it existed at the time, likely contributed to this lack of engagement. The scholarship of Baird, Jackson, Rasmussen and others was characterized by the development of theoretical models, complete with assumptions regarding a prototypical case and how the relevant parties would be incentivized to act. Meanwhile, Warren and Jay Westbrook were championing the effort to bring more empirical evidence to questions of bankruptcy law and policy. As the creditors' bargain theory gained traction, empirical evidence became an increasingly useful method for testing its assumptions and predictions against real world behavior.

Warren and Westbrook helped establish empirical research as a central feature of bankruptcy scholarship. The result was a richer debate, as theoretical models had to

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[79] *See* Edward R. Morrison, *Bankruptcy Decision Making: An Empirical Study of Continuation Bias in Small-Business Bankruptcies*, 50 J.L. & ECON. 381, 394 (2007).
[80] Douglas G. Baird & Robert K. Rasmussen, *Chapter 11 at Twilight*, 56 STAN. L. REV. 673 (2003).
[81] Zachary Liscow, *Counter-Cyclical Bankruptcy Law: An Efficiency Argument for Employment-Preserving Bankruptcy Rules*, 116 COLUM. L. REV. 1461 (2016).
[82] Baird, *Bankruptcy's Uncontested Axioms*, *supra* n. 11, at 575.

account for how bankruptcy participants and institutions actually behaved. A recognized leader in the academic fields of insolvency law, particularly cross-border insolvency, Westbrook's work has been truly anchored in empirical analysis. His research has consistently examined whether prevailing theoretical models accurately described the operation of bankruptcy systems.[83] These empirical studies should inform the work of theorists operating with logical models. The two approaches are not at war but rather engaged in a productive contest of ideas and information. Each strengthens and complements the other.

In 2018, the International Insolvency Institute and the University of Texas Law Review hosted a conference in celebration of Westbrook's seventy-fifth birthday. Subsequently, the group published a series of essays as a festschrift in Westbrook's honor, celebrating him as the "universal pragmatist" who inspired generations of future scholars.[84] A single line from Christoph Paulus and John Pottow's Editor's Introduction of that volume perhaps best encapsulates Westbrook's legacy: "He has, in his characteristically genteel but unrelentingly rigorous way, always offered a friendly hand to move people along in the scholarly pursuit of one thing: what commercial law actually is and how it does and should actually work to help real people with real problems."[85]

When the Symposium celebrating the *Journal's* 100th anniversary was first organized, Westbrook had agreed to contribute one of the articles. Unexpected health complications made doing so impossible, and his contribution is sorely missed. One of his strengths – recognized by his long-time co-author Warren in the festschrift described above – is his willingness to revisit prior conclusions in light of new data, a quality that typifies the spirit of this Symposium.[86]

Mapping Channels and Tributaries

As acknowledged above, there remain commonalities and differences among groups of scholars in how they approach the law, even if they cannot be as easily reducible as the traditionalist/proceduralist typology suggested. Some scholars are noticeably more focused on market discipline. They frequently write about corporate bankruptcy law with the implicit assumption that all relevant actors can adjust to

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[83] *See, e.g.,* Elizabeth Warren & Jay Lawrence Westbrook, *Searching for Reorganization Realities*, 72 WASH. U. L.Q. 1257 (1994) (arguing for the introduction of more data into policy debates in the business bankruptcy system); Elizabeth Warren & Jay Lawrence Westbrook, *Contracting Out of Bankruptcy: An Empirical Intervention*, 118 HARV. L. REV. 1197 (2005) (using data drawn from business bankruptcy cases to challenge central factual premises regarding creditors' ability to adjust in business bankruptcy cases); Jay Lawrence Westbrook, *Secured Creditor Control and Bankruptcy Sales: An Empirical View*, 2015 U. ILL. L. REV. 831 (data indicate that secured creditor control is important but not as pervasive as commonly believed); Jay Lawrence Westbrook, *Chapter 11 Under Duress*, 37 EMORY BANKR. DEV. J. 551 (2021) (reporting that the trend towards granting lenders control of companies prebankruptcy has led to a loss of value).

[84] BANKRUPTCY'S UNIVERSAL PRAGMATIST: FESTCHRIFT IN HONOR OF PROFESSOR JAY LAWRENCE WESTBROOK (Christoph G. Paulus & John A.E. Pottow, eds. 2021). The uncommon term "festschrift," found in the subtitle of the work, is derived from German and means "celebration publication." *Festschrift,* Merriam-Webster, https://www.merriam-webster.com/dictionary/Festschrift (last visited May 19, 2026).

[85] BANKRUPTCY'S UNIVERSAL PRAGMATIST, *supra* n. 94, at 4-5.

[86] *Id.* at viii.

relevant legal structures *ex ante*, and actors may sell their interests on an existing market as a built-in method of valuation. To these scholars, market economics are the most important, relevant question in corporate bankruptcy, because corporate bankruptcies take place in the context of public markets.

It is axiomatic that markets play a role in large corporate bankruptcies and easily conceded that formal theoretical models anticipating how rational actors will act in a market setting are useful in that context. But these models – admittedly, by those who create them[87] – have next to nothing to say about individual bankruptcies. More problematically, they may be incomplete when examining the vast majority of corporate bankruptcies, which involve small- and medium-sized entities (SMEs), who lack publicly traded bonds or the ability to price their equity ownership in a public market.

More work is warranted in the area of SME bankruptcies, now a primary focus of my own scholarly research. These make up the vast majority of Chapter 11 cases, especially since the recent creation of Subchapter V. Applicable provisions make corporate reorganization considerably easier and cheaper for companies with less than the applicable debt cap.[88] These legislative changes to disclosure and voting requirements were justified in light of the differences in size, access to capital, and creditor engagement.[89] Many of the theoretical assumptions regarding corporate bankruptcy break down when applied in miniature, and a more fulsome view of bankruptcy cases can shed new light on assumptions applied to the larger cases. For example, Lubben's work on professional fees effectively challenges some of the assumed criticisms associated with the costs of Chapter 11, mostly by broadening the normal scope of corporate law to include all cases.[90]

When corporate bankruptcy is understood to include more than just the large cases, and more than those cases in which participants can adjust *ex ante* to applicable rules of priority and distribution, the focus tends to shift. This difference in focus explains much of today's most easily perceivable differences among scholars. Although all corporate bankruptcy scholars are concerned with social welfare – making the state of the world the best it possibly can be – some scholars look first, if not exclusively, to bankruptcy policy's interaction with market effects, while others look at the impact on groups and individuals.

For example, both Westbrook and Jacoby have emphasized research focused on "real people"; for Westbrook this means empirical work, not just theoretical models, and for Jacoby a focus on flesh-and-blood individuals, not just corporations. Just as Westbrook's scholarly pursuit was said to concern helping "real people with real problems,"[91] Jacoby has argued that the most basic function of American bankruptcy

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[87] *See* Baird, *Uncontested Axioms*, *supra* n. 11, at 577, n. 14; Rasmussen, *Bankruptcy and Social Justice*, *supra* n. 15, at 9 ("By *bankruptcy law* I refer only to corporate bankruptcy law and thus exclude individual bankruptcy law.").
[88] As of this writing, that cap was about three million dollars. *See* 11 U.S.C. § 101(51D).
[89] H.R. Report No. 116-171, 116th Cong. Small Business Reorganization Act of 2019.
[90] Stephen J. Lubben, *Corporate Reorganization & Professional Fees*, 82 AM. BANKR. L.J. 77, 79 (2008).
[91] BANKRUPTCY'S UNIVERSAL PRAGMATIST, *supra* n. 84, at 4-5.

law "is to cancel the contract-based debts of real people."[92] A keen awareness of the individual impact on these real people is a core feature of their scholarship, which includes personal vignettes alongside data analyses. They, along with other like-minded scholars, tend to see corporate bankruptcy law as one part of a broader insolvency regime, in which scholars can bring out commonly applicable themes. On the other hand, scholars who embrace a market-focused view of corporate bankruptcy perceive individual bankruptcy laws as entirely different, separate, and distinct.

Jackson's creditors' bargain model focuses primarily on preserving the value of the debtor's estate and distributing that value according to prebankruptcy entitlements, largely without regard to the distributional consequences of that distribution.[93] (Those consequences are a matter for non-bankruptcy law to cope with.) The normative justification for this approach does not lie in the welfare of any individual creditor, but in the effect that bankruptcy rules have on credit markets more generally.[94] Because financial creditors can price bankruptcy risk ex ante, rules that reliably enforce prebankruptcy rights should lower uncertainty, facilitate efficient lending, and improve the functioning of credit markets. The same orientation is reflected in Jackson and Baird's embrace of the *Butner* principle, under which bankruptcy law should generally track non-bankruptcy entitlements absent a distinct federal interest in a different result.[95] By minimizing departures from ordinary legal rights, the approach seeks to preserve market expectations and reduce distortions in the pricing of credit.

None of this is to say that a market-first scholar is indifferent to the lives and struggles of "real people." Far from it – the approach merely reflects the belief that corporate law is tied up with the broader economic market. Healthy markets will ultimately benefit all people, and corporate bankruptcy law is best positioned to encourage healthy markets, not the litany of other policy concerns that may arise.[96] Ultimately, all scholars seek the best for society; using different analytical and theoretical approaches encourages a healthy exchange of ideas, even where they disagree.

Viewing bankruptcy scholarship through the two distinct lenses of market effects and human consequences permits some insight into authors' thought processes, but the approach does not determine the policy outcome nor the method of study. As demonstrated above in the discussions over absolute priority, reasonable scholars may reach conflicting outcomes even when arguing over the same question: how does this policy affect parties' ability to bargain and, by extension, the operation of the market? In contrast, other scholars may first ask how a given bankruptcy policy is likely to impact a

[92] JACOBY, UNJUST DEBTS, *supra* n. 55, at 239.
[93] Jackson &. Scott, *Nature of Bankruptcy*, *supra* n. 20, at 155-56.
[94] *See* Schwartz, *Normative Theory*, *supra* n. 41, at 1200 (arguing that the only metric that should matter to measure bankruptcy policy is its effect on the cost of capital).
[95] Butner v. U.S., 440 U.S. 48, 54-55 (1979).
[96] *See* Dougals G. Baird & Thomas H. Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 U. CHI. L. REV. 97, 103 (1984) ("Social reform should be brought about through broad changes in the substantive law rather than through ad hoc modifications of rights in bankruptcy.").

company's employees or tort victims, not because of the effect they will then produce on the case or the market more generally, but for their own sakes. They may also disagree, but still be arguing over the same question: how does this policy affect other concerns, which are also tied to individuals' well-being?

Deepening The Flow of Ideas

When scholars approach a bankruptcy topic through different lenses, frustration can result. Because they are asking different questions, the answers one scholar produces may seem utterly nonresponsive to the other. But there is also great opportunity for insight in sharing these different foci of research. Rather than dismissing or rejecting research one perceives as being tangential to a scholar's central query, all scholars should seek to understand both the question the research sought to answer and why the researcher thought it important. Exploring the answers to these questions can help broaden understanding of the law and create a larger, more robust conversation.

There is substantial overlap in the work of scholars concerned with the impact of corporate bankruptcy on individuals and scholars concerned with the impact of corporations generally – not only on market forces, but on people's day to day lives. If one begins the legal inquiry by asking, "how does this rule affect real people?" it is possible to explain much of the instinct pushing for greater awareness of the public interest in the investment and corporate framework. Likewise, it is easier to explain the concerns raised in bankruptcy scholarship regarding the impact of rules on employees, their communities, and the procedural rights of tort claimants.[97] Engaging seriously with that framework can benefit all scholars, including those who begin from a markets-first conception of bankruptcy.

Symposium Articles

In celebration of the *ABLJ*'s 100th anniversary, the Symposium recognizes the *Journal's* contributions to the development and dissemination of knowledge by inviting scholars to reconsider previous contributions to the *Journal*. The authors featured in this edition reflect on their own previous scholarship and that of others. They address how their understanding of bankruptcy has changed over time and how previous conclusions might be updated. At its heart, the endeavor is a recognition that the process of inquiry and discovery continues long after any given article is published, and thus remains open to revision, refinement, and further insight.

Revisiting a particular subject may reveal areas in which the scholarly work was left unfinished. Bruce A. Markell, Professor and former bankruptcy judge, contributes a piece to our symposium that expands his prior analysis of the oldest precedent still actively cited in American courts, *Twyne's Case*. Twenty-five years ago, Markell published an essay in the *Journal* celebrating Professor Barry Zaretsky's insightful

[97] *See* Brook E. Gotberg, *Employment, Stability, and Dignity: Pillars of Corporate Bankruptcy Policy* in ESG AND BANKRUPTCY (Anthony Casey & Thilo Kuntz, eds.) (forthcoming).

treatment of the test for a “constructively” fraudulent conveyance, meaning a transfer in which the insolvent debtor failed to receive reasonably equivalent value in exchange. Here, he reexamines another often-overlooked element of fraudulent conveyance. Although the subjective intent requirement of fraudulent conveyance has been present from the very beginning, scholars and commentators have largely limited their consideration to an intent to defraud. But transfers made with the intent to hinder or delay creditors are also ripe for avoidance. In distilling early and modern case law, Markell develops a theory of how fraudulent conveyance doctrines might be applied to modern liability management transactions.

It is also instructive to revisit prior arguments for the purpose of demonstrating where they've gone wrong. Professor John A. E. Pottow has written a perceptive critique of the view that equality in bankruptcy is a quaint notion of yesteryear. Although critical vendor payments, carveouts, gifting, and modern trends of lender-on-lender violence have produced preferential treatment of some creditors, the courts have begun to push back. Pottow demonstrates how recent caselaw reveals a judicial correction towards the equality norm of bankruptcy law.

Sometimes, revisiting prior arguments can reinforce the wisdom of prior conclusions. Professor Robert Rasmussen reengages with his previous scholarship on the general benefits of contracting and enforcing those contractual agreements, particularly agreements on venue. Rasmussen has previously argued that the law should permit companies to commit to a particular bankruptcy venue prior to the onset of financial distress.[98] Enforcing these forum selection clauses would create strong incentives for managers to select a forum that would maximize the value of the firm.[99] Here, he demonstrates that not only does this private ordering benefit individual firms and their creditors, doing so at the international level can incentivize governments to design more value-enhancing insolvency regimes.

Finally, reconsideration of prior contributions can shed additional light on what may yet be possible in future scholarship. Professor Melissa Jacoby reflects favorably on a prior characterization of bankruptcy courts as America's commercial courts. Being able to see past bankruptcy courts' specialization to their overall role helps to put what these courts do in a more accurate context. Not only do bankruptcy courts exist within a larger framework of federal and state courts, the law itself interacts and influences a constellation of other federal and state laws. She asserts that the path to excellence for bankruptcy judges today will be paved with an increased understanding of this context, including a deeper understanding of how bankruptcy law is situated among related laws of commerce.

Conclusion

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[98] Robert K. Rasmussen & Randall S. Thomas, *Timing Matters: Promoting Forum Shopping by Insolvent Corporations*, 94 NW. U. L. REV. 1357, 1359 (2000).
[99] *Id.*

The scholars writing in this Symposium, and those referenced in the above paragraphs, are recognized leaders in the field.[100] Their work is rightly celebrated for its important contributions to the broader field. Efforts to understand the differences in viewpoint, approach, and conclusions between these scholars can be useful and may lead to important insights, perhaps revealing gaps in our collective understanding of bankruptcy law. That said, the traditionalist/proceduralist divide, while historically important, no longer accurately describes bankruptcy scholarship. Modern writing on corporate bankruptcy has evolved to incorporate many of the prior insights, and the arguments have correspondingly changed. Put another way, the course of the discussion has been altered as the stream of ideas has been fed by multiple sources.

Today's disagreements are not really about non-bankruptcy entitlements, judicial discretion, or even methodology, but increasingly about who bankruptcy serves and whose interests deserve emphasis. Those discussions can benefit from a wealth of perspectives and viewpoints, which incorporate not only an understanding of large corporate bankruptcies, but small ones as well.

This Symposium promotes the scholarly virtue of revisiting assumptions and reconsidering prior scholarship. It encourages both its authors and its readers to come to the topic with fresh eyes and a willingness to learn from others' insights, wisdom, and mistakes. In this way, it reflects what is best about scholarship and scholarly debate.

[100] Of course, there are many more scholars – too many to list individually – who are also constantly enhancing the field through their own theoretical and empirical insights.