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SUPERDELEGATION AND GATEKEEPING IN BANKRUPTCY COURTS

Melissa B. Jacoby*

INTRODUCTION

America's bankruptcy court system runs on delegation, all the way down. The Judicial Code expressly authorizes federal district judges to make a wholesale hand off of bankruptcy cases and related adversary proceedings to bankruptcy judges.¹ Many observers, including justices on the U.S. Supreme Court, doubt this arrangement with non–Article III judges is fully constitutional.² Some district judges even try to offload appeals from bankruptcy court decisions onto their non–Article III magistrates.³ But delegation of work

* Graham Kenan Professor of Law, University of North Carolina at Chapel Hill. Thanks to Bill Whitford for inspiration, to Jill Family for her administrative law expertise, and to the UNC Law Chancellors' Scholars for their helpful and enthusiastic discussion at a paper workshop in February 2015. Robert El-Jaouhari and Britton Lewis provided substantial research and editorial assistance for which I am grateful. Insofar as this Article is part of a larger project, it also has benefitted from the research assistance of Raymond Echevarria, Dana Messenger, Brett Neve, and Safa Sajadi. I have had the good fortune to discuss the subjects of this article with several bankruptcy judges and lawyers. To quote Professor Whitford, "[n]one of these persons is responsible for any of the errors contained herein, nor should they be presumed to agree with the views set forth. But without their assistance, the errors would have been more numerous and the views more outlandish." William C. Whitford, *The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy*, 68 AM. BANKR. L.J. 397, 397 n* (1994) [hereinafter Whitford, *Individualized Justice*].

1. 28 U.S.C. § 157(a) (2012).

2. Melissa B. Jacoby, *What Should Judges Do in Chapter 11?*, 2015 U. ILL. L. REV. 571, 573–74 [hereinafter, Jacoby, *What Should Judges Do*] (discussing the Supreme Court's decisions in *Stern v. Marshall* and *Executive Benefits Insurance Agency v. Arkison*, and its grant of certiorari in *Wellness International Network Limited v. Sharif*). With three justices dissenting, the Supreme Court recently held that bankruptcy judges have the constitutional authority to adjudicate *Stern* claims with party consent. *Wellness International Network, Limited v. Sharif*, 135 S. Ct. 1932 (2015).

3. See, e.g., *Bannistor v. Ullman*, 287 F.3d 394 (5th Cir. 2002); *Hall v. Vance*, 887 F.2d 1041 (10th Cir. 1989); *Minerex Erdoel, Inc. v. Sina, Inc.*, 838 F.2d 781, 786 (5th Cir. 1988); *In re Elcona Homes Corp.*, 810 F.2d 136 (7th Cir. 1987); *In re Continental Airlines, Inc.*, 218 B.R. 324 (Dist. Del. 1997); Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA. L. REV. 384, 428 n.282 (2012). The more benign reasons for an eagerness to offload bankruptcy might relate to the obligation of district courts to prioritize the processing of criminal cases. Speedy Trial Act of 1974, 18 U.S.C. §§ 3161–74 (2012). A darker rationale can be gleaned from the savage language some district judges have employed in their descriptions of bankruptcy work. E.g., Arthur D. Hellman, *Conference on Empirical Research in Judicial Administration*, 21 ARIZ. ST. L.J. 33, 121 (1989) (quoting Judge Bilby as saying, "[m]ost district judges like bankruptcy about as much as AIDS . . . [t]hey hate [bankruptcy], they don't want anything to do with it"); *id.* at 122 ("Most judges will take two death penalty cases to one bankruptcy case."); see also Pardo & Watts, *supra*, at 428

by bankruptcy judges to other actors has escaped the attention of Congress, federal courts of appeal, and even the “fastidious carping of scholars.”⁴

In a volume of scholarship celebrating Professor Bill Whitford, this Article considers the allocation of government oversight in Chapter 13, a type of bankruptcy about which Professor Whitford has much expertise.⁵ Chapter 13 bankruptcy is available to individuals with regular income as long as their debts are not too large.⁶ It offers special tools for protecting co-debtors and dealing with property encumbered by security interests or mortgages.⁷ Systematic empirical studies illustrate strongly rooted localized practices for Chapter 13.⁸ Although filing ratios vary by location, Chapter 13 remains the second most populous type of bankruptcy nationally, behind Chapter 7.⁹

To manage the volume of cases, some bankruptcy judges hand over their courtrooms to Chapter 13 trustees, who then supervise plan confirmation hearings in the courtroom without a judge present. According to a finding in an extensive survey of judges, nearly one-third of judges in the early 1990s reported

(“[W]hen Article III judges do have the opportunity to decide bankruptcy appeals, they may not find such matters interesting, which may lead to suboptimal decisionmaking.”).

4. Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 365 (1986) (noting that the judicial system relies on safeguards such as “the self-consciousness of judges, the vigilance and assertiveness of advocates, the probing suspicions of journalists, and the fastidious carping of scholars”).

5. William C. Whitford, *Has the Time Come to Repeal Chapter 13?*, 65 IND. L.J. 85 (1989) [hereinafter Whitford, *Has the Time Come*]; William C. Whitford, *A History of the Automobile Lender Provisions of BAPCPA*, 2007 U. ILL. L. REV. 143; Whitford, *Individualized Justice*, *supra* note *; William C. Whitford, *Secured Creditors and Consumer Bankruptcy in the United States*, 37 OSGOODE HALL L. J. 339 (1999). Also, Professor Whitford’s work on business bankruptcy reveals an interest in delegation within the bankruptcy system. William C. Whitford, *What’s Right About Chapter 11*, 72 WASH. U. L. Q. 1379, 1402–05 (1994) [hereinafter Whitford, *What’s Right About Chapter 11*] (discussing how bankruptcy judges could deploy their discretion to change business bankruptcy practices, questioning whether “value choices such as these should be made by Congress, not by an unelected judiciary,” but ultimately acknowledging the difficulty of placing expectations for reform in the hands of Congress).

6. 11 U.S.C. § 109(e) (2012) (imposing a regular income requirement and debt limits that are adjusted for inflation every three years); *id.* § 101(30) (defining “individual with regular income” for Chapter 13 purposes).

7. *Id.* §§ 1301, 1322, 1325; see Gordon Bermant & Jean Braucher, *Making Post-Petition Mortgage Payments Inside Chapter 13 Plans: Facts, Law, Policy*, 80 AM. BANKR. L.J. 261 (2006); Juliet M. Moringiello, *Mortgage Modification, Equitable Subordination, and the Honest but Unfortunate Creditor*, 79 FORDHAM L. REV. 1599, 1603–07 (2011); Juliet M. Moringiello, *(Mis)use of State Law in Bankruptcy: The Hanging Paragraph Story*, 2012 WIS. L. REV. 963.

8. Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501 (1993) [hereinafter Braucher, *One Code*]; Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 HARV. J. L. & PUB. POL’Y 801 (1994).

9. U.S. BANKR. COURTS, BUSINESS AND NONBUSINESS CASES COMMENCED, BY CHAPTER OF THE BANKRUPTCY CODE, DURING THE 12-MONTH PERIOD ENDING DECEMBER 31, 2013 tbl.F-2 (2013), available at http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2013/1213_f2.pdf.

some version of this method.¹⁰ Yet, this particular subset of the practice of deference to the positions of Chapter 13 trustees seems to have escaped sustained attention from, or even detailed description by, legal scholars. Likewise, I cannot find appellate court treatment of the practice. That absence is consistent with the disconnect between what justices on the U.S. Supreme Court think bankruptcy judges do and the reality.¹¹

In some districts, therefore, individual debtors have passed through the bankruptcy system possibly believing that the Chapter 13 trustees are, in fact, the federal judges. But the addition of the “super” to the term “delegation” comes from the cross-branch structure of the handover. Congress assigned oversight of the plan confirmation process to the federal judiciary rather than to an executive agency.¹² As already noted, Congress expressly authorized Article III judges to pass along bankruptcy work to bankruptcy judges, not to trustees. Who appoints trustees? In all states but two, they are appointed and overseen by the United States Trustee, part of the U.S. Department of Justice.¹³ Thus, this little-studied convention and its variations should be of interest to administrative law and federal courts scholars as well as to the bankruptcy world.

At the other end of the philosophy spectrum, some judges are such active gatekeepers that they impose hurdles on Chapter 13 that are difficult to locate in the Bankruptcy Code. Especially before the Bankruptcy Code’s 2005 amendments, it was well known that some judges refused to confirm plans unless they promised particular percentage payments to unsecured creditors.¹⁴ But recent examples are even more intriguing. I have heard a rumor of a judge in Kentucky who conditioned Chapter 13 plan confirmation on a debtor quitting smoking.¹⁵ And a judge in California is systematically seeking to heighten the bar not only to plan confirmation, but also to the receipt of a discharge after plan

10. Hon. Stephen A. Stripp, *An Analysis of the Role of the Bankruptcy Judge and the Use of Judicial Time*, 23 SETON HALL L. REV. 1329, 1391 (1993) (reporting twenty-eight percent of judges who responded to his survey “permit the standing trustee to conduct uncontested chapter 13 confirmation hearings without the judge’s presence in the courtroom”); *id.* at 1427 (reporting that over 120 judges responded to this question). A slightly distinct question is whether a Chapter 13 confirmation hearing is required at all if no party in interest objects.

11. See *infra* Section I for an examination of the perceived role of bankruptcy judges. For a parallel point about Chapter 11, see Douglas G. Baird, *The New Face of Chapter 11*, 12 AM. BANKR. INST. L. REV. 69 (2004).

12. For a critique of that choice, see Pardo & Watts, *supra* note 3.

13. 11 U.S.C. § 1302 (2012) (setting forth duties of standing Chapter 13 trustee appointed by the U.S. trustee).

14. NAT’L BANKR. REVIEW COMM’N, BANKRUPTCY: THE NEXT TWENTY YEARS 234–35 (1997) (discussing how some courts “condition confirmation on payment of high percentages of unsecured debt”); *id.* at 267 (“Some courts throughout the country will not confirm plans that provide less than a certain percentage of repayment to unsecured creditors. . . . Had the debtor’s case been assigned to another judge who will confirm plans that promise no payments to unsecured creditors, the outcome would have been different.”); Braucher, *One Code*, *supra* note 8, at 532; Whitford, *Has the Time Come*, *supra* note 5, at 97; Whitford, *Individualized Justice*, *supra* note *, at 404, 409, 410–11 (citing Chapter 13 trustee survey).

15. See *infra* Section III for a discussion of “extreme” gatekeeping.

completion.¹⁶ Such practices are difficult to counter through the expensive, and one-case-at-a-time, appellate process, particularly if there is no absolute right to appeal an order denying plan confirmation.¹⁷ As distinct from superdelegation, judges who impose extra requirements to the most fundamental element of bankruptcy—the discharge of debt—arguably overconsume the gatekeeping authority Congress gave them. Of course, many, if not most, courts fall in between these two poles.

This Article proceeds as follows. Section I considers the baseline expectations of judges in the Bankruptcy and Judicial Codes, coupled with the interpretive overlay of the Supreme Court and appellate courts. Section II examines cross-branch delegation of Chapter 13 gatekeeping, featuring an example I observed in a bankruptcy court in 2012. Section III considers gatekeeping that goes beyond Congress's or the Supreme Court's expectations for exercising the judicial role.

I. THE BANKRUPTCY JUDGE'S ROLE ACCORDING TO CONGRESS, THE SUPREME COURT, AND SOME APPELLATE COURTS

A. *The Statutory Baseline*

In the 1970s, Congress made an earnest attempt to divide judicial and administrative duties, allocating the first category to courts and the second to the executive branch.¹⁸ In the idealized world, this production of a distinct administrative apparatus and adjunct trustee program meant bankruptcy judges could preserve their time and authority resolving disputes.¹⁹ A key component of this structure is the U.S. Trustee Program (part of the U.S. Department of Justice). The U.S. Trustee Program was created as a pilot program in 1978 and made permanent in 1986,²⁰ after Congress restructured the bankruptcy courts in response to the Supreme Court's *Northern Pipeline* ruling.²¹

16. Standing Order *In re* Procedures for Chapter 13 Cases Assigned to Judge Johnson (Bankr. C.D. Cal.) [hereinafter Standing Order of Judge Johnson] (applicable to cases after Jan. 1, 2013). See *infra* Section III for a review of pleadings in specific cases.

17. Bullard v. Blue Hills Bank, 135 S. Ct. 1686 (2015) (holding that an order denying confirmation of a plan is not a final order that the debtor has the right to immediately appeal). For the more general challenges associated with relying on the appellate process, see Ted Janger, *Crystals and Mud in Bankruptcy Law: Judicial Competence and Statutory Design*, 43 ARIZ. L. REV. 559, 619 (2001), noting that “[i]n most consumer cases, the burden of litigation will be dispositive.” See also NAT’L BANKR. REVIEW COMM’N, *supra* note 14, at 264–65 (1997) (discussing the difficulty of parsing fact-intensive court decisions in Chapter 13 and the resource requirements of litigation).

18. Richard B. Levin, *Towards a Model of Bankruptcy Administration*, 44 S.C. L. REV. 963, 966–67 (1993); Rafael I. Pardo, *Eliminating the Judicial Function in Consumer Bankruptcy*, 81 AM. BANKR. L.J. 471, 488–93 (2007); Pardo & Watts, *supra* note 3, at 394–99.

19. Jacoby, *What Should Judges Do*, *supra* note 2.

20. Pardo & Watts, *supra* note 3, at 394–96 (describing the U.S. Trustee Program as well as the fact that Alabama and North Carolina were permitted to opt out of the program).

21. In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 76 (1982), a plurality ruled that bankruptcy court structure violated Article III of the United States Constitution. In 1984, Congress revised the Judicial Code to conform with *Northern Pipeline* in the Bankruptcy

Per its statutory authorization, the United States Trustee for each region appoints and oversees private trustees, including Chapter 13 trustees.²² The Bankruptcy and Judicial Codes specify the duties of trustees. For example, they convene and oversee meetings of creditors with the debtor; judges are not permitted to attend.²³ In Chapter 13, trustees have rather mixed responsibilities. On the one hand, they assess whether the debtor is promising sufficient payments to creditors to meet the confirmation standards.²⁴ Trustees also have a facilitative role, however. Congress has charged trustees with assisting the debtor in performance under the plan.²⁵ In some districts, trustees have experimented over time with credit rehabilitation and methods of increasing the odds that mortgages remain current, thus protecting debtors from post-plan default and foreclosure.²⁶

The Bankruptcy Code provides that a judge “shall confirm” a Chapter 13 plan “if” it meets a lengthy list of requirements.²⁷ A traditional formulation of how that task unfolds appears in the classic bankruptcy study, *As We Forgive Our Debtors*: “After the hearing, the clerk schedules a confirmation hearing at which the trustee makes a recommendation to the court about the debtors’ plan.”²⁸ In the subset of cases in which the debtor completes the plan, the court is to enter a discharge order “as soon as practicable after completion by the debtor of all payments under the plan.”²⁹

What happens if the trustee endorses the debtor’s proposed plan and all other parties are silent or acquiescent? The Bankruptcy Code drafters did not make clear how bankruptcy judges are supposed to perform their roles when the

Amendments and Federal Judgeship Act of 1984. See Pub. L. No. 98-353, 98 Stat. 333 (codified as amended at 11 U.S.C. § 101(47)(A)(i) (2012)).

22. 28 U.S.C. § 586(a)(1), (3) (2012); see *id.* § 586(b) (authorizing the appointment of a standing Chapter 13 trustee for a region if the volume of cases so warrants); *id.* § 586(d) (authorizing the Attorney General to prescribe by rule the requirements for serving as a standing Chapter 13 trustee); *id.* § 586(e) (authorizing the Attorney General to fix the compensation, including by a percentage of no greater than ten percent).

23. *Id.* § 586(b); 11 U.S.C. § 341; U.S. DEPT. OF JUSTICE EXECUTIVE OFFICE FOR UNITED STATES TRUSTEES, HANDBOOK FOR CHAPTER 13 STANDING TRUSTEES, 3–9 (2012); see also Donald R. Lassman & Carolyn A. Bankowski, *Advice for Bankruptcy Trustees in Consumer Cases*, in STRATEGIES FOR CONSUMER BANKRUPTCY TRUSTEES: LEADING LAWYERS ON ANALYZING THE ROLE OF THE TRUSTEE IN THE BANKRUPTCY PROCESS 36 (2012) (private trustees from Massachusetts noting that the trustee “will be the only person in an official capacity the debtor will meet during their bankruptcy case. Therefore, for most people filing for bankruptcy, their entire perception of the bankruptcy process will be based on their interaction with their bankruptcy trustee.”).

24. See 11 U.S.C. § 1302(b)(2).

25. *Id.* § 1302(b)(4).

26. See NAT’L BANKR. REVIEW COMM’N, *supra* note 14, at 294 (discussing Chapter 13 trustee credit rehabilitation programs); Bermant & Braucher, *supra* note 7 (discussing methods of mortgage payment during Chapter 13).

27. 11 U.S.C. § 1325.

28. TERESA SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *AS WE FORGIVE OUR DEBTORS* 36 (1989).

29. 11 U.S.C. § 1328(a).

case proved nonadversarial.³⁰ Should the judge presume the statutory requirements are met if the Chapter 13 trustee says so? If a trustee and the parties in interest have no objections, should the judge raise one or two of her own? The Bankruptcy Code does not tell the judge how she should assess the plan's legality other than based on what the parties tell her.³¹ At least in dicta, we will see, the U.S. Supreme Court attempted to fill the gap.

B. The Supreme Court's Vision of Plan Confirmation

United Student Aid Funds, Inc. v. Espinosa,³² a unanimous 2010 Supreme Court decision, emphatically instructs bankruptcy judges to independently review the requirements for Chapter 13 plan confirmation in each case, even if no one has objected. Espinosa's Chapter 13 plan provided that completion of the plan would discharge some unpaid student loans. This part of the plan violated bankruptcy law; Espinosa's lawyer should have brought a separate lawsuit to determine whether the circumstances necessary to discharge student loans—a highly fact-intensive inquiry—were present.³³ The creditor should have been served with a complaint and summons on a nondischargeability action. But no one objected to the clause: not the creditor to whom Espinosa owed the student loans, and not the Chapter 13 trustee, who ordinarily would be expected to flag noncompliant plan provisions. The repayment plan was confirmed.

Espinosa finished the plan and earned a discharge order from the court.³⁴ After the entry of that order, the student loan creditor tried to intercept Espinosa's tax refund to satisfy the modest unpaid debt. Espinosa responded that he no longer owed this debt. The creditor argued the plan should be considered void as to the student loan. On the initial appeal, the district court sided with the creditor. The Court of Appeals for the Ninth Circuit reversed, stating that the bankruptcy court was *obliged* to confirm the plan in the absence of objections.³⁵ The panel explained:

If the creditor is notified and fails to object, it is doubtless the result of a careful calculation that this course is the one most likely to yield repayment of at least a portion of the debt. In such circumstances, bankruptcy courts have no business standing in the way.³⁶

Espinosa's student loan creditor successfully sought review from the U.S. Supreme Court. Although the Supreme Court upheld the result, the content of the opinion was quite different from that of the Ninth Circuit.

30. John D. Ayer, *The Forms of Action in Bankruptcy Practice: An Exposition and a Critique*, 1985 NORTON ANN. SURV. BANKR. L. 6, 11; John D. Ayer, *How to Think About Bankruptcy Ethics*, 60 AM. BANKR. L.J. 355, 393 (1986).

31. Such gaps are not unique to bankruptcy. See Jacoby, *What Should Judges Do*, *supra* note 2.

32. 559 U.S. 260 (2010).

33. 11 U.S.C. § 523(a)(8).

34. *Espinosa*, 559 U.S. at 265–66.

35. *Espinosa v. United Student Aid Funds, Inc.*, 553 F.3d 1193, 1205 (9th Cir. 2008).

36. *Id.*

Delivering the opinion of a unanimous court, Justice Thomas readily dispensed with the main issue. The conditions for unraveling a judgment, as the creditor requested, were not present in this case and thus discharge of the remaining student loan debt would be upheld. Yet, the Court explained that the bankruptcy court had committed legal error by confirming Espinosa's Chapter 13: "the Code makes plain that bankruptcy courts have the authority—indeed, the obligation—to direct a debtor to conform his plan to the requirements of [the Bankruptcy Code]."³⁷ Several variations followed on the judge-as-gatekeeper theme. The law "requires bankruptcy courts to address and correct a defect in a debtor's proposed plan even if no creditor raises the issue," said the Court.³⁸ Citing just one bankruptcy court decision, the Court noted that bankruptcy judges "appear to be well aware of this statutory obligation."³⁹ Then, speaking in particular to the student loan issue, the Court stated, "the bankruptcy court must make an *independent* determination of undue hardship before a plan is confirmed, even if the creditor fails to object or appear in the adversary proceeding."⁴⁰

The takeaway message of *Espinosa* on the gatekeeping responsibility of bankruptcy judges seems to be that they should independently review hundreds of thousands of Chapter 13 plans, annually, for potentially erroneous provisions. They should do so, suggested the Supreme Court, even if neither a standing trustee, nor a creditor with money on the line, alerts the court to a flaw.

Espinosa's message, however striking, was not entirely new. The 1990 Supreme Court decision *United States v. Energy Resources Co.*,⁴¹ which focused on trust fund taxes in Chapter 11, had already revealed the expectation that judges would review Chapter 11 plans to ensure that those plans *will* succeed (contrary to Chapter 11 language that speaks of probability, not certainty).⁴² In *Till v. SCS Credit Corp.*,⁴³ a 2004 decision about the interest rate for restructuring a truck loan in Chapter 13, members of the Supreme Court made empirical statements about how bankruptcy judges assess the viability of repayment plans.⁴⁴ Justice Stevens's plurality opinion assumed the bankruptcy judge would set the interest rate through a deliberative bespoke process, assessing the likelihood that each particular debtor would complete his or her

37. *Espinosa*, 559 U.S. at 277.

38. *Id.* at 277 n.14.

39. *Id.* at 277 n.15.

40. *Id.* at 278 (emphasis added). This last iteration may not be literally achievable. See David Gray Carlson, *The Federal Rules of Bankruptcy Procedure in Reorganization Cases: Do They Have a Constitutional Dimension?*, 84 AM. BANKR. L.J. 251, 271 (2010).

41. 495 U.S. 545 (1990).

42. *Energy Resources Co.*, 495 U.S. at 549 (misapplying 11 U.S.C. § 1129(a)(11), as did the First Circuit below); see also *In re Michelson*, 141 B.R. 715, 720 (Bankr. E.D. Cal. 1992) (restating the *Energy Resources* holding so that it was more consistent with § 1129 language).

43. 541 U.S. 465 (2004).

44. *Till*, 541 U.S. 465. The dispute that went up to the Supreme Court related to the interest rate Till should pay on the restructured debt secured by a truck, dividing the Supreme Court into more shreds than many of the thorniest constitutional issues.

plan.⁴⁵ In dissent, Justice Scalia observed correctly that every confirmed Chapter 13 plan has been accompanied by a finding that the debtor *will* complete the plan, a legal condition of confirmation contained in the Bankruptcy Code. And yet, the majority of confirmed Chapter 13 cases are never completed. “[B]ankruptcy judges are not oracles,” Justice Scalia concluded.⁴⁶ Although he understands the consumer bankruptcy system better than many other sitting justices, Justice Scalia inaccurately assumed that bankruptcy judges *try* to predict the future in Chapter 13 cases.

C. *A Spectrum of Circuit Court Conceptions of Plan Confirmation*

In *Espinosa* and similar decisions from courts of appeals, the declaration of a judicial duty did not change the result *ex post*.⁴⁷ A few further-reaching circuit

45. “[T]his requirement obligates the court to select a rate high enough to compensate the creditor for its risk but not so high as to doom the plan.” *Id.* at 480. For an earlier circuit decision with similar expectations, see *United States v. Estus*, 695 F.2d 311, 316 (8th Cir. 1982), which observes that “[t]he bankruptcy court must utilize its fact-finding expertise and judge each case on its own facts after considering all the circumstances of the case.”

46. *Till*, 541 U.S. at 493 (Scalia, J., dissenting).

47. *In re Szostek*, a Third Circuit case from the 1980s, is in the spirit of *Espinosa*, asserting the judge’s independent duty but with duller teeth. 886 F.2d 1045 (3d Cir. 1989). The Szosteks sought confirmation of their Chapter 13 repayment plan. The trustee endorsed confirmation. Hearing no objection, the plan was confirmed. Four months later, the Kissell Company complained that the Szosteks’ plan violated the law because it did not pay interest on its secured claim. After a hearing, the bankruptcy court said it was “too late” to raise this objection. Kissell appealed to the district court. The district court vacated the confirmation of the Szosteks’ plan. *In re Szostek*, 886 F.2d at 1408. According to the district court, the bankruptcy court had failed to perform its independent duty to ensure the plan was fully compliant with all legal requirements. *Id.* The debtors appealed to the Third Circuit, which reversed the district court. True, the bankruptcy judge had an independent duty that it failed to perform, said the Third Circuit decision. But clear rules determine when creditors can object to plans that affect them; those rules would be meaningless if the creditor could stay silent while the bankruptcy judge’s duty preserved parties’ rights to appeal. The benefits of finality of the confirmation order trumped the bankruptcy judge’s mistake in the case. *Id.* at 1414. In an Eleventh Circuit case, a debtor in a confirmed Chapter 13 plan was in a dispute with a mortgage lender. *In re Bateman*, 331 F.3d 821, 828 (11th Cir. 2003). The mortgage lender had not objected to the plan, and sought to complain after the fact. The collateral attack on the plan was unsuccessful in the bankruptcy court, district court, and, ultimately, in the U.S. Court of Appeals for the Eleventh Circuit. Nonetheless, footnote six of the Eleventh Circuit decision previews *Espinosa*:

We will not lecture on the various roles and responsibilities delegated to and required of each party in interest participating in a Chapter 13 plan confirmation; however, we deem it necessary to urge all parties to carefully execute their responsibilities such that every confirmed plan will result in a synthesis of the interests of all participants in a consistent manner. . . . Moreover, it is the independent duty of the bankruptcy court to ensure that the proposed plan comports with the requirements of the bankruptcy code.

In re Bateman, 331 F.3d at 828 n.6.

One last example: the Fifth Circuit, in *In re Williams*, imposed an “independent duty” on a bankruptcy judge with respect to a contested Chapter 11 plan *rejected* by the bankruptcy court. *Williams v. Hibernia National Bank (In re Williams)*, 850 F.2d 250, 251 (5th Cir. 1988). Williams owned thirty-two horses as well as real estate. Earlier in the case, the court had ruled on the value of the horses at \$134,300; Williams’s creditor Fidelity did not object to that valuation. *Id.* at 251. But Fidelity disputed the value of the horses at the confirmation hearing. It so happens that the bankruptcy court used a lower valuation of the horses as part of its reasoning for rejecting the plan. The Fifth

court decisions, however, have charged bankruptcy judges with responsibilities that preserve issues for appeal even for creditors who sat on their rights.

The *In re Lett*⁴⁸ appeal arose from a Chapter 11 case filed by an individual. Lett sought bankruptcy protection in the face of a \$3 million judgment and a big debt to the U.S. Department of Housing and Urban Affairs. After working through several objections, Lett's plan was confirmed. Appealing the confirmation order to the district court, a creditor argued for the first time that Lett's plan violated the absolute priority rule, a requirement of nonconsensual Chapter 11 plan confirmation.⁴⁹ Recognizing that the creditor had not raised the issue below, the district court found that the issue was not preserved for appeal.⁵⁰ Undaunted, the creditor appealed to the U.S. Court of Appeals for the Eleventh Circuit, which reversed in favor of the creditor. The majority of the panel said the bankruptcy court had an independent duty to ensure that the absolute priority rule was satisfied, even if no creditor raised an objection.⁵¹ This conclusion, the court noted, "should rededicate bankruptcy courts to the faithful execution of their statutory duties . . ."⁵²

Lett had a precursor in a Ninth Circuit decision, *In re Perez*,⁵³ which also involved an individual debtor in Chapter 11. After a difficult process, the bankruptcy court confirmed Perez's third proposed plan, and the Bankruptcy Appellate Panel for the Ninth Circuit affirmed.⁵⁴ As in *Lett*, the creditor appealed further on the basis of the absolute priority rule, an objection the creditor did not make in the bankruptcy court. The majority of the Ninth Circuit panel decided the appeal could be heard anyway.⁵⁵ Bankruptcy is "not precisely analogous to normal adversary litigation," the majority reasoned, and bankruptcy courts "must pass on those issues, whether or not they're specifically

Circuit upheld the bankruptcy court's rejection of the plan. Quoting an Arkansas bankruptcy court, the court stated, "[i]n addition to the consideration of objections raised by creditors, the [c]ourt has a mandatory independent duty to determine whether the plan has met all of the requirements necessary for confirmation." *Id.* at 253 (alteration in original) (quoting *In re Holthoff*, 58 B.R. 216, 218 (Bankr. E.D. Ark. 1985)). Thus, said the Fifth Circuit, the bankruptcy court "properly re-examined" the value of the horses at the time of confirmation, independent of creditors' positions on valuation. *Id.* at 253. In the spirit of the Fifth Circuit's opinion are many others that use independent duty language to reinforce the power of the bankruptcy court rather than to scold a judge for shirking. *E.g.*, *In re Duval Manor Associates*, 203 B.R. 42, 44–45 (E.D. Pa. 1996) (using the term "inquisitor" to normatively characterize bankruptcy judges' review of plan confirmation requirements).

48. 632 F.3d 1216 (11th Cir. 2011).

49. *Lett*, 632 F.3d at 1218–19.

50. *Id.* at 1224.

51. *Id.* at 1229.

52. *Id.* at 1230. In concurrence, the third panel judge wrote separately to stress that the holding was narrow and applied to only the absolute priority rule. *Id.* at 1231 (Carnes, J., concurring). But in light of the *Espinosa* reasoning that the bankruptcy judge runs the lighthouse, on the lookout for any legal violations, it is not obvious why the analysis would be limited to that doctrinal question.

53. 30 F.3d 1209 (9th Cir. 1994).

54. *Perez*, 30 F.3d at 1212.

55. A district court judge sitting by designation did not join the majority decision and was sharply critical of its reasoning as well as its imagery. *Id.* at 1219–20 (Zilly, J., dissenting).

put in dispute.”⁵⁶ The panel majority held the bankruptcy court committed clear error when it confirmed the plan.⁵⁷ It also chastised the bankruptcy court, the Bankruptcy Appellate Panel, and the lawyers, noting “[n]one of the repeat players in the bankruptcy system have covered themselves with glory in this case.”⁵⁸

Lett and *Perez* illustrate a world in which several hundred bankruptcy judges are admonished to engage in a sufficiently strong form of gatekeeping to preserve an uncomplaining creditor’s right to appeal a bankruptcy court’s orders. But even the more modest *Espinosa* tells judges to directly inquire into the details of hundreds of thousands of repayment/restructuring plans each year before approving the plans. *Espinosa* therefore casts doubt on earlier circuit decisions that could be read to endorse a higher level of deference to trustees.

For example, in *In re Hines*,⁵⁹ the Commonwealth of Pennsylvania objected that a Chapter 13 plan was not filed in good faith because the plan made only nominal payments to unsecured creditors and the debtor failed to carry the burden of proof to affirmatively establish good faith.⁶⁰ At the confirmation hearing, the debtor introduced as evidence the report of the standing trustee stating that the plan met all of the statutory requirements. The standing trustee appeared and recommended confirmation. The U.S. Court of Appeals for the Third Circuit said, “If the statute imposes any affirmative burden of showing good faith upon the debtor, it was satisfied by the report of the standing trustee.”⁶¹ At least prior to *Espinosa*, that conclusion could support a significant level of deference on the legality of plans to Chapter 13 trustees.

D. *Espinosa’s Legacy?*

The independent duty and gatekeeping language are routinely picked up in bankruptcy and district court decisions,⁶² as well as appellate court

56. *Id.* at 1213 (majority opinion).

57. *Id.* at 1217–18.

58. *Id.* at 1218. Curiously, the author of the *Perez* majority opinion later penned the Ninth Circuit’s *Espinosa* opinion that characterized the bankruptcy judge’s role in an entirely different light. Why such a different attitude? The Ninth Circuit’s *Espinosa* opinion does not even cite *Perez*. Perhaps Chapter 13 and Chapter 11, or student loans and the absolute priority rule, were thought to be sufficiently different from each other? Neither distinction is persuasive.

59. 723 F.2d 333 (3d Cir. 1983).

60. *Hines*, 723 F.2d at 334.

61. *Id.* at 334.

62. For example, in a California case, a plan that would strip a second lien from the debtors’ residence proposed to pay the debtor’s lawyer through the plan, but claimed no disposable income to pay general unsecured creditors. *In re Ingram*, No. 11–13216, 2012 WL 10812, at *1 (Bankr. N.D. Cal. Jan. 3, 2012). The trustee initially did not object. Worried that this was, in essence, a disguised Chapter 7, the judge raised questions and held a hearing, noting that he had a responsibility to review Chapter 13 plans, and offered his view of how to fix the plan. The debtor’s lawyer contended that the court’s demands were supported by no legal requirement, and that the court did not have the right to propose terms to a plan. Transcript of Confirmation Hearing 14–15, *In re Ingram*, No. 11–13216, 2012 WL 10812 (Bankr. N.D. Cal. Jan. 3, 2012) (4:12-CV-00408). Eventually, the trustee chimed in and joined

decisions.⁶³ Recounting the “disturbing number of serial filers and high number of defaulting active cases,” an Alabama judge declared he “will no longer confirm a plan for a below median-income debtor unless facts, not mere speculation, are shown that support cause for an extended term.”⁶⁴ Aligning itself with the aspirations of *Espinosa*, the court reported its practice as follows: it “reviews each plan every time the case is up for confirmation, and takes seriously its duty to apply the Code’s requirements for confirmation.”⁶⁵ In another case, the same judge challenged, *sua sponte*, portions of a debtor’s plan that did not comply with the statute and conditioned confirmation on very specific changes.⁶⁶ This judge has criticized lawyers for their role in producing infeasible plans.⁶⁷ Other courts, though, take an entirely different approach, as Section II explores.

II. THE SUPERDELEGATION MODEL

A. *Help Wanted*

Recall that, in his *Till* dissent, Justice Scalia observed that judges are not oracles in their efforts to predict whether Chapter 13 plans will be completed.⁶⁸ What Justice Scalia did not say, probably because he did not know, is that some (perhaps many) judges do not make any attempt to predict the future themselves.⁶⁹ The idea that they would read all the Chapter 13 plans and

the judge’s objection, but in any event, the bankruptcy judge denied confirmation. The debtor appealed and the district court affirmed the bankruptcy court’s denial of confirmation. *Ingram v. Burchard*, 482 B.R. 313, 323 (N.D. Cal. 2012). Citing the Supreme Court, the district court noted that “[t]he Bankruptcy Court is not a rubber stamp.” *Id.* at 321. Thereafter, the debtor put forth a confirmable plan.

63. For example, the U.S. Court of Appeals for the Eighth Circuit upheld a confirmed repayment plan, but in a footnote chastised the bankruptcy court for not independently reviewing Chapter 13 plans for full legal compliance. *Burnett v. Burnett (In re Burnett)*, 646 F.3d 575, 581, 581 n.3 (8th Cir. 2011).

64. *In re Davis*, No. 11–43159–JJR, 2012 WL 3239204, at *7 n.6 (Bankr. N.D. Ala. June 7, 2012).

65. *Id.* at *7 n.8. The court emphasized that the confirmation standard was not lack of bad faith, but an affirmative showing of good faith. *Id.* at *6.

66. *In re Kirk*, 465 B.R. 300, 303 (Bankr. N.D. Ala. 2012). The court was especially concerned with whether the debtor had proposed the plan in good faith. But the court also had a specific statutory concern about the payment schedule for secured and unsecured debts. *Id.* at 302 (citing *Espinosa* and *Lett*); see also *In re Jackson*, Nos. 11–42528–JJR–13, 11–42825–JJR–13, 2012 WL 909782, at *1 (Bankr. N.D. Ala. Mar. 16, 2012) (finding two Chapter 13s, which would essentially only pay lawyers’ fees, did not satisfy the good faith requirement for confirmation: “These cases contort the intent of chapter 13 . . . and benefit no one with the exception of debtors’ counsel.”).

67. *In re Garrard*, Nos. 13–40418–JJR13, 13–40419–JJR13, 2013 WL 4009324, at *7–14 (Bankr. N.D. Ala. Aug. 5, 2013) (denying lawyer’s motion to strike footnote in prior opinion criticizing lawyer).

68. *Till v. SCS Credit Corp.*, 541 U.S. 465, 493 (Scalia, J., dissenting). See *supra* notes 44–46 and accompanying text for a discussion of *Till*.

69. For judges’ reluctance to assess plan feasibility, see Melissa B. Jacoby, *Bankruptcy Reform and Homeownership Risk*, 2007 U. ILL. L. REV. 323, 336–37, which discusses how judges “delegate[] this review, in one form or another, to chapter 13 trustees”; and Melissa B. Jacoby, *Collecting Debts*

make a judgment on each one would seem, to those judges, as practical as commuting to work on a unicorn. They allocate or outsource the work, to various degrees.

Federal judges of all types have been known to seek help to manage their cases.⁷⁰ Strands of case law have addressed how far federal district judges can go in such endeavors. Some involve delegates Congress has expressly authorized, such as magistrates, or endorsed through the Rules Enabling Act, such as special masters.⁷¹ When district judges have relied on their “inherent” authority, for example, to appoint technical advisors, those advisors have been considered to be within the fold of the judiciary, not another branch.⁷²

With high volumes of cases, some of which are large and sprawling, bankruptcy judges have likewise sought help in undertaking their responsibilities.⁷³ The extent of their recruitment may surprise some jurists, academics, and members of Congress. When a U.S. senator asked a district judge at a hearing in the 1970s whether bankruptcy judges would need law clerks to perform their new duties, the district judge’s response implied that a bankruptcy judge *was*, essentially, a law clerk.⁷⁴ Even after judges shed their prior “referee” title, bankruptcy judges were still “subjudges” according to Professor Owen Fiss, falling “somewhere between law clerks and judges in terms of their power.”⁷⁵ Justice Breyer’s dissent in *Stern v. Marshall*⁷⁶ likewise analogized bankruptcy judges to law clerks.⁷⁷

from the Ill and Injured; The Rhetorical Significance, But Actual Irrelevance, of Culpability and Ability to Pay, 51 AM. U. L. REV. 229, 261 (2001).

70. Melissa B. Jacoby, *Federalism Form and Function in the Detroit Bankruptcy*, 33 YALE J. REG. (forthcoming 2016) [hereinafter Jacoby, *Federalism Form and Function*] (discussing team building tendencies of judges, including the use of fee examiners, mediators, court-appointed experts, and nontestifying consultants).

71. *Mathews v. Weber*, 423 U.S. 261, 265 (1976) (upholding a district court’s use of a standing order to refer all Social Security benefit cases to a magistrate for preliminary review, oral argument, and preparation of a recommended decision as to whether there is substantial evidence to support the administrative determination); *La Buy v. Howes Leather Co.*, 352 U.S. 249, 250–51 (1956) (holding that district judge abused his power by referring antitrust actions to special master, and that the court of appeals properly used mandamus authority in response).

72. *In re Peterson*, 253 U.S. 300, 312 (1920) (holding that courts have “inherent power” to appoint “persons unconnected with the court to aid judges in the performance of specific judicial duties”); *Techsearch L.L.C. v. Intel Corp.*, 286 F.3d 1360, 1377–78 (Fed. Cir. 2002) (quoting *Peterson* for the proposition that “[c]ourts have . . . inherent power to provide themselves with appropriate instruments required for the performance of their duties”); *Ass’n Mexican-Am. Educators v. California*, 231 F.3d 572, 590–91 (9th Cir. 2000) (“In those rare cases in which outside technical expertise would be helpful to a district court, the court may appoint a technical advisor.”); *Conservation Law Found. v. Evans*, 203 F. Supp. 2d 27, 30, 32 (D.D.C. 2002) (asserting that an advisor “shall *not* give any advice to the Court on the ultimate issue of the remedy that is most appropriate”); *Reilly v. United States*, 682 F. Supp. 150 (D. R.I. 1988).

73. Jacoby, *Federalism Form and Function*, *supra* note 70.

74. See Lloyd D. George, *The Bankruptcy Appellate Panels: An Unfinished Experiment*, 1982 BYU L. REV. 205, 208 n.12 (quoting judicial witness at Senate hearing responding, “I do not think they need a law clerk. That is why they were appointed in the first place, because of their competence to do this.”).

75. Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1446 (1983).

Today, few would question bankruptcy judges' need to hire law clerks.⁷⁸ Delegation of work is inevitable within a judge's chambers, such as conducting routinized reviews of proposed Chapter 13 plans or, in Chapter 11 cases, fee applications.⁷⁹ This Part focuses on a strong form of outsourcing across branches of government, to Chapter 13 trustees, who play an essential administrative function in the second most populous type of bankruptcy case.

Everywhere but North Carolina and Alabama, Chapter 13 trustees are executive branch appointees with specific statutory duties.⁸⁰ Judicial reliance on or deference to trustees can take many forms. As suggested earlier, the most traditional is that the judge solicits the trustee's opinion during the plan confirmation hearing and gives great weight to that opinion.⁸¹ A middle approach is that judges do not schedule and hold hearings at all unless the trustee indicates a dispute or objection.⁸² The focus of the next Part is the practice of permitting standing Chapter 13 trustees to oversee Chapter 13 plan confirmation hearings.⁸³

B. *Handing Over the Courtroom*

To give flavor to the practice of allowing Chapter 13 trustees to supervise plan confirmation hearings, here is an example I observed, somewhat by accident, in June 2012.⁸⁴ I had wanted to sit in on bankruptcy court hearings and

76. 131 S. Ct. 2594 (2011).

77. *Marshall*, 131 S. Ct. at 2627 (Breyer, J., dissenting). Justice Breyer wrote this, it seems, in an effort to illustrate pragmatically that portions of title 28 of the United States Code establishing the bankruptcy court's authority pass constitutional muster. Justice Breyer also swept magistrates into this comparison, along with "administrative officials" of the judiciary. *Id.*

78. See 28 U.S.C. § 156(a) (2012) (authorizing hiring of law clerks by bankruptcy judges). The Federal Judicial Center's handbook for law clerks includes advice to bankruptcy court law clerks. FED. JUDICIAL CTR., LAW CLERK HANDBOOK: A HANDBOOK FOR LAW CLERKS TO FEDERAL JUDGES 1, 38–46, 62, 65, 67, 75–76, 103, 105, 107, 112–13 (Sylvan A. Sobel ed., 2d ed. 2007).

79. Even delegation to law clerks has its critics outside of bankruptcy. For allegations of law clerk overuse, see LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 393–96 (2013), which calls the role of staff in federal courts a topic "cry[ing] out for systematic analysis," with law clerks being their primary subject, and lamenting the "growing dominance of a management model of the judicial workplace"; and JOHN BILYEU OAKLEY & ROBERT S. THOMPSON, LAW CLERKS AND THE JUDICIAL PROCESS: PERCEPTIONS OF THE QUALITIES AND FUNCTIONS OF LAW CLERKS IN AMERICAN COURTS 29–35 (1980), which expresses concern about impact of routinized work of long-term law clerks in California state courts.

80. See *supra* Part I.A for a discussion of the U.S. Trustee Program, from which Alabama and North Carolina were permitted to opt out.

81. In such courts, the structure resembles judicial solicitation of the opinions of probation officers. But probation officers are part of the judiciary, unlike most Chapter 13 trustees.

82. *In re Dues*, 98 B.R. 434, 440 n.3 (Bankr. N.D. Ind. 1989) (noting, in Chapter 12 family farmer case, awareness of "more than one" jurisdiction in which courts say a hearing is not required unless objections are raised).

83. Again, the primary recognition I can find in the scholarship is Stripp, *supra* note 10, at 1391–92.

84. Although I visited the Eastern District of Pennsylvania, I believe the practices observed there reflect those of many districts, as addressed in Stripp, *supra* note 10. Notes taken

looked up the time and place for hearings on the court's website. That schedule announced the case numbers that would be called. The hearing started in the courtroom at the appointed time, but without a judge. The Chapter 13 trustee did not take the judge's bench, but turned a speaker's podium 180 degrees to face the audience. He called the cases in the order they appeared on the court's official hearing list, with the relevant parties and lawyers approaching the podium in turn. The parties had conversations with the trustee about the status of the case that were audible to others in the courtroom. If a debtor requested an extension of time, and the trustee agreed, the judge's courtroom deputy was present to adjust the court calendar, as if the judge had made or expressly acceded to the request. If the issue could not be resolved through these methods, the courtroom deputy added the matter to a much-shortened list for the judge to handle later that day. The trustee resolved at least two-thirds of the cases himself.⁸⁵ It took about an hour to ninety minutes for the trustee to get through the list, including re-calling cases in which no one initially appeared.

C. *Why Superdelegation Matters*

To many bankruptcy judges and trustees who engage in some form of what I have described above, the practice is non-news, common sense, and the only reasonable allocation of work. The practice also prevents judges from adopting what they might perceive as an overly inquisitorial role in uncontested cases. Thus, it might seem unduly formalistic to observe that the practice is unanticipated in the Bankruptcy Code and, as best I can tell, unexplored by appellate judges and scholars. After all, some courts do not hold confirmation hearings at all if the trustee supports a debtor's plan and no other parties object. The trustee or her staff may meet with the debtor's lawyer in a private office or talk on the phone to resolve the matters. Does that non-hearing approach differ meaningfully from what would appear to the outside world as trustees holding court? Yes. The former is a bureaucratized negotiation. The latter depends heavily on a public court paradigm, creating the visible impression that a federal court proceeding is underway with a judge at the helm.⁸⁶ The drafters of the Bankruptcy Code specified that a Chapter 13 trustee has a right to be heard at a plan confirmation hearing,⁸⁷ not a right or power to run a public hearing while the judge does other work elsewhere, however capable and reliable the trustee might be.

contemporaneously are on file with the author and have been checked against this description by the author's research assistant.

85. For those plans, the judge's signature will likely be affixed to confirmation orders. Stripp, *supra* note 10, at 1443–44, 1456 (reprinting standing omnibus order permitting a clerk of court to affix stamp on Chapter 13 confirmation orders).

86. For an extensive analysis of courthouses and images of justice, see JUDITH RESNIK & DENNIS CURTIS, *REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS* (2011).

87. 11 U.S.C. § 1302(b)(2)(B) (2012).

Allowing Chapter 13 trustees to preside over confirmation hearings generates a range of practical questions. On the day I visited court,⁸⁸ a cellular phone rang, prompting the trustee to request decorum in the courtroom. That same party's phone rang at least once more, generating yet another stern warning by the trustee. The trustee could raise his voice or pound a fist, but what more could he do? Also, is the portion of the hearing overseen by the Chapter 13 trustee on the record or off the record, with transcripts or recordings available? Consistent with the notion that a national bankruptcy system is infused with localized practices, the answer will not be the same from court to court.

This Chapter 13 hearing practice does not violate the “nondelegation doctrine” sometimes discussed by constitutional and administrative law scholars, assuming that such a doctrine even exists.⁸⁹ The nondelegation doctrine is occupied with instances in which Congress has overshared its policymaking authority.⁹⁰ As already established, having trustees preside over the courtroom was not Congress's plan. Congress allocated oversight of bankruptcy plan confirmation to the federal judiciary, not to an executive agency.⁹¹ The legislative choice to select judge over executive agency for this particular responsibility may be deliberate and well reasoned.⁹² As noted at the outset of Section I, the Bankruptcy Code drafters were quite intentional in their allocation of bankruptcy-related responsibilities to judges on the one hand and the executive branch on the other. This allocation happened in response to longstanding concerns about the conflicted position of a bankruptcy referee.⁹³

The practice described in Section II.B more closely fits what Professors F. Andrew Hessick and Carissa Byrne Hessick call redelegation: “When Congress delegates power to a particular agent, a court should presume that it cannot redelegate that power to another.”⁹⁴ Hessick and Hessick focused on the

88. See *supra* Part II.B

89. Compare Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002) (arguing that there is no nondelegation doctrine), with F. Andrew Hessick & Carissa Byrne Hessick, *The Non-Redelegation Doctrine*, 55 WM. & MARY L. REV. 163, 170 (2013) (reviewing nondelegation doctrine but noting that court holdings signify that the doctrine “has over time been rendered toothless”).

90. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); Pardo & Watts, *supra* note 3, at 421–23 (describing the doctrine and its limited use).

91. Jonathan C. Lipson, *Debt and Democracy: Towards a Constitutional Theory of Bankruptcy*, 83 NOTRE DAME L. REV. 605, 644, 656 (2008) (observing that “the bankruptcy power is conducted almost entirely in courts”); Pardo & Watts, *supra* note 3, at 415–18 (questioning choice of judiciary over executive agency for significant swaths of bankruptcy law).

92. Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 469–71 (2008); Lipson, *supra* note 91, at 654; Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1040 (2006).

93. Jacoby, *What Should Judges Do*, *supra* note 2, at 578–79; see DAVID T. STANLEY & MARJORIE GIRTH, *BANKRUPTCY: PROBLEM, PROCESS, REFORM* 160–64 (1971) (discussing bankruptcy referees).

94. Hessick & Hessick, *supra* note 89, at 214.

Supreme Court's decision, *United States v. Booker*,⁹⁵ which essentially transferred the power to make sentencing decisions from the U.S. Sentencing Commission to individual district judges.⁹⁶ The Sentencing Commission itself, however, is part of the judicial branch.⁹⁷ Thus, even that example is less structurally notable than this Chapter 13 practice.

* * *

Chapter 13 trustees have shaped the consumer bankruptcy system for decades.⁹⁸ And Professor Whitford has long taught us that the law in action may bear little resemblance to abstract theory or the law on the books.⁹⁹ Yet, he has also reminded us that bankruptcy is a powerful, albeit blunt, form of consumer protection of last resort.¹⁰⁰ The ability to appear before a judge is a component of that protection. To some extent, the Dodd-Frank Wall Street Reform and Consumer Protection Act lightened the bankruptcy system's do-it-all burden: it created a Bureau of Consumer Financial Protection (CFPB) funded by the Federal Reserve, and restored the power of states to enforce consumer protection laws.¹⁰¹ Although the CFPB's activities are consistent with Professor Whitford's vision,¹⁰² the bankruptcy system's function is, thus far, hardly rendered irrelevant.

Replacing one institutional actor with another surely has consequences for fulfillment of that mission. As noted earlier, Congress imposed a curious mix of

95. 543 U.S. 220 (2005).

96. Hessick & Hessick, *supra* note 89 (citing and discussing *Booker*).

97. *About*, U.S. SENT'G COMM'N, <http://www.ussc.gov/about> (last visited Sept. 15, 2015); *see* *Mistretta v. United States*, 488 U.S. 361, 371–79 (1989) (upholding Sentencing Commission's presence in the judicial branch against nondelegation doctrine challenge).

98. Braucher, *One Code*, *supra* note 8, at 547.

99. *E.g.*, William C. Whitford, *Comment on A Theory of the Consumer Product Warranty*, 91 YALE L.J. 1371, 1380–81 (1982) (critiquing article purporting to establish complete theory of warranty content that was not accompanied by sufficient attention to the real life content of warranties for the poor). Professor Whitford also has raised the perils of isolated anecdotes, even if accurately depicted. Whitford, *What's Right About Chapter 11*, *supra* note 5, at 1386 (“Eastern Airlines happened, and it was a travesty. But it was not a typical large Chapter 11 case.”).

100. Whitford, *Individualized Justice*, *supra* note *, at 416 (positing that bankruptcy comes closer to the ideal of individualized justice, even on matters that should have been redressable through other means); *id.* (calling consumer bankruptcy both a serious new problem and an advance, the latter for “the development of a private legal practice that is routinized, relatively low cost, and capable of offering effective solutions to everyday consumer problems of large numbers of people”); *see also* William C. Whitford, *Structuring Consumer Protection to Maximize Effectiveness*, 1981 WIS. L. REV. 1018, 1043 (concluding that public remedies are superior to private remedies to address consumer protection problems).

101. *See* Melissa B. Jacoby, *Dodd-Frank, Regulatory Innovation, and the Safety of Consumer Financial Products*, 15 N.C. BANKING INST. 99 (2011).

102. Whitford, *Individualized Justice*, *supra* note *, at 398 (“From a law enforcement perspective there is no substitute for aggressive public enforcement of consumer protection laws.”).

duties on trustees.¹⁰³ They not only collect money for creditors and seek to maximize payment, but also advise debtors on performance of their plans. It is an honorable business, but one that differs significantly from the adjudicative obligations of a federal bankruptcy judge. Title 28 also specifies distinct appointment processes and job protections for judges and trustees.

It is either ironic or fitting to close a discussion in a symposium honoring Professor Whitford with a call to for further study. But that would illuminate at a more granular level whether my formal structural concerns have functional effects. In the meantime, courts that engage in superdelegation could take steps to make clearer to parties and the public that the event is not a court hearing, the trustee is not a federal judge (or even an employee of the federal judiciary), and parties have the right to a hearing before the presiding judge.

III. THE OTHER END OF THE SPECTRUM: EXTREME GATEKEEPING

The diversity of gatekeeping approaches includes treating oversight as an opportunity to screen cases on criteria that do not flow readily from the statutory design. The potential for creativity in gatekeeping is, of course, not limited to bankruptcy. In 2012, I watched an hour-long sentencing hearing in the U.S. District Court for the Northern District of Illinois arising from a currency counterfeiting scheme.¹⁰⁴ Apparently, this defendant's role was limited to painting hair gel onto the fake money, and the defendant's lawyer requested lenient treatment due to the limited nature of his client's role relative to the alleged mastermind. The judge attached strings to an otherwise relatively light sentence. In addition to requiring drug testing, the judge prohibited the defendant from riding a motorcycle for several years. There was no connection between motorcycles and the counterfeiting. But the defendant had previously earned a citation for speeding on a highway with which the judge was familiar. The judge presumably was seeking to keep the defendant out of trouble more generally. The defendant planned to move away from Chicago to help with the family business, but the judge planned to retain oversight; if he violated the terms of the sentence, the judge emphasized, the defendant would have to return to Chicago to look the district judge in the eye.¹⁰⁵

Recounting this story of counterfeiting and motorcycles to a large room of lawyers and judges the following year prompted a lawyer to privately share with me a bankruptcy example. Apparently, a bankruptcy judge in Kentucky had conditioned approval of a Chapter 13 repayment plan on the debtor quitting

103. See *supra* Part I.A for a discussion of the duties imposed on bankruptcy trustees. See also Iain Ramsay, *Market Imperatives, Professional Discretion and the Role of Intermediaries in Consumer Bankruptcy: A Comparative Study of the Canadian Trustee in Bankruptcy*, 74 AM. BANKR. L.J. 399 (2000) (comparing U.S. trustee system with Canadian trustee system).

104. The defendant had pled guilty, obviating the need for a trial on the underlying offense, as in the great majority of criminal actions. See STEPHANO BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* (2012); U.S. SENTENCING COMM'N, 2013 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.C (2014) (indicating 96.9% of federal criminal cases were resolved by a guilty plea in 2013).

105. Notes taken contemporaneously with the hearing are on file with the author, and this account has been checked for accuracy against those notes by the author's research assistant.

smoking. According to this lawyer, the bankruptcy judge asked the debtor, rhetorically, didn't he want to stay alive to watch his kids grow up? If this story is accurate (and I have no reason to doubt it),¹⁰⁶ the judge used his ability to withhold the right to Chapter 13 relief to accomplish what he perceived to be a public health and pro-family objective.

The nonsmoking condition to plan confirmation may or may not have been a one-off, but in California, bankruptcy judge Wayne Johnson is more systematically heightening the bar to Chapter 13.¹⁰⁷ Citing low Chapter 13 plan completion rates, in his location and nationally, Judge Johnson has developed his own set of rules and requirements for Chapter 13 that expressly depart from, at the very least, the local rules of procedure in the district.¹⁰⁸ For example, his standing order claims to override the local rules such that the Chapter 13 trustee does not have the power to excuse debtors' counsel or debtors from appearing at the confirmation hearing or to continue the hearing.¹⁰⁹ The standing order puts lawyers and parties on notice that the judge actively reviews cases with a skeptical eye, regardless of the views of the trustee, debtor, and creditors.

Judge Johnson has prefaced his approach in part on enforcement of the statutory plan confirmation requirement, colloquially known as feasibility, that the debtor will be able to make all of the plan payments.¹¹⁰ Judicial attention to feasibility is consistent with the Bankruptcy Code and the Supreme Court cases reviewed in Section I. Yet, his interpretation of feasibility has provoked a rare appeal and reversal. In *In re Mycek*,¹¹¹ the court held that a plan that promises zero payment to general unsecured claims is subject to a higher feasibility standard and evidentiary burden than the debtor's schedules of income and expenses, filed with the court under penalty of perjury. Reversing, the district court concluded, "The Bankruptcy Court did not cite to any federal law, federal

106. Diligent efforts failed to locate written documentation of this practice or to identify the case number. The lawyer was quite specific about the details.

107. *In re Hobbs*, No. 6:11-bk-19132-WJ, 2012 WL 1681981, at *3 (Bankr. C.D. Cal. May 7, 2012) (quoting lawyer in separate case who professed to have given up "'a long time ago' trying to figure out 'who is going to make it and who isn't'"); *id.* at *7 (stating that all Chapter 13 debtors must provide evidence of their plans' feasibility lest "courts are tempted to simply ignore [the feasibility requirement] which is a prerogative the law does not permit"); *see also* Standing Order of Judge Johnson, *supra* note 16.

108. Standing Order of Judge Johnson, *supra* note 16, at 5 (citing Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 TEX. L. REV. 103 (2011) for study statistics and noting a three percent plan completion rate in the Central District of California and an eight percent plan completion rate in the Riverside Division). Chapter 13's track record of noncompletion is long. Whitford, *Individualized Justice*, *supra* note *, at 411 (reporting significant noncompletion rates regardless of percentage of debt promised).

109. Standing Order of Judge Johnson, *supra* note 16, at 14.

110. Transcript of Proceedings at 2, 4, *In re* Judge Johnson's General Comments, Case No. N/A (C.D. Cal. April 13, 2011) ("Section 1325(a)(6) is about as clear as it could be regarding feasibility in a chapter 13 plan. Some courts, I'm well aware, have a no-look policy on feasibility. Essentially, there's not going to ask any questions regarding the payment practices of the debtor. I don't have that policy, and I won't have that policy"); Standing Order of Judge Johnson, *supra* note 16, at 8.

111. No. 5:15-cv-00369-JGB, 2013 WL 9994332 (C.D. Cal. Oct. 22, 2013).

rules, or local rules to support its additional requirement.”¹¹² The district court noted the lack of authority for the counterintuitive notion that the zero payment plans are subject to the highest burden of proof to assess feasibility.¹¹³ The district court found several other bases for reversal, including the concern that the court was basing its assessment of the plan’s feasibility on hypotheticals rather than on the facts of the case.

Technically, the *Mycek* appeal was a win for the debtor and the debtor’s lawyer. But it was an expensive step to give the debtor another chance to convince a still-skeptical judge to confirm a plan. One-at-a-time successes at the district court level—which have no binding effect on other cases—are unlikely to produce wholesale changes to a judge’s practices. As Professor Whitford explained several decades ago, “[I]f a judge disfavors Chapter 13, . . . she can discourage their filing by conducting extensive inquiries into the feasibility of any Chapter 13 plan. The need to prepare for and participate in a lengthy confirmation hearing can effectively discourage lawyers from steering clients to Chapter 13.”¹¹⁴ An occasional win in the district court does not alter that calculus, especially given the Supreme Court’s ruling, previously mentioned, that there is no absolute right to appeal an order denying plan confirmation.¹¹⁵

The judge also seems to defer the entry of discharge orders when debtors have completed their plans. A major part of the job of a Chapter 13 trustee is to regularly and carefully track and log debtors’ payments over the life of the plan. Trustees file reports on the docket to certify that payment is complete. The discharge is supposed to be entered as soon as practicable after plan completion.¹¹⁶

In *In re Engler*,¹¹⁷ the debtor’s plan promised to pay general unsecured creditors in full, and the debtor finished the plan early; Engler’s plan did not address secured or priority debt because the debtor had none.¹¹⁸ Around the time Engler completed the plan, his case was assigned to Judge Johnson, who imposed several additional hurdles to be cleared before he would enter the discharge order, including a status conference four months after the debtor completed the plan and nearly three months after the trustee filed a final report.¹¹⁹

112. *In re Mycek*, 2013 WL 9994332, at *4.

113. *Id.* at *4–*5. Judge Johnson’s rationale appeared to be that if a debtor in a zero percent plan hit a rough patch, there was no room in the plan to reduce the payments.

114. Whitford, *Has the Time Come*, *supra* note 5, at 92 (internal footnote omitted).

115. See *supra* note 17 and accompanying text.

116. See *supra* notes 29–30 and accompanying text.

117. No. 6:10–bk–15174–WJ (Bankr. C.D. Cal. July 2, 2012).

118. Debtor’s Objection to Order Setting Status Conference and Motion to Enter Discharge and Vacate Status Conference Hearing at 2, *In re Engler*, No.: 6:10–bk–15174–WJ (Bankr. C.D. Cal. July 2, 2012).

119. *Id.*; see In Response to Order Setting Status Conference at 1, *In re Engler*, No. 6:10–bk–15174–WJ (Bankr. C.D. Cal. July 25, 2012) (citing § 105(d)(1) of the Bankruptcy Code as authority to hold status conference because additional information was necessary). The declarations the court

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Extreme forms of gatekeeping bear similarities with superdelegation. They are not among the nonuniform features of Chapter 13 that attracted the most attention over the last several decades. Deferring the discharge after years of payment (and the rarity of plan completion) has consumer protection implications,¹²⁰ although presumably the automatic stay remains in place until the details are worked out. Extreme forms of gatekeeping, like superdelegation, also raise structural questions about allocation of authority to the judicial branch.

CONCLUSION

Writing this Article for a symposium honoring Professor Whitford admittedly started with an immodest objective: to report things that Professor Whitford would find interesting. For all he has done for several fields of study, he deserves that and much, much more. Whatever the level of fulfillment of that objective, the Article offers food for thought for participants in the bankruptcy system who engage in the practices identified herein, as well as for academic audiences.

For a rising generation of consumer bankruptcy scholars, the practices explored in this Article show the desirability of using a broader range of methods and theories to study the bankruptcy system. The pathbreaking studies of the past several decades could not, and did not, pick up and analyze all features that may be significantly and systematically affecting the implementation of the bankruptcy system. Additional methods of observation, and theories with which to frame the findings, are in order.

The discussion likewise serves as another reminder that bankruptcy is far more than a subspecies of commercial or corporate law. Administrative law and federal courts scholars should not forget the bankruptcy system when they evaluate the institutional structure and challenges of modern government.

sought seem to relate to types of claims (secured and priority) that the debtor did not have and were not part of the plan. The hearing does appear to have been held and a discharge entered the following day. Discharge of Debtor After Completion of Chapter 13 Plan, *In re Engler*, No. 6:10-bk-15174-WJ (Bankr. C.D. Cal. July 26, 2012), ECF No. 48.

120. See Whitford, *Individualized Justice*, *supra* note *.