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Corporate Bankruptcy Hybridity

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ARTICLE

CORPORATE BANKRUPTCY HYBRIDITY

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INTRODUCTION

Spend a day in a busy bankruptcy court and your research agenda could be set for life. Bankruptcy is crisis management for individuals, business entities, and even governments. The entities that file for bankruptcy come in all shapes and sizes, as do their troubles. In addition to basic capital structure problems, bankruptcy dockets and courtrooms contain allegations of sexual harassment, race discrimination, systemic financial risk, First Amendment issues, toxic and defective products (medical devices, airplanes, and automobiles), global warming litigation, and pyramid schemes. This catastrophist's dream has the potential to provoke engagement from scholars spanning the law school curriculum.[1]

That breadth of engagement, however, is missing. In a public lecture, commercial law scholar and teacher Jay Lawrence Westbrook lamented the lack of "public interest" concerns in corporate bankruptcy scholarship.[2] That term signals something more than the aggregation of individual rights-based interests and arguments, to encompass the system's broader effects—matters that cannot simply be waived by creditors when they settle their own claims. In addition, the scholarship insufficiently attends to claimants whose rights against a bankrupt company arise through pathways other than the fine print of a contract.

In short, the field of corporate bankruptcy has been redistricted to wealth maximization, voluntary lenders, and investors.[3] Academic careers have

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1 That is, after all, how the field of consumer bankruptcy has unfolded. The contributors to consumer bankruptcy debates are trained or otherwise steeped in law, sociology, economics, psychology, history, and political science. The consumer scholarship draws on a wider spectrum of law and economics than has typically been the case in corporate bankruptcy. Both empirical and theoretical, the scholarship explores connections between overindebtedness and domestic violence, racial and ethnic identity, medical problems, overconsumption, fringe credit products, overpromotion of homeownership, tax policy, aging, education, natural disasters, and beyond. Leading contributors are diverse by demographic as well as methodological and ideological measures.

2 Jay Lawrence Westbrook, *Commercial Law and the Public Interest*, 4 PENN ST. J.L. & INT'L AFF. 445, 450 (2015).

3 This Article does not contain extended critiques of the creditors' bargain or contractualism because they have been evaluated thoroughly elsewhere. Recommended analysis and critiques include Susan Block-Lieb, *Fishing in Muddy Waters: Clarifying the Common Pool Analogy as Applied to the Standard for Commencement of a Bankruptcy Case*, 42 AM. U. L. REV. 337, 430 (1993) (concluding that model is unhelpful as applied to voluntary case commencement); Susan Block-Lieb, *The Logic and Limits of Contract Bankruptcy*, 2001 U. ILL. L. REV. 503, 508 (2001) (identifying and explaining ways in which academics' arguments favoring simple contractarian bankruptcy models are "incoherent"); Susan Block-Lieb, *The Politics of Privatizing Business Bankruptcy Law*, 74 AM. BANKR. L.J. 77 (2000) [hereinafter *Politics*] (critiquing neo-libertarian bankruptcy theorists' political economy analysis); Jonathan C. Lipson, *Bargaining Bankrupt: A Relational Theory of Contract in Bankruptcy*, 6 HARV. BUS. L. REV. 239, 241 (arguing that contractarians "offer neither doctrinal nor theoretical accounts of the instrument and institution they laud"); *id.* at 242 ("Contractualism tends to rely on what Robert Ellickson would call a 'cardboard' Coasean theory of contract."); *id.* at 265 (documenting how creditors' bargain founder "made questionable statements of law in the service of efficiency"); Lynn M. LoPucki, *Contract Bankruptcy: A Reply to Alan Schwartz*, 109 YALE L.J. 317 (1999) (critiquing view that contract bankruptcy is superior to the current system); Lynn M. LoPucki, *Team Production Theory of Bankruptcy*

flourished characterizing Chapter 11 as a mere corporate control transaction among investors, shuffling pieces of the company's capital structure.[4] Whether due to this framing, the lack of a popular alternative, or both, the redistricters tend to ignore scholarly contributions that construe the field more broadly.[5]

This Article is an invitation to explore an alternative model: corporate bankruptcy as a public–private partnership. In this model, allocating responsibilities to private parties can improve regulatory functioning, but parties cannot redefine system goals purely for their own benefit. The application of this framework is supported by an institutional analysis of the bankruptcy system, drawing on privatization and administrative law scholarship that has received too little attention in bankruptcy debates.[6] Scholars of the regulatory state understand that efficiency is not the exclusive objective: "the public law perspective asks not whether privatization is efficient, but whether it erodes the public law norms that these constitutional and statutory limits are designed to protect."[7] Private contributions to a system must be solicited and managed in ways that improve, not undermine, public regulatory objectives.[8]

Reorganization, 57 VAND. L. REV. 741, 747-48 (2004) (illustrating how changes over time in creditors' bargain description left it "with no foundation" and "useless").

4 I have discussed this phenomenon in prior work. *See* Melissa B. Jacoby, *Fast, Cheap, and Creditor-Controlled: Is Corporate Reorganization Failing?*, 54 BUFF. L. REV. 401, 430 (2006) (identifying transactional model of Chapter 11 as "prevailing conception"); Melissa B. Jacoby, *What Should Judges Do in Chapter 11?*, 2015 U. ILL. L. REV. 571 (2015) [hereinafter *Chapter 11*] (arguing that current views overemphasize the corporate law elements of Chapter 11 to the exclusion of other elements).

5 *See* Lipson, *supra* note 3, at 261 ("While the contractualist project has been criticized for many reasons, no alternative vision of contract in bankruptcy has emerged."); Westbrook, *supra* note 2, at 446 ("One of the reasons that other public interest considerations have been elbowed aside is that those who are concerned with public interest factors do not have a church as do the public choice and contractualist scholars."); *see also* Ronald J. Mann, *Bankruptcy and the Entitlements of the Government: Whose Money Is it Anyway*, 70 N.Y.U. L. REV. 993, 1057 (supplying a political philosophy justification for the government using the bankruptcy system "as an instrument of social policy" more generally, but expressly reserving and deferring the task of articulating the scope of such policy for another day).

6 For (scarce) prior uses of administrative law scholarship to aid analysis of other bankruptcy issues, see Melissa B. Jacoby, *Superdelegation and Gatekeeping in Bankruptcy Courts*, 87 TEMP. L. REV. 875 (2015) (considering applications of nondelegation doctrine and re-delegation theory to practices in consumer bankruptcy); Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. REV. 384 (2012) (proposing changes to reduce policymaking by courts in bankruptcy); Robert Kenneth Rasmussen, *Bankruptcy and the Administrative State*, 42 HASTINGS L.J. 1567, 1568 (1991) ("seeking to integrate the administrative state into bankruptcy theory," focusing on questions of forum); Mark J. Roe & Frederick Tung, *Breaking Bankruptcy Priority: How Rent-Seeking Upends the Creditors' Bargain*, 99 VA. L. REV. 1235, 1241 (2013) (comparing bankruptcy to other financial regulatory processes within the administrative state).

7 Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1302 (2003).

8 Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 549 (2000) ("This realization suggests the possibility of harnessing private capacity to serve public goals."); *id.* at 551 ("Private actors are deeply involved in regulation, service provision, policy design, and implementation."); *id.* at 569 n.96 (emphasizing the potential of private contributions and objecting to assumptions that "deny the possibility of collaborative, public-oriented, accountable regulatory

In addition to enlivening academic debates, the public–private partnership model sheds new light on real-world problems. And problems abound. The American Bankruptcy Institute Commission on Chapter 11 recently released a report cataloging the ways in which Chapter 11 no longer functions in accordance with its original legislative mandate.[9] The public–private partnership model not only helps diagnose shortcomings in Chapter 11 as it operates on the ground, but expands the range of options for addressing them.

This Article unpacks these ideas as follows. Part I defines corporate bankruptcy's public–private partnership, interrogating the common assumption that bankruptcy is private law, using the analytical tools of administrative law and privatization scholarship. Topics include the nature of liabilities addressed in Chapter 11, the funding of the bankruptcy system, and the standard-setting and oversight regime set forth in black-letter bankruptcy law.

Part II explores features of modern Chapter 11 that distort the balance in the public–private partnership. The first is the most well-established: financing in Chapter 11 as a means of shifting control to private parties for private gain. The discussion then turns to features that connect to the public–private partnership in subtler ways, including case venue and equitable mootness doctrine (which combine to concentrate cases and court authority); disabling the threat of trustee appointment as a disciplinary backstop; and shifting major debtor-in-possession obligations to creditors' committees.

Part III offers ideas, still in germinal form, for improving the system inspired by the public–private partnership model. First, all repeat players that shape the system, including powerful private actors, must attend to procedural justice to maintain the system's legitimacy. Social psychology research conducted in nonbankruptcy settings shows that procedural justice (the sense that the process was fair) is more critical to maintaining public confidence than economically efficient outcomes.[10] A legal procedure thought to be efficient (by whatever measure) cannot stand if the procedure imposes intolerable procedural justice costs. In a public–private partnership,

regimes"); *see also* Block-Lieb, *Politics*, *supra* note 3, at 91-92 (discussing law-and-society research on the recursive influence of private actors on the public sphere).

9 AM. BANKR. INST., COMMISSION TO STUDY THE REFORM OF CHAPTER 11: FINAL REPORT AND RECOMMENDATIONS (2014).

10 The work of Rebecca Hollander-Blumoff canvasses this research and applies it to court and dispute resolution settings. *See* Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127, 134, 137 (2011) ("When people feel that they have received fair treatment, they are more likely to adhere to, accept, and feel satisfied with a given outcome, and to view the system that gave rise to that outcome as legitimate."). For applications to complex litigation, see Elizabeth Chamblee Burch, *Procedural Justice in Nonclass Aggregation*, 44 WAKE FOREST L. REV. 1, 27 (2009) (applying procedural justice theory to nonclass aggregate litigation); Judith Resnik, Dennis E. Curtis, & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 372-76 (1996) (exploring the role of procedural justice and representation in aggregate litigation).

procedural justice is not the sole responsibility of public officials. Private parties that dominate Chapter 11 cases also must be held accountable.

Second, I propose the Sunlight Fund, a not-for-profit enterprise. To moderate the leverage of private lenders, the Sunlight Fund could be tapped to finance portions of Chapter 11 cases with the potential to enhance the bankruptcy estate, or achieve other public objectives.

Returning to the academic realm, Part III lastly calls for a reckoning with the field's homogeneity—in ideology (traditional law and economics),[11] and demography (white and male).[12] Making readers more attentive to whom they cite and invite could reset the boundaries of not only who counts as a "leading scholar," but of the field itself, allowing the kind of engagement with a broader set of problems and methods that Jay Westbrook has endorsed.

I. PRIVATE ACTORS, PUBLIC GOALS: THE PUBLIC–PRIVATE PARTNERSHIP

A. *What Is It?*

Governments and private parties collaborate on public projects in seemingly infinite patterns.[13] The nature and intensity of private involvement in any regulatory enterprise can vary. The public–private partnership is one

11 Law and economics is, or could be, a large umbrella but the scholarship on corporate bankruptcy generally reflects just a subset. *Cf.* Jean Braucher, *Toward a Broader Perspective on the Role of Economics in Legal Policy Analysis: A Retrospective and an Agenda from Albert O. Hirschman*, 13 L. & SOC. INQUIRY 741, 745-46 (1988) (identifying Hirschman's appreciation for cooperation and moral obligation in a successful market economy and the need to consider the broader social context); Jean Braucher, *Bankruptcy Reorganization and Economic Development*, 23 CAP. U. L. REV. 499, 512-14 (1994) (explaining the broader possibilities of bankruptcy reorganization for economic development); Martha T. McCluskey, Frank Pasquale & Jennifer Taub, *Law and Economics: Contemporary Approaches*, 35 YALE L. & POL'Y REV. 297, 300 (2016) (discussing the "current cramped confines" of the dominant strand of law and economics).

12 As discussed later, the challenge of demographic homogeneity in this field transcends scholarly methods or ideology. *See infra* Part III.

13 *See* Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1395 (2003) (discussing public–private collaborations in modern administrative state); Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1257 (2003) (explaining the intersecting trends in privatization involving public government actors); *see also* Jody Freeman, *Private Parties, Public Functions and the New Administrative Law*, 52 ADMIN. L. REV. 813, 816 (2000) (discussing the role of non-government actors in standard setting, implementation, and enforcement); Margaret H. Lemos, *Privatizing Public Litigation*, 104 GEO. L.J. 515, 518 (2016)("[P]rivatization typically involves enlisting private actors to perform, on the government's behalf, functions that otherwise would be carried out by government employees."); *id.* at 522 (discussing hybridity across variety of arrangements). Examples include industrial codes and product settings, and arise even in traditional command-and-control frameworks. Freeman, *supra* note 13, at 827, 835-36.

way of expressing such collaborations. An early publication using the term defines the concept this way:

> a legal hybrid which possesses some characteristics of a purely private corporation and others of a purely governmental corporation. It may be owned jointly by government and private interests or owned privately and financed jointly with public and private funds. But however it is structured, it is formed to accomplish a public purpose.[14]

This framework recognizes that private actors may offer expertise, efficiency, and innovation.[15] But there is an important catch: the partnership is meant to promote public values. Achieving those objectives requires planning, not merely a handover of the keys to willing profit seekers.[16] Private provision of public goods, without sufficient safeguards, risks end runs around constitutional obligations of state actors.[17] Erosion of the public foundation imposes stress on democracy, accountability, and general welfare.[18] Gillian Metzger notes that "[t]he concerns raised by privatization are not merely free-floating normative or policy concerns; they emanate from the basic constitutional accountability premise that government is subject to certain constraints in the way it operates."[19] Delegations to private actors must be "adequately structured to preserve constitutional accountability."[20] Left to their own devices, private actors may underinvest in socially useful activities and overinvest in activities with little or no social utility.[21] When governments use market mechanisms, they can and should advance public values.[22]

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14 Robert S. Amdursky, *A Public–Private Partnership for Urban Progress*, 46 J. URB. L. 199, 199 (1969).

15 *See* Freeman, *supra* note 13, at 846 (explaining that the "private role in regulation is even more pervasive and longstanding than the literature suggests," even in command-and-control settings); Minow, *supra* note 13, at 1230, 1240-42, 1245 (describing market-style competition and innovation among justifications to move public functions into private hands).

16 *See* Freeman, *supra* note 7, at 1327 (explaining the focus on enlisting private sector entities to protect democratic norms).

17 *See, e.g.*, Minow, *supra* note 13, at 1246 ("Government agencies act not only as purchasers of goods and services but also as guarantors of freedom and equality."); *id.* at 1246 n.60 ("Due process, equal protection, freedom of information, and public participation are leading public values jeopardized by privatization of public services."); *id.* at 1267 (encouraging transparency to promote accountability of private providers of public goods).

18 *See* Audrey G. McFarlane, *Putting the "Public" Back into Public–Private Partnerships for Economic Development*, 30 W. NEW ENG. L. REV. 39, 45-46 (2007) (discussing how partnerships have become increasingly private).

19 Metzger, *supra* note 13, at 1456.

20 *See Id.*; Freeman, *supra* note 7, at 1301 (expressing concern about privatization's impact on "liberal democratic norms of accountability, due process, equality, rationality, and the like"); Minow, *supra* note 13, at 1259 (discussing accountability as the key element to delegating public functions).

21 Lemos, *supra* note 13, at 525-26.

22 MARTHA MINOW, PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD (2002). Minow gives the example of the government auctioning off the electromagnetic spectrum: "To think in public terms would require viewing the sale of the public asset as a resource with the potential

Defining "the public interest" can be a contested exercise. Recognizing that the public interest is unlikely to be boiled down to just one thing is an important step. Martha Minow's work on privatization offers an illustrative list of public goals and values key to collaborations of many kinds:

- Achieving social provision—human needs, redressing inequality;
- Freedom of self-expression and political practice;
- Pluralism—cultivate "participation, self-governance, mutual aid, and care for others";
- Democracy;
- Division of labor; and
- Accountability.[23]

The last point, accountability, is particularly critical, says Minow, to assess fulfillment of other values.[24] As the list suggests, the values need not be specific and exclusive to the substantive focus of the partnership and need not be winnowed to a single overriding purpose. We should speak of public values instead of "the public interest" as a monolith.[25]

B. *Utility for Corporate Bankruptcy*

Corporate bankruptcy's frequent characterization as private law, rather than public law or a hybrid, is curious and overdue for interrogation. Limited liability and other features associated with a corporate charter are forms of government largess, state-conferred public benefits.[26] Business restructuring and failure affect more than the coffers of voluntary investors; they impair the rights of individuals who made no conscious choice to dabble in distressed debt and yet may not be

for enhancing a public good—but only if the proceeds from the auctions are preserved for distinctive purposes" rather than simply handing the money over to the Treasury to pay the deficit. *Id.* at 19.

23 *Id.* at 45-46 (explaining that "prevent[ing] abuse, fraud, and waste, and . . . enhanc[ing] learning and improvement, transparent and effective means of accountability, in the day-to-day administrative settings as well as through formal public elections" should be a key goal of public–private partnerships).

24 *Id.* at 150-51.

25 *Id.*

26 *See* Metzger, *supra* note 13, at 1462 (classifying "[l]icenses, corporate charters, and rights of property and contract . . . [as] 'delegations' of state power to private actors"); Hillary A. Sale, *Public Governance*, 81 GEO. WASH. L. REV. 1013, 1015 (2013) (stating that corporations are public in the sense that they are "entities that exist with the permission of the government").

able to absorb the loss without further consequence.[27] Business restructuring and failure produce ripple effects in communities and society at large.[28]

Contractualist scholars do not deny the presence of involuntary creditors but marginalize their significance to corporate bankruptcy theory. Proposals to repeal Chapter 11 in favor of full private ordering often concede that involuntary creditors might warrant special treatment.[29] Yet, National Involuntary Creditor Reflection Day has yet to arrive. When scholars raised questions of the broader public interest in bankruptcy several decades ago, critiques on institutional competence grounds quickly emerged, expressing doubt that judges in an adversarial system could identify the public interest.[30] And that was that.

Stepping back from the particulars of this field, it is far from clear that law should attribute much significance to the highly contested labels "private" and "public."[31] Ascribing law to one or the other of these realms is a function of

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27 *See* Elizabeth Warren & Jay Lawrence Westbrook, *Contracting Out of Bankruptcy: An Empirical Intervention*, 118 HARV. L. REV. 1197, 1211, 1225, 1237 (2005) (identifying potentially involuntary and non-adjusting creditors in Chapter 11 bankruptcy); *id.* at 1238 ("In 1994, more than one in every four dollars of claims listed in bankruptcy was owed to a maladjusting creditor . . . . Based on the 2002 projection, about one-fifth of the dollar amount of claims in bankruptcy is held by creditors that could be classified as maladjusting.").

28 *See* Karen Gross, *Taking Community Interests into Account in Bankruptcy: An Essay*, 72 WASH. U. L.Q. 1031, 1034-35 (1994)(describing the community-wide negative impact of the bankruptcy of a contractor on Asbury Park, New Jersey); Westbrook, *supra* note 2, at 457 (noting that factors like "community stability" are typically not considered in bankruptcy law, and distinguishing between aggregation of claims and "significant secondary effects of commercial law rules"); Mary Jo Wiggins, *Finance and Factionalism: The Uneasy Present (and Future) of Special Interest Committees in Corporate Reorganization Law*, 41 SAN DIEGO L. REV. 1373, 1374, 1383 (2004) ("Corporate bankruptcy cases have wide social, economic, and political reach . . . . Issues of voice, representation, legitimacy, and transparency become key policies that must be considered . . . ."); *see also* Hillary A. Sale, *The New "Public" Corporation*, 74 L. & CONTEMP. PROBS. 138, 144-46 (2011) (discussing the social effects of seemingly private corporate decisionmaking, such as setting executive compensation).

29 Melissa B. Jacoby & Edward J. Janger, *Tracing Equity: Realizing and Allocating Value in Chapter 11*, 96 TEX. L. REV. 673, 714 n.165 (2018) (discussing examples).

30 *See* Christopher W. Frost, *Bankruptcy Redistributive Policies and the Limits of the Judicial Process*, 74 N.C. L. REV. 75, 77 (1995) (contending that "the bankruptcy process is institutionally incapable of resolving the loss distribution issues among all who are interested in the outcome of the case . . . the judicial system is particularly ill-equipped . . .").

31 *See, e.g.*, Freeman, *supra* note 8, at 550 (discussing the "linguistic conundrum" of "public" and "private" and the importance of these terms as signifiers—they are associated with "different capacities, cultures, and priorities, for example, and respond to different incentives"); *id.* at 551 (discussing "[y]ou know it when you see it" definitions of public and private); Freeman, *supra* note 20, at 1287 (arguing that private refers to a host of arrangements rather than a single thing); Metzger, *supra* note 13, at 1443 (arguing that "every instance of economic and social legislation could be seen as a private delegation of power" and noting that "Legal Realists . . . [made] the claim that it was impossible to draw a neutral or objective line between public and private for constitutional purposes"); Minow, *supra* note 13, at 1229 n.1 (discussing the difficulty of making meaning of these terms and their interconnections); *see also* Lemos, *supra* note 13, at 519 ("Understanding these questions, not as discrete policy dilemmas but as part of the broader privatization phenomenon, helps clarify the interests at stake and suggests useful avenues for normative assessment."); Julie A. Nice, *The New Private Law: An Introduction*, 73 DENV. U. L. REV. 993, 998 (1996) (categorizing features of "new private law" and "new public law").

historical context and social construct; private parties once dominated exercises of power now identified as governmental.[32] The public–private dichotomy also risks circularity: just as the nature of an activity affects the label, the label affects perceptions of its nature. The distinction persists, however, in scholarship, in the law school curriculum, and in appellate court decisions, particularly on state action doctrine.[33] Refusing to use the terms would not save bankruptcy law from their consequences.[34] But we should use them more constructively—focusing, as Jody Freeman recommends, on the negotiated relationships between public and private *actors*.[35]

In any event, it is a mistake to conflate involvement of private actors and contractual liabilities with the nature of bankruptcy law. Even a minimalist government-provided system—the automatic stay, a permanent injunction on debt enforcement without unanimous consent—involves coercive government power.[36] At the very least, the public has a stake in who makes the key decisions in corporate bankruptcy and whether that process comports with basic constitutional and democratic norms. The interests of the public grow alongside the scope of a government-supplied bankruptcy system. Constitutional and quasi-constitutional matters cannot be kicked to the curb simply because a company experiences financial distress and initiates a Chapter 11 case.

Congress's exercise of its constitutional authority to create uniform bankruptcy laws thus triggers the need for accountability and due process safeguards. This is the case whether or not responsibilities are undertaken by public officials or outsourced to private parties.[37]

C. *Contracts and Other Liabilities*

Chapter 11's identity crisis arises in part from the integral role of contracts in the establishment of debt. Even scholars who have opposed limiting bankruptcy's

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32 *See, e.g.*, Lemos, *supra* note 13, at 524, 572 (noting examples of shift from private to public authority, and vice versa).

33 For discussion of the continued doctrinal role of the private and public distinction in constitutional and administrative law, see Freeman, *supra* note 13, at 841; Metzger, *supra* note 13 at 1370, 1448.

34 Because the analysis in this Article largely is independent of the bankruptcy court's non-Article III status, I do not rely on the "public rights" question regarding the constitutional authority of non-Article III tribunals, an issue recently addressed in *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*,138 S. Ct. 1365 (2018).

35 Freeman, *supra* note 8, at 548, 565; *see also* Freeman, *supra* note 13, at 857 (suggesting a focus on the "*regulatory regimes* in which agencies are in dynamic relationships with private actors" rather than distinguishing between private and public law).

36 As an example of a minimalist bankruptcy, consider the proposal to add Chapter 16 to the Bankruptcy Code. NATIONAL BANKRUPTCY CONFERENCE, PROPOSAL FOR A NEW CHAPTER FOR RESTRUCTURING BOND AND CREDIT AGREEMENT DEBT (CHAPTER 16) 1 (2014) (creating stripped-down bankruptcy to bind holdouts in bond indentures).

37 *See* Freeman, *supra* note 15, at 824 ("Concern about accountability and legality . . . arise with almost every example of contracting out").

role to creditor wealth maximization, such as now-Senator Elizabeth Warren, frequently have highlighted the system's contractual elements.[38] Separate from calls for consideration of the public interest, Jay Westbrook has written foundational works on the treatment of contracts in bankruptcy.[39]

These scholars, however, also have documented the pervasiveness of involuntary and non-adjusting creditors.[40] As Kate Heidt wrote before her untimely death, liabilities such as those arising from environmental harm sometimes rise to the level of worldwide politics and public health concerns.[41] Bankruptcy cases involve debts arising from police brutality,[42] employment discrimination,[43] and, as exemplified in The Weinstein Company bankruptcy, sexual harassment and assault.[44]

38 Elizabeth Warren, *Bankruptcy Policymaking in an Imperfect World*, 92 MICH. L. REV. 336, 368-69 (1993) [hereinafter *Bankruptcy Policymaking*] (discussing how Chapter 11 is privately initiated and monitored with the state providing only a forum and procedures); *id.* at 364-65 (bankruptcy reduces pressure on Congress to fund bailouts, indicating that government participation in bankruptcy is "largely" or "partially" self-supported by the parties, not publicly funded); Elizabeth Warren, *What is a Women's Issue? Bankruptcy, Commercial Law, and Other Gender-Neutral Topics*, 25 HARV. WOMEN'S L.J. 19, 53 (2002) ("The perception of bankruptcy as a 'government program' is flatly wrong. Bankruptcy is about commercial debt and the allocation of losses among parties who enter into contracts voluntarily."); *id.* at 55 ("[B]ankruptcy is the privately funded part of the social safety net. No debtor gets a handout or a government guaranteed loan from the bankruptcy court . . . .[A] large portion of the services . . . are paid for by user fees."); Elizabeth Warren, *"Why Have a Federal Bankruptcy System?"*, 77 CORNELL L. REV. 1093, 1096 (1992) ("Is the bankruptcy system socialization of risk? No. My sense is that the reason bank failures and bankruptcy are stitched together in this panel is that the bankruptcy system is what happens when we do not socialize the risk, and bank failure is what happens when we do.").

39 Jay Lawrence Westbrook, *A Functional Analysis of Executory Contracts*, 74 MINN. L. REV. 227 (1989).

40 Warren & Westbrook, *supra* note 27; Kathryn R. Heidt, *The Changing Paradigm of Debt*, 72 WASH. U. L.Q. 1055, 1058 (1994) ("[T]he traditional concept of debt has been expanded to include not only consensual obligations but also obligations that arise from nonconsensual transactions.").

41 Heidt, *supra* note 40, at 1062 n.28 ("Some believe that environmental matters affect world political stability . . . contributing to violent conflicts in parts of the world and hav[ing] the potential to contribute to conflict and social instability in the future in poorer nations."); Kathryn R. Heidt, *Corrective Justice from Aristotle to Second Order Liability: Who Should Pay When the Culpable Cannot?*, 47 WASH. & LEE L. REV. 347, 359 (1990) (using toxic waste as an example of initial harm having an impact for decades, if not centuries).

42 Melissa B. Jacoby & Mary Ellen Goode, *Who Pays for Police Misconduct in Bankrupt Cities?* (Sept. 20, 2016)(U.N.C. L. Stud., Research Paper No. 2796582).

43 *See* Joanne Gelfand, *The Treatment of Employment Discrimination Claims in Bankruptcy: Priority Status, Stay Relief, Dischargeability and Exemptions*, 56 U. MIAMI L. REV. 601, 601 (2002) ("Low dollar distributions on discrimination claims eviscerates the rehabilitative and deterrent goals of [civil rights laws].").

44 *See* Libby Lewis, *How Bankruptcy Law Could Keep Money—and the Truth—from Weinstein's Victims*, WASH. POST, May 2, 2018, https://www.washingtonpost.com/outlook/how-bankruptcy-law-could-keep-money—and-the-truth—from-weinsteins-victims/2018/05/02/88f29b12-4e3f-11e8-84a0-458a1aa9ac0a_story.html?noredirect=on&utm_term=.8f0bdcf88ea0 [https://perma.cc/7E62-NAJG].

These liabilities make it hard to characterize bankruptcy as simply a species of private law.[45] Civil rights claims are quasi-constitutional at the very least.[46] If it is true that "Americans now believe that a core function of the federal government is to prohibit discrimination in the public and private sectors,"[47] then federal court cases should reflect those concerns even in the context of bankruptcy.

Even with respect to consensual contractual obligation, no liability that depends on formal legal enforcement can be truly private. Contract and property rights are creatures of the state, with teeth sharpened by the threat or reality of government assistance with debt collection.[48] A court adjudicating contract law must be, and will be, evaluated as a public institution and measured against norms of legitimacy and accountability.[49] Debtor-creditor law relies on coercive power of government actors to an even greater extent than mere adjudication of liability. For example, state law permits private parties to direct sheriffs to levy on a debtor's property after a court awards a judgment, diverting time and resources from other law enforcement tasks.[50] Settlements of disputes over liability present elements of private transacting but harness public power when they are promoted by courts, or if the law requires court approval due to third-party consequences.[51]

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45 Rasmussen, *supra* note 6, at 1567 ("Although bankruptcy law is generally conceived to be a private law regime, the filing of a bankruptcy petition does not remove a debtor from the reach of public law . . . ."); *id.* at 1578 ("The creditors' bargain model fails to recognize any meaningful difference between a private party pursuing a dispute against the debtor and the government doing so."). *See generally* Freeman*, supra* note 7, at 1303 (describing characteristics of public law perspective to include accountability, due process, and rationality, as well as "a preference for deliberative, disinterested, and expert decisionmaking that does not merely serve the interests of a special few.").

46 *See* Metzger, *supra* note 13, at 1455, n.307 ("[C]ore federal antidiscrimination statutes such as Title VII have been described as 'quasi-constitutional.'").

47 Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation after* Morrison *and* Kimel, 110 YALE L.J. 441, 502 (2000).

48 *See* Nancy Ehrenreich, *The Progressive Potential in Privatization*, 73 DENV. U. L. REV. 1235, 1240 (1996) ("The importance of this deconstruction of the public/private dichotomy is to demonstrate that government regulates even when it claims not to"); Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1, 3, 11 (1992) (distinguishing between critiques of public–private distinction and examining indeterminacy arguments); Minow, *supra* note 13, at 1267 ("[C]ontract law is no less dependent upon public enforcement"); Nice, *supra* note 31, at 993-94 (discussing overlap of what has been traditionally characterized as private and public law).

49 *See* Judith Resnik, *Courts* and *Economic and Social Rights/Courts* as *Economic and Social Rights*, *in* THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS 2 (Katharine G. Young, ed., forthcoming 2018) (distinguishing between courts as a place where social and economic rights are considered and enforced and "courts themselves as *services* that governments must provide to individuals"); *id.* at 3 ("[S]eeing courts as economic and social rights clarifies the utility of government services committed to norms of fairness.").

50 *See* Melissa B. Jacoby, *Does Indebtedness Influence Health? A Preliminary Inquiry*, 30 J. L., MED. & ETHICS 560, 565-66 (2002) (describing the government's role in enforcing private debt obligations); *see also* Mann, *supra* note 5, at 1053-56 (discussing the redistributive nature of the government system of dealing with bankruptcy).

51 *See* Melissa B. Jacoby, *Federalism Form and Function in the Detroit Bankruptcy*, 33 YALE J. ON REG. 55, 67 (2016) [hereinafter *Federalism*] ("With varying levels of enthusiasm, scholars have documented

In summary, based on liabilities, even a minimalist form of bankruptcy is best understood as a hybrid form of law. This hybridity increases the salience of the public–private partnership model.

D. *Follow the Money*

Sources of funding shape the extent to which a system or function is seen as privatized.[52] Particularly through filing fees, private parties in bankruptcy cases fund not only significant portions (an estimated three quarters) of the bankruptcy system but other government functions as well.[53] Much of the money comes from fees for initiating bankruptcy cases.[54] Fees associated with filing particular motions or adversary proceedings within a case contribute a smaller, but nontrivial, amount.[55] The bankruptcy system also generates private fees when parties or members of the public pay to access electronic court records.[56] Chapter 11 cases require quarterly fees, calibrated to disbursements, payable to an administrative watchdog within the U.S. Department of Justice known as the U.S. Trustee.[57] Between 2010 and 2014, quarterly fees generated about $138 million per year.[58] In 2017, Congress not only increased the amount owed for cases with greater disbursements, but directed a portion of the resulting revenues to the Treasury.[59]

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courts' heavy use of informal and non-adversarial techniques to expedite proceedings, discourage litigation, direct fact-gathering, and encourage settlement."); Jacoby, *Chapter 11*, *supra* note 4, at 585 ("[B]ankruptcy courts are neither unique in straddling the worlds of deals and litigation, nor alone in being foisted into the delicate position of policing a negotiated outcome under conflicting expectations.").

52 *See* Lemos, *supra* note 13, at 518 (describing reliance on user fees as form of privatization); *id.* at 523 (providing examples of reliance on private payments).

53 *See* Ed Flynn, *Is Bankruptcy the Red-Headed Stepchild of the Judiciary?*, 34 AM. BANKR. INST. J., OCT. 2015, at 36, 58 [hereinafter *Stepchild*] (estimating the total annual administrative costs of bankruptcy (not limited to the courts) to be over $1.5 billion, and reporting that "nearly one quarter of filing fees are paid to the Treasury); *id.* at 59 (stating that over $100 million a year "are diverted into a general government fund"); Ed Flynn, *Chapter 13 Revisited: Can it Help Solve the Judiciary's Fiscal Problems?*, AM. BANKR. INST. J., Dec. 2013, at 11, 73 (proposing a one-percent surcharge on Chapter 13 disbursements to be allocated to federal judiciary).

54 Case filing fees provided about $375 million annually between 2010 and 2014. The fee for filing a non-railroad Chapter 11 petition is currently $1717. Flynn, *Stepchild*, *supra* note 53, at 58. The U.S. Supreme Court cited the need for those fees to run the system when it declined to recognize a constitutional right to access bankruptcy in the absence of the ability to pay. U.S. v. Kras, 409 U.S. 434, 449 (1973).

55 Flynn, *Stepchild*, *supra* note 53, at 58 (noting that fees for filing motions for relief from the automatic stay and adversary proceedings raised at least another $50 million per year).

56 *Id.* (describing how fees from accessing bankruptcy court records generate at least $60 million a year). As with other sources, these revenues are not necessarily funneled back into the bankruptcy system.

57 28 U.S.C. § 1930(a)(6) (2012); U.S. DEP'T. OF JUSTICE, CHAPTER 11 QUARTERLY FEES (2014). On the low end, cases with quarterly disbursements between $0 and $14,999.99 owe a $325 quarterly fee. On the high end, cases with $30,000,000 or more owe a $30,000 quarterly fee.

58 Flynn, *Stepchild*, *supra* note 53, at 58.

59 Bankruptcy Judgeship Act of 2017, H.R. 2266, 115th Cong. § 1004 (2017) (explaining that for fiscal years 2018-2022, "if the balance in the United States Trustee System Fund as of September 30

Private parties also keep businesses financially afloat during their stay in the bankruptcy system.[60] The drafters of the Bankruptcy Code anticipated the possibility that distressed businesses would need third parties to fill the liquidity gap, and the Bankruptcy Code accordingly incentivizes lenders to offer debtor-in-possession ("DIP") financing.[61] As Part II will explore, however, the drafters may not have anticipated the extent to which prebankruptcy lenders would be permitted to use DIP financing to cherry-pick the activities and litigation the bankruptcy estate could undertake.

In summary, the bankruptcy system relies heavily on private sources of funds rather than drawing exclusively or even dominantly from the Treasury. In retrospect, it should not be surprising that this funding structure tempts private parties to try to operate the system purely in self-interest. But, given the structure of public oversight and standard-setting discussed below, drafters may have expected more tempering of those private incentives than we see today.

E. *Oversight and Standard-Setting*

In creating the bankruptcy system, policymakers engaged in considerable and deliberate balancing between public control and private outsourcing. As written, the Bankruptcy and Judicial Codes invite ongoing involvement of private actors in pursuit of the system's public functions. Yet, textbook bankruptcy law implicitly and explicitly anticipates that public actors plus substantive standards in the Bankruptcy Code will cabin private party influence. This approach is consistent with the need for checks and balances in any public–private partnership to ensure maintenance and promotion of public values.

For the most part, private actors formally initiate bankruptcy filings.[62] Reliance on private initiation is not free from problems, but proposed responses tend to tweak the incentives rather than reallocate the responsibility to a public official.[63] Also, the Judicial Code expressly allocates

. . . is less than $200,000,000, the quarterly fee payable for a quarter in which disbursements equal or exceed $1,000,000 shall be the lesser of 1 percent of such disbursements or $250,000").

60 Third parties cannot be required to lend new money on a prebankruptcy agreement once a bankruptcy case is commenced. 11 U.S.C. § 365(c)(2) (2012).

61 *Id.* § 364.

62 Chapter 9 municipal bankruptcy filings present an exception and require state approval and voluntary action by whoever has authority to make decisions for the municipality. Jacoby, *Federalism*, *supra* note 51, at 61-64.

63 *See generally* A. Mechele Dickerson, *Privatizing Ethics in Corporate Reorganizations*, 93 MINN. L. REV. 875 (2009); *see also* Warren, *Bankruptcy Policymaking*, *supra* note 38, at 368-69 (discussing preference for private over public initiation).

to private parties the ability to select the case's venue.[64] Both initiation and venue are coupled with the possibility of public official review.[65]

The two key public officials in corporate bankruptcy cases are the court and the administrative watchdog.[66] In addition to specific grants of oversight, the Bankruptcy Code gives courts many pockets of discretionary authority and the right to raise issues sua sponte.[67] Use of this authority is complicated by not only the non-Article III status of bankruptcy judges, but the shared sense that rules and standards in the Bankruptcy Code are calibrated to promote bargaining, negotiation, and settlement.[68] Thus, while some judges read the law as imposing a duty to independently evaluate the elements of plan confirmation even in the absence of objections,[69] others are reluctant to intervene when parties profess harmony with one another.[70] In between case initiation and plan confirmation in a traditional Chapter 11, the Bankruptcy Code anticipates ongoing court oversight for matters such as hiring and paying professionals, incurring new debt, rejecting or assuming contracts, and selling assets outside the ordinary course of business.

The administrative watchdog,[71] which has its own list of oversight responsibilities, was created in response to concerns about a "Bankruptcy Ring."[72] The watchdog can participate directly in all types of bankruptcy

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64 28 U.S.C. § 1408 (2012). For more discussion, *see infra* Section II.B.1.

65 A court may dismiss a Chapter 11 case if it was not filed in good faith. *See, e.g.*, *In re* SGL Carbon Corp., 200 F.3d 154 (3d Cir. 1999). And a court may transfer a case to another venue in the interest of justice or for the convenience of the parties. *See, e.g.*, *In re* Patriot Coal Corp., 482 B.R. 718 (Bankr. S.D.N.Y 2012) (interpreting 28 U.S.C. § 1412).

66 *See infra* note 71. Another government entity, the U.S. Securities and Exchange Commission had a significant role in the earlier corporate bankruptcy system, but its role was dramatically reduced in 1978. *See* DAVID A. SKEEL, DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 19 (2001).

67 11 U.S.C. § 105 (2012).

68 *See* Frederick Tung, *Confirmation and Claims Trading*, 90 NW. U. L. REV. 1684, 1694 (1996) ("[F]ormal rules of plan confirmation, then, create a bargaining regime in which leverage is distributed among the parties in such a way that each and all may influence the terms of reorganization."); *see also* Melissa B. Jacoby & Edward J. Janger, *Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy*, 123 YALE L.J. 862, 884 (2014).

69 *See* Jacoby, *Federalism*, *supra* note 51, at 77 (describing inquisitorial techniques and expectations); Jacoby, *supra* note 6, at 883 (discussing the *Everett v. Perez* and *Alabama Department of Economic and Community Affairs v. Lett* (*In re Lett*) decisions, in which appellate courts heard issues on appeal that were not argued in the lower courts).

70 *See* Jacoby, *Chapter 11*, *supra* note 4, at 583 n.82 (giving examples).

71 In addition to the Executive Office of U.S. Trustees in Washington, D.C., Congress established twenty-one regions and regional offices that cover everywhere but districts in Alabama and North Carolina. *See* 28 U.S.C. § 581 (2012)(delineating the regions). In districts in Alabama and North Carolina, U.S. Trustee responsibilities are performed instead by the Office of the Bankruptcy Administrator, which is part of the federal judiciary. The legislation and rulemaking to implement this alternative system are documented in Pardo & Watts, *supra* note 6, at 396-97.

72 *See* SKEEL, *supra* note 66, at 76-77, 133, 146; Karen Gross & Patricia Redmond, *In Defense of Debtor Exclusivity: Assessing Four of the 1994 Amendments to the Bankruptcy Code*, 69 AM. BANKR. L.J. 287, 296-97 (1995); *see also* Laura Napoli Coordes, *The Geography of Bankruptcy*, 68 VAND. L. REV. 381, 395

cases, including Chapter 11.[73] It can weigh in on substantive and logistical matters including compensation of Chapter 11 professionals.[74] Also within its portfolio are the appointment and supervision of a variety of private individuals and entities, both nonprofit and for-profit, to perform statutorily required roles. These roles include case trustee, providers of credit counseling briefings and debtor education in individual debtor cases, consumer privacy ombudsperson, health care ombudsperson, and examiner.[75]

The power to select a Chapter 11 trustee is particularly consequential. Unlike in Chapters 7, 12, and 13, trustee appointment in Chapter 11 is not automatic and is meant to be an exception rather than the rule. But structural discipline flows from the possibility that the court will authorize trustee appointment and the administrative watchdog will select the person to fill that role.[76] The resulting structural discipline could affect not only the debtor company but other parties with strong economic or legal leverage, such as lenders with security interests in key assets of the debtor.

F. *Implications*

By statutory design, the U.S. business bankruptcy system can be conceptualized as a public–private partnership. In addition to handling claims arising from a variety of legal theories, the bankruptcy system depends on a mixture of private and public funds to operate. Whatever running room the Bankruptcy Code gives private parties to craft resolutions is balanced against

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(2015) (comparing historic concerns about a bankruptcy ring to perceptions of elite Chapter 11 professionals). As I have written elsewhere, "bankruptcy referees were appoint*ees* of friendly district court judges, and appoint*ers* of case trustees who also were parties in litigation," producing concerns about patronage that cast a shadow on the system. Jacoby, *Chapter 11*, *supra* note 4, at 577. This concern is not unique to bankruptcy, of course. *See generally* Lemos, *supra* note 13, at 543 ("The federal government and some states have instituted reforms designed to combat cronyism in the award of government litigation work.").

73 28 U.S.C. § 586(a)(3)(A)–(I), (5), (7)–(8) (2012).

74 *Id.* § 586(a)(3)(A).

75 *See* 11 U.S.C. § 111(b) (2012) (setting forth parameters for approving the use of nonprofit budget and credit counseling providers or instructional courses on personal financial management); 28 U.S.C. § 586(a)(1), (2), (b), (d) (2012); (delineating responsibilities of each U.S. Trustee and the extent to which a U.S. Trustee can establish requirements for panel trustee service); *id.* § 586(f) (authorizing hiring of auditors); *see also* 11 U.S.C. §§ 332, 333 (2012) (describing the procedure for U.S. Trustee appointment of a patient care ombudsperson or a consumer privacy ombudsperson); *id.* § 1104 (providing the substantive grounds and procedure for appointment of a Chapter 11 trustee or examiner).

76 Although creditors can elect a trustee under 11 U.S.C. § 1104(b), enacted in 1994, few published cases discuss the process, which seems to be rarely invoked. *See, e.g.*, *In re* Petters Co., 425 B.R. 534, 540 (Bankr. D. Minn. 2010); *In re* Nat'l Farm Fin. Corp., No. 07-31580, 2008 WL 410236, at *6 n.8 (Bankr. N.D. Cal. Feb. 12, 2008); *In re* Aspen Marine Grp, 189 B.R. 859, 861 (Bankr. S.D. Fla. 1995). See generally AM. BANKR. INST., COMMISSION TO STUDY THE REFORM OF CHAPTER 11: FINAL REPORT AND RECOMMENDATIONS 29-30 (2014) (discussing trustee election option and calling it "unsatisfactory").

a double-branch dose of public official oversight and substantive standards meant to condition use of Chapter 11's extraordinary legal tools.

II. MODERN DEVELOPMENTS THAT SKEW THE PARTNERSHIP

As previously discussed, a hybrid system that privatizes some public functions requires safeguards to protect constitutional and democratic norms, as well as particular objectives of that system.[77] This is as true for bankruptcy as elsewhere.

In the bankruptcy system, however, institutional actors have moved the "baselines" incrementally, one motion and court order at a time.[78] Whereas Part I showed how the textbook version of the American bankruptcy system draws on a combination of public and private actors to advance public interests, features of modern Chapter 11 distort the public–private balance and delink extraordinary legal tools from public standards and oversight. The example in subpart A, below, is fairly well recognized. But the public–private partnership has become dysfunctional in other, quieter, ways, as detailed in subsequent linked examples.

A. *Control by Lending Agreement*

In modern Chapter 11 cases, parties often argue that the ordinary rules of Chapter 11 are unaffordable due to urgency, whether real or manufactured. This framing facilitates DIP financing (often bridges to quick all-asset sales) with terms considered "odious" even by restructuring professionals.[79] However high the cost of these loans, a perhaps bigger concern is how

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77 *See* Freeman, *supra* note 8, at 589.

78 For research on how legal institutions can be remade without statutory amendment, see Melissa B. Jacoby, *The Bankruptcy Code at Twenty-Five and the Next Generation of Lawmaking*, 78 AM. BANKR. L.J. 221 (2004) (presenting examples of changes to the bankruptcy system while the statute remained static, and identifying alternative non-statutory channels of reform); *see also* Lipson, *supra* note 3, at 266 (2016) (noting that although contractualist proposals did not get enacted in legislation, "it seems more than mere coincidence that Chapter 11 has become an increasingly contractualized process").

79 Marc J. Heimowitz, *Government as Rescue Financier: Not Just a Private Lender*, 19 U. PA. J. BUS. L. 49, 51 (2016) ("Restructuring professionals understand and generally accept the proposition that when there is no better alternative even odious private rescue financing should be accepted on proffered terms."). Academics agree. *See, e.g.*, Adrian J. Walters, *Statutory Erosion of Secured Creditors' Rights: Some Insights from the United Kingdom*, 2015 U. ILL. L. REV. 543, 545 ("[A]ccording to the prevailing conventional wisdom, Chapter 11, in the general run of cases, has become little more than a glorified nationwide foreclosure process through which secured creditors can exit via a quick section 363 sale or an outright liquidation."); Elizabeth Warren & Jay Lawrence Westbrook, *Secured Party in Possession*, 22 AM. BANKR. INST. L. REV. 12 (2003) ("American lawyers are now creating the SPIP (secured-party-in-possession)."). *See generally* Charles W. Mooney, Jr., *The (Il)legitimacy of Bankruptcies for the Benefit of Secured Creditors*, 2015 U. ILL. L. REV. 735, 764 (forum shopping into bankruptcy for secured creditors' benefit has the capacity for "mischief"); Jay Lawrence Westbrook, *The Control of Wealth in Bankruptcy*, 82 TEXAS L. REV. 795, 860-61 (2004) (identifying control as the central concept in models of dominant secured lending and the distributional impact of this control).

prepetition lenders use DIP lending to direct the activities of the bankruptcy estate. For example, lenders abhor funding lawsuits against themselves.[80] Thus, lenders use the promise of DIP financing to prevent being sued, or to deter other steps that might promote public values. With heightened knowledge of the debtor's financial condition, the DIP lender is in a unique position to run out the clock.

To be sure, one can find examples of courts pushing back and refusing to sign overreaching proposed orders.[81] Seemingly more often than not, though, courts sign orders supported by key parties and a string of citations showing that whatever it is has been done before, haunted by the worry that resistance will reduce creditor returns.[82] Such rulings implicitly subordinate other public objectives to (mostly voluntary) creditor wealth maximization.

B. *Court Concentration, Squared*

A second mechanism destabilizing bankruptcy's public–private partnership involves the reduction of the number and types of courts overseeing larger Chapter 11 cases. The two components of this concentration are addressed separately.

1. The Initial Forum

Larger Chapter 11 cases are concentrated in a handful of judicial districts. The governing statute is partially responsible. Bankruptcy venue law allocates forum selection to the private party that initiates the bankruptcy case. Departing from other federal venue laws, the statute provides several options based on geographic connections of the *debtor* rather than creditors or other stakeholders.[83] Bankruptcy's affiliate venue rule gives even more latitude,

80 *See, e.g.*, Czyzewski v. Jevic Holding Corp. 137 S. Ct. 973, 983 (2017) ("Sun insisted upon a settlement that gave petitioners nothing only because it did not want to help fund petitioners' WARN lawsuit against it.").

81 *See, e.g.*, *In re* Fisker Auto. Holdings, 510 B.R. 55, 61 (Bankr. D. Del. 2014) (capping a lender's credit bid in light of evidence of misbehavior); Melissa B. Jacoby & Edward J. Janger, *Bankruptcy Sales*, in CORPORATE BANKRUPTCY HANDBOOK (Barry Adler ed., forthcoming 2019) (discussing *Fisker* case).

82 *See* Daniel J. Bussel & Kenneth N. Klee, *Recalibrating Consent in Bankruptcy*, 83 AM. BANKR. L.J. 663, 690 (2009) ("So very much of Chapter 11 practice . . . has become bankruptcy court ratification of whatever deal is worked out among secured lenders, the debtor and the unsecured creditors' committee in the context of settlements, sales, and financings, that those deals pretermit or predetermine the terms of any reorganization plan."); Jacoby & Janger, *supra* note 68, at 889. For example, the committee's lawyer in *Jevic* said, "This is hardly the first case where such an arrangement has been approved by the Court. It's not the first case where this Court has approved such an arrangement, and it's not the first case this month where this Court has approved an arrangement of this kind." Transcript of Hearing at 101, *In re* Jevic Holding Corp., 526 B.R. 547, (D. Del. Nov. 13, 2012) (No. 75); *id.* at 109 ("Court has approved in another context a gifting or class gifting arrangement where some priority creditors benefited and other that this [sic.] priority creditors did not. So we don't think that this is, again, breaking new ground.").

83 28 U.S.C. § 1408 (2012).

allowing a corporate parent debtor to file a Chapter 11 petition in a forum based only on the contacts of a tiny subsidiary.[84] The statutory foundation notwithstanding, the drafters likely did not anticipate the level of concentration that developed.[85]

Venue patterns present several challenges for the public–private partnership. First, the unevenly distributed volume of large corporate cases severely taxes busy courts' institutional capacity to exercise the oversight that both appellate courts and the Bankruptcy Code expect.[86] With the volume of documents filed in a typical large Chapter 11 and the expedited timeframe that certain lenders favor, it can be literally impossible for courts to gain the familiarity necessary to fulfill public–private partnership obligations. The court and administrative watchdog instead engage in ongoing triage. That time crunch and need for triage may be among the elements lenders and others consider when seeking to influence a debtor's venue selection.[87]

Second, recall that bankruptcy's public purposes need not be unique to the subject matter; they include constitutional and democratic values. Based on the non-bankruptcy law of venue and personal jurisdiction, corporate bankruptcy venue law seems out of step. Personal jurisdiction doctrine outside of bankruptcy prevents a parent company from being sued in a jurisdiction selected only because it has a subsidiary "at home" there.[88] Recent U.S. Supreme Court decisions emphasize the burden on parties involuntarily brought to court.[89] Filers of civil actions cannot choose a venue based solely

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84 *Id.*

85 *See* Coordes, *supra* note 72, at 390, 399 (looking at history, comparing to tax and international trade courts, and arguing that Congress intended to decentralize the bankruptcy system). Lynn LoPucki's Bankruptcy Research Database has the most comprehensive venue information for large publicly held companies. *UCLA–LoPucki Bankruptcy Research Database*, UCLA SCH. L., http://lopucki.law.ucla.edu [https://perma.cc/YU9B-PH33].

86 Coordes, *supra* note 72, at 404 ("Instead of depending on the experience of judges sitting in only two courts with crowded dockets, a national array of experienced judges would provide more efficient and effective resolutions to a larger number of bankruptcy cases."); Jacoby, *Chapter 11*, *supra* note 4; Jacoby, *supra* note 6 (discussing expectations of bankruptcy courts held by the U.S. Supreme Court and courts of appeal); *see also infra* note 116 (citing appellate courts calling for bankruptcy court oversight of derivative standing).

87 Coordes, *supra* note 72, at 407-08. For commentary on whether lender selections more generally can be assumed to be efficient, see Diane Lourdes Dick, *The Chapter 11 Efficiency Fallacy*, 2013 B.Y.U. L. REV. 759 (2013) (analyzing how market mechanisms do not necessarily produce efficient outcomes, to the detriment of creditors, equity holders, and the public).

88 *See* Daimler AG v. Bauman, 134 S. Ct. 746, 751 (2014) (holding that even if the defendant's subsidiary was considered at home in California, it would not be sufficient to find the parent corporation at home there).

89 *See, e.g.*, Bristol-Myers Squibb Co. v. Superior Court of California, 137 S. Ct. 1773, 1780 (2017). Personal jurisdiction decisions involving state court actions prompt Fourteenth Amendment concerns not present in bankruptcy, although Jackie Gardina has argued that the parallel Fifth Amendment analysis should increase in rigor. *See* Jackie Gardina, *The Bankruptcy of Due Process: Nationwide Service of Process, Personal Jurisdiction and the Bankruptcy Code*, 16 AM. BANKR. INST. L. REV. 37, 39 (2008) ("The Supreme Court has yet to define the parameters of the Fifth Amendment

on *their own* places of incorporation; the key question is where the defendant resides.[90] In multidistrict litigation, life-tenured judges, not private parties, decide whether and in what district to consolidate a matter.[91] These comparisons further call into question whether the current corporate bankruptcy system is sufficiently attentive to public values underlying federal courts and procedure jurisprudence.

2. Access to Appellate Review: Equitable Mootness and More

Limiting appellate review of bankruptcy court decisions further reduces public oversight in Chapter 11 and intensifies the authority of bankruptcy courts.[92] Bankruptcy court decisions are more insulated than district court decisions from circuit-level appellate review because, in most instances, they must be appealed first to a district court or Bankruptcy Appellate Panel.[93] The Bankruptcy Code expressly limits the ability to unwind DIP loans and sales, which reduces objectors' incentives to appeal related court orders.[94] The

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due process clause or sanction the current analysis adopted by the federal courts. Its silence is deafening in circumstances in which Congress has allowed for nationwide service of process.").

90 *See* TC Heartland LLC v. Kraft Foods Grp. Brands LLC, 137 S. Ct. 1514, 1514 (2017) (interpreting 28 U.S.C. § 1400(b) for patent cases); 28 U.S.C. §§ 1391(a)–(b) (2012). As reflected in *TC Heartland*, corporations have been known to resist being sued in their place of incorporation. *See also* Report of the National Bankruptcy Review Commission 783 (1997) ("[N]o plaintiff anywhere else in the system may commence a lawsuit based on its *own* place of incorporation."). A plaintiff was formerly permitted to choose a venue in diversity jurisdiction cases based on the plaintiff's residence, but Congress eliminated that option in 1990. Judicial Improvement Act of 1990 § 311, 28 U.S.C. 1391 (2012).

91 Although they are assigned for pretrial purposes only, that assignment almost always is dispositive. *See* Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1673 (2017); Margaret S. Williams & Tracey E. George, *Who Will Manage Complex Civil Litigation? The Decision to Transfer and Consolidate Multidistrict Litigation*, 10 J. EMPIRICAL LEG. STUD. 424, 426 (2013) ("nearly all cases are resolved in the transferee court"). The Judicial Panel on Multidistrict Litigation has assigned at least one multidistrict litigation to sixty-three of the ninety-four federal judicial districts in the country. *Id.* at 443.

92 *See* Roe & Tung, *supra* note 6, at 1276-77 ("Because of the dearth of bankruptcy appeals, bankruptcy judges enjoy autonomy in administering their cases."). As discussed elsewhere, delegations in *consumer* bankruptcy cases also have escaped notice of appellate courts. Jacoby, *supra* note 6, at 887-88 (noting, based on courtroom observations, that trustees, rather than judges, functionally preside over Chapter 13 confirmation hearings in some districts). *Superdelegation* emphasized the cross-government-branch nature of this activity, but the application of the (relatively dormant) nondelegation doctrine to bankruptcy is also worth considering. *See* Freeman, *supra* note 13, at 840 ("Despite the . . . fact that numerous delegations to private bodies have quietly survived judicial scrutiny, private delegations are still likely to be more troubling to courts than even broad delegations to public agencies.").

93 Bussel & Klee, *supra* note 82, at 684.

94 *See* 11 U.S.C. §§ 363(m), 364(e) (2012) (noting circumstances under which a reversal or modification on appeal will not alter the bankruptcy court's order, allowing the sale or loan to stand).

definition of a final order, a predicate to be appealable as of right, also limits appellate review,[95] as does appellate standing doctrine.[96]

Pragmatic considerations further reduce the odds appellate courts will scrutinize activity in a bankruptcy case. To the extent that judges encourage settlement and discourage parties from litigating a decision on the merits, neither the merits nor a court's efforts in encouraging settlement end up being subject to appellate review.[97] And the ability to pursue multiple layers of appeal is likely constrained when one of the parties is bankrupt.

Appellate courts have added the doctrine of equitable mootness to this already-daunting list. The doctrine, which has captured majorities in all circuit courts that have considered it, allows an appellate court to dismiss an appeal without considering the merits.[98] The court instead asks whether a confirmed Chapter 11 plan has been substantially consummated.[99] Consummation is likely when an objecting creditor has not obtained a stay pending appeal—either because no stay was requested or the creditor cannot afford the bond. If the plan has been consummated, the equitable mootness analysis continues by considering whether granting the requested relief "will (a) fatally scramble the plan and/or (b) significantly harm third parties who have justifiably relied on plan confirmation."[100] The larger and more complicated the case, the more likely the appeal will be equitably moot.[101]

Notwithstanding the formidable talents of the judges who preside in America's bankruptcy courts, equitable mootness doctrine fosters an environment in which alterations of the public–private partnership can flourish with fewer public institutional checks. Debtors and associated parties are incentivized to rush to consummate a restructuring plan to insulate the deal from further judicial scrutiny. Because the doctrine reduces the leverage of parties financially unable

95 *See* Bullard v. Blue Hills Bank, 135 S. Ct. 1686, 1692 (2015) (holding that an order denying confirmation of a proposed Chapter 13 repayment plan is not a final appealable order); Bank of New York Mellon v. Watt, 867 F.3d 1155, 1157 (9th Cir. 2017) (ruling that the court lacked appellate jurisdiction to review a district court's order vacating a bankruptcy court order confirming a Chapter 13 plan because it was not a final appealable order).

96 *See In re* Combustion Engineering, Inc., 391 F.3d 190, 215 (3d Cir. 2004) (noting that "[a]ppellate standing in the bankruptcy context is more restrictive than Article III standing" and citing other circuit cases similarly limiting appellate standing).

97 *See, e.g.*, Porter v. Chicago Bd. of Educ., 981 F. Supp. 1129, 1131-32 (N.D. Ill. 1997) (rejecting a party's claim of being rushed and coerced into accepting settlement agreement). *But see In re* A.T. Reynolds & Sons, Inc., 452 B.R. 374, 381 (S.D.N.Y. 2011) (reversing sanction awarded by a bankruptcy court after finding a party failed to participate in good faith, noting that "inquiry into the parties' conduct in a mediation, backed by the threat of sanctions, may exact a coercive influence on the parties to settle").

98 *See, e.g.*, *In re* City of Detroit, 838 F.3d 792, 807 (6th Cir. 2016) (Moore, J., Dissenting) (observing that the doctrine has been adopted by every circuit to consider it).

99 *See, e.g.*, *In re* Tribune Media Co., 799 F.3d 272, 278 (3d Cir. 2015), *cert denied sub nom.* Aurelius Capital Mgmt. v. Tribune Media Co., 136 S. Ct. 1459 (2016).

100 *Id.*

101 *Id.*

to post the bond required to obtain a stay pending appeal, the balance among various private parties is further skewed as well.

Equitable mootness doctrine affects the maintenance of underlying public values in other ways. The doctrine is in tension with Supreme Court case law directing judges to hear and decide cases and controversies within their subject-matter jurisdiction.[102] The prospect of appellate review by a multi-judge court fosters confidence in the system.[103] Indeed, "the value of the appellate system's ability to increase public trust in judicial outcomes may exceed the amount of error correction actually accomplished."[104] Judith Resnik has emphasized the importance of public participation (including observation) in adjudicatory processes as a democratic practice.[105] As a result of equitable mootness, even fewer people get to tell their stories to a court of higher authority, or to observe an appellate court considering the matter.

C. *Disabling a Disciplining Backstop*

Like removing the batteries from a kitchen smoke alarm while preparing a special dish, a risky act often starts with good intentions and the belief that the risks are both minimal and manageable. But habituation to disabling the alarm can lead to disaster—inability to cope with crisis when the need arises. In Chapter 11, the threat of trustee appointment has similarly been disabled in larger corporate cases.[106]

Repeat players in the bankruptcy system have developed a sense that trustee appointment is intolerable.[107] Professionals doubt the qualifications of

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102 *See* Lexmark International, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1386 (2014) (noting the "virtually unflagging" obligation of a federal court to hear and decide cases within its jurisdiction); Sprint Communications, Inc. v. Jacobs, 134 S. Ct. 584, 588-91 (2013) (noting that "federal courts are obliged to decide cases within the scope of federal jurisdiction" and "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given") (citation omitted); *see also* Melissa B. Jacoby, *Presiding over Municipal Bankruptcies: Then, Now, and Puerto Rico*, 91 AM. BANKR. L.J. 377, 387-88 (2017) (discussing critiques of equitable mootness as extended to municipal bankruptcy).

103 *See* Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. REV. 1219, 1239, 1263 (2013).

104 *Id.* at 1272.

105 Resnik, *supra* note 49, at 16-17 ("States *need* their members and residents to participate in adjudicatory processes, both to maintain peace and security as well as to generate and to reinforce their own authority to do so.").

106 *See* Dickerson, *supra* note 63, at 875-76 (tracing the substitution of creditor-selected managers for trustees and arguing that the former should have the same duties as the latter).

107 *See* Michelle M. Harner, *The Search for an Unbiased Fiduciary in Corporate Reorganizations*, 86 NOTRE DAME L. REV. 469, 520 (2011) (arguing that expanded trustee appointment "would meet intense resistance"); Dickerson, *supra* note 63, at 902 (discussing secured creditors' resistance to trustee appointment). As LoPucki has highlighted, if a trustee could not get appointed in a case with as much fraud as Enron, would there ever be a suitably egregious circumstance to warrant appointment? *See* LYNN M. LOPUCKI, COURTING FAILURE 148 (2005). For a parallel analysis regarding Chapter 11 examiners, see Lipson, *supra* note 3.

trustee candidates and seem to believe that the statutory alternative of electing a Chapter 11 trustee is infeasible.[108] They have taken insufficient heed of the analysis of Kelli Alces, who has contended that courts have considerable discretion to tailor the scope of a trustee's duties, suggesting that trustee displacement need not be as drastic a remedy as is sometimes suggested.[109]

The restructuring world has coalesced around a private workaround, such as the chief restructuring officer (CRO)—discussed in scholarship by both Mechele Dickerson and Michelle Harner[110]—that operates almost entirely outside the governance architecture in the Bankruptcy Code and Judicial Code. CROs are selected by someone other than the administrative watchdog, appointed under different (and contested) statutory authority, and may not even be subject to court oversight of their compensation.[111]

In addition to resisting trustee appointment in Chapter 11, restructuring professionals and repeat player lenders may limit the odds of trustee appointment in other ways, and for other reasons. Businesses destined for sale nonetheless tend to file Chapter 11, the "reorganization" chapter, rather than Chapter 7 petitions. The standards for conversion to Chapter 7 from Chapter 11 are lighter, or at least more varied, than Chapter 11 trustee appointment.[112] Yet, at least for larger cases, the threat of conversion to Chapter 7 also seems to have collapsed, at least until all actions of consequence have been taken. Professionals have a financial stake in this fight. Upon conversion from Chapter 11 to Chapter 7, professionals' Chapter 11 fees are subordinated to Chapter 7 trustee fees.[113] It is hardly irrational for professionals to be concerned about getting paid. But the question here is the impact of these private party preferences on the overall public–private balance and the system's integrity.

By incrementally but systematically weakening the trustee backstop, private parties have shifted the balance of power. Potent tools and powers have been substituted with private-party-supplied alternatives that are qualitatively different.

108 *See supra* note 107.

109 Kelli A. Alces, *Enforcing Corporate Fiduciary Duties in Bankruptcy*, 56 KAN. L. REV. 83, 106-107 (2007) (giving examples of limited trustee appointments that did not require complete elimination of management and explaining legal basis for these acts); *see also* AM. BANKR. INST., COMMISSION TO STUDY THE REFORM OF CHAPTER 11: FINAL REPORT AND RECOMMENDATIONS 31 (2014) (supporting the idea that a Chapter 11 trustee should be able to retain managers and employees deemed necessary to the reorganization process).

110 Dickerson, *supra* note 63, at 917 (describing the "new private trustee"); *id.* at 921 (documenting the frequency of chief restructuring officers in large cases); Harner, *supra* note 107.

111 Dickerson, *supra* note 63, at 918, 921.

112 11 U.S.C. § 1112 (2012) (delineating circumstances under which a Chapter 11 should be converted to Chapter 7).

113 *Id.* § 726(b) (giving administrative priority claims incurred in Chapter 7 priority over administrative claims incurred in Chapter 11 before conversion).

D. *Shifting Litigation Responsibility*

Bankruptcy empowers a trustee to scrutinize and seek to unwind certain pre-bankruptcy transactions.[114] Absent trustee appointment, this scavenger hunt obligation rests with the debtor-in-possession. Debtors-in-possession in larger Chapter 11 cases have transferred these responsibilities in yet another off-script alternative: statutory committees of creditors.[115]

In some cases, this delegation might seem logical. A committee of sexual abuse claimants, for example, might be well situated to pursue litigation against a bankrupt diocese.[116] Yet, given that committees are creatures of the Bankruptcy Code,[117] it is notable that the Bankruptcy Code itself does not assign avoidance actions to committees directly.[118] Committee members' interests may not overlap well enough with those of the bankruptcy estate as a whole.[119]

Committee composition is bound to affect the extent to which avoidance actions are pursued, abandoned, or settled in ways that may be consistent with obligations to unsecured creditors but depart from what a true estate fiduciary would have done. For example, committees have advocated in some cases for full

114 Leveraged buyout transactions are a frequent target. Danielle D'Onfro, *Limited Liability Property*, 39 CARDOZO L. REV. 1365 (2018) (discussing doctrines to prevent dissipation of assets to creditors' detriment); Marie T. Reilly, *The Latent Efficiency of Fraudulent Transfer Law*, 57 LA. L. REV. 1213, 1248-51 (1997) (discussing application to leveraged buyouts).

115 *See* Bussel & Klee, *supra* note 82, at 690 ("Indeed, it has increasingly become the practice for courts simply to authorize the committee to prosecute or settle much estate litigation, particularly avoiding power litigation and claims against insiders."); *id.* at 736 ("The Bankruptcy Code, however, does not expressly contemplate the current practice of looking to the committee to give de facto binding consent to preplan case-dispositive settlements, financings and sales."); *see also* Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery, 330 F.3d 548, 580 (3d Cir. 2003) (en banc) (holding that bankruptcy courts have sufficient authority to authorize derivative standing); *In re* Commodore Int'l Ltd., 262 F.3d 96, 99-100 (2d Cir. 2001) (discussing circumstances where a creditors' committee can acquire standing to pursue claims of the bankruptcy estate). Even before the Third Circuit authorized the practice, derivative standing was used frequently. *In re* W.R. Grace Co., 285 B.R. 148, 155 (Bankr. D. Del. 2002) (discussing cases treating derivative standing as a settled issue). Bankruptcy professionals were likely influential in the *Cybergenics* en banc reversal. Melissa B. Jacoby, *The Bankruptcy Code at Twenty-Five and the Next Generation of Lawmaking*, 78 AM. BANKR. L.J. 221, 238-40 (2004). For a court less accepting of derivative standing, see, e.g., *In re* Fox, 305 B.R. 912, 915-16 (B.A.P. 10th Cir. 2004)(upholding bankruptcy judge ruling that only a trustee or DIP can pursue avoidance actions).

116 Thanks to Pamela Foohey for highlighting this example.

117 *See* 11 U.S.C. § 1102 (outlining the appointment of a creditors' committee).

118 *See id.* § 1103 (discussing the powers and duties of committees).

119 *See In re* SPM Mfg. Corp., 984 F.2d 1305, 1315 (1st Cir. 1993) ("[T]he committee is a fiduciary for those whom it represents, not for the debtor or the estate generally.").

payment of priority claims,[120] but supported skipping priority claims in others.[121] Some committee members may be eager to prevent certain avoidance actions from being litigated rather than zealously pursuing them.[122] For all of its supposed benefits, granting derivative standing to committees gives them extra leverage to compromise the rights of some creditors while advantaging others.[123]

Recognizing the potential divergence of interests between committees and the bankruptcy estate, appellate case law calls for bankruptcy courts to fill the gap through monitoring.[124] Judges may not have the information and infrastructure to fulfill this responsibility under even the best of circumstances. But the aforementioned concentration of large cases, producing the need for the triage discussed above, makes court oversight of this redelegation of litigation authority even more unrealistic. Furthermore, the routine allocation of avoidance actions to committees may be accompanied by a broader sense of freedom of the debtor-in-possession, on the theory that the committee is now the stand-in for the estate. Offloading estate responsibility while benefitting from debtor-in-possession status, largely free of fear of trustee appointment, again distorts the system's balance.

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120 *See e.g.*, Transcript at 4, *In re* Allen Family Foods, No. 11-11764 (Bankr. D. Del. June 24, 2011). Four supplier members of the Allen Family Foods creditors' committee asserted supplier priority claims: Archer Daniel Midland, Interstate Corpack, Tri-Gas & Oil, and Wye Mills Grain. Claims Register, *In re* Allen Family Foods, Inc., 11-11764 (Bankr. D. Del. Oct. 14, 2014), ECF No. 1025; Notice of Appointment of Committee of Unsecured Creditors, *In re* Allen Family Foods, Inc., 11-11764 (Bankr. D. Del. June 17, 2011), ECF No. 53. The committee in Sports Authority's Chapter 11 advocated for suppliers asserting priority claims, which ultimately accepted less than full payment. Several members of the Sports Authority creditors' committee (Nike, Realty Income Corp., and GGP) asserted priority claims. Notice of Appointment of Committee of Unsecured Creditors, *In re* TSAWD Holdings, 16-10527 (Bankr. D. Del., Mar. 10, 2016), ECF No. 262; Claims Register, *In re* TSAWD Holdings, Inc., 16-10527 (Bankr. D. Del. Mar. 2, 2016), ECF No. 3549. For earlier iterations of this issue, see Stephen J. Lubben, *The "New and Improved" Chapter 11*, 93 KY. L.J. 839, 854 (2004).

121 *See, e.g.*, Czyzewski v. Jevic Holding Corp. 137 S. Ct. 973 (2017) (holding that a structured dismissal order that skips a priority claimant in allocating funds is not permitted under the Bankruptcy Code, but does not necessarily foreclose other priority-skipping practices). Sally Henry has uncovered a variety of creative ways in which parties try to skip priority; committees are involved in many examples. *See* Sally McDonald Henry, *Chapter 11 Zombies*, 50 IND. L. REV. 579 (2017).

122 Sometimes such avoidance actions can be buried through asset sales with the understanding that the buyer will not pursue those suits. Transcript of Hearing, *In re* Allen Family Foods, Inc., No. 11-11764, (Bankr. D. Del. June 27, 2011) (ECF No. 88).

123 *See* Diane Lourdes Dick, *Valuation in Chapter 11 Bankruptcy: The Dangers of an Implicit Market Test*, 2017 U. ILL. L. REV. 1487, 1498 (discussing impact of relying on committees to conduct investigations in other contexts).

124 *In re* Adelphia Commc'ns Corp., 544 F.3d 420, 423-25 (2d Cir. 2008) (holding that the court's withdrawal of derivative standing and transfer of management of litigation was not abuse of discretion); *id.* at 424 ("[A] court's role [is to] . . . oversee the litigation and 'to check any potential for abuse by the parties'."); *In re* Commodore Int'l Ltd., 262 F.3d 96, 99-100 (2d Cir. 2001) (upholding withdrawal of derivative standing and discussing the court's role in balancing and oversight).

III. THREE STEPS TOWARD RESTORING HYBRIDITY

So far, this Article has done the following. Part I established the grounds for conceptualizing corporate bankruptcy as a public–private partnership and documented the hybridity of bankruptcy that makes this model a good descriptive and normative fit. Part II identified aspects of corporate bankruptcy practice that distort the partnership. Part III will float three ideas to both promote and take advantage of the partnership model in the real world and the legal academy.

A. *Procedural Justice*

Debates about corporate bankruptcy tend to coalesce around outcomes. How much money did creditors receive? How many companies reorganized?[125] Yet, parties and the public evaluate systems on criteria other than (financial) end results.[126] The bankruptcy system's very premises—not enough to go around, changing legal entitlements without consent—make its procedures particularly vulnerable to public distrust.

Even if increasing the influence of private parties in Chapter 11 guaranteed efficiency (far from a foregone conclusion),[127] public–private partnerships can ill afford to use efficiency as the exclusive metric.[128] Increasing efficiency would not inevitably serve the system if the efficiency-promoting steps led the public to question the system's legitimacy.[129]

Procedural justice theory is relevant to maintaining the legitimacy of legal systems and individuals' compliance with them. Theoretical and empirical research since at least the 1970s has examined how individuals perceive the fairness of

125 Elizabeth Warren & Jay Lawrence Westbrook, *The Success of Chapter 11: A Challenge to Its Critics*, 107 MICH. L. REV. 603, 611 (2009) ("[P]lan confirmation is surely the central measure of success in Chapter 11. A system that does not lead to confirmed plans cannot achieve its objectives.").

126 Gross, *supra* note 28, at 1033 (recognizing the importance of community interests in the bankruptcy process); Gillian K. Hadfield, *Framing the Choice between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 L. & SOC'Y REV. 645 (2008) (emphasizing interest in values other than financial compensation, such as information forcing and attainment of justice); Tamara Relis, *"It's Not about the Money!": A Theory on Misconceptions of Plaintiffs' Litigation Aims*, 68 U. PITT. L. REV. 341, 342, 373 (2006) (discussing plaintiffs' non-monetary motivations).

127 *See* Dick, *supra* note 123, at 1491 (describing the dangers of relying on private negotiations to produce accurate valuations, given that some relevant parties may be excluded from the negotiation process); Roe & Tung, *supra* note 6, at 1244, 1271 (2013); Warren & Westbrook, *supra* note 27, at 1253 (observing that the assumption that upping reliance on private parties to increase efficiency "ignores basic economic theory, including the problems of pricing inefficiencies and high transaction costs").

128 *See* JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN PUBLIC 122 (2017) (describing how privatization promoters "assume without explaining why economic efficiency is an unalloyed good or why it translates well into the public arena. Specifically, they fail to reconcile this celebration of efficiency with an underlying constitutional culture that is decidedly skeptical of efficiency arguments"). Michaels observes that separation of powers is intentionally inefficient. *Id.*

129 *See* Lemos, *supra* note 13, at 520 (noting concerns about private financing of public action raised in circumstances "marked by substantial externalities and where distributive concerns are strongest").

systems of authority, distinct from the outcome.[130] Although the reasons remain contested, "[r]obust findings suggest that individuals value decisionmaking processes that they deem fair, are more willing to accept and adhere to decisions made via fair processes, and believe that authorities are more legitimate when they have used fair processes."[131] Procedures, rather than outcomes, may be the largest contributors to public dissatisfaction with the legal system.[132]

Rebecca Hollander-Blumoff summarizes the studies this way:

> Simply put, the empirical evidence suggests that individuals value fairness of process, separate and apart from outcome, because of the special message that fairness of process sends to its recipients: an authority who acts in a fair manner is an authority who is legitimate and cares about the dignity and social standing of those who stand before it.[133]

Consistent among demographic and economic backgrounds, the fairness of process has been the *primary* factor shaping willingness to accept decisions—both for parties in interest and the public.[134]. Evaluation of perceptions is generally ex post rather than ex ante.[135] Key elements shaping perceptions of procedural justice include neutrality of the decisionmaker (aided by transparency), respect afforded to the party, and trustworthiness of the decisionmaker, with voice (the opportunity to tell one's side of the story in one's own words) being an indirect contributor.[136]

The bankruptcy system has not undergone rigorous procedural justice assessment.[137] Nonetheless, Elizabeth Gibson's work suggests that experiences

130 For the history, see Rebecca Hollander-Blumoff, *Just Negotiation*, 88 WASH. U. L. REV. 381, 384 n.7 (2010). John Thiebaut and Laurens Walker are credited with the early model propelling this research based on social exchange theory. *See generally* Tom Tyler, Peter Degoey & Heather Smith, *Understanding Why the Justice of Group Procedures Matters: A Test of the Psychological Dynamics of the Group-Value Model*, 70 J. PERSONALITY & SOC. PSYCHOL. 913, 913 (1996) (testing "whether fair procedures, in fact, communicate . . . identity-relevant information and whether it is this information that mediates the influence of procedural justice on general group-oriented behaviors").

131 Hollander-Blumoff, *supra* note 130, at 388. *See* Hollander-Blumoff, *supra* note 10, at 129 ("[W]hen people feel that they have been treated fairly by decisionmaking authorities, they are more likely to accept and comply with decisions, feel satisfied with outcomes, and believe in the legitimacy of the authority.").

132 *See generally* Elizabeth Chamblee Burch, *Calibrating Participation: Reflections on Procedure Versus Procedural Justice*, 65 DEPAUL L. REV. 323, 323 (2016) (citing empirical literature regarding unfair procedures as "the single most important source of popular dissatisfaction with the American legal system").

133 Hollander-Blumoff, *supra* note 10, at 137-38.

134 *See* Tom R. Tyler, *Procedural Justice and the Courts*, 44 CT. REV. 26, 28-29 (2007); *see also* Burch, *supra* note 132, at 330 (noting forum shopping as example in which "procedures can drift away from their procedural justice moorings").

135 Burch, *supra* note 10, at 27 ("Empirical research has demonstrated that the two vantage points are distinct: ex ante evaluations do not necessarily predict ex post satisfaction.").

136 *See id.* at 28; Hollander-Blumoff, *supra* note 130, at 390-91; Hollander-Blumoff, *supra* note 10, at 135; Tyler, *supra* note 134, at 30-31.

137 Efforts to uncover prior applications to bankruptcy have produced only one source. *See The Chapter 11 Bankruptcy Venue Reform Act of 2011: Hearing on H.R. 2533 Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. 57-58 (2011) (statement of Melissa

with other forms of aggregate litigation are relevant to bankruptcy.[138] Procedural justice is critical to legitimacy maintenance in aggregate litigation.[139] Resnik, Curtis, and Hensler have observed that welfarist evaluations of aggregate litigation's cost, accuracy and utility of outcomes are incomplete without inclusion of procedural justice concerns.[140] Aggregate litigation's procedural justice weak spots include reduced attention to individuals, privatized governance, and increased amounts of non-public activity.[141] These are important lessons for corporate bankruptcy.

Public actors can more readily implement the lessons of procedural justice than assess welfare implications on the spot. Thus, systematically attending to procedural justice is itself a way to promote public values.[142] Currently, federal courts are far from uniform on logistical matters that affect public access, including

B. Jacoby, Professor of Law, Univ. of N.C. at Chapel Hill, Chapel Hill, NC). Of course, others have made similar points without using the term procedural justice. *See, e.g.*, Jay Lawrence Westbrook, University of Texas School of Law, Testimony to the American Bankruptcy Institute Commission on Chapter 11 Reform: Venue: Domestic and International at 3 (Nov. 22, 2013) ("[T]he removal of proceedings to a distant place seems to defy common sense and may leave local citizens suspicious of the motives behind it.").

138 *See* S. ELIZABETH GIBSON, CASE STUDIES OF MASS TORT LIMITED FUND CLASS ACTION SETTLEMENTS AND BANKRUPTCY REORGANIZATIONS (2000) ("An examination of . . . class action settlements as a group in contrast to . . . bankruptcy reorganizations . . . allows some comparisons about the fairness and effectiveness of these two means of achieving global resolutions of mass tort liabilities."); S. Elizabeth Gibson, *A Response to Professor Resnick: Will This Vehicle Pass Inspection?*, 148 U. PA. L. REV. 2095, 2107 (2000) ("Stating the differences in the requirements [between class actions and bankruptcy] . . . merely begs the question why typicality, adequacy of representation, and predominance are concerns of class actions and not also of bankruptcy."). *See generally* Troy A. McKenzie, *The Mass Tort Bankruptcy: A Pre-History*, 5 J. TORT LAW 59 (2012)(deeming the relationship between bankruptcy and aggregate litigation as one of transformation); Troy McKenzie, *Toward a Bankruptcy Model for Non-Class Aggregate Litigation*, 87 N.Y.U. L. REV. 960 (2012) (noting that bankruptcy provides a useful lens for aggregation).

139 *See* Burch, *supra* note 132, at 326 (focusing on "securing and curtailing participation rights through both aggregating and pleading"); Burch, *supra* note 10, at 5 (noting "procedural justice's significance by observing its symbiotic relationship with institutional legitimacy and voluntary compliance"); Resnik, Curtis, & Hensler, *supra* note 10, at 307 (noting the dearth of scholarship on issues such as "aggregation, the financing of litigation, the role of lawyers, or how to shape aggregate cases to enable any of that to which they aspire—voice, participation, rights seeking, empowerment—to occur").

140 Resnik, Curtis & Hensler, *supra* note 10, at 307, 372, 376.

141 *See* Burch, *supra* note 10, at 10-11.

142 In the General Motors bankruptcy, several years after the company was sold and litigation continued on various matters, the presiding judge permitted retirees, located around the country, to tell their stories by telephone in open court. Melissa B. Jacoby, Professor of Law, Univ. of N.C. at Chapel Hill, Notes on Visit to S.D.N.Y. (June 14, 2012) (on file with author). By contrast, at least two books on the A.H. Robins bankruptcy indicate that the presiding *district* judge was dismissive of concerns that women who were adversely affected by the company's birth control product lacked access to the courtroom and to information. *See* KAREN M. HICKS, SURVIVING THE DALKON SHIELD IUD: WOMEN V. THE PHARMACEUTICAL INDUSTRY 51, 97, 174 (1994); RICHARD SOBEL, BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY 180 (1991) ("Not only would Judge Mehrige not let injured women testify, he did not even want them in the courtroom . . . . [He] evidenced his disdain toward both the claimants and their lawyers: . . . 'I will try to explain to the ladies, there isn't any need for them to stay around, but I don't think that will chase many of them away until maybe the first recess, and then [they'll] get tired.'").

even availability of daily hearing calendars,[143] and posting digital recordings of hearings on court dockets.[144] The necessary approvals for the latter within the federal judiciary are in place.[145] Bankruptcy courts on the whole probably use this technology more than other federal trial courts but still vary greatly.[146]

The public–private partnership model suggests an important expansion to the circle of parties responsible for procedural justice. References to evaluation of the "decisionmaker" in the procedural justice literature should apply to the administrative watchdog as well as judges. More significantly, in a hybrid system, it would be wrong to assign all procedural justice responsibility to public officials. For both theoretical and instrumental reasons, private parties (including lenders, debtors-in-possession, and creditors' committees) also are responsible for the construction of a fair process and should be assessed accordingly.

B. *The Sunlight Fund*

Recognizing corporate bankruptcy's hybridity with the public–private partnership label is not merely a matter of semantics. It presents avenues to think differently about the process of reform as well as its objectives. For example, other

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143 *See, e.g.*, Melissa B. Jacoby, *What's On at a Courthouse Near You*, CREDIT SLIPS (July 17, 2012), http://www.creditslips.org/creditslips/2012/07/whats-playing-at-the-bankruptcy-court-near-you-bankruptcy-court-calls-revisited.html [https://perma.cc/56TK-UZFF] (describing the "variation in the website availability of daily calendars for U.S. bankruptcy courtrooms").

144 *See* Jacoby, *supra* note 6, at 883-84 (describing the use of audio recordings to conduct research on the *City of Detroit* bankruptcy).

145 In 1999, the Judicial Conference of the United States approved digital audio recording as a method of taking the official court record. JUD. CONF. OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 12 (2005). In 2007, the Judicial Conference authorized a pilot project in the district and bankruptcy courts to make digital recordings of hearings available on PACER. JUD. CONF. OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 12 (2007). That pilot was extended and expanded in 2009. *See* JUD. CONF. OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 6 (2009) (noting that the pilot program was extended by one year, "so that data from up to five additional courts" could be included). In 2010, the Judicial Conference endorsed a proposal to allow courts to provide access to digital audio through PACER at the discretion of the presiding judge. JUD. CONF. OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, 9-10 (2010).

146 Looking at a one-year period, I identified three dozen bankruptcy courts that posted digital audio recordings on PACER at least once. Based on that search, some bankruptcy courts seem to be regular users of the technology, such as the District of Puerto Rico, the Eastern and Middle Districts of North Carolina, and the Eastern District of Michigan, while others used it rarely. Magnet districts for large Chapter 11 cases were not among the users, although the District of Delaware has recently amended its policy. *See News & Announcements: Digital Audio Files Available over the Internet Beginning November 6, 2017*, U.S. BANKR. CT., D. DEL. (Oct. 31, 2017), http://www.deb.uscourts.gov/sites/default/files/forms/DEB_CourtSpeak_Notification_10-31-2017.pdf [https://perma.cc/HWA7-CMMV]. A broader search produced a small number of audio recordings in the Southern District of New York bankruptcy court in 2011–2012 for *General Motors* and in 2009 for *Chrysler*.

public–private partnerships involve a range of institutions, such as nonprofit special purpose corporations, which assist in furthering public goals.[147]

So let us consider the Sunlight Fund as a way to advance the goals of corporate bankruptcy by providing an alternative and competing source of capital for businesses in bankruptcy. The types of actions eligible for the Sunlight Fund should be up for debate,[148] but overall the goal would be designed to reduce the ability of private parties with leverage to deter estate-enhancing and public-value–promoting activity. For example, it could reduce the leverage of pre-petition lenders to condition DIP lending on refraining from estate- and transparency-promoting activities, including certain causes of action. Or it could be used to fund a bond that must be posted to obtain a stay of an order pending appeal when that bond otherwise would be out of financial reach for the objector.

As this cursory description suggests, the details and competing considerations have yet to be worked out. Most prominent is how to capitalize the Sunlight Fund itself. One possible, albeit limited, source is bankruptcy filing-fee revenue currently being diverted to other parts of the federal government. It also will be necessary to think through what controls should be imposed on tapping this fund, such as requiring that the litigation at least survive a motion to dismiss.

The general takeaway for now is this: conceptualizing bankruptcy as a public–private partnership allows proposals of this nature to flow more readily, providing a richer set of materials and perspectives for the bankruptcy world to consider.

C. *Rewriting the Invitation List*

If the next major symposium on corporate bankruptcy law focuses on the Sunlight Fund, or on procedural justice, who will be invited to present papers and discuss ideas? The introduction to this Article posited that the field of corporate bankruptcy has been redistricted to a narrow range of issues and methods. Much of this Article has sought to expand the questions and methods used to evaluate and improve corporate bankruptcy.

Left to be addressed is the homogeneity of those often asked to chart bankruptcy's next frontiers. Will a new model of corporate bankruptcy also beget demographic diversification? To achieve the objectives discussed in this Article, both ideological and demographic expansions are necessary.

147 Some cities have established nonprofit organizations to accept donations to fund public interest litigation. *See* Lemos, *supra* note 13, at 534.

148 For example, Lipson has proposed mini-examinations consistent with experimentalist regulatory theory. Lipson, *supra* note 3, at 252.

Research supports the commonsense inference that a diverse team produces better results.[149] "Groups of cognitively diverse people can make more accurate predictions, solve problems, improve performance, and aggregate information."[150] Homogeneity breeds cognitive bias: cascade and conformity effects, confirmation bias, and group polarization.[151] Diverse groups not only might create better products but also have an easier time convincing others to accept them.[152] The population affected by bankruptcy cases is heterogeneous by many measures, increasing the relevance of diversity as a legitimacy-promoting tool.[153]

In the legal academy, white men, particularly those associated with traditional law and economics, tend to dominate high-profile publications and events about

149 *See* Amanda Bayer & Cecelia Elena Rouse, *Diversity in the Economics Profession: A New Attack on an Old Problem*, 30 J. ECON. PERSP. 232-33 (2016) (noting that the "range of views among economists is likely to be biased by the relative lack of women and minority economists" and "racially diverse groups significantly outperform other groups in solving complex problems"); Debbie Chachra, *To Reduce Gender Biases, Acknowledge Them*, 548 NATURE 373, 373 ("[D]iverse teams of engineers do better engineering . . . . [I]f you value rationality and objectivity, you need to engage with gender bias."); Diane Coyle, *Economics Has a Problem With Women*, FIN. TIMES (Aug. 28, 2017), https://www.ft.com/content/6b3cc8be-881e-11e7-afd2-74b8ecd34d3b [https://perma.cc/GW29-DQLU] ("It is just as bad to have mainly male economic research and policy advice as it is to test medicines mainly on men."); *Inefficient Equilibrium: Women and Economics*, THE ECONOMIST (Dec. 19, 2017), https://www.economist.com/christmas-specials/2017/12/19/women-and-economics [https://perma.cc/3LDK-S2V8] [hereinafter *Inefficient Equilibrium*] ("There is every chance that this lack of diversity [in economics] constrains or distorts the field's intellectual development.").

150 Burch, *supra* note 132, at 349. *See also* Martha T. McCluskey, Frank Pasquale & Jennifer Taub, *Law and Economics: Contemporary Approaches*, 35 YALE L. & POL'Y REV. 297, 300 (2016) ("[W]e need more, not fewer, accounts of how law can improve economic justice and economic policy.").

151 *See* Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1008, 1014, 1051-52, 1055 (2016) ("[S]ocial science teaches that such a homogeneous group of individuals is predisposed to act in a biased fashion.").

152 An American Bar Association resolution tied the demographic make-up of the bankruptcy bench to public confidence in the judiciary. Resolution 102, AM. BAR ASS'N 4-6 (Aug. 8-9, 2016) ("Diversity on the bankruptcy bench is particularly important in relation to perceptions of justice."). A New York State Bar Association task force report notes the "well-documented benefits of diversity in decision-making processes for all stakeholders," and that when "members of group notice they are socially different from one another, . . . they assume they will need to work harder to come to a consensus," which can produce better outcomes. N. Y. STATE BAR ASS'N, IF NOT NOW, WHEN? ACHIEVING EQUALITY FOR WOMEN ATTORNEYS IN THE COURTROOM AND ADR (2017). In the courtroom, "a team with diverse voices may be more capable of communicating in terms that resonate with a broader spectrum of courtroom decision-makers." *Id.* at 29. See also STEPHANIE A. SCHARF & ROBERTA D. LIEBENBERG, FIRST CHAIRS AT TRIAL: MORE WOMEN NEED SEATS AT THE TABLE 3 (2015) (noting that a lack of women in lead roles results in "less diversity of thinking, less effectiveness in front of a broad range of judges and jurors, and less creative energy brought to bear on client matters").

153 *See e.g.*, Tyler, *supra* note 134, at 28-30 (2007) (discussing diversity of ethnic and social backgrounds amongst those who bring problems to court).

corporate bankruptcy.[154] Examples include *Bankruptcy Law Stories*,[155] a forthcoming corporate bankruptcy handbook,[156] a 2014 conference on creditors in corporate governance at the University of Chicago,[157] a 2017 conference at the University of Pennsylvania,[158] and a 2017 joint NYU/Penn law and finance conference.[159]

Events organized by scholars or organizations with other orientations have not escaped homogeneity. Examples include a conference on Chapter 11 reform and secured credit sponsored by the American Bankruptcy Institute and the Illinois Law Review,[160] the Rethinking Chapter 11 conference held on Capitol Hill by the National Bankruptcy Conference in 2015,[161] and panels on corporate bankruptcy and financial institutions during a conference at the University of Texas in 2018.[162]

Dozens of female scholars have written on business bankruptcy topics.[163] Judging by research in other fields, however, they probably are cited less than

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154 For evidence of bias, whether implicit or otherwise, in the academic field of economics, see generally Bayer & Rouse, *supra* note 149; Coyle, *supra* note 149; *Inefficient Equilibrium*, *supra* note 149; Amanda Bayer & David Wilcox, *The Unequal Distribution of Economic Education*, (Fin. & Econ. Discussion Series, Working Paper No. 2017-105); Erin Hengel, *Publishing While Female: Are Women Held to Higher Standards? Evidence from Peer Review.* (Dec. 2017) (unpublished manuscript) (available at http://www.erinhengel.com/research/publishing_female.pdf [https://perma.cc/X2PE-DWK3]; Alice H. Wu, *Gender Stereotyping in Academia: Evidence from Economics Job Market Rumors Forum* (Dec. 2017) (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3051462 [http://perma.cc/9Ql7-8VZY].

155 BANKRUPTCY LAW STORIES, (Robert K. Rasmussen ed., 2007) (featuring nine male-authored chapters and one female-authored chapter).

156 Sixteen authors are male, two authors are female, and all but about five of the authors (including one of the women) do work falling within law and economics.

157 *Creditors and Corporate Governance*, BECKER FRIEDMAN INST., https://bfi.uchicago.edu/events/creditors-and-corporate-governance-0 [https://perma.cc/F69L-PFY5] (featuring eleven male academic presenters and one female academic presenter).

158 *Symposium Schedule: Bankruptcy's New Frontiers*, U. PA. L. REV., https://www.pennlawreview.com/symposium/schedule/ [https://perma.cc/8UQF-PD79] (featuring discussion of seven papers in total: one authored by a white woman and six coauthored by eleven white men, nearly all law-and-economics scholars, nine of whom have coauthored with each other in various combinations over the years). *See* Symposium, *Bankruptcy's New Frontiers*, 166 U. PA. L. REV. 1571 (2018).

159 *The Thirteenth Annual NYU/Penn Conference on Law and Finance*, N.Y.U. L., http://www.law.nyu.edu/node/29462 [https://perma.cc/6C8G-NG2A] (including presentations only by men).

160 Three of nineteen paper presenters at the live event were women. Published papers (with a slightly different mix of contributors—but still three women) are captured in *Illinois ABI Symposium on Chapter 11 Reform*, 2015 U. ILL. L. REV. 401, 507-863 (2015).

161 Conference Schedule, National Bankruptcy Conference: Rethinking Chapter 11 (May 28–29, 2015), https://jenner.com/system/assets/assets/8700/original/NBC_20Rethinking_20Chapter_2011_20Schedule_20_as_20revised_203-25-15_.pdf [https://perma.cc/KYU8-SFZ7] (among twenty-five speakers, three were academics, and all three were white men associated with law and economics).

162 *Symposium: Bankruptcy's Universal Pragmatist: Celebrating the Work of Jay Lawrence Westbrook*, TEX. L. REV., https://texaslawreview.org/symposium/ [https://perma.cc/5YEJ-5C3R] (including one woman on the corporate bankruptcy panel out of five panelists, plus a male panel chair, and one woman on a financial institutions restructuring panel out of six panelists, plus a male panel chair). The honoree of this symposium played no role in selecting the participants.

163 The sources cited throughout this Article do not exhaust the list.

men even after controlling for important variables.[164] It is not a neutral practice to cite only authors and papers that first come to mind.[165] It is not a neutral practice to express explicit disagreement with some authors and overlook others as unworthy of even a "but see."

These dynamics do not exist in a vacuum. Corporate bankruptcy law practice is "disproportionately male."[166] The academic field of economics has received significant attention for multiple signs of bias.[167]

Whatever the context, whatever the cause, the odds of conceptualizing the field as a public–private partnership are reduced without diversifying the voices contributing to the debate.[168] If high-profile conferences and publications continue defining the field in its narrower, redistricted form, they at least should strive for truth in advertising on the scope of the enterprise. Individual authors should be mindful that selecting who and what to cite in their scholarship shapes the field and its inclusiveness footnote by footnote, line by line, article by article.

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164 Molly M. King et al., *Men Set Their Own Cites High: Gender and Self-Citation Across Fields and over Time*, 3 SOCIUS, 2017, at 1, 2 (noting a disparity in citations between men and women across disciplines even after controlling for variables such as institution, journal, and tenure status). Self-citation, which boosts overall citation counts through several pathways, occurs at higher rates among men. *Id.* at 15.

165 Emily Beaulieu et al., *Women Also Know Stuff: Meta-Level Mentoring to Battle Gender Bias in Political Science*, AM. POL. SCI. ASS'N 779, 780 (2017) ("[M]en and women alike hold implicit biases about gender that shape their attitudes and behavior, including the tendency to think of—and reference—men rather than women as experts.").

166 David A. Skeel, Jr., *Rediscovering Corporate Governance in Bankruptcy*, 87 TEMP. L. REV. 1015, 1025 (2015). In 2014, 30.6% of bankruptcy judges were women and under 3% were African American. AM. BAR ASS'N, *supra* note 152, at 4-5; *see also* Laurel M. Isicoff, *Judicial Fellows Diversity Initiative: It's Just a Beginning*, C. COLUMNS (Am. Coll. Of Bankr., Stanardsville, Va.), May 2017, at 10-11 (sharing that ABA reported two years earlier that "the bankruptcy bench is the least diverse of the federal judiciary" and describing resulting initiatives). This demography is in line with that of related fields: for example, in the more readily measured litigation realms, white men dominate as lead counsel in corporate and commercial law litigation, and in so-called bet-the-company litigation and high-stakes alternative dispute resolution. N. Y. STATE BAR ASS'N, *supra* note 152, at 10 ("The more high-stakes the case, the lower the odds that a woman would be involved.") (quoting Noah Hanft, *Making Diversity Happen in ADR: No More Lip Service*, 257 N.Y. L.J. S6 (2017)); *see also* Daniella Isaacson, *Where Do We Go From Here? Big Law's Struggle with Recruiting and Retaining Female Talent*, LAW.COM (Apr. 17, 2017, 7:03 AM) https://www.law.com/sites/ali/2017/04/17/where-do-we-go-from-here-big-laws-struggle-with-recruiting-and-retaining-female-talent/?slreturn=20180309141735 [https://perma.cc/A32M-Y8KC], (discussing low representation of female attorneys in corporate and banking law). Some studies find low rates of women as lead counsel in class actions as well. Scharf & Liebenberg, *supra* note 152, at 12 (reporting that in a study of cases filed in 2013 in the U.S. District Court for the Northern District of Illinois, men were lead counsel in eighty-seven percent class actions).

167 *See supra* note 154.

168 *See generally* June Carbone & Naomi Kahn, *Unequal Terms: Gender, Power, and the Recreation of Hierarchy*, 69 STUD. L., POL. & SOC'Y 189, 211 (2016) ("The elite of our new gilded age valorizes competition, individualism and hierarchy . . . . The hierarchies rewarding competition at the top create vicious cycles that block more substantive change."). As just one example, scholars who have experienced discrimination throughout their own lives are less likely to see the civil rights implications of bankruptcy as an extraneous issue.

CONCLUSION

This Article had both descriptive and normative aims. Characterizing the existing corporate bankruptcy system as a public–private partnership facilitates the goals expressed by Jay Westbrook that began this Article—to bring a broader range of considerations to dominant scholarly discourse on corporate bankruptcy. The model helps diagnose problems in current practice, as well as to get new purchase on problems already on the radar screen. The model fosters solutions that are "out of the box" for corporate bankruptcy because it has been insufficiently influenced to date by scholars of the regulatory state.

One need not be wedded to the problems and solutions in this Article to find value in the model. The ideas expressed here have only scratched the surface of an expanded and reconceptualized field. What the academy and the bankruptcy system can ill afford, however, is maintenance of the status quo.

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