# Aff Card Doc---Dartmouth---Round 7

## Case

### Pharma Innovation / Pandemics

#### Effective pharmaceutical innovation stops disease and bioweaponry---extinction.

Millett ’17 [Piers; August 1; Ph.D. in International Relations from the University of Bradford; Health Security, “Existential Risk and Cost-Effective Biosecurity,” vol. 15]

Abstract

In the decades to come, advanced bioweapons could threaten human existence. Although the probability of human extinction from bioweapons may be low, the expected value of reducing the risk could still be large, since such risks jeopardize the existence of all future generations. We provide an overview of biotechnological extinction risk, make some rough initial estimates for how severe the risks might be, and compare the cost-effectiveness of reducing these extinction-level risks with existing biosecurity work. We find that reducing human extinction risk can be more cost-effective than reducing smaller-scale risks, even when using conservative estimates. This suggests that the risks are not low enough to ignore and that more ought to be done to prevent the worst-case scenarios.

Keywords: : Biothreat, Catastrophic risk, Existential risk, Cost-effectiveness, Cost-benefit analysis

How worthwhile is it spending resources to study and mitigate the chance of human extinction from biological risks? The risks of such a catastrophe are presumably low, so a skeptic might argue that addressing such risks would be a waste of scarce resources. In this article, we investigate this position using a cost-effectiveness approach and ultimately conclude that the expected value of reducing these risks is large, especially since such risks jeopardize the existence of all future human lives.

Historically, disease events have been responsible for the greatest death tolls on humanity. The 1918 flu was responsible for more than 50 million deaths,1 while smallpox killed perhaps 10 times that many in the 20th century alone.2 The Black Death was responsible for killing over 25% of the European population,3 while other pandemics, such as the plague of Justinian, are thought to have killed 25 million in the 6th century—constituting over 10% of the world's population at the time.4 It is an open question whether a future pandemic could result in outright human extinction or the irreversible collapse of civilization.

A skeptic would have many good reasons to think that existential risk from disease is unlikely. Such a disease would need to spread worldwide to remote populations, overcome rare genetic resistances, and evade detection, cures, and countermeasures. Even evolution itself may work in humanity's favor: Virulence and transmission is often a trade-off, and so evolutionary pressures could push against maximally lethal wild-type pathogens.5,6

While these arguments point to a very small risk of human extinction, they do not rule the possibility out entirely. Although rare, there are recorded instances of species going extinct due to disease—primarily in amphibians, but also in 1 mammalian species of rat on Christmas Island.7,8 There are also historical examples of large human populations being almost entirely wiped out by disease, especially when multiple diseases were simultaneously introduced into a population without immunity. The most striking examples of total population collapse include native American tribes exposed to European diseases, such as the Massachusett (86% loss of population), Quiripi-Unquachog (95% loss of population), and the Western Abenaki (which suffered a staggering 98% loss of population).9

In the modern context, no single disease currently exists that combines the worst-case levels of transmissibility, lethality, resistance to countermeasures, and global reach. But many diseases are proof of principle that each worst-case attribute can be realized independently. For example, some diseases exhibit nearly a 100% case fatality ratio in the absence of treatment, such as rabies or septicemic plague. Other diseases have a track record of spreading to virtually every human community worldwide, such as the 1918 flu,10 and seroprevalence studies indicate that other pathogens, such as chickenpox and HSV-1, can successfully reach over 95% of a population.11,12 Under optimal virulence theory, natural evolution would be an unlikely source for pathogens with the highest possible levels of transmissibility, virulence, and global reach. But advances in biotechnology might allow the creation of diseases that combine such traits. Recent controversy has already emerged over a number of scientific experiments that resulted in viruses with enhanced transmissibility, lethality, and/or the ability to overcome therapeutics.13-17 Other experiments demonstrated that mousepox could be modified to have a 100% case fatality rate and render a vaccine ineffective.18 In addition to transmissibility and lethality, studies have shown that other disease traits, such as incubation time, environmental survival, and available vectors, could be modified as well.19-21

Although these experiments had scientific merit and were not conducted with malicious intent, their implications are still worrying. This is especially true given that there is also a long historical track record of state-run bioweapon research applying cutting-edge science and technology to design agents not previously seen in nature. The Soviet bioweapons program developed agents with traits such as enhanced virulence, resistance to therapies, greater environmental resilience, increased difficulty to diagnose or treat, and which caused unexpected disease presentations and outcomes.22 Delivery capabilities have also been subject to the cutting edge of technical development, with Canadian, US, and UK bioweapon efforts playing a critical role in developing the discipline of aerobiology.23,24 While there is no evidence of state-run bioweapons programs directly attempting to develop or deploy bioweapons that would pose an existential risk, the logic of deterrence and mutually assured destruction could create such incentives in more unstable political environments or following a breakdown of the Biological Weapons Convention.25 The possibility of a war between great powers could also increase the pressure to use such weapons—during the World Wars, bioweapons were used across multiple continents, with Germany targeting animals in WWI,26 and Japan using plague to cause an epidemic in China during WWII.27

Non-state actors may also pose a risk, especially those with explicitly omnicidal aims. While rare, there are examples. The Aum Shinrikyo cult in Japan sought biological weapons for the express purpose of causing extinction.28 Environmental groups, such as the Gaia Liberation Front, have argued that “we can ensure Gaia's survival only through the extinction of the Humans as a species … we now have the specific technology for doing the job … several different [genetically engineered] viruses could be released”(quoted in ref. 29). Groups such as R.I.S.E. also sought to protect nature by destroying most of humanity with bioweapons.30 Fortunately, to date, non-state actors have lacked the capabilities needed to pose a catastrophic bioweapons threat, but this could change in future decades as biotechnology becomes more accessible and the pool of experienced users grows.31,32

<<CONDENSED, NONE OMITTED>>

What is the appropriate response to these speculative extinction threats? A balanced biosecurity portfolio might include investments that reduce a mix of proven and speculative risks, but striking this balance is still difficult given the massive uncertainties around the low-probability, high-consequence risks. In this article, we examine the traditional spectrum of biosecurity risks (ie, biocrimes, bioterrorism, and biowarfare) to categorize biothreats by likelihood and impact, expanding the historical analysis to consider even lower-probability, higher-consequence events (catastrophic risks and existential risks). In order to produce reasoned estimates of the likelihood of different categories of biothreats, we bring together relevant data and theory and produce some first-guess estimates of the likelihood of different categories of biothreat, and we use these initial estimates to compare the cost-effectiveness of reducing existential risks with more traditional biosecurity measures. We emphasize that these models are highly uncertain, and their utility lies more in enabling order-of-magnitude comparisons rather than as a precise measure of the true risk. However, even with the most conservative models, we find that reduction of low-probability, high-consequence risks can be more cost-effective, as measured by quality-adjusted life year per dollar, especially when we account for the lives of future generations. This suggests that despite the low probability of such events, society still ought to invest more in preventing the most extreme possible biosecurity catastrophes. Here, we use historical data to analyze the probability and severity of biothreats. We place biothreats in 6 loose categories: incidents, events, disasters, crises, global catastrophic risk, and existential risk. Together they form an overlapping spectrum of increasing impact and decreasing likelihood (Figure 1).\* A spectrum of differing impacts and likelihoods from biothreats. Below each category of risk is the number of human fatalities. We loosely define global catastrophic risk as being 100 million fatalities, and existential risk as being the total extinction of humanity. Alternative definitions can be found in previous reports,33 as well as within this journal issue.34 The historical use of bioweapons provides useful examples of some categories of biothreats. Biocrimes and bioterrorism provide examples of incidents.† Biological warfare provides examples of events and disasters. These historical examples provide indicative data on likelihood and impact that we can then feed into a cost-effectiveness analysis. We should note that these data are both sparse and sometimes controversial. Where possible, we use multiple datasets to corroborate our numbers, but ultimately the “true rate” of bioweapon attacks is highly uncertain. Biocrimes and Bioterrorism Historically, risks of biocrime‡ and bioterrorism§ have been limited. A 2015 Risk and Benefit Analysis for Gain of Function Research detailed 24 biocrimes between 1990 and 2015 (0.96 per year) and an additional 42 bioterrorism incidents between 1972 and 2014 (1 per year).36 This is consistent with other estimates of biocrimes and bioterrorism frequency, which range from 0.35 to 3.5 per year (see supplementary material, part 1, at http://online.liebertpub.com/doi/suppl/10.1089/hs.2017.0028). Most attacks typically result in no more than a handful of casualties (and many of these events include hoaxes, threats, and attacks that had no casualties at all). For example, the anthrax letter attacks in the United States in 2001, perhaps the most high-profile case in recent years, resulted in only 17 infections with 5 fatalities.37 The 2015 Risk and Benefit Analysis for Gain of Function Research detailed only a single death from the recorded biocrimes.\*\* Only 1 of the bioterrorism incidents in the report had associated deaths (the 2001 anthrax letter attacks).36 Based on this data, for the purposes of this article, we assume that we could expect 1 incident per year resulting in up to tens of deaths. Biological Warfare Academic overviews of biological warfare†† detail 7 programs prior to 1945.38 A further 9 programs are recorded between 1945 and 1994.39 For most of the last century, at least 1 program was active in any given year (Table 1). The actual use of bioweapons by states is less common: Over the 85 years covered by these histories (1915 to 2000), 18 cases of use (or possible use) were recorded, including outbreaks connected to biological warfare (see supplementary material, part 2, at http://online.liebertpub.com/doi/suppl/10.1089/hs.2017.0028). Extrapolating this out (dividing 18 by 85), we would have about a 20% chance per year of biowarfare. It is worth noting the limitations of these data. Most of these events occurred before the introduction of the Biological Weapons Convention and were conducted by countries that no longer have biological weapons programs. Since many of these incidents occurred during infrequent great power wars, we revise our best guess to around 10% chance per year of biowarfare. We use 2 sets of data to estimate the magnitude of such events. The first dataset was Japanese biological warfare in China,40 where records indicate a series of attacks on towns resulted in a mean of 330 casualties per event and 1 case in which an attack resulted in a regional outbreak causing an estimated 30,000 deaths (see supplementary material, part 3, at http://online.liebertpub.com/doi/suppl/10.1089/hs.2017.0028). The second data set came from disease events that were alleged to have an unnatural origin.41 In one case study, a point source release of anthrax resulted in at least 66 deaths. In a second case study, a regional epidemic of the same disease resulted in more than 17,000 human cases. While these events were not confirmed as having been caused by biological warfare, contemporary or subsequent analysis has suggested that such an origin was at least feasible. Combined, these figures provide an estimated impact of between 66 to 330 and 17,000 to 30,000. For the purposes of this analysis, we are assuming the lower boundary figures from biological warfare are indicative of events, with a likelihood of 10% per year and an impact ranging between tens and thousands of fatalities. The upper boundary figures from biological warfare are indicative of disasters, with a likelihood of 1% per year and an impact range of thousands to tens of thousands of fatalities.‡‡ Unlike standard biothreats, there is no historical record on which to draw when considering global catastrophic or existential risks. Alternative approaches are required to estimate the likelihood of such an event. Given the high degree of uncertainty, we adopt 3 different approaches to approximate the risk of extinction from bioweapons: utilizing surveys of experts, previous major risk assessments, and simple toy models. These should be taken as initial guesses or rough order-of-magnitude approximations, and not a reliable or precise measure. An informal survey at the 2008 Oxford Global Catastrophic Risk Conference asked participants to estimate the chance that disasters of different types would occur before 2100. Participants had a median risk estimate of 0.05% that a natural pandemic would lead to human extinction by 2100, and a median risk estimate of 2% that an “engineered” pandemic would lead to extinction by 2100.42 The advantage of the survey is that it directly measures the quantity that we are interested in: probability of extinction from bioweapons. The disadvantage is that the estimates were likely highly subjective and unreliable, especially as the survey did not account for response bias, and the respondents were not calibrated beforehand. We therefore also turn to other models that, while indirect, provide more objective measures of risk.§§ Recent controversial experiments on H5N1 influenza prompted discussions as to the risks of deliberately creating potentially pandemic pathogens. These agents are those that are highly transmissible, capable of uncontrollable spread in human populations, highly virulent, and also possibly able to overcome medical countermeasures.44 Previous work in a comprehensive report done by Gryphon Scientific, Risk and Benefit Analysis of Gain of Function Research,36 has laid out very detailed risk assessments of potentially pandemic pathogen research, suggesting that the annual probability of a global pandemic resulting from an accident with this type of research in the United States is 0.002% to 0.1%. The report also concluded that risks of deliberate misuse were about as serious as the risks of an accidental outbreak, suggesting a 2-fold increase in risk. Assuming that 25% of relevant research is done in the United States as opposed to elsewhere in the world, this gives us a further 4-fold increase in risk. In total, this 8-fold increase in risk gives us a 0.016% to 0.8% chance of a pandemic in the future each year (see supplementary material, part 4, at http://online.liebertpub.com/doi/suppl/10.1089/hs.2017.0028). The analysis in Risk and Benefit Analysis of Gain of Function Research suggested that lab outbreaks from wild-type influenza viruses could result in between 4 million and 80 million deaths,36 but others have suggested that if some of the modified pathogens were to escape from a laboratory, they could cause up to 1 billion fatalities.45 For the purposes of this model, we assume that for any global pandemic arising from this kind of research, each has only a 1 in 10,000\*\*\* chance of causing an existential risk. This figure is somewhat arbitrary but serves as an excessively conservative guess that would include worst-case situations in which scientists intentionally cause harm, where civilization permanently collapses following a particularly bad outbreak, or other worst-case scenarios that would result in existential risk. Multiplying the probability of an outbreak with the probability of an existential risk gives us an annual risk probability between 1.6 × 10–8 and 8 × 10–7.††† Model 3: Naive Power Law Extrapolation Previous literature has found that casualty numbers from terrorism and warfare follow a power law distribution, including terrorism from WMDs.46 Power laws have the property of being scale invariant, meaning that the ratio in likelihood between events that cause the deaths of 10 people and 10,000 people will be the same as that between 10,000 people and 10,000,000 people.‡‡‡ This property results in a distribution with an exceptionally heavy tail, so that the vast majority of events will have very low casualty rates, with a couple of extreme outliers. Past studies have estimated this ratio for terrorism using biological and chemical weapons to be about 0.5 for 1 order of magnitude,47 meaning that an attack that kills 10x people is about 3 times less likely (100.5) than an attack that kills 10x–1 people (a concrete example is that attacks with more than 1,000 casualties, such as the Aum Shinrikyo attacks, will be about 30 times less probable than an attack that kills a single individual). Extrapolating the power law out, we find that the probability that an attack kills more than 5 billion will be (5 billion)–0.5 or 0.000014. Assuming 1 attack per year (extrapolated on the current rate of bio-attacks) and assuming that only 10% of such attacks that kill more than 5 billion eventually lead to extinction (due to the breakdown of society, or other knock-on effects), we get an annual existential risk of 0.0000014 (or 1.4 × 10–6). We can also use similar reasoning for warfare, where we have more reliable data (97 wars between 1820 and 1997, although the data are less specific to biological warfare). The parameter for warfare is 0.41,47 suggesting that wars that result in more than 5 billion casualties will comprise (5 billion)–0.41 = 0.0001 of all wars. Our estimate assumes that wars will occur with the same frequency as in 1820 to 1997, with 1 new war arising roughly every 2 years. It also assumes that in these extreme outlier scenarios, nuclear or contagious biological weapons would be the cause of such high casualty numbers, and that bioweapons specifically would be responsible for these enormous casualties about 10% of the time (historically bioweapons were deployed in WWI, WWII, and developed but not deployed in the Cold War—constituting a bioweapons threat in every great power war since 1900). Assuming that 10% of biowarfare escalations resulting in more than 5 billion deaths eventually lead to extinction, we get an annual existential risk from biowarfare of 0.0000005 (or 5 × 10–7). Perhaps the most interesting implication of the fatalities following a power law with a small exponent is that the majority of the expected casualties come from rare, catastrophic events. The data also bear this out for warfare and terrorism. The vast majority of US terrorism deaths occurred during 9/11, and the vast majority of terrorism injuries in Japan over the past decades came from a single Aum Shinrikyo attack. Warfare casualties are dominated by the great power wars. This suggests that a typical individual is far more likely to die from a rare, catastrophic attack as opposed to a smaller scale and more common one. If our goal is to reduce the greatest expected number of fatalities, we may be better off devoting resources to preventing the worst possible attacks. Why Uncertainty Is Not Cause for Reassurance

<<PARAGRAPH BREAKS RESUME>>

Each of our estimates rely to some extent on guesswork and remain highly uncertain. Technological breakthroughs in areas such as diagnostics, vaccines, and therapeutics, as well as vastly improved surveillance, or even eventual space colonization, could reduce the chance of disease-related extinction by many orders of magnitude. Other breakthroughs such as highly distributed DNA synthesis or improved understanding of how to construct and modify diseases could increase or decrease the risks. Destabilizing political forces, the breakdown of the Biological Weapons Convention, or warfare between major world powers could vastly increase the amount of investment in bioweapons and create the incentives to actively use knowledge and biotechnology in destructive ways. Each of these factors suggests that our wide estimates could still be many orders of magnitude off from the true risk in this century. But uncertainty is not cause for reassurance. In instances where the probability of a catastrophe is thought to be extremely low (eg, human extinction from bioweapons), greater uncertainty around the estimates will typically imply greater risk of the catastrophe, as we have reduced confidence that the risk is actually at a low level.48 §§§

Given that our conservative models are based on historical data, they fail to account for the primary source of future risk: technological development that could radically democratize the ability to build advanced bioweapons. If the cost and required expertise of developing bioweapons falls far enough, the world might enter a phase where offensive capabilities dominate defensive ones. Some scholars, such as Martin Rees, think that humanity has about a 50% chance of going extinct due in large part to such technologies.49 However, incorporating these intuitions and technological conjectures would mean relying on qualitative arguments that would be far more contentious than our conservative estimates. We therefore proceed to assess the cost-effectiveness on the basis of our conservative models, until superior models of the risk emerge.

#### Imbalanced bankruptcy proceedings allow Takings logic to falsely constitutionalize inviolable creditor property.

Tabb ’15 [Charles; 2015; Professor of Law at the University of Illinois College of Law; University of Illinois Law Review, “The Bankruptcy Clause, the Fifth Amendment, and the Limited Rights of Secured Creditors in Bankruptcy,” vol. 2015]

V. IN SEARCH OF A PROPER CONSTITUTIONAL BALANCE

One of the fundamental functions of a bankruptcy law is to act on the claims of a multiplicity of competing creditors. In the typical bankruptcy case, the debtor has a limited pool of assets, and a horde of creditors clamoring for their share of the insufficient pie. No one questions the constitutionality of a congressional act under the Bankruptcy Clause discharging the claims of creditors - unsecured or secured - to the extent the debtor's extant pool of assets at the time of the commencement of the bankruptcy case is insufficient to satisfy all claimants in full. This holds true even with respect to preexisting claims. The Contracts Clause must give way to the Bankruptcy Clause. Nor is there any debate regarding whether Congress has the power under the Bankruptcy Clause to provide for the allocation and distribution of the debtor's assets as between competing creditor claimants. In short, discharge and distribution are the heart and soul of any bankruptcy law. No one seriously disputes that the reach of the congressional bankruptcy power is paramount with regard to those twin functions. While due process does constrain very modestly the manner in which those functions can be implemented, that is a minimal constraint at best, requiring only a sufficient notice and opportunity to be heard on the procedural side, and a rational basis on the substantive side. But what about takings?

An assertion that the Takings Clause independently limits the power of Congress under the Bankruptcy Clause to modify the rights of secured creditors must rest on at least two core assumptions. The first assumption is that secured creditors have a protectable property right that constitutionally trumps the bankruptcy power in a way that simple "contract" claims do not. This first assumption really is the crux of the whole debate. The second assumption is that, as a distributional matter, the nonbankruptcy priority of secured creditors over unsecured creditors to repayment out of their collateral is constitutionally mandated. Both assumptions are questionable at best. If they do hold, the positive law as currently implemented in fact departs substantially from a consistent and faithful adherence to them. It is well to be mindful of Frank Michelman's observation about takings jurisprudence that "[t]he results... are nonetheless liberally salted with paradox." 2 33

First, consider the claim that secured creditors enjoy a "property" right in their collateral that deserves constitutional protection under the Takings Clause notwithstanding a bankruptcy law in a way that unsecured creditors, who have only a general claim to the debtor's entire pool of assets, do not, based on their constitutionally subordinate mere "contract" claims. This premise was the central move made by the Security Industrial Bank Court, which stated in conclusory fashion, relying almost entirely on the dubious authority of Radford, that "the contractual right of a secured creditor to obtain repayment of his debt may be quite different in legal contemplation from the property right of the same creditor in the collateral."234 With only the slightest of pushes, that seemingly powerful and meaningful distinction collapses.

The first problem is that the distinction suggests a property/notproperty dichotomy for property/"mere contract" claims for Takings Clause purposes. That supposed strict dichotomy, however, is not only misleading, it also assumes the answer. The Supreme Court squarely concluded many years ago in Lynch that "contract" claims are considered "property" for Fifth Amendment Takings Clause purposes.2 5 Nor has the Court ever directly recanted that position. Many economic interests are-and should be-legally protected interests, requiring just compensation when private property is taken for public use,236 including valid contracts. 2 37

Even aside from the positive law, normatively this conclusion makes sense. A "contract" can be, and indeed is intended and hoped to be by the parties thereto, a valuable right owned by those parties. As Michelman explains in discussing takings jurisprudence, "[t]he one incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, or the public at large, 'regularly' use, or 'permanently' occupy, space or a thing which theretofore was understood to be under private ownership."238 He then points out that:

[Tihe word "thing" signifies any discrete, identifiable (even if incorporeal) vehicle of economic value which one can conceive of as being owned. Patents, easements, and contract rights are all examples of "things" as I am here using the term. Such things can be affirmatively expropriated by public authority in a manner analogous to its "taking" of a corporeal thing. Government, for example, might expropriate and continue to operate a going business, exploiting all its appurtenant incorporeal things. 9

If the government were to so expropriate a business, which after all is really nothing but a nexus of contracts,2 40 surely there has been a "taking" of private property for Fifth Amendment purposes.

Some modem authority (especially in the Seventh Circuit) argues that the Lynch doctrine has effectively been overruled, and that "contract" claims simply are not "property" for takings purposes. 24 1 The better view, though, is just that the expectations deserving takings protection are simply weaker in a contract setting than when there is a lien. But "weaker" is not the same as "nonexistent." Notably, much of the genesis of the Seventh Circuit's "not property" view came from the Supreme Court's misguided and unprecedented 1982 decision in Security Industrial Bank,24 2 discussed above, which in turn simply restated Radford as gospel. In short, if Radford falls (as I argued above), the whole construct collapses. Other courts of appeal, by contrast, continue to treat Lynch as good law.2 43 The most that can be said, I submit, is that in contracts takings cases the protection is less absolute and more easily provided under the Court's three-part takings analysis.2 44 But that does not take it out of takings protection altogether.

Yet, no one doubts that there is no Fifth Amendment takings problem when a contract-as-property claim is discharged pursuant to a bankruptcy law. Assuming that such is a correct conclusion, and I submit that it is, that then means that a supporter of the position that the Takings Clause limits what can be done to secured creditors in bankruptcy must identify a constitutionally distinguishable basis for treating the two types of "property" differently. I do not believe that case can be made.245 Just saying so, as the Court did in Radford and then in Security Industrial Bank, is not satisfactory but question-begging.

To identify a constitutional distinction, we first need to know why it is that contract-as-property claims are conceded to be undeserving of takings protection in the face of a bankruptcy law. That answer then might tell us how (if at all) we can distinguish secured-claims-as-property claims.

The possibilities for why there is no takings protection for "mere" contract claims in bankruptcy are: (1) the contract claim is not a protectable property interest at all; (2) the property interest is not "taken"; (3) even if taken, it is not taken for a public use within the meaning of the Fifth Amendment; (4) the property interest is taken for a public use, but receives just compensation; or (5) the legitimate exercise of congressional power under the Bankruptcy Clause trumps any takings problem.

The Supreme Court has never carefully analyzed the bankruptcy discharge of contract claims under a takings paradigm, but appears to proceed on a view either that contract claims are not "property" in the way that rights in collateral are, or under the unstated assumption that there simply is not a takings problem when contract claims are discharged in bankruptcy, because that is the essence of what it means to have a bankruptcy law in the first place. That is, if the outcome were otherwise, then the possibility of having an efficacious bankruptcy law would be stillborn, and the Bankruptcy Clause would be, pardon the pun, a bankrupt grant of power. In short, the Court's premise plainly has been to embrace the fifth possibility listed above, viz., that the Bankruptcy Clause simply controls, along with (at times)2 46 the first option (contract claim is not "property" for takings purposes in this context).

A clear explication of the view favoring the fifth option (Bankruptcy Clause trumps) is found in the Rock Island case,2 47 albeit in the announced context of considering the tension between the Bankruptcy Clause and the Contract Clause, not the Takings Clause. In addition, the Court considered and rejected a Fifth Amendment challenge-lack of due process. No one, not even the affected secured lienholders, apparently even considered that takings might be implicated.2 48 The Court said:

Speaking generally, it may be said that Congress, while without power to impair the obligation of contracts by laws acting directly and independently to that end, undeniably, has authority to pass legislation pertinent to any of the powers conferred by the Constitution however it may operate collaterally or incidentally to impair or destroy the obligation of private contracts. And under the express power to pass uniform laws on the subject of bankruptcies, the legislation is valid though drawn with the direct aim and effect of relieving insolvent persons in whole or in part from the payment of their debts. So much necessarily results from the nature of the power, and this must have been within the contemplation of the framers of the Constitution when the power was granted.2 49

What about the first possibility, viz., that contract rights are not "property" for Takings Clause purposes? The first problem, of course, is the Court's clear statement that contract rights are indeed "property" within the meaning of the Takings Clause,2 50 as discussed earlier. Note, though, that the Court on two occasions has used some language that may suggest otherwise in the bankruptcy context. So, for example, in Radford, the Court stated:

Under the bankruptcy power Congress may discharge the debtor's personal obligation, because, unlike the states, it is not prohibited from impairing the obligations of contracts. But the effect of the act here complained of is not the discharge of Radford's personal obligation. It is the taking of substantive rights in specific property acquired by the bank prior to the act.251

That passage implies that lien rights are "specific property" subject to takings scrutiny, whereas "contract" rights are not. It was this premise from Radford that the Security Industrial Bank Court resurrected,252 even though, as discussed in detail in Part IV, immediate post-Radford bankruptcy cases soon recanted that position.253 And, as noted, the Court has held directly that contract rights are "property" within the meaning of the Takings Clause,25 4 a position from which it has never withdrawn, even if some subsequent cases suggest that the extent of contract-as-property protection under the Fifth Amendment is less robust.255 The above quoted passage in Radford, if taken literally, would directly contradict that other authority, which held that contract rights are protectable property for purposes of the Takings Clause. The only honest way to harmonize the two is to reason that contract rights are a sort of "property-light" in the specific context of bankruptcy for takings purposes, as compared to lien rights as property. As will be discussed below, though, that approach is fraught with peril. The other option, which is even less satisfying, is simply to ignore Lynch and similar authority, as Radford and Security Industrial Bank did.256

On the second question (viz., is there a taking at all?), the sort of "taking" that a bankruptcy law would implicate would be a regulatory taking. Determining whether a regulatory taking has occurred is a heavily fact-based endeavor.25 7 In 1922, the Supreme Court held that just compensation is due when government regulation "goes too far" in diminishing private property's value. 258 Yet, this standard is vague and the Court has struggled to come up with a test to determine what sort of government regulations go "too far." 259 There is no "set formula" to determine whether a regulation is a taking.2 60

The Court has identified three factors which aid in determining whether a regulatory taking has occurred: "(1) 'the economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action."' 2 6 1

In a bankruptcy discharge, the economic impact is to eliminate forever any right of the creditor to seek to collect from the debtor, in exchange for the creditor receiving either: (1) in a liquidation case, an aliquot share of any unencumbered, nonexempt property of the debtor, after deduction of expenses of administration and other statutory priority claims, or (2) in a reorganization case, a stream of future payments at least equal in present value to the creditor's expected liquidation entitlement.

While at the exact instant in time of the implementation of the bankruptcy case, the creditor might not have received anything more, what it does have taken away is any chance to pursue recovery against the debtor in the future. For an individual debtor, who has human capital and the ongoing ability to generate leviable assets, that is a meaningful loss, whether in a liquidation or a reorganization case. For a corporate debtor, however, who can simply go out of business and wind up its affairs, the creditor arguably would have no more rights in a liquidation bankruptcy but is losing a meaningful chance to collect in the future from the debtor in a reorganization.

Similarly, the discharged creditor is being forced to relinquish "distinct investment-backed expectations." 26 2 A creditor who enters into a contract with a debtor expects to be able to pursue collection from the debtor's assets in perpetuity, again excepting only as against a corporate debtor who poses the expectable threat of dissolution. Of course, if the bankruptcy law were to operate only prospectively, then the "expectations" of contract creditors would account for the possibility of a less-than-compensatory bankruptcy discharge.

Finally, the character of the government action is to bar absolutely and permanently, via a statutory injunction, any right of the discharged creditor to pursue future collection.2 63 Thus, except for the possible case of a liquidating corporate debtor, a bankruptcy discharge appears to "take" a creditor's contract rights within the meaning of the Takings Clause.

So, too, it is quite clear that the taking of that contract claim is for a public use (the third issue identified above in the takings analysis). The Supreme Court in the iconic Local Loan case, in which the Court explained most clearly the justification for the bankruptcy discharge, specifically stated that:

One of the primary purposes of the Bankruptcy Act is to "relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes." This purpose of the act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.2 64

A good argument thus can be made that a contract claim that is discharged in bankruptcy is protectable property and is taken for a public use. But does the discharged creditor receive "just compensation"? The answer is plainly "no"-the government provides no compensation at all! All that the creditor receives in exchange for its discharged debt is whatever distribution is called for in the bankruptcy distribution of the debtor's assets. If that suffices as a taking in the first instance, as discussed above, then the Fifth Amendment takings violation appears evident.

And yet, as already explained, the Court has never even taken seriously the argument that there is a Fifth Amendment takings problem with discharging a contract claim in bankruptcy. The likely reason is, as noted in the Rock Island case, that the Bankruptcy Clause simply prevails, 265 assuming the legislation in question is a legitimate bankruptcy law and within the scope of congressional constitutional bankruptcy power. As discussed at length earlier, the scope of the constitutional grant on the "subject of Bankruptcies" has an expansive and elastic reach, and easily would encompass legislation affecting secured and unsecured claims alike. The key point, though, is that for contract claims, the only question is whether the legislation is within the scope of the Bankruptcy Clause, assuming no due process violations exist. The due process bar, as noted, is quite modest as a substantive matter: as an economic regulation, due process can easily be satisfied if the legislation is not arbitrary, unreasonable, and at odds with fundamental law. The bottom line, then, is that for unsecured creditors, there is no takings problem at all. 2 66

Why, then, should secured creditors be treated any differently for takings purposes? The only realistic possibilities are: (1) that their lien rights are a constitutionally more deserving form of "property" than are simple contract claims; (2) that the "taking" of property that occurs with regard to a lien triggers Fifth Amendment takings scrutiny in a way that discharge of contract rights does not; and (3) that the Bankruptcy Clause does not trump the Takings Clause for the specific category of lien "property" only. None of these explanations are persuasive.

The only intimations on the point that can be found in the Court's opinions appear to rest on the first possibility, that lien rights are a form of "property" that is entitled to takings protection whereas contract-as-property claims are not. The passage in Radford, quoted above (and embraced anew by the Court in Security Industrial Bank), suggests as much.2 67 The basis for this view is probably an unarticulated but assumed premise that a secured creditor has a right to have its claim paid by resort to a specific piece of property (the "collateral") and, claiming thereby a tangible "stick" in the bundle of property rights, indisputably has a protectable property interest that unsecured creditors lack, who instead only have a general claim against the debtor, with no particular, specific items of property answerable for payment of their "mere contract" claim.26 If my suspicion is correct, that is a simplistic and unsupportable basis for drawing a constitutional line.

Among other problems, it ignores the fact that unsecured creditors, too, may have a "property" interest in the debtor's assets, as, for example, in situations where the "trust fund" doctrine (viz., that the assets of an insolvent corporation are held in "trust" for the corporation's creditors) would be triggered.269 Even if that doctrine is not directly applicable, the practical reality of analogous situations involving unsecured as opposed to secured creditors may undermine the plausibility and wisdom of drawing a constitutional line between them. Furthermore, the "property" mantra obscures the fact that for insolvent debtors, the significance of security lies not in a property right but in the priority ranking it confers; and yet, it is not thought that protection of priority alone is constitutionally mandated. To ascribe constitutional significance to a semantic difference between "property" and "priority" is, well, absurd.

Furthermore, if the "property" interest of a secured creditor in collateral is to be afforded constitutional takings protection, we are left with the conundrum of identifying which sticks in the "property" bundle deserve that constitutional protection. The reality (as the Radford Court aptly noted2 7 0 ) is that under state law secured creditors enjoy multiple "property" rights arising out of their "deal" with the debtor. Which of those rights must be protected from takings under the Fifth Amendment? If fewer than all of the rights deserve protection (as the Supreme Court clearly has held), 27 1 why and on what conceivable basis can distinctions be made between those rights? On this matter, Justice Brandeis surely had it right in Radford, that is, they all should matter equally and-if takings protection applies at all-then none can be taken. Yet the Court retreated almost immediately from that absolutist view of the property protection required, principally for the pragmatic reason that to do so would almost completely defang many necessary and justifiable forms of bankruptcy relief.

And that recognition, of course, supports the critical point: as an independent and coequal constitutional rule, the Bankruptcy Clause simply is not, and should not be, constrained by the Takings Clause. Freeing the Bankruptcy Clause from the tethers of takings is necessary for a bankruptcy law to be efficacious in realizing its core functions.

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Let us consider three pairs of hypotheticals. Hypos one and two illustrate how it can be problematic to differentiate between secured and unsecured creditors on a "property/not-property" basis for determining whether takings protection does/does-not apply. A. Hypo # 1 DebtorCo has $15,000 in assets. It has three creditors (A, B, and C), each of whom it owes $10,000 (thus $30,000 total), all on an unsecured basis. There is little question that Congress could pass a bankruptcy law that would discharge the claims of these creditors, without requiring as a constitutional takings matter an aliquot distribution of all of the assets between them. 2 7 2 Congress could afford one creditor priority over the others without offending the Takings Clause. It likewise could provide for distribution of less than the entire fifty percent in value. The only limitations would be that the law must be on the "subject of Bankruptcies" (which it indisputably is) and cannot offend due process, which would be satisfied as long as there was a rational basis for the legislation and reasonable notice is given, both of which likely would be quite easy to show. Even though under state law the assets of DebtorCo might well be considered to be held in "trust" for the claims of the three creditors, nevertheless that trust claim is not considered to be the sort of "property" deserving of takings protection in the face of bankruptcy legislation enacted pursuant to the Bankruptcy Clause. And that makes sense as a structural matter; otherwise, the efficacy of possible bankruptcy legislation would be hamstrung by the constraints of takings jurisprudence. B. Hypo # 2 Same facts as number one, except now assume that creditors A, B, and C each have taken a security interest in all of DebtorCo's assets. Assume for simplicity that the security interests are of equal rank. Thus, the "secured claim" of each equals $5000.m Assuming that Radford and Security Industrial Bank are good law and that Union Central does in fact constitutionally require preservation of the secured creditor's collateral value as of the beginning of the case, Congress is precluded by the Takings Clause from passing a bankruptcy law that would vary or diminish such a recovery, such as would be allowed under Hypo one. Yet, the two hypos, as a functional matter, are essentially indistinguishable; in both, no value remains for any stakeholder other than creditors A, B, and C, and as between those three creditors, they are of equal priority rank under nonbankruptcy law. Drawing a constitutional line between them makes no sense. Hypos three and four, presented next, show how a takings analysis can be changed based on unimportant semantic differences in underlying state law. The important question when a debtor is insolvent is determining relative priorities as between competing claimants; a "property" label is but one means of expressing that priority. But if a takings analysis is used, the label becomes outcome-determinative. C. Hypo #3 Same facts as number one, except that creditor A enjoys a state statutory priority over other unsecured creditors. A's priority claim is not entitled to constitutional takings protection. State law priorities are preempted by federal priorities under the bankruptcy law. Under the current bankruptcy law, creditors A, B, and C would take equal shares of DebtorCo's bankruptcy estate. Yet, outside of bankruptcy, A would get paid before creditors B and C. Since A lacks a "property" right, though, Congress has the power to enact legislation on the "subject of Bankruptcies" that would modify A's rights, subject only to very modest due process protection. D. Hypo # 4 Same facts as number three, except now the state statute characterizes A's preferred standing as a "lien" and not as just a "priority." Now A is a "secured" creditor, for its full $10,000 claim, and is constitutionally entitled to protection against a taking of that $10,000 "property" right. Justifying the extreme difference in constitutional rights that occur as between hypos three and four is difficult, to say the least. Outside of bankruptcy, under the creating state law, there are few if any meaningful differences in the rights accruing to the holder of the entitlement, whether it is called a "priority" or a "lien"; for both, the only important point is that the party with the entitlement gets paid first. Hypos five and six demonstrate how the current constitutional analysis distinguishes between different "property" rights held by secured creditors. Some are protected, while others are not. Such a picking and choosing likewise is difficult to justify constitutionally. E. Hypo # 5 Same facts as in number one, except now A has a security interest in one of DebtorCo's assets, which collateral has a value of $9000 to secure A's claim of $10,000. That collateral is not depreciating in value. Under state law, A would be entitled to foreclose immediately and realize $9000, and would be able to put that $9000 to work as an investment at a rate of ten percent per annum. DebtorCo files bankruptcy, however, and A is stayed from foreclosing. DebtorCo is in bankruptcy for two years. A thus loses $1800 (ten percent of $9000, for two years) due solely to the interference of the bankruptcy case with its state law foreclosure rights. Yet, the Supreme Court has squarely held that A has no constitutional (or statutory) claim to reimbursement of the lost $1800.274 F. Hypo # 6 Same facts as number 5, except now A could only make a five percent return on a reinvestment of the $9000 that it is barred from realizing immediately via foreclosure. Thus over two years A would lose only $900 on lost opportunity costs. Over those two years, however, the collateral would depreciate by $900 rather than remaining constant in value. Now A is entitled to constitutional taking protection (as well as statutory protection275) against the decline in collateral value. In both Hypos five and six, A suffers a loss of $1800 due to the bankruptcy deprivation of indisputable state law rights. How much, if any, of that loss is protected by the Takings Clause depends, though, on which of the sticks in the property bundle is being taken away by the bankruptcy law. Why that should be so, as a matter of either policy or constitutional law, is difficult to grasp. I submit that the better result is simply to abandon the notion of an independent takings restraint on the exercise of the bankruptcy power as it affects secured creditor's rights in collateral. IV. CONCLUSION

<<PARAGRAPH BREAKS RESUME>>

In the final analysis, perhaps the clearest way to state the matter is to say that a Fifth Amendment takings analysis simply is not helpful or indeed even applicable when considering the nature and scope of the protection constitutionally due to secured creditors in bankruptcy. Somehow we have arrived at a curious and unprincipled compromise in which a "secured" creditor-but not an unsecured creditor-is accorded constitutional takings protection to the preservation of its "property" interest as measured and defined by the market value in collateral of a bankruptcy debtor at the outset of a bankruptcy case, but not to the protection of any other of its state law property rights, and not to any protection if its nonbankruptcy priority rights stem from any source other than what is labeled as "security" and thus "property." It only obfuscates the very real tradeoffs and competing constitutional and policy imperatives to hew to such an odd regime. And it hobbles greatly congressional flexibility to enact meaningful bankruptcy reforms.

If, however, we could move away from an obsessive preoccupation with takings and a secured creditor's "property" interest, and look instead at whether a law fell within the Bankruptcy Clause as a "uniform" law on the "subject of Bankruptcies," and if so, whether that law complied with the fundamental dictates of due process, considerable clarity and freedom of action would be gained. The ability of Congress to realize fully the promise of the Bankruptcy Clause would be enhanced, without unfairly sacrificing the legitimate expectations of stakeholders. The Takings Clause, in short, simply should not be treated as an independent limitation on the operation of congressional power under the Bankruptcy Clause.

#### That contradiction and legal imbalance categorically exempts bankruptcy and other property like patents from Takings and due process.

Lammey ’23 [Mark; August 1; J.D. Candidate, Villanova University Charles Widger School of Law; Villanova Law Review, “Finding a Port in the Storm: Constitutional Claims Find Protection Under the Fifth Amendment in Municipal Bankruptcy in In re Financial Oversight & Management Board,” vol. 68]

Bankruptcy processes can often operate in seeming contradiction to other areas of law. By allowing impairment and discharge of particular obligations, the Code allows a debtor to escape debts they would otherwise be contractually obligated to pay.25 The Code allows for the adjudication of contested matters by a non-Article III judge, which has routinely come under constitutional scrutiny; the contours of bankruptcy jurisdiction are still a contested issue.26 Finally, by getting involved in the collection and disbursement of property and money, bankruptcy has naturally produced debate about whether and to what extent the Takings Clause creates constitutional limits on its operation.27

For many, the hallmark of bankruptcy is the discharge; that is, upon consummation of a bankruptcy plan, creditors may not receive full payments of debts or judgments and are, instead, barred from attempting to collect those debts.28 Regardless of the varied views on the wisdom of such a system, the current American bankruptcy system attempts to give individual debtors a fresh start and incentivize ailing businesses to restructure rather than liquidate.29 The process necessarily means that some party is left worse off, typically the unsecured creditor.30 This comes about partly because secured creditors—those whose debts are backed by collateral, often real property—cannot have their debts impaired below the value of that collateral.31 Though the Code may augment the rights of some creditors, the Takings Clause has been a perennial watchman limiting bankruptcy’s effect on private property.32

Given the current state of bankruptcy precedent—and popular notions about the protections of the Fifth Amendment—it may seem perfectly reasonable that Takings claims should survive the bankruptcy unimpaired.33 However, there are strong arguments to the contrary, and the issue is not resolved by simply referring to the preeminence of the Fifth Amendment.34 In Part II of this Note, Section A traces the history of the Takings Clause and how its protections have expanded over time. Section B explores how those protections have interacted with bankruptcy laws. Section C details the recent Supreme Court decision regarding the timing of Takings claims and their interaction with § 1983 civil rights claims. Lastly, Section D directly looks at the recent trio of federal cases making up the current circuit split.

A. History of the Expanding Takings Clause

The Fifth Amendment was originally a limitation on the federal government.35 After the passage of the Fourteenth Amendment, the Fifth Amendment’s guarantees were eventually applied to the states through incorporation.36 While the Fifth Amendment’s original purpose is debated, it was clearly understood to at least protect “direct, physical takings”—that is, condemnation of land.37 In the late nineteenth century, the Supreme Court expanded the Takings Clause to allow compensation for physical invasions of property stemming from government action, like flooding from a government-run dam.38 However, in evaluating land regulation, the analysis originally proceeded under substantive due process and many land regulations were upheld under state police power.39

In 1922, the Supreme Court decided Pennsylvania Coal Co. v. Mahon40 and held that a taking had occurred by operation of a state statute forbidding coal mining in certain areas, noting that “if regulation goes too far it will be recognized as a taking.”41 It was not until the 1978 landmark case Penn Central Transportation Co. v. City of New York42 that the Court handed down a set of factors to consider when determining whether a regulatory taking had, in fact, gone too far.43 The Court has gone on to hold that the Takings Clause’s requirement for just compensation further extends to construction moratoria,44 building restrictions devaluing property,45 interest accruing on money held by a court,46 and trade secrets.47 Furthermore, there is ongoing debate as to whether other forms of intangible property—like patents and copyrights, or even cryptocurrency—fall under the protection of the Takings Clause.48

<<FOOTNOTE 48 BEGINS>>

48. See Jesse Wynn, Note, Patents, Public Franchises, and Constitutional Property Interests, 71 CASE W. RES. L. REV. 887, 910–13 (2020) (discussing the long-standing notion that intellectual property is covered by the Takings Clause even though the Supreme Court has never expressly spoken on the issue); Zachary Segal, Note, Taking Back Bitcoin, 34 TOURO L. REV. 1375, 1377 (2018) (arguing that Bitcoin is property for Takings Clause purposes under the Penn Central test). Segal also suggests that cryptocurrency regulations could potentially be challenged under the Takings Clause. Id. at 1379.

<<FOOTNOTE 48 ENDS>>

B. Takings Clause Interactions with Bankruptcy Laws

As the Takings Clause has evolved and its protections thrown into sharper relief, its application to bankruptcy laws has similarly evolved. In 1935, Louisville Joint Stock Land Bank v. Radford49 dealt with legislation that sought to deprive mortgage-holders of certain property rights during bankruptcy proceedings.50 Intending to protect farm owners impacted by the dust bowl, the law would have deprived a mortgagee of lien rights to property that it would have retained under state law.51 The bank, which would have otherwise foreclosed on the property, was prevented from doing so and instead forced to accept court determined rental payments and stayed from taking legal action for five years.52 The Court found that this law violated the Fifth Amendment and announced the oft-repeated phrase: “The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment.”53

Two years later, the Court heard Kuehner v. Irving Trust Co., 54 where a bankruptcy provision capped the amount a landlord could claim against a debtor–tenant for terminating a lease.55 Again, the Court reiterated that “[t]he exercise of the power [to create a provision] is, nevertheless, subject to the commands of the Fifth Amendment.”56 However, the Court affirmed the constitutionality of the provision, finding that it provided an adequate remedy, and that contract rights, not property rights, were at issue in the case.57 Thus, the precedent going forward was clear: Congress would be limited by the Fifth Amendment when designing bankruptcy provisions, particularly those that sought to deprive creditors of compensation for property-related rights.58

#### Treating property as ‘inviolable’ derails efficient patent management and encourages monopolization---that stifles pharmaceutical innovation.

Brough ’24 [Wayne; August 21; Program Director for Technology and Innovation at the R Street Institute, Ph.D. in Economics from Goerge Mason University; R Street, “Patents, Property Rights, and Regulation,” https://www.rstreet.org/commentary/patents-property-rights-and-regulation/]

Long viewed as a cornerstone of innovation policy, the U.S. patent system is designed to encourage invention and promote technological progress. Over time, many have come to view patents as property rights akin to those arising from tangible, physical property. However, a closer examination reveals that patent rights are fundamentally different from physical property rights and that the patent system functions more as a regulatory framework that defines and grants market exclusivities. And like any regulatory structure, the patent system is subject to rent-seeking and special-interest politics.

This essay explores how the current patent system, driven heavily by the interests of patent holders, can have adverse impacts—particularly in the pharmaceutical sector—and argues that a better understanding of the nature of patent rights will facilitate reforms that better align patents with their intended purpose: fostering innovation.

Patents Are Not Equivalent to Physical Property Rights

A critical starting point in this discussion is recognizing the fundamental difference between patent rights and physical property rights. The U.S. Constitution is silent on the issue of patents as property; rather, it authorizes Congress to “promote the Progress of Science and useful Arts” through “limited times” exclusive rights. Former U.S. Solicitor General Paul Clement noted that, among the nation’s Framers, there was “virtually no disagreement that patent rights are not vested by nature or the common law; instead, they are creatures of positive law whose scope, contours, and very existence depend on the will of Congress.”

Patents emerged historically as government-granted privileges, not as recognitions of pre-existing property rights. For example, early patents in England were not just for inventions. They were a form of royal patronage—“letters patent”—granting anything from an official appointment, to land, to a monopoly in a particular trade or industry. Corruption and abuse of these grants from the monarchy ultimately led to the Statute of Monopolies, passed in 1624, which curbed the ability to grant such privileges while repealing a large swath of patents. Importantly, patents for novel inventions were allowed only under the new law, which is seen as the origin of modern Anglo-American patent law.

The distinction between a patent—a form of intellectual property—and physical property stems from the economic nature of ideas and inventions, a distinction economists call “non-rivalrous” and “non-excludable.” Unlike physical property, one person’s use of an idea does not preclude others from also using it. Ideas exist without scarcity. As noted in an important study of patents produced for the U.S. Senate, someone who complains about a stolen idea “complains that something has been stolen which he still possesses, and he wants back something which, if given to him a thousand times, would add nothing to his possession.” Put simply, because ideas are different, Congress felt it necessary to create the patent system as a way for inventors to capture the benefits of their work.

The U.S. Supreme Court’s 2018 decision in Oil States Energy Services v. Greene’s Energy Group provided an even more explicit clarification of patents as public rights rather than private property rights. The Court ruled that inter partes review proceedings at the Patent Trial and Appeal Board do not violate the U.S. Constitution’s Article III (which states that only the judicial branch can decide legal arguments) or its Seventh Amendment (which guarantees the right to a jury trial). Justice Clarence Thomas, writing for the majority, stated unequivocally that patents are “public franchises” rather than “private rights.” This characterization firmly places patents in the realm of public rights that, should they fail to achieve their goal, can be reconsidered and reformed through administrative processes and statutory law.

Given the fundamental differences between tangible and intangible rights, applying a maximalist view of intellectual property that equates the two is deeply flawed. Many adherents of stronger patent laws rely on a “natural rights” framework to justify the equal treatment of these distinct forms of property, but this argument ignores the significant economic and legal distinctions between the two.

Moreover, treating a patent as an inviolable property right disregards their stated role to encourage progress in the arts and sciences. It also overlooks the social costs of monopolies, particularly on products with little novelty or innovation. As economist Friedrich Hayek warned, “[T]he mechanical extension of the property concept by lawyers has done so much to create undesirable and harmful privilege.”

Importantly, examining patents through a property rights framework offers no insights into important questions, such as the appropriate scope or duration of a patent or what standards should be adopted in order to yield the optimal level of invention and innovation. These are questions of positive law informed by legislation and regulation. By contrast, the lens of physical property rights offers no way to balance the benefits of incentivizing innovation against the costs of restricting competition and follow-on inventions.

Patents as a Regulatory Framework

Patents are more accurately understood as a regulatory framework established by Congress and administered by the U.S. Patent and Trademark Office (USPTO). The entire system of examining patent applications, granting exclusive intellectual property rights, and adjudicating patent disputes is a creation of statute and government bureaucracy. A federal agency with more than 14,000 employees is responsible for administering the patent system. Unlike physical property, patent rights depend on the institutional structure, incentives, and decision-making processes within the USPTO.

Yet despite the incentives this creates for invention, the system is not flawless. For example, the USPTO’s fee structure and funding model encourages the overgranting of patents, particularly when budgets are tight. Patent examiners also face time pressures and institutional biases that can lead to the approval of low-quality patents. Nevertheless, even in this contrary circumstance, the value and quality of patents remains a function of the institutional framework and incentives created by the patent system, which distinguishes patents from more traditional forms of physical property.

Of course, like any regulatory framework, the patent system is vulnerable to rent-seeking behavior and manipulation by special interests. Perhaps most notably, the U.S. pharmaceutical industry employs various strategies to extend patent protection and maintain market exclusivity for their products—often at the expense of patients and consumers. From 1999 to 2018, pharmaceutical companies spent $4.7 billion lobbying the federal government. Recent lobbying efforts include support for the Patent Eligibility Restoration Act (PERA) and the Promoting and Respecting Economically Vital American Innovation Leadership Act, (PREVAIL), both of which would strengthen the hand of patent owners and deter innovation—PERA by expanding what can be patented and PREVAIL by making it harder to challenge weak or invalid patents.

Pharmaceutical companies also employ various strategies to exploit the patent system and thus extend their market exclusivity to keep generic rivals out of the market. Evergreening strategies, such as filing numerous additional patents on minor modifications to existing drugs, are often used to extend exclusivity. Patent thickets—impenetrable walls of patents filed around the initial patent—make it extremely difficult for generic competitors to enter the market.

Patent thickets are most often created by extensive filing of so-called “secondary patents.” While a primary patent covers the product’s active ingredient, secondary patents can be filed for such elements as dosage, manufacturing process, delivery mechanism, or formulation. Secondary patents (many filed after the granting of the primary patent) have been criticized because, although the protected product changes can be relatively minor and/or of little therapeutic value, they can effectively delay market entry by generic manufacturers. Secondary patent thickets can be virtually impenetrable. For instance, one study of top-selling drugs in the United States found there was an average of 74 patents granted for each drug. Additionally, pharmaceutical companies filed an average of 140 patent applications for each drug—66 percent of them filed after U.S. Food and Drug Administration (FDA) approval.

Humira, AbbVie’s blockbuster arthritis drug, provides a good example. Originally approved by the FDA in 2002 for the treatment of rheumatoid arthritis, its use cases expanded to cover 16 indications including psoriatic arthritis, ulcerative colitis, Crohn’s disease, and psoriasis, among others. Humira has proved to be one of the most profitable drugs in history, netting AbbVie approximately $200 billion in global revenue since its introduction. In 2022 alone, AbbVie earned $21.2 billion from Humira—surprising, given that the primary patent expired in 2016. But AbbVie conducted an aggressive patenting campaign, racking up 166 secondary patents to maintain Humira’s exclusivity in the market. In fact, generic competition for Humira did not reach the U.S. market until 2023, when nine companies moved to offer biosimilar versions. One unbranded version has a list price 81 percent lower than Humira itself.

The USPTO’s willingness to grant follow-on patents, particularly weak patents of questionable validity, enables these quasi-monopolistic strategies. While individual secondary patents may eventually be overturned in court, they can still delay competition significantly and impose substantial costs on generic drug manufacturers—not to mention on patients and the health care system—for many years to come. Yet there is hope. In testimony before the U.S. House of Representatives, one witness declared that secondary patents were ripe for challenge because they may not satisfy the “novel” or “non-obvious” requirements of a valid patent. In fact, to date, legal challenges to secondary patents have been effective 67 percent of the time, while challenges to primary patents on active ingredients have succeeded only 8 percent of the time.

Conclusion

Patents play a critical role in innovation policy, but they are best understood as a regulatory tool to promote invention and innovation rather than as a right in the sense of tangible property. Unfortunately, this maximalist view of patents inhibits legal or even legislative remediation because each patent (whether primary or secondary), no matter how trivial or strategically motivated, is considered an inviolable “property right.” As noted, this perspective ignores the fundamental differences between intellectual and physical property, disregarding the regulatory role patents are meant to serve. Consequently, patenting strategies have emerged to extend monopoly protections without corresponding therapeutic benefits, effectively turning the patent system into a mechanism for rent protection rather than innovation enhancement.

Recognizing that patent policy is subject to manipulation and rent-seeking behaviors opens the door to much-needed reforms that can improve patent quality without deterring competition. The pharmaceutical industry’s patent gamesmanship serves as a stark reminder of the need for reform. The proliferation of secondary patents, the creation of patent thickets, and the practice of evergreening have all contributed to delaying generic competition and keeping drug prices artificially high. These techniques not only burden consumers and strain health care systems, but they also stifle genuine innovation by diverting resources from research and development to legal maneuvering aimed at extending (or challenging) the monopolies of blockbuster drugs.

### Solvency / Spillover

#### Ending the untouchable practice of rejecting CBAs, effectually creates a balancing test of bankruptcy versus non-bankruptcy goals.

Dawson ’20 [Andrew; 2020; Vice Dean for Academic Affairs and Professor of Law, University of Miami School of Law; Cardozo Law Review, “Selling Out,” vol. 41]

This Article thus argues that courts should instead focus on whether the sale process distorts the distributional priorities embedded in those balancing tests. This argument is consistent with the approaches advocated by Mark Roe and David Skeel, Ralph Brubaker and Charles Tabb, and the American Bankruptcy Institute's Commission to Study the Reform of Chapter 11.8 This Article contributes to this argument by highlighting the distributional priorities inherent in the processes for rejecting labor and retirement benefits.

Understanding sections 1113 and 1114's distributional priorities, the coal mining bankruptcy playbook should not work to permit these companies to quickly shed their labor and retirement benefits in bankruptcy.

While this argument focuses on labor and pension balancing, it has implications for the way courts balance bankruptcy and non-bankruptcy policies more broadly. To what extent should environmental creditors bear the burden of financial restructuring? To what extent should bankruptcy policy honor corporate separateness when all or part of an enterprise group files bankruptcy? And to what extent should bankruptcy law provide a safe harbor from federal securities disclosure requirements? This Article does not address these questions, but its argument implicates each of them by focusing on the way that the quick sale model of bankruptcy impacts the way bankruptcy law strikes these balances.

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I. THE COAL BANKRUPTCY PLAYBOOK The setting for this bankruptcy dispute is the wake of the coal industry crisis, with coal mining companies across the industry struggling to compete with cheaper natural gas prices all the while continuing to service their existing debt.9 A major portion of that existing debt comes in the form of retiree health care benefits, provided pursuant to collective bargaining agreements (CBAs) with labor unions. 10 Labor costs are high because the companies' CBAs were negotiated when coal prices were high.II They are also high because coal companies have statutory obligations to fund retiree pensions.12 And President Trump's coal-friendly policies encouraged investors to pump large sums of money into the coal mining industry through the leveraged loan market, in anticipation of the coal rebound that has not materialized. 13 When they filed for bankruptcy relief, one of the principal questions is how the restructuring burden should be borne by different creditor groups. Restructuring requires reducing or wiping out existing claims against the debtor-that is, bankruptcy reorganization requires imposing costs on the creditors. One of the core bankruptcy functions is to determine how those costs get distributed among creditors, what we refer to as the relative priority of creditors' claims. When the coal companies file bankruptcy in order to reorganize, one of the principal questions is how their restructuring costs should be spread among various creditor interests. In this way, these coal mining bankruptcy cases raise important questions about the interaction of federal bankruptcy law with state corporate law, federal and state environmental laws, and federal laws protecting retirees. 14 While some of these problems are unique to the coal mining industry, the problem of dealing with large (and growing) legacy labor costs is neither new nor limited to the coal mining industry.15 Bankruptcy law as a potential tool to modify or terminate retiree benefits has deep roots. LTV Corp. made national news headlines back in 1986 for doing precisely this. 16 And while the pressures of the coal mining industries are unique in some ways-this is a heavily regulated business in which worker and retiree benefits have long been a central concern the legal issues presented here are common. Similar issues arise in retail bankruptcy (SEARS and its pension plan plans), manufacturing (Hostess Bakeries), and transportation (American Airlines, Delta, United Airlines). 17 Walter Energy Industries provides a useful case study of this dynamic. Walter Energy, like other bankruptcy coal miners, filed for bankruptcy at a time when coal prices were at their lowest. At the same time, they were parties to CBAs that were negotiated when coal demand was on the rise. Walter Energy's CBAs had been negotiated back in 2011, when coal prices were at their highest, only to find itself struggling to meet its financial obligations as coal prices sank.is In addition to their obligations under existing CBAs, coal companies have obligations to fund retiree funds for coal mining companies that have failed, pursuant to the Coal Act.19 Walter Energy stated that its obligations to employees and retirees, including pensions and postretirement healthcare, were nearly $600 million as of the end of 2014, with additional annual obligations under the Coal Act.20 Not only did Walter Energy find itself with high labor costs, but by the time it filed bankruptcy it was mortgaged to the hilt. 21 Walter Energy, as the coal mining companies that filed bankruptcy before it, entered bankruptcy with substantially all of its assets pledged to its first and second lien lenders. 22 Before it filed bankruptcy, Walter Energy's secured creditors negotiated with the debtor to buy the company's assets through a bankruptcy sale. Walter Energy, thus, filed for bankruptcy relief and then filed a motion to sell its assets to the lender, free and clear of any claims against the estate. 23 That sale agreement was contingent on Walter Energy obtaining a court order that the sale would be "free and clear" of Walter Energy's debts and that the purchaser would not be bound by Walter Energy's labor and pension obligations.24

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Both of these moves-a "free and clear" sale of corporate assets and a motion to reject the collective bargaining agreement as a precondition to the sale-were standard practice in the coal mining bankruptcies examined here. Alpha Natural Resources,25 Patriot Coal,26 Westmoreland Coal,27 and Murray Energy28 have all used this same approach: prepetition first lien lenders proposed to buy the debtor's business as a going concern out of bankruptcy but only if the debtor first rejected its CBAs. And the debtors have succeeded in rejecting their collective bargaining obligations in every case in which the debtor has sought to do S0. 2 9

The general asset sale model pursued here was not only common in the coal mining cases, but it has been common practice (minus the labor transformation part) in bankruptcy practice broadly over at least the past two decades.30 Scholars have examined this trend and its implications for a long time now, reaching a crescendo perhaps when General Motors and Chrysler both pursued the quick asset sale model in bankruptcy during the Great Recession.31

#### 1. INFORMATION---union activism, backed by an enforceable CBA, during reorganization provides a critical ally to corporations---unlocking effective corporate governance.

Dawson ’14 [Andrew; February 18; Associate Professor at the University of Miami School of Law; American Bankruptcy Law Journal, “Labor Activism in Bankruptcy,” vol. 89]

As illustrated in the cases above, the struggle among creditors to control the corporate reorganization can directly threaten the interests of workers. The two attempted restructurings of Hostess provide examples of how controlling creditors may require the debtor to re-work its collective bargaining agreements as a condition to providing financing for the reorganization. And as seen in Hostess II and the AMR reorganization, adjusting labor costs may be the primary purpose of the bankruptcy filing.

Labor unions clearly had an important role in these cases as bargaining agents in the § 1113 rejection process. But these cases also show that this was not labor unions' only role. In fact, the Hostess bakers' union refused to even engage in the concession bargaining process, declining to oppose the motion to reject their collective bargaining agreement. Instead, they expressed their desire to negotiate over bankruptcy strategy. The AMR pilots did both-they engaged in concession bargaining while at the same time explored alliances to change the course of the bankruptcy proceedings.

With both of these debtors, the unions' arguments were unsuccessful at opposing the debtor's motion to reject the collective bargaining agreements, but they were successful in attracting the attention of other creditors. In AMR's case, the pilots' union's arguments were rejected by the court in the § 1113 litigation, but they were accepted by the bondholders and by AMR's merger partner. In Hostess I, although the agreement between the Teamsters and Yucaipa ultimately proved ineffective, the union was successful in finding a partner to attempt to solve what it identified as managerial slack. These cases, then, provide examples of how labor union activism in bankruptcy can impact bankruptcy governance.

There is good reason, then, to believe that labor unions can impact a corporate reorganization and potentially protect labor's interests in bankruptcy by forging alliances in the competition for control. But is this activism good for bankruptcy governance?

An evaluation of whether labor activism is good for bankruptcy governance is complicated because, as has long been recognized, "governance questions are inextricably bound up in the broader policy question of what goals Chapter 11 should seek to promote." 33 Corporate reorganization is designed to promote reorganization and to maximize returns to creditors.134 At times, these goals may be consistent, as rehabilitating the debtor may be the best way to maximize creditor recoveries. At other times, though, maximizing creditor returns may require liquidating the firm.135 Thus, from an outcome-based view of bankruptcy, it is difficult to assess whether labor activism is good for bankruptcy. In the AMR case, labor activism may have helped with both goals. In the Hostess cases, labor activism may have maximized returns to creditors (arguably) but did not promote reorganization.

From a process-oriented perspective, however, labor activism has the potential to improve bankruptcy governance. The potential added value from labor activism is primarily informational: it provides a means for workers to contribute to the reorganization by identifying managerial slack.

Yucaipa, the investment fund that partnered with the Teamsters in Hostess's first bankruptcy, has explained that one of the reasons it has sought alliances with unions is for their informational advantage: "cooperative union members provide 'phenomenal' information about potential deals and good business practices" as "union workers know more than anyone about 'the company, the management, the competitive environment and everything else' at their companies."136

Providing information does not assure that the process will properly balance bankruptcy's two policies, but it does provide the opportunity for improved governance in bankruptcy. As Anderson and Ma conclude in their empirical analysis comparing § 363 sale prices with prices obtained through a confirmed plan of reorganization, the lower sale prices through § 363 sales are not due to the speed of such sales or to the financial distress of the seller; rather, they conclude that the lower prices "appear to be associated with the diminished creditor negotiation leverage in 363 sales."137

This information does not necessarily promote reorganization or liquidation. Instead, it can improve creditor negotiations that can lead to maximizing asset value.

This basic argument that labor union's monitoring information can improve bankruptcy governance has a direct corollary in the corporate governance literature. Kenneth Dau-Schmidt, for instance, has argued that an alliance between capital and labor could greatly improve monitoring of management by combining shareholders' control rights with labor's inside information regarding the firm's operations. 38 That is, labor-stakeholder alliances can improve corporate governance outside of bankruptcy. Likewise, labor-stakeholder alliances, in which labor unions contribute their inside information into the market for corporate control, have the potential to improve governance in corporate reorganizations. This is especially true in those cases in which there is competition for creditor control, as "[t]he marketization of reorganization law has placed a greater premium on information."'3 9

#### 2. PRECEDENT---resolving conflicts between bankruptcy and labor is a model for other countervailing areas of law, like federal securities and constitutional questions.

Dawson ’20 [Andrew; 2020; Vice Dean for Academic Affairs and Professor of Law, University of Miami School of Law; Cardozo Law Review, “Selling Out,” vol. 41]

IV. IMPLICATIONS FOR BANKRUPTCY POLICY AND PRACTICE

This Article has focused primarily on sections 1113 and 1114, dealing with the way Congress has balanced bankruptcy policy against labor and retirement benefits policies. But these are not the only nonbankruptcy policies that courts have to balance against chapter 11's pro-reorganization goals. Even within the coal industry, there are competing concerns as courts have to balance the interests of creditors with the interests of environmental regulators-every dollar spent for environmental remediation is a dollar less for the other claimants.119 Bankruptcy courts likewise have to consider other countervailing policies, from constitutional due process of law, corporate governance, and federal securities regulations, to name a few. 120

Even though labor and retirement benefits are governed by special sections of the Bankruptcy Code, the examination of how the quick asset sale model affects the balance between bankruptcy and non-bankruptcy law has implications for the way courts have to strike this balance generally. Furthermore, the fact that quick asset sales affect how courts balance bankruptcy and non-bankruptcy policies, even in fields with a codified balancing test, provides some helpful insights into the ways bankruptcy judges make decisions.

A. Sales Restrike the Balance

The coal bankruptcy cases provide a specific illustration of the larger problem in corporate bankruptcy practice: Distributional norms are flattened when a secured creditor is in control of the case and, in particular, when it exercises that control to bring about a quick asset sale. While Ayotte and Morrison highlight how this creditor-in-control model can lead to inefficient sales, this Article highlights how these sales can also work to rebalance bankruptcy and non-bankruptcy policies.

Macey and Salovaara examine this same phenomenon and conclude that the problem is one of "continuation bias."121 Courts, they argue, accept overly optimistic asset valuations, in part, because that supports plans that will keep the debtor in business-even if the debtor's reorganization plan is not actually feasible. This allows companies to externalize the external costs of their business, notably the regulatory costs of their labor, retiree healthcare, and environmental obligations.

They are correct that there are many areas in which bankruptcy law threatens to undermine competing regulatory goals. For instance, bankruptcy law's respect for corporate separateness can at times facilitate fraudulent transfer schemes, and a more robust substantive consolidation remedy might counteract that. 122 This is an important point, and one that could possibly be well-informed by comparative studies with jurisdictions, such as Brazil, that have a much more robust substantive consolidation remedy. 123

They are further almost certainly right that continuation bias plays a role in elevating bankruptcy policy over non-bankruptcy policies-that is, in promoting a company's rehabilitation even at the expense of competing regulatory goals. Indeed, that continuation bias is one way of explaining why courts have interpreted "reorganization" to include going concern sales.

The difficulty, of course, comes from determining when a case should be permitted to "reorganize" and when it should be forced to "liquidate," a question that is further complicated by the blurriness between these two outcomes. As illustrated in the academic debates in the 1990s about the "success" rate of chapter 11, the question of whether bankruptcy courts are good gatekeepers for determining whether debtors should remain in business is a complicated one, 124 and so is the question of whether a liquidating chapter 11 plan should be coded as a "success."125 The UCLA-LoPucki Bankruptcy Research Database's Success-modeling Project, for instance, does not define "success" itself, recognizing that "success" for some scholars focuses on whether the debtor emerged from bankruptcy as a standalone entity while others might look at the continuation of the business line. 126 Thus, while this Article recognizes that these are important questions, it focuses instead on a specific aspect of these coal reorganization cases that tends to elevate bankruptcy policy over other regulatory goals-and that is the quick sale model. The process exacerbates this norm-flattening because it forces the normative dialogue into the mold of an asset sale motion: Was the sale process reasonably designed to maximize the value of the estate? There is no room in that mold to ask questions about feasibility, best interests of the creditors, or discriminatory treatment among creditors.

In the labor rejection context, we see this clearly. When section 1113's requirements are forced into the mold of an asset sale, the dialogue changes. Instead of asking when the proposed changes are necessary to the debtor's reorganization, the union is forced to question only the sale process. Questions about sale process focus not on bankruptcy's distributional entitlements but on whether the sale is likely to maximize the value of the estate. And if the question is whether the sale would yield more value if stripped of the collective bargaining obligation (and, consequently, also potentially stripped of the collectively-bargained retiree benefits), then the answer is always going to be yes.

In short, when bankruptcy's balancing tests are forced through the procedures of asset sales, the balance of bankruptcy and non-bankruptcy interests inevitably (and drastically) tilts toward bankruptcy.

B. Norm-Power Paradox

These coal bankruptcy cases do more than merely illustrate this rebalancing aspect of asset sale cases. They also help us think about the role of bankruptcy courts in corporate reorganization cases. In particular, they can help us think about Janger's proposed Norm/Power Paradox of bankruptcy judging. 127

Examining how bankruptcy judges make decisions, Janger draws on the public law litigation model and concludes that, "[w]here a relatively 'inarticulate' legal norm regulates a public institution, the need for a detailed judicial remedy may be greatest precisely where the link to a specific legal command is at its most tenuous."128 That is, unarticulated legal norms require a more active judicial role; when legal norms are more clearly articulated, the judge's role can be much more passive.

To illustrate this, he considers constitutional issues such as school desegregation in which it is difficult for a judge "to map a broad constitutional norm onto granular institutional practices."129 Any such order, then, "may appear to be a naked exercise of judicial power unless tempered by the techniques of public law judging," for example, "information gathering, participatory consultation, facilitation and ultimately consent." 130

Janger extends this to the municipal bankruptcy context, he posits there exists a similar problem in that context because the broad norms of debt repayment and sustainable debt load do not map neatly onto a granular remedy. This puts judges into a public law function, as "determining the sources of debt repayment and of a sustainable debt load requires social choices." 131 Just as in the school desegregation cases, then, the political consequences of any judicial ruling in the municipal debt restructuring context creates a legitimacy gap: Any ruling, say, permitting pensioners to recover before bondholders might appear to lack legitimacy. As David Skeel reports, that was a common reaction by many experts. 132

In the corporate reorganization context, the political consequences of favoring secured versus unsecured creditors might be inconsequential; however, the consequences of favoring bankruptcy policy over labor policy are important and serious.

If we try to apply the Norm/Power Paradox in this context, we would ask whether there was a broad or narrowly defined legal norm the court must apply. If broad, then the judge should exercise the public litigation model. If narrow, then less judicial involvement is required. When applying a broad norm, such as feasibility, we might expect the judge to engage in more public litigation-style case management: The court should gather more information and promote and facilitate consent. When applying more specific norms, that judicial involvement is less necessary.

Whether the bankruptcy-labor context is one that calls for more active judicial management depends on whether section 1113 is thought of as reflecting a broad or narrow norm. If the "necessary to permit the debtor's reorganization" is viewed simply as asking the question "does the debtor need to reject the collective bargaining agreement in order to reorganize?," then this appears to be a fairly narrow norm. Active judicial management is not necessary, and this dispute looks much more like a private litigation model. But if the standard is read as asking "are these proposed modifications necessary?," the norm is much broader, and it is difficult to map that onto a granular remedy. The section 1113 rejection process, then, looks to involve more of a public law judging model, with fact-gathering, consultation, and consensual resolution.

CONCLUSION

This Article examined an important issue raised in a recent Eleventh Circuit decision in Walter Energy, in an effort to address a much broader question about bankruptcy law's supremacy. Walter Energy addressed the controversial question of when and whether a debtor should be able to use bankruptcy to reject its CBAs and modify its pension obligations. This is a difficult, policy-laden question that requires balancing the interests of bankruptcy law (preserving going concern value, preserving jobs, minimizing the impact of business failure) with those of labor and employment laws (enforcing collectively bargaining for agreements, protecting retiree benefits).

I have argued that the court's analysis of this issue focused on this wrong question. Instead of focusing on the question of whether a going concern sale is a "reorganization" for purposes of section 1113, the court should have focused on whether the proposed modifications to the collective bargaining agreement would allocate some of the reorganization surplus to the labor union. That is, would the structure of the reorganization honor and respect the distributional entitlements Congress created when enacting section 1113?

The failure to honor these entitlements raises policy questions of particular concern in the field of labor and employment law. Further, it illustrates the way that current chapter 11 practice permits debtors and their powerful creditors to engineer a reorganization and sidestep the distributional entitlements Congress baked into chapter 11.

#### Strengthening collective bargaining rights during the bankruptcy process solves both advantages, ending Section 1113 abuse.

Hunter ’22 [Olivia; July 25; J.D. 2022, Columbia Law School, B.A. 2016, Earlham College; Columbia Business Law Review, “A Bankrupt Bargain,” vol. 2022]

B. Recommendations for Judicial Interpretation

Whether § 1113 allows for rejection or modification of expired CBAs "remains a question of interpretation." 258 Because legislative history is unenlightening and proposed amendments to the statute are silent on this issue, the interpretive framework must be centered on the language in the statute. This analysis reveals that § 1113 does not provide for the rejection or modification of expired CBAs-it allows solely for interim modifications of such expired agreements. Textual interpretation and the canons of statutory construction suggest congressional intent to protect certain aspects of labor law from the ravages of the bankruptcy process. Consequently, judicial adoption of an interpretive framework based on the text of the statute is necessary to prevent an expansion of the abuses of § 1113 by debtors looking to shed CBAs.

1. The Significance of the Word "Interim" in Section 1113(e)

The first contested term in § 1113(e) is the word "interim."259 Indeed, this word was ignored in the Karykeion court's analysis of the provision. 260 Black's Law Dictionary defines "interim" as "[d]one, made, or occurring for an intervening time" or as "temporary or provisional." 2 6 1 Ballentine's Law Dictionary defines "interim" as "[m]eanwhile; in the meantime. Hence, temporary." 262 In accordance with this definition, Ballentine's defines "interim allowance" as a "temporary allowance," and an "interim curator" as a "temporary guardian or custodian." 263 The Wolters Kluwer Bouvier Law Dictionary similarly defines "interim" as a "temporary gap between periods." 2 64 Courts have used the term both to mean "temporary" and "during an intervening period" when interpreting § 1113(e). In Accurate Die Casting, for example, the NLRB seemed to use "interim" to mean the period between the expiration of a CBA and the adoption of a new agreement. 265 The Board held that "labor peace is preserved by the maintenance of established practices during the interim period."266 However, it is not clear whether the Board intended to define "interim" as it appears in § 1113(e). This sentence appears before the Board applies the Bankruptcy Code provision to the facts of the case, 267 so it could be using the phrase "interim period" as part of a general statement about the importance of maintaining the status quo ante.

Justice Brennan's Bildisco concurrence is also illuminating. While the concurrence references the "interim period," the majority opinion does not. 268 It is possible that in drafting § 1113, Congress used the word "interim" as it was used in the concurrence. Justice Brennan writes that "enforcement of the contract is suspended during the interim period," and later refers to "the interim between filing and rejection or assumption." 269 Both of these uses suggest that "interim" is being used to describe the period during which the debtor is in bankruptcy and before the debtor has either assumed or rejected the contract in question.

Lately, however, the term has been interpreted to refer to the second of Black's definitions: temporary or provisional. For example, the bankruptcy court in Trump Entertainment Resorts held that § 1113(e) allows for modifications of a CBA on an interim basis." 2 70 In this context, "interim" most plainly means "temporary." The proposed changes to § 1113 also suggest that reading "interim" to mean "temporary or provisional" is the more appropriate interpretation. The congressional drafters specified that interim changes could last no longer than fourteen days 271-much shorter than the length of most bankruptcy proceedings, and potentially shorter than the period between a CBA's expiration and the adoption of a new agreement.

All of these interpretations are plausible, and in fact, none are antithetical to the "interim changes" allowed by § 1113(e). Changes for any of the periods explained above would of course be temporary, and that is the key distinction between §§ 1113(e) and 1113(c). Subsection (e) allows for a judge to approve changes without requiring the debtor to bargain with the Union, and subsection (c) imposes a bargaining structure. 272 Thus it is imperative that "interim" not be read out of the statute. Moreover, reading "interim" out of the statute would violate the statutory interpretation rule against surplusage. 273 Each word in a statute is presumed to have meaning. Whether "interim" means a specific, temporary period or whether it suggests provisional changes, it cannot be left out of an application of the statute. It follows that § 1113(e) should not be used to make permanent modifications to CBAs, whether expired or unexpired. While some bankruptcy courts allow interim modifications for lengthy periods, the changes will evaporate once the debtor is out of bankruptcy, or when the court decides the changes are no longer necessary to the debtor's survival.274

2. The Significance of the Phrase "Continues in Effect" in Section 1113(e)

The second term that has sparked debate is "continues in effect," which appears in § 1113(e). 275 Invoking again the rule against surplusage and the presumption of meaningful variation, it is clear that a collective bargaining agreement that "continues in effect" must have a different scope than a "collective bargaining agreement." 276 As purposeful drafters, Congress would not have added a qualifier unless it intended to alter the meaning of the term. Further, if Congress had wanted the scopes of §§ 1113(c) and 1113(e) to be identical, Congress could have explicitly specified that § 1113(c) applied to CBAs that "continue[] in effect." An argument that this qualifier is implicit in § 1113(c) obfuscates congressional intent by ignoring the plain meaning of the statute. 2 77

A CBA that "continues in effect" must have a scope that is either broader or narrower than a CBA without the qualifier. In defining the term, most courts cite Litton Financial Printing Division v. NLRB, which held that "continues in effect" refers to post-expiration obligations. 278 The courts in the Karykeion line of cases ruled that this qualifier is "implicit" in §§ 1113(c) and 1113(b).279 Thus, by extension they have adopted a broad definition of CBAs which "continue in effect"-it must include both expired and unexpired agreements. 280 This definition comports with the NLRB's holding in Accurate Die Casting, where the Board ruled that "[t]he period when a collective bargaining agreement 'continues in effect' includes a period when its replacement is being negotiated and in which no impasse has been reached." 281

The consensus around the scope of what is included in a CBA that "continues in effect" makes sense upon close inspection. 28 2 Labor law principles support the expansive reading of the term. 283 The inclusion of unexpired CBAs in the term helps to make sense of the final line of § 1113(e), which states, "The implementation of such interim changes shall not render the application for rejection moot."284 Where an application for rejection has been made in relation to an unexpired CBA, a debtor can still move for interim changes without nullifying the application. This line, however, does not refer to expired CBAs, which are, as this Note argues, not eligible for the rejection process detailed in § 1113(c).

Thus, courts' misapplication of § 1113(c) to expired collective bargaining agreements does not stem from their misunderstanding of "continues in effect." Rather, it stems from "stretch[ing] the statute's language too far." 285 These courts import the phrase into provisions where it does not exist in order to hold that the statute allows for rejection of expired CBAs. In doing so, they violate not only the rule against surplusage and the presumption of meaningful variation, but also the rule against allowing a specific statutory rule to be abrogated by a general rule in the same statute. 286 The CBA that is the subject of § 1113(c) and the CBA that "continues in effect" in § 1113(e) must have distinct meanings. But the line of cases explored in this Note hold that these terms are synonymous. 287 In order to reject expired CBAs, bankruptcy courts are ignoring the basic norm of statutory interpretation that all words in a statute are presumed to have meaning and thus contravening congressional intent.

Further, the courts are improperly allowing a general statutory provision to nullify a specific provision. Because the words "continues in effect" are only present in § 1113(e), it follows that this provision applies to a specific situation. Specifically, this subsection allows for interim modifications to both expired and unexpired CBAs, while the rest of the provision applies only to unexpired CBAs. At least one court has noted § 1113(e) as an "exception" to the general terms detailed before it.288 In applying §§ 1113(b), (c), and (d) to expired CBAs, the courts are essentially nullifying the specificity of the subsection and applying the general rule to a situation that is specifically provided for in § 1113(e).

Courts have implicitly relied on the "whole act rule" as justification for their over-inclusive reading of § 1113(c). 289 The "whole act rule" is an interpretive canon that favors coherence and consistency within the statute itself based on its perceived purpose. 290 While scholars debate the intended purpose behind the Bankruptcy Code, 291 courts often refer to Bankruptcy's goal to maintain debtors as a going concern.2 92 They reason that, because reorganization is the ultimate goal, provisions in the code should be read to promote continuance of the debtor firm. 293 Indeed, in the instant scenario, courts have characterized a plain meaning interpretation of § 1113 as inconsistent with the purpose of the Bankruptcy Code. 294 The Karykeion court held that prohibiting the debtor from rejecting residual obligations would make the debtor "less competitive" upon emergence from bankruptcy and for that reason would be incompatible with the statute's purpose. 295 However, when read closely, § 1113(e) is not ambiguous and therefore amorphous concepts-such as the purpose of the whole act-need not be invoked to understand it's meaning.2 96 Moreover, there are numerous exceptions in the bankruptcy process which restrict debtors' prerogatives or are otherwise incompatible with the broader trend toward debtor deference.297

3. The Rule Favoring Continuity

Finally, the analysis supporting rejection of expired CBAs violates the rule favoring continuity. The rule favoring continuity states that when there is doubt, the courts should interpret statutes to minimize interference with other legal rights. 298 Before Congress passed § 1113, rejection of expired CBAs was a moot issue-because the contracts were expired, they were no longer considered executory and there was nothing to reject. 299 A reading of § 1113 that allows debtors to do something they could not do under § 365 would require explicit inclusion of the new right. In the case of § 1113(e), the statute does exactly that-it specifically allows for interim modifications to expired CBAs, explicitly granting bankruptcy courts a power that they previously did not possess. 300 Without an express signal from Congress providing for rejection of CBAs, the rule favoring continuity suggests that courts should not interpret § 1113 to create a new right to reject expired CBAs as this would not be consistent with previously established common law.

4. The Policy Justification for Allowing Only Interim Modifications to Expired CBAs

There are important policy reasons why Congress would not want to allow for the rejection of expired CBAs. While the courts that have allowed debtors to reject expired CBAs have made numerous policy arguments in favor of their decision, they have also emphatically expressed doubt that there is any policy justification for a decision the other way. The In re Trump Entertainment court, for example, could not fathom why Congress would pass legislation allowing for such an "absurd result."301

There are a variety of policy benefits that can flow from a closer adherence to the text- namely, preservation of an already-commenced bargaining process between the employer and the union. Especially when a negotiating process has already started, it is important to uphold the integrity of that process in order to maintain trust and cooperation between the parties. Moreover, preserving the bargaining obligation encourages information sharing. Instead of simply cutting off communication with unions and filing for rejection, employers with expired CBAs would need to maintain a dialogue with their workers' representative in order to gain voluntary concessions outside of bankruptcy through the traditional NLRA-imposed bargaining procedure. 30 2 Interim modifications would provide immediate, though temporary, relief to employers and the impetus to continue sharing information and cultivate a good relationship with the union would remain. The on-the-market negotiation procedure that Congress intended when drafting the NLRA, and which is the ideal outcome under § 1113, is thus preserved. 303

Maintaining labor peace is another major reason Congress may have chosen to except expired agreements from rejection. In Accurate Die Casting, the NLRB held that "[t]he obligations which survive the expiration of a collective-bargaining agreement are among the most important that are contained in the agreement," and that "[l]abor peace is preserved by the maintenance of established practices." 304 Indeed, after their expired CBA was rejected In re Trump Entertainment, the unionized workers at Trump's casino went on a prolonged strike that ended in the business's closure. 305 This exemplifies the labor strife that debtor corporations may experience after they reject their unexpired CBAs.306 Because labor law preserves only the most important aspects of a CBA's terms after expiration, such as wages, hours, benefits, and work rules, it makes sense that Congress would provide for the maintenance of the these status quo obligations, while providing flexibility to the debtor through the interim relief provision. 30 7

The fears expressed by bankruptcy court judges that involving the NLRB in the debtor's reorganization would result in overcomplication, while valid, are already realized. The Bankruptcy Code's automatic stay provision does not apply to enforcement actions brought by the NLRB.308 Often, debtors with unionized workforces are already in litigation with the NLRB during their bankruptcy proceedings. Thus, labor concerns can sometimes trump bankruptcy's goal of maintaining the business as a going concern.

Furthermore, preventing debtors from rejecting expired CBAs may result in a more accurate valuation of the firm as a going concern. Valuation is a major issue in bankruptcy and determines not only how much is paid out to different classes of creditors, but also who ends up owning the firm after debt is converted to equity. If the firm's projected costs and revenues are inaccurate, the "fulcrum security" class of creditors 30 9 could end up getting less than they were ordered to receive in bankruptcy. In the scenario where an expired CBA is rejected, the firm may project lower labor costs than when they entered bankruptcy. However, these labor costs are not likely to remain at the post-rejection level. While rejection can set a union back, hurt morale, and have many negative consequences for the individual workers, the employer still has a duty to bargain with the union outside of bankruptcy. It is possible that the union will compel the employer to improve working conditions or raise wages a short time after bankruptcy, negating the firm's cost projections upon which their valuation was based.310 Bankruptcy judges may attempt to ignore labor law within a bankruptcy proceeding, but they cannot trump it outside of bankruptcy.

It is true that more firms may liquidate if they are not able to negotiate a compromise with their union workers and comply with higher wages imposed by an expired CBA. This consequence is unfortunate and could potentially hurt the broader local economy surrounding the closed firm.311 However, contrary to the suggestion in Long Ridge,312 unions likely do not favor the firm liquidating over rejection of their CBA.313 Moreover, scholars have argued that "a company should not be able to use bankruptcy to dispose of obligations whose purpose is to force corporations, shareholders, and creditors to bear the social costs of corporate activities." 314 Indeed, "unless Congress has explicitly permitted it" firms should not be able to shed regulatory obligations in bankruptcy. 315 In the instant case, Congress has not explicitly allowed for the shedding of the statutorily-imposed status quo obligations that survive a CBA's expiration through the bankruptcy process. In fact, it has expressly provided for bankruptcy court action in this area in only one provision: section 1113(e).

The most important effect of not allowing rejection of expired CBAs through § 1113(e) is that it would prevent further abuse of § 1113. As noted above, § 1113 has become a weapon used by companies against an already struggling union labor force. 31 6 Abuse of § 1113(e) is similarly creating a situation where workers bear the cost of poor management and outsized executive compensation. Requiring companies to maintain status quo obligations and bargain to impasse maintains the union's influence, encourages information sharing, and gives employees a voice.

#### And…

Wu ’24 [Jason; 2024; J.D. from Harvard Law School, M.A. from Harvard Graduate School of Arts & Sciences, B.A. from the University of California San Diego; American Bankruptcy Institute Law Review, “How Do ‘Bankruptcy Grifters’ Destroy Value in Mass Tort Settlements? In Re Purdue Pharma as a Bargaining Failure,” vol. 32]

3. Imposing a Duty to Bargain in Good Faith. - A complementary reform is to require debtors and their affiliate holding entities to bargain with tort victims in good faith. Currently, the Bankruptcy Code only requires the reorganization plan to be proposed in good faith. 366 My proposal will give the bankruptcy judge an oversight role over the entire reorganization process to ensure good faith in bargaining. Under this proposal, if either the debtor or the non-debtor affiliate walks away without bargaining, rejects the tort victim's proposed reorganization plan without explanation, or refuses to bargain, the good faith duty will be deemed to be violated. As a remedy, the bankruptcy judge may refuse to confirm the reorganization plan or modify it in the tort victims' favor. The judge may also sanction repeat offenders. Here, the idea is to import the duty to bargain in good faith from the labor union (i.e., collective bargaining agreement) context to the mass tort bankruptcy context.3 67 By imposing such duty, debtors and non-debtor affiliates will be penalized for deploying harmful bargaining tactics to the detriment of the tort victims. This will foster more productive negotiation dialogues that can lead to better outcomes for both debtors and the tort victims.

## Economy Turn

### Uniqueness

#### Current bankruptcy law structurally favors corporations, sacrificing collective bargaining agreements (CBAs) and worker interests.

Velazquez ’25 [Alvin; March 2025; Associate Professor of Law, Indiana University Maurer School of Law; Maurer School of Law Legal Studies Research Paper Series, “Bargaining for the Common Good in Bankruptcy,” no. 551]

When a corporation files for bankruptcy, it is usually bad news for workers. That is because most corporations are usually looking to slash wages or seek other concessions from workers. Unions that fight back do so risk having the bankrupt corporation seek judicial approval to set aside their collective bargaining agreement. The news is not much better for public sector workers when a government goes into bankruptcy because the law forces governments to prioritize debt payments to financial creditors over workers. Certain funds, often called “vulture funds”, opportunistically purchased distressed governmental debt such as Puerto Rico’s cheaply and then used the bankruptcy process to extract profits at a cost to workers and the public. What happened in Puerto Rico’s bankruptcy challenged that convention. This article explains how unions learned from previous engagements to engage their membership, organize with public allies, and use the bankruptcy code to bargain for the common good to prevent pension cuts and protect their collective bargaining agreements.

Introduction

Despite the challenges posed by bankruptcy law, several unions involved in the Puerto Rico bankruptcy were able to educate their members and work with their community allies to accomplish improved outcomes through a combination of organizing and strategically exploiting parts of the bankruptcy code. For many unions, the word “bankruptcy” conjures up images of a union about to travel on a long and winding boulevard of broken dreams (Green Day 2004). Those fears have historically been justified. Bankruptcy literature views unions as a vehicle for concessionary bargaining in private sector bankruptcies or as an existential fight between retirees, unions, and Wall Street-based creditors in the public sector (Dawson, Labor Activism in Bankruptcy 2015; Dick 2018). These portrayals reflect the design of the bankruptcy code and lived experience.

Puerto Rico's debt had long been a favorite of Wall Street investors. It was also a favorite for the 60,000 local investors who lent money to Puerto Rico's government (Abrasetti 2016). Investors on the U.S. mainland and on island lent money to the government of Puerto Rico through the purchase of these bonds because the bonds were “triple-tax exempt.” That meant that purchasers did not have to pay state, local, or federal taxes on the interest of those bonds.1 Additionally, Puerto Rico's constitution prioritized repayment, primarily in Wall Street's interests, over those of workers and retirees.2 When Puerto Rico faced extreme fiscal distress, traditional investment firms sold their bonds to vulture funds at a discount. These vulture funds stepped into the shoes of the original holders by purchasing bonds at a discount and receiving the full benefits of Puerto Rico's legal regime.

To make matters worse for unions and the workers they represent, when Congress finally passed the Puerto Rico Oversight, Management, and Economic Stabilization Act (PROMESA) authorizing Puerto Rico to file bankruptcy, it took no steps to protect the workers and put in place weak protections for retirees.3 Instead, it created a Financial Oversight and Management Board (FOMB) that had the power to overturn financial decisions made by Puerto Rico's elected officials.4 During the pendency of the case, unions were the target of unrelenting concessions requests and the FOMB threatened at one point that it would seek 25% reductions to modest pensions that, on average, totaled less than US$20,000 a year. Nevertheless, many unions survived without having their CBA's further impaired from what they conceded through pre-bankruptcy legislative sanctioned takebacks (Velazquez, Lucha Si, Entrega No: How “an Awkward Power Sharing Arrangement” Upended a Plan of Adjustment 2023).

The Puerto Rico bankruptcy was different because of the success of workers and retirees had engaging with the community. This article explains how they did that applying a bargaining for common good framework (BCG). At its core, the BCG framework broadens “participation to give community stakeholders a place at the bargaining table,” in some cases symbolic, but in other cases actually at the bargaining table (Sniederman and McCartin 2020). BCG encourages unions to form bargaining demands beyond the National Labor Relation Act's (NLRA) mandatory subjects of bargaining framework by expanding and building worker solidarity with the community (McCartin, Sniederman and Weeks 2020). BCG encourages unions to negotiate for what Jane McAlevey calls “the whole worker” within the contexts of their communities (McAlevey 2003). The application of the BCG framework to bankruptcy is simply another iteration of movement unionism. The BCG framework contrasts with business unionism in that it encourages unions to focus not just on “bread and butter” issues, but also on political issues. To date, no one has applied the BCG framework to the municipal bankruptcy context because such bankruptcies are rare, and the theoretical work to develop a BCG framework was underway only after Puerto Rico filed for bankruptcy protection.

The fact that some unions, including U.S. mainland-based unions, tied their legal positions to fights happening in Puerto Rico is highly unusual. Puerto Rico remains a U.S. colony in which its citizens do not have the same rights of social citizenship than those on the U.S. mainland (Hammond 2021).5 The history between U.S.-based international unions and Puerto Rico's unions has at times been fractious. In many instances, local Puerto Rico with no attachment to the AFL have criticized mainland-based U.S. labor unions for being colonizers who are only interested in extracting resources from the island. In fact, they frequently would use the term “chupaquotas,” translated as “dues suckers,” to describe them (Marzán 2009). While what happened in this bankruptcy will not completely heal the relationship between sister unions, this article conceptualizes bargaining for the common good as being flexible enough to avoid the replication of these harmful dynamics by encouraging unions to work alongside local communities.

Toward that end, this article lays out five key lessons from the Puerto Rico bankruptcy. These lessons include that unions and sympathetic activists should:

1. Prepare before the filing of a bankruptcy petition. This means internally gaming various contingencies and strategies and identifying priorities, identifying allies among creditors and within the community, educating membership, and taking other steps to protect the bargaining agreement,

2. articulate bargaining demands that both workers and community allies support and which could be funded by debt relief,

3. once bankruptcy proceedings begin, use their status as parties-in-interest to insert itself into major controversies beyond those that affect the wages and benefits of their members, and use their legal filings to cast a framework for the common good,

4. apply to participate on official creditors’ committees if the conditions for being on those committees do not overly constrain their ability to organize, and

5. view the relevant territorial legislature or local city councils as arenas for engaging in bargaining with the debtor and Wall Street, as well as other creditors and parties-in-interest.

This article will provide some background on governmental bankruptcy law and then turn to outlining specific code provisions that unions and activists interested in applying a BCG framework should learn. The article will then go through the lessons outlined above and provide explanations of how that played out in Puerto Rico's bankruptcy in comparison to other municipal bankruptcies.

A Primer on Bankruptcy Law

Even though the focus of this article is on the Puerto Rico bankruptcy as governed by PROMESA, this article will provide a general overview of bankruptcy law to provide the tools to understand what is happening when a government seeks bankruptcy relief. To begin, bankruptcy provides a forum in which debtors (either corporations or people) can reorganize their debts and/or shed certain contracts (like collective bargaining agreements) when they no longer have the cash on hand to pay them as they come due. The whole point of bankruptcy is to provide the honest, but unfortunate debtor with a “fresh start”6 while ensuring that creditors who sue the indebted entity receive repayment based on the strength of their underlying legal claim and pursuant to rules of repayment priority (Jackson 1982). Put another way, when creditors sue for repayment, bankruptcy law protects the debtor from collection efforts by paralyzing all collection efforts temporarily. This is called an automatic stay.7 Bankruptcy law paralyzes lawsuits against a debtor and simultaneously lays out a framework for determining (1) who can get in line for payment and (2) where in line that creditor stands. Bankruptcy law essentially sets out rules delineating who gets paid by categorizing debts and the debt holders. It then sets up procedures for resolving disputes concerning payment priority and balances that against the needs of the debtor.8

The Bankruptcy Code (“Code”) has several different sections that govern bankruptcies based on the nature of the debtor that is seeking relief as well as the relief sought. In the private sector, bankruptcy is governed by Chapters 7, 11, 12, 13, and 15 of the Code.9 Chapter 7 of the Code covers personal and corporate liquidations. When a corporation files for bankruptcy under Chapter 7 of the Code, the United States Bankruptcy Trustee, acting on behalf of the Department of Justice (U.S. Trustee), will appoint a trustee.10 The trustee, or its successor, will collect the debtor's assets and make them available for repayment to their creditors.11 When a corporation liquidates, it is essentially going out of business.12 Chapter 11 allows corporations and individuals to restructure their debts and continue operations, but only provides debt forgiveness when certain conditions are met.13 In those cases, one of the roles of the U.S. Trustee is to appoint a creditor committee to represent the interests of different constituencies.14

For the purposes of this article, it is critical to understand that a creditor's place in line determines the likelihood of repayment. Workers are in a difficult position because they have weaker priorities than secured creditors and many other unsecured creditors.15 So who gets paid first? The first to get paid are secured creditors. Secured creditors are those whose claims are backed by a lien on an identifiable source of property.16 In the event of non-payment, the creditor can foreclose on the lien/collateral immediately ahead of other creditors who lack a security or otherwise only have a legal right to payment based in contract.17 If the debtor still owes the secured creditor money after foreclosing on a lien, then the remaining amount (called a deficiency) is treated as an unsecured claim. After secured creditors foreclose on their liens, a trustee can distribute the debtor's remaining assets to unsecured creditors such as workers and retirees as they do not hold a lien.

Not all unsecured creditors are created equal, however. Certain unsecured debtors may have “priority” status over other similarly situated creditors.18 For example, the lawyers and other officers charged with administering the corporate or governmental bankruptcy case get paid before almost anyone else (excluding child support and other “super-priority” claims).19 Any wage claims and claims for employer contributions to a benefit plan for amounts owed during the 180 days before the debtor files for bankruptcy receive fourth and fifth priority as an unsecured creditor, respectively.20 Workers’ compensation claims and any tort claims that a worker has against their employer would fall into the general unsecured creditors pool and receive no priority. If the debtor does not have enough money to pay all secured and unsecured creditors with greater priority, the debtor may receive a discharge having paid very little to those at the end of the line.21

One final constraint that serves as a potential constraint has to do with the conditions under which a judge may approve a repayment plan that (1) provides less than full payment and (2) does so over the objection of the creditor receiving less than full payment. This is called a “cramdown.”22 A plan of adjustment is “a document that sets out the liabilities of a municipal debtor that has restructured its debts on a going-forward basis. The court overseeing a restructuring proceeding must ensure that a plan of adjustment is both feasible and in the best interest of creditors” (Velazquez, Broke(n) Governments and Disaster's Dollars).

A judge can approve a repayment plan that crams a creditor down only if “the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.”23 In general, that means that a debtor cannot propose to repay an unsecured debtor less than a secured debtor, or that an unsecured debtor such as a bondholder who has a statutory priority to repayment over worker claims gets paid less than a retiree who does not have a priority claim. This guardrail is meant to ensure that the debtor does not play favorites amongst similarly situated creditors (Hynes and Walt 2015). This paper will later describe how the judge dealt with claims that certain bondholders made about being “unfairly discriminated” against as retirees certainly appeared to do better than some bondholders who held Puerto Rico's general obligation bonds.

A Primer on Governmental Bankruptcy

Governmental bankruptcies build upon the principles outlined above and therefore create challenges for workers. However, they also have some special rules that govern them due to the sovereign nature of governments.24 Governmental bankruptcies are governed by Chapter 9 of the Code and PROMESA (which borrows from Chapter 9). The big distinction though is that when a government chooses to seek bankruptcy protection under the law requires them to be insolvent, but it does not require them to turn over city hall to a trustee for sale.25 That is because bankruptcy law recognizes that the point of a government is for it to serve its constituents. Selling public assets would undermine that mission.

For a government to enter bankruptcy, it either has to show that it is insolvent or lose its right of self-governance.26 In practice, what that means is that the government must show that they have engaged in round after round of austerity, including layoffs, in a (usually) futile attempt to meet constitutional legal debt obligations to Wall Street holders due to macro-economic factors outside of their control (Lav 2014; Buccola 2019). This process does not affect just workers, it affects the communities they serve by creating service insolvency, or the inability of a government to deliver basic services.27 By way of example, Puerto Rico laid off almost 30,000 of its employees, raised taxes, and amended retirement benefits several times before finally admitting it could no longer pay its debt and filing a bankruptcy petition (Noticel 2011).28 While SEIU, UAW, UFCW, and OPEIU filed suit to detain the layoffs, they lost that bid. The courts in those cases ruled that Puerto Rico's abrogation of collective bargaining contracts and cuts to retirement benefits did not violate the U.S. or Puerto Rico Constitution because the actions were appropriate responses for dealing with its fiscal emergencies.29

Once a government finally does file a bankruptcy petition, unions and their allied enter into another legal playing field that is tilted against them. This is especially true if unions have not begun the work of organizing both their local community and their membership. That is to say pre-planning shapes the playing field at the outset of a case. Vulture funds start with an advantage by sweeping up distressed bonds at steep discounts from their original values and assuming the property rights associated with those bonds once a governmental entity enters serious fiscal distress, and well before a government is contemplating a bankruptcy filing (Pintado and Rodriguez Banchs 2020).30 This allows the fund to create leverage as a creditor that gives it certain rights during a bankruptcy. Certain debts, such as secured debts or debts that come with a constitutional obligation for repayment, can increase the influence among other constituencies in the bankruptcy both before and during the case.

By way of example, the Government of Puerto Rico issued US$3.5 billion in junk-rated debt that primarily hedge and vulture funds purchased in 2014, well before Puerto Rico filed for bankruptcy in 2017. At that time, 275 firms, primarily vulture funds, purchased the bonds with the expectation that their bond would have a higher priority to repayment than retiree claims. For many of the firms that purchased bonds, this was not their first foray. They also participated in earlier municipal debt restructurings such as Detroit and Stockton (Abrasetti 2016).

Vulture funds start with an advantage because they understand how bankruptcy affects and modifies pre-existing contractual and property rights, including rights that remain intact during the bankruptcy proceedings. Property law generally protects creditors that have a security interest in the tax and business revenues of a bankrupt government. For example, if a Wall Street investor purchases a toll road bond and the government has pledged the tolls it collects as a source of repayment, that Wall Street-based investor has a property right to that identifiable piece of property which the Fifth Amendment's protection against forced takings protects against, even in bankruptcy31 (Harker and Parikh 2014). That means that even if the government does not have enough money to pay other obligations—for example, retirement benefits or wages—it cannot redirect the toll revenues to pay another bill or obligation without court permission. Puerto Rico's general obligation bonds are securities. While they are not backed by a specific source of revenue, its constitution effectively claims that an investor can look at its taxing power as a source of repayment. Therefore, an investor who buys these general obligation bonds is still in a privileged position vis-à-vis workers and retirees because bankruptcy law simply imports Puerto Rico's debt law to determine who gets paid first.

In contrast, in a public sector bankruptcy, workers and retirees have contractual claims that bankruptcy courts can break.32 Bankruptcy law provides mechanisms by which governments can set aside their collective bargaining agreements that are extremely deferential under 11 U.S.C. §365 and the Supreme Court's decision in NLRB v. Bildisco & Bildisco.33 In that case, the Supreme Court ruled that a debtor can set aside a CBA if it can show that the agreement burdens the estate and that the equities balance in favor of rejection.34 In other words, a very lenient standard for a debtor in bankruptcy to show. Unions have had their CBA's set aside for worse terms in several municipal bankruptcy cases.35

#### The process undermines ‘good faith’ attempts at collective bargaining during bankruptcy.

Velazquez ’25 [Alvin; 2025; Associate Professor of Law, Indiana University Maurer School of Law; Stanford Law Review, “Bankrupting Labor Power,” vol. 78]

Bankruptcy judges use the concept of good faith as an equitable tool for managing the strategic behavior of unions in collective bargaining, and to a much lesser extent, corporate behavior. It is an important gatekeeping tool that courts use throughout the entire bankruptcy process. There are three Code provisions touching on faith (good or bad) that are relevant for this discussion. They are §1112(b)(3), §1113(b)(2), and §1129(a)(3).100 Even though each of these provisions require a bankruptcy judge to evaluate the good faith of a party throughout different phases of a Chapter 11 process, the observations made by the Federal Bankruptcy Court for the Eastern District of Michigan provides a useful orientation for thinking about the inconsistent results that seem to arise in applying the good faith standards to any part of the Code before delving further. As the court explained, the good faith requirement requires:

“…[I]n our view, placing the amorphous concept of good faith outside the confines of all of the other elements for confirmation of the plan, even outside § 1129(b)'s cramdown requirements, is intended to allow courts to utilize their gut feeling about a plan's effects:

We have always been reluctant to seize upon “good faith” as an easy way out of confirming a difficult or questionable plan. We believe that a finding of lack of good faith in proposing a plan ought to be extraordinary and should not substitute for careful analysis of other elements necessary for confirmation. However, we also believe that a court of equity must use all of its senses to determine whether a proposed course is fair and equitable. A bankruptcy judge is more than a pair of ears to hear the argument and a pair of eyes to read the law. Furthermore, the mind, which may tell us intellectually that there is nothing technically “illegal” in a particular course of action, is not always the final arbiter. Sometimes a bankruptcy judge's nose tells him/her that something doesn't smell right and further inquiry is warranted. (Others may call this “common sense.”) As a human being, a bankruptcy judge may allow the heart to influence a decision even though, as a judge, he/she should beware not to let emotions stand in the way of justice. Sometimes, a bankruptcy judge's stomach may turn, when he/she is preparing to sign a particular judgment or order. This queasiness is reflective of the judge's sense that for some, perhaps inarticulable, reason, it just isn't right to grant the relief requested. In the context of plan confirmation in bankruptcy cases, when this is the way the judge feels, it may be because the plan has not “been proposed in good faith.” In short, the reading of the law should be tempered by the judge's sense of equity—what is just in the circumstances of the case. If there are objective facts to support this feeling, perhaps the plan should not be confirmed.” 101

The next subsections discuss each Code provision in the chronological order that they are likely to come up in a Chapter 11 bankruptcy proceeding.

c. Good faith filing of a bankruptcy petition under §1112(b)

The criterion that a debtor must file to enter into Chapter 11 protection is set out in §1112(b) of the Code. The purpose of §1112(b) is to provide a judge with the ability to review the “good faith” of the petitioner in seeking bankruptcy relief and the powerful equitable tools that come with it.102 This part of the Code does not use the words “good faith”. Instead, it sets out two criteria for dismissal to protect the integrity of the bankruptcy process. The first is that a court must dismiss a Chapter 11 petition for cause unless it finds that the appointment of a trustee to oversee the affairs of the debtor would be in the best interest of creditors. In that case, it can appoint a trustee instead of allowing the debtor to run the affairs of the corporation.103 The second criteria follows the logic of the first. It states that a court must dismiss a Chapter 11 petition if it finds that there are unusual circumstances surrounding the case unless the court finds that it will be able to confirm a plan of adjustment quickly and the debtor can mitigate the harm coming from the unusual circumstances that are present.104 In applying this statute, courts have read the “good cause” language to imply a good faith requirement.105 They have developed a two-step analysis for determining whether a debtor has filed in good faith. First, they “determine whether cause exists to dismiss the Chapter 11 filing. Second, they “determine whether dismissal is in the best interest of creditors and the estate.”106

As noted above, courts are reticent to dismiss a case for lack of good faith.107 As Ponoroff and Knippenberg observe, “…the judicial attitude that has emerged is that so long as valid reasons for filing exist, it is irrelevant that the petition may actually be motivated by other circumstances and events.”108 This lenient standard has incentivized companies to engage in strategic filings of bankruptcy and also raises questions about whether unions faced with a crippling tort judgment could use bankruptcy law strategically.109 Unions attempting to save their CBA’s from being abrogated under §1113 of the Code have attempted to challenge employer Chapter 11 filings as being in bad faith to no avail. For example, In re Continental Airlines, the unions claimed that the airline had filed in bad faith solely for the purpose of rejecting their collective bargaining agreements. The court understood that the corporations filed to set aside the CBA’s but denied the union’s motion. 110 In contrast, in smaller commercial cases, unions have been able to demonstrate that a voluntary dismissal of a Chapter 11 was done in bad faith in violation of 1112(b) when it was used as a device for avoiding an employee’s priority claim for union benefit fund contributions.111

Unfortunately, the cases evaluating whether unions filing for Chapter 11 bankruptcy protection did so in good faith under 1112(b) does not provide much guidance for constructing a theory of bankruptcy law that balances their role as collective bargaining agent with bankruptcy’s goal of a fresh start. The one case arising out a union filing due to a judgement against it arose out of an internal dispute. In it, a local union president brought a successful claim for damages under the Labor Management Reporting Disclosure Act, and the local union filed bankruptcy to protect against having to pay the judgement.112 The court dismissed the filing as being done in bad faith because the local did not need bankruptcy protection as it was solvent.113

While the case provides important context, the cases considering bad faith may give a union declaring bankruptcy over a tort claim brought by a hostile employer a doctrinal hook for a court to refrain from dismissing its petition. Venditto suggests a finding of bad faith only when a court finds that: “1) the debtor’s filing is primarily motivated by a desire to obtain some strategic advantage offered by bankruptcy’s equitable powers; 2) the debtor’s ability to effectuate a plan is largely dependent up securing that strategic advantage in order to adversely affect the contractual or property rights of a third party; and 3) the solution of existing financial problems in, or through, chapter 11 would make the debtor a financially stable entity.”114 The problem with applying these suggestions to a labor dispute when a union is seeking bankruptcy’s protection is that a union in that position would be unable to meet the first two prongs. The NLRA literally requires unions to bargain on behalf of their members and seek strategic advantage within the framework of the employer-employee dyad.115 By its very design, labor law allows for unions to engage in strikes to gain strategic advantage over an employer. A union’s strike can have the effect of harming third parties who are not part of a dispute. For example, when dockworkers go on strike, packages of goods do not get delivered. Under Venditto’s proposal, if a union goes bankrupt while on strike, it would never be able to able to file in anything other than bad faith. That option is not viable because it would mean that a union could never file for bankruptcy, and Congress has not excluded them from the Code. More is needed to construct a theory of bankruptcy law that seeks to balance workers’ right to organize under Sec. 7 of the NLRA and bankruptcy law’s fresh start and creditors’ rights regimes.

d. Bargaining in good faith under §1113

While the bad faith standard under §1112 (b) provides grist for constructing a theory of unions in bankruptcy, the most logical place to draw materials from is §1113, the part of the Code that allows for a debtor to reject a CBA. As noted above, Congress passed §1113 in response to the Supreme Court’s decision in Bildisco.116 Congress incorporated the NLRA’s requirement that parties negotiate in good faith.117 Congress also required that courts refrain from rejecting a CBA unless it finds that (1) the debtor made a proposal that makes only necessary changes to the CBA to continue to let the business continue operating; 118 (2) that the union “refused to accept such proposal without good cause”; 119 and (3) “the balance of the equities clearly favors rejection of such agreement”. 120

The interpretation of §1113 has developed in a way that undermines a union’s power by making it easy for corporations to reject a collective bargaining agreement. Unions have tried to make the argument that companies have sought Chapter 11 protection in bad faith when it is for the purpose avoiding their obligations under CBA’s onto deaf ears. There is a good reason why unions tried that maneuver. Union wanted to avoid having their CBA’s rejected under §1113 under standards that favor management. Anne McClain notes, courts have liberally construed Section 1113 in favor of debtors: allowing union and nonunion employees to be treated differently, de-emphasizing the requirement of debtor good faith in negotiations, and presuming a union’s rejection to be without good cause.”121 Courts have examined the terms emphasized above and arrived at the conclusion that they support rejection of CBA’s more often than not despite the Court’s unclear instructions in Bildisco. As a result, one court observed “that the curse of Babel struck when the courts came to consider the test for allowing rejection of collective bargaining agreements.122 Even though the court made that observation before Congress enacted §1113, it applies with equal force to §1113. As the court in American Provision Company noted, §1113 is “not a masterpiece of draftsmanship.”123 To make sense of it, the court enumerated nine requirements for the rejection of a CBA under §1113 including:

1. The debtor in possession must make a proposal to the Union to modify the collective bargaining agreement…

3. The proposed modifications must be necessary to permit the reorganization of the debtor.

4. The proposed modifications must assure that all creditors, the debtor and all of the affected parties are treated fairly and equitably…

7. At the meetings the debtor must confer in good faith in attempting to reach mutually satisfactory modifications of the collective bargaining agreement.

8. The Union must have refused to accept the proposal without good cause.

9. The balance of the equities must clearly favor rejection of the collective bargaining agreement.124

A circuit split emerged in applying this standard and specifically deciding what is a “necessary” modification to a CBA between the 2nd and 3rd Circuits. The Third Circuit developed a strict standard in Wheeling Pittsburgh Steel Corp. v United Steelworkers of America. It held that a necessary change to a CBA is one that is essential to the restructuring of the debtor. Showing that rejection would lower labor costs is not good enough to demonstrate necessity.125 That view has become the minority. Instead, the Second Circuit’s decision Truck Drivers Local 807 v. Carey Transp. now take preeminence.126 In that case, the court held that the necessity element only requires that debtors prove the made a proposal in good faith and that it contains necessary, but not absolutely minimal, changes that will ensure that the debtor successfully emerges from bankruptcy.127 In general, courts have gone ahead and simply deferred to the business judgement of the debtor concerning what is a necessary modification to the collective bargaining agreement and allowed for modification, even if the CBA is expired and the party who owns the debtor happens to be twice elected President Trump.128 When unions have objected or refused to enter into an agreement, courts have readily called it “stonewalling” and found that they have done so without “good cause” and are not bargaining in “good faith”. 129

#### 1. MORAL HAZARD---pro-debtor outcomes and reorganization goals make bankruptcy a tool for union-busting.

Hunter ’22 [Olivia; July 25; J.D. 2022, Columbia Law School; Columbia Business Law Review, “A Bankrupt Bargain,” vol. 2022]

A wave of bankruptcies brought on by the COVID-19 pandemic and the accompanying quarantine coincided with an unemployment crisis and renewed focus on labor protections.) Unions have rallied around the issues of job protection, workplace safety, and employee voice in the workplace. 2 However, unions have historically struggled to protect their members' bargained-for and statutory rights within bankruptcy. 3 The need to protect workers' rights in bankruptcy took on an increased urgency during the COVID19 crisis because financial crises can have a long-lasting impact on wages and union membership. 4 Despite this historical trend, organized labor has experienced a significant increase in interest in the wake of the COVID-19 pandemic. 5 Established unions are participating in twice as many strikes as before the health crisis, and there is a boom in new unionizations across industries. 6 While workers may have more leverage outside of bankruptcy at this moment, it is unclear if this power translates to the bankruptcy process. And while businesses are now bouncing back after the economic contraction caused by the pandemic, the high amount of debt that many firms took on leaves a large sector of the economy exposed in the event of another economic downturn. Unions may again face vulnerability if the forecasted recession spurs a throng of bankruptcy filings.7

This Note examines the conflict between the bankruptcy process and labor law. Specifically, it probes § 1113 of the Bankruptcy Code (“the Code”), which governs the rejection of collective bargaining agreements (CBAs) by bankrupt firms.8 Though Congress passed § 1113 to protect unionized workers from unilateral rejection of their CBAs, § 1113 is often used as a union-busting device by firms looking to cut labor costs.9 Labor protections are being further eroded as certain courts, particularly those in the Third Circuit, are interpreting § 1113 to allow for the rejection of expired CBAs.10

<<TEXT CONDENSED, NONE OMITTED>>

This Note argues that the Third Circuit’s broad interpretation of § 1113 allows for an abuse of bankruptcy procedure by creating a loophole that permits corporations to default on their statutorily imposed labor obligations. Part II explores bankruptcy law, labor law, and the tension between these areas of law that culminate in § 1113. Part III examines the troubling trend in the lower courts’ rejection of expired CBAs and probes the courts’ differing interpretations. Part IV suggests that judges should focus on a close reading of the statute to ascertain congressional intent, instead of relying on their policy intuitions and their own weighing of the goals of the National Labor Relations Act (NLRA) and Bankruptcy Code. Part IV further argues that a close reading of the statute reveals that § 1113(e) allows for temporary modifications of expired CBAs, but that this power to alter unexpired agreements does not extend to approving a debtor’s application for rejection of an expired CBA through § 1113(c). Further, this Note suggests that effectuating congressional intent will protect union workers—a constituency that should not be forces to bear all of the costs of economic downturn or poor managerial decisions. Part V concludes. II. BACKGROUND Part II lays out the basics of bankruptcy law and policy, labor law and policy, and the conflict between these two areas of federal law. It details the genesis of the conflict, the Supreme Court case which addressed the issue, and the subsequent congressional action which intended to smooth the conflict and blend the goals and processes of the two laws. This attempt, codified in 11 U.S.C. § 1113, was successful in many ways; yet it did not fully resolve the differing goals of bankruptcy and labor law. This Part details how the conflict persists through § 1113, and how in bankruptcy court the goals of bankruptcy often trump those of labor, to disastrous effect. A. Bankruptcy Law The Bankruptcy Code, enacted by Congress in 1978, governs the distribution of a distressed firm's assets to its creditors in a Chapter 11 restructuring proceeding. 1 1 Restructuring is intended to relieve a profitable but financially distressed company of their burdensome debt obligations so that they may survive as a "going concern." 12 Such relief is accomplished through converting debt to equity, allowing rejection of unprofitable contracts, and discharging claims against the firm. 13 A major creditor or group of creditors often becomes the owner of the debtor firm after the conclusion of a bankruptcy proceeding. 14 The Code also serves to solve a collective action problem. 15 Insolvency could create a rush by creditors to foreclose on assets and trigger loan acceleration, making survival of the firm unlikely. 16 By imposing an automatic stay on all proceedings against the debtor, the bankruptcy process prevents certain creditors who are quicker to notice the firm's insolvency from receiving unfair priority over other creditors. 17 Thus, the automatic stay not only prevents a mad rush to foreclose upon the debtor's assets, but also preserves value both by allowing the firm to continue using those assets and by preventing the breakup of assets that are worth more preserved together. 18 Without a bankruptcy procedure to stay state foreclosure actions and divide the assets pro rata, one watchful unsecured creditor could receive a windfall to the detriment of both secured creditors and other unsecured creditors. 19 Within bankruptcy, however, creditors whose loans are secured by collateral are paid in full, while unsecured creditors receive a portion of the remaining assets. 20 Unsecured creditors can include lenders, employees, suppliers, and tort victims.2 1 General unsecured creditors have the highest risk of recovering less than the full value of their claim. 2 2 The bankruptcy process also allows companies to decide which contractual obligations it wants to survive bankruptcy. Firms are able to "assume" beneficial executory contracts and "reject" unprofitable executory contracts. 23 Courts have generally interpreted an "executory contract" to mean a contract where substantial performance is required by both parties to the agreement. 24 When a debtor company assumes an executory contract in bankruptcy, it incurs all obligations and receives all benefits under the contract. 25 Rejection, by contrast, terminates each party's future obligations and benefits. 26 Thus, when the debtor rejects a contracting party's agreement, the contracting party has a claim for contract breach. 27 This claim is evaluated by the bankruptcy judge and is discharged post-bankruptcy. 28 Crucially, the remedy for rejection of a contract within bankruptcy is invariably a smaller monetary award than it would be outside of bankruptcy, as the contracting party's claim is considered along with the claims of all the other general unsecured creditors. As discussed below, CBAs were originally treated as executory contracts that could be assumed or rejected under § 365 of the Bankruptcy Code. 29 However, in 1984 Congress enacted § 1113 to separately govern the assumption, rejection, and modification of CBAs in bankruptcy proceedings. 30 Courts and academics continue to debate whether workers have a claim for damages after rejection or modification of their CBA under § 1113.31 B. Labor Law The Clayton Antitrust Act of 1914 codified the labor exception to antitrust legislation. 3 2 Congress approved the National Labor Relations Act (NLRA or "the Act,") in 193533 as part of President Franklin D. Roosevelt's New Deal. 34 The Act allows workers to form labor organizations and bargain as a group for better wages and working conditions without the threat of employer retaliation. 35 The NLRA also created an administrative body, the National Labor Relations Board (NLRB), to oversee and enforce the NLRA, and to adjudicate any disputes between unions and management. 36 The NLRA is intended to correct a perceived imbalance of bargaining power between the workers and the management by giving workers a (qualified) right to strike without fear of retaliation by the employer.37 It is also intended to ensure peace between labor and management, 38 and it is structured to encourage labor agreements to be determined on the market, rather than by the government. 39 The NLRA details processes for employees to vote to join a union, certify their bargaining unit, and negotiate with the employer to form a CBA.40 The NLRA defines certain employer actions to be "unfair labor practices," 41 and the NLRB has the authority to adjudicate alleged unfair labor practices and issue makewhole remedies like employee reinstatement or injunctions. 42 Employers that retaliate against workers for supporting or joining a union violate § 7 of the NLRA and are liable under § 8 for committing an "unfair labor practice." 43 Additional prohibited behaviors include coercion, anti-union animus, and unilateral changes in employment.44 It is also an unfair labor practice for an employer or union to refuse to bargain collectively. 45 Though these prohibitions appear broad, they have been eroded by numerous specific exceptions. For example, while an employer may not prevent its workers from discussing unionization, it may restrict them from speaking and distributing information about unions while they are on the clock in certain areas of the workplace. 46 The NLRA sets out detailed procedural and substantive requirements for negotiating a CBA.47 Section 8(d) of the Act mandates that the employer and the employee representative meet "at reasonable times" to negotiate "wages, hours, and other terms and conditions of employment." 48 The Act imposes a requirement to "confer in good faith" but specifies that neither party is required to make concessions. 49 Good-faith bargaining for the purposes of the NLRA entails meeting at regular intervals, putting forth reasonable demands and counterproposals, "demonstrat[ing] a willingness to consider issues further," and "refrain[ing] from adding new proposals at an advanced stage in the negotiations or withdraw[ing] already agreed-upon proposals." 50 If the parties are unable to come to an agreement after good-faith bargaining, the employer may declare an impasse and implement its last best offer-that is, the last proposal it made to the employee representative. 51 At this point, the union is legally permitted to strike if it chooses to do so and the employer can institute a lockout. 52 If the union contests that negotiations are at an impasse, it can file an unfair labor practice claim with the NLRB, which would then make a factual determination. 53 If, at any time during the term of a CBA, an "employer modifies the terms of the CBA before its expiration without following the guidelines set forth in the act, it commits an 'unfair labor practice."' 54 Even after the CBA's expiration, an employer is held to certain continuing obligations until a new CBA is negotiated. 55 Violating these "status quo obligations" is similarly prohibited by the NLRA.56 The status quo obligations that survive expiration preserve certain core terms of the CBA, such as wages. 57 Post-expiration obligations are statutory, rather than contractual, even though their terms are based on the expired contract. 58 A unilateral change in employment conditions after expiration is statutorily prohibited because it amounts to a refusal to bargain and constitutes an unfair labor practice. 59 This requirement serves to maintain labor peace even after a CBA's expiration, and to prohibit the employer from allowing the CBA to lapse in an effort to avoid negotiation. Hence, to implement a new CBA, the parties must re-negotiate under the same process described above. C. Conflict Between Labor and Bankruptcy Law The Bankruptcy Code often disrupts other laws. 60 Indeed, it is designed in part to override certain contractual obligations of the debtor in order to relieve them of credit agreements they can no longer honor.6 1 At the same time, a guiding principle adopted by bankruptcy judges is to upset state law as little as possible. 62 Professor Ronald Mann has argued that the interests of the bankruptcy process are consistently subordinated to "competing state and federal interests." 63 However, tensions still arise in bankruptcy proceedings with both state and federal law when the goals of competing statutes are at odds. 64

<<PARAGRAPH BREAKS RESUME>>

The Proceduralists and the Traditionalists, two groups of legal scholars, disagree as to the proper purpose of bankruptcy law in the face of such conflicts. Proceduralists advocate for identical asset distribution rules within the state law forum and the bankruptcy forum. 65 This position leads to favoring secured creditors within bankruptcy because of their state law foreclosure rights.66 Indeed, Proceduralists are characterized as arguing that "bankruptcy should aim exclusively to maximize asset values" for the benefit of secured creditors. 67 Traditionalists, in contrast, see bankruptcy as a way to further social values and federal policy goals. 68 This camp is prone to "continuation bias," which favors reorganizing the firm instead of liquidating in order to preserve employment. 69 Elizabeth Warren and Douglas Baird published a pair of influential articles in 1987, which advocated for a Traditionalist approach and a Proceduralist approach to bankruptcy policy, respectively. 70 Warren points to congressional comments on the Bankruptcy Code to argue that, as opposed to state law debt collection, bankruptcy is intended to serve the interests of parties other than the creditors. 7 1 She notes that Congress has acknowledged that the community, employees, suppliers, and customers are all affected when a business dissolves. 72 In particular, Warren points out that employees are specially provided for in bankruptcy, likely because they are rarely able to diversify employment risk and therefore the insolvency of their employer is likely to affect them most viscerally. 73 In contrast to Warren's distributive approach, Baird argues that the "legal rule to distribute losses in bankruptcy" and the "legal rule that distributes the same loss outside of bankruptcy" should be the same. 74 He argues that secured creditors should receive the "same deal" as they are entitled to outside of bankruptcy, and that this value should be based on liquidation value. 75 Baird's view ultimately favors secured creditors over other stakeholders. 76

This Note embraces neither the Proceduralist nor the Traditionalist view in their entirety. Rather, it proposes that congressional intent and laws outside bankruptcy law collide in ways that do not directly fit into the paradigm created by these two approaches. In the case of a unionized workforce, enforcing rights owed to the creditor-employees outside of bankruptcy would not necessarily be considered efficient or benefit secured creditors. Baird's Proceduralist emphasis on parity of rights within and without of bankruptcy does not consider the situation in which the creditor is a unionized workforce.77 This Note posits that creditors in bankruptcy should have their out-of-bankruptcy rights protected as much as possible, regardless of perceived value maximization, unless Congress has given express authority to the bankruptcy judge to eliminate an out-of-bankruptcy right.

Apart from the Proceduralist and Traditionalist schools, other commentators have argued "that it is often impossible to isolate bankruptcy's goals from other competing statutory mandates" and that reorganization of the firm should not be the aim if reorganizing would "undercut [other] congressional goals." 78 Still others argue that "traditionalist" goals, such as preserving employment, can actually be macroeconomically efficient if considered when unemployment is high.79 These differing views of the underlying purpose of bankruptcy law are likely to implicate whether the goals of other statutes should be honored or overshadowed in bankruptcy.80

In the case of labor law within bankruptcy, it is unclear which of the NLRA or the Bankruptcy Code should supersede the other, and which should be subjugated. Given that "[t]here is no supremacy clause to tell the courts which law should prevail," courts have resorted to statutory interpretation, legislative history, and intuition to square these two laws. 81 Though the NLRA contains a conflict of laws provision that stipulates its supremacy over the 1898 Bankruptcy Act,82 this provision was rendered moot with the passage of the 1978 Bankruptcy Code. 83 Indeed, because the Code contains no provision suggesting that labor law would supersede it, some courts have interpreted this to suggest that the Code, since it was enacted more recently, trumps the NLRA.84

Conflict between the goals of labor law and bankruptcy law emerges in several key areas during a reorganization. For example, while CBA bargaining and other NLRB processes take time, bankruptcy proceedings are under significant time constraints. While the NLRA allows workers to bargain for higher wages, bankruptcy is intended to help debtors cut costs and take other measures to preserve the vitality of struggling companies. Moreover, bankruptcy's power to eliminate burdensome contractual obligations contrasts with the statutory duties placed on companies by the NLRA, which invariably protect expensive labor contracts.

These tensions came to a head in 1984 in the Supreme Court case NLRB v. Bildisco & Bildisco.85 In 1980, Bildisco, a small, New Jersey-based building material distributer, filed for bankruptcy and sought to reject their CBA.86 At issue was whether the debtor could, through § 365 of the Bankruptcy Code, reject its employees' CBA, and whether unilateral changes to working conditions made by the employer after the filing constituted an unfair labor practice. 87 The Court ruled that the requirements of the NLRA were to be "subordinated to the exigencies of bankruptcy." 88 More specifically, the Court ruled that a debtor could unilaterally reject a CBA in bankruptcy because rejection was governed under § 365, which applies to the rejection of executory contracts. 89 While the Court mandated that the application for rejection be evaluated with a standard slightly more stringent than the business judgement rule, 90 critics responded that this dictum was meaningless when combined with the grant of unilateral rejection. 9 1

Bildisco was a puzzling decision considering the unique nature of CBAs. In contrast to agreements that emerge from a completely voluntary, mutually desired contractual relationship, CBAs are born out of a statutorily-imposed relationship that mandates good faith bargaining. 92 Moreover, while CBAs may be "executory" in the sense that there are continuing obligations on both sides, it can be argued that they are not "executory" because there is no way to breach a CBA that would excuse performance by the other party.93 The relationship and obligations mandated by CBAs continue despite breach, and any unilateral change would be considered an unfair labor practice and be adjudicated by the NLRB.

D. Section 1113

The same day the Supreme Court handed down the Bildisco decision, Congressman Peter Rodino introduced a bill in the House of Representatives to overturn the ruling. 94 At one point, there were three separate bills on the floor all intending to "clarify" Bildisco.95 A compromise was eventually reached, leading to § 1113 of the Code. 96 While the provision was in some ways a "pro-labor" reaction to Bildisco,97 the compromise resulted in an addition to the Code which was not a "clear victory" for either labor or business interests. 98 Section 1113 eliminated a firm's ability to unilaterally reject a CBA upon filing for bankruptcy, but it also codified Bildisco's holding that a debtor could reject a CBA-albeit after negotiation and judicial approval. 9 9 Despite its ambiguous legislative history, § 1113 is thought to have been "enacted to prevent companies from using bankruptcy as a strategic tool in its dealings with labor."1 0 0

To that end, § 1113 implements an expedited negotiation process for insolvent firms seeking to modify or reject their CBAs. First, the debtor is required to make a proposal to the union or employee representative and provide the union with all relevant information so that the union can adequately assess the proposal. 101 This proposal must also treat all affected parties "fairly and equitably." 102 The bankruptcy trustee or debtor in possession must then meet the union representative to "confer in good faith in attempting to reach mutually satisfactory modifications of such agreement"103 After this process, the debtor may submit to the court an application for rejection or modification of the CBA, which the judge may grant if the union refuses to accept the proposal without "good cause" and if the "balance of the equities clearly favors rejection of such agreement"104 After a judge has authorized rejection, debtors can implement new labor terms in one of two ways. Some courts hold that the employer can implement its "last, best offer" that it proposed in negotiations. 105 Other courts find that the employer can implement terms found in any proposals made to the union before the application for rejection was filed.106 To complement this process, § 1113(e) allows the court to authorize interim changes to a CBA that "continues in effect" 107 when it is essential to the debtor's continued business or "in order to avoid irreparable damage to the estate." 108

While § 1113 may seem straightforward, it has fomented numerous and varied interpretations. 109 Indeed, critics have decried it as "not a masterpiece of draftsmanship," 110 "unworkable," "flawed," and in need of a "congressional overhaul." 111 Both labor and business advocates suggest a reauthorize interim changes to a CBA that "continues in effect" 107 when it is essential to the debtor's continued business or "in order to avoid irreparable damage to the estate." 108

While § 1113 may seem straightforward, it has fomented numerous and varied interpretations. 109 Indeed, critics have decried it as "not a masterpiece of draftsmanship," 110 "unworkable," "flawed," and in need of a "congressional overhaul." 111 Both labor and business advocates suggest a rewrite. 112 While pro-business voices argue that under the current statute unions always win, 113 labor advocates have noted that rejection applications almost always result in prodebtor outcomes. 114 Commentators worried about the strength of the NLRA's protections perceive a resurgence of bankruptcy-led union busting reminiscent of the time before § 1113 when CBAs could be unilaterally rejected through § 365.115 Most visibly, the airline industry's bankruptcies have allegedly been used to "ravage" CBAs.116 "Notwithstanding [the] congressional intent" of § 1113, airlines have serially filed for bankruptcy in order to reject CBAs and lower the cost of labor. 117 While wages for pilots and flight attendants drop precipitously after bankruptcies, executive compensation remains high.118 That airlines maintain outsized executive compensation undermines the argument that airlines need these labor concessions in order to continue operating. 119

Section 1113 is also employed in other industries to dispose of CBAs. A recent decision by a federal district judge in Alabama approving the rejection of a mineworkers' CBA without requiring the employer to bargain with the union shows the flimsy protections provided under § 1113.120 An older, though telling, case allowed a meat-packing plant's rejection of a CBA even though the debtor's net worth was $67 million.121 Indeed, despite the different standards applied in the various courts, applications for rejection are invariably approved. 122 Clearly, there is no parity between labor law and bankruptcy law when the two meet in § 1113: Bankruptcy's goals of reorganization trump the NLRA's mission to provide statutory protections to organized workers. 123 Moreover, this interpretation of § 1113 is expanding. Courts are increasingly reading the statute to allow for rejection of expired collective bargaining agreements within bankruptcy proceedings and thus increasing the scope of § 1113's potential for abuse.

#### 2. CAUSATION---escaping the duty to bargain is the primary driver to file.

Dawson ’20 [Andrew; 2020; Vice Dean for Academic Affairs and Professor of Law, University of Miami School of Law; Cardozo Law Review, “Selling Out,” vol. 41]

Sections 1113 and 1114 reflect an attempt to balance the policy goal of Chapter 11 of the Bankruptcy Code with the policies underlying the federal labor and employment laws. These come in conflict when a debtor's labor and pension obligations render it unable to continue as a going concern. In that case, the practical solution would be to allow the debtor to escape those obligations to the extent necessary to continue operations. This result would be better for everyone: the debtor remains in operations and continues to generate revenue that allows it to pay workers and retirees. As stated by the bankruptcy court in Walter Energy:

This Court recognizes that the miners are the backbone and crucial workforce in these mining operations. Essentially, the dilemma facing the Court is whether to shut down the mines or allow the possibility that the mining operations continue in the hopes that coal prices will rebound in time and the miners keep valuable jobs, and are able to benefit when better times and better coal prices occur. 7 5

At the same time, the power to escape these obligations creates an incentive for debtors to file bankruptcy even if doing so were not absolutely essential for the debtor's survival-an incentive that is all the greater for companies under the control of private equity and other institutional investors looking to extract value from the debtor.76 This extraordinary bankruptcy power, coupled with the fact that U.S. bankruptcy law does not have an insolvency requirement, may make it more likely that employers would use bankruptcy with the primary purpose of escaping labor and pension obligations.77

#### CIRCUIT SPLIT---judicial inconsistency drives strategic filing, to avoid labor-union costs.

Hunter ’22 [Olivia; July 25; J.D. 2022, Columbia Law School, B.A. 2016, Earlham College; Columbia Business Law Review, “A Bankrupt Bargain,” vol. 2022]

In determining whether § 1113 authorizes a debtor to reject an expired CBA, courts have been surprisingly inconsistent in their holdings and reasoning. Courts generally look to § 1113(e) when deciding whether the Bankruptcy Code grants them the authority to allow the debtor to modify, reject, or assume expired CBAs. Section 1113(e) reads:

If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement. Any hearing under this paragraph shall be scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot. 124

Some courts have held that 1113(e) allows only for temporary changes to expired CBAs,125 while others have decided that the language in § 1113(e) allows for rejection and assumption of expired CBAs through §§ 1113(b) and 1113(c) provisions. 126 Still another court has held that § 1113(e) in no way implicates expired CBAs, and thus disallows rejection, assumption, and temporary modification of expired agreements. 127 One court overrode the language of the statute entirely, relying solely on policy to justify allowing rejection of a debtor's expired CBA.128

While there is a split among the lower courts of several circuits, the Third Circuit is the only circuit court of appeals to have decided the issue. 129 Nevertheless, the wide range in methods of interpretation throughout the lower courts means that an eventual circuit conflict is likely. An examination of these varying lower court opinions is useful in assessing the reasoning behind- and the solution to-this conflict. On the whole, courts are increasingly split on their interpretation of § 1113(e) to allow for rejection of expired CBAs.130 In light of this variation, it is especially important to highlight and critique the courts' varying interpretations of § 1113's text and resulting consequences, as these decisions expand debtors' ability to nullify the goals of labor law.

The cases that analyze § 1113(e) often do not clearly or accurately define terms that are essential to divining its meaning. Few of the cases that deal with § 1113(e) examine the statutory language or construction closely. 13 1 Instead, these courts rely on policy, intuition, or loosely gesture to the minimal harm done to labor law to support their conclusion. 132 Courts have implicitly or explicitly asserted definitions of terms and phrases in § 1113(e) that are broad or inconsistent with other courts' interpretations. First, courts have ignored or misinterpreted the requirement for changes to a CBA ordered under § 1113(e) to be interim modifications.1 33 Second, some courts have read the phrase "continues in effect" into the rest of § 1113, despite its presence only in subsection (e), to argue that a CBA and a CBA that "continues in effect" are identical in meaning. 134 The trend toward an atextual interpretation of § 1113 is not only inappropriate because it departs from the statute's plain meaning; it also has negative policy implications. It allows for inequitable application of § 1113 to extinguish terms of employment that survive expiration of CBAs-eliminating statutory protections established by the NLRA.

One line of cases that favors a policy analysis to the exclusion of rigorous statutory interpretation includes In re Karykeion, Inc., 135 In re 710 Long Ridge Road Operating Co., LLC,136 In re Trump Entertainment Resorts Unite Here Local 54,137 and In re N.W. Holding Co. 138 Together, these cases represent a shift in the enforcement of § 1113 toward debtorfriendly outcomes. In re Karykeion, Inc. was the first of these cases, and set the stage and interpretive framework for the other three. In Karykeion, the court allowed a bankrupt hospital to reject its expired collective bargaining agreement. 13 9 In doing so, it relied primarily on policy concerns, misinterpreted § 1113(e), and wrongly relied upon wording in the Bildisco majority opinion. These misinterpretations survived and mutated in the subsequent cases.

<<TEXT CONDENSED, NONE OMITTED>>

A. In re Karykeion In Karykeion, the Central District of California acknowledged that "[t]he rejection of a CBA is a rejection of one of the most binding of contracts in our legal system and not a matter to be treated lightly." 140 With that being noted, the case before the court was a situation which mandated increased attention to the needs of the debtor. The debtor was a hospital in a poor community in California, which was operating at a monthly loss of $500,000.141 In addition to jeopardizing the jobs of many employees of the hospital during a recession, the bankruptcy threatened an indigent community's access to healthcare. 142 Judge Tighe was straightforward about her desire to keep the debtor in operation for these reasons. 143 With these considerations in mind, the court reasoned that holding the debtor to the terms of the expired CBA-in other words, not allowing a debtor to reject an expired CBA-would cause "residual effects" that would "greatly impede" the overriding goal of the Bankruptcy Code. 144 The court stated that the NLRA-imposed negotiation process would be lengthier and more costly than the process laid out by § 1113.145 It asserted that the debtor would be "locked into" the labor rates dictated by the expired CBA until the NLRB declared an impasse. 146 Thus, in order to release the hospital from this funds-draining process, the court held that the expired CBA should be rejected through the "procedures" imposed by § 1113(e). 14 7 The court looked to both the "language and purpose" of § 1113 to hold that it allows for the rejection of expired CBAs.148 First, the court examined the language of the statute. It held that the phrase "continues in effect" is a term of art used in labor law that refers to the period of time between expiration of a CBA and when the NLRB rules that there is an impasse in negotiations and that the parties are no longer subject to the CBA's continuing terms. 149 The court asserted that the phrase "continues in effect," which is present only in § 1113(e), must be read "in conjunction" with the last sentence of the statute, § 1113(f).150 Section 1113(f), provides that "[n]o provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section." 151 Reading these two subsections in conjunction, the court held that "[s]uch language is intended to give the debtors the authority to reject the continuing effects of expired collective bargaining agreements through compliance with § 1113 instead of the NLRA." 152 However, the court did not explain why these two subsections provide the basis for allowing rejection of expired CBAs. One possible explanation is that the court found that § 1113(f) requires all terminations or alterations to occur through the § 1113(c) process, including any alterations to expired agreements. The problem with this interpretation is that § 1113(e) provides its own shortened process for interim changes to CBAs that continue in effect, 153 so § 1113(f) can be satisfied without requiring all modifications to go through the § 1113(c) process. Second, the court divined the purpose of § 1113 by looking to Bildisco. The Karykeion court stated that § 1113 was passed in order to "codify and modify" Bildisco, and thus Bildisco's reasoning is relevant to interpreting the statute. 154 The court reasoned that, because Bildisco appeared to give debtors the ability to modify or reject the "residual obligations" of a CBA, § 1113 must give debtors the same authority.155 Finally, the court invoked the overarching purpose of bankruptcy: allowing a debtor to modify its existing obligations to prevent liquidation.156 While the policy justifications in Karykeion are understandable considering the circumstances, the decision is wholly atextual. 157 The court read the word "interim" of out §1113(e), and simultaneously read the phrase "continues in effect" into areas of the statute in which it does not appear. While the decision references the rejection "procedures" imposed by § 1113(e), 158 there is in fact no particular rejection process imposed by this subsection alone. Section 1113(e) requires notice, a hearing, and court approval, but this process is only applicable to "interim" modifications, not permanent rejections. 159 The court effectively read out the word "interim" from subsection (e) in its analysis, never addressing how this word may affect application of § 1113 to expired CBAs. In addition, by reading the phrase "continues in effect," present only in subsection (e), in "conjunction" with subsection (), the court imported this phrase into areas of the statute where it does not appear. 160 Indeed, the court stretched the language of the statute so much that it nearly re-writes it. Next, the court relied on a misreading of Bildisco to support applying the § 1113(c) procedure to expired CBAs. While the court asserts that Bildisco suggested that debtors were able to modify the "residual obligations" resulting from an expired CBA,161 Bildisco in fact never refers to "residual obligations" either explicitly or implicitly. Bildisco includes references to "obligations under [a] collective bargaining agreement" and "contractual obligations"; yet residual obligations are never addressed. 162 Moreover, Bildisco explicitly applies to unexpired CBAs-the court specifies that no party disputed that unexpired CBAs were executory contracts, and thus held that as an executory contract, an unexpired CBA could be rejected through the § 365 process. 163 In addition, the Karykeion court's reliance on the reasoning of a controversial case that was quickly overturned by Congress is questionable. 16 4 Finally, the Karykeion decision oversimplifies labor law by distilling it only to the adjudication process overseen by the NLRB.165 The court asserted that a debtor who is unable to reject an expired CBA would be "locked into" the established labor rates until the NLRB declared an impasse. 166 This assertion rejects the possibility of a negotiated agreement between the union and the employer. In fact, the NLRA intends for negotiations and agreements to happen on the market, ideally without any need for NLRB involvement. 167 The court assumed that the unions would not make concessions in negotiations, despite evidence that unions are typically understanding of their employers when they are in financial distress. 168 It seems that the decision in In re Karykeion was one based on policy: without rejection of the CBA, the potential buyer would have walked away, and the hospital would have closed. 169 More generally, the court holds that the NLRA's "procedural hurdles" could impede reorganization, or "leav[e] the debtor less competitive when it emerges from bankruptcy." 170 The court here made a policy choice to favor bankruptcy's restructuring goal over labor law. In the process, it stretched the wording of the relevant statute and relegated the goals and procedures of labor law. Ultimately, the Karykeion court propagated dubious textual analysis that later decisions rely upon to allow for the rejection of expired CBAs through § 1113 in cases which do not have the same compelling facts or policy rationale. 17 1 B. In re Long Ridge Road In re 710 Long Ridge Road Operating Co., II, LLC172 serves as an example of a subsequent case which relied on Karykeion's reasoning, even when faced with facts less deserving of debtor deference. In this case, decided by the Bankruptcy Court of the District of New Jersey in 2014, the debtor nursing home facility had an ostensibly compelling policy reason to advocate for rejecting their expired CBA and preserving the business as a going concern. Upon closer inspection, the court was deferential to the debtor at the expense of the plain meaning of the Code and labor policy. The court's decision leaned heavily on bankruptcy policy, the Karykeion analysis of § 1113 and Bildisco, and on an NLRB case, Accurate Die Casting. The court found the textual analysis in Karykeion more persuasive than the analysis in opposing case law and it based its decision largely on Karykeion's reading of § 1113.173 Ultimately, the Long Ridge court held that "§ 1113(c) provides authority to reject and modify the terms of an expired collective bargaining agreement while those terms continue in effect during the Chapter 11 proceeding." 174 The Long Ridge court similarly followed the Karykeion court's analysis of Bildisco and held that Bildisco allowed for the rejection of expired labor contracts' residual obligations and that Congress intended for § 1113 to codify this holding. 175 The Long Ridge court also cited to a 1989 NLRB decision that commented on §1113's applicability to expired agreements to support its decision. 176 The court asserted that in Accurate Die Casting Co., the NLRB "held that a debtor may avail itself of § 1113(c) to reject an expired collective bargaining agreement."177 Finally, the court decided this case based on its policy intuitions. It found that there was "no logic to support Congressional intent allowing interim modifications to an expired CBA . .. but not allowing the rejection of the expired CBA if necessary to further the purpose of reorganization provided §1113(c) conditions are met." 178 Moreover, relying on legislative history, the court asserts that § 1113 "was enacted to provide bankruptcy courts with the ultimate authority to modify or terminate a debtor's collective bargaining obligations." 179 The court based its determination on the statements of Senator Daniel Moynihan, who commented that § 1113 was a "sound and entirely reasonable compromise" between the goals of the NLRA and the goals of the bankruptcy proceedings under Chapter 11.180 The court interpreted Moynihan's statement as indicating that the Bankruptcy Code's policy interest in avoiding liquidation retains its primacy. 181 In this particular case, the continued care of elderly residents in the debtor's facility was at risk, and it is reasonable to argue that public policy favored the survival of the facility.1 82 The court also decided the case in a way that would avoid "loss of employment for hundreds of workers." 183 However, this policy rationale is less convincing when taking into account the union's allegations that (1) the debtor's management company, which is owned by the debtor's parent company, reported a 17% profit margin in 2010 and (2) the principal shareholders had extracted $23 million from the business in the preceding three years. 184 Indeed, there is ample evidence to disprove the debtor's testimony that the burdensome CBAs caused the debtor's financial troubles between 2010 to 2012.185 The debtor stopped complying with its CBAs starting in 2010. This noncompliance was the subject of an NLRB enforcement action that eventually went to the Second Circuit. 186 The Second Circuit found that the debtor nursing home began laying off union employees in 2010, in contravention of their CBA.187 Then, from 2011 to 2012 the debtor instituted a lockout and replaced all unionized employees with non-union employees. 188 Clearly, this group of nursing homes experienced a fair share of labor strife, but any economic strife they experienced between 2010 to 2012 was not due to burdensome CBAs. Indeed, the Second Circuit found that during this period, the debtor was wantonly violating its CBAs.189 Despite the debtor's unfair labor practices, and the potential for further labor strife resulting from rejecting the CBA, the Long Ridge court prioritizes the debtor's cost-cutting goals over the statutory rights of the workers. Indeed, the Long Ridge court found "no logic to support Congressional intent" prohibiting rejection of an expired CBA;190 but it is incumbent on Congress, not the bankruptcy court, to decide which federal statute prevails when their goals are conflicting. Though the Long Ridge court correctly identified § 1113(c) as the portion of the statute which provides a procedure for rejection of CBAs, it also imported § 1113(e)'s language into subsection (c) without a textual basis for doing so. While reasonable parties may (and do) disagree about whether "continues in effect" refers to an unexpired CBA, an expired CBA, or both, the court violated rules of statutory construction in applying this specific and confined language to the statute generally. 19 1 The court, however, chose to follow the debtor's "common sense" argument and the Karykeion court's assertion that the language in § 1113(e) is "intended to give the debtors the authority to reject the continuing effects of expired collective bargaining agreements though compliance with § 1113 instead of the NLRA."192 Long Ridge also adopted Karykeion's problematic analysis of Bildisco.193 As noted above, the Bildisco decision never referred to "residual obligations" and can thus not be used to support a finding that Congress intended to codify a debtor's power to reject expired agreements. 19 4 Finally, Long Ridge is based on a misreading of Accurate Die Casting. In Accurate Die Casting, the debtor company argued that, because it was engaged in a Chapter 11 proceeding, it did not have to comply with the continuing obligations of the expired CBA.195 The Board held that whether or not the CBA was expired, the debtor company would not be able to unilaterally terminate the terms and conditions of the CBA. 196 It highlighted that "[t]he obligations which survive the expiration of a collective bargaining agreement are among the most important that are contained in the agreement." 19 7 Accurate Die Casting held that § "1113 does not ignore" the continuing burdens of an expired CBA and indeed makes "explicit provision" for them in §§ 1113(e) and 1113(f. 198 Accurate Die Casting did not hold, as the Long Ridge court asserts, that a debtor can "avail itself of § 1113(c) in order to reject an expired collective bargaining agreement." 199 Rather, the Board in Accurate Die Casting held that the debtor is required under § 1113 to present its proposed changes to the union, and if the union fails to agree to the changes, the debtor should "make application to the bankruptcy court." 200 This holding is in line with the text of § 1113(e), which allows for "interim changes" to CBAs that continue in effect after approval of the court. 201 The only mention of rejection occurs earlier in the decision, where the Board explained the general purpose of § 1113 and the modifications it made to Bildisco.2 0 2 C. In re Trump Entertainment Resorts Karykeion's legacy of poor textual interpretation lives on in the sole circuit case to evaluate this issue, In re Trump Entertainment Resorts Unite Here Local 54.203 The Third Circuit found that "§ 1113 does not distinguish between the terms of an unexpired CBA and the terms and conditions that continue to govern after the CBA expires," and the court allowed the debtor to reject its expired CBAs. 204 With each case subsequent to Karykeion, the underlying policy rationale degrades further. In this case, the court threw out the CBAs of service workers for a serially-filing casino in Atlantic City.205 The workers paid the price when the casino's CEO and controlling shareholder, Donald Trump, consistently overleveraged the business while still making a fortune through "salary, bonuses, and other payments." 206 His poor managerial tactics pushed the business into bankruptcy four times. 20 7 Perhaps unaware of this history, or simply more hopeful for the future, the Third Circuit based its decision on the policy goal of eliminating debts and costly contracts so the company could achieve "longterm viability." 208 Judge Jane Roth focused on bankruptcy's overarching policy goals, admitting that she would not decide the case based on "a hyper-technical parsing of the words and phrases that comprise § 1113."209 Yet, while this opinion did not delve into the statute's language, it affirmed part of the bankruptcy court's analysis, which addressed the language of the statute in more depth. 210 The bankruptcy court held that while the legislative history of § 1113 is not dispositive, "the words of the statute and the context in which Congress enacted it are instructive as to its purpose." 211 First, the court relied on Karykeion's definition of "continues in effect," holding that it refers to the "employer's post-expiration status quo obligations." 2 12 The court noted that the use of "continues in effect" in the provision rather than "executory" is significant-and that by choosing this phrasing and not mirroring the § 365 terminology, Congress intended to allow for rejection of expired CBAs. 2 13 The bankruptcy court argued that the phrase "continues in effect," which appears only in § 1113(e), is "implicit" in § 1113(c) and thus Congress intended to allow rejection of expired CBAs through the process detailed in § 1113(c). 214 This reading is based on the argument that the statute would otherwise produce an "absurd" result where only interim modifications were available to a debtor subject to terms of an expired CBA.215 The court relied on the statutory interpretation device that "interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."216

<<PARAGRPAH BREAKS RESUME>>

The bankruptcy court then dove into the purpose behind § 1113, asserting the supremacy of bankruptcy policy over labor policy in the context of § 1113.217 The court noted that § 1113 codified certain parts of Bildisco and rejected others, striking a balance between flexibility for debtors and court oversight. 218 It looked to the schedule of hearings, within fourteen days of filing, of § 1113(d) to assert that the process is meant to be expedited. 2 19 The court also argued that allowing the NLRB to oversee the negotiation between the debtor and the union would "thwart" the overriding policy of bankruptcy: maintaining the debtor corporation as a going concern. 220 It criticized the union's argument as "illogical" because it would allow the court to reject an unexpired CBA, but would not allow the court to permanently cast-off the continuing effects of an expired CBA.221

The bankruptcy court's textual analysis of the statute, as in the cases that preceded it, ignored the distinction between a CBA and a CBA that "continues in effect." But in asserting that "continues in effect" is implicit in § 1113(c), the court disregarded the language and structure of § 1113. Moreover, the court's focus on the exclusion of the word "executory"222 results in conjecture about congressional intent that ignores alternative reasons why Congress could choose to omit the term "executory" from the statute. For example, Congress could have thought that the term "collective bargaining agreement" on its own implied that an agreement had to be unexpired or executory, especially contrasted with a "collective bargaining agreement that continues in effect." More likely, the statute's congressional drafters chose not to include the term because it is confusing when applied to CBAs. As previously mentioned, the term "executory" does not apply neatly to a CBA since there is no extent of performance which can excuse another party's obligations. 223 Though these possibilities are mere speculation, they show that the court's analysis requires jumping to a conclusion about why Congress omitted a word.

Ultimately, this decision is based on a policy rationale rather than a textual one-the court reads the statute to avoid what it deems an "illogical" result, rather than interpreting the statute as it is written. 224 While the court relied on the canon that statutes should be read to avoid absurd results, the outcome in this case would not be so absurd as to justify rewriting the statute. The Code provides relief for the debtor by allowing interim modifications to expired agreements while preserving the delicate negotiation process. Indeed, the policies behind labor law favor negotiations on the market in order to promote industrial peace. The justification for slowing down the bankruptcy process with negotiations between the union and the employer parallels this labor law policy. In this case, the court was concerned with executing a deal quickly in order to avoid liquidation and save 3,000 jobs. 22 5 Yet after approving rejection of the expired CBA, the union employees were legally permitted to strike. In fact, after the decision, the casino employees began striking and continued to no avail until the casino closed. 226 While focusing on bankruptcy policy to the exclusion of labor law's goals, the bankruptcy court's decision fomented the very outcome it had attempted to prevent. 2 27

Thus, the legacy of the Karykeion opinion, a decision based on a valid social policy concern but an atextual reading of the Bankruptcy Code, survives despite the flawed analysis. The distorted textual analysis passed first to Long Ridge, where the debtor nursing home appeared on its face to be dependent on cost-cutting for its survival, but in fact was in bankruptcy because of oversized payouts to shareholders. 228 The next debtor company, Trump Entertainment Resorts, was a serial filer whose profits were regularly pilfered by management. 229 While the decisions in Long Ridge and its progeny, Trump I, leaned heavily on the mission to further bankruptcy policy, the decisions in fact worked against bankruptcy goals by promoting strategic filing. These bankruptcies appear to be tactical maneuvers by the debtors to shed labor contracts and avoid the statutory duty to bargain with their unions. The policy justification for relying on poor textual analysis weakened with each iteration. Not only do these decisions subvert the text of the Bankruptcy Code and ignore labor policy, they also promote strategic filing and therefore work counter even to bankruptcy policy. 23 0 This slippery slope can only be corrected by courts following § 1113 to the letter.

### Link Turn---Workers

#### Frivolous matters because labor interests mitigate recession risks. Every worker matters!

Liscow ’16 [Zachary; 2016; Associate Professor, Yale Law School; Columbia Law Review, “Counter-Cyclical Bankruptcy Law,” vol. 116]

This Article builds on insights from macroeconomics showing that departing from these neoclassical assumptions reverses these conclusions.32 Although no specific model is required for the results here, these macroeconomics models provide useful conceptual frameworks for understanding how the results might arise. In general, bankruptcy serves the important function of reallocating capital and labor to more productive uses.33 But this result does not necessarily apply in recessions. Whether due to sticky information,34 sticky wages,35 or some other cause, reallocation does not work as well during recessions. Capital is underutilized. Workers lose their jobs and then become unemployed; they are not reallocated. One way to understand this phenomenon is through the presence of sticky wages. Labor demand falls, but wages do not. As a result, when workers are laid off, they are not re-employed. The economy stays in a recession, so capital too is underutilized. This market failure may justify “interference” with the value-maximizing role of bankruptcy.

Two positive externalities result from keeping workers employed. First, the government does not have to incur spending on items like unemployment insurance required for unemployed workers; due to long unemployment durations, this spending is unusually high during recessions for each job lost.36 Second, as John Maynard Keynes argued in the first half of the twentieth century, keeping one worker employed results in a “multiplier,” through which increased spending by one employed worker results in more employment, further increasing spending and therefore employment.37 Thus, spending a dollar to keep a worker employed is worth more than a dollar in increased economic output.38

#### 1. INFORMATION---union activism, backed by an enforceable CBA, during reorganization provides a critical ally to corporations---unlocking effective corporate governance.

Dawson ’14 [Andrew; February 18; Associate Professor at the University of Miami School of Law; American Bankruptcy Law Journal, “Labor Activism in Bankruptcy,” vol. 89]

As illustrated in the cases above, the struggle among creditors to control the corporate reorganization can directly threaten the interests of workers. The two attempted restructurings of Hostess provide examples of how controlling creditors may require the debtor to re-work its collective bargaining agreements as a condition to providing financing for the reorganization. And as seen in Hostess II and the AMR reorganization, adjusting labor costs may be the primary purpose of the bankruptcy filing.

Labor unions clearly had an important role in these cases as bargaining agents in the § 1113 rejection process. But these cases also show that this was not labor unions' only role. In fact, the Hostess bakers' union refused to even engage in the concession bargaining process, declining to oppose the motion to reject their collective bargaining agreement. Instead, they expressed their desire to negotiate over bankruptcy strategy. The AMR pilots did both-they engaged in concession bargaining while at the same time explored alliances to change the course of the bankruptcy proceedings.

With both of these debtors, the unions' arguments were unsuccessful at opposing the debtor's motion to reject the collective bargaining agreements, but they were successful in attracting the attention of other creditors. In AMR's case, the pilots' union's arguments were rejected by the court in the § 1113 litigation, but they were accepted by the bondholders and by AMR's merger partner. In Hostess I, although the agreement between the Teamsters and Yucaipa ultimately proved ineffective, the union was successful in finding a partner to attempt to solve what it identified as managerial slack. These cases, then, provide examples of how labor union activism in bankruptcy can impact bankruptcy governance.

There is good reason, then, to believe that labor unions can impact a corporate reorganization and potentially protect labor's interests in bankruptcy by forging alliances in the competition for control. But is this activism good for bankruptcy governance?

An evaluation of whether labor activism is good for bankruptcy governance is complicated because, as has long been recognized, "governance questions are inextricably bound up in the broader policy question of what goals Chapter 11 should seek to promote." 33 Corporate reorganization is designed to promote reorganization and to maximize returns to creditors.134 At times, these goals may be consistent, as rehabilitating the debtor may be the best way to maximize creditor recoveries. At other times, though, maximizing creditor returns may require liquidating the firm.135 Thus, from an outcome-based view of bankruptcy, it is difficult to assess whether labor activism is good for bankruptcy. In the AMR case, labor activism may have helped with both goals. In the Hostess cases, labor activism may have maximized returns to creditors (arguably) but did not promote reorganization.

From a process-oriented perspective, however, labor activism has the potential to improve bankruptcy governance. The potential added value from labor activism is primarily informational: it provides a means for workers to contribute to the reorganization by identifying managerial slack.

Yucaipa, the investment fund that partnered with the Teamsters in Hostess's first bankruptcy, has explained that one of the reasons it has sought alliances with unions is for their informational advantage: "cooperative union members provide 'phenomenal' information about potential deals and good business practices" as "union workers know more than anyone about 'the company, the management, the competitive environment and everything else' at their companies."136

Providing information does not assure that the process will properly balance bankruptcy's two policies, but it does provide the opportunity for improved governance in bankruptcy. As Anderson and Ma conclude in their empirical analysis comparing § 363 sale prices with prices obtained through a confirmed plan of reorganization, the lower sale prices through § 363 sales are not due to the speed of such sales or to the financial distress of the seller; rather, they conclude that the lower prices "appear to be associated with the diminished creditor negotiation leverage in 363 sales."137

This information does not necessarily promote reorganization or liquidation. Instead, it can improve creditor negotiations that can lead to maximizing asset value.

This basic argument that labor union's monitoring information can improve bankruptcy governance has a direct corollary in the corporate governance literature. Kenneth Dau-Schmidt, for instance, has argued that an alliance between capital and labor could greatly improve monitoring of management by combining shareholders' control rights with labor's inside information regarding the firm's operations. 38 That is, labor-stakeholder alliances can improve corporate governance outside of bankruptcy. Likewise, labor-stakeholder alliances, in which labor unions contribute their inside information into the market for corporate control, have the potential to improve governance in corporate reorganizations. This is especially true in those cases in which there is competition for creditor control, as "[t]he marketization of reorganization law has placed a greater premium on information."'3 9

#### If there is a link, the plan reduces labor strife. Otherwise, firm collapse.

Hunter ’22 [Olivia; July 25; J.D. 2022, Columbia Law School, B.A. 2016, Earlham College; Columbia Business Law Review, “A Bankrupt Bargain,” vol. 2022]

Maintaining labor peace is another major reason Congress may have chosen to except expired agreements from rejection. In Accurate Die Casting, the NLRB held that "[t]he obligations which survive the expiration of a collective-bargaining agreement are among the most important that are contained in the agreement," and that "[l]abor peace is preserved by the maintenance of established practices." 304 Indeed, after their expired CBA was rejected In re Trump Entertainment, the unionized workers at Trump's casino went on a prolonged strike that ended in the business's closure. 305 This exemplifies the labor strife that debtor corporations may experience after they reject their unexpired CBAs.306 Because labor law preserves only the most important aspects of a CBA's terms after expiration, such as wages, hours, benefits, and work rules, it makes sense that Congress would provide for the maintenance of the these status quo obligations, while providing flexibility to the debtor through the interim relief provision. 30 7

#### The plan is balanced! Even under ‘good faith’ unions cannot make extraordinary demands.

Slade ’25 [Michael; April 1; Judge, United States Bankruptcy Court for the Northern District of Illinois, Eastern Division; United States Bankruptcy Court for the Northern District of Illinois, “In re VMR Contractors, Inc.,” No. 22-bk-14211]

It is critical to understand that as part of the statutorily directed give-and-take of section 1113, a union cannot demand the impossible from a debtor. See, e.g., Nw. Airlines, 346 B.R. at 328; Karykeion, 435 B.R. at 684 (holding that union failed to show good cause for rejecting proposals where the union made no counterproposal concerning the proposed elimination of the successorship provisions in the CBAs and continued to make demands the debtor could not meet); In re Maxwell Newspapers, Inc., 981 F.2d 85, 90–92 (2d Cir. 1992) (a lack of good cause may be demonstrated by union demands that are impossible for the debtor to meet and failure to offer alternatives that take into account the debtors’ plan); Mission Coal, 2019 WL 1024933, at \*30 (“‘Good cause’ does not include demands that are not economically feasible or alternatives that would not permit the debtor to reorganize successfully.”); Walter Energy, 542 B.R. at 895– 96 (same). For that very reason, while the debtor can (and often does) propose that unions make material sacrifices pursuant to section 1113 where doing so is necessary to its reorganization, the same is true in reverse: a debtor cannot demand something that a union is legally unable to do. If, as in National Forge, “[t]he Union’s insistence that the Debtor provide something which was not within its control indicates that the Union’s refusal to accept Debtor’s proposal was without good cause,” 289 B.R. at 812, then a debtor’s insistence that a union do something not within its control must indicate that the union did have good cause to reject the proposal.

For that reason and that reason alone, I cannot grant the motion filed by VMR at this time. The only proposal made by VMR to Local 1 demanded that a third party which Local 1 did not control make concessions. Local 1, quite literally, could not say “yes” to the proposal. Section 1113 does not permit me to authorize rejection of the CBA under those circumstances because Local 1 had “good cause” for saying “no” to doing something it could not legally do.

But as described above, nothing about this changes the reality facing all of the parties in this chapter 11 case. There is no reason to believe that the CBA can survive reorganization. So, if VMR proposes to simply reject the CBA and provide Local 1 employees with go-forward terms of employment similar to what Mr. Robertson testified at trial they would be, it is hard to see any justification (let alone “good cause”) for Local 1 rejecting such a proposal. Such a proposal could permit VMR to reorganize; it would likely lead to any allowed claim from the Fund being treated exactly as VMR has suggested. Local 1 would likely be in a better position than it is in today because VMR could employ its members; its members would certainly benefit. And the Fund would be able to achieve at least some recovery under a confirmed plan—a recovery likely higher than what it could obtain should VMR have to close its doors. Again, I’m hopeful that after reading this opinion, the parties will resume discussions in this direction, but if they do not, all parties retain their rights under the Bankruptcy Code.

#### Employee inclusion acts as a financial early warning system, ensuring long-term stability.

Knopf ’25 [John and Kristina Lalova; February 2025; Associate Professor of Finance at the University of Connecticut; Assistant Professor of Finance at Michigan State University; SSRN, “Predicting Bankruptcy: Ask the Employees,” https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=4399476]

Our paper demonstrates that employee satisfaction is a powerful predictor of bankruptcy across different phases of the bankruptcy process – years before filing, immediately before filing, and during the restructuring or liquidation phase. We find that two to three years before bankruptcy, employee sentiment provides an early warning signal, outperforming traditional financial models in predictive accuracy. Employees possess unique insider knowledge about operational inefficiencies and declining workplace conditions that financial statements fail to capture at such an early stage. However, in the year leading up to bankruptcy, financial indicators become dominant, reflecting distress that was previously only visible to employees.

When we incorporate employee satisfaction into established bankruptcy prediction models, we observe significant improvements in their predictive performance. Employees’ attitudes enhance the models’ ability to detect financial distress earlier, strengthens their in-sample fit, and improves out-of-sample forecasting accuracy. This suggests that employee satisfaction complements financial metrics rather than merely duplicating their predictive power. Furthermore, during the bankruptcy process itself, employees’ attitudes play a critical role in predicting whether a firm will successfully emerge from bankruptcy or face liquidation. Higher employee satisfaction is strongly associated with successful reorganizations, highlighting the importance of human capital in corporate recovery

We further extend our analysis by leveraging advanced machine learning techniques to assess employees’ attitudes from textual reviews. Our results show that qualitative feedback from employees contains rich predictive signals beyond numerical satisfaction ratings, underscoring the depth of employee insight into corporate distress. This finding contributes to the growing literature on alternative data sources for financial risk assessment.

We use a Cox proportional hazards model to test whether employee satisfaction, financial and market data increase the hazard of bankruptcy emergence. We test whether the company would emerge from bankruptcy given their time of filing to their time of liquidation/restructuring. Our results suggest a complex temporal relationship between employee satisfaction and bankruptcy emergence. While higher employee satisfaction one year before filing may delay emergence, possibly due to reorganization efforts prioritizing employee concerns, higher satisfaction two years before filing appears to facilitate eventual emergence. This pattern suggests that the timing of employee satisfaction measurements relative to bankruptcy filing is crucial in understanding its impact on corporate restructuring outcomes.

Overall, our findings suggest that employees' perspectives offer valuable, forward-looking information that traditional financial models overlook. The results highlight the need for bankruptcy prediction models that incorporate workforce sentiment to improve risk assessment and credit analysis. Future research should explore the causal mechanisms underlying the relationship between employee satisfaction and financial distress, as well as the broader implications of workforce morale for corporate stability and long-term performance.

#### The plan does not end bankruptcy filings, it weeds out economically extraneous cases.

Kimhi ’15 [Omer and Arno Doebert; August 15; Assistant Professor at the University of Haifa Faculty of Law; Doctoral candidate at Bucerius Law School, Associate at Reimer Rechtsanwälte, Hamburg; American Bankruptcy Institute Law Review, “Bankruptcy Law as a Balancing System: Lessons from a Comparative Analysis of the Intersection between Labor and Bankruptcy Laws,” vol. 23]

The first problem the labor modifications present is bankruptcy abuse. This means that debtors use bankruptcy proceedings in order to enjoy the labor law privileges bankruptcy law affords, even when there is no real financial or economic necessity for the filing. Since the employer cannot easily dismiss employees outside bankruptcy, he files for bankruptcy and thereby bypasses the general labor law hudles. The existence of bankruptcy abuse is damaging both to employees and to society as a whole. From the employees' perspective, they do not receive the protections they deserve. If outside bankruptcy dismissed employees are entitled to compensation, to a notice period, or to certain procedural benefits, the filing deprives them of these rights and forces them to accept less for their terminations. From a societal perspective the bankruptcy abuse is an unrequired cost. A bankruptcy process is very expensive (it involves lawyers, judges, economic consultants and more), and an unnecessary filing wastes resources with no social gains.225 The bankruptcy decreases firms' value and raises credit prices. 226 Judicial systems, therefore, should aim to minimize bankruptcy abuses, and decrease parties' incentives to file for bankruptcy when there is no financial or economic need to do so.

The European systems, however, seem to do the opposite. Although few empirical studies have been conducted on bankruptcy abuse in Europe, from the few studies that have been conducted, especially in the Netherlands, it is clear that the phenomenon is not negligible. In research conducted in 1996, for example, Roger Knegt examined this problem by looking into 286 bankruptcy cases (including interviews with administrators and debtors).227 He reports that in eight percent of the cases the need to reduce employment costs was indicated as an important motive for the bankruptcy filing.228 In all these cases, the firm filed for liquidation bankruptcy (in order to enjoy the labor law privileges),229 yet it was not liquidated but rather sold to a buyer that was linked to the firm's former management or shareholders. The firm continued as a new legal entity, but with similar or resembling ownership or leadership. 230 Knegt explains that, although formally prohibited, management and shareholders in these cases used the bankruptcy process in order to circumvent regular labor laws and reduce employment costs in ways unavailable outside of bankruptcy. 231 A more recent study conducted in 2005 confirms the existence of bankruptcy abuse, although on a smaller scale. This study, which focused on 868 bankruptcy cases, shows that approximately four percent of the bankruptcies were filed in order to cut employees' surplus.232 In addition, most of the trustees interviewed for the study said that they are inclined to almost always consider a "technical bankruptcy" as a legitimate way out of financial difficulties. 233 The vast number of trustees that consider bankruptcy abuse as a solution to a firm's economic distress may indicate that the number of unnecessary filings is even greater than the numbers Knegt et al., report.

But bankruptcy abuse is only part of the problem. Even when the bankruptcy filing is economically justified, forum-shopping among different bankruptcy proceedings can create social damage. When a jurisdiction offers several types of bankruptcy procedures-some with labor law modifications and others without-firms tend to choose the bankruptcy procedure that maximizes their labor law privileges, rather than choose the more economically efficient procedure. To better explain this argument, we first examine the different bankruptcy procedures we refer to, and then show the difficulties bankruptcy labor modifications create.

### Link Turn---Investment Discipline

#### 2. INVESTMENT DISCIPLINE---raising the cost of bankruptcy breeds smarter business capacity.

Mazur ’22 [Joe; September 30; Economist and researcher at the Purdue University Economics Department; Purdue University Economics Department, “Can Stricter Bankruptcy Laws Discipline Capital Investment? Evidence from the U.S. Airline Industry,” https://mazur3.github.io/files/Mazur\_BankruptcyInvestment.pdf]

Mazur (2022) demonstrated the intuitive yet overlooked theoretical possibility that the handling of contracts under the U.S. Bankruptcy Code might have a direct impact - and one distinct from any financing considerations - on the ex ante investment behavior of imperfectly competitive firms. That paper showed that higher bankruptcy costs could theoretically reduce firms’ incentives to invest during periods of high demand and increase their likelihood of disinvestment during periods of low demand, the pair of which effects I shall refer to herein as “capacity discipline.” Whether and to what extent those effects are present in reality are the central questions of this work. To answer them, I develop and estimate a structural model that allows firms to both enter and exit Chapter 11 in a continuous-time, discrete-choice oligopoly investment game. I estimate the model using data on airline capacity, bankruptcy, and demand in the U.S. airline industry, and exploiting an increase in the expected cost of reorganization due to the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005, which made significant changes to Chapter 11. I find support for the influence of bankruptcy policy upon investment and evaluate the consequences of alternative insolvency policies. I also identify BAPCPA as a potential cause of the capacity discipline observed in the airline industry after 2005.

The airline industry presents the ideal context in which to test the link between investment and bankruptcy for three main reasons. First, the volatility of air travel demand and the prevalence of contractual labor and capital lease agreements in this industry make Chapter 11 especially appealing for distressed airlines. In other words, airlines satisfy the requirements of an industry that would benefit from Chapter 11: They heavily use long-term contracts, and they face volatile demand that sometimes necessitates breaching those contracts. Second, the prevalence of bankruptcy in the industry suggests it may be strategically used. To the extent that forward-looking firms internalize the reorganization option, they may tend to over-commit to long-term contracts, resulting in rampant bankruptcy when demand falls. The notorious insolvency of U.S. airlines fits this pattern. Third, anecdotal evidence suggests that an airline’s Chapter 11 filing can be strategically timed, indicating that bankruptcy is far from an exogenous event.

Beyond the anecdotal evidence of its strategic use, modeling bankruptcy as voluntary is reasonable given the appeal of Chapter 11 reorganization as a downsizing option. Chapter 11 introduces malleability to many otherwise rigid contractual agreements. For example, financially distressed corporations can often renegotiate substantial portions of debt and other liabilities. On the non-financial side, Chapter 11 offers the potential to rescind or unilaterally alter many types of contracts. These non-financial protections can be especially important for companies with contractual commitments to utilize labor, capital, or materials because they open up cost-cutting options unavailable outside of bankruptcy. Among the more salient examples are pay cuts for unionized employees, renegotiated leasing terms, and pension benefit modifications.

For all of these reasons, a change to the perceived cost of filing under Chapter 11 is highly likely to affect ex ante investment incentives, and the BAPCPA reform of 2005 did precisely that. BAPCPA reduced the amount of time allowed for a corporation to put forth an exclusive plan of reorganization, increased the amount and priority of wage and benefit claims, tightened the deadlines for accepting certain leases, and raised the priority and amount of a number of other claim categories. Legal scholars and practitioners agree that the reform served to restrict debtor protection and reduce the likelihood of a successful reorganization, particularly for the largest and most complex corporations.3 Indeed, under standard economic models of bargaining, such as Merlo and Wilson (1998), limiting the exclusivity period alone is enough to shift bargaining power to creditors. Therefore, BAPCPA seems to present a natural test for the influence of bankruptcy costs upon investment behavior.

My empirical approach to studying the link between bankruptcy and investment is three-fold. First, I perform a difference-in-differences analysis on airline industry data to determine whether BAPCPA had a disciplining effect on the investment behavior of large airlines. Second, I estimate a dynamic oligopoly model of investment and bankruptcy in order to measure BAPCPA’s impact on perceived Chapter 11 costs. According to my estimates, the reform roughly doubles the expected cost of filing for Chapter 11 bankruptcy. Third, using the parameters estimated from the structural model, I simulate two counterfactual scenarios. In the first, I simulate equilibrium behavior as though BAPCPA had never been passed, finding an increase in industry capacity of about 5%. This analysis suggests that BAPCPA may have played a role in the capacity discipline observed in the airline industry after 2005. While the phenomenon has been well documented and discussed since that time, explanations for its persistence have been little more than conjectures. Airline consolidation, a disappearing emphasis on market share, and more rational management have all been suggested, but most simply take the phenomenon as given. This paper offers an alternative mechanism, namely, an underlying change in bankruptcy law may have made holding capacity less desirable. In the second scenario, I simulate a new equilibrium in which reorganization is prohibitively costly, allowing me to measure the overall effect of the Chapter 11 option (i.e. in addition to Chapter 7 liquidation) on industry capacity. I find that eliminating Chapter 11 reduces total industry capacity by as much as 20%, suggesting that the relatively debtor-friendly nature of insolvency policy in the U.S. tends to increase investment overall.

Understanding how the airline industry has responded to bankruptcy reform is valuable in its own right, yet the framework used herein applies to any industry with heavily contractual investment and volatile demand. Steel, auto manufacturing, telecommunications, and even retail conform to this pattern. The capacity discipline engendered by a more creditor-friendly Chapter 11 should correlate positively with an industry’s demand volatility and prevalence of long-term contracts. The degree to which this relationship applies beyond the airline industry is an open question, and one that would seem highly relevant for the study of industry dynamics, both within each relevant industry and in the broader macroeconomy.

#### Absent discipline, inefficient invocations of bankruptcy create economic disruptions.

Kimhi ’15 [Omer and Arno Doebert; August 15; Assistant Professor at the University of Haifa Faculty of Law; Doctoral candidate at Bucerius Law School, Associate at Reimer Rechtsanwälte, Hamburg; American Bankruptcy Institute Law Review, “Bankruptcy Law as a Balancing System: Lessons from a Comparative Analysis of the Intersection between Labor and Bankruptcy Laws,” vol. 23]

The second, and perhaps more important, argument for the preservation of non-bankruptcy entitlement is that not only is a bankruptcy specific change in substantive rights not justified, it can also be damaging. Bankruptcy specific changes create bankruptcy abuse and forum-shopping effects, and these effects decrease debtors' value and harm the social welfare. Douglas Baird explains the problem of forum shopping through the following example.182 Imagine there are two cities, each with its own courthouse. The reason for building two courthouses is to allow the residents of each city to resolve their disputes close to where they reside-without having to spend unnecessary traveling costs. If, however, the two courthouses adjudicate cases according to a different set of substantive rules, then the purpose of having two courthouses will be defeated. Litigants will choose the court that applies the rules which maximize their chances of success, even when adjudication in that courthouse imposes unnecessary traveling costs on all parties. The same is true with regard to bankruptcy and non-bankruptcy forums. The goal of creating a bankruptcy specific collection system is to maximize the debtor's value when it becomes insolvent. If, however, substantive laws change as a result of the bankruptcy filing, then the debtor and creditors will choose the forum that implements the law most favorable to their individual claims. They may invoke bankruptcy in order to gain advantages from the substantive law modifications, even when the bankruptcy reduces the debtor's value for all other claimants. This creates economic inefficiency, and in a sense reintroduces the very problem bankruptcy is designed to solve 183

### Link Turn---Spillover

#### The coming surge of bankruptcy filings precipitates a recession, derailing financial stability and ending the dollar.

Dilawer ’24 [Awais; December 2; an investment professional with 17 years of experience in private markets, specializing in both debt and equity; Enterprising Investor, “Navigating Troubled Waters: What the Surge in Bankruptcy Filings Means for the Economy,” https://blogs.cfainstitute.org/investor/2024/12/02/navigating-troubled-waters-what-the-surge-in-bankruptcy-filings-means-for-the-economy/]

The financial landscape is showing signs of strain as bankruptcy filings surge, with businesses and consumers alike feeling the pressure of shifting economic conditions. Despite Federal Reserve rate cuts aimed at stabilizing the market, historical patterns suggest that monetary policy alone may not be enough to stem the tide. As cracks in the system become more apparent, understanding the drivers of the rise in bankruptcies is crucial for navigating the challenges ahead.

Statistics reported by the Administrative Office of the US Courts show a 16% surge in bankruptcy filings in the 12 months before June 30, 2024, with 486,613 new cases, up from 418,724 the previous year. Business filings saw an even sharper increase, rising by 40.3%. These figures indicate growing financial stress within the US economy, but the real storm may be just around the corner.

During the 2001 recession, the Federal Reserve’s aggressive rate cuts failed to prevent a sharp increase in corporate bankruptcies. Despite lower interest rates, the Option-Adjusted Spread (OAS) for high-yield bonds widened significantly, reflecting heightened risk aversion among investors, and increasing default risks for lower-rated companies.

<<FIGURE OMITTED>>

The Disconnect Between Monetary Easing and Market Conditions

As a result, the period saw a sharp spike in corporate bankruptcies as many businesses struggled to manage their debt burdens amid tightening credit conditions and deteriorating economic fundamentals. This disconnect between monetary easing and market realities ultimately led to a surge in bankruptcies as businesses struggled with tightening credit conditions.

A similar pattern emerged during the 2008 global financial crisis. For 218 days, the ICE BoFA US High Yield OAS Spread remained above 1000 basis points (bps), which signaled extreme market stress. This prolonged period of elevated spreads led to a significant increase in Chapter 7 liquidations as companies facing refinancing difficulties opted to liquidate their assets rather than restructure.

<<FIGURE OMITTED >>

The sustained period of elevated OAS spreads in 2008 serves as a stark reminder of the crisis’s intensity and its profound impact on the economy, particularly on companies teetering on the edge of insolvency. The connection between the distressed debt environment, as indicated by the OAS and the wave of Chapter 7 liquidations, paints a grim picture of the financial landscape during one of the most challenging periods in modern economic history.

The Federal Reserve’s interest rate policies have frequently lagged the Taylor Rule’s recommendations. The Taylor Rule is a widely referenced guideline for setting rates based on economic conditions. Formulated by economist John Taylor, the rule suggests that interest rates should rise when inflation is above target, or the economy is operating above its potential. Conversely, interest rates should fall when inflation is below target or the economy is operating below its potential.

The Lag

The Fed’s rate adjustments lag for several reasons.

First, the Fed often adopts a cautious approach, preferring to wait for clear evidence of economic trends before making rate adjustments. This cautiousness can lead to delayed responses, particularly when inflation begins to rise, or economic conditions start to diverge from their potential.

Second, the Fed’s dual mandate of promoting maximum employment and stable prices sometimes leads to decisions that diverge from the Taylor Rule. For example, the Fed might prioritize supporting employment during economic slowdowns, even when the Taylor Rule suggests higher rates to combat rising inflation. This was evident during prolonged periods of low interest rates in the aftermath of the 2008 financial crisis. The Fed kept rates lower for longer than the Taylor Rule suggests to stimulate economic growth and reduce unemployment.

In addition, the Fed’s focus on financial market stability and the global economy can influence its rate decisions, sometimes causing it to maintain lower rates than the Taylor Rule prescribes. The rule’s goal is to avoid potential disruptions in financial markets or to mitigate global economic risks.

Historical Fed Funds Rate Prescriptions from Simple Policy Rules

<<FIGURE OMITTED>>

The consequence of this lag is that the Fed’s rate cuts or increases may arrive too late to prevent inflationary pressures or curb an overheating economy, as they did in the lead-up to previous recessions. Cautious timing for rate cuts may also delay needed economic stimulus, which prolongs economic downturns.

As the economy faces new challenges, this lag between the Fed’s actions and the Taylor Rule’s recommendations continues to raise concerns. Critics argue that a more-timely alignment with the Taylor Rule could lead to more effective monetary policy and reduce the risk of inflation or recession, ensuring a more stable economic environment. Balancing the strict guidelines of the Taylor Rule with the complexities of the real economy remains a significant challenge for policymakers.

As we approach Q4 2024, the economic landscape bears unsettling similarities to past recessions, particularly those of 2001 and 2008. With signs of a slowing economy, the Federal Reserve has cut the interest rate by 0.5% recently to prevent a deeper downturn. However, historical patterns suggest this strategy may not be enough to avert a broader financial storm.

Furthermore, easing monetary policy, which typically involves lowering interest rates, will likely shift investor behavior. As yields on US Treasuries decline, investors may seek higher returns in high-yield sovereign debt from other countries. This shift could result in significant capital outflows from US Treasuries and into alternative markets, putting downward pressure on the US dollar.

The current global environment, including the growing influence of the BRICS bloc, the expiration of Saudi Arabia’s petrodollar agreements, and ongoing regional conflicts, make the US economic outlook complex. The BRICS nations (Brazil, Russia, India, China, and South Africa) have been pushing to reduce reliance on the US dollar in global trade, and petrodollar petrodollar contracts are weakening. These trends could accelerate the dollar’s depreciation.

As demand for US Treasuries declines, the US dollar could face significant pressure, leading to depreciation. A weaker dollar, geopolitical tensions, and a shifting global economic order could place the US economy in a precarious position, making it increasingly difficult to maintain financial stability.

While Federal Reserve rate cuts may offer temporary relief, they are unlikely to address the underlying risks within the financial system. The specter of widening OAS spreads and rising bankruptcies in 2024 is a stark reminder that monetary policy alone cannot resolve deep-seated financial vulnerabilities. As we brace for what lies ahead, it’s essential to recognize the potential for a repeat of past crises and prepare accordingly.

#### 1. SPILLOVER---bankruptcy is a contagion, cascading to all networks of the economy. Independently, dampens supply chain shocks

Celestin ’24 [Mbonigaba and Mugabire Vedaste; October 2024; Professors at Braniae University; Braniae Journal of Business, Sciences and Technology, “The Impact of Corporate Bankruptcy Laws on Financial Restructuring and Business Continuity Strategies,” vol. 8]

However, the reality presents a contrasting scenario. Despite corporate bankruptcy laws existing in most economies, financial restructuring remains a challenging process, with high failure rates. According to the World Bank (2022), only 30% of firms that file for bankruptcy successfully restructure and continue operations. Additionally, a study by the IMF (2021) found that in emerging markets, up to 45% of bankrupt companies liquidate rather than restructure due to inefficient legal frameworks. Even in developed economies, financial distress often results in prolonged court battles, with an average corporate bankruptcy case lasting 1.5 to 3 years (OECD, 2023). The high legal and administrative costs—estimated to consume 10-15% of firm assets in some jurisdictions—further exacerbate the problem, leaving businesses with fewer resources to recover (European Commission, 2021).

The consequences of weak bankruptcy frameworks are far-reaching. When companies struggle to restructure effectively, mass layoffs become inevitable. A report by the International Labour Organization (ILO, 2022) found that corporate insolvencies led to approximately 1.2 million job losses globally in 2021 alone. Investors, too, suffer substantial financial losses, with an estimated $250 billion in unpaid creditor claims annually (Moody’s Analytics, 2023). The economic ripple effects include decreased consumer confidence, reduced tax revenues for governments, and increased financial instability across supply chains.

The magnitude of the problem is alarming. The number of corporate bankruptcies surged by 21% worldwide between 2019 and 2022 (Deloitte, 2023), with small and medium-sized enterprises (SMEs) being particularly vulnerable. In the United States, corporate bankruptcy filings increased from 5,518 in 2019 to 7,128 in 2022, reflecting the deteriorating financial health of businesses (U.S. Courts, 2023). Similar trends have been observed in the European Union, where insolvency rates grew by 23% in 2021 alone (European Banking Authority, 2022). The COVID-19 pandemic further intensified financial distress, exposing weaknesses in existing bankruptcy frameworks and making effective financial restructuring an urgent priority.

#### That provokes a negative feedback loop that terminates growth.

Taylor ’25 [Diane; August 25; Journalist at The Guardian; “Rising Bankruptcy Filings Signal Economic Headwinds Ahead,” https://havokjournal.com/finance-2/rising-bankruptcy-filings-signal-economic-headwinds-ahead/]

Looking Ahead: Potential Economic Implications

The surge in bankruptcy filings could be an early indicator of more significant economic challenges ahead. Historical patterns suggest that increases in bankruptcy rates often precede broader economic downturns. As more consumers and businesses seek debt relief through bankruptcy courts, the effects ripple through the financial system.

Banks and credit unions may face increased loan losses, potentially leading to tighter lending standards that could further constrain economic growth. Reduced consumer spending power resulting from widespread financial distress could create a negative feedback loop, where decreased demand leads to business closures and job losses, which in turn drive more bankruptcy filings.

The current trend in bankruptcy filings serves as a crucial barometer of economic health, signaling that beneath surface-level stability, many Americans and businesses are experiencing significant financial distress that may foreshadow broader economic headwinds ahead.

#### Firms are interconnected. Bankruptcy ripples.

Song ’24 [Hao and Xiaoxia Zhao; January 23; Professor at the School of Civil, Commercial and Economics Law, Henan University of Economics and Law; Associate Professor at the School of Applied Science, Jiangxi University of Science and Technology, and the School of Public Administration and Policy, Nanchang University; Finance Research Letters, “The Unexpected Consequences of Company Bankruptcy: An Investigation Into the Spillover Effect of Local Economic Liquidation,” vol. 61]

Bankruptcy is a momentous occurrence in the business realm, frequently accompanied by a surge of media coverage, legal actions, and financial evaluations. The ramifications of bankruptcy, namely for the corporation undertaking the procedure, have been extensively scrutinized and recorded (Yuan et al., 2023). Nevertheless, the impact of firm bankruptcy on the local economies in which they operate has yet to be given as much consideration. This study explores an overlooked aspect of bankruptcy, aiming to reveal any unforeseen outcomes that may occur following corporate insolvency. The importance of this inquiry resides in the framework of China's swiftly changing economic terrain. China, being one of the largest and most vibrant economies globally, has experienced a significant increase in corporate bankruptcies in the last ten years. The causes are diverse, encompassing economic downturns as well as government actions intended to reduce overcapacity and foster economic reform. Consequently, it is now more crucial than ever to comprehend the consequences of these bankruptcies that go beyond their immediate effects on individual companies. In the realm of corporate bankruptcy, the spillover effect refers to the unanticipated and unintentional economic repercussions that might spread throughout the regions and industries closely linked to the bankrupt company. There is a need for more empirical studies in this field, although their importance is growing. Bankruptcy can elicit various responses from suppliers, creditors, employees, and local communities. Furthermore, the abrupt decline in economic activity could have an adverse impact on local property values, municipal tax income, and community welfare. The ramifications of corporate bankruptcy extend well beyond the confines of company boardrooms and financial statements. The phenomenon has a widespread impact on economies and societies, resulting in unforeseen and significant outcomes. Amidst the current era of globalized markets and interconnected financial systems, comprehending the spillover impact of corporate insolvency on local economies has become progressively vital. This study aims to examine the complex process of economic liquidation that arises from corporate insolvency, with a specific emphasis on China. The significance of this research is magnified by China's dynamic economic landscape, which is recognized as one of the largest and most important in the world.

## DA

### Case Turns DA / Cyber / Ads

#### Bad-faith bankruptcies undermine securities enforcement.

Alces ’10 [Kellis; Winter 2010; Assistant Professor of Law at the Florida State University College of Law; American Bankruptcy Institute Law Review, “Limiting the SEC’s Role in Bankruptcy,” vol. 18]

Of course, the SEC serves important public policies, and even bankrupt companies can affect the public securities markets in important ways.' When the securities markets and bankruptcy intersect, we must find ways to balance the priorities of the separate systems to reach results that advance both, or at least avoid undermining either. The balance may prove a delicate one in some instances, however, and wherever possible, the bankruptcy courts and bankruptcy system should determine the SEC's role in the reorganization of a debtor company, not the other way around.

The SEC serves the important purpose of "safeguard[ing] the public interest by enjoining securities violations." 2 The securities laws have become vital to the proper function of our securities markets and federal securities laws play an increasingly important role in the governance of public corporations. To excuse a public corporation from the mandates of the securities laws just because it has entered bankruptcy would be to insulate it from much of the corporate law that applies to it and may serve as an incentive for failing companies who have not yet filed to violate securities laws in anticipation of filing. When a company is in financial distress, it is crucially important that it abide by the disclosure requirements of securities laws and that its public investors be aware of the truth about its financial condition. There are ways to resolve the problem without pursuing actions against bankrupt corporations, such as continuing to hold managers accountable for the violations they caused. Further, once the company files bankruptcy, the bankruptcy system closely supervises the firm and its management, and imposes rigorous disclosure requirements

#### Functioning securities law is key to cyber-security.

Lopez ’23 [Lisa; 2023; J.D. Candidate, Temple University Beasley School of Law; Temple Law Review, “The Road to the Rules: The SEC Mandates Cybersecurity Disclosures,” vol. 96]

Only recently, following a number of high-profile attacks on major American corporations, have federal agencies begun to consider the broader range of cybersecurity concerns affecting companies." The Securities and Exchange Commission (SEC) is among U.S. regulators beginning to turn their attention to gaps in cybersecurity oversight. SEC Chair Gary Gensler has stated that "[c]ybersecurity is a team sport," 1 6 and the SEC sees itself as a key player on that team. The SEC grounds its authority for cybersecurity oversight in its mission to protect investors and ensure the integrity of financial markets. Chair Gensler asserted, in 2022, that "cyber relates to each part of [the SEC's] three-part mission: investor protection, facilitating capital formation, and that which is in the middle, promoting fair, orderly, and efficient markets."1 7

Finalized in July 2023, and over a decade in the making, the SEC's Rules on Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure ("Cybersecurity Rules") apply the long-established SEC corporate disclosure framework to the cybersecurity events, risks, and strategies of publicly traded companies. The Rules present both opportunities and challenges. Uniform, mandatory disclosures have the potential to spotlight successful cybersecurity practices as industry models and to lay plain the gaps and deficiencies that make some companies more vulnerable to a cyberattack. Risk assessment firm Moody's suggested that the Rules would "provide more transparency into an otherwise opaque but growing risk, as well as more consistency and predictability," and that "increased disclosure should help companies compare practices and may spur improvements in cyber defenses .... Nonetheless, the Rules provide little guidance on the application of the materiality standard to this emerging and shifting area of risk and oversight.2 0 While the materiality standard has historically been plagued by a lack of clarity in its application to other areas of disclosure, it is particularly problematic in the context of cybersecurity.2 1 Additionally, companies are understandably concerned about the inherent dangers of disclosing the details of an in-process cyberattack.22

#### Behavior spreads---deceit bankruptcies defang the FTC and encourage mass consumer fraud.

Florio ’23 [Nicolas; May 2023; J.D., George Washington University Law School; Federal Communications Law Journal, “Some Added Security: Applying Lessons from Bankruptcy Law to Strengthen the Collection of Consumer Fraud Penalties,” vol. 75]

Indeed, the gazelles of the telecommunications industry have stopped running, but there is greater cause for concern on the horizon. An unresolved disagreement amongst federal courts over a particular section of the United States Bankruptcy Code ("the Code") might offer telecommunications companies a way to completely erase their consumer fraud penalties through Chapter 11 reorganization, further upsetting the FCC and FTC's practical ability to collect their fines.7 While the United States' bankruptcy system is not intended as a means for corporate debtors to escape accountability for consumer fraud, a general understanding of the corporate bankruptcy process reveals how such an opportunity can arise.

When a distressed corporation files for relief under Chapter 11 of the Code, the corporation becomes a federally protected debtor." In turn, the government can no longer collect its penalty claims against the debtor corporation.9 This gives the corporation time to implement a plan of reorganization that restructures its capital arrangements and permits it to exit as a solvent entity.' 0 Any creditor whose claim against the corporation is not backed by collateral is classified as an unsecured creditor" and ranks low within the creditor hierarchy without any guarantee of recovery.1 2 Consumer fraud penalties levied by the FCC and FTC fall under unsecured status.1 3 If the debtor corporation seeks to discharge the penalty in its plan of reorganization, it may very well succeed in doing so, despite the fact that that debt was the consequence of fraud.' 4 For the FCC and FTC, this is the worst case scenario.

A recent case in the United States Bankruptcy Court for the Southern District of New York brought this exact fear to light. In 2019, Fusion Connect, Inc., a telecommunications provider, filed for bankruptcy and nearly discharged a $2.1 million FCC consumer fraud penalty levied via consent decree.' 5 The bankruptcy judge ruled that where the government itself is not an injured victim of the fraudulent scheme, the penalty is dischargeable.1 6 But on appeal, the bankruptcy court's ruling was reversed,"' rekindling an awareness within the federal judiciary of disagreement.' 8 And it has significant potential side effects.

Practitioners fear that the In re Fusion Connect saga serves as a precursor to what will soon become common practice in the telecommunications industry.1 9 Telecommunications companies may begin to test courts with bankruptcy spinoffs. 20 Here, they may offload their consumer fraud penalties into subsidiaries solely for the purpose of discharging them in bankruptcy. 2 1 And this will not only perpetuate the FCC and FTC's struggles to collect their penalties, but also the agencies' ability to curb mass market consumer fraud. To address these problems, this Note argues that by modifying the way the FCC and FTC issue their consumer fraud penalties, the agencies can not only protect their claims in bankruptcy but strengthen their overall ability to collect their fines and disincentivize default.

#### FTC enforcement and penalties deter deceptive economic representations.

Patten ’20 [Bonnie and Laura Smith; December 2020; attorneys at Truth in Advertising, Inc.; AMG Capital Management, LLC v. Federal Trade Commission, “Brief of Amicus Curiae Truth in Advertising, Inc. In Support of Respondent,” No. 19-508]

1. The central premises of modern consumer protection laws are that marketplace dishonesty is not simply deplorable in some abstract sense, but injurious—causing harms against which individual consumers and businesses cannot practically protect themselves; and that, if uncorrected, such behavior seriously impairs the efficient allocation of resources in the Nation’s market economy. See Pitofsky, Beyond Nader, 90 Harv. L. Rev. 661 (1977). On this understanding, some dishonesty is ineffectual or relatively harmless: Consumers don’t expect that a random donut shop actually serves the “world’s best coffee”; they can inspect and evaluate many goods for themselves; and when inexpensive, frequently purchased items fail to perform as advertised, they may switch to a competitor’s product. Id.

But many falsehoods and misrepresentations cannot be discovered until long after purchase. When an appliance is falsely marketed to last 10 years, the consumer may not learn that claim was deceptive until it breaks down after five, and if an ordinary metal was used, not the space-age alloy claimed, the consumer may never be able to detect that deception. The same goes for goods marketed as “Made in America,” products sold as organic, and health supplements claimed to contain potent, safe, or pure ingredients. Likewise, no car buyer could be expected to have detected deception when a leading automaker marketed pollution-spewing “clean diesel” vehicles, whose actual breakthrough technology was software designed to trick emissions-testing equipment. See https://www.propublica.org/article/how-vw-paid-25- billion-for-dieselgate-and-got-off-easy. Lying to consumers can be a highly successful business strategy.

Harms to consumers can go beyond pocket-book injury. As Judge Easterbrook’s opinion in FTC v. QT, Inc., 512 F.3d 858 (7th Cir. 2008), explained, when useless products are marketed with false health claims, consumers can forego therapies that might actually help. Id. at 863, overruled, FTC v. Credit Bureau Ctr., LLC, 937 F.3d 764 (7th Cir. 2019). (Some deceptions arguably are worse still, causing injury by concealing from consumers known dangers.)2

Consumers are not the only parties injured when false advertising goes unchecked. It typically costs more to produce organic goods or make products in America than it costs a dishonest competitor to affix a label saying that; it is obviously much more expensive to develop health products that are demonstrably effective in improving well-being than to lie about that.

9. These practices inflict systemic damage on the American economy. Consumer welfare is lost when money set aside to purchase needed products instead flows to sellers who lied. Bad advertising can drive out good: When consumers become suspicious of advertising claims, persuading them that an honest representation is true becomes more costly—a special obstacle for new market entrants, who account for a disproportionate share of innovative products, but who must rely on advertising to overcome consumer wariness. Capital is likewise misdirected to fraudulently successful businesses or toward developing detection-avoidance technologies.

In significant ways, these threats have worsened in recent years. First, the internet dramatically decreases the cost (to perpetrators) of dishonesty: Emails and online videos are essentially free, and it is cheaper to build websites that look like legitimate businesses than to fabricate brick-and-mortar operations. It has never been easier to gather data about and target vulnerable consumers. By contrast, detecting and combatting fraud have become more complex and costly: Online shoppers cannot directly inspect and compare goods before purchasing, nor complain in-person when they discover they were lied to; and it is much harder for them, and ultimately law enforcers, to unearth who perpetrated the fraud and where they are (or were, before the scam was exposed). Even internet-based counterstrategies can be outsmarted; on-line product reviews are not helpful if positive ones are faked by the seller or negative ones suppressed. Finally, as the many large and sophisticated frauds that triggered the 2008 financial crisis show, established national and multinational corporations are not “too big (or reputable) to lie.” Dishonest practices may be simply too remunerative to resist, and behemoths that have resources to fight battles of attrition with enforcement authorities can adopt the “catch me if you can” attitude of fly-by-night grifters.

3. Because these realities are “market failures,” the central determinant of whether dishonest practices can succeed—and inflict greater damage—is the efficacy of law enforcement. For two generations, courts, economists, and consumer advocates have recognized that traditional common law remedies afford remarkably ineffective consumer protection. Consumers often do not know they are victims of fraudulent marketing, and when they do, their individual injuries can be so relatively small and difficult to calculate and prove as to rule out hiring a lawyer—even before accounting for doctrinal limitations making winning a case almost impossible. Lawsuits by competitors deprived of market share by rivals’ dishonest marketing have never gained substantial traction either: Although competitors are often better positioned to detect harmful, deceptive practices, they face difficulty proving that a rival’s unlawful marketing caused a lower-than-expected market share; in markets where dishonesty is widespread (as in cigarette sales), participants have self-interested reasons for not filing suits challenging competitors’ deceptions; and the reality that litigation costs are borne by the plaintiff alone, while benefits redound to all competitors, poses a classic collective action problem (one made more difficult by the potential that joint efforts to sanction a misbehaving rival will raise antitrust flags, see Fashion Originators’ Guild v. FTC, 312 U.S. 457, 468 (1941)).

#### Extinction

Hamelink ’20 [Cees; 2020; Emeritus Professor of Global Communication at the University of Amsterdam, Athena Professor of Human Rights and Public Health at the Vrije Universiteit, Honorary President of the International Association for Media and Communication Research; Communication and Peace: Celebrating Moments of Sheer Human Togetherness, “A Polarized Planet” to “A Tall Order,” Ch. 4]

The accumulation of the fractures into polarization causes the human species—in the beginning of the twenty-ﬁrst century—to face once again deep existential risks. Those are the risks where humankind as a whole is imperiled as they imply major adverse consequences for the course of human civilization for all time to come. Risks in this cate- gory are a recent phenomenon. This is part of the reason why it is use- ful to distinguish them from other risks. We have not evolved mechanisms, either biologically or culturally, for managing the present risks (Bostrom 2002) that are largely “unintended consequences of radicalized modernity” (Beck 1999, 3). The concern about the extinction of the species we belong to is based on carcinogenic ingredients in food supplies, organized (cyber-)crime, pollution by poisonous materials (acid rains, chemical products), series of natural disasters (asteroids, comets, volca- noes), genetic experiments, collapse of ﬁnancial markets, the scarcity of water and energy sources, infectious pandemic diseases, the consequences of genetic engineering, artiﬁcial intelligence or molecular manufacturing, or on increasing global inequalities that endanger economies and politics (Stiglitz 2013). There is the persistent risk of nuclear, chemical and biological warfare with the observation that for the ﬁrst time in history weapons of mass destruction and the knowledge of how to manufacture them are available for individuals and small groups. There is also climate change, the loss of biological diversity and the largely underrated issue of overpopulation.2 The human species has survived over centuries

deep fractures that divide us pose a serious existential risk to humanity and stand in the way of collectively celebrating cosmopolitan togetherness. The form of human cooperative communication we need to build resilient communities that can confront polarization is the genuine conversation that I called “deep dialogue”. This conversational mode of human

behaviour has strongly increased. In order to compete successfully, deceit is practically unavoidable. Being open and honest simply cannot win all those battles. Modern society is mainly a market economy. Social life is governed by all types of commercialization. All this buying and selling only work if people believe, it is in their interest and that they get value for their money. Due to the excessive amount of goods and services on offer, the purchase must be promoted as being unique, exclusive and available for a competitive price. As the daily stream of advertising de-sensitizes the public, more and more strong impulses are required to do things and buy things they really don’t need. In a commercial society, you will see what is referred to as the “calculating” person. This moral calculating person will ﬁnd it increasingly easy to weigh the beneﬁts and disadvantages of the deceit against each other and will often conclude that deceit is rewarding.

### UQ---2AC

#### The court will strike down Humphrey’s Executor now.

White ’10-2 [Adam; October 2; senior fellow at the American Enterprise Institute and director of the Antonin Scalia Law School’s C. Boyden Gray Center for the Study of the Administrative State, served on the Presidential Commission on the Supreme Court of the United States and chaired the ABA’s Administrative Law Section; SCOTUS Blog, “Is Humphrey’s Executor headed for Slaughter?” https://www.scotusblog.com/2025/10/is-humphreys-executor-headed-for-slaughter/]

So the key question remains: Will the court agree, too? As I noted above, the court seems likely to uphold Trump’s firing of Slaughter. The clearest indication came in the court’s brief order a few months ago in Trump v. Wilcox, when the court stayed lower court orders blocking Trump from firing members of the National Labor Relations Board and Merit Systems Protection Board. In its brief opinion, the court noted that “[t]he stay reflects our judgment that the Government is likely to show that both the NLRB and MSPB exercise considerable executive power.” The NLRB’s own powers – again, largely enforcement-centric, and increasingly partisan or ideological – strike me as very close to the FTC’s. (I unpacked the court’s Wilcox opinion in my previous column on the Federal Reserve’s own independence.)

But this need not entail completely renouncing Humphrey’s Executor, which I believe the court is unlikely to do, given Trump’s threats against the Federal Reserve’s own independence looming in the background.

The court already emphasized (in Wilcox) that it sees the Federal Reserve as fundamentally different from other independent regulatory agencies due to the Fed’s different structure and history. And, as I noted in my previous column, the Fed’s most important powers – its monetary power, and its supervision of the Federal Reserve Banks – are vastly different than normal regulatory agencies’ powers. As I wrote last time, the Fed’s powers seem to fit comfortably within the Humphrey’s Executor framework, more so than any other modern independent regulatory agency.

If the court were to categorically renounce Humphrey’s Executor, it would raise the very questions and fears that the court sought to avoid in the Wilcox order. At the very least, a Slaughter decision that renounces Humphrey’s Executor would restate a new framework for agency independence that clearly distinguishes between agencies that primarily wield “executive” powers and those that do not, thus preserving the constitutionality of our independent Federal Reserve Board of Governors.

### UQ---1AR

#### The court is poised to overturn Humphrey’s, but exempt the Fed by enshrining protections based in originalist reasoning.

Bednar ’10-15 [Nick; October 15; associate professor of law at the University of Minnesota Law School. He writes in the areas of executive politics, administrative law, and immigration. He holds a PhD in political science from Vanderbilt University and a JD from the University of Minnesota Law School; Lawfare, “‘Slaughter’-ing Humphrey’s Executor,” https://www.lawfaremedia.org/article/slaughter--ing-humphrey-s-executor]

By the beginning of Trump’s second term, many legal scholars regarded Humphrey’s Executor as effectively on life support. That perception was reinforced when the Supreme Court stayed a district court order enjoining the removal of members of the Merit Systems Protection Board (MSPB) and the National Labor Relations Board (NLRB). In an unsigned, two-page opinion in Trump v. Wilcox, the Supreme Court concluded that “the Government [was] likely to show that both the NLRB and MSPB exercise considerable executive power.” The majority, however, stopped short of deciding whether those agencies fell within the Humphrey’s Executor exception. Nevertheless, it felt the need to recognize a new exception for the Federal Reserve—an agency not before the Court—reasoning that the “Federal Reserve is a uniquely structured, quasi-private entity that follows in the distinct historical tradition of the First and Second Banks of the United States.” Such an originalist-inspired carve-out would have been unnecessary if Humphrey’s Executor remained firmly intact.

The Supreme Court appears poised to overturn—or at least substantially narrow—Humphrey’s Executor. How far the Court intends to extend the president’s removal power remains uncertain, and any prediction is fraught. Roberts authored the majority opinions in Free Enterprise and Collins, adopting a characteristically incrementalist approach to changing precedent. Yet Roberts is no longer the pivotal vote in the conservative majority. Justices Clarence Thomas and Neil Gorsuch have openly called for overruling Humphrey’s Executor. Justice Brett Kavanaugh has expressed skepticism about the decision, though scholars debate whether he would vote to overturn it. Justice Samuel Alito, who authored Collins, has not indicated whether he would support overruling Humphrey’s Executor. Justice Amy Coney Barrett has yet to write in a case involving removal protections. The coming term will reveal whether the Court is prepared to dismantle Humphrey’s Executor outright or continue its gradual erosion.

The narrowest path forward could preserve Humphrey’s Executor while distinguishing the modern FTC on factual grounds. Today’s FTC exercises greater power than it did in 1935, raising questions about whether it exercises “substantial executive authority” rather than “quasi-judicial” or “quasi-legislative” functions. The D.C. Circuit has interpreted the Trade Commission Act as providing broader authority than originally anticipated, and the Magnuson-Moss Warranty Act greatly expanded the FTC’s jurisdiction over consumer protection. This incrementalist approach would preserve the core holding of Humphrey’s Executor but would require lower courts to undertake the fraught task of parsing agency functions to decide whether a given agency exercises “substantial executive authority.”

Alternatively, the Court could simply overturn Humphrey’s Executor, striking down removal protections for most multimember commissions. As suggested by its rhetoric in Trump v. Wilcox, the Court seems poised to recognize an exception for the Federal Reserve Board of Governors. Effectively, the Court may preserve removal protections for entities or officers that had some sort of analog at the Founding. (Such a test, however, has its own problems with respect to the Federal Reserve.)

#### The court is going out of its way to soft launch overturning Humphrey’s but excluding the fed.

Bortz ’25 [Katy; September 25; League of Women Voters, “Humphrey's Executor and Threats to Independent Government Agencies,” https://www.lwv.org/blog/humphreys-executor-and-threats-independent-government-agencies]

In May 2025, however, the Supreme Court ruled on its emergency docket challenging this well-established principle. Without a full briefing on the issue, the Court outlined the dismantling of Humphrey's Executor.

In Trump v. Wilcox, the Court’s majority allowed the president to remove two officers, one from the National Labor Relations Board and one from the Merit System Protections Board, for political reasons. Since then, there has been concern about what the decision means for the other federal agencies, most importantly the Federal Reserve Board of Governors, which governs the central bank of the United States and regulates the financial sector.

In the Wilcox emergency decision, the Court suggested that allowing the positions at issue to be politically appointed does not threaten the Federal Reserve officers. While similarly insulated from politics, the Federal Reserve Board of Governors remains protected because “[t]he Federal Reserve is a uniquely structured, quasi-private entity.” When the Supreme Court deems an agency as “quasi-legislative” and/or “quasi-judicial,” its function is not solely executive, so the officers are protected to serve in good faith. In other words, the President cannot, at will, fire officers of “quasi-legislative” or “quasi-judicial” independent agencies. The “quasi-private” language used in the Court’s decision in Wilcox seems to be a new rule protecting the Federal Reserve Board of Governors.

It remains unclear if any other federal agency positions will also fit this Federal Reserve carve-out and be deemed “quasi-private.” It is safe to say that this decision, at least until the whole case is heard, gives the president dramatically more authority to control the heads of various government agencies.

A yard sign that says "Vote like democracy depends on it. It does!"

And now, it appears the Court will do away with Humphrey’s Executor entirely. On September 22, the Court took up a case concerning the Federal Trade Commission, which will decide whether to overrule this bedrock precedent.

#### This outcome is highly certain.

Estreicher ’25 [Samuel, G. Roger King, and David Sherwyn; June 25; Dwight D. Opperman Professor of Public Law at NYU School of Law; rmer partner with Jones Day law firm and the Senior Labor and Employment counsel for the HR Policy Association; John and Melissa Ceriale Professor of Hospitality Human Resources and a professor of law at Cornell Peter and Stephanie Nolan School of Hotel Administration; On Labor, “Dealing with the Likely Demise of Humphrey’s Executor,” https://onlabor.org/dealing-with-the-likely-demise-of-humphreys-executor/]

The future of the National Labor Relations Board (NLRB or Board), the venerable agency that since 1935 has been the exclusive investigation, enforcement, and adjudicatory body under the National Labor Relations Act (NLRA or Act), is in doubt. As of this writing, it seems likely, that perhaps sometime in fall 2025 or spring 2026, the Supreme Court will overrule or substantially narrow Humphrey’s Executor v. United States (1935). There will be some consternation over imperiling the structure of the Federal Reserve Board, which like the NLRB is a multimember agency whose members are insulated from at-will presidential removal before the end of their terms. The Court will, we suspect, find some way to distinguish the Federal Reserve Board, whether persuasively or not.

One of us (Estreicher) is usually loathe to make short-term predictions, but this one is likely to hold true. We base this on the Court’s order or decision in Trump v. Wilcox, No. A24A966 (May 22, 2025), staying a lower court ruling requiring the reinstatement of a member of the NLRB and a member of the Merit Systems Protection Board (MSPB), a multimember body that handles federal employee disputes. The Court explained that “[t]he stay reflects our judgment that the Government is likely to show that both the NLRB and the MSPB exercise considerable executive power.” The Court did aver that it was not deciding at this stage whether either agency falls within a “recognized exception” from unrestricted presidential removal authority under Seila Law, LLC v. Consumer Financial Protection Bureau (2020), and Free Enterprise Fund v. Public Company Accounting Oversight Board (PCAOB) (2009).

### UQ---AT: Erksine---1AR

#### Erksine says they’ve already destroyed it! inserted for reference.

Erksine and Vladeck 25 – Editor of SCOTUSblog; Professor of law at Georgetown University, J.D. from Yale University.

Ellena Erskine interviewing Stephen Vladeck, “Will the court overturn a 1930s precedent to expand presidential power, again?,” SCOTUSblog, 04-10-25, https://www.scotusblog.com/2025/04/will-the-court-overturn-a-1930s-precedent-to-expand-presidential-power-again/

EE: So back to where Humphrey’s Executor sits today, how narrow are those protections?

SV: One of the tricky things about Humphrey’s Executor is that, even though the Supreme Court hasn’t overruled it, it has to at least some degree reconceptualized it. Humphrey’s Executor itself, if you read Justice Sutherland’s opinion, spends a lot of time talking about how what the FTC does is not purely executive power. Instead, he talks about the quasi-judicial role that the FTC plays and even in some respects, the quasi-legislative role that the FTC plays.

Even though the modern court has not overruled Humphrey’s Executor, it has really, I think, heavily watered down that understanding. Indeed, it has increasingly come to treat Humphrey’s Executor as this extreme outlier — as one of two Supreme Court precedents that are at least superficially inconsistent with the broad view of the unitary executive toward which the court has otherwise gravitated, Morrison v. Olson being the other.

### IL---2AC/1AR

#### No impact if it’s overturned---tons of workarounds for independent agencies.

Crews ’12-8 [Clyde Wayne; December 8; Fred L. Smith Fellow in Regulatory Studies at the Competitive Enterprise Institute; Competitive Enterprise Institute, “Two cheers for ending Humphrey’s Executor,” https://cei.org/blog/two-cheers-for-ending-humphreys-executor/]

The concern for the liberty movement is that, even if Humphrey’s Executor falls, we will remain saddled with a Congress that over-delegates to executive branch agencies and independent ones alike. Worse, as recent major and sweeping legislative enactments have demonstrated, Congress recognizes no effective limits on its powers to intervene in economic and societal concerns as such.

Consider that even after the Supreme Court’s recent overturning of Chevron deference, the progressive left retains workarounds, such as:

sweeping statutes unconstrained by enumerated powers;

subsidies, contracting, and public-private frameworks that fuse state and corporate power;

sub-regulatory guidance and other forms of regulatory dark matter that evade accountability.

Trump’s own interventionist impulses, such as partial nationalizations of private firms, are a warning to temper expectations that muscular presidential authorities over agencies will be used to limit state intervention in private enterprise.

Overturning Humphrey’s Executor would sever one of the Administrative State’s oxygen lines, but would by no means asphyxiate it. If, however, the decision forces reconsideration of the Federal Reserve – an institution whose monetary manipulation enables congressional deficit excess – that would brighten the outlook considerably.

Independent agencies arose a century after ratification of a Constitution that never contemplated fourth branch power centers. That makes removal authority a core constitutional function rather than a modern aberration. The anomaly is not merely Humphrey’s Executor; it is the Administrative State itself.

The core abnormality of the past century is the assumption that Washington may legislate on everything – energy, speech, finance, health, education, family – with no constitutional gravity. A win like Humphrey’s Executor reversal is necessary but will ultimately fail to deliver without structural restraint on Congress and a restoration of enumerated-powers principles.

A Congress that legislates broadly will continue to delegate broadly, and presidents will continue to inherit vast power, regardless of whether agencies downstream are deemed “independent” or have leadership that can be readily replaced. The liberty movement’s deeper work lies in recovering the truth that Congress is not omnipotent.

Until then, rolling back Humphrey’s Executor adds insulation but leaves untouched the furnace beneath: Congress’s appetite for wielding non-enumerated powers and the steady erosions of federalism and individualism that accompany powerful central government.