# Case

## Adv---Filings

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#### 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

#### That fuels bankruptcy and spurs frivolous filings:

#### 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

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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

#### 3. 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.

### AT: Turn---1AR

#### Bankruptcy…

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

Even though there are no cases in which a union as a debtor has applied Kawaauhau, there have been several instances in which unions or their pension funds have litigated the matter as a creditor with mixed results. Even though the decisions reflect Norberg’s observations concerning what counts as dischargeable debt under §523(a)(6), they do not provide a basis from which to make observations about whether the cases serve to grow union power as an extension of collective worker power, or undermine it.63 For example, in one case, an employer attempted to use non-union labor in violation of a CBA.64 The employer continued to do so even after a court ruled against it.65 The Fifth Circuit held that the claim was not a tort claim because it did not injure the union, and there was no evidence that the employer wanted to injure the union.66 Instead, the court treated the breach of the CBA as ordinary dischargeable breach of contract claim.67 However, the fact that the employer continued in the prohibited conduct in violation of a second judgement rendered the claim non-dischargeable.68 In another instance, a union pension fund tried to collect on an employer’s failure to make a legally required contribution, but the court allowed for the debtor to discharge it because the failure to pay was done without intent to injure.69

Courts have not been afraid to punish unions though. In one case, the union brought an action seeking a declaration that a contract debt was non-dischargeable under §523(a)(6). Specifically, the union brought the action against a member who crossed a picket line and returned to work while the union was on strike in violation of the union’s constitution.70 The court denied the union’s request for relief and sanctioned the union (instead of its counsel) for bringing the case in violation of Rule 11 of the Federal Rules of Civil Procedure.71

Bankruptcy scholars have demonstrated that how corporations aggressively use bankruptcy to silence the voice of tort victims. Pamela Foohey and Christopher Odinet highlight “how for-profit and nonprofit organizations leverage dealing with future claims, using channeling injunctions, and asking for third-party releases to cabin people’s voices and cut short public scrutiny of alleged wrongdoing.” 72 The story they tell is a story about how large corporations use bankruptcy law to silence collective voice. However, §523(a)(6) has a silencing effect on those who protest as well. For example, in one case restaurant workers who were owed wages protested their employer only to be retaliated against. The court held that their claims were dischargeable because the discharged employees did not prove that their employer acted with actual malice toward them!73

#### That 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.

### Capital Flight---Impact

#### The coming surge of bankruptcy filings places pressure on a strong, yet vulnerable dollar---spiraling into catastrophic dollar depreciation.

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.

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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

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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.

#### Extinction.

Muhleisen ’25 [Martin and Valbona Zeneli; May 20; Senior Fellow, Former Chief of Staff and Director for Strategy, Policy, and Review at the International Monetary Fund, Ph.D. in Economics from Ludwig-Maxmilians-Universitat Munchen; Nonresident Senior Fellow, Ph.D. in Political Economy from the University of Bari; Atlantic Council, “Why the U.S. Cannot Afford to Lose Dollar Dominance,” https://www.atlanticcouncil.org/content-series/atlantic-council-strategy-paper-series/why-the-us-cannot-afford-to-lose-dollar-dominance/]

Any developments that weaken the US economy and the role of the dollar could also affect the United States’ ability to preserve its military superiority. China is in the middle of an extraordinary defense buildup that is challenging US strategic positions in the Indo-Pacific theater. Moreover, the Ukraine war has led to stepped-up cooperation between Russia, Iran, and North Korea (which has been contributing troops to compensate for Russia’s losses), and China increasingly supports Russia’s armament efforts by supplying it with drones and dual-use technology.

The United States and Europe have also been pushed on the defensive in Africa as China, especially, has made strategic inroads there, as have Russia, India, and countries in the Persian Gulf. Many countries are looking to China for help in developing their energy and transport infrastructure, imports of low-cost consumer and investment goods, and market access for their own exports, allowing the use of strategic ports and other locations in exchange.

At the same time, China has a hold on supply chains involving critical raw materials, controlling 85 percent of the world’s refined rare earth materials, which are crucial for high-tech military technologies. If made unavailable to the United States, this could significantly complicate the production of advanced weaponry. The global processing capacity for critical raw materials is also highly concentrated in China, providing it with means to influence market prices and access, and creating supply chain vulnerabilities and dependencies.

Advances in military technology toward low-cost weapons, lower procurement costs in competitor countries, and a relative decline in US manufacturing capabilities (e.g., in shipbuilding) pose significant challenges to US military strength. While the United States retains a large nominal advantage in military spending over other competitors, the discrepancy is smaller when considering cost differences; in other words, the United States has a smaller advantage in real terms than suggested by simple budget comparisons (see Figure 3).

In fact, a recent congressional review of US defense strategy has raised concerns that the United States is not ready for a multifront war spanning theaters in Europe and Asia. US forces have also been slow to adopt new battlefield technologies, including a trend toward autonomous weapons systems, which will take considerable time to redress. In addition, the end of the New START treaty in 2026 could trigger a nuclear arms race that would force the United States to expand its nuclear forces after decades of deep cuts.

While the United States is still the only country able to project military power at any point in the world, it is unlikely to be able to respond to these challenges on its own. The room to dedicate additional fiscal means to the US defense budget is increasingly circumscribed by growing interest and entitlement spending (see Figure 4), and even under optimistic assumptions, there is a risk of strategic overreach for the United States, given the magnitude of challenges across different regional theaters.

While US presidents have long called for European nations to play a bigger part in their own defense, the second Trump administration has ramped up the pressure on NATO allies to take on a larger military role and financing burden in the European theater. However, raising the combat readiness of European armed forces will require several years under the best of circumstances. Unless the United States is willing to cede military dominance in Europe to Russia, it will need to continue supporting its European allies—including in arms production, securing supply chains, and military burden sharing—for the foreseeable future.

If the United States were to forgo a deepening of its alliances in Europe and become outmatched by China in Asia, it could in principle still benefit from the relative safety of its continental geography. However, it would face a loss of military stature and reduced global reach. No longer being a global hegemon, the United States would not be able to protect global trade and financial flows in the way it has done in the past, hurting itself and other economies that similarly benefited from open trade. The United States would leave a vacuum of power that would most likely be filled by China and other autocratic countries, with detrimental effects for its own security and economic stability.

Goals

This paper proposes a strategy to preserve the US dollar’s lead role in international markets, allowing it to continue attracting foreign capital at favorable interest rates. As laid out above, the dominant role of the US dollar has been a key element in a decades-long virtuous cycle that allowed the United States to finance its large military apparatus while expanding its social safety net and keeping a low tax burden.

With the rise in public debt and the sharp increase in net international liabilities, this cycle cannot continue indefinitely. The time has come for the United States to begin reining in deficit spending and rebuilding its fiscal position. Notwithstanding the Trump administration’s commitment to this objective, this process will take time, given continued pressure on defense and entitlement spending. Continued dollar dominance would therefore be critical for keeping a lid on interest rates while nurturing a political consensus that could lead to a lasting decline in government deficits over several administrations.

Continued dollar dominance would also be beneficial from a geopolitical perspective, providing the United States with leverage in shaping the future of global finance, leadership in multilateral organizations, and the continued possibility of sanctioning opponents to raise the cost of acting against US interests. Having said that, the United States’ ability to dominate global developments on its own will likely continue to diminish. To maintain and reap the full benefits of the dollar as a reserve currency, it will need to rely more on networks with countries that have trade, financial, and security interests that align with those of its own. These networks evolve around shared interests, and they will only thrive in an environment of mutual respect and give-and-take.

Breaking up such networks by way of a US isolationist withdrawal—the possibility of which is as high as it has been at any time in the past century—would trigger a fragmentation of the global economic and security landscape with large losses in general welfare (i.e., prosperity and well-being) both in the United States and abroad. It would accelerate the decline in the dollar’s reserve status as it could force countries to fundamentally rethink their security arrangements, possibly leading to a reorientation of trading and financial relationships toward China and other illiberal states.

In fostering US interests, the objective for US policymakers should therefore be to maximize the mutual advantages accruing from working with countries that benefit from the United States’ global economic and security footprint, as well as the stability provided by the dollar as a leading currency. If the United States manages to pursue its domestic interests while remaining at the center of a network of powerful alliances, the dollar’s reserve currency status and its exorbitant privilege could serve US interests for years to come.

### Economic Decline---Impact

#### Spikes in bankruptcies precipitate a recession, derailing financial stability.

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/]

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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.

#### Decline ignites global hotspots.

Wishart ’24 [Ellissa, Sophie Heading, Kevin Kohler, and Saaida Zahidi; January 10; Head of Global Risks Initiative, M.Phil in GIS and Remote Sensing from the University of Cambridge; Masters in Behavioral Sciences from the London School of Economics and Political Science, M.A. in International Affairs and Governance from the University of St. Gallen, Global Risks Specialists; M.Phil in International Economics, Managing Director; The Global Risks Report 2024: 19th Edition, “Global Risks 2024: At a Turning Point,” Ch. 1]

Weakened systems only require the smallest shock to edge past the tipping point of resilience. In the second time frame covered by the survey, respondents were asked to rank the likely impact of risks in the next two years. The results suggest that corrosive socioeconomic vulnerabilities will be amplified in the near term, with looming concerns about an Economic downturn (Chapter 1.5), resurgent risks such as Interstate armed conflict (Chapter 1.4), and rapidly evolving risks like Misinformation and disinformation (Chapter 1.3).

As discussed in last year’s Global Risks Report, less predictable and harder-to-handle inflation heightens the risk of miscalibration of efforts to balance price stability and economic growth (Chapter 1.5: Economic uncertainty). Economic risks are notable new entrants to the top 10 rankings this year, with both Inflation (#7) and Economic downturn (#9) featuring in the two-year time frame (Figure 1.3). Economic risks are prioritized in particular by public- and private-sector respondents (Figure 1.5). Geoeconomic confrontation (#14) is a marked absence from the top 10 rankings this year (Figure 1.4) and has decreased in perceived severity compared to last year’s scores. However, like related economic risks, it features among the top concerns for both public- and private-sector respondents (at #10 and #11, respectively) as a continuing source of economic volatility.

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<<FIGURE 1.3 OMITTED>> <<FIGURE 1.4 OMITTED>> <<FIGURE 1.5 OMITTED>> Misinformation and disinformation has risen rapidly in rankings to first place for the two-year time frame, and the risk is likely to become more acute as elections in several economies take place this year (Chapter 1.3: False information). Societal polarization is the third-most severe risk over the short term, and a consistent concern across nearly all stakeholder groupings (Figures 1.5 and 1.6). Divisive factors such as political polarization and economic hardship are diminishing trust and a sense of shared values. The erosion of social cohesion is leaving ample room for new and evolving risks to propagate in turn. Societal polarization, alongside Economic downturn, is seen as one of the most central risks in the interconnected “risks network”, with the greatest potential to trigger and be influenced by other risks (Figure 1.7). <<FIGURE 1.6 OMITTED>> <<FIGURE 1.7 OMITTED>> Interstate armed conflict (#5) rises in the rankings for the two-year horizon, across nearly all stakeholder groups, except for government respondents. This divergence may simply reflect different views around defining conflict: interstate armed conflict in the strict definition has remained relatively rare thus far, but international interventions in intrastate conflict are on the rise (Chapter 1.4: Rise in conflict). Extreme weather events, a persistent concern between last year and this year, is at #2, Cyber insecurity at #4, Involuntary migration at #8 and Pollution at #10, rounding out the top 10 concerns in respondents’ risk perceptions through to 2026. Overall, global risks have lower severity scores compared to last year’s results.7 Further down in the two-year time frame rankings, Critical change to Earth systems comes in at #11, Debt in 16th place, and Adverse outcomes of AI technologies and other frontier technologies in 29th and last place, respectively. The following sections explore some of the most severe risks that many expect to play out over the next two years, focusing on three entrants to the top 10 risks list over the short term: Misinformation and disinformation (#1), Interstate armed conflict (#5) and Economic downturn (#9). We briefly describe the latest developments and key drivers for false information, a rise in conflict and economic uncertainty, and consider their emerging implications and knock-on effects. <<FIGURE 1.8 OMITTED>> 1.3 False information – Misinformation and disinformation may radically disrupt electoral processes in several economies over the next two years. – A growing distrust of information, as well as media and governments as sources, will deepen polarized views – a vicious cycle that could trigger civil unrest and possibly confrontation. – There is a risk of repression and erosion of rights as authorities seek to crack down on the proliferation of false information – as well as risks arising from inaction. 1.3 False information FIGURE 1.8 Severity score: Misinformation and disinformation Source World Economic Forum Global Risks Perception Survey 2023-2024. Rank: 1st 1% Persistent false information (deliberate or otherwise) widely spread through media networks, shifting public opinion in a significant way towards distrust in facts and authority. Includes, but is not limited to: false, imposter, manipulated and fabricated content. 16% 15% 23% 21% 16% 7% Average: 4.7 Proportion of respondents Note Severity was assessed on a 1-7 Likert scale [1 – Low severity, 7 – High severity]. The percentages in the graph may not add up to 100% because figures have been rounded up/down. 2 years 7 High Low 6 5 4 3 2 1 Severity The disruptive capabilities of manipulated information are rapidly accelerating, as open access to increasingly sophisticated technologies proliferates and trust in information and institutions deteriorates. In the next two years, a wide set of actors will capitalize on the boom in synthetic content,8 amplifying societal divisions, ideological violence and political repression – ramifications that will persist far beyond the short term. Misinformation and disinformation (#1) is a new leader of the top 10 rankings this year. No longer requiring a niche skill set, easy-to-use interfaces to large-scale artificial intelligence (AI) models have already enabled an explosion in falsified information and so-called ‘synthetic’ content, from sophisticated voice cloning to counterfeit websites. To combat growing risks, governments are beginning to roll out new and evolving regulations to target both hosts and creators of online disinformation and illegal content.9 Nascent regulation of generative AI will likely complement these efforts. For example, requirements in China to watermark AI-generated content may help identify false information, including unintentional misinformation through AI hallucinated content.10 Generally however, the speed and effectiveness of regulation is unlikely to match the pace of development. Synthetic content will manipulate individuals, damage economies and fracture societies in numerous ways over the next two years. Falsified information could be deployed in pursuit of diverse goals, from climate activism to conflict escalation. New classes of crimes will also proliferate, such as non-consensual deepfake pornography or stock market manipulation.11 However, even as the insidious spread of misinformation and disinformation threatens the cohesion of societies, there is a risk that some governments will act too slowly, facing a trade-off between preventing misinformation and protecting free speech, while repressive governments could use enhanced regulatory control to erode human rights. Mistrust in elections Over the next two years, close to three billion people will head to the electoral polls across several economies, including the United States, India, the United Kingdom, Mexico and Indonesia (Figure 1.9).12 The presence of misinformation and disinformation in these electoral processes could seriously destabilize the real and perceived legitimacy of newly elected governments, risking political unrest, violence and terrorism, and a longer-term erosion of democratic processes. Recent technological advances have enhanced the volume, reach and efficacy of falsified information, with flows more difficult to track, attribute and control. The capacity of social media companies to ensure platform integrity will likely be overwhelmed in the face of multiple overlapping campaigns.13 Disinformation will also be increasingly personalized to its recipients and targeted to specific groups, such as minority communities, as well as disseminated through more opaque messaging platforms such as WhatsApp or WeChat.14 The identification of AI-generated mis- and disinformation in these campaigns will not be clear-cut. The difference between AI- and human-generated content is becoming more difficult to discern, not only for digitally literate individuals, but also for detection mechanisms.15 Research and development continues at pace, but this area of innovation is radically underfunded in comparison to the underlying technology.16 Moreover, even if synthetic content is labelled as such,17 these labels are often digital and not visible to consumers of content or appear as warnings that still allow the information to spread. Such information can thus still be emotively powerful, blurring the line between malign and benign use. For example, an AI-generated campaign video could influence voters and fuel protests, or in more extreme scenarios, lead to violence or radicalization, even if it carries a warning by the platform on which it is shared that it is fabricated content.18 The implications of these manipulative campaigns could be profound, threatening democratic processes. If the legitimacy of elections is questioned, civil confrontation is possible – and could even expand to internal conflicts and terrorism, and state collapse in more extreme cases. Depending on the systemic importance of an economy, there is also a risk to global trade and financial markets. State-backed campaigns could deteriorate interstate relations, by way of strengthened sanctions regimes, cyber offense operations with related spillover risks, and detention of individuals (including targeting primarily based on nationality, ethnicity and religion).19 Societies divided Misinformation and disinformation and Societal polarization are seen by GRPS respondents to be the most strongly connected risks in the network, with the largest potential to amplify each other. Indeed, polarized societies are more likely to trust information (true or false) that confirms their beliefs. Given distrust in the government and media as sources of false information,20 manipulated content may not be needed – merely raising a question as to whether it has been fabricated may be sufficient to achieve relevant objectives. This then sows the seeds for further polarization. As identified in last year’s Global Risks Report (Chapter 1.2: Societal polarization), the consequences could be vast. Societies may become polarized not only in their political affiliations, but also in their perceptions of reality, posing a serious challenge to social cohesion and even mental health. When emotions and ideologies overshadow facts, manipulative narratives can infiltrate the public discourse on issues ranging from public health to social justice and education to the environment. Falsified information can also fuel animosity, from bias and discrimination in the workplace to violent protests, hate crimes and terrorism. Some governments and platforms, aiming to protect free speech and civil liberties, may fail to act to effectively curb falsified information and harmful content, making the definition of “truth” increasingly contentious across societies. State and non-state actors alike may leverage false information to widen fractures in societal views, erode public confidence in political institutions, and threaten national cohesion and coherence. Trust in specific leaders will confer trust in information, and the authority of these actors – from conspiracy theorists, including politicians, and extremist groups to influencers and business leaders – could be amplified as they become arbiters of truth. Defining truth False information could not only be used as a source of societal disruption, but also of control, by domestic actors in pursuit of political agendas.21 Although misinformation and disinformation have long histories, the erosion of political checks and balances, and growth in tools that spread and control information, could amplify the efficacy of domestic disinformation over the next two years.22 Global internet freedom is already in decline and access to wider sets of information has dropped in numerous countries.23 Falls in press freedoms in recent years and a related lack of strong investigative media, are also significant vulnerabilities that are set to grow.24 Indeed, the proliferation of misinformation and disinformation may be leveraged to strengthen digital authoritarianism and the use of technology to control citizens. Governments themselves will be increasingly in a position to determine what is true, potentially allowing political parties to monopolize the public discourse and suppress dissenting voices, including journalists and opponents.25 Individuals have already been imprisoned in Belarus and Nicaragua, and killed in Myanmar and Iran, for online speech.26 <<FIGURE 1.10 OMITTED>> The export of authoritarian digital norms to a wider set of countries could create a vicious cycle: the risk of misinformation quickly descends into the widespread control of information which, in turn, leaves citizens vulnerable to political repression and domestic disinformation.27 GRPS respondents highlight strong bilateral relationships between Misinformation and disinformation, Censorship and surveillance (#21) and the Erosion of human rights (#15), indicating a higher perceived likelihood of all three risks occurring together (Figure 1.10). This is a particular concern in those countries facing upcoming elections, where a crackdown on real or perceived foreign interference could be used to consolidate existing control, particularly in flawed democracies or hybrid regimes. Yet more mature democracies could also be at risk, both from extensive exercises of government control or due to trade-offs between managing mis- and disinformation and protecting free speech. In January last year, Twitter and YouTube agreed to remove links to a BBC documentary in India.28 In Mexico, civil society has been concerned about the government's approach to fake news and its implications for press freedom and safety.29

<<PARAGRAPH BREAKS RESUME>>

1.4 Rise in conflict

<<FIGURE 1.11 OMITTED>>

– Escalation in three key hotspots – Ukraine, Israel and Taiwan – is possible, with high-stakes ramifications for the geopolitical order, global economy, and safety and security.

– Geographic, ideological, socioeconomic and environmental trends could converge to spark new and resurgent hostilities, amplifying state fragility.

– As the world becomes more multipolar, a widening array of pivotal powers will step into the vacuum, potentially eroding guardrails to conflict containment.

The world has become significantly less peaceful over the past decade, with conflict erupting in multiple regions last year.30 Active conflicts are at the highest levels in decades, while related deaths have witnessed a steep increase, nearly quadrupling over the two-year period from 2020 to 2022 (Figure 1.12), largely attributable to developments in Ethiopia and Ukraine. While difficult to attribute to a single cause, longer-term shifts in geopolitical power, economic fragility and limits to the efficacy and capacity of international security mechanisms have all contributed to this surge.

Interstate armed conflict (#5) is a new entrant to the top 10 risk rankings this year. Specific flashpoints could absorb focus and split the resources of major powers over the next two years, degrading global security and destabilizing the global financial system and supply chains. Although war between two states in the strict definition remains relatively rare (Figure 1.12), this could contribute to conflict contagion, leading to rapidly expanding humanitarian crises that overwhelm the capacity to respond.

<<FIGURE 1.12 OMITTED>>

High-stakes hotspots

Over the next two years, the attention and resources of global powers are likely to be focused on three hotspots in particular: the war in Ukraine, the Israel-Gaza conflict and tensions over Taiwan. Escalation in any one of these hotspots would radically disrupt global supply chains, financial markets, security dynamics and political stability, viscerally threatening the sense of security and safety of individuals worldwide.

All three areas stand at a geopolitical crossroads, where major powers have vested interests: oil and trade routes in the Middle East, stability and the balance of power in Eastern Europe, and advanced technological supply chains in East Asia. Each could lead to broader regional destabilization, directly drawing in major power(s) and escalating the scale of conflict. All three also directly involve power(s) reckoned to possess nuclear capabilities.

Over the next two years, the war in Ukraine could sporadically alternate between intensifying and refreezing. Despite sanctions, Russia has continued to benefit from energy profits and commodity exports – and this could increase further if the conflict in the Middle East widens.31 Pro-Russian or neutral sentiment in Eastern and Central Europe could soften support from Ukraine’s European allies,32 while support in the United States could wane under domestic pressures, other international priorities, or under a new government. Global divisions with respect to the Middle East conflict may also complicate efforts by Ukraine to maintain unity with Western allies, while also garnering support from the Global South.33 If the conflict intensifies, it is still more likely to do so through conventional rather than nuclear means, but it could also expand to neighbouring countries. While post-conflict scenarios for both Ukraine and Russia are difficult to predict, the war could ‘refreeze’ into a prolonged, sporadic conflict that could last years or even decades.34

Proximate developments in the Middle East are a source of considerable uncertainty, risking further indirect or direct confrontation between global powers. If the Israel-Gaza conflict destabilizes into wider regional warfare, more extensive intervention by major powers is possible, including Iran and the West.35 Beyond potentially seismic shocks to global energy prices and supply chains, escalation could split the attention and resources of the EU and the United States between Ukraine and Israel.36 The scale of Gulf countries’ or Western intervention is uncertain; it’s likely to continue to be deeply polarizing domestically and hold significant political sway.

Numerous GRPS respondents also cited Taiwan and disputed territories in East and South-East Asia as areas of concern. In contrast to Russia, which doubled its defense spending target to more than $100 billion in 2023, and the United States, which allocated over $113 billion in assistance relating to the war in Ukraine alone,37 China has largely acted as a non-interventionist power in both the Ukraine and Middle East conflicts, avoiding the risk of overstretch.38 While there is no evidence to suggest that escalation is imminent, there remains a material possibility of accidental or intentional outbreak of hostilities, given heightened activity in the region.39

Conflict contagion

As high-stakes hotspots undermine global security, a wider set of trends may fuel a combustible environment in which new and existing hostilities are more likely to ignite. As conflicts spread, guardrails to their containment are eroding and resolve for long-term solutions have stalled.40 In parallel, the internationalization of conflicts by a wider set of alternate powers will accelerate ‘multipolarity’ and the risk of inadvertent escalation.

First, simmering tensions and frozen conflicts that are proximate to existing hotspots could heat up. For example, spillover impacts from a high concentration of conflicts, such as in Asia and Africa (Figure 1.13), could range from more readily available arms trafficking to conflict-driven migration. Other states could also deliberately stoke tensions in neighbouring countries to divert attention and resources, through disinformation campaigns or the deployment of state-backed militia groups, for example. Frozen conflicts at risk could include the Balkans, Libya, Syria, Kashmir, Guyana, the Kurdish region and Korean peninsula.41 These risks are well-recognized by business leaders: Interstate armed conflict features as a top-five risk in 20 countries (18%) surveyed in the Forum’s Executive Opinion Survey (EOS, see Appendix C: Executive Opinion Survey: National Risk Perceptions), including Egypt, Iraq, Kazakhstan and Serbia, and is the top risk in Armenia, Georgia, Kyrgyzstan and Japan.

Second, resource stress, economic hardship and weakened state capacity will likely grow and, in turn, fuel conflict.42 There may also be a rise of ‘ungoverned countries’, where non-state actors fight for control over large swathes of territory, or where parties not recognized by the international system gain full control. For example, resource-rich countries could become caught in a battleground of proxy warfare between multiple powers, including neighbouring economies, organized crime networks and paramilitary groups (Chapter 2.6: Crime wave).43

<<FIGURE 1.13 OMITTED>>

Third, with instant information networks and reinforcing algorithms, the symbolism of highstakes hotspots could trigger contagion beyond conflict geographies. Deeply ingrained ideological grievances are in some cases driving hostilities, and these divisions are resonating with communities and political parties elsewhere. This expands beyond religious and ethnic divisions to broader challenges to systems of governance. National identities, international law and democratic values are coming into question, contributing to civil unrest, threatening human rights, and reigniting violence, including in advanced democracies and between the Global North and South.

North-South rift

Dissatisfaction with the continued political, military and economic dominance of the Global North is growing, particularly as states in the Global South bear the brunt of a changing climate, the aftereffects of pandemic-era crises and geoeconomic rifts between major powers. Historical grievances of colonialism, combined with more recent ones regarding the costs of food and fuel, geopolitical alliances, the United Nations and Bretton Woods systems, and the loss and damage agenda, could accelerate anti-Western sentiment over the next two years. In conjunction with more thinly spread resources and tighter economic conditions, military power projection by the West could fade further, potentially creating power vacuums in parts of Africa, the Middle East and Asia. France, for example, has withdrawn troops on request from Mali, Burkina Faso and Niger over the past two years.44

As the dominance of long-held power centres wanes, alternate powers will compete for influence in interstate and intrastate conflicts, potentially leading to deadlier, prolonged proxy warfare and overwhelming humanitarian crises.45 There are a number of incentives to this involvement, from access to raw resources, such as minerals and oil, to the protection and promotion of trade, investment and security interests. Pivotal powers will also increasingly lend support and resources to garner political allies, taking advantage of this widening rift between the Global North and the Global South.

As a new set of influences in global affairs takes shape, political alliances and alignment within the Global South will also shape the longer-term trajectory of internationalized conflicts. A deep divide on the international stage could mean that coordinated efforts to isolate ‘rogue’ states may be increasingly futile, while international governance and peacekeeping mechanisms shown to be ineffective at ‘policing’ conflict could be sidelined.

1.5 Economic uncertainty

<<FIGURE 1.14 OMITTED>>

– The near-term outlook remains highly uncertain due to domestic factors in some of the world's largest markets as well as geopolitical developments.

– Continued supply-side pressures and demand uncertainty could contribute to persistent inflation and high interest rates.

– Small- and medium-sized companies and heavily indebted countries will be particularly exposed to slowing growth amid elevated interest rates.

According to one narrative, the global economy has shown surprising resilience in the face of the most aggressive global tightening of monetary policy in decades. Despite widespread predictions of a recession in 2023 (Figure 1.15),46 the perception of a ‘softer landing’ appears to be prevailing. Inflation is falling amid tight labour markets and stronger-than-anticipated consumer spending and growth, particularly in the United States.47 In another version, persistently elevated inflation in many countries and high interest rates are weighing heavily on economic growth, particularly in export- and manufacturing-led markets. An already visible economic downturn is likely to spread, with a risk that new economic shocks would be unmanageable in such fragility and debt passes the tipping point of sustainability.

<<FIGURE 1.15 OMITTED>>

<<FIGURE 1.16 OMITTED>>

These contrasting narratives encapsulate the highly uncertain economic outlook. Fears of an Economic downturn are widespread among private-sector respondents, featuring as a top-five risk in 102 countries (90%) surveyed in the EOS, a significant uptick from 2022 (Figure 1.16). A slowdown in global growth is already occurring, but it is taking place under a different set of economic parameters than previous cycles, heightening uncertainty. Over the next two years, there may be a lack of coherence in forward projections within and between economies, particularly with respect to inflation, interest rates and growth rates. With contrasting views about the future, the risk of miscalibration by central banks, governments and companies will rise accordingly, potentially deepening and prolonging economic risks. Additionally, continued trade conflicts and geoeconomic rifts between the United States, European Union and China add to the significant economic uncertainty ahead.

Supply-driven price pressures

Markets are already anticipating interest rate cuts in key economies in the first half of this year.48 However, there are several inflationary pressures that may stymie expectations and present a less-smooth path to inflation targets. If price pressures continue, central banks could be hesitant to cut rates in response to signals of weaker growth, resulting in higher-for-longer inflation and interest rates.

Reflecting tighter financial conditions, both headline and core inflation have dropped in the United States and the Eurozone (Figure 1.17).49 In parallel, there has been a slowdown in economic growth in key industries and markets. The global economy had been propped up by continued strength in services throughout 2023, which is now flagging, while manufacturing has already been in contraction for over a year (Figure 1.18).50 Economic growth is stagnant in the European Union, at 0.6% last year, with estimates suggesting that the economic powerhouse of Germany contracted by 0.3% in 2023.51 Profits of the S&P 500, excluding the ‘Magnificent 7’ tech stocks, were estimated to contract by 8.6% last year.52

<<FIGURE 1.17 OMITTED>>  
<<FIGURE 1.18 OMITTED>>

Yet even as inflation has been partially tamed through higher interest rates, it has not reached central bank targets of two percent and there remains a material risk of largely supply-side price pressures over the next two years. For example, El Niño-impacts to food production and logistics could drive inflation and costly disruptions to supply chains. Any amplification of the Middle East conflict could trigger price spikes in energy and further disrupt shipping routes, compounding continued impacts from the war in Ukraine.53 The cost-ofliving impact of persistent inflation, perceived to be declining in 2024, could resurge as the continued impact of elevated prices persists. A wage-price spiral is still possible, with EOS respondents anticipating labour shortages in key sectors and economies over the next two years (Chapter 2.5: End of development?). Stronger industrial policies and trade controls emanating from advanced economies, targeting the green transition and advanced technology, could also remain a persistent inflationary trend over this period.

Uncertainty within global powerhouses

The outlooks for the two largest economies – China and the United States – are highly complex, and these two key sources of uncertainty could lead to unanticipated, and possibly divergent, implications for the trajectory of the global economy.

China’s economy is widely expected to slow this year, with the weakening of the property market and local and external demand generally cited as primary causes.54 Despite retaining its ‘A1’ long-term credit rating, the outlook for China’s government debt was recently downgraded from ‘neutral’ to ‘negative’, reflecting risks relating to ‘structurally and persistently lower medium term economic growth’.55 Yet investment in both manufacturing and energy infrastructure have been key drivers of growth in recent years, replacing lost construction demand to a degree.56 Although challenges remain, in the absence of further shocks, there is room for an upside surprise – local consumption may revive, growth may be less sluggish and the slowdown shallower than pervasive market expectations. In addition, in the absence of further geoeconomic backlash, excess capacity in advanced manufacturing, particularly in green technologies, could help counteract global price pressures, lending momentum to the green transition and global demand.57

There is similar uncertainty in the United States. Some forecasts are already pricing in up to 2.4% economic growth for 2024, and others predict rate cuts in the early half of the year.58 Fiscal policy has remained loose even as monetary policy tightened, with the United States running a $1.7 trillion deficit in 2023, effectively doubling the deficit in the past year alone.59 This could continue to keep demand-driven price pressures high. The correlation between consumer sentiment and spending is also adding to uncertainty: economic pessimism may be widespread, but it is not necessarily dampening demand – yet.60 On the other hand, debt servicing hit over $981 billion in Q3 2023 – an increase of over $753 billion compared to the same period in 2022, a sum similar to the budgetary spend on defense.61 Any fiscal consolidation in the United States – or a political stand-off relating to debt loads – could have a profound effect on global markets and trade, while any overestimation of the slowdown could lead to earlier or sharper intervention on interest rates and re-spark demand-side price pressures. The outcome of the US presidential elections in November creates additional uncertainty for the country’s economic outlook, depending on the policy choices of the next government.62

Debt distress

Higher interest rates amid slowing growth will strain debt loads for the public and private sector alike. The corporate debt default rate remains far lower than peaks hit during the 2008-09 Global Financial Crisis (Figure 1.19).63 The majority of corporate debt is also years from maturity. Less than 14% of S&P 500 debt is set to mature in the next two years, with nearly half to mature after 2030.64 In essence, the world’s largest companies will be effectively insulated from higher interest rates for more than half a decade.

However, small and medium-sized companies, that form the backbone of many domestic markets, will be particularly sensitive to slowing economic growth and persistently high interest rates. As struggling companies cut costs, unemployment may rise, reducing consumer spending and creating a negative feedback loop that can contribute to a deeper economic downturn. This could also contribute to heightened market concentration, as start-ups struggle and larger, more financially robust corporations consolidate their position, including in the tech sector (Chapter 2.4: AI in charge).

Heavily indebted countries are also exposed to these economic conditions. The risk of sovereign debt defaults is rising but notably, even with a strong US dollar, larger emerging economies such as Mexico and Brazil have largely avoided debt distress to date.65 This has been attributed to structurally different conditions in these markets than in the past, including central bank independence and the accumulation of large foreign-exchange reserves.66 In other parts of the world, like in Egypt, Ethiopia, Ghana, Lebanon, Pakistan, and Tunisia, the risks are much higher. The impacts of tighter financial conditions will build over time, and pressures on fiscal balances will rise. Given historically high debt loads, many governments might be unable or unwilling to help cushion economic impacts to the same degree as they have in recent years, sharpening the slowdown for companies and individuals.

#### Causation is robust---growth pacifies great-power tension, downturn escalate.

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Although peace and development are central themes of our time, various forms of conflict – between nations, ethnic groups, organizations, and individuals– remain pervasive. High-profile geopolitical tensions, such as the ongoing conflicts between Russia and Ukraine and in the Middle East, serve as stark reminders of the preciousness of peace. The shifting global landscape and power struggles among major nations are particularly concerning. Thucydides’s Trap, a concept popularized by political scientist Graham T. Allison (Allison, 2015, 2017), draws from the ancient Greek historian Thucydides, who noted that the rise of a new power often led to conflict with an established one. The idea has gained significant attention in contemporary international relations, particularly in the context of the perceived rivalry between the United States and China.

Historical accounts underscore the recurring nature of power transitions leading to conflict. For example, the rise and fall of British naval mastery, as discussed by Kennedy (2017), and broader analyses of war and change in world politics by Gilpin (1981) illustrate the Thucydides Trap.1 Allison (2015) refers to 16 historical cases over the past 500 years where a rising power challenged an established power, finding that 12 resulted in war. The two World Wars are also prominent historical cases. These historical perspectives highlight the potential for instability and conflict during significant power shifts.

This deterministic view has been challenged by scholars like Lee (2019) and Chan (2020) who argue that conflict is not inevitable and that other factors, particularly economic conditions, can influence the trajectory. This argument is further supported by analyses of historical power shifts, such as Britain’s response to its relative decline (Friedberg, 2021) and the dynamics of power transitions in Asia (Shambaugh, 2005).2 This opens the door to investigating whether economic conditions can alter the course toward conflict or cooperation in power dynamics.

Economic conditions are undeniably crucial in determining international conflicts. World War II, for example, was significantly influenced by the Great Depression. Economic prospects also influence domestic politics and conflicts. Collier and Hoeffler (2004) suggest that economic conditions largely determine the opportunity for rebellion in civil conflicts, while Blattman and Miguel (2010) and Ray and Esteban (2017) identify lower income levels and weak economic growth as strong predictors of civil wars. Gartzke (2007) and Mitra and Ray (2014) highlight the role of economic development in reducing war and mitigating communal violence. The role of economic factors in power transitions is more complex. Gilpin (1981) and Kennedy (2017) argue that disparities in economic growth can disrupt the balance of power, potentially leading to instability and conflict.

Building on this, we explore how economic prospects affect the likelihood of cooperation and conflict between rising and established powers. We hypothesize that growth prospects encourage cooperative strategies, as both parties stand to benefit from mutual gains. Economic interdependence driven by positive economic prospects can foster stronger trade relations, investment, and collaboration in technology and infrastructure, creating a stabilizing effect where both powers have a vested interest in maintaining peace. Conversely, bleak economic prospects can intensify competition over limited resources. An established power may perceive the rising power’s growth as a threat to its dominance, prompting preemptive actions. Similarly, a rising power facing economic difficulties may adopt aggressive strategies to secure resources and markets, escalating tensions.

Better understanding the interactions between the dynamics of power and economic trajectories provides valuable insights into the potential for cooperation or conflict on the global stage.3 However, numerous confounding factors make it difficult to isolate the causal effect of economic prospects on the natural occurrence of conflicts. It is also impractical to create real conflict scenarios in the real world to test these hypotheses. Therefore, we used a laboratory experiment to simulate interactions between two entities undergoing a power shift under varying economic prospects. While this experiment cannot capture the full complexity of international or commercial relations, it does allow us to study the causal relationship between economic prospects and conflict in a power-dynamic context under controlled conditions.

To achieve this, we designed a dynamic power rivalry game where two players in fixed pairs, A and B, simultaneously decide how to allocate a pie in each period by either choosing to “Maintain Status Quo” or “Challenge”. If both maintain the status quo, the pie is shared equally. If one or both challenge, the pie size shrinks by a social loss coefficient, and the remaining pie is distributed according to the players’ relative strength, which shifts over time. Player A represents the rising power, starting with low relative strength, which increases each period. Player B, the established power, starts with high relative strength, which declines over time. Across the 21 periods of the game, their strengths undergo a symmetrical reversal, with Player A starting at 0.2 and Player B at 0.8, each shifting by 0.03 per period. Players incur a cost when choosing to challenge.

We compared three economic prospect conditions across between-subjects treatments, independent from the players’ actions: in the Constant treatment, the pie size remains constant across periods at 20,000 tokens; in the Decline treatment, the pie size starts at 30,000 tokens and decreases by 1,000 tokens per period; and in the Growth treatment, the pie starts at 10,000 tokens and increases by 1,000 tokens per period.

The Nash equilibrium of the game predicts that Player B will challenge in the first eight periods, while Player A will challenge in the last eight, with both players maintaining the status quo in the remaining periods. Notably, the different economic prospects do not alter this equilibrium. In contrast, our results show that the proportion of challenges from both players, as well as the overall conflict incidence rate, is highest in the Decline treatment and lowest in the Growth treatment. The differences between these treatments are significant across various metrics. Only the Growth treatment reaches a conflict rate significantly lower than the Nash equilibrium. Specifically, Player A (the rising power) challenges significantly more than the equilibrium in both the Decline and Constant treatments but challenges insignificantly less than the equilibrium in the Growth treatment. Player B (the established power) challenges less than the equilibrium in all treatments but only significantly so in the Growth treatment.

## Adv---Reorganization

### AT: Delaware Preemption

#### It’s preempted.

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Therefore, from the observations above, it may be submitted that establishing whether a collective agreement survives the restructuring process and it is therefore, adopted by the new employer is determined on a case by case basis, but not guaranteed. It is dependent on the nature of the obligations the new employer is assuming and the interplay between labour law policies on the continuity of the employment relationships and federal bankruptcy law’s policy for the continuity and survival of the financially struggling business undergoing bankruptcy reorganisations.28 Where state labour law objectives conflict with those of federal bankruptcy law, the courts have often tipped the balance towards the survival of the company undergoing reorganisation rather than the continuity of inherited obligations arising out of collectively bargained agreements.29

Moreover, under the successorship doctrine, the successor employer’s main responsibility to the predecessor’s union and collectively bargained agreements is maintaining the duty to bargain but not a mandatory adoption of the agreements entered into by the predecessor. Where the successor employer adopts the predecessor’s collectively bargained agreements, the successor employer does so voluntarily.

Therefore, as a result of the Supremacy Clause,30 it would not only be difficult for a state court in Delaware to mandate for the continuity of collective bargaining following a business sale or transfer, but would be deemed unconstitutional, as such a mandate would be contrary to the policies and objectives inherent in the US Congress’ enactment of the NLRA.

#### State protections will be struck down by implicit field preemption AND the Bankruptcy Clause.

Harner ’17 [Michelle; 2017; Professor of Law at the University of Maryland Francis King Carey School of Law, United States Bankruptcy Judge for the District of Maryland; William and Mary Law Review, “Rethinking Preemption and Constitutional Parameters in Bankruptcy,” vol. 59]

D. The Preemption Doctrine, Bankruptcy, and State Debtor- Creditor Laws

State debtor-creditor laws and federal bankruptcy laws have coexisted in one form or another since Congress enacted the first Bankruptcy Act in 1800. 124 Nevertheless, both federal bankruptcy and state debtor-creditor laws have evolved since the Court's last opinions addressing their coexistence in the 1930s. 125 This changing landscape has created new potential preemption issues, particularly in the context of field and conflict preemption, doctrines under which preemption is implied rather than set out in the language of a federal statute. 126

In bankruptcy, as in other disciplines, field preemption speaks to federal law that is sufficiently comprehensive "to make reasonable the inference that Congress left no room for" supplementary state regulation. 127 Conflict preemption, on the other hand, applies "when 'compliance with both federal and state regulations is a physical impossibility,' or when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" 128 The following Sections first discuss recent Supreme Court precedent on the preemption doctrine involving disciplines other than bankruptcy and then turn to lower courts' application of the preemption doctrine in the bankruptcy context.

1. The Supreme Court and the Preemption Doctrine

The Supreme Court's jurisprudence on the federal preemption doctrine is extensive, not always consistent, 129 and the subject of much commentary. 130 This Section focuses on the Court's discussions of implied preemption--specifically, field and conflict preemption--given the limited nature of any statutory preemption language in the Bankruptcy Code. That said, the Bankruptcy Clause itself authorizes Congress to occupy the field of bankruptcy, which should inform any analysis of congressional intent as to the scope, purposes, and objectives of the Bankruptcy Code. 131

The Court's decision in Arizona v. United States is a good example of the often-overlapping inquiry of implied field and conflict preemption. 132 The case involved certain laws passed by Arizona in an attempt to unilaterally address the issue of illegal immigration. 133 The Court considered four provisions of the Arizona statute, finding three of the provisions preempted and one constitutional. 134 Similar to the Bankruptcy Clause, Congress's authority to enact federal immigration legislation also stems, in part, from Article I, Section 8, of the U.S. Constitution, which provides that Congress has the power "[t]o establish an uniform Rule of Naturalization." 135 Also akin to the purpose of the Bankruptcy Clause, the Naturalization Clause was meant to protect commerce. As the Court in Arizona explained, "The federal power to determine immigration policy is well settled. Immigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation." 136

One of the provisions at issue in Arizona involved additional penalties imposed by the state for violations of the federal law. 137 The Court considered the federal statutory scheme for the registration of aliens, and it determined that the scheme was comprehensive and addressed all aspects of alien registration, including the consequences of noncompliance. 138 According to the Court, the scheme "was designed as a 'harmonious whole.'" 139 The Court observed, "Where Congress occupies an entire field, as it has in the field of alien registration, even complementary state regulation is impermissible." 140 In doing so, the Court rejected the State's argument that its penalty provisions were simply in aid of the federal law. 141

The two other provisions of the Arizona statute struck down in the case attempted to criminalize conduct that was not addressed by the federal statute and to supplement the authority of state police officers with respect to the removability of aliens under the federal statute, respectively. 142 In both instances, the Court held that the state law created "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 143 In reaching this conclusion, the Court analyzed and relied on the "text, structure, and history" of the federal legislation. 144

Not all of the members of the Supreme Court support a broad implied preemption doctrine. For example, in his dissent in Arizona 145 and his concurrence in Wyeth v. Levine, 146 Justice Clarence Thomas posited that preemption analysis should be based solely on the language of the applicable statutes. He explained that it "should not be '[a] freewheeling judicial inquiry into whether a state statute is in tension with federal objectives, but an inquiry into whether the ordinary meanings of state and federal law conflict.'" 147 Nevertheless, the Court has continued to invoke the field preemption doctrine and a somewhat expansive consideration of the purposes and objectives of the federal statute at issue. 148 Notably, however, the Court's willingness to engage in a purposive analysis does not always result in federal preemption of the state law at issue. 149

The Court's preemption analysis--whether or not solely textual--is guided by two long-standing preemption principles. "First, 'the purpose of Congress is the ultimate touchstone in every preemption case.'" 150 The Court frequently analyzes the history and context of the federal legislation at issue in making this determination. 151

Second, "[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated … in a field which the States have traditionally occupied,' … we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" 152

At least one court of appeals has suggested that such a presumption is weaker in cases involving the Bankruptcy Clause and the regulation of creditors' rights, which "has 'a history of significant federal presence.'"

### AT: Delaware solvency

#### The structure of federalism makes shareholder primacy inevitable

Gordon ’23 [Colin; Summer 2023; PhD, professor of history at University of Iowa; Catalyst, "Federalism and Class Struggle," vol. 7]

Federalism exaggerates all of this. In a patchwork of investment-anxious local and state jurisdictions, firms can much more credibly and readily wield the threat of exit — a dynamic underscored by the jurisdictional competition to subsidize new investment and the perpetual hand-wringing in state legislatures over the maintenance of a “friendly business climate.”10 State legislatures, on this score, are notoriously in thrall to the demands of local employers and labor markets, calibrating their labor and social policies (even ensuring the wholesale exemption of some workers from any protection) to ensure a stable and quiescent labor supply.11 In subnational jurisdictions, the logic of Polanyi’s “double movement” is distorted at both poles: state and local political actors are at once more inclined to defer to the interests and demands of capital and less inclined to contemplate social protections that might prove competitive liabilities.12 These dynamics are even starker in municipal settings where economic growth and property valuation is the sine qua non of local public policy, where regulatory and taxing powers are constrained by the “home rule” provisions of state law, and where meaningful social protection is beyond the vision or capacity of local policy.13

In turn, states do not just replicate the nation-state at a smaller scale or nest neatly inside it. They lack not only the will but the ability to ameliorate market conditions, to sustain equal protection, or to provide robust public goods and services. Policy devolution, in other words, often means lodging political responsibility — quite intentionally and strategically — in jurisdictions without the capacity or inclination to meet them.14 American federalism (unlike all its international peers) makes no provision for revenue sharing across jurisdictions. The fiscal capacity of state government is relatively weak (most states have self-imposed tax and expenditure limits) and reliant on regressive revenue sources.15 For their part, local governments are doubly disadvantaged; their ability to raise revenue or incur debt is sharply constrained by state governments, leaving them dependent on volatile sales and property taxes, increasingly meager intergovernmental transfers, or predatory policing and code enforcement.16 In the delegation of political authority, state and local government is largely organized around “police power” regulation, restraint, and punishment of private conduct.17 The unsurprising result, at this intersection of narrow political horizons and limited fiscal capacity, is a policy environment in which market deference is matched by meager and punitive social policies.18

Federalism, in practice, is hostile to productive democratic governance. It works to the benefit of those best positioned to exploit or leverage both jurisdictional competition and the jurisdictional proliferation of political “veto points.” It sustains a “checks and balances” environment for policymaking that is almost all checks. Gridlock, inaction, and the failure to respond to changing conditions favor the status quo.19 The defense of federalism or the pursuit of decentralization, as Lisa Miller underscores, has become a profoundly anti-statist agenda. The goal is not to find the best venue or jurisdiction for affirmative state action but to quash that prospect altogether. In the states, entrenched interests are uniquely able to “craft political agendas behind the scenes, kill off reform policies before they see the light of day, or create seemingly neutral anti-statist political narratives.”20 In our polarized states, partisan or ideological differences are widened by the administration of policy — which increasingly reinforces political extremism rather than dampening it.21

Indeed, as recent work by Miller, Jacob Grumbach, Alex Hertel-Fernandez, and others has documented, state legislatures have become the sweet spot for conservative policy experiments. Growing partisan polarization has yielded gridlock in national politics but a steady increase in one-party “trifecta” control of state politics (in 1992, the Democrats claimed trifecta control in sixteen states, the Republicans just three; in 2018, the Democrat claimed eight trifectas and the Republicans twenty-six). This has afforded national conservative interests (including partisan groups like the Republican Governors Association, multi-issue clearinghouses like the American Legislative Exchange Council, and single-issue lobbies like National Right to Life) the opportunity to capture state policymaking and to use the states to shop even the most odious and unpopular policy ideas. Republican statehouses play right along, not only embracing such policies but (as in the post-Dobbs abortion debate) competing with one another to see who can come up with the most craven and punitive version.22 The cynical backlash against “woke” curricula and diversity programming, in the bargain, serves as a potent reminder of the racial animus at the core of our fragmented politics.

### AT: Delaware / Corporate Supremacy Turn

#### 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.

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.

#### 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

#### Scenario 1---COAL:

#### Unchecked rejections of labor contracts in the bankruptcy process allows unfettered coal mining. Only rebalancing non-bankruptcy interest closes regulatory loopholes.

Macey ’19 [Joshua and Jackson Salovaara; April 2019; Postdoctoral Associate at Cornell Law School; works in the renewable energy industry; Stanford Law Review, “Bankruptcy as Bailout: Coal Company Insolvency and the Erosion of Federal Law,” vol. 71]

This Article shows how bankruptcy law has operated to thwart other federal laws. The key takeaway is simple: Coal companies have used the Bankruptcy Code to discharge or otherwise restructure substantial environmental, pension, and health care liabilities in a manner that has eviscerated the regulatory schemes that gave rise to those obligations. From the perspective of bankruptcy theory, we posit that bankruptcy law can be manipulated in a manner that allows corporations to ignore federal environmental and labor laws even when those companies are solvent.26

A commonly held view about corporate bankruptcy—known as the Creditors’ Bargain Theory27—is that bankruptcy proceedings should (1) not disturb nonbankruptcy entitlements28 and (2) maximize the value of the insolvent firm’s estate.29 The role of bankruptcy law, on this view, is primarily to solve the coordination problem caused by having multiple creditors who all want to seize an insolvent debtor’s assets before other creditors.30 Adherents of the Creditors’ Bargain Theory readily concede that bankruptcy law should— and does—“accord substantial respect to nonbankruptcy entitlements.”31 This Article shows that strategic reorganizations that occur before and during a bankruptcy proceeding can be used to rearrange nonbankruptcy entitlements to the detriment of regulatory obligations. Many of the substantive rules embraced by the Creditors’ Bargain Theory as maximizing asset values and preserving nonbankruptcy entitlements have been weaponized by corporations to evade their regulatory obligations. The implication is that the Bankruptcy Code allows corporations and their creditors to make ex post readjustments to nonbankruptcy entitlements, and they do so at the expense of the government’s ability to effectively regulate.

To be sure, strategic prebankruptcy conduct has played a critical role in allowing coal companies to evade their regulatory obligations. By spinning off underfunded subsidiaries and giving those subsidiaries legal responsibility for the parent’s regulatory obligations, coal companies have been able to separate productive assets from onerous regulatory debts. When the underfunded successor entity liquidates, it is difficult to hold that original company responsible for honoring those regulatory debts. In this way, the ability to siphon off regulatory obligations through spin-offs and divestitures—whether those spin-offs occurred during or before the reorganization—has allowed companies to pay unsecured pecuniary creditors a relatively high percentage of what they are owed while paying regulatory creditors virtually nothing.32 In this way, strategic prebankruptcy conduct has allowed coal companies to externalize social costs despite regulations intended to force them to internalize those costs.33 A more aggressive application of fraudulent conveyance law, substantive consolidation, and the Bankruptcy Code’s feasibility requirement would make it more difficult for corporations to do this. Bankruptcy law’s failure to prevent such strategic behavior has thus allowed coal companies to pay similarly situated classes of creditors dramatically different payouts.34

There is a clear tension between bankruptcy law’s goal of maximizing the value of an estate and regulatory programs that operate by forcing regulated parties to internalize the social costs of their behavior. Maximizing the value of an estate is obviously in the interest of both debtors and creditors, because a corporation’s ability to extricate itself from its regulatory obligations will increase the pool of assets available to the other creditors. Unfortunately, maximizing asset valuations can conflict with—and even undermine— regulatory schemes whose force stems from their compliance costs.35

The central claim of this Article is that regulatory obligations need to be understood as fundamentally different from debts incurred in capital markets, and 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. It is especially problematic that bankruptcy favors command-and-control regulations over market-based regulations. This bias occurs because in a reorganization, injunctions enjoy what amounts to an effective priority claim while pecuniary liabilities are generally treated no differently than are ordinary contracts—even when such liabilities are designed to further regulatory goals.36

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These conclusions are based on our analysis of the coal industry, but they also apply more broadly to all regulations for which parties can defer the costs of compliance. When the social costs of an activity are greater than the market value of the goods produced by a firm, and when a regulatory scheme has been specifically designed to force firms to internalize those social costs, the firm should not be able to shed those regulatory obligations in bankruptcy or reorganization unless Congress has explicitly permitted it. And if a firm’s ability to reorganize is predicated on its ability to shirk its regulatory obligations, then it should be forced to liquidate, and its outstanding regulatory obligations should be given first priority when the assets of the business are distributed. These principles should apply whether a regulatory obligation takes the form of a command-and-control regulation or a money judgment. Finally, we criticize bankruptcy judges for reading the Bankruptcy Code to permit discharges of regulatory debts despite plausible interpretations that would except such debts from discharge. Specifically, we argue that certain provisions of the Code—the prohibition against fraudulent transfers,37 the regulatory and administrative expense exceptions to the automatic stay,38 and the feasibility requirement39—should be understood to prevent companies from using bankruptcy to avoid federal regulations. This argument is also relevant to recent developments in the field of bankruptcy law. First, it poses challenges for scholars and judges who have questioned the structure of the U.S. bankruptcy system for its reliance on mandatory federal rules. These critiques take one of two approaches. Scholars such as David Skeel have argued that states should play a larger role in the development of bankruptcy law.40 Others such as Alan Schwartz have argued that bankruptcy law should be a default—not a requirement—and that parties should be able to select whatever rules they want via contract.41 We show that these arguments are persuasive only if federal regulations do not force firms to bear some of the social costs of firm activities.42 Negative externalities require a mandatory, consistent framework. They therefore justify the use of a uniform federal bankruptcy law. Thus, while we criticize the manner in which federal bankruptcy law has been applied in recent coal company reorganizations, we also defend its basic structure against proposals urging that Congress replace the Bankruptcy Code with a decentralized alternative. This Article also destabilizes core assumptions embraced by both sides of one of the most enduring debates in bankruptcy law.43 For several decades, a principal dispute in bankruptcy scholarship has been between traditionalists, who think that bankruptcy proceedings should further social values such as increased employment, and proceduralists, who argue that bankruptcy should aim exclusively to maximize asset values.44 Although proceduralists argue that broad social goals should be pursued outside of bankruptcy,45 some believe that bankruptcy law should still favor reorganization because it generally maximizes the value of a firm’s assets.46 In showing that bankruptcy can implicate the social goals that Congress has chosen to pursue outside of bankruptcy, we show that it is often impossible to isolate bankruptcy’s goals from other competing statutory mandates. In these situations, proceduralists’ preference for reorganization undermines the very nonbankruptcy federal goals that bankruptcy should respect. Traditionalists have a similar problem. They assume that reorganization is preferable to liquidation because reorganization has positive spillovers in the form of increased employment.47 For this reason, traditionalists have provided a theoretical defense of the “continuation bias” on the ground that it reduces the economic and employment disruptions caused by liquidation.48 We agree that social concerns are relevant to bankruptcy proceedings. The recent experience of the coal mining industry, however, indicates that in some situations, these social concerns are more effectively promoted by liquidation, not reorganization. The assumption that bankruptcy should, as a default, aim to reorganize is therefore contingent on whether a given reorganization would undercut congressional goals unrelated to employment. This Article proceeds in four Parts. Part I outlines the regulatory regime that aims to force coal companies to reclaim land degraded by mining, and to provide pensions and health benefits to retired coal miners. Part II describes the coal industry’s recent financial difficulties, and explains how bankruptcy law has operated to undermine environmental and labor laws. Part III argues that the Bankruptcy Code should not be used to allow firms to externalize social costs when federal legislation and regulation aim to force firms to internalize such costs. Firms’ ability to externalize costs incentivizes regulators to control firms’ behavior through design standards—not through more economically defensible performance standards or market-based approaches. Part IV explains how judges and regulators could make it more difficult for firms to misuse bankruptcy to evade their environmental and retiree obligations. While Part III offers a normative defense of our position that Chapter 11 should not be used to thwart such obligations, Part IV puts forward legal and policy suggestions intended to help judges and lawmakers accomplish this goal. I. The Regulatory Landscape This Part provides an overview of the regulatory landscape governing coal companies. The Surface Mining Control and Reclamation Act (SMCRA) requires that coal companies reclaim land degraded by coal mining.49 SMCRA contemplates the possibility that coal companies will become insolvent and requires that they post performance bonds to ensure that the land will be reclaimed.50 Meanwhile, the Coal Industry Retiree Health Benefit Act (Coal Act) mandates that coal companies pay health care benefits to retired miners.51 These statutes aim to force coal companies to internalize the social costs of mining, and to produce coal only when the market value of mining exceeds both the costs of production and the environmental and health costs associated with coal extraction.52 A. The Surface Mining Control and Reclamation Act (SMCRA) Congress passed SMCRA in 1977, shortly after certain coal companies had abandoned thousands of mine sites.53 SMCRA requires coal companies to restore land affected by surface mining to “a condition capable of supporting the uses which it was capable of supporting prior to any mining.”54 This may involve replacing the topsoil,55 restoring the “approximate original contour” of the land,56 disposing mine wastes,57 protecting the local hydrology,58 and revegetating the surrounding area.59 SMCRA also requires coal mine operators to obtain a permit and post a bond prior to the commencement of any mining activity.60 Regulators can also inspect surface mines, impose penalties and fines, and require operators to forfeit bonds for violations of the Act.61 SMCRA’s bonding requirement forces coal companies to post reclamation bonds to ensure that they will be able to restore a site’s land to its original condition once mining concludes. The bond must be “sufficient to assure the completion of the reclamation plan if the work had to be performed by the regulatory authority,”62 and regulators can revoke a permit if they establish that a coal company’s failure to reclaim a mine site was “willfully caused” or “unwarranted.”63 These bonds serve two purposes. They ensure that the land will be reclaimed, and they force coal companies to internalize the environmental costs associated with mining. SMCRA permits coal companies to post three kinds of bonds to satisfy this requirement: surety bonds, collateral bonds, and self-bonds. A surety bond is a third-party guarantee.64 It is basically a form of insurance that pays out to the government in the event that the mining company fails to reclaim the land. A collateral bond involves posting assets as collateral.65 If the coal company fails to reclaim the land, the government can seize the posted assets and use the proceeds obtained from their sale to restore the land.66 The third type of bond, a self-bond, allows a coal company to act as guarantor of its own reclamation obligations.67 Unlike surety and collateral bonds, self-bonds do not provide particular sources for repayment in the form of third-party guarantees or tangible assets.68 For this reason, SMCRA states that a company can use self-bonds only when it can establish that it is in good financial health.69 As a result, since a company that uses self-bonds merely commits to performing reclamation work without posting collateral, the company must meet certain metrics of financial health.70 Leading up to their bankruptcy filings, many coal companies had used self-bonds far more frequently than they had used surety or collateral bonds. We would expect coal companies to prefer self-bonding because it frees up assets that would otherwise be used to collateralize a company’s reclamation obligations.71 A number of states enforcing SMCRA have secured billions of dollars of reclamation obligations in self-bonding programs.72 The total value of self-bonded reclamation obligations is sizable. By 2015, the four largest coal companies totaled nearly $2.8 billion in self-bonds.73 For example, the largest of those companies, Peabody, had guaranteed more than $1.43 billion in self-bonds by the end of 2015.74 This was approximately 71% of its total reclamation obligations.75 At that time, Peabody’s total reported net worth was only $918.5 million.76 In theory, SMCRA forces coal companies to internalize some of the environmental costs of surface mining by requiring a financial guarantee that they will reclaim degraded land. Operational costs are reduced for companies more likely to reclaim mine sites because surety companies will offer favorable rates to those that meet their obligations. In this way, reclamation bonds take advantage of market forces because they encourage coal companies to compete to develop more efficient reclamation plans. Thus, SMCRA attempts to align coal companies’ financial interests with society’s interest in preserving environmental quality. In reality, however, self-bonding undermines this regulatory scheme. The ability to self-bond makes it less likely that coal companies will actually internalize the costs of abandoning mine sites. Because self-bonds are not secured by any assets, they provide scant assurance that coal companies will reclaim the degraded land if they go bankrupt. When a mine operator declares bankruptcy, the government may not be able to recover the full value of the company’s reclamation obligations because self-bonds are treated like unsecured debt.82 Self-bonding is ineffective. When a company’s financial position deteriorates and it is no longer eligible for self-bonding, it also lacks the financial resources to post surety or collateral bonds.83 Once a company becomes financially distressed, regulators may become reluctant to require the company to cease operating if it is unable to obtain a surety bond, or if acquiring a surety bond would force the company into greater financial distress.84 This dynamic occurs because if a mining company continues to operate, it will at least be able to generate some revenue to offset the ongoing costs of reclamation. But if regulators force the company to shut down its operations, they might thereby reduce the company’s liquidity and push the company into bankruptcy. At that point, it is unlikely that the company would be able to pay the full value of its bonds.85 The Executive Director of the Interstate Mining Compact Commission described this situation as “a classic Catch-22: if the state chooses to insist on alternative financial assurances or collateral as a result of the company’s diminished financial situation, the threat to the company’s financial solvency would only increase.”86 Thus, ex ante, we would expect state regulators to want coal companies to internalize the costs of environmental regulations so that they do not leave taxpayers with unreclaimed mine sites. But after environmental liabilities reach a certain size and a coal company cannot afford to actually reclaim damaged land, state regulators’ incentives change: Regulators now want the company to continue mining in the hope that additional revenue will offset at least some of the reclamation costs that will otherwise fall on taxpayers. Moreover, once a coal company finds itself in a financially precarious situation, it has an incentive to continue to expand as rapidly as possible, because the larger its unclaimed environmental obligations, the more desperate state regulators will be to find a way for the company to stay in business. This pattern played out repeatedly in the recent wave of coal company bankruptcies. Just as the market for coal began to contract, large coal companies in precarious financial positions expanded dramatically.87 These acquisitions increased the number of sites each coal company mined, which in turn increased their reclamation costs and left regulators even more fearful that the failure of any company would leave taxpayers on the hook for billions of dollars in cleanup costs.88 Before the major coal companies began filing for bankruptcy in 2015, only 10% of land disturbed by surface mining in Montana, North Dakota, and Wyoming had been fully reclaimed.89 Roughly a third of disturbed land had seen no reclamation activity whatsoever.90 As described in Part II.B below, the recent slate of bankruptcies has allowed some coal companies to get rid of these obligations altogether. B. The Coal Act In addition to their environmental obligations, coal companies are also required to provide lifetime health care benefits and pensions to retired miners under the Coal Act.91 The Coal Act is similar to SMCRA in that it aims to force companies to internalize some of the deleterious health effects of coal mining. If expansion would only make economic sense if the company did not have to provide these health benefits, then the costs imposed by the Coal Act would deter the company from expanding—at least in theory, assuming that the company actually has to pay these costs. The coal industry’s commitment to fund health care and pension obligations to coal miners was only secured after a protracted battle between coal companies and miners unions. In the late 1980s, it was not clear that coal companies would continue to provide health care benefits to retired miners.92 Increased medical costs, consolidation in the coal industry, and a flood of new retirees contributed to a deficit of $114.7 million owed to retirees.93 This deficit was projected to increase to $300 million by 1993.94 And coal companies threatened to default on these obligations.95 At the time, 120,000 retirees were receiving benefits from coal companies.96 This set the stage for a congressional intervention. The Coal Act was not the first time Congress stepped in to require that companies take action to mitigate the health and safety risks of coal mining,97 but it was the first time that the federal government required that the coal companies provide postretirement benefits for all miners.98 The Coal Act requires employers who had been providing benefits to coal miners to continue to do so for the life of all beneficiaries who retired before October 1994.99 The Act also provides benefits to coal miners who were not covered by the union agreements.100 In addition, the Act guarantees a minimum level of benefits.101 Any company that had employed miners under a previous UMWA coal wage agreement is required to participate in the benefit program.102 If the employer is defunct, responsibility is reallocated to any entity that was a “related person” to the employer on the date that the signatory employer went out of business.103 This means that any company that has ever employed a given coal miner—or is connected with a company that had—can be held responsible for that individual’s Coal Act benefits. Insolvency is therefore not supposed to be an avenue to circumvent the obligations. Like SMCRA, the Coal Act permits coal companies to defer payment on their regulatory liabilities. Pensions and health care services owed to retired miners often do not come due for a number of years because benefits are paid periodically throughout a miner’s retirement.104 While companies will be more likely to have funds available if they allocate money beforehand, the Coal Act does not require them to do so. Coal companies’ unwillingness to fully fund these obligations before they are due has contributed to numerous congres sional interventions.105 As shown in Part II.B below, the ability to defer payment is a crucial factor that has allowed coal companies to evade these regulatory liabilities. C. Bankruptcy: A Primer The goal of corporate bankruptcy, according to the law and economics literature, is to maximize the expected value of the pool of assets that will ultimately be divvied up among creditors.106 This goal originates with the Creditors’ Bargain Theory, which argues that reorganization should be “designed to mirror the agreement one would expect the creditors to form among themselves were they able to negotiate such an agreement from an ex ante position.”107 The Creditors’ Bargain Theory provides a coherent justification for the use of collective proceedings in bankruptcy. The theory posits that bankruptcy is necessary for a single reason: By temporarily shielding the debtor’s assets from its creditors, the Code “prevent[s] a race that rewards the first creditor to the courthouse, it avoids dismemberment of a firm with going-concern value and [it] facilitates a collective proceeding in which the parties (debtor and creditors) can negotiate the terms under which the firm will continue as a going concern.”108 The idea is that when a debtor does not have enough assets to pay all its creditors, a tragedy of the commons ensues. Each creditor will worry that it will not be paid, so it rushes to collect whatever assets it can. Creditors take what is available without thinking about how to maximize the total value of the debtor. Although a few creditors might come out ahead, most will not, because this rush to the courthouse will destroy the company—even if it is still viable. This situation harms creditors ex post because the assets that are distributed may be worth less piecemeal than as a going concern.109 It will also harm the debtor ex ante by making creditors insist on harsher credit terms in order to compensate for the risk that they will not get paid. The Creditors’ Bargain Theory thus justifies bankruptcy law for supplying the terms of the contract that the parties would have agreed to if they had been able to negotiate with each other ex ante.110 According to Douglas Baird,111 Thomas Jackson,112 and other adherents of the Creditors’ Bargain Theory, the Bankruptcy Code realizes this ideal through the automatic stay,113 the prohibition on fraudulent transfers,114 and the absolute priority rule.115 When a company files a petition for bankruptcy, the automatic stay operates as an injunction that halts all actions by creditors.116 The stay prevents creditors from collecting debts, seizing the debtor’s assets, or otherwise “exercis[ing] control over the property.”117 The stay is designed both to provide relief to a struggling debtor and to prevent creditors from rushing to collect assets in a manner that will destroy the value of the firm. The rule against fraudulent transfers serves a similar purpose. This rule prohibits debtors from making payments shortly before bankruptcy that are designed to place certain assets outside the reach of creditors.118 For instance, a debtor may decide to pay her sister shortly before filing for bankruptcy, or she may repay a bank, even if she cannot repay her other creditors, in the hope that the bank will continue to do business with her after she emerges from bankruptcy. Not only are such tactics unfair to the other creditors, but the prospect that a firm will pay favored creditors first will exacerbate the “race to the courthouse” problem that justifies the automatic stay. If creditors fear that debtors will pay certain creditors first, they may demand early repayment from debtors who are not insolvent but who may be experiencing financial hardships. If every creditor does this at the same time, an otherwise solvent debtor may become insolvent because she may be unable to get a fair return for her assets if she is forced to sell them all at once. While creditors might theoretically agree to arrangements that would prevent this kind of selfinterested behavior if they were able to bargain about distribution ex ante, once a firm actually files for bankruptcy, individual creditors will rush to get whatever they can get from the firm. The Bankruptcy Code is therefore intended, at least in theory,119 to mitigate these pathologies and maximize the total worth of an insolvent firm’s assets. Whereas the automatic stay and the prohibition against fraudulent conveyances ensure that a debtor’s assets are shielded from its creditors, the absolute priority rule governs the ultimate distribution of an insolvent debtor’s assets. The rule entitles senior creditors to be paid in full before junior creditors receive anything.120 In practice, creditors often deviate from the absolute priority rule by negotiating restructuring support agreements—ex post agreements.121 In other words, the absolute priority rule is the default rule, but parties can contract for other terms after a debtor files for bankruptcy.122 In a Chapter 11 reorganization, the parties can agree to whatever new arrangement they wish, subject to a few conditions. First, the creditors and debtors must be divided into classes based on the seniority and character of their claims.123 Each class votes separately on any proposed reorganization plan.124 Second, the plan must be approved by creditors in each class that own two-thirds of the value of the debt for that class and that also constitute a majority of individual creditors for that class.125 It is worth noting that all of these rules assume that the purpose of bankruptcy is to allow the debtor to access credit and to allow the creditor to receive a return on her investment. This assumption is often true, but the pervasiveness of this view suggests that bankruptcy scholarship and the legal framework governing bankruptcy insufficiently contemplate debts that are primarily intended to further policy goals unrelated to capital formation. As the rest of this Article shows, this assumption may not apply to regulatory debts. Creditors whose goal is to make money will prefer—and vote in favor of—a reorganization agreement that maximizes their return on investment. However, creditors who value a corporation’s compliance with its regulatory obligations may choose terms accordingly, even if compliance comes at the expense of future profits. D. Local Impacts of Coal Company Bankruptcies Bankruptcy does not eliminate the social losses that arise when a corporation fails. Rather, it allocates losses between various stakeholders. Part II below describes the financial and legal strategy that coal companies have used to shed at least $1.9 billion in environmental liabilities, as well as $3.2 billion in pension, health care, and other retiree benefits.126 But these monetary figures do not fully convey how much damage this behavior has caused: The strategies coal companies have used to get rid of their regulatory obligations have imposed real human costs on the communities and workers associated with the mines. Unlike traditional creditors in a bankruptcy, who bear the costs of bankruptcy in the form of lowered investment performance, the communities affected by coal companies’ bankruptcies bear these costs in the form of worse health, poor financial security, and diminished land and water quality. Thus, while every bankruptcy forces stakeholders to bear the costs of the failing firm, regulatory discharges often impose those costs on third parties. The farmers whose livelihoods are threatened by surface mining were not involved in the insolvent firm, yet they bear many of the costs of its insolvency—despite the existence of regulations intended to prevent that from happening. Although many coal miners were promised lifetime health benefits, coal companies have evaded their retiree liabilities, leaving many retired miners to face debilitating diseases and disabilities on their own. In many cases, miners became sick or disabled as a direct result of the hazards of coal mining. Consider the example of West Virginia resident Alfred Price, who spent nearly thirty years working for Peabody.127 Mining exposed Price to a neurotoxic chemical called polyacrylamide, which has caused memory loss and severe mood swings, and has left him cognitively impaired.128 Peabody’s bankruptcy has allowed the company to avoid covering Price’s health care costs and to cut his pension.129 Or consider Carlyn Rehbein, who spent twenty-seven years working at Peabody’s Illinois mines, and now suffers from lung cancer.130 Peabody transferred the liabilities for his health care benefits to Patriot, which then went through its own bankruptcies.131 In Rehbein’s own words, “I ate coal dust and rock dust for 27 years and was promised all these benefits, and now they’re trying to back out.”132 The discharge of liabilities extends beyond health care to pensions as well, causing financial security issues for many retired miners. Roger Merriman worked in the coal industry for twenty-eight years.133 As a result of Patriot’s two bankruptcies, he was slated to lose both his pension and health care benefits, putting him and his wife in an untenable position.134 Merriman described the difficulty his family was facing: “We’ll have to make a choice of whether [we’re] going to the doctors and buying prescriptions or paying bills and eating. It’s a life and death situation realistically is what it is.”135 Price, Rehbein, and Merriman are representative of thousands of coal mining families across the country.136 Coal companies promised their employees that career miners would have their needs taken care of in old age. Recent bankruptcies show that the companies are reneging on that deal. Moreover, coal companies have evaded their environmental liabilities, leaving a legacy of damaged land and polluted water—the burden of which falls on local communities. L.J. Turner, a Wyoming rancher, saw his whole livelihood displaced by the arrival of mining activities near his land.137 Since the 1930s, his family has grazed livestock on the same assigned public lands. Six thousand acres of that land were turned over to coal mining operations, displacing Turner’s cattle and sheep herds.138 The mining operations also choked off the water supply. Spring-fed streams that flowed since Turner was a young child have dried up because of depressurization from mining. Turner has been forced to spend nearly $250,000 to drill wells to provide his animals with water.139 In another example, Peabody’s Gold Fields subsidiary is responsible for a hazardous waste site in Caney, Kansas, where smelter waste was stockpiled.140 Peabody discharged cleanup costs for the site as part of its bankruptcy. The site, which is located next to Caney High School, continues to leach almost 4,500 gallons of metals-contaminated water per month.141 Peabody’s abandonment of the property is likely to lead to the malfunction of the current leachate containment system, causing more contaminated water to spread to the high school and surrounding residences.142 In short, liability discharges pose real threats to public health, the environment, and the livelihoods of surrounding communities.

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II. How Coal Companies Avoid Federal Regulation Through Bankruptcy

By requiring coal companies to internalize some of the social costs of mining, SMCRA and the Coal Act theoretically force coal companies to make business decisions with these costs in mind. In practice, however, coal companies have been able to avoid these costs by strategically using bankruptcy to evade federal regulatory liabilities. This Part examines the recent history of the industry to explain how this has happened.

Time and again, coal companies have relied on a consistent strategy to evade their regulatory obligations. Coal companies either file for bankruptcy themselves, or they spin off or sell underfunded subsidiaries laden with environmental and retiree obligations. When a company files for bankruptcy, it will try to discharge its regulatory obligations. When a coal company spins off a subsidiary, which can happen in a reorganization or in the normal course of business, the new company typically declares bankruptcy after a short period of time. At that point, the short-lived spin-off abandons its regulatory obligations, making it very difficult to hold the original entity responsible for those obligations. The result is that individual coal companies continue to operate—and generate new reclamation and retiree obligations—despite their failure to honor their existing obligations.

This Part traces the bankruptcy process of four large coal companies. Part II.A explains the methodology used to determine when a company is insolvent. Part II.B provides a broad history of coal company bankruptcies and conducts a financial analysis of Peabody, Patriot, Alpha, and Arch to explain the strategies adopted by coal companies to use bankruptcy to avoid their regulatory obligations. Part II.C explains which provisions of the Bankruptcy Code were used to effect this strategy.

A. Methodology

It is important to clarify at the outset how we use the term “insolvency.” There is considerable debate about when a firm becomes insolvent.143 Broadly speaking, courts employ two tests—the balance sheet test and the cash flow test—to make this determination.144 Under the balance sheet test, a bankruptcy judge determines whether the fair market value145 of a corporation’s liabilities exceeds the fair market value of its assets.146 This definition is consistent with the definition of insolvency provided in the Bankruptcy Code.147 It has also become the settled test for determining whether a prebankruptcy payment qualifies as a fraudulent conveyance.148 By contrast, the cash flow test considers whether a corporation can “produce sufficient cash (which can be derived from continuing operations, disposition of assets, or other capital-raising activities) for the payments of debts as they mature.”149 Under the cash flow test, a company must be able to show that it can make good on its obligations as they come due.

In this Article, we apply a version of the balance sheet test to determine when coal companies became insolvent. We choose the balance sheet test for a few reasons. First, it comports with the definition of insolvency provided in the Bankruptcy Code: A company is legally insolvent when its liabilities exceed its assets.150 By establishing that some coal companies became legally insolvent years before filing for bankruptcy, we show that they were only able to continue operating because their creditors assumed that they would be able to shed their environmental and retiree obligations. Second, because a company can fail the cash flow test even if it has a positive net worth, the balance sheet test establishes with greater certainty that the coal companies would no longer have been financially viable if they had accounted for their federal regulatory obligations.151 Third, the balance sheet test measures whether a corporation has a positive net worth, whereas the cash flow test simply measures a company’s ability to pay its debts. In doing so, the balance sheet test measures whether the market valuation of a company indicates that the company provides a good for which the demand exceeds the costs of production and financing. A corporation could provide value while failing the cash flow test if it cannot readily convert assets to cash, or if its debts are for some reason all due in a short period of time. However, failure to satisfy the balance sheet test indicates that the company has a negative present value.152

We use a more stringent version of the balance sheet test than that applied during bankruptcy proceedings. Specifically, we rely on asset and liability valuations reported by the coal mining companies in their SEC and bankruptcy filings—not the fair market valuation of the companies’ assets and liabilities, which would more accurately indicate the companies’ precarious financial condition. Corporations regularly inflate asset valuations and discount liabilities in their SEC filings.153 As discussed below, these overvaluations were so significant in the cases of Peabody154 and Alpha155 that those companies might have been insolvent the second they emerged from bankruptcy had they provided an accurate accounting of their assets and liabilities. However, in order to avoid the critique that we ourselves employ misleading valuation techniques, we rely on the values reported by the companies themselves.

B. Recent History of Coal Bankruptcies

Since the mid-2000s, the U.S. coal mining industry has been in structural decline. Reduced demand for coal triggered a number of bankruptcies—an average of one per month—between 2012 and 2016.156 Without a government bailout, the coal industry will likely continue to contract.157 By the beginning of 2017, companies accounting for over 40% of ongoing U.S. coal production had gone bankrupt in the previous five years, including the first-, second-, and fourth-largest producers.158 Additional bankruptcies have followed since.159

Coal was once the dominant fuel source for U.S. electricity, providing approximately 49% of all utility-scale generation in 2007.160 By 2017, that number had fallen to 30%.161 There is now widespread economic consensus that the coal industry can no longer compete with less expensive energy sources.162 According to a 2015 McKinsey & Company report, the coal industry’s production capacity has vastly outpaced demand.163 The report found that market conditions will make it difficult for the coal industry to service the $70 billion it has in outstanding debt.164 Demand for coal dropped 27% in the five-year period between 2011 and 2016.165 McKinsey predicts a decline in demand of more than 20% by 2020,166 and Bloomberg has estimated that coal generation’s market share will decline 70% over the next three decades.167 As a result of this structural decline, over fifty coal companies have filed for bankruptcy protection since 2012, when Patriot Coal filed for Chapter 11 protection.168

Thus, our analysis does not show that the viability of the coal industry is predicated solely on its ability to use bankruptcy to evade federal regulatory requirements. Rather, this Article shows that bankruptcy has allowed coal companies to produce more coal and for longer than they otherwise would. The analysis below provides a history of recent bankruptcies and explains how they have allowed coal companies to evade their environmental obligations.

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1. Patriot Coal Patriot Coal was formed out of mines spun off from Peabody Energy and Arch Coal. Peabody and Arch seem to have used Patriot to shed a large portion of their environmental and pension obligations.169 When Patriot was initially spun off from Peabody, it inherited only 13% of Peabody’s coal reserves but 40% of its health care liabilities.170 These liabilities included $557 million in health care liabilities171 as well as over $233 million in environmental liabilities.172 In late 2008, Patriot acquired several additional Appalachian mines from the Magnum Coal Company, which had been formerly held by Arch Coal.173 Many of the assets Patriot acquired were unprofitable174 and had to be idled.175 The Magnum mines were also heavily burdened with $500 million of retiree liabilities,176 as well as environmental liabilities. As the bankruptcy judge observed in Patriot’s first reorganization, Arch’s spin-off of Magnum to Patriot “allowed Arch to assign to Magnum only 12.3% of its assets but also, 96.7% of Arch’s retiree health care liabilities.”177 Two years after its formation, Patriot had amassed over $2 billion in environmental and retiree obligations that had all been originally incurred by Peabody or Arch. In fact, Patriot’s financial situation was so precarious when it was founded that the UMWA alleged that Patriot was a “company created to fail.”178 The UMWA was correct. Patriot was a corporate vehicle into which Arch and Peabody dumped onerous regulatory debts. Peabody’s CEO, Gregory H. Boyce, described the Patriot spin-off as a “key element in transforming our business portfolio.”179 On an earnings call, one executive described how the spin-off meant that “[o]ur retiree, health care liability and related expense will be reduced by about 40[%],” adding that “[w]orkers compensation liability will be cut nearly 90% . . . and the combined fund and multi-employer co-act obligations will now fully reside with Patriot.”180 Even Patriot’s own CEO, Ben Hatfield, did not see a future for the company he was managing. When asked by a West Virginia newspaper if Patriot was designed to fail from the beginning, Hatfield seemed to agree, stating: “Frankly, . . . we looked at that and said, ‘how could that work?’ It looks like a bad balance . . . [with] too many liabilities and not enough assets . . . . I frankly agree with many of the things [UMWA President] Cecil Roberts has said. Something doesn’t quite smell right here.”181 The company’s publicly reported financial data bear this theory out.182 In its first annual report in 2008, when all of its assets were mines that had been spun off from Peabody, Patriot reported assets of $1.20 billion and liabilities of $1.12 billion.183 While a company is legally insolvent only when its assets are worth less than its liabilities,184 in practice, companies need some cushion in order to actually pay debts as they come due. But Patriot’s leverage ratio (that is, the ratio of debt to assets) was 93% upon its founding,185 and its debt-toequity ratio was about 14.186 A debt-to-equity ratio of 1, which means that “no more than half of the company’s assets . . . [are] financed by debt,” is considered healthy.187 Patriot’s debt-to-equity ratio was nearly fourteen times that benchmark. Over its short four-year life span, Patriot Coal added a number of Arch Coal assets, but its financial condition changed very little.188 Generally, a company’s financial condition deteriorates before it files for bankruptcy. But Patriot’s financial health hardly changed at all. The implication is that Patriot was never in a position to pay all of its debts. When Patriot filed for bankruptcy in 2012, it had assets of $3.6 billion against $3.4 billion of liabilities.189 In other words, although Patriot had acquired additional assets since it was formed in 2008, those assets also carried substantial liabilities such that the company’s financial position hardly changed. Included in these liabilities were $1.4 billion in health care and pension liabilities, and $700 million in environmental liabilities.190 Patriot Coal entered Chapter 11 bankruptcy for the first time in August 2012. At that time, the company employed over 4,000 employees, about half of whom were unionized.191 The bankruptcy proceedings consisted largely of disputes over Patriot’s pension and health care liabilities.192 During the restructuring negotiations, unions challenged Patriot’s proposed plan on the ground that the spin-off was a fraudulent conveyance and Peabody should be liable for the union members’ health care and pension entitlements.193 In the end, only around $385 million of these liabilities was funded.194 Peabody agreed to pay $310 million toward the health care and pension liabilities,195 though it has since tried to reduce this amount.196 Arch also made negligible payments toward these liabilities.197 The bankruptcy judge thus allowed Patriot to breach its contracts with the UMWA and steeply reduce the mine workers’ retiree benefits. As a result, the company was able to discharge roughly $1.1 billion of health care and pension liabilities.198 In addition, Patriot was able to delay compliance with environmental obligations concerning selenium water discharge.199 Patriot emerged from bankruptcy with purported assets of $3.6 billion and liabilities of $2.0 billion.200 At least $1.1 billion out of the $1.8 billion in Patriot’s discharged liabilities—around 60% of the total discharged obligations—consisted of liabilities that were owed to retired coal miners who had spent their careers at Peabody or Alpha.201 Patriot’s second life also proved short. In May 2015, less than eighteen months after it reorganized, Patriot again filed for Chapter 11.202 It turned out that Patriot’s assets were worth nowhere near $3.6 billion. Although the judge who approved Patriot’s 2013 reorganization found that the Plan was “not likely to be followed by the liquidation or the need for further financial reorganization,”203 the bankruptcy court had relied on assumptions about the coal industry that turned out to be incorrect. As dryly noted in the second bankruptcy disclosure statement, “[Patriot Coal’s] feasibility after the 2012-13 Restructuring was predicated on assumptions about coal prices and operating performance that ultimately did not materialize.”204 Patriot’s second bankruptcy turned out to be part of a wave of bankruptcies across the U.S. coal mining industry in 2015 and 2016.205 Patriot’s second bankruptcy resulted in a sale of all its assets. Blackhawk Mining purchased a portion.206 Although Blackhawk initially tried to purchase Patriot’s mines free and clear of reclamation obligations, the company ended up agreeing to reclaim Patriot’s former mine sites after state regulators objected.207 Still, the company inherited only Patriot’s most desirable mines.208 The lease agreement between Patriot and Blackhawk stipulated that Blackhawk would be responsible only for reclaiming the assets it purchased.209 The remaining assets, with an estimated $738 million in environmental and retiree liabilities, were not included in the asset purchase agreement between Patriot and Blackhawk.210 These remaining assets included Patriot’s Federal No. 2 mine and Hobet 21 mountaintop removal complex, which had accrued hundreds of millions of dollars in reclamation obligations.211 These assets were originally scheduled to be abandoned, but a nonprofit called the Virginia Conservation Legacy Fund (VCLF), which has dedicated itself to reclaiming lands, acquired them and is attempting to fulfill Patriot’s environmental obligations.212 But it is not clear that the VCLF has any ability to make good on its commitment to reclaim the West Virginia mines. The VCLF’s business plan involved offsetting its mines’ reclamation obligations by planting trees so that it would receive carbon credits.213 As of 2018, one of the mines the VCLF inherited from Patriot has been inactive since the VCLF purchased it.214 In addition, the only operating mine it received from Patriot closed when the “tree planting plan went nowhere.”215 Perhaps most troublingly, Tom Clarke, the VCLF’s CEO, has a “modus operandi” of “drain[ing] substantial funds from his projects into a web of related companies—through which he can then use funds for his own benefit—all while delaying payment or entirely defaulting on legitimate debts owed to creditors.”216 From the moment it was founded in 2008, Patriot had insufficient cash flow to meet its liabilities. Its very existence allowed Peabody and Arch to move onerous assets off their books. And after Patriot liquidated, Blackhawk, which took over Patriot’s attractive assets, continued to mine 11.9 million short tons of coal in 2016.217 Blackhawk has done so, moreover, without having to pay for the labor obligations associated with those mines or for the environmental obligations associated with the Patriot’s unproductive mines.218 2. Alpha Natural Resources Alpha Natural Resources followed Patriot into bankruptcy in August 2015.219 At the time, Alpha was the fourth-largest coal producer in the country and produced almost 8% of all coal in the United States.220 Alpha adopted three mutually reinforcing strategies to shed its environmental and retiree liabilities during and immediately following bankruptcy. Its first tactic was simply to discharge retiree obligations and convince state regulators to accept a haircut on its environmental obligations. The second was to rely on unrealistic accounting assumptions to convince interested parties to approve reorganization. And the third was to follow Patriot’s playbook by spinning off mine sites with significant liabilities so that the successor company would not actually have to account for its environmental and pension liabilities. Altogether, these strategies allowed Alpha to separate its profitable mines from many of its regulatory liabilities. In their objection to Alpha’s Second Plan of Reorganization, the EPA and the DOI said that the plan “would extract over $300 million as well as [Alpha’s] more valuable mines out of [Alpha’s] estate, leaving behind what presently are proposed to be inadequately funded and infeasible reorganized entities.”221 According to the agencies, such a “depletion of [Alpha’s] assets renders it unable to comply with significant environmental compliance obligations under federal and state law for the mines it will continue to own.”222 The first part of the strategy was simple. As part of the bankruptcy proceedings, Alpha cut deals with Wyoming and West Virginia regulators which allowed the company to continue mining, even though it no longer met the self-bonding requirements and could not post alternative bonds. For instance, Alpha granted Wyoming a $61 million superpriority claim to cover the company’s $411 million of reclamation bonding obligations in that State.223 Similarly, Alpha granted West Virginia a $24 million superpriority claim and a $15 million letter of credit to cover the company’s $244 million of reclamation obligations in that State.224 Although Alpha owed a total of $655 million in reclamation liabilities, state regulators agreed to accept a superpriority claim on only $85 million in the event that the company stopped operating. This arrangement seemingly gave Alpha a legal right to abandon over $500 million in cleanup costs that the company would have had to pay had it been forced to liquidate. The deals Alpha struck with states in which it self-bonded (and other similar deals executed by other coal companies) arguably represent a violation of SMCRA’s permitting and bonding provisions. Under SMCRA, coal companies are not allowed to operate surface mines without adequate bonding.225 The deals reassured senior secured creditors that Alpha’s reclamation obligations would dilute the pool of assets available to senior creditors in a liquidation by only a few million dollars—rather than by hundreds of millions of dollars. The Office of Surface Mining Reclamation and Enforcement, a federal agency that oversees state mining programs, filed a Reservation of Rights in several coal company bankruptcy proceedings asserting that the state agreements had no bearing on its own legal rights, but the agency did not prevent the companies from continuing to operate during or after reorganization.226 And although environmental groups challenged the deals on the ground that they violated SMCRA’s bonding requirements, a bankruptcy judge dismissed the case for lack of standing.227 In addition to environmental liabilities, Alpha owed its retired miners over $2.3 billion in health care and pension liabilities.228 The discharge of these liabilities resulted in 4,500 retired miners losing their health care, and another 6,670 current employees losing future health coverage.229 A bankruptcy judge in the Eastern District of Virginia determined that these retirement obligations could be discharged.230 Equally troubling is Alpha’s use of unrealistic accounting assumptions to push its remaining environmental and retiree obligations onto corporate vehicles that seem to have been designed to fail. On the surface, Alpha actually appeared to have been solvent when it filed for bankruptcy, with $10.1 billion in assets and $7.1 billion in liabilities.231 Whereas Patriot, Peabody, and Arch were close to or actually underwater when they filed for bankruptcy, Alpha had breathing room relative to its competitors. However, this appearance was belied by the reality that Alpha inflated the value of its assets and left significant liabilities off its books. In fact, Alpha only declared bankruptcy after Wyoming found that Alpha no longer qualified for self-bonding, and that Alpha would therefore have to come up with collateral or surety to guarantee its $411 million in reclamation bonding obligations in that State.232 West Virginia submitted a similar request for $244 million in selfbonds.233 The fact that Alpha was immediately unable to service its debt despite ostensibly having a net worth of $3 billion234 indicates that its self-reported valuation was incorrect. As it turns out, Alpha did not record much of its SMCRA obligations on its balance sheet. The company recognized $1.6 billion in total asset retirement obligations,235 which consisted largely of reclamation liabilities, while only $583 million was accounted for on the balance sheet.236 The company thus assumed, for purposes of calculating its assets and liabilities, that it would not have to pay $1 billion in reclamation bonds. Moreover, despite its reported positive net worth, Alpha had recorded losses ranging from $730 million to $2.4 billion in each of the four years prior to its bankruptcy.237 But when state regulators attempted to force the company to account for those very liabilities, Alpha was unable to do so and immediately declared bankruptcy. Alpha’s accounting gimmickry was especially critical to its restructuring during the bankruptcy proceedings. Alpha used Chapter 11 to split into two companies, Contura and the reorganized Alpha (we refer to this company as Alpha II).238 Contura inherited the crown-jewel mining assets in the Powder River Basin,239 while Alpha II inherited Alpha’s unprofitable Appalachian mines, along with much of Alpha’s environmental and retiree liabilities.240 Alpha thus used bankruptcy to create a new company, Contura, that retained only the valuable assets, and to load up its regulatory liabilities onto a new reorganized entity, Alpha II. The reorganization plan was approved only after the company convinced state environmental regulators that Alpha II would be able to use the proceeds from the mines it inherited to reclaim those mine sites and eventually unwind.241 In other words, Alpha’s right to spin off Alpha II was conditioned on the new company being financially viable. To this end, the financial statements Alpha submitted during the bankruptcy proceedings indicated that Alpha II would be able to reclaim damaged land.242 But Alpha omitted sizable obligations from Alpha II’s books.243 The projections ignored significant capital expenditures that would make it difficult for Alpha II to honor its ongoing obligations.244 Alpha’s failure to report these expenditures decreased the cash Alpha expected to have available by $233 million and resulted in an immediate expected cash flow of negative $87 million.245 As soon as Alpha II emerged from bankruptcy, its liabilities turned out to be so significant that the corporation could not pay its debts as they came due.246 As the West Virginia Department of Environmental Protection pointed out, “[t]he conclusion thus seems almost inescapable that the debtors’ senior management knew about but did not disclose those impending ‘unaccountedfor’ expenditures to ensure consummation of the debtors’ Contura sale and chapter 11 plan for their own benefit and to secure the releases of environmental liability.”247 In short, Alpha purposefully undervalued its liabilities in order to keep environmental and retiree liabilities off of Contura’s balance sheet. The fact that Alpha II had insufficient cash flow to meet its obligations was part and parcel of the bargain. Even worse, the bankruptcy agreement expressly stipulated that Contura could not be held liable if Alpha II eventually liquidated.248 And the process did not end there. Alpha II got rid of its own reclamation obligations by selling the mines affiliated with those obligations to other companies. Specifically, Alpha II transferred $192 million of self-bonds to a company called Lexington Coal.249 As part of the deal, Alpha II kept twenty active mining operations and gave its legacy and abandoned mines to Lexington Coal.250 And after shedding those obligations, Alpha II and Contura merged again.251 It is unclear whether Lexington Coal, the company that took over many of Alpha II’s idle mines,252 will be able to perform its reclamation obligations. Lexington’s CEO, Jeff Hoops, has adopted a business strategy in which he receives compensation in exchange for taking over coal mines laden with environmental obligations.253 But Hoops’s history in the coal industry does not suggest that he will be able to honor the environmental obligations his companies have assumed. Rather, his businesses have begun to exhibit a pattern: Hoops takes over abandoned mines, receives cash from the company that wants to get rid of them, and then fails to actually remediate the environmental problems. Hoops also owns Revelation Energy,254 which previously took over idle mines from Keystone Industries.255 Two years later, state environmental regulators shut down the mines because Revelation had failed to reclaim any of the land, and the toxic waste emitted from the legacy mines was endangering local farmlands and exposing residents to toxic water.256 Moreover, a bank recently sued Revelation, alleging that its owners were stripping the company of its assets and did not intend to make good on its obligations.257 Furthermore, Contura recently sold additional mines to another small coal company called Blackjewel, which also happens to be run by Hoops.258 The transaction allowed Contura to “unload hefty reclamation obligations from [its] books.”259 Hoops’s past environmental obligations have caused state environmental regulators to delay transferring Contura’s coal leases to Blackjewel. But once ownership changes hands, it becomes more difficult for regulators to enforce reclamation. The coal company that originally incurred the liabilities is no longer responsible for them, and the new company lacks the financial resources to make good on the inherited obligations. Finally, as mentioned above, in April 2018 Contura and Alpha II announced plans to merge and rejoin the two companies.260 Each company had separately shed its high-liability mines, and the two were now able to recombine with only their profitable assets. In sum, actions taken in bankruptcy reduced reclamation liabilities by roughly $200 million; subsequent divestitures to Lexington and Blackjewel eliminated another $355 million in asset retirement obligations.261 And when Contura and Alpha II announced their merger, they mentioned Alpha II’s success in shedding obligations as one of the central arguments to justify the merger.262 In other words, Contura and Alpha II split so that Alpha’s senior creditors would not have to pay to reclaim degraded mines. Alpha II had promised to reclaim its Appalachian mines while in bankruptcy, but its own operational insolvency led it to shed those same mines. Once Alpha II did so, it became financially viable again, and thus the two companies reunited. This series of reorganizations effectively shielded Alpha’s profitable mines from half a billion dollars’ worth of environmental liabilities. 3. Arch Coal Arch Coal, the second-largest U.S. coal producer in 2015,263 was producing approximately 15% of American coal just before it filed for bankruptcy on January 11, 2016.264 In its last SEC filing before entering bankruptcy, the company reported assets of $5.1 billion and liabilities of $6.35 billion.265 Arch’s bankruptcy was more conventional than those of its coal industry peers: Its reorganization primarily consisted of a straightforward discharge of approximately $5 billion in unsecured debt. The reason, we think, that Arch engaged in fewer accounting gimmicks than its competitors is that the company had previously so effectively discharged and otherwise avoided its regulatory liabilities through the Patriot divestitures that it had the luxury of being able to give a more accurate accounting of its assets and liabilities. Arch emerged from bankruptcy in 2016 having shed $5 billion—or about 80%—of its debt.266 Like Alpha and Peabody, Arch used its bankruptcy proceedings to renegotiate its SMCRA obligations. To cover $485.5 million in self-bonded obligations, Arch promised $75 million in superpriority bonds and agreed to provide some form of collateral on $17 million of self-bonds.267 In other words, like Alpha, Arch reached an agreement that would have required it to pay only a small fraction of its environmental liabilities had the company distributed all of its assets in bankruptcy. Then, in its reorganization agreement, Arch agreed to replace its self-bonds with surety or collateralized bonds.268 As noted above, Arch had successfully spun off unproductive mines, loading them up with health care and environmental liabilities in the years before it filed for bankruptcy. Although Arch did not do this in its 2016 bankruptcy filing, it had already shed $522 million in environmental and retiree liabilities when Patriot acquired some of the company’s mines in 2008.269 Because Arch shed those obligations before it filed for bankruptcy, they are not calculated in the company’s 2015 debt load. It is worth noting, however, that since emerging from bankruptcy, Arch has managed to use Revelation Energy, the same company that took over Alpha’s reclamation obligations, to get rid of high-cost and idle mines.270 4. Peabody Energy Peabody Energy, the world’s largest coal company, was producing nearly 20% of all U.S. coal by the time it filed for Chapter 11 protection on April 13, 2016.271 Like Alpha, Peabody adopted three strategies to offload its environmental obligations. The first was to spin off subsidiaries that contained unwanted liabilities and unprofitable mines. In this way, Peabody shed $527 million in pension obligations and $134 million in reclamation liabilities when it transferred those assets to Patriot in 2007.272 Its continued reliance on this strategy during its reorganization prompted the EPA and the DOI to object that the entire plan was “a carefully constructed scheme to evade environmental liabilities.”273 The second strategy was to convince regulators to accept a haircut on Peabody’s outstanding environmental liabilities. The third was to discharge or substantially write down significant environmental and pension obligations. In its bankruptcy filing, Peabody listed $11.0 billion in assets and $10.1 billion in liabilities.274 Included in its liabilities were $687 million in asset retirement obligations and $723 million in postretirement benefits.275 Peabody’s 2015 10-K also noted significant off-balance-sheet arrangements, including $2.0 billion in reclamation obligations.276 Adding these off-balancesheet reclamation obligations to the company’s retiree liabilities indicates that Peabody’s labor and reclamation liabilities amounted to more than $3.0 billion (not the $1.4 billion that the balance sheet suggests).277 Moreover, when Peabody had to disclose its liabilities for its bankruptcy filing, it shifted these liabilities onto its balance sheet.278 Most companies become insolvent before their liabilities exceed their assets because as the company’s leverage ratio increases, it becomes increasingly difficult to generate enough income to meet obligations as they come due. Peabody was legally insolvent by almost $700 million when it filed for bankruptcy.279 In other words, Peabody assumed that it would not have to pay its environmental liabilities, and that assumption allowed it to continue operating and report a positive net worth. Peabody thus had roughly $2.0 billion in recognized reclamation obligations, only $600 million of which were covered by surety bonds or other guarantees. The remaining $1.4 billion of these environmental liabilities were self-bonded.280 Accordingly, Peabody pursued a superpriority claim swap with the states in which it practiced self-bonding, akin to the strategy employed by Alpha and Arch. Superpriority bonds are paid out first when assets are distributed in a Chapter 7 bankruptcy.281 In Wyoming, Peabody granted the State a $126.9 million superpriority claim to cover $726.8 million in reclamation liabilities;282 in New Mexico, a $31.6 million claim for $181 million in liabilities;283 in Indiana, a $17.9 million superpriority claim and a collateral bond of $7.5 million for $145.2 million in liabilities;284 and in Illinois, a $12.9 million superpriority claim and a $3.2 million collateral bond to cover $92.2 million in liabilities.285 State regulators feared that the liabilities associated with these reclamation obligations would be eliminated entirely in a Chapter 7 liquidation. So they agreed to accept guaranteed payouts of just over 17% of the value of the bonds. Although we argue in Part IV below that these obligations are nondischargeable, the threat that Peabody would be unable to make good on any of its reclamation obligations convinced state regulators to accept a mere 17 cents on the dollar. In order to emerge from bankruptcy, Peabody discharged over $8 billion in debt. This left it with some $8.3 billion in assets and $5.1 billion in liabilities.286 However, the assumptions Peabody relied on to arrive at these numbers misrepresent the size of Peabody’s assets and its coal production outlook.287 When analyzing the viability of Peabody’s reorganization plan, the Institute for Energy Economics and Financial Analysis (IEEFA) thought Peabody’s reorganization looked familiar: “Peabody’s bankruptcy is reminiscent of the bankruptcy of Patriot Coal . . . . [T]he similarities are striking, especially in terms of stated coal reserves and in being overly optimistic about the effects of its cost-management strategies.”288 These accounting gimmicks are troubling for two reasons. First, they have allowed the single largest coal producer in the United States to continue operating and generating new reclamation obligations despite the fact that it has no real future. Second, in allowing the company to continue operating, the reorganization agreement gave Peabody additional opportunities to shed environmental and retiree obligations by spinning off its assets. The primary accounting infirmities were unrealistic assumptions about the price of coal, as well as impossible predictions about Peabody’s ability to cut costs. For instance, Amherst Consulting pointed out that although Peabody did not explain many of the assumptions behind the projections made in its reorganization plan, a number of the projections were inconsistent.289 Amherst’s report emphasizes that Peabody assumed that it would dramatically increase market share in certain regions290 while simultaneously cutting costs.291 It further observed that Peabody’s cost estimate seemed to assume that the company would not have to pay to reclaim degraded mines. As the IEEFA said, “[a]n overestimate of coal reserves and related asset values at this time in the company’s financial history . . . frustrates state regulators as they try to manage environmental liabilities.”292 Based on these assumptions, financial analysts found that Peabody’s reorganization plan was not credible.293 What is potentially more interesting, however, is that Peabody’s ability to inflate its assets gave it an opportunity to spin off regulatory liabilities once it emerged from bankruptcy. In our view, the hidden assumption behind Peabody’s overly rosy projections was perhaps not that the company would increase its market share while cutting costs, but that the company would be able to shed environmental liabilities by selling them or spinning them off into inadequately funded successor companies. This theory has been borne out by Peabody’s post-reorganization spin-offs, which have used this very technique to shed onerous assets since emerging from bankruptcy.294 As part of its reorganization plan, Peabody liquidated Gold Fields Mining, a subsidiary that formerly operated noncoal smelting operations.295 Through Peabody’s reorganization, Gold Fields’s assets were liquidated and the proceeds placed into a trust.296 Peabody’s reorganization agreement required it to pay an additional $43 million into that trust and to use the proceeds to cover Gold Fields’s environmental liabilities.297 Under the liquidation analysis, Gold Fields had assets of roughly $6 million against claims of almost $13 billion, including at least $745 million in environmental liabilities.298 The EPA and the DOI have determined that the Gold Fields Liquidating Trust was a stratagem—and an effective one at that—for Peabody to shed its environmental obligations.299 The agencies objected that Gold Fields “will own certain contaminated properties, including one subject to an administrative order protecting public health and safety, but . . . [will] fail to make provision for compliance and protection of public health and safety.”300 Moreover, the reorganization plan would allow “the Gold Fields Trust to abandon the contaminated property seemingly without notice or approval of the Court and without conditions formulated to protect public health and safety.”301 Peabody also used Gold Fields to formally discharge and write down substantial environmental obligations. According to the EPA and the DOI, Gold Fields and Peabody each owed close to $1 billion in environmental obligations to the federal government, along with hundreds of millions to states.302 The reorganization agreements allowed Peabody and Gold Fields to pay just $32 million to settle these environmental claims.303 If the government’s estimate was correct and the two companies actually owed closer to $1.8 billion, Peabody’s bankruptcy proceedings allowed the company to receive a haircut of greater than 98% on these environmental claims. Granted, some of he earlier environmental obligations did not stem from SMCRA. Many, for example, came from the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), another environmental statute that requires mining companies to provide financial assurance to guarantee that they can mitigate environmental damage from their activities.304 That does not count the $745 million of SMCRA obligations Peabody offloaded onto Gold Fields. The point, however, is that, according to federal environmental agencies, Peabody has avoided having to pay $3 billion in environmental obligations simply because it pushed the obligations onto a former subsidiary, and in that way immunized itself from its environmental obligations. Table 2 below summarizes the environmental and retiree liabilities that coal companies have shed through corporate reorganizations in which an underfunded successor entity eventually liquidates. These obligations formed 22% of the total debts that were wiped out in the series of bankruptcies and spin-offs that began when Patriot was formed in 2007.305

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In summary, coal companies have adopted three mutually reinforcing strategies to evade their environmental and retiree liabilities through bankruptcy. First, companies structure regulatory arrangements in a manner that allows them to avoid fully internalizing costs. In the case of their environmental obligations, coal companies take advantage of the ability to self-bond. Then, before filing for bankruptcy, they convince state regulators to allow them to continue mining in exchange for steeply discounted superpriority claims. In the case of their retiree obligations, coal companies simply neglect to adequately fund them. Just as with reclamation obligations, once a company experiences financial difficulties, it can threaten to default.

Second, parent companies repeatedly spin off subsidiaries comprised of depleted mining assets and significant liabilities, either through divestiture or liquidation. The leading coal companies have embraced a strategy of depleting the value of assets by extracting all of the easily accessible coal, incurring significant environmental and retiree liabilities at the mine sites, and then disposing of the assets through divestiture or liquidation. When a successor company inevitably liquidates, the company that originally incurred these liabilities is shielded from the obligations.

This pattern occurs with sufficient regularity to suggest that the leading companies never intended to cover their liabilities. Peabody executed this maneuver in the original formation of Patriot Coal in 2007. Patriot consisted of only 13% of Peabody’s coal reserves but 40% of its retiree liabilities to 8,400 former Peabody employees.306 Furthermore, the mines Patriot inherited were largely legacy mines in the Appalachia basin whose coal could no longer be sold at a profit, but which had accrued significant environmental liabilities.307 The addition of legacy Arch assets in 2008 with responsibility for 2,300 retirees followed the same pattern.308 By divesting these mines into a separate entity, Peabody and Arch removed the associated liabilities from their respective balance sheets. This spin-off arrangement is also how Alpha used bankruptcy to separate its profitable assets from its onerous regulatory liabilities.

Third, coal companies engage in financial gimmickry by overvaluing assets, undervaluing liabilities, or pushing liabilities off balance sheet in order to appear solvent and continue operating. This is how Patriot and Peabody were able to operate for years despite being legally insolvent, and it is how Alpha was able to pile all of its worthless assets and environmental and retiree liabilities onto a company that was unable to pay its debts just weeks after it began operating. In the language of the disclosure statement in Patriot’s second bankruptcy, “the Debtors’ feasibility upon emergence from the 2012-13 Restructuring was predicated on assumptions about coal prices and operating performance that ultimately did not materialize.”309 An incorrect valuation of coal company assets and liabilities effectively amounts to a discharge of environmental liabilities because allowing an insolvent company to continue operating creates additional environmental costs that will ultimately be borne by the public. This valuation tactic thus works in concert with the divestiture and liquidation tactic described above, because an incorrect valuation enables divestitures that would not have occurred had the company liquidated.

C. Bankruptcy Code Provisions That Have Eroded Environmental and Labor Laws

The previous Subpart described the various strategies that the coal industry has employed to evade federal regulations through bankruptcy. This Subpart provides a descriptive, technical overview of the legal provisions of the Bankruptcy Code that have allowed this to happen. We argue in Part IV below that the Code need not—and should not—be interpreted in this manner.

Coal companies rely on three different parts of the Bankruptcy Code to avoid federal regulatory obligations. First, they simply reject health care and pension obligations in their reorganization plans. Second, they transfer sizable regulatory liabilities to successor companies that are inadequately funded and arguably set up to fail. Third, they discharge or abandon those regulatory liabilities when the successor companies liquidate. Along the way, coal companies convince bankruptcy judges to approve a reorganization plan by inflating asset valuations during bankruptcy. That, in turn, allows the corporation to incur additional regulatory liabilities that they will be unable to honor when they liquidate.

All of these provisions further the Bankruptcy Code’s general goal of maximizing the going-concern value of firms in financial distress.310 Moreover, the tendency of these provisions to favor reorganization over liquidation is consistent with the view that reorganizations maximize firm value by avoiding disorderly fire sales and preserving economies of scale.311 In fact, the bankruptcy judge who oversaw Patriot’s first reorganization explicitly embraced these goals, stating: “The overarching goal for this Court is to guide Debtors through the Bankruptcy Code, particularly its Chapter 11 strictures, to maximize the value of Debtors’ estates for the organized benefit of all stakeholders . . . .”312 As this Article shows, however, the overzealous application of these goals can be in tension with other purposes of bankruptcy law.313

1. Rejecting regulatory obligations

Coal companies have shed billions of dollars of pension and health care liabilities by rejecting executory contracts.314 While executory contracts are typically rejected under § 365(a) of the Bankruptcy Code,315 the key provisions that bankruptcy judges have relied on to reject obligations incurred in accordance with the Coal Act are §§ 1113 and 1114, which govern the specific circumstances under which debtors can reject collective bargaining agreements.316 Bankruptcy judges have pitted the Coal Act’s precise language requiring payment of lifetime health benefits against the general provisions of the Bankruptcy Code that allow corporations to reject collective bargaining agreements during reorganization.317 The Bankruptcy Code was enacted before the Coal Act and does not distinguish between retiree obligations that have an independent statutory basis and those that do not. Nevertheless, bankruptcy judges have determined that the Code’s language trumps the language in the Coal Act.318

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According to the bankruptcy judge who allowed Alpha to reject its Coal Act liabilities, “[t]he threat of liquidation and loss of every union and nonunion job permeates the Court’s concern in this case, and overrides the other equitable considerations.”319 The court thus felt that the economic consequences of liquidation tipped the scale toward reorganization and justified getting rid of significant Coal Act obligations: “Without a rejection of the collective bargaining agreements, the sale . . . will not close. . . . The Debtors desperately need to bring their cash bleed under control if they have any hope of avoiding liquidation.”320 To reject obligations owed to retirees, a debtor must show that the modification is “necessary to permit the reorganization of the debtor.”321 Bankruptcy judges overseeing reorganizations have interpreted this provision generally to mean that the rejection will “prevent the debtor’s liquidation.”322 Under this test, an important concern is whether the discharges facilitate the company’s reorganization.323 But of course, the act of rejecting a contract and transforming it into a claim that will only receive pro rata payment on equal terms as the claims of other unsecured creditors will make a company more financially viable. The simple act of discharging a debt axiomatically reduces the company’s costs and thereby makes it more competitive. The Bankruptcy Code has thus been interpreted in a manner that makes it easy for coal companies to reject retiree liabilities. Once a company such as Patriot has inherited retiree liabilities from Peabody and Alpha, it will, of course, be “necessary” for it to reject those inherited liabilities, because it was never in a position to pay them in the first place. On its own, the ability to reject collective bargaining agreements might not be as problematic. Rejection transforms the counterparty into an ordinary creditor who shares in the distribution of the estate’s assets with other, similarly situated creditors.324 If retirees truly shared in the distribution of a company’s assets, however, retirees would be in the same position as other claimants because they would be able to share equally in the distribution of the company’s assets. While we urge Congress to give such claims priority status, Congress’s failure to do so could be read to imply that the companies are actually treating retirees no differently than they are treating other unsecured creditors. But even a priority claim or the elimination of self-bonding would not have protected retirees and environmental claimants during the coal bankruptcies described above. This is because the situation is different after a company engages in a series of prebankruptcy corporate reorganizations that separate its employment obligations from its lucrative assets. At that point, coal miners are left without a good option because their claims are supported by an empty corporate shell that has already been stripped of all of its valuable assets. In this way, retired miners’ inability to claw back assets from the entity that actually incurred these Coal Act obligations renders the discharge more problematic. 2. Abandoning regulatory obligations Coal companies have also taken advantage of their right to abandon burdensome property.325 To abandon property, the trustee merely has to demonstrate to the bankruptcy court that such property is burdensome or of inconsequential value.326 In a Chapter 11 reorganization case, courts require the trustee (or debtor) to show also that there is a “good ‘business reason’ or ‘articulated business justification’” for the proposed abandonment.327 But this requirement suffers a similar infirmity as the requirement that a debtor can only reject collective bargaining agreements if it can show that doing so is “necessary” for the reorganization. The mandate that parties communicate a business reason for abandoning burdensome property hardly creates a meaningful barrier. Because environmental obligations are, by definition, financially burdensome, the “good reason” requirement ends up rubber-stamping the right to abandon property laden with environmental obligations. The abandonment power confers wide latitude to abandon burdensome property. Although the U.S. Supreme Court has held that property cannot be abandoned if abandonment would contravene state laws designed to protect public health and safety,328 the Court qualified that exception by explaining in a footnote that the abandonment power “is not to be fettered by laws or regulations not reasonably calculated to protect the public health or safety from imminent and identifiable harm.”329 The question is therefore not whether abandonment undermines a state or federal law; it is whether it undermines a law that protects the public from immediate danger. Courts have relied on this qualification to permit corporations to abandon property even when abandonment allows the companies to expressly violate environmental laws. Under the terms of Patriot’s liquidation agreement, for instance, any property not sold, regardless of any regulatory encumbrances associated with the property, will be abandoned pursuant to § 363.330 Because Patriot could abandon burdensome property, Blackhawk Mining—the corporation that purchased most of Patriot’s productive mines—was able to pick and choose the assets it wanted; all other assets were scheduled to be abandoned.331 Blackhawk is thus liable only for the reclamation obligations of the mines it purchased. The rest of Patriot’s reclamation obligations will likely go unfulfilled. In other words, the abandonment power allowed insolvent corporations to flout congressional policy. Unlike Patriot, the other firms we analyzed did not abandon property during their bankruptcies. That does not mean, however, that abandonment did not play a role in those companies’ reorganizations. In fact, Peabody and Alpha were able to obtain such favorable terms in part because state regulators feared that the companies would abandon burdensome property if they were forced to liquidate.332 Peabody, for instance, expressly threatened to liquidate in order to convince both the UMWA and state environmental regulators to accept a haircut on their regulatory obligations.333 This abandonment power has historically been used to thwart environmental laws in a wide variety of contexts. It has, for instance, been used to abandon toxic chemical sites in contravention of state environmental laws.334 Similarly, despite the debtor’s ongoing obligations under state environmental laws, the Fourth Circuit permitted the Bankruptcy Code to be read to preempt “[s]tate laws which obstruct expeditious and equitable distribution” of assets out of bankruptcy proceedings.335 The Tenth Circuit reached the same result in In re L.F. Jennings Oil Co., in which it held that former gas stations could be abandoned without fulfilling environmental obligations because there was no immediate or identifiable harm to public health or safety.336 3. Transferring regulatory obligations Coal companies have been especially successful in evading environmental and retiree liabilities by transferring those obligations to companies that will not be able to make good on them. These transfers have made the other strategies much more effective because they have depleted the pool of assets the underfunded subsidiaries have available to honor their noncontractual, regulatory obligations when they eventually liquidate. Debts inherited by successor companies are theoretically subject to the prohibition against fraudulent transfers, which prevents a debtor from “dispos[ing] of his property with the intent or the effect of placing it beyond the reach of his creditors.”337 In theory, an otherwise valid transfer can be voided if it impairs the ability of creditors to reach the debtor’s property.338 To establish that a transaction is a fraudulent conveyance, courts generally ask (1) if the debtor is unable to pay its debts, and (2) if the debtor received “less than a reasonably equivalent value” in the transfer.339 The difficulty, however, is that SMCRA and Coal Act liabilities do not become due for many years, and so it may not be apparent that a spin-off defrauded regulatory beneficiaries out of the debts due them. Patriot’s first filing, for example, occurred just after the look-back period, which is when creditors could still have clawed assets back from Peabody.340 Equally problematic is that the creditors who vote to approve a reorganization plan understandably want the company to shed its environmental obligations. Creditors are eager to approve arrangements that allow the company to get rid of these liabilities and thereby increase the share of the insolvent company’s assets that will be available to them. Although the spinoffs described above seem intended to defraud government and union creditors, the government environmental creditors generally did not get to vote along with other creditors, and had to file separate petitions objecting to the plans.341 As described in Part II.B above, the Peabody retirees had more luck, but were dissuaded from bringing their fraudulent transfer claim once the company threatened to liquidate. In fact, the CEO of Peabody publicly stated that his goal in spinning assets off to Patriot was to ensure that Peabody did not have to pay the environmental and retiree obligations associated with those assets.342 Moreover, the fact that the company that inherits the regulatory debts either (1) was originally a subsidiary company of the corporation that incurred the debts (like Patriot or Alpha II), or (2) is intentionally underfunded such that it never intends to perform the regulatory obligations (like Lexington Coal), means that the parties will not negotiate as if they were actually going to honor their regulatory requirements. And because the company that inherits these obligations often did not give anything when it took them—it may even have received a small fee to accept the regulatory obligations—there is nothing to claw back from the parent company that has accepted responsibility for reclaiming damaged mines and for paying health and pension benefits to retired coal miners. 4. Inflating asset values Part II.B above showed how Alpha, Peabody, and Patriot inflated asset valuations in order to stay in business, and that these misleading analyses gave them additional opportunities to shed burdensome debts. For instance, Alpha’s accounting wizardry allowed the company to offload the vast majority of its environmental and retiree obligations onto an insolvent successor corporation.343 Peabody made dubious claims about its future viability that prompted the bankruptcy judge to approve its reorganization agreement, only to promptly spin off the very mines it had promised to reclaim.344 Overly optimistic asset valuations seem to be consistent with the preferences for reorganization expressed by the judges in the Patriot, Alpha, and Peabody bankruptcies. While it is not clear that the continuation bias even makes sense in the context of the Bankruptcy Code’s goal of maximizing firm value,345 any judicial preference for reorganization is especially questionable when it allows the continued operation of companies in violation of two federal regulatory schemes. The purpose of regulatory approaches that force corporations to internalize the social costs of their activities is to decrease the private value of a good, such that production levels account for the externalities of the regulated behavior. To the extent that the continuation bias enfeebles regulations that operate in this way, it is in direct tension with regulatory approaches that rely on markets to reduce the level of production of goods and services. III. A Critique of the Continuation Bias Coal companies’ use of the Bankruptcy Code to avoid SMCRA’s bonding requirement and the Coal Act’s guaranty of lifetime health benefits demonstrates how bankruptcy law can be used to undermine efficient regulatory approaches. Academics describe the view that corporations should prioritize reorganization over liquidation as the “continuation bias.”346 This Part first offers a brief summary of the traditional arguments supporting the continuation bias. It then argues that the continuation bias should not trump congressionally mandated obligations. It is important to clarify one thing at the outset. Although we suggest that reorganization permits corporations to evade market-based regulations such as SMCRA and that liquidation does not, certain provisions of the Bankruptcy Code can also be used by successor firms to operate without internalizing regulatory costs in the manner SMCRA envisions. As described above, abandonment generally permits new firms to take control of those assets unencumbered by the debts left behind by the failing firm.347 In doing so, the Code allows new companies to operate assets without incurring the regulatory costs that the liquidated corporation faced. Insofar as we argue that firms should not be able to use bankruptcy to avoid internalizing social costs, our argument applies with equal force to all provisions of the Bankruptcy Code— both Chapter 11 and, indirectly, Chapter 7—that allow firms to avoid marketbased regulatory schemes. A. Bankruptcy Law’s Continuation Bias There is a longstanding debate in bankruptcy theory between traditionalists, who support considering community concerns in bankruptcy proceedings, and proceduralists, who argue that bankruptcy law’s exclusive aim should be to maximize the value of the assets in the bankruptcy estate.348 The traditionalists point to congressional language that indicates that one of the goals of bankruptcy law is to promote employment.349 They emphasize legislative history350 and Supreme Court language stressing “the congressional goal of encouraging reorganizations.”351 According to the traditionalists, these policy goals are embedded in U.S. bankruptcy law and should be considered during bankruptcy proceedings. The proceduralists, by contrast, argue that Congress can realize these policy concerns more effectively outside of bankruptcy. On this view, bankruptcy law’s primary goal should be to maximize the value of bankrupt firms’ assets.352 Despite their disagreement about bankruptcy law’s fundamental goals, traditionalists and proceduralists generally agree that there are situations in which bankruptcy law should prioritize reorganization over liquidation. Their reasons differ. Traditionalists support the continuation bias because they fear that liquidation will reduce employment and harm local communities.353 Although proceduralists will, of course, prefer liquidation when it maximizes asset values, it is often the case that a corporation’s assets will be worth more when they are preserved as a going concern.354 When that is the case, proceduralists will prefer reorganization because it furthers what they perceive as the central goal of bankruptcy.355 But for both traditionalists and proceduralists, the perceived benefits of reorganization—either the employment benefits or the maximization of asset values—associated with the continued operation of firms justify a bias toward Chapter 11 restructuring over Chapter 7 liquidation. B. Continuation Bias Should Not Undermine Federal Laws We agree with traditionalists that externalities should play an important role in bankruptcy but think that employment concerns are far from the only externality relevant to bankruptcy proceedings. We also agree with proceduralists that bankruptcy is not the proper forum to advance broad social policy goals that Congress has not prioritized in other contexts. Unlike proceduralists, however, we recognize that there are situations in which bankruptcy cannot avoid operating at cross-purposes with other public policy goals. As Part II above shows, attempts to maximize the value of corporate assets can themselves undermine other congressional policy goals. In recent coal company bankruptcies, the value of mining assets increased because coal companies were able to avoid SMCRA’s reclamation requirements (perhaps this is axiomatic—the ability to discharge debts by definition makes an asset more valuable). But by artificially increasing the value of these assets, bankruptcy undermines SMCRA’s goal of forcing coal companies to reclaim legacy mine sites. The coal company bankruptcies have shown that by focusing so single-mindedly on maximizing asset values, the proceduralist tendency to exclude other policy goals from bankruptcy decisionmaking can undermine those congressionally mandated policies that remain in effect. C. Continuation Bias Should Not Undermine Market-Based Regulations or Performance Standards The provisions of the Bankruptcy Code that incentivize reorganization can also operate to undermine some types of federal regulations. This Subpart shows that coal companies’ reorganizations have thwarted the mechanism by which SMCRA and the Coal Act aim to regulate firms’ behavior. The result is more coal production than is socially optimal, despite the fact that SMCRA and the Coal Act are designed to ensure that coal production bears some of the social costs of coal extraction. The government can regulate behavior in several ways. It can implement command-and-control regulations that force firms to engage in or forbear from certain actions. Or it can use market-based instruments that raise the costs associated with socially harmful activities and thereby provide incentives for firms to reduce or eliminate negative externalities. Market-based regulations and performance standards are more efficient than command-andcontrol regulations.356 Regulatory obligations that can be deferred are the only obligations that are potentially dischargeable because they can be deferred, bankruptcy law treats market-based regulations especially disfavorably. This is because an obligation can generally be discharged only if it can be reduced to a payment.357 Thus, injunctions and other command-and-control regulations receive what amounts to a special priority interest, whereas regulations that force a corporation to internalize social costs by charging polluters is treated as an ordinary contractual claim.358 In our view, the priority a regulation receives should not depend on whether the claim can be converted to a money judgment. Command-and-control regulations require a person or firm to take or refrain from a particular action.359 The regulator—be it an administrative agency, a court, the executive, or the legislature—determines whether an activity should be prohibited or required. Within the category of command- and-control regulations, the government can issue design standards, in which the regulated party must do a specific thing in a specific way. It can also promulgate performance standards, in which it orders the party to do a specific thing but permits the party to decide how to comply. Market-based solutions, in contrast, influence behavior by changing the costs associated with certain actions. The government uses the market-based model regularly. The Tax Code has been used, for example, to incentivize the use of clean energy,360 to encourage homeownership,361 and to motivate charitable giving.362 Most economists regard incentive-based approaches as preferable to command-and-control regulations in nearly all situations.363 Writing about market-based policy instruments in the context of environmental regulations, one scholar has observed that regulatory goals are often “frustrated by a lack of information” when regulators adopt command-andcontrol approaches.364 By contrast, market-based solutions “create a system of incentives in which those who have the best knowledge about control opportunities, the environmental managers for the industries, are encouraged to use that knowledge to achieve environmental objectives at minimum cost.”365 While this description applies to prototypical market-based regulation, the advantages apply to market-based regulations and performance standards alike.366 This is because both these types of regulations permit regulated parties to determine for themselves the best means of compliance.367 Despite this academic consensus, policymakers have generally been reluctant to use market-based regulations.368 The reason performance standards and market-based solutions contain informational advantages compared to command-and-control alternatives is that when promulgating a command-and-control regulation, the regulator must be aware of both the costs and the benefits of a behavior.369 In marketbased solutions, by contrast, the government only needs to know the social costs of the activity. For example, if the government simply stipulated the amount of coal that a company is allowed to produce, then the government— not those subject to the regulation—would have to determine both the costs and the benefits associated with coal mining. This would require not only that the government know the negative spillovers created by coal mining, but also the market demand for coal as well as the costs a company would face in extracting coal and reclaiming degraded mines. Market-based solutions, by contrast, allow the net benefit to be calculated based on the market’s appetite for the regulated good. The regulator need only provide a mechanism by which to force a company to internalize social costs. In the case of SMCRA, regulators do not even need to make a precise calculation. If one company can reclaim the land more efficiently than others, it is free to do so and thereby gain an advantage over its competitors. All that matters is that the companies actually reclaim the land and that they post bonds to prove that they will do so. Another benefit of market-based approaches is that they are less invasive than the alternatives.370 Because the regulator only determines the social cost of an activity, the regulated parties are free to adjust the intensity of that activity based on their private costs.371 In raising the costs associated with surface coal extraction, the government permits coal companies to innovate by coming up with less invasive mining practices and more efficient reclamation policies. This consideration has also led some to assert that incentive-based regulations are better able to encourage technological development.372 Because the government allows parties to come up with innovative solutions rather than mandating a specific behavior, the government rewards parties who develop mechanisms to comply with the regulations more efficiently. Of course, some market-based regulations and performance standards cannot be evaded through bankruptcy. An example is a tax on alcohol. Individuals cannot avoid the regulatory burden that accompanies such taxes for the simple reason that the tax attaches at the time of sale.373 A requirement that one reclaim a degraded coal mine at some point in the future, by contrast, allows the regulated party to enjoy the monetary benefits of selling coal before having to fully internalize the costs. It is this temporal gap that allows companies to use bankruptcy to externalize costs even when a regulatory regime exists that should force companies to bear such costs. Rather than outlawing surface mining, SMCRA instructs coal operators to post reclamation bonds to ensure that land be reclaimed according to the standards set out in the Act.374 SMCRA leaves coal operators a great deal of discretion. They can reclaim the land themselves, pay someone else to do it, or reimburse regulators if the companies fail to reclaim mine sites. The same applies with the Coal Act: Companies can determine how to fund their retirement obligations, and they are free to allocate capital in whatever manner they see fit, so long as they are able to provide retirement benefits as they come due.375 Both statutes give coal companies a great deal of discretion to determine how to minimize the costs of complying. Coal companies also retain the freedom to devise innovative reclamation and investment techniques to make good on these obligations. The statutes’ regulatory force thus stems as much from the incentives they create as it does from the standards they prescribe. While coal companies have significant leeway to figure out how to reclaim mine sites and fund retirement benefits, no matter how they do so, they must bear the social costs of reclamation in the form of a performance bond, and they must bear the social cost of exposing employees to hazardous work conditions in the form of health care. Of course, those companies that reclaim mines more efficiently will be able to pay less, but that is simply a reward for effective reclamation practices. The fact that those companies have to pay less does not suggest that they are bearing less social cost; it instead indicates that those companies have figured out how to reduce the social costs of coal mining more effectively. Having to earmark funds for reclamation and retiree liabilities decreases the total amount of capital available for a firm to use to support coal production. Basic economic principles suggest that companies will produce a good until marginal cost equals marginal demand. When a company does not need to account for social costs, it will produce more of a good than is socially desirable because it is not internalizing some of the costs of that good.376 In forcing companies to bear social costs, market-based regulations reduce output to the socially optimal point. Moreover, by reducing the aggregate amount of coal production, market-based regulations reduce the social harms caused by coal mining.

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As shown in Part II above, however, coal companies are able to use bankruptcy to avoid paying the social costs of coal mining, despite the fact that Congress has ordered that they do so. Coal companies thus do not actually internalize social costs in the manner envisioned by SMCRA and the Coal Act. For that reason, coal companies engage in more mining than is socially optimal, in turn resulting in more environmental and health damage. Patriot’s brief and troubled existence illustrates this point. The company was likely insolvent throughout its existence, but was able to continue mining nonetheless.

Moreover, the ability to externalize social costs is not only beneficial to the nongovernment creditors of companies that become insolvent. Such discharges provide a boon to all companies that issue corporate debt. If coal companies were unable to discharge obligations to the government, their capital costs would be higher. If private creditors’ claims became subordinate to regulatory liabilities, the pool of assets available to repay private creditors would shrink,377 decreasing the likelihood that private creditors would be repaid and reducing the expected payout by reducing the amount of total available funds. Creditors would thus charge higher rates to compensate for the additional risk they incur for lending to a company that has environmental and pension creditors with claims senior to their own.378 In other words, the Bankruptcy Code allows coal companies to borrow on more favorable terms than would otherwise be possible if they truly had to internalize the externalities of mining. This, in turn, incentivizes excessive mining because it reduces the marginal costs of producing coal and provides a windfall to every coal company—solvent or not.

These problems are exacerbated by the fact that bankruptcy allows these companies to stay in business even after they have violated their environmental and labor obligations. For example, Patriot’s ability to avoid liquidation allowed it to produce more coal than it otherwise would have, generate additional reclamation obligations, and employ more miners, thereby increasing the amount of retirement obligations it incurred. Of course, the company’s inevitable bankruptcy allowed Patriot to shed those added obligations.

This ex post windfall means that the deterrent purpose of SMCRA and the Coal Act is eroded even after companies are found to be in express violation of the statutes. But the fact that Patriot was able to continue operating years after it became insolvent meant that the company incurred new environmental obligations and generated additional retiree liabilities despite the fact that it was incapable of paying for the regulatory obligations that were already on its balance sheet.

As the foregoing analysis makes clear, when regulation aims to control production levels by increasing the costs of engaging in the regulated activity, the ability to shed those costs in bankruptcy undermines such performance standards and market-based regulatory schemes. Note that the Bankruptcy Code can only be used to undermine certain types of regulations: regulations that allow the regulated party to defer payment.379 Perhaps most problematically, judicial interpretations of the Code exempt injunctions but not marketbased regulations from the automatic stay.380 In doing so, judges have given command-and-control regulations what amounts to a priority claim while treating market-based approaches as ordinary contractual debts.

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The Bankruptcy Code’s ability to erode federal regulatory programs cannot be justified on policy grounds, and both the regulators and the regulated would prefer the use of market-based approaches if the alternative is moredirect regulatory intervention. As the next Part shows, the corporate reorganizations Patriot, Alpha, Arch, and Peabody have relied on to shed their regulatory obligations also cannot be justified on legal grounds. IV. Solutions Whereas the previous Parts explained how bankruptcy can be used to thwart federal regulations, this Part identifies solutions. Part IV.A argues that existing doctrine can—and should—be interpreted to give the government and other beneficiaries of regulatory debts the right to collect on those debts. First, companies such as Peabody should not be able to get rid of their regulatory obligations simply by spinning off new companies such as Patriot. The prohibition against fraudulent conveyances applies to corporate reorganizations in which companies shed their obligations before bankruptcy, and the doctrine of substantive consolidation applies to reorganizations in which the divestiture occurs during bankruptcy proceedings. Second, regulators and other beneficiaries of regulatory debts should have first priority whenever their claims further congressional policy goals. Part IV.B makes policy suggestions that would further reinforce the goal of ensuring that private companies make good on their regulatory obligations. Note that these two proposals work hand in hand. While scholars who have considered the treatment of environmental claims in bankruptcy have generally argued that the solution to the problem of environmental discharges is to give such debts priority in bankruptcy, our analysis has shown that a simple priority claim is meaningless if prior corporate restructurings have drained the company of valuable assets. A priority claim, for example, will not guarantee payment on regulatory obligations if spin-offs and divestitures leave the company an empty shell with insufficient assets left to pay even its senior creditors. Thus this is a difficult challenge, as each of the solutions we propose is insufficient by itself. A. Judicial Solutions 1. No spinning off regulatory obligations Beneficiaries of regulatory obligations are entitled to claw back debts when companies have transferred those obligations in a manner that prevents the beneficiaries from recovering. One of the most effective ways coal companies have been able to evade regulatory obligations is by spinning off burdensome assets to affiliates that cannot possibly make good on those obligations. This is patently illegal under the prohibition on fraudulent transfers, discussed in Part II.C.3 above. Under this doctrine, the company that originally incurred a regulatory obligation should remain liable for its regulatory debts where the purpose of the transfer was to prevent beneficiaries from collecting on their obligations.381 Fraudulent conveyance law prohibits debtors from making transfers that hinder, delay, or defraud their creditors,382 and makes such transfers voidable.383 Substantive consolidation, which allows bankruptcy judges to consolidate related legal entities in a bankruptcy estate, could accomplish the same goal during a reorganization.384 Finally, bankruptcy judges should use the Code’s feasibility requirement, which is supposed to ensure that reorganized companies are actually financially viable,385 to prevent clearly insolvent companies to continue to operate. This is especially important when continued operation allows companies to further drain resources that could be used to satisfy their regulatory obligations. So long as the predictable consequence of a transaction is that the creditor will be hindered in its ability to collect, government and union creditors should be able to prevail under a theory that coal companies divested assets without fair consideration.386 As explained above, Arch and Peabody gave Patriot approximately half of their regulatory obligations, but they did not provide Patriot with enough assets to pay its debts.387 The CEO of Patriot even stated publicly that the company was designed to fail, and that it was spun off to allow other coal companies to get rid of their retiree obligations.388 Patriot ultimately liquidated, and its debts were wiped out with minimal consequence to Peabody and Arch. The same scenario occurred when Alpha declared bankruptcy, gave Contura all of its valuable assets, and shunted its regulatory obligations onto Alpha II. The consequences are entirely predictable: The company with worthless assets laden with regulatory debts is unable to pay those debts. Such transactions should be considered fraudulent conveyances. This was precisely the UMWA’s theory when it sued Peabody for spinning off Patriot in order to get out of its retiree obligations.389 That case ultimately settled because Peabody threatened to liquidate and thereby discharge all of its regulatory debts. We think that environmental regulators and unions should be able to bring similarly meritorious suits against similar coal companies. As the next Subpart shows, the threat of liquidation should not control, because regulatory debts should receive first priority in bankruptcy. 2. Judicial priority In our opinion, the regulatory and police power exception to the automatic stay should be interpreted to prevent companies from evading market-based regulations and discharging other liabilities that serve a clear regulatory purpose.390 The regulatory exception applies when “the government is effectuating public policy rather than adjudicating private rights.”391 The exception allows regulators to pursue environmental claims after a firm files for bankruptcy protection.392 In this way, the exception “in effect makes the bankrupt’s clean-up obligation prior to the bankrupt’s other obligations.”393 The bankruptcies described above did not confront this issue because state environmental regulators and bankrupt coal companies agreed that only a small percentage of SMCRA obligations would be given priority treatment.394 Nonetheless, exempting reclamation bonds from the automatic stay would seemingly be consistent with the spirit of § 362(b)(4) because doing so would further the regulatory goal of protecting the environment. Unfortunately, Supreme Court and courts of appeals precedent suggests that our interpretation of the regulatory exception to the automatic stay would not be regarded favorably by courts.395 The Court has held that if an environmental obligation requires a debtor to spend money, then the obligation counts as a “claim” and can be discharged.396 By contrast, an order to clean up a polluted site is not a “claim” and therefore not dischargeable.397 Still, a capacious understanding of § 362(b)(4) aligns with the notion that regulations designed to force companies to internalize social costs should receive priority in bankruptcy. Such a conception of the automatic stay provision would ensure that regulations that charge corporations for polluting receive the same treatment as regulations that enjoin corporations from polluting. The current approach means that command-and-control regulations such as injunctions enjoy favored status in bankruptcy whereas market-based regulations are treated no differently than ordinary contractual claims. B. Legislative Solutions 1. No payment deferrals The ability to shed federal debts in bankruptcy is predicated on the ability to defer payment on those debts for many years. Self-bonding allowed coal companies to evade SMCRA because the government did not demand a security interest and because payment on the debt was deferred such that the obligation was outstanding when the company declared insolvency. Similarly, the companies did not need to fund Coal Act obligations for many years—not until the miners actually retired. Patriot, for instance, seems to have never been in a position to honor its environmental and retiree obligations.398 However, because those obligations did not have to be paid out until retirement benefits came due, Patriot could defer payment and continue operating. If companies were unable to defer payment—that is, if they were required to fully fund pensions and post collateral on reclamation obligations—then regulatory obligations would be funded in the event that the company filed for bankruptcy. That would make it more difficult for coal companies to avoid their regulatory obligations: If they had set aside actual funds for coal reclamation, taken out surety bonds, posted collateral, or fully funded their pensions, the regulations’ intended beneficiaries would not have had to compete for funds during bankruptcy proceedings. 2. Accurate accounting Bankruptcy judges should use generally accepted accounting principles when valuing insolvent corporations that owe significant regulatory debts. As shown in Parts II and III above, the continuation bias is indefensible when it supports the circumvention of federal law. Insofar as bankruptcy judges sanction disingenuous predictions about companies’ future cash flows, they facilitate chronic regulatory violations. Patriot, Peabody, and Alpha took questionable measures to make it look as though they could cover their SMCRA and Coal Act obligations. The companies kept their environmental and retiree obligations off their balance sheets and valued their assets on the basis of impossible projections about future cash flows. In doing so, they ensured that insolvent spin-offs would be assigned, and then default on, regulatory obligations. That, in turn, allowed coal companies to take on new environmental and retiree obligations despite the fact that they had already violated their regulatory obligations. Requiring corporations to give an accurate accounting in bankruptcy would make it more difficult to reorganize in a manner that allows them to repeatedly evade regulatory obligations. 3. First priority through legislative decree Congress should stipulate that certain regulatory debts should get first priority in bankruptcy and cannot be discharged. The current regime has failed to make coal companies fully internalize the social costs of mining in part because private creditors can take precedence over regulatory obligations. Legislation prohibiting such arrangements would force companies to honor their regulatory obligations. In this way, Congress could ensure that its legislative mandates do not wither away whenever a company finds itself in a precarious financial condition. Note again that the current priority scheme disfavors market-based regulations. The Bankruptcy Code only allows debtors to discharge a “debt,”399 which the Code defines as a “liability on a claim.”400 A claim is a “right to payment” or a “right to an equitable remedy for breach of performance if such breach gives rise to a right to payment.”401 This means that a regulatory obligation is dischargeable only if it can be converted to a money judgment.402 Injunctions thus receive superiority in bankruptcy. The ability of senior creditors to enjoy priority over regulatory programs should not depend on whether a given regulatory obligation is a pecuniary obligation or an injunction. 4. Extend the look-back period Finally, Congress and state legislatures should extend the look-back period for fraudulent transfers. Creditors generally have no more than four years to bring fraudulent conveyance claims,403 though the Internal Revenue Service (IRS) can collect some wrongfully withheld tax obligations for up to ten years.404 This allows the IRS to go after would-be tax evaders long after they have defrauded the agency. A longer look-back period for other regulatory obligations would reduce coal companies’ ability to evade their regulatory obligations through spin-offs or sales to undercapitalized corporations.

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Conclusion

Perhaps there are situations in which it makes sense for courts to favor reorganization over liquidation in order to prevent job losses.405 For example, it is understandable that the bankruptcy judge in Patriot’s reorganization expressly cited unemployment concerns when he approved Patriot’s reorganization plan despite misgivings about its viability.406 But Patriot’s bankruptcy judge did not ensure compliance with any federal law by approving Patriot’s reorganization agreement. Rather, he rubber-stamped the company’s continued violations of environmental and labor laws. Alpha, Arch, and Peabody all enjoyed the same inappropriate windfall. At the end of the day, compliance with laws that have been duly enacted by Congress should trump other policy concerns, and any Bankruptcy Code bias in favor of reorganization should be balanced with statutes that require firms to account for the social costs of their operations.

#### That causes acid-rain---extinction.

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To power modern civilization by conventional means consumes around 7.5 billion tonnes of coal, 4.5 billion tonnes of petroleum, and 4 billion tonnes of gas every year.35 This vast output of fossil energy is one of the largest human chemical impacts on the Planet – and does not come without grave cost.

Contaminants commonly found in coal include mercury, cadmium, radioactive elements, sulphur and nitrogen compounds, volatile organic carcinogens and other toxins. The carbon released when coal is burned is the major driver of global climate change. The mining and burning of coal also cause acid runoff and acid rain, which damage rivers and forests and are chiefly responsible for acidifying the world’s oceans. By volume, the mining, burning and processing of coal constitutes the largest source of toxicity from any human activity. Coal combustion, for instance, releases about 8100 tonnes of highly poisonous mercury into the Earth system every year. This accumulates year after year, affecting the food chain, such as in long-lived fish. Likewise, petroleum contains many substances, such as benzene, that are toxic or may cause cancer.

The burning of all fossil fuels – coal, oil, gas, tar sands etc. – poses multiple threats to human health, especially for developing children and unborn babies.36 It releases a range of poisons into the environment including polyaromatic hydrocarbons (PAHs), volatile organic compounds (VOCs), mercury, sulphur dioxide, nitrogen oxides and microscopic particles of black carbon which impair air quality, water and food. The direct impacts of these on health, especially of infants and children, include lung disease, asthma, developmental and sexual disorders, brain disease and cancers. Furthermore, the burning of fossil fuels releases 37 billion tonnes of carbon into the atmosphere each year, driving climate change, which in turn causes malnutrition, heat stress, infectious disease and mental problems. All of these interact with the direct effects of poisoning to make them worse.

In the world’s first endeavour to quantify the costs of air pollution alone, the Centre for Research into Clean Energy and Air (CRCEA) put it at $2.9 trillion in 2018 (Figure 1.2), equal to around 3.3 per cent of world economic turnover.37 Air pollution also killed around 8 million people from lung disease, heart disease, stroke and cancer, and caused the loss of 1.8 billion days of work, 4 million new cases of child asthma and 2 million premature births.38

This, however, is by no means the full toll of fossil fuels, which also includes industrial workers poisoned, the toxic emissions from plastics, packaging, furnishings, paints, cleaning agents and solvents, creating indoor air pollution in homes and workplaces which is often worse than the city air outside. It includes pesticides and microplastics in the home and food chain, the side-effects of drugs both illegal and legal, a flood of ‘gender bender’ substances and nerve poisons. In short, the fossil fuels industry, while powering society, is also the primary source of most of the poisoning of people and life on Earth.

In October 2017, The Lancet Commission on Pollution and Public Health concluded:

Pollution is the largest environmental cause of disease and premature death in the world today. Diseases caused by pollution were responsible for an estimated 9 million premature deaths in 2015—16% of all deaths worldwide—three times more deaths than from AIDS, tuberculosis, and malaria combined and 15 times more than from all wars and other forms of violence. In the most severely affected countries, pollution-related disease is responsible for more than one death in four.39

The fossil fuels industry, for all its convenience and many economic, social and even health benefits, is thus implicated in the worst case of mass homicide in human history – an annual death toll far greater than that of either of the World Wars.

#### Literature downplays its existential nature.

Turchin ’20 [Alexey; 2020; B.S. in Physics from Moscow University, National Scientific Complex IASA in Kyiv State Polytechnical Institute; Research Gate, “Global Catastrophic Risks by Chemical Contamination,” http://dx.doi.org/10.13140/RG.2.2.17515.98082]

The overall global catastrophic risks of chemical contamination are underexplored in existing literature. Some scientific articles describe the global effects of just one pollutant, like mercury compounds (De Lacerda and Salomons 2012). Pollution was a general category in a model which predicted inevitable global decline (Meadows, Randers, and Meadows 2004). Cribb explored in detail persistent low-level chemical contamination in the book Poisoned Planet: How constant exposure to man-made chemicals is putting your life at risk (Cribb 2016). Developmental neurotoxicity is especially important as it appears slowly and young brain evolution is especially fragile. Several chemicals were identified as possible causes: like “lead, methylmercury, polychlorinated biphenyls, arsenic, and toluene” and “manganese, fluoride, chlorpyrifos, dichlorodiphenyltrichloroethane, tetrachloroethylene, and the polybrominated diphenyl ethers”, according to (Grandjean and Landrigan 2014), who also claim that many toxins are probably not yet identified.

There are several alarming trends that suggest that some form of dangerous global contamination may be ongoing. The average human male sperm count has declined 60 per cent since the 1970s (Levine et al. 2017), and if the trend continues, European males may have sperm counts so low as to be infertile in the 2060s (Barratt 2017). The incidence of autism has grown to 1 in 58 births, up 15 per cent in 2 years (Baio 2018). Insect biomass has declined 75 per cent in 27 years in protected areas (Hallmann et al. 2017). All of these have been suspected of connection with some form of global chemical contamination (Foster et al. 2008). Significant work on chemical pollution as a global catastrophic risk was done under the framework of “planetary boundaries” (Baum and Handoh 2014; Handoh 2013).

Moreover, current global warming is connected with atmospheric accumulation of CO2 as well as with other greenhouse gases. CO2 alone also may be toxic for humans (Bierwirth 2018). Global warming has increased the spread of other environmental contaminants (Noyes et al. 2009).

Despite claims that 9 of 10 people are breathing polluted above recommended thresholds air and 7 million premature deaths a year occur because of this (WHO 2018), the average global life expectancy continues to grow (GBD 2013 Mortality and Causes of Death Collaborators 2015). This growth demonstrates that other effects are more important than air pollution. Moreover, as a large part of air pollution comes from coal burning (Cheng 2003), which is expected to decline, such pollution should also decline. Home cooking and heating using low-quality fuels, especially without a chimney, also contribute to air pollution (Mestl et al. 2007).

Air pollution especially affects megacities, as such cities create a lot of waste, including industrial air pollution, car air pollution and home waste dumps. While air pollution is a global, and even a catastrophic problem given the number of deaths, which are on same yearly level as military deaths during World War II (Wang 2018), it does not currently appear to be a catastrophe which could wipe out humanity in the near term.

The main reason global catastrophic chemical contamination is theoretically possible is that almost all humans are connected via the atmosphere, with submariners and astronauts the only (temporary) exceptions. The hydrosphere, food chains, and a few other sources can serve as global transport vectors for dangerous chemicals.

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In this article, we will describe the field of chemical global catastrophic risks (CGCR). In Section 2, the criteria defining a global catastrophic chemical are explored; in Section 3, physical scenarios of global chemical contamination are presented, and in Section 4, scenarios in which such an event could become possible are analyzed. Section 5 looks at the combinatorial effect of many new chemicals in the biosphere, and Section 6 is devoted to societal processes which may contribute to CGCR. In Section 7, global chemical contamination is assessed as a possible human extinction risk in the wider context of other such catastrophic risks. 2. Criteria for classifying a chemical as a catastrophic risk To become a global catastrophic risk, potentially collapsing civilization, chemical contamination should be able to cover almost the entire surface of the Earth. However, for most poisonous chemicals, their effects are highly visible immediately and protection measures are straightforward. Such measures may include stopping the source of the contamination, e.g. by shutting down the manufacturing which creates such chemical, or, if that is impossible, using different cleaning technologies like air filtering, chemical reactions with some chelators, etc. Thus, a truly dangerous chemical must be either difficult to detect or unstoppable. Undetectability could be “achieved”, either by a malicious agent, or more likely, randomly, if the contaminant acts very slowly and indirectly. For example, such an agent might act by affecting human reproduction, e.g. rates of mutation and birth defects, or by increasing cancer rates. It could also act in indirect ways that are not easily recognized. One example of such a threat is a class of chemicals, chlorofluorocarbons (like Freon), which were once used as refrigerants. After years of widespread use, they were found to indirectly affect human health via atmospheric ozone depletion (Solomon 1999). Based on the above considerations, the following criteria for potentially global catastrophic chemical contamination can be laid out: 1) Able to act globally. The chemical can travel large distances via air or water currents or by entering the food chain. 2) Stable in the environment and the biosphere. Sunlight and chemical reactions tend to destroy most complex molecules over times. Rain and rivers bury them eventually on the ocean floor. 3) Causes slow but fatal toxicity, or other non-immediate effects. These non-immediate effects may affect humanity in the future in ways like lower fertility, higher aggression, or gradual mental decline. This type of chemical toxicity would become obvious years or decades after exposure. This condition is self-contradicting, as slower toxicity means lower level mortality as many will be able to reproduce before the onset of the toxic effects. 4) Indirect mode of action. The agent acts slowly and is not easily identified or proved to be the main culprit. 5) Difficult to mitigate. If the amount or toxicity of an agent is very large, or if no simple antidotes or alternatives are available, the catastrophe could be difficult to reverse. While these criteria seem to be difficult to meet, the sheer number of possible toxic chemicals, as well as large number and amount of different chemicals created by an industrial civilization means that some contaminants could meet them. Malicious agents may also intentionally attempt to synthesize dangerous chemicals with these properties. We will explore the candidates in the next section. 3. Possible types of chemicals which could cause global catastrophic contamination 3.1. The case of dioxin as a possible global catastrophic chemical Dioxins are extremely lethal, with an LD50 (the dose at which half of the experimental animal models die) of about 0.6 micrograms per kilogram of body weight in guinea pigs (Wada 2002) (however, humans could be much less susceptible to the dioxin acute toxicity, and the main risk is long-term development problems). They are also very stable in the environment, putting them in the category of persistent organic pollutants (POPs). A leak of about 25 kilograms of dioxin at Seveso in Italy in 1976 contaminated approximately 17 square kilometers, killing 3,300 local animals within days and a further eighty thousand animals had to be slaughtered to prevent dioxin from entering the food chain (Roche Group 2006). Dioxins bioaccumulate (Stephens et al. 1990), meaning they reach higher concentrations in animals higher on the food chain. By this mechanism, they contaminate meat and other animal products used as food. The Seveso disaster resulted in no confirmed human casualties, but there were almost 200 cases of chloracne, a severe type of disfiguring acne caused by chemical contamination. The total cost of decontamination exceeded 40 billion lire (47.8 million USD). 3.2. Element pollution: heavy metals, phosphorus The causes of increased rates of autism and Alzheimer disease and the decline in human sperm counts are unknown. Some have suggested that all of these trends may be caused by accumulation of one or several chemicals, most likely metals (Kampa and Castanas 2008). Environmental metal contamination can occur as a byproduct of mining, like in the case of mercury (Duruibe, Ogwuegbu, and Egwurugwu 2007). It has been suggested that metal production is poisoning the biosphere (Nriagu 1990). Global pollution with cadmium has been observed and correlates with elevated rates of renal disease and hypertension (Satarug et al. 2003). Mercury is used for gold miming in Brazil in large quantities, where it has affected the aquatic food cycle and the health of tropical forests (Salomons 1995), creating what has been called a “chemical time bomb” (De Lacerda and Salomons 2012).Selenium pollution has been recognized as a global issue (Lemly 2004). Aluminum is known to be neurotoxic; aluminum salts are used by many people as antiperspirants and as an antacid drug. Widespread contamination by other trace elements has also been discussed (Calabrese, Canada, and Sacco 1985). Products such as electric batteries contribute to metal pollution (Rydh and Svärd 2003), as they have many different metals inside. Phosphorus, which is globally used as a fertilizer, goes into the oceans. This could trigger an oceanic anoxic event, which has been associated with mass extinction events, probably via producing of H2S (Handoh 2013). It was estimated that at current rates, phosphorus could trigger oceanic anoxic event in a few centuries or millennia (Cordell, Drangert, and White 2009). 3.3. Gases Most toxic gases do not remain in the atmosphere for long, as they tend to be highly reactive. But some gases with environmental effects are quite stable, like chlorofluorocarbons and some greenhouse gases. Toxic gases like hydrogen sulfide (H2S) may be produced by a supervolcano eruption, or by eruption of a water column saturated by dissolved gas, as happened in Lake Nyos (Kling et al. 1987). A similar effect on a global scale, “ocean overturn” causing a tenfold increase in atmospheric CO2 concentration, has been suggested as a possible mechanism of Permian-Triassic extinction event (Knoll et al. 1996). Global eruption of methane from the ocean has also been considered as a possible cause (Zhang and Kling 2006). It has also been suggested that nickel-consuming bacteria may have worsened the Permian extinction by producing huge amounts of methane (Ghose 2012). Heavy gases like volcanic CO2 can accumulate in low areas. Radon is a heavy radioactive gas, and is the second leading cause of lung cancer in the US (Field et al. 2000), but it cannot accumulate long-term as it is very unstable; the most stable isotope has a half-life of only 3.8 days.

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Global acid deposition has been recognized as threat to forests and crops (McCormick 2013), contributing to a decline in biodiversity, which itself could be a factor contributing to existential risks (Kareiva & Carranza, 2018; Torres, 2016).

It has been suggested that eruption of gases (CO2 and especially SO2) from the massive volcanic province called the Deccan traps contributed to the demise of dinosaurs (Self et al. 2006). The most dangerous effects might have stemmed from SO2, namely global cooling (which is climate risk, but closely connected with environmental pollution) and acid rain. Another gas that could cause a global catastrophe is carbon monoxide, as it is not rained out as strongly (D. Denkenberger and Pearce 2014).

#### Scenario 2---WARMING:

#### Public-interest oriented bankruptcy facilitates effective climate mitigation.

Gouzoules ’22 [Alexander; October 31; Westerfield Fellow at Loyola University New Orleans College of Law; Boston College Law Review, “Going Concerns and Environmental Concerns: Mitigating Climate Change through Bankruptcy Reform,” vol. 63]

With the goal of animating discussion of possible solutions (and particularly ones that do not rely entirely on the beleaguered administrative state), this Article explores how legislative reforms to the Bankruptcy Code could contribute to a highly overdue transformation of our energy sector.34 As written, Chapter 11 of the Code encourages eligible debtors to reorganize themselves, a policy choice motivated by the assumption that insolvent firms are more valuable when preserved as going concerns rather than liquidated.35 For fossil fuel companies, which are exposed to volatile prices36 and characterized by boom-and-bust cycles,37 Chapter 11 allows firms to survive insolvency during price declines and exit bankruptcy in time to profit from price spikes.38 The wave of bankruptcies caused by the recent price collapse in 2020 followed by recoveries driven by price increases in 2021 amply demonstrate this trend. 39 This inherent volatility, which would otherwise constitute a significant market disadvantage of fossil fuels compared to renewables is smoothed out by the bankruptcy system, which benefits carbon-intensive industries and inhibits the needed transition to alternative sources.

This Article suggests that Congress should reexamine Chapter 11’s underlying assumptions in situations where the debtor corporation’s continued operation as a going concern would significantly contribute to greenhouse gas emissions, thereby impeding the public’s interest in climate-change mitigation. It proposes specific, novel legislative reforms that would require bankrupt fossil fuel firms to liquidate rather than reorganize, while also mandating consideration of the public interest by a specially selected trustee during the liquidation proceedings. Together, these proposals would wind down—rather than reorganize—insolvent polluters, directing at least some assets toward climate remediation. By removing a bankruptcy support that helps prop up fossil fuel firms during market downturns, these reforms would spur the adoption of less volatile, renewable power sources.40

#### Empowering workers to challenge creditor primacy unleashes sustainable bankruptcy to check existential warming.

Warner ’25 [G. Ray; 2025; Professor of Law, St. John’s University School of Law; St. John’s School of Law Legal Studies Research Paper Series, “Sustainable Bankruptcy,” no. 25-0011]

Deviation from the shareholder/creditor wealth maximization goal is permitted only as far as required by government regulation, according to primacy theorists. That is absurd. After 50 years of primacy theory, both the corporate and bankruptcy systems have become unmoored from their raison d'etre – to serve the public good. While corporations and bankruptcy estates are artificial entities, they operate in a human world and must consider the consequences of their actions. This is all that sustainability asks.

The sustainability approach requires no change in the vast majority of bankruptcy cases. Most cases affect no one other than the debtor, its creditors and its shareholders. Bankruptcy already adopts a sustainability approach as to those parties and fully considers and addresses their interests. However, some bankruptcies impose significant consequences on non-creditors or on society as a whole. In those cases, sustainability requires that those consequences be considered and, while not overriding the goal of creditor recovery, be weighed in the balance.

A. Consequences that Cannot Be Ignored

Business as usual is no longer usual. We have reached or are rapidly approaching the carrying capacity of the planet in many areas. For example, the undeniable and existential threat posed by climate change2 challenges traditional ideas of the purpose and permissible range of business activity. No longer is it a given that the goal of business is wealth maximization for a limited group of privileged stakeholders. No longer is it accepted as a principle of faith that the profit incentives for private transactions will result in activity that will produce a net positive benefit for society as a whole.

Instead, it is now clear that business as usual threatens the health, welfare, and even the existence of humanity.3 Against this backdrop, accepted business practices and legal rules that may have worked reasonably well in earlier periods are being revisited and revised or rejected. The critique of those rules is not limited to discrete areas where the harmful impact of particular business activities arguably could be addressed by targeted external regulations. Instead, there is a recognition that ordinary business activity itself may create more harm than benefit, even if there is no identifiable wrongful action and no specifically identifiable victim.

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While externally imposed regulations are an important - likely the most important - tool for addressing problems like climate change, they are simply not enough. The problems are global, but regulations operate locally. Regulators are subject to capture by the businesses they regulate. Further, the problem is too large and the situation too perilous to rely on external regulation alone. Climate change must be tackled at many levels, including internal changes to business practices. B. Internalizing the Sustainability Norm This is already happening as most well-run businesses now measure and attempt to limit the carbon footprint of not only their activities but also those of their suppliers and customers.4 The concept of the purpose of a corporation is also shifting, partly as a result of climate change.5 Recently the influential Business Roundtable of industry leaders rejected the profit-maximizing shareholder primacy statement of the purpose of a corporation, replacing it with a stakeholder-centric approach.6 These changes put overwhelming pressure on the legal rules of internal corporate governance. The view that corporate managers are duty-bound to focus solely on maximizing shareholder wealth is being challenged by a stakeholder approach that considers the interests of a much broader group of constituents.7 The stakeholder approach is not limited to climate change issues but requires consideration of the interests of all who may be affected by the business’s actions. This is a “sustainability” approach and it considers the interests of both present and future stakeholders.8 While a dramatic change in principle, the shift from shareholder primacy to sustainability is merely a tweak to the traditional business judgment rule. That test defines the scope of interests that a corporation’s directors must consider in making corporate decisions. Those interests flow from the corporation’s purpose. A broader articulation of business purpose expands the scope of relevant considerations. The sustainability approach does not require that shareholder interests be subordinated to other interests, but it does shift the focus from a single constituency to the entity as a whole and requires that the interests of all of the entity’s stakeholders be considered.9 The business judgment test provides a portal through which sustainability can be incorporated into bankruptcy law with no legislative change. The nature of the bankruptcy process results in a few subtle shifts in the bankruptcy variant of the business judgment rule and the shareholder primacy model. Creditors generally will have replaced shareholders as the residual interest holders in bankruptcy. Thus, the bankruptcy variant of the shareholder primacy model is a creditor primacy model aimed at maximizing creditor returns. It is the foundation of the currently dominant “creditors’ bargain” theory of bankruptcy. 10 Modern bankruptcy practice is primarily about the rescue of failing businesses, not the burial of failed ones. In a bankruptcy reorganization the business continues and raises the same sustainability concerns that existed before bankruptcy. The sustainability approach simply extends those principles to the continued existence and operation of the business during the distress and resolution phase. Thus, the operations and decisions made during bankruptcy should take into consideration the consequences for all stakeholders, and not just creditors. While few in number, bankruptcy cases raising serious sustainability concerns are of great importance. Big things happen in bankruptcy court. Bankruptcy has become a principal forum for important public policy debates. Major economic shifts, like those that will be caused by climate change, are addressed primarily by the bankruptcy system. National industrial policy often plays out in the bankruptcy system. For example, the automotive industry is one of the most important sectors of the US economy, 11 but most decisions involving its government-financed bailout took place in bankruptcy court, not in the legislative arena. 12 Similarly, the bankruptcy courts played a major role in the global financial collapse of the Great Recession, handling the resolution of such systemically important institutions as the Lehman Brothers investment bank.13 Beyond market shifts and financial crises, the bankruptcy court is the forum for a wide variety of other important public policy issues. For example, the major public policy decisions raised by a variety of mass tort situations ranging from the early asbestos case of John’s Manville14 to the current opioid addiction plague15 regularly end up in bankruptcy court. These cases do not simply involve readjusting the relationship between the debtor and its creditors; they involve major issues of public interest that affect society as a whole. Sustainability must be part of that process, and the decisions made must balance the interests of all who are affected by them and not serve only the interests of a select few. C. Empowering Stakeholders in Bankruptcy Bankruptcy’s business judgment test is based on its non-bankruptcy cousin. To the extent that the standards for measuring business judgment evolve outside of bankruptcy, they should be reflected within bankruptcy. While a shift to stakeholderism is underway in corporate law, that change is still in its early phase and is not yet widely enough accepted as a principle of corporate law to force a systemic shift to stakeholderism in bankruptcy. Nonetheless, the bankruptcy process already incorporates the primary features pressed by the sustainability movement. Outside of bankruptcy, the business judgment test is almost exclusively procedural, requiring investigation and consideration of relevant factors.16 All the sustainability approach does is add the interests of other stakeholders as a relevant factor for consideration; it does not impose a requirement that those interests be served by the decision. This means that the stakeholder approach will have limited impact in corporate law, operating more like a nudge than a command. Bankruptcy is different. It is an adversarial and public process with liberal appearance standards.17 Advance notice must be given of significant proposed actions. Thus, affected stakeholders can raise sustainability concerns before a decision is final. They need not rely on the bankruptcy decision maker to adequately investigate the stakeholder impact but can add any information needed to inform the process. They even have limited power to ensure that the stakeholder concern is considered by triggering a hearing before the bankruptcy judge. This is more than would be required by the sustainability approach to corporate decision making. Thus, the bankruptcy process already provides the tools needed to incorporate sustainability concerns and to do so in a more robust fashion than the evolving corporate law standards envision. The bankruptcy process goes one step further. Outside of bankruptcy, the corporate directors are the decision makers, and the judge has no role in reviewing the merits of the decision.18 However, in bankruptcy most decisions are vested in the bankruptcy judge.19 Thus, the business judgment rule plays a very different role in bankruptcy. Rather than a rule that insulates the merits of a decision from review, it is merely a rule of deference to the proposed decision of the bankruptcy manager.20 While that deference is substantial, the bankruptcy judge decides whether the balance struck by the bankruptcy manager is a reasonable one. This allows stakeholders to challenge the merits of a decision on sustainability grounds. Sustainability must become an internalized norm of all business activity,21 with every business decision viewed through that lens. In recent years that has become an accepted best practice of well-managed businesses. It also is becoming accepted at the theoretical level. The shareholder primacy model of corporate purpose has lost its appeal and is being replaced by a stakeholder approach22 that includes sustainability. Bankruptcy must also become sustainable. That can be achieved through currently available bankruptcy tools and need not await consensus in the corporate governance realm. II. Sustainable Business Wealth maximization is nice, but survival is better. Functioning properly, market capitalism generates wealth. That is what it does and all that it is designed to do. The model is oblivious to other goals. It takes no account of them and has no mechanism to accommodate them. It promotes growth, full exploitation of resources, and maximization of material wealth.23 And it has done its job reasonably well. Market capitalism has produced a world of plenty. But we now face a dilemma. The process of producing wealth may render the world uninhabitable. This has resulted in a paradigm shift where livability trumps all other goals. Sustainability must replace wealth maximization as the guiding economic principle. Business practice, economic theory and commercial law must adapt to this new reality.24 The idea that sustainability is a desirable goal of business is of recent origin. Since the industrial revolution the focus has instead been on wealth maximization. In a world of scarcity, the primary purpose of economic activity is production, and more is better than less. The underlying principles of market capitalism are designed to use the profit motive to incentivize the production of desired goods and services. Profit is not the end, but rather a tool designed to serve the public good by providing incentives for private actors to solve the problem of scarcity. 25 Market capitalism not only incentivizes production of desired goods and services, it also incentives the maximum utilization of resources. There is a fundamental tension between market capitalism and the concept of sustainability.26 Market capitalism is not a stable system but rather one that generates and depends upon growth.27 The incentive is to increase profits. There is no natural limit to growth and no built-in mechanism to account for external consequences. If profitable, all available resources will be fully exploited, even to the point of depletion.28 Times change, needs change, and attitudes change. Legal systems adapt to changes. Commercial legal rules adjust to meet the changing needs of commerce. They also evolve to reflect changes in prevailing attitudes and economic theories.29 Legal rules developed in a feudal agrarian society do not serve the needs of an industrial market economy. As market capitalism replaced older economic models like mercantilism and physiocracy30 that were not well suited to industrialization, legal rules changed to reflect the new mindset. For example, the need for large amounts of capital led to the legal recognition of artificial entities like corporations that are distinct from their owners.31 Private corporations developed in the US during the mid to late 1800’s,32 a time when much of the country was wilderness and development was a priority. There has been a constant push and pull since then between legal rules designed to empower corporations and those designed to address perceived excesses.

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The profit motive does not always cause the selfish interests of business to align with the public interest. However, those areas were not generally seen as fundamental flaws in the model but rather were viewed as discrete problems that could be addressed by targeted external regulations. For example, collusive behavior that might thwart the market mechanism and undermine the theory were addressed through anti-trust legislation.33 Abusive working conditions were addressed through New Deal external regulations like collective bargaining rights 34 and wage and hour rules and child labor laws.35 The insatiable nature of market capitalism was not seen as a problem. The world was a large and largely undeveloped place, and it was almost inconceivable that it could be used up. Little thought was given to the possibility that the profit motive might lead to the depletion of natural resources or the destruction of the planetary ecosystem.

A budding recognition of those possibilities came late in the process. The modern US environmental movement was triggered by the publication of Silent Spring in 1962. 36 In 1969, the Cuyahoga River fire37 and a massive oil spill in Santa Barbara38 brought national attention to the effects of pollution on the environment and helped spur passage of the National Environmental Policy Act of 1969. 39 The problem of air and water pollution had become severe enough to trigger a legislative response with the passage of Clean Air Act in 197040 and the Clean Water Act in 1972. 41 Just like earlier reforms targeting other problems, pollution was treated as an unfortunate side effect of business activity and not as evidence of a more fundamental problem. Pollution could be addressed by tweaking the market model to force businesses to internalize the costs of pollution through regulation.

Awareness that the environmental problem was more than merely an industrial pollution problem emerged slowly over the next two decades. By 1990 the scientific community had reached consensus that human activity was causing global warming. A change in the public consensus took longer and was subject to heated political debate. In the last decade, the scientific consensus has become the public consensus, and human activity is widely accepted as the primary cause of climate change.42

Recently the nature of the risk and urgency of a response also has become clear. Climate change is not a slowly emerging future problem that can be addressed piecemeal over an extended timeframe. Instead, climate change is already having catastrophic effects on a global scale. Extreme and destructive storms, wildfires,43 and heat waves are but a few of the recent disasters resulting from climate change.44 Sea level rise threatens to flood much of the world’s population 45 and destroy much of its economic capacity. Beyond the dislocation and economic impacts, climate change threatens the very existence of humanity.

In the blink of an eye, climate change leaped from vague awareness to existential crisis. No longer is environmental damage merely a problem caused by harmful business activity; business activity itself has become the problem. Unrestrained market capitalism does not provide a workable model for a sustainable economy. We do not face an undeveloped world with apparently inexhaustible resources, but rather a nearly exhausted planet.46 A model based on profits rather than consequences no longer assures that businesses will make choices that align with the public interest.

III. The Emergence of Sustainability

Addressing climate change is one aspect of sustainability, but the concept is much broader. A sustainable approach takes into account the full range of an action’s consequences. It considers and weighs the interests of all who might affect a decision or be affected by it. This includes future interests as well as present ones. It is a stakeholder approach and the concepts of sustainability and stakeholderism are largely interchangeable in the business and development contexts.

Sustainability as a concept arose first in the international development context and evolved out of the environmental movement. 47 The sustainability terminology dates to the 1987 report of the World Commission on Environment and Development, “Our Common Future.”48 The report defined sustainable development as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”49

Importantly, the Commission and its report rejected a narrow environmental focus and instead argued for “a new era of economic growth … that is forceful and at the same time socially and environmentally sustainable.”50 The report both gave birth to the sustainability concept and stated it as a general economic theory of human welfare. It was not merely an aspect of the environmental problem or of some other problem. Rather it was posited as a core component of economic planning. The purpose of growth, development, and economic activity is to improve the human condition and therefore the economic model must be driven by that objective.

Sustainability is not a “doomsday” approach but designed to address the more ordinary consequences of economic development. Although the term might suggest a narrow focus on matters threatening continued operation or existence, the concept requires consideration of all impacts of economic activity and not just those that pose existential threats. 51 Thus, the Commission’s report included long-standing problems such as poverty and the unequal distribution of resources, problems that pose no imminent threat of societal collapse. 52 Under this broad view, sustainability includes social sustainability, economic sustainability, and environmental sustainability.53

While climate change was seen as an emerging problem in the 1980’s, at the time it was only one of several potential “survival” threats that might lead to a broader collapse.54 Rather than a focus on cataclysmic threats, the emergence of sustainability was based on a more general disillusionment with the global economic system.55 By the 1970s and 1980s, the optimism of the 1950’s and 1960’s and the belief in progress and the benefits of development were fading.56 It appeared that the limits of the Earth’s carrying capacity were being reached in a number of areas. 57 The expected benefits of growth and development had not fully materialized, but the harmful effects were becoming obvious, substantial, and indisputable. Sustainability was a foundational critique of the global economic system. The main problems the sustainability critique addressed were not new and presented no particular urgency.

The climate crisis changed that.58 Climate change dwarfed the other problems, and it required immediate action. Suddenly there was an urgent need to revise the economic model to accommodate the new survival imperative. The sustainability approach was a natural fit. IV. Sustainable Capitalism

The principles of sustainability quickly spread beyond the development sphere and became a broader critique of market capitalism. Just as the confidence that economic progress and development could solve global problems faded, so too did the faith in market capitalism. Since the 1970’s the linkage between shareholder profits and worker wages had ceased. 59 Great disparities in wealth had arisen. Shareholder activism had resulted in a focus on short-term returns. It was no longer obvious that the system operated for the greater good of all instead of for the benefit only of a few.60 While climate change was becoming a concern, more traditional concerns about environmental degradation, destruction of habitat, over-development, worker exploitation, distributive justice, and intergenerational equity drove the movement.61

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The sustainability critique reflected the sense that many societal problems flowed directly from the economic model’s profit focus and were not merely incidental to its operation.62 The sustainable capitalism approach is designed to preserve the perceived benefits of market capitalism while limiting its excesses.63 The concept of sustainable capitalism is still evolving and there is no single model.64 At its core, it is a movement designed to incorporate sustainability concerns into business decision making. What are the norms that sustainability adds? The two principal characteristics of sustainable capitalism are that it adopts a stakeholder approach and takes a long-term focus.65 Thus, it expands the universe of constituents whose interests must be factored into decision making and shifts the frame for decisions from the short term to the long term. It adopts an extremely broad view of stakeholder, requiring consideration of the interests of “any group or individual who can affect or is affected by the achievement of an organization’s objectives.”66 That formulation of stakeholder naturally includes future generations and thus requires a consideration of the long-term effects of decisions. The goal of sustainable capitalism is to make sustainability the norm for business decision making. 67 It is a relatively light touch approach. It does not eliminate profit making as a goal of business activity, but it does remove it as the sole consideration. It seeks to reimagine capitalism as a shared enterprise designed to benefit all participants, rather than benefiting a few at the expense of others. 68 The interests of all must be weighed in the balance and maximizing the benefits to the entire group of stakeholders becomes the norm for business activity.69 The shift to sustainable capitalism operates at many levels. The most important and most powerful way to advance the interests of other stakeholders and of society in general is through external regulation. While regulation has long been used to address specific problems that arise out of business activity, sustainable capitalism shifts the regulatory focus toward a broader consideration of overall impacts. For example, greenhouse gases accelerate climate change but result from normal business activity, not from questionable activities designed to externalize some of a business’ costs. This requires a different type of regulation. At the global level, national governments have agreed to reduce the emission of greenhouse gases, first in the Kyoto Protocol70 and more recently in the Paris Agreement.71 This climate friendly policy shift results in a variety of regulations that encourage or require businesses to incorporate climate change impacts in their decisions and actions. Recent examples in the United States include the Inflation Reduction Act that heavily incentives the adoption of clean energy technologies72 and California’s 2022 Building Energy Efficiency Standards that requires solar panels on many new homes. 73 Unlike traditional regulations, such as labor and environmental standards, which are targeted at injury caused by the particular business, these broader measures are designed to motivate business activity that will address problems the business may not have caused. With respect to the broader sustainability concept, the European Union is leading the way. The EU has gone well beyond the issue-specific approach and imposed regulations that nudge or force businesses to incorporate a sustainability methodology into their decision-making processes. The nudges come from regulations like the Corporate Sustainability Reporting Directive (CSRD)74 that force businesses to audit their impact on people and the environment and publicly report the resulting “sustainability information.” 75 While imposing no requirement that businesses adopt sustainable practices, the CSRD significantly advances the stainable capitalism project. Stakeholder impacts cannot be balanced against profit incentives unless they are known. But once known, they almost certainly are at least given some consideration by business decision makers. Sustainability is important to many investors and the CSRD facilitates investor pressure and public pressure to internalize the sustainability norm.76 A similar, but less-extensive, audit and disclosure requirement in the US is the SEC’s March 2024 climate-related disclosure regulation. 77 In June of 2024, the EU moved beyond nudges and imposed substantive sustainability78 requirements through the Corporate Sustainability Due Diligence Directive (CSDDD). 79 The CSDDD is similar to much business regulation in that it imposes responsibility on businesses for their environmental and human rights impacts. 80 The Directive goes much further, however, and injects sustainability into the business’ decision-making process. Covered businesses are not only required to conduct environmental and human rights due diligence, 81 but to integrate the due diligence “into all their relevant policies and risk management systems.”82 Most significantly from a sustainable capitalism perspective, the decision-making process must be an open one that includes meaningful engagement with stakeholders, 83 a broadly defined term that includes all “individuals, groupings, communities or entities whose rights or interests are or could be affected by the products, services and operations of the company.”84 The EU’s approach aligns the corporate interest with the public interest and parallels the current trend toward stakeholderism in US corporate law, discussed below. Adoption of a robust stakeholder view in EU law legitimizes that approach and should influence its development here. However, imposition of a stakeholder approach on US businesses will not depend solely on the persuasive power of the European authority. The European stakeholder approach will apply to many important US businesses either directly or indirectly by virtue of the extensive reach of the CSDDD. Once fully implemented, the CSDDD will apply directly to any US entity that has significant business in the EU, 85 and for global corporate groups, may apply directly to the group’s “ultimate parent company.”86 Even if the US business is not subject to the CSDDD directly, some of the directive’s sustainability requirements may be imposed upon it by a covered customer or business partner. The CSDDD requirements are not restricted to the operations of the covered entity but require that entity to ensure that the activities of business partners involved in its “chain of activities” conform to the directives’ requirements.87 from a sustainable capitalism perspective, the decision-making process must be an open one that includes meaningful engagement with stakeholders, 83 a broadly defined term that includes all “individuals, groupings, communities or entities whose rights or interests are or could be affected by the products, services and operations of the company.”84 The EU’s approach aligns the corporate interest with the public interest and parallels the current trend toward stakeholderism in US corporate law, discussed below. Adoption of a robust stakeholder view in EU law legitimizes that approach and should influence its development here. 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The CSDDD requirements are not restricted to the operations of the covered entity but require that entity to ensure that the activities of business partners involved in its “chain of activities” conform to the directives’ requirements.87 Sustainability concerns are also becoming incorporated into business decisions through evolving best practices standards. These are norms of business behavior that become widely accepted as appropriate and even required behavioral constraints. As sustainability concepts become widely-held societal norms, they are reflected in the best practices of well-run businesses. The pressure to adopt the sustainability norm as a standard business practice comes from both external and internal sources. In addition to government regulation, other external actors may exert pressure on businesses to adopt sustainability best practices. Reputational concerns may cause a business to impose sustainability filters on its decisions and actions. Businesses have long been forced by pressure from consumers to consider the impact of their practices on others.88 More recently, businesses have begun to pressure their business partners to adopt socially responsible practices.89 Concerns about climate change have caused many businesses to commit to greenhouse gas reduction goals. These goals are based not just on the business’ carbon footprints but on “value chain” emissions that include the emissions of both suppliers and customers.90 Similarly, many investors require the businesses they invest in to meet a variety of social responsibility or sustainability goals. This includes both equity and debt investors. Just as other businesses have committed to environmental and social benchmarks, so too have many lenders. And like other businesses, they are requiring their borrowers to adopt socially responsible practices.91 On the equity side, the growth of ESG index funds is a good example. The first ESG index was launched in 1990 and since then ESG investments have grown to account for almost a quarter of all global assets under management.92 A business is an organization comprised of many stakeholders. In addition to external stakeholders like lenders, customers, and suppliers, the business’ employees can and do exert pressure to adopt a sustainability norm.93 Employees are essential to the business’ success, but they also live in the world that is affected by the business’ activities and may use their positions within the company to mold its culture and norms. There are many examples of businesses embracing corporate social responsibility initiatives because of internal pressure from employees.94 Businesses need customers. They need suppliers. They need capital. And they need employees. As the pressure to adopt sustainable practices increases, businesses will have to respond. While external regulation and external pressure are important, sustainable capitalism requires that the sustainability norm become an internalized guideline for business behavior. That is also happening. Some of this comes from external pressures that result in changes to standard business practices to reflect sustainability concerns. Over time, the new practices become ingrained, and sustainability becomes an internalized value of the business. Further, like employees, the business’ decision makers are human and hold views on a variety of sustainability issues. They have the ability to influence or even impose norms of sustainability and often do.95 Norms also can arise from an organization’s vision of its purpose. As new conceptions of the purpose of a business corporation gain currency, they create new norms of behavior. If the sole purpose of a business is profit maximization, then that becomes the only value and all other considerations are excluded. However, if the purpose of a business is more broadly conceived as creating value for society, 96 then values other than profit maximization are important and weighing them in the decision-making process becomes an internalized norm. The accepted view of the purpose of a business corporation has been changing, and rapidly. The same factors that gave rise to sustainability as a popular concept also challenged the traditional view of corporate purpose.97 The adoption of a sustainability approach in the international development field led directly to its acceptance as a norm for corporate decision making.98 The UN’s 2015 Sustainable Development Goals grew out of the work done in the 1987 Our Common Future report. Two years later, in 2017, those sustainability goals migrated to corporate governance when more than a hundred global business leaders signed on to the World Economic Forum’s Compact for Responsive and Responsible Leadership99 committing to align their corporate values and strategies with the UN’s Sustainable Development Goals. 100 Also in 2017, Harvard Business School Professors Joseph L. Bower and Lynn S. Paine argued for an entity-focused stakeholder approach recognizing that “corporations are independent entities serving multiple purposes and endowed by law with the potential to endure over time.” 101 In 2018, Oxford Professor Colin Mayer posited a stakeholder-oriented corporate purpose of “producing profitable solutions to problems of people and planet.” 102 This culminated in 2019, with the Business Roundtable’s restatement of its Principles of Corporate Governance replacing the profit maximization purpose with an approach recognizing that “Each of our stakeholders is essential. We commit to deliver value to all of them, for the future success of our companies, our communities and our country.”103 Thus, in the space of a few short years, sustainability has become an internalized norm for business decision making and an accepted best practice of business. V. Corporate Decision Making The principles of sustainable capitalism have replaced the pure profit maximization view as the dominant notion of the purpose of business activity. This change is evident in international instruments, regulatory changes, business practices, popular sentiment, and the views of business leaders. Thus, as a matter of practice, business decision makers consider the interests of other stakeholders and weigh those in addition to the interests of shareholders. But how is the changing conception of corporate purpose manifested in the law? While it may be imposed externally by regulations like the EU’s CSDDD, the legal internalization of the sustainability norm depends on the rules of corporate governance. In the US, that battle is fought in the context of the “business judgment” test - the rule that governs governance.104 The business judgment rule sets the boundaries within which the directors of a corporation must operate. It determines whether directors owe duties only to shareholders or also to other stakeholders and society in general. It determines which interests are legitimate ones for consideration by the corporation’s decision makers, and which are not. And it determines the extent to which directors must investigate and the degree to which they must consider the consequences of corporate decisions. At its core, the rule imposes on the directors a duty of loyalty, requiring them to act in the corporation’s best interests. 105 But a corporation is an artificial entity, so its interests are derived from the purpose for which it exists.106 That purpose defines the corporation’s interests, and those interests determine the range of factors that can and must be investigated and considered by the directors. This is where the changing theory of corporate purpose exerts its influence. In practice, the rule is mostly bark, and not much bite. The business judgment test operates principally as a shield for corporate directors, giving them broad discretion and largely protecting them from liability for decisions made.107 While its standards are phrased in terms of reasonableness, that is mostly aspirational because director liability is predicated on gross negligence.108 The corporate business judgment test is almost exclusively procedural.109 It focuses on the process used in reaching a decision and not on the quality of the decision reached.110 Under the business judgment rule, the factors that were considered are reviewed to determine whether the directors honored their duty to act in the corporation’s interests. The directors must also become reasonably informed of the factors relevant to the decision.111 This is a part of their duty of care, 112 which also requires that they consider all relevant information.113 These two requirements are the tools through which sustainability norms become internalized in corporate decision making. If the corporation’s sole purpose is to maximize profits for shareholders, then the directors should ignore the interests of other stakeholders.114 This view is generally known as the “shareholder primacy” theory. Alternatively, if the corporation’s purpose is more broadly conceived as including at least some aspects of public good, then the directors must consider all interests related to those included aspects. This would be a stakeholder or sustainability approach. The sustainability approach would make a relatively small change in corporate decision making. It would simply require directors to become reasonably informed about the effect a proposed corporate decision might have on other stakeholders. And it would require that they consider those consequences as part of the decision-making process. That is all that it would do - impose duties to become informed and to consider.115 A sustainability approach would not eliminate profits from the equation and would not impose a sustainability metric on the outcome.116 The courts would continue to have no role in evaluating the correctness of the balance struck, as long as the sustainability impacts were investigated and actually considered. The business judgment test is a judicial creation and, like all common law doctrines, it shifts over time to reflect prevailing conditions and attitudes.117 A shift in the prevailing judicial view of corporate purpose automatically changes the scope of appropriate factors for corporate decision making. Judicial attitudes are influenced by societal change and both attitudes and the natural and social environment are undergoing rapid and monumental change.118 The rise of stakeholderism in business theory and practice naturally changes the business judgment test. That change is underway This is not the first time the theory of corporate purpose has changed.119 It is an evolving concept that has long been subject to the competing pulls of profit maximization and social purpose. Originally the grant of a corporate charter was seen as a privilege conferred by the state to serve a public purpose.120 That changed with the advent of laws that permitted private corporations to be formed for private purposes, 121 and that began the debate. Private corporations are artificial entities, separate and distinct from their shareholder-owners. What was the nature of this newly invented entity and what was its relationship to its owners and to society? Does the freedom to establish a business corporation mean that it is merely an instrumentality of the shareholders with the sole purpose of maximizing their wealth? Or, does its status as a separate entity mean that it has a social purpose as well as a profit-making one? 122 Under the instrumentality theory, the principal issue addressed by the business judgment rule is an agency problem caused by the separation of ownership and control.123 While there is room for some consideration of competing interests, clearly profit-making is the purpose of the corporation and the primary consideration for corporate decision making. The aggressive shareholder primacy model was championed by Milton Freidman,124 who flatly rejected consideration of any factor other than profit maximization. In his view, “there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits.” 125 Although initially an outlier on economic thought,126 Milton Friedman’s theories and the related views of other “Chicago School” economists and legal scholars entered the mainstream and generated the dominant models in many areas of economics and commercial law.127 One such area was corporate governance, where the shareholder primacy model was advanced by other scholars in the Chicago School over the next two decades.128 The shareholder primacy theory was attractive for its simplicity, ease of application, and apparent utility.129 While the times are never simple, those were simpler times where the regulation of issues like environmental pollution was limited and there was little awareness of the global consequences of corporate decisions. The idea that government should do what it does best, i.e. establish the regulatory boundaries needed to protect society, and that business should do what it does best, i.e. maximize profits within those boundaries, made sense.130 The shareholder primacy model also fit well with the thinking of the time. Trust in the New Deal regulatory state had been replaced with the idea that markets made better decisions.131 The shareholder primacy approach has come under attack in recent decades as the negative consequences of the profit-only focus of economic activity have become more severe and apparent.132 Shareholder profits may have been maximized, but at a devasting cost to the human race.133 The dominance of the Chicago School has waned134 and conceptions of the nature of a corporation also have evolved. The shareholder instrumentality model is giving way to a resurgence of the competing entity view. Changing ideas of the corporation have spawned new models that emphasize the collective nature of business activity and the multifaceted nature of the corporation and its constituents.135 While stakeholderism now dominates both the thinking about corporate theory and the actual practice of business, it has not yet displaced shareholder primacy as the conceptual foundation of the business judgment rule. Nonetheless, the current view of shareholder primacy is not Milton Friedman’s extreme version. Courts recognize considerable leeway to consider competing interests. 136 Of perhaps greater importance, the great majority of state legislatures have adopted “corporate constituency statutes” that move away from the narrow shareholder value proposition and adopt much of the stakeholder approach and longer-term focus of the sustainability analysis.137 At the academic level, the recent debate is robust. As expected, the usual arguments have been raised in opposition to stakeholderism.138 Corporate governance law is not unique in this regard as primacy theory is in retreat and stakeholderism is ascendant across the whole range of legal areas where it recently dominated. 139 No winner has yet emerged, but just as stakeholderism has rapidly replaced the shareholder primacy approach in economic theory, international instruments, and business practice, it will eventually expand the scope of the business judgment rule. VI. Sustainable Bankruptcy A. Introduction Most bankruptcy decisions do not raise significant sustainability concerns. This is also true of most corporate decisions. Generally, the effects of the bankruptcy process are limited to the debtor, its shareholders, its employees, and its creditors and simply involve the distribution of assets or the restructuring of liabilities. They are the only affected stakeholders and their interests are considered and provided for in the process, usually with the weighing of those interests governed by express statutory provisions.

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That is not always the case, however. Bankruptcy laws are designed to deal with financial distress and that often comes paired with other serious problems. Many of society’s most vexatious issues end up being addressed in whole or in part in the bankruptcy process. And those cases often present serious sustainability concerns. Examples are legion.

The bankruptcy system was the process used by the government to salvage and restructure the American automotive sector.140 It handled the collapse of Lehman Brothers141 and much of the related impact of the Great Recession of 2008. It handled numerous mass tort issues, including such pervasive problems as industry-wide asbestos exposure142 and the fallout from the opioid addiction crisis. 143 It handled the collapse and rescue of the City of Detroit.144 And it handled innumerable environmentally sensitive cases.145

All of these had significant consequences for non-creditor stakeholders. In theory, bankruptcy addresses only financial problems. But, in reality, the decisions made in the process have a much broader impact. The bankruptcy court is the only forum where those impacts can be considered and addressed.

Can sustainability concepts be incorporated into bankruptcy law?

Unlike the corporate context, many of sustainability’s concepts are already included in the bankruptcy law and process. Bankruptcy adopts a much broader stakeholder view that extends beyond the interests of shareholders, and even beyond the interests of other residual interest holders like creditors. And, to some extent, it adopts a longer-term focus that considers the interests of future stakeholders.

The process of decision making in bankruptcy also incorporates most of sustainability’s features. The bankruptcy forum provides a mechanism for considering the interests of most parties who may be affected by a bankruptcy decision. Indeed, in many respects, the bankruptcy process already does more to ensure consideration of other stakeholder interests than the argued for revisions to corporate law would achieve in the non-bankruptcy context. Unlike corporate law, the bankruptcy process empowers affected stakeholders. It gives them a role in the decision-making process and permits them to raise sustainability concerns and to challenge a proposed decision before it becomes final.

Thus, many of the objectives of the sustainability project have already been achieved in bankruptcy. Bankruptcy does not, however, yet recognize the full range of stakeholder interests or fully embrace the long-term focus of the sustainability approach. Nonetheless, bankruptcy law incorporates a variant of the business judgment rule that can be used to import those features.

B. Expanding the Stakeholders

The corporate decision-making process is designed to advance the interests of the corporation. Although a decision will affect various stakeholders and their interests may influence the outcome, that is incidental to the process. In contrast, the objective of the bankruptcy process is to adjust the rights of most parties affected by a financial collapse. Its focus is on the stakeholders, and their interests are the primary considerations underlying the decisions made. As a collective judicial process, the stakeholder interests that are considered in bankruptcy extend well beyond the shareholders of a debtor corporation.

Indeed, the shareholder primacy model does not apply in most bankruptcy cases. While shareholder interests are considered in all corporate bankruptcy cases, the creditors’ interests are the primary focus of the process. Outside of bankruptcy, shareholders hold the residual interest in the corporation and thus their interests are the focus of the directors’ duties.146 This is part of the foundation of the shareholder primacy model. Traditionally bankruptcy operated in insolvency, a situation where the shareholder interests likely will be of no value and the creditors will have replaced the shareholders as the residual interest holders. Upon insolvency, the focus of the directors’ duties shifts from the shareholders to the creditors.147 Thus, the bankruptcy variant of the shareholder primacy model generally will be a creditor primacy model.

Modern bankruptcy is not restricted to insolvency but operates at much earlier stages in a business’ demise curve.148 Chapter 11 is designed to preserve and restructure a distressed business. While the business often will be insolvent or on the verge of insolvency, it need not be in order to use the chapter 11 process.149 In those cases where the entity is not yet insolvent, the shareholders would be the residual claimants and the shareholder primacy model might apply to the bankruptcy process. Regardless, the primacy granted by either variation is a far cry from Milton Friedman’s profits only approach or even the more relaxed shareholder primacy view of most caselaw. Bankruptcy, by its very nature, rejects the primacy principle and instead embodies a broader analysis focused on the “estate.”150 Like the entity approach in corporate law, this shifts the focus away from shareholders and even from creditors. Indeed, bankruptcy law expressly considers the interests of many additional stakeholders.151 While municipal bankruptcy is a special case with many unique features, it does not follow the creditor primacy model but instead protects many non-financial stakeholders who depend upon municipal services and may be harmed by a municipality’s collapse.152 This reflects a stakeholder approach.

Similarly, in railroad reorganizations, the court is expressly required to “consider the public interest in addition to the interests of the debtor, creditors, and [shareholders].”153 And, where the public interest so requires, the court may order continued operation of a railroad even though that may be contrary to the interests of the financial stakeholders. 154 Again, this is a stakeholder approach that is at odds with the prevailing creditor primacy narrative.

Stakeholderism principles are evident beyond those special bankruptcy contexts. For example, contract and lease counterparties who may not be creditors are included as stakeholders in the bankruptcy process and their interests can be raised and considered.155 In several cases they are given special protection from the impact of bankruptcy. Examples of cases where special rights are granted to non-debtor counterparties include real estate lessees, 156 timeshare purchasers, 157 and intellectual property licensees. 158

Employees and retirees are treated as stakeholders and given special rights that go beyond any rights they may have as creditors. For example, the treatment of employees covered by collective bargaining agreements must be supported by a balance of the equities.159 Retiree benefits generally must be continued under a similar balance of the equities approach.160 These approaches clearly reject creditor primacy.

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Similarly, the court is required to consider the privacy interests of consumers before approving the sale of personally identifiable information161 even though those interests may conflict with the creditors’ interest in maximizing the sale price. Bankruptcy caselaw also recognizes the interests of some parties affected by the process. For example, in the environmental pollution context, case law requires protection of the public interest and limits the freedom to abandon toxic assets even though that may be most advantageous for the financial claimants.162 Stakeholderism is one core component of the sustainability approach; the other is adoption of a long-term focus.163 The very nature of bankruptcy suggests a short-term focus. In the classic liquidation context, bankruptcy signals an end to corporate existence so there can be no long-term perspective. However, the long-term focus may not be a separate component of sustainability but merely the natural consequence of including future parties as relevant stakeholders. In this regard bankruptcy embraces the long-term focus of sustainability, even in a liquidation case. Bankruptcy law broadly defines creditors to include parties with no current claim but who may hold a claim arising in the future.164 Future claimants are included in the process and their potential future claims will be considered and provided for. These provisions demonstrate that bankruptcy law already embraces stakeholderism to a large degree and that consideration of the interests of non-financial stakeholders is not fundamentally inconsistent with the bankruptcy process. It does that all the time. C. Proactive Stakeholder Involvement “I wanna be in the room where it happens”165 The main effect of adopting a sustainability approach to the corporate law business judgment test is informational.166 Directors would have to undertake some investigation to inform themselves of the stakeholder implications of a proposed action. The nature and scope of the investigation is a factual question that could be established through evidence and thus would be susceptible to meaningful judicial review. In fact, a well-advised board of directors would document the reasonableness of its investigation and likely hire professionals to conduct it. 167 While the directors would also need to consider that information in reaching a decision, the business judgment test lacks an effective mechanism to ensure that. Unlike the investigation, there may be no practical way to establish that the directors failed to consider a particular issue. Further, since courts do not review the quality of the decision,168 directors are not required to justify their decisions. Bankruptcy is different. As a practical matter, it is much easier in bankruptcy to bring sustainability concerns to the decision maker’s attention and to ensure that they actually are considered as part of the decision-making process. Unlike corporate governance, where there is no opportunity for stakeholders to add sustainability information to the decision-making process,169 bankruptcy law has formal features that both allow information to be added before a decision is finalized and permit stakeholders to challenge proposed actions preemptively. The informational aspect of the sustainability approach is already part of the fabric of bankruptcy practice. Indeed, the bankruptcy process provides a much more powerful informational component than would changes to the corporate business judgment test. Outside of bankruptcy, affected stakeholders have no notice of or role in the decisionmaking process and usually can challenge a decision only after the fact.170 In contrast, bankruptcy is an open and partly adversarial process that includes a broad array of stakeholders in the decision-making process. Almost every significant decision can be made only “after notice and a hearing.”171 This includes most of the types of actions that might raise sustainability concerns like the sale of assets or of the business,172 other non-ordinary course transactions,173 and approval of a bankruptcy plan of reorganization.174 Thus, pending decisions likely will be brought to the attention of affected stakeholders. Even if no formal notice is given to the affected stakeholder, bankruptcy is a public judicial process, and the filings and hearings are open to the public.175 Further, bankruptcy’s hearing requirement involves the affected stakeholders in the decision-making process. Stakeholders have a right to be heard before a decision is made. They are also provided with much of the information they may need. Bankruptcy is an informationrich environment, with the debtor required to disclose a large amount of information in the initial schedules and statement of affairs filed with the bankruptcy petition176 and later in the disclosure statement accompanying a proposed plan.177 If necessary, stakeholders can obtain more information from the debtor or from third parties using bankruptcy’s expansive discovery procedures.178 The right to seek discovery is not limited to the debtor, shareholders, or creditors, but extends to any “party in interest”179 – a term that includes most stakeholders. While the court controls the process, the scope of bankruptcy discovery is much broader than normal civil discovery. Unlike non-bankruptcy discovery, the scope of discovery in bankruptcy is not limited matters relevant to a claim or defense180 but extends to any matter that might “relate” to administration of the case.181 Standing was a major obstacle in early environmental activism cases and continues to be a challenge in climate-change litigation.182 But that is not the case in bankruptcy. In chapter 11 cases, any “party in interest … may raise and may appear and be heard on any issue.”183 This should include anyone affected by the proposed action, whether or not they have a direct financial stake in the outcome. While some courts had inappropriately imposed such a restriction,184 the Supreme Court recently rejected that limitation. “The plain meaning of [party in interest] refers to entities that are potentially concerned with or affected by a proceeding.” 185 That articulation of the test is almost identical to sustainability’s stakeholder definition. The Court applied the test to extend standing to an insurer, with no claim in the case, based on the possibility that the reorganization plan might expose it to millions of dollars in fraudulent insurance claims.186 While the Court did not opine on the outer bounds of section 1109, it made clear that even “truly peripheral parties” might have a “sufficiently direct interest” to permit their participation in the case.187 The Court rejected the debtor’s “parade of horribles” argument, noting that the statute “provides parties in interest only an opportunity to be heard—not a vote or a veto in the proceedings” and that the bankruptcy courts have ample authority to control the proceedings to prevent abuse.188 No great harm results from such a broad interpretation of party in interest because the participation right only applies at the bankruptcy court level and gives no right of appeal.189 Even if a stakeholder’s interest falls outside the expansive scope of the “party in interest” concept, or the case is a chapter 7 where section 1109 does not apply, the stakeholder can easily become a creditor by purchasing a claim.190 Once covered, the stakeholder can be heard on any issue, even those not affecting its creditor status.191 D. Adding Sustainability to the Mix

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The right to notice and the ability to be heard have important implications. Outside of bankruptcy, stakeholders must rely on the corporate directors to identify and investigate relevant decisional factors. But in bankruptcy, a stakeholder can add sustainability information to the decision-making process before the decision is finalized, rather than merely attacking the decision after the fact because of its absence. More importantly, the bankruptcy hearing requirement adds a debate element to the process so the stakeholder can ensure that the factor is considered, even though it may be rejected.

Bankruptcy gives even greater engagement rights to some stakeholders. For example, both unsecured creditors and shareholders may be able to form committees to represent their interests. 192 Those committees can hire professionals at the estate’s expense.193

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Bankruptcy also empowers a number of non-financial stakeholders who might otherwise lack the resources to participate. For example, a consumer privacy ombudsman may be appointed to protect the privacy interests of the debtor’s customers, 194 and a patient care ombudsman may be appointed to ensure the quality of care provided to patients of a health care debtor.195 Like the professionals retained by a creditors’ committee, these ombudsmen are paid for their services by the bankruptcy estate.196 Information is power. The effects of a bankruptcy decision cannot be considered unless they are known and, once known, may be impossible to ignore - even if they are not relevant under the prevailing legal standard. For example, environmental impact statements, although merely informational, are a powerful tool in the environmental advocacy arsenal.197 Similarly, the new SEC sustainability disclosure rules are merely informational,198 yet the duty to disclose likely will influence corporate decisions. Providing stakeholders with a voice may be beneficial to the bankruptcy system because the information provided can shape the development of the law and make it more responsive to current needs.199 But having a voice is also important to stakeholders, particularly where they are pursuing non-monetary goals, such as dignity interests. 200 And it may yield results. For example, in the Boy Scouts of America bankruptcy, the abuse victims’ voices were heard and resulted in non-monetary commitments that were important to them like providing a path to obtain the Eagle designation for scouts who quit because of abuse and enhanced protection for future scouts.201 And in the Purdue Pharma case, opioid victims’ dignity interests were served by the creation of a document repository and the removal of the Sackler name from cultural institutions.202 A stakeholder’s ability to add information to the bankruptcy decision-making process provides a substitute for the business judgment test’s duty to investigate. Information about the adverse consequences of a decision will change the decision in cases where the consequences of an action to others clearly outweighs its economic benefit. This may occur because the bankruptcy manager, armed with a better understanding of the situation, makes the correct decision, or it can be forced upon the bankruptcy manager where the proposed action does not reflect a reasonable balancing of the economic and non-economic consequences. Even if the information is not legally relevant or the bankruptcy manager chooses to ignore it, adding information to the mix may have substantive effects. The bankruptcy process provides a screen that permits creditors to evade responsibility for the consequences of actions taken on their behalf in a bankruptcy case. For example, in a non-bankruptcy liquidation a lender whose collateral is an older steel mill that cannot economically comply with emissions regulations in the US might be unwilling to maximize its financial recovery by selling the plant to a buyer for reassembly in a jurisdiction with no emissions restrictions. However, in a bankruptcy case, the lender can hide behind the bankruptcy trustee and bankruptcy court and blame them for that decision. If the environmental consequences of the decision can be raised as an objection to the sale, the lender may be forced to use its powerful position as a secured creditor to block the sale, either because of its own green lending policies or to avoid negative publicity. For example, ENRON was one of the largest companies in the US at the time of its bankruptcy. Its former employees not only lost their jobs, but many lost their retirement savings and were owed substantial unpaid wages. Publicity ripped away the bankruptcy screen and forced the creditors to cause the bankruptcy estate to pay up to $13,500 in unpaid wages to laid off employees - well in excess of the then-applicable statutory priority amount.203 A minor loss for institutional creditors; a godsend for former employees. E. Forcing Consideration of Sustainability Process is substance. Unlike corporate law, bankruptcy provides an effective mechanism to ensure that sustainability information actually is considered. Stakeholders, as parties in interest, are not only able to add sustainability information, but by objecting to a proposed action can force a hearing before the bankruptcy judge. The bankruptcy decision-making process bears little resemblance to corporate decision making. Decisions are not debated in private by a small group of directors. Instead, they are made in open court. The hearing and the related motion papers, objections, and responses allow the stakeholder to present its arguments about why and how its interest should affect the decision. The process also forces the bankruptcy manager to provide reasons why other considerations outweigh the stakeholder’s interest. There is no analog in corporate decision making. Corporate decisions are rarely challenged outside of bankruptcy. The effort and expense of mounting a legal challenge coupled with procedural and legal hurdles means that decisions will almost never be reviewed by a judge. While the business judgment test’s “gross negligence” standard already imposes almost no effective regulation of the corporate decision-making process, the low probability of a challenge reduces the incentives to satisfy even that minimal requirement. Thus, the decision-making process dictated by the business judgment test may be more theoretical than real. That probability calculus is reversed in bankruptcy because almost every significant management decision made during a bankruptcy case is subject to some level of judicial involvement.204 The ease of challenging the bankruptcy manager’s proposed action and the manager’s need to justify its decision to the bankruptcy judge greatly increase the incentives to carefully consider sustainability concerns. In addition, reputational issues are at stake. The judge’s cooperation is needed for countless issues that arise during the case and the bankruptcy manager needs the judge to view them as a careful, competent and reasonable decision maker.205 These features mean that the bankruptcy manager must be prepared to explain why any asserted sustainability concern should not affect their decision and give it at least sufficient attention for that. While bankruptcy provides a robust set of tools to force consideration of sustainability factors, affected stakeholders may not need to use them. As a practical matter, the stakeholder will usually add information and negotiate changes informally through discussion with the bankruptcy manager without filing a formal objection. Bankruptcy unusually operates through negotiated resolutions rather than judicial rulings. This is facilitated by the “negative notice” mechanism. While notice must be given of the proposed action, the bankruptcy manager can proceed without a hearing or further delay if no objections are filed.206 There is a strong incentive in bankruptcy to resolve objections without adding the delay, expense and risk of involving the court. Thus, if sustainability concerns can be addressed without unreasonably compromising competing interests, they probably will be accommodated without court involvement. F. Importing Sustainability Is bankruptcy law sustainable? Sustainability requires consideration of all the effects of a decision. Bankruptcy law is almost there. Procedurally, bankruptcy adopts an expanded stakeholder view that allows those affected by the process to participate in it. It also permits information about consequences to be brought to the attention of the decision maker. And, as a practical matter, it gives stakeholders the ability to force the decision maker to give at least some consideration to those consequences. But are consequences legally relevant? That is the missing piece.207 The statute gives no answer. Except for a few very specific provisions granting special rights to specific classes of stakeholders, the Bankruptcy Code simply does not speak to the issue. This leaves a blank canvas, neither mandating nor prohibiting sustainability considerations. The business judgment rule is one mechanism for incorporating into bankruptcy the final piece of the sustainability analysis. In corporate law the test establishes the factors that can and must be considered by directors. Its bankruptcy cousin determines those that can and must be considered by the bankruptcy decision maker. The business judgment rule is a flexible judge-made standard that can easily change. It has evolved over time and will continue to evolve. The world changes. And as circumstances change, so does the law. New challenges need new solutions, new theories gain traction and supplant earlier ones, public policy changes, and judicial attitudes shift. These cause legal rules to change.208 The problem of economic stagflation in the 1970’s catapulted Milton Friedman’s ideas from the periphery of American economic thinking to its center.209 His ideas spawned the shareholder primacy theory that was quickly embraced by the courts and, in little more than a decade, almost eliminated from the corporate test consideration of the interests of other stakeholders. That victory was never complete and in recent decades the tide has begun to turn.210 The need for sustainable business and the evolving view of corporate purpose have reenergized the stakeholder approach. The periodic skirmishes between sustainability and profit maximization have erupted into a battle to incorporate the broad range of consequences into corporate decision making. As stakeholderism alters the corporate business judgment rule, those changes should cause parallel changes in the bankruptcy business judgment rule. That argument, however, is not yet ripe. While shareholder primacy is under attack, it remains an accepted approach. But it is not necessary to wait. Just as the relevant factors for corporate decisions derive from the purpose of a corporation, the factors relevant to bankruptcy decision making derive from the purpose of bankruptcy. The appropriateness of the outcome depends on the objective. The objectives of the bankruptcy process are much broader than those of a private corporation.211 And, just as in corporate law, the single-constituency approach never became absolute in bankruptcy.212 The Bankruptcy Code sets forth the broad strokes of the bankruptcy process and provides several specific rules, but beyond those restrictions the bankruptcy court is left with broad discretionary authority to achieve appropriate outcomes.213 The bankruptcy manager has significant autonomy and is expected to mediate the conflicting interests of multiple stakeholders.214 Substantial room remains for consideration of other factors. 215 Thus, like corporate law, bankruptcy law already permits consideration of many stakeholder interests. What of the remaining stakeholder interests? Does bankruptcy serve any general public purpose? If so, then the interests of all affected by the process would at least be relevant enough to permit their consideration. It is not necessary to negate creditor interests in order to adopt a sustainability approach. It is sufficient if bankruptcy is not designed solely to maximize creditor wealth. Bankruptcy has long been viewed as serving the public interest and the 1978 Bankruptcy Code addressed many different concerns.216 The law was based largely on the 1973 report of the Commission on the Bankruptcy Laws of the United States.217 Milton Friedman’s views were just coming into vogue as the Bankruptcy Code became law. The creditor primacy theory and its creditor’s bargain idea would not appear in the academic literature until several years after the Bankruptcy Code became law and almost a decade after the commission’s report. Professor Thomas H. Jackson218 first articulated the creditor’s bargain theory in a 1982 law review article.219 That theory posited that bankruptcy’s sole purpose was to replicate the hypothetical bargain that “one would expect the creditors to form among themselves were they able to negotiate such an agreement from an ex ante position.”220 He followed up with his seminal work, The Logic and Limits of Bankruptcy Law, 221 in 1986. The theory was not a description of the Bankruptcy Code of 1978, but rather a prescription for what a bankruptcy law should be. It was a powerful tool for attacking the statute; not for explaining it. Or, to use Professor Douglas G. Baird's analogy, “knocking Coke bottles over with a baseball bat as one went through the process of comparing bankruptcy provisions versus this theoretical model.” 222 Thus, rather than being the policy behind the Bankruptcy Code, creditor primacy was a gloss placed upon it almost a decade later. Although the approach had little initial judicial impact,223 its apparent simplicity and the certainty of the answers it appeared to provide made it seductive. 224 It quickly gained popularity among bankruptcy scholars225 and by the time of the famous bankruptcy policy debate between Professors Baird and Warren226 had likely become the dominant academic theory of corporate bankruptcy. Eventually bankruptcy practice also adopted much of what Jackson advocated.227 Thus, just as the thinking of Chicago School scholars shifted the law of corporate governance to focus on only a single constituency - the shareholders, and a single problem - agency risk, it had a similar impact in bankruptcy.228 The focus in bankruptcy narrowed to creditors, and bankruptcy was reimagined as a tool designed to solve a single problem – the commons dilemma.229 That approach narrows bankruptcy’s purpose down to the single objective of maximizing creditor wealth. Gone is any consideration of the public interest or the consequences borne by other stakeholders,230 except those forced upon the process by specific statutory provisions or external regulations. This is the creditor primacy approach, and it is the foundation for the currently dominant “creditors’ bargain” theory of bankruptcy.231 But bankruptcy is not simply a negotiation forum for private ordering among affected creditors. There is no creditors’ bargain. Instead, it is a coercive government regulatory process where the will of a majority of creditors overrides the rights of other creditors.232 The cross-class cram down power goes even further and allows the rights of one group of claimants to be overridden by the will of claimants holding completely different rights.233 Bankruptcy’s coercive power extends well beyond creditors and shareholders to extinguish the rights of many non-creditors, who get no vote in the bargaining process.234 The contract rights of non-creditors are abrogated.235 The property rights of non-creditors are abrogated, even to the extent that the estate can sell property the debtor never owned.236 These are extraordinary powers intended to maximize the value of the estate and to facilitate the restructuring of the debtor. That makes sense if the process serves a greater public purpose, but if its sole purpose is to maximize creditor wealth then it is nothing more than a subsidy of creditors at the expense of others. The bankruptcy process can also impose substantial costs on others who have no vote in it, like the insurance company affected by the plan in the Truck Insurance Exchange case. 237 Under the creditor primacy theory, bankruptcy does not impose these externalities on others to serve any greater public interest or social purpose. It does it merely to help creditors reach an optimal bargain they were not able to negotiate privately. 238 This is hardly a Pareto efficient outcome justifying imposition of an involuntary regime.239 Justification under a Kaldor-Hicks efficiency analysis would require measuring the gains to creditors against the losses to others.240 In other words, bankruptcy choices can be justified only by weighing the consequences to all other stakeholders – a classic sustainability approach. The myopic focus on creditor returns causes bankruptcy judges to accept value maximizing schemes that override other important legal principles241 and social values.242 The excesses of that approach have become apparent, and they are not acceptable.243 The singleconstituency approach of the primacy models in corporate, securities and bankruptcy law can work together to encourage businesses to take excessive risks in search of profits while avoiding accountability for consequences borne by everyone else.244 Bankruptcy has become a forum for sharp deals and byzantine strategies designed to extract value without regard to consequence.245 As noted by Professor Aneil Kovvali, “[B]ankruptcy’s emphasis on serving the interests of financial creditors seem[s] to have reached an absurd end point.”246 It is time for a change. Creditor returns obviously are important, as is the rescue of distressed business enterprises. But the consequences of the process and the externalities it imposes on others are also important. All that sustainability requires is that consequences be considered in the balance. 247 And that easily can be achieved by altering the dominant view of bankruptcy’s purpose to accept just enough of a public purpose to make those stakeholder interests legally relevant. That may already be the case because the single-constituency view never became absolute. But just as the 1978 Bankruptcy Code was reinterpreted without any legislative change to embrace creditor primacy, it can shift back.248 G. Applying Sustainability

<<PARAGRAPH BREAKS RESUME>>

Adding sustainability considerations to the bankruptcy process won’t change much. Most bankruptcy decisions and most bankruptcy cases raise no significant sustainability concerns. In those that do, the only change is that the bankruptcy decision maker must become informed about and consider the implications of proposed actions that affect others or society at large.

While the sustainability approach shifts the focus from creditor primacy to stakeholderism, it does not mean that sustainability concerns will prevail over value maximization. They are merely factors that can and must be weighed along with value maximization. It imposes no substantive sustainability metric upon the bankruptcy estate.

Although a small change in the bankruptcy decision-making process, adding sustainability considerations through the business judgment test is a major leap forward, just as it would be in the non-bankruptcy corporate governance field.

That change will, however, have a greater effect in bankruptcy than in corporate law. As previously discussed, the informational component of the test becomes a more significant factor in bankruptcy because interested parties can raise sustainability concerns before a decision is made. And the adversarial nature of the process makes it more likely that sustainability concerns will be given serious consideration by the bankruptcy decision maker.

#### Warming causes extinction.

Spangenberg ’25 [Joachim citing Chi Xu, Timothy Kohler, Tim Lenton, Jens-Christian Svenning, Marten Scheffer, Nicole Miranda, Jesus Lizana, Sarah Sparrow, Miriam Zachau-Walker, Peter Watson, David Wallom, Radhika Khosla, and Malcolm McCulloch; 2025; Professor at University of Versailles St. Quentin, Research Coordinator at the Sustainable Europe Research Institute, member of the Executive Committee of the International Network of Engineers and Scientists for Global Responsibility, PhD in Economics; Professor of Ecology at Nanjing University; Professor of Anthropology at Washington State University, Fellow at the Research Institute for Humanity and Nature; Professor of Earth Science at University of Exeter, PhD from University of East Anglia; Professor in the Department of Bioscience at Aarhus University; Professor at Wageningen University; Professor of Engineering Science at University of Oxford; Associate Professor in Engineering Science at University of Oxford; Associate Professor in Environmental Impact at University of Oxford; PhD Candidate in Engineering Science; Senior Lecturer at School of Geographical Sciences at Bristol University; Professor in Informatics at University of Oxford; Associate Professor at the School of Geography and the Environment at University of Oxford; Professor of Engineering at University of Oxford; Consumption and Society Journal, “The Roadmap to Collapse: Whatever the Last Summers Have Been Like for You, One Thing Is Clear: You Are Currently Experiencing the Coolest Period of Your Lives,” vol. 4]

In 2022, European meteorologists recorded the worst drought on the European continent in more than 500 years (European Commission et al, 2022). AtmosphericCO2 concentrations were more than 50 per cent above pre-industrial levels for the first time, primarily because of emissions from the combustion of fossil fuels and cement production (WMO, 2023), but also driven by the surge in military spending after the Russian invasion of Ukraine. NATO’s 2023 military spending accounted for 233 million t CO2 , 5.5 per cent of the total emissions and an increase of 15 per cent. The last time such concentrations prevailed, 3–5 million years ago, the Earth temperature was 2–3°C and the sea level 10–20 m higher (WMO, 2023). Little wonder then that 2023 was the hottest of the last 125,000 years. We and the plants and animals we use are leaving the climate envelope of human civilization, everywhere (Xu et al, 2020). However, mere temperature figures are dry air temperatures taken by thermometers, and do not reflect human health impacts. To consider sweating and humidity, ‘wet-bulb temperature’ (WBT) is measured. Vanos et al (2023) have shown that in a mixture of sun and shade exposure, and rest and sport, the survival limits for WBT are between 26°C and 34°C in young people and between 21°C and 34°C in older people. At these thresholds, a healthy person can survive for only around six hours, leading to heat stroke in even the healthiest people – everyone will die at that point (Wong, 2023). More than 60,000 people died in Europe as a result of the 2022 heat waves (Ballester et al, 2023), and almost 50,000 in 2023 (Miranda et al, 2023). During the 2024 Hajj, the Muslim pilgrimage to Mecca, the heat caused more than 1,300 heat deaths. According to the United Nations, around 70 per cent of the global working population, that is, 2.4 billion people, are now at high risk from extreme heat.

While in 2009, three Planetary Boundaries had been crossed, it was four in 2015 and six out of nine in 2023 (Ruwet, 2023). Having crossed a tipping point, there is no way back to the status quo ante – the development is irreversible and no longer under human control. Overshooting tipping points and triggering tipping cascades will shape the Earth for the millennia to come. For instance, on Greenland, ice equivalent to a 1–2-metre rise in global sea levels is likely already doomed to melt, only the time scale is disputed (Boers, 2021). Tropical coral reefs are bound to die off, and the Amazon rainforest dieback (including logging) will not only wreak havoc on South and some North American precipitation systems, forest fires and drinking water availability (Joughin et al, 2014; Armstrong McKay et al, 2022), but will accelerate global heating by turning a carbon sink into a source. The same is happening to the Canadian (and probably Russian) boreal forests, turning from a carbon sink to a major source – in 2024, only China, the United States and India emitted more CO2 than the Canadian forest fires (Byrne et al, 2024). The AMOC (in the North called the Gulf Stream) might be the next tipping point to be crossed (Lohmann and Ditlevsen, 2021). It is now weaker than it has been for at least 1,600 years (Thornalley et al, 2018). Most of the weakening can clearly be attributed to the burning of fossil fuels (Caesar et al, 2018). Its collapse would lead to a massive cooling of Europe in a heating world and is expected for 2050 (central estimate, range 2025–2095) if global carbon emissions are not significantly reduced (Ditlevsen and Ditlevsen, 2023).

Politics

The reports to COP28 in December 2023 were incomplete and partly greenwashing. While emissions of 20 bln t CO2eq 2030 would be 1.5° consistent (25 bln for 2°), government pledges add up to 33 bln t. Current policies, if continued, would lead to 37 bln t 2030, that is, no reductions as compared to 2023, and announced plans and projects would increase emissions about 45 bln t CO2eq 2030. Escalating politicaltensions in the Eastern Mediterranean and in the South China Sea over ownership of (expected) gas reserves illustrate that access to additional fossil fuels is still a policy priority. This is all the more true for a number of mostly extreme right authoritarian governments and personalities (Trump, Musk, and so on).

For the following projections we assume that neither pledges nor the announced plans are realised, and hence emissions remain almost constant – that is, we assume that the efforts in antagonistic directions rather cancel out each other’s effects. This is an optimistic assumption, given the announced exploitation plan for coal (calculation in exajoule for better comparability: India +11 EJ, Russia +3 EJ, Indonesia +2.3 EJ, Colombia +1.8 EJ), oil (Saudi Arabia +5.5 EJ, USA +5 EJ, Brazil +5 EJ, Canada +3 EJ) and gas (Qatar +3.8 EJ, Russia +3 EJ, Nigeria, USA and China each +2.5 EJ) (SEI et al, 2023).

Globalisation is in retreat, neoimperialism is replacing neoliberalism in international relations – but it still dominates in domestic politics. Nonetheless, free trade is in decline – currently, more than a quarter of countries and almost a third of the global economy are affected by sanctions. The biggest problem are the secondary sanctions, which most international lawyers classify as illegal (Shidore, 2024). These developments have diminished the predicted ‘bouncing back’ of the global economy after the recent periods of recession (the global financial crisis, the COVID-19 pandemic and the war/inflation/cost-of-living crisis). These crises have shown that it is precisely the growth dependent economic model that is in enormous difficulties when the economic system reduces its consumption of energy and new materials, that is, stops growing. However, despite the multiple environmental (climate, biodiversity, pollution) and social crises (poverty, income polarisation) and the resulting necessity to adjust the economic system, this has not led to developing a ‘Plan B’. The European conservatives, like many decision-makers, even hope to achieve climate protection by economic growth, an oxymoron turned principle of faith, even dogma, against all empirical data, and sacrificing biodiversity and pollution policies on this altar.

Consumers

Consumers are reluctant to adapt their habits as well, although even food insecurity is rising, also in the North: the 2018 European heatwave led to multiple crop failures and loss of yield of up to 50 per cent in Central and Northern Europe. In 2022, record temperatures in the UK killed fruit and vegetables on the vine (Tollefson, 2023). Large numbers of people are being displaced by worsening weather extremes, and the world’s poor are being hit by far the hardest (IPCC, 2022).

The world’s richest 10 per cent are causing 50 per cent of the climate heating emissions, making them key to ending the climate crisis; about two-thirds of them live in the North. The global consumer class encompasses most of the middle classes in developed countries (anyone paid more than about €38,000 a year), who are hardly willing to give up their lifestyles. The number of cars per capita still increases in Europe, although two-thirds of global oil consumption is for the transport sector, mostly private cars. Middle-income country citizens were more motivated to endorse strict mitigation measures than those from affluent countries (OECD, 2020).

When climate negotiations began in the 1990s, most of the inequality in people’s carbon emissions was between rich and poor nations. Today, most of the inequality in emissions between the rich and poor exists within individual countries, with the richest 10 per cent of people causing up to 40 times more climate heating emissions than the poorest 10 per cent of their fellow citizens. A 2020 Organisation for Economic Co-operation and Development study found that the most effective mitigation measures find least consumer support, with the strongest support in China, followed by Italy (OECD, 2020).

Business

The big oil companies have recently abandoned the targets they promised in recent years to reduce oil and gas production and cut their emissions – they do not expect effective climate policies to be enacted. Consequently, ExxonMobil, Chevron, BP, Shell and Total modified their business plans, started exploring new oil fields and invested in additional production capacities which are to come online in 2026/7. As these were voluntary declarations, there is no sanction for this breach of promise, and the retreat pays out: the profit margins in renewable energy are lower than what oil managers are used to, so they re-fossilise their portfolios. For instance, ExxonMobil quietly withdrew funding for a high-profile project to use algae to produce lowcarbon fuels. Exxon CEO Darren Woods told an industry conference in June 2023 that his company planned to double oil production from its US shale gas reserves over the next five years – resulting in record profits of US$9.2 bln for Exxon in the three months of the second quarter of 2024. Banks are more than willing to finance such investments. BP retracted its earlier target of cutting emissions by 35 per cent by 2030 – in real terms BP has expanded its gas drilling. Shell announced that it would not increase its investment in renewable energy in 2023, even though it had previously promised to drastically reduce its emissions (Noor, 2023). The Organization of the Petroleum Exporting Countries announced that it would increase its annual oil production by more than half a million barrels per day from October 2024, as it expects peak demand at some time long after 2040.

The chemical industry tries to rescue its business model, replacing fossil by solar energy and fossil feedstock by organic and synthetic substances. Unfortunately for them, the volumes of both biomass and green electricity available are but a fraction of what an unchanged business model requires, and they are expensive. Already in 2023 the sector estimated that to transition to net zero in Europe, chemical companies would need to increase their capital expenditure by 70 per cent and maintain this level of investment annually until 2050 – money that would have to come from government subsidies as 60 per cent of chemical industry executives said they couldn’t afford further investment in decarbonisation (Scott, 2024). However, given the supply constraints, even substantial public subsidies cannot bridge the gap – a climate neutral chemistry remains out of reach.

The automotive industry reluctantly endorses the switch to electro-mobility, but also has no new business model and tries to limit the innovation to replacing the fossil by a new electric drivetrain, in Europe and the United States for SUVs and pick-up trucks. Sustainable mobility in a broader sense, for instance preference for non-motorised transport or replacement of business trips by online communication, is still anathema.

Science

The effects of such a strong warming are still insufficiently researched – some scientists speak of the ‘climate endgame’ (Kemp et al, 2022). Climate researchers have constantly underestimated both the extent and the speed of change, and economists, who have long played down climate change, still massively misperceive science (economics is a scholastic system, not a science: Diesendorf et al, 2024), underestimate the social costs of the climate crisis, and thus misadvise policy (Rennert et al, 2022).

2030

Economy and Politics

The war in Ukraine has ended with a compromise, Russia keeping Crimea, but the Near East conflict is close to a nuclear confrontation. The United States has withdrawn support from Ukraine, leaving the multi-billion job to rebuild the country to Europe; no comparable efforts are undertaken in Palestine. The significant weaponry production facilities built up during the war in Ukraine continue producing, flooding the world with exports from Europe, Russia and the United States, and fuelling military conflicts around the world. The international order, international regulations and norms are eroding. Throughout the world economy, resource constraints are felt – this is a major challenge to the EU refining economy model (importing cheap resources at low cost, exporting sophisticated products at high ones). With these effects on top of the decades-old trend of secular stagnation, economic growth has come to a standstill. To secure resource access and trade, the major powers (United States, China, Russia and their satellites) increasingly use military means.

The electrification of all spheres of life continues, following US standards for the West, and Chinese ones for the rest of the world. Artificial intelligence and Large Language Models made the share of global greenhouse gas emissions double from about 4 per cent of the global total – an unbroken trend driven by demand and supply. Governments invest heavily in subsidising technical solutions to still not declining CO2 emissions like carbon capture and storage (CCS – capturing CO2 from production processes, purifying and compressing it, transporting it to on-shore and off-shore underground dumping sites and storing it there). However, the volumes stored remain marginal, and the process is expensive and increases overall energy consumption. The new ‘hydrogen ready’ natural gas fired power stations built in the first half of the decade continue running on fossil fuels as the limited amount of ‘green hydrogen’ available is used for production processes. Hence, even if some of them are converted to hydrogen, the hydrogen they use is generated from natural gas. So while gasoline use is decreasing, natural gas consumption increases steeply.

Consumers are still unwilling to change habits – solar energy production in households has been growing significantly as it saves costs, but overall energy consumption is still increasing. Reduction of heat demand falls short of what is needed to limit the climate crisis, sustainable mobility including less car use, and even the market share of electric vehicles, is only growing slowly – bans on fossil fuel cars have been abandoned under the pressure of public opinion and conservative parties. Sufficiency is still anathema, even more so as expectations of rising incomes are being disappointed. After a short phase of war Keynesianism (growth through military investment), economic growth is further slowing down due to higher resource and energy costs, insecure supply chains, re-shoring (relocating industries back into the national economy – a kind of insurance against supply risks, associated with less division of tasks and higher cost).

Society

Social inequality is increasing, as the richer strata of society are better able to protect themselves from climate impacts than the poorer, but this is accepted after decades of neoliberal education – social consideration is dwindling, self-fulfilment at the expense of others is on the rise (Benz, 2022), the brutalisation of elites has taken hold of the middle classes (Heitmeyer, 2012). The crisis of care, remunerated and voluntary, is accelerating (Spangenberg and Lorek, 2022). As in the past after floods, droughts, cyclones and heat waves, violence against women and members of gender minorities is on the rise – mental stress, drug abuse, economic problems, food insecurity and poor social infrastructure after climate disasters are the immediate triggers (Rodrigues, 2022).

The readiness to employ violence in all kinds of conflicts, or just for the fun of it, continues to increase – police, fire brigades and ambulances are attacked, as are local politicians. As frightened people withdraw from such engagement, public security and democracy are suffering, and extremism is on the rise. Together with the increasing income polarisation, this leads to emerging unrest, intensifying social tensions exploited by the far right/neo-fascists; and populist parties win majorities.

Climate

The global temperature rise has surpassed 1.5°C and is on its way to 2° to 3°C (Carrington, 2022). The causes are manifold – besides the lack of political will and sufficient funding, and institutional feasibility constraints, the conversion of many economic sectors is failing due to a lack of skilled workers, especially in handicraft professions. Second, physical resources are lacking, not only because of unreliable supply chains, but also because minerals and metals are not available in sufficient quantities – past expansion plans have systematically ignored the finite nature of resources. Given the lack of resources, competition of decarbonisation strategies with digital applications and armament is leading to a price explosion that is slowing down the expansion of renewable energies. NATO members have increased their military spending to 2 per cent of their GDP, causing annual additional emissions larger than those of Russia, the world’s largest natural gas producer. Accelerated clean energy production reduces the energy cost, but contributes little to reducing the overall emissions.

Due to insufficient decarbonisation, lack of conservation of materials and energy, and the influence of the fossil fuel industry, greenhouse gas emissions remain too high. For example, since 2022, the 12 largest oil and gas companies alone have spent €103 million per day on the development and exploitation of new oil and gas fields (Carrington, 2021). Correspondingly, emissions have increased by 14 per cent since 2020 instead of falling by 50 per cent as required (McKie, 2022). Governments did nothing to prevent oil and gas multinationals from embarking on these projects, which clearly made compliance with the 1.5° limit impossible (Carrington and Taylor, 2022).

As a result of higher evaporation, summer drought is the new normal in Europe, including heat waves and large-scale forest fires (up 40 per cent in the Mediterranean). The number of heat days has doubled compared to 1971–81 and the number of frost days has dropped significantly. At the same time, there are extreme cold spells (persistent low temperatures of up to minus 20°C in Central Europe and massive snowfalls in the Mediterranean) due to polar air intrusions, caused by the weakening of the circumpolar jet stream. The ongoing Amazon dieback has turned wider parts of the basin from carbon sinks into carbon emission sources, further accelerating climate change.

Although heavy rainfall on land has increased by 16 per cent in Europe, and massive investments in flood protection are required, more than 270 million people suffer from water shortages, and in some regions water has to be rationed regularly. Water-intensive agricultural crops are being cut back, ploughing is becoming problematic. Harvests are at risk due to the mix of heat, drought, heavy rain and frost periods, while varieties genetically optimised for one environmental condition fail under the other conditions. In particular, winter cereals, depending on a prolonged period of low temperatures before they can shoot and flower (vernalisation), produce significantly reduced yields.

The collapse of the Greenland ice sheet is accelerating, but it is not yet clear by when it will have melted completely, raising global sea levels by seven metres. Decision-makers are hoping for the long term and postponing protective measures for coastal regions that go beyond incremental dike increases. The tipping points of the climate, first exceeded in the early 2020s, are becoming a cascade (Armstrong McKay et al, 2022). Migration and immigration of species result in communities that have never existed in the past 10,000 years, altering the spectrum of ecosystem services provided. The restoration of ecosystems and their services proves to be impossible.

Health

In particular in ageing societies, health costs are spiralling out of control (in European public health systems less than in the United States). The problem is aggravated by the additional challenges caused by environmental degradation, like more frequent pandemics, new infectious diseases and the curbs on medical research introduced to minimise the risk of terrorists using bio-medical know-how to produce and disseminate bioweapons (Brent et al, 2024).

The areas suitable for malaria transmission have grown by 10 per cent and more where re-wetting of wetlands was implemented. Disease vectors such as the tiger mosquito are forming stable local populations in formerly temperate climate zones, ticks continue to spread, and known tropical pathogens are spreading at an increasing rate (Mora et al, 2022). It is not possible to prevent the new waves of infection through precautionary measures due to the multitude of mechanisms of action.

2040

Economy

The obstacles to growth already manifest in 2030 have been growing, and new ones have emerged, for individual countries (mostly the heavily export-dependent ones like China and Germany), and for the world economy as a whole. Already 15 years ago, economic research estimated that an increase in global temperature of 1°C would lead to a 12 per cent decline in global GDP (Bilal and Känzig, 2024), and the ‘locked in’ global economic damage caused by global warming up to the year 2050 was estimated to be almost US$60,000 billion, corresponding to 30 per cent of the global economy (Kotz et al, 2024) – now the bill has to be paid. Add to this the expenditure on coastal protection, relocation of dykes and partial abandonment of cities and settlements due to the faster than expected rise in sea levels now and in the next decades (Taberna, 2022), what we have been facing since 2030 is just the beginning of a long-term, climate change-induced recession of the entire global economy (Kotz et al, 2024).

Hence, after years of stagnation, economic growth has turned negative. The economic reason is that to generate growth, the annual investment must be higher than what is needed to compensate for loss to wear and tear, and the requirements of technological development – otherwise the production potential does not increase. Investments are financed from the surplus of the previous year, plus by credit. The latter is limited in the private sector by the risk of over-indebtedness, and in the public sector by the necessity to keep redemption below a level impinging on key policy priorities, and to limit the regressive effects of taxpayers financing the interest for rich lenders. Hence the necessary massive defensive investments in climate adaptation, the repair of environmental damages, protection of biodiversity (not least for food security) and cleaning the environment from health-threatening pollution with particulate matter, microplastics and the like – economically necessary to avoid future losses – begin crowding out investments in expanding the production potential. The increased spending on CCS and hydrogen processes and infrastructures, armaments, and business subsidies for climate neutral production (state subsidies cover a significant share of the European chemical industry’s 2021–50 decarbonisation funding gap of US$550 billion [Scott, 2024]), and so on, exacerbates the situation. Furthermore, the health systems are at the brink of collapse due to heat-induced treatment needs, and with them the stability of an ageing society (Romanello et al, 2021). Such investments are classified as ‘defensive’, as they prevent damages accumulating, but are not (or only to a certain part) enhancing the production potential. Subsidies are claimed as for the business sector, defensive investment needs are mostly the result of mandatory legal obligations. Innovation, dematerialization and digitalization suffer, in particular as decarbonization, digitalization and weapons production are competing for the same or similar physical resources. As defensive investments are crowding out business production capacity enhancing investments, the production potential is shrinking, and GDP declines. For some time, public authorities have tried to compensate such investment capital scarcity with public funding, but the required level is surpassing all estimates of public fund availability. The necessary level of government spending begins to lead to a higher tax burden on corporate profits and to declining real incomes, public disapproval and social unrest.

Consumption

Consumption, which has been the main driver of ecological burdens since the turn of the millennium, is declining – the consumer society is running out of consumers (Spangenberg and Kurz, 2023). However, this externally enforced reduction in consumption leads an ever fiercer defence of privileges, less willingness to voluntarily reduce consumption, or to share the remaining wealth with others, in particular with the Global South. Hence, public pressure results in an end to development cooperation and (the always insufficient) financial support for climate adaptation to poor countries. The result is more climate refugees, clashing with a decreasing willingness to welcome any kind of migrants as they are – wrongly – perceived as competitors for the diminishing consumption space. Consumer dissatisfaction spills over into increasing scepticism regarding the liberal democratic system – an institutional crisis is emerging (Kalke et al, 2024).

Politics

The global political situation has become volatile, with a group of major powers struggling for dominance, while the majority of countries tries to navigate the stormy waters in changing collaborations and confrontations. Trade wars and patent conflicts prevail; international regimes of intellectual property rights have collapsed and free trade in resources has come to a virtual standstill. Armed conflicts are fueled by geopolitics and upscaled by weapons export since 2025, resource wars increase, but in order to avoid nuclear escalation, the major powers impose an allocation system for raw materials, with quotas for all countries (which many consider a neocolonial means to deny access to non-affiliate countries). There are political and armed conflicts about access to increasingly short freshwater supplies. The global water crisis takes its toll, hunger is getting normalized in many parts of the world, due to declining harvests due to heat stress and lack of irrigation water.

Public pressure demands a ‘Fortress’ policy, denying climate refugees access to the still relatively affluent countries – a demand the strong extreme right is more than happy to fulfil (nativism, economic fears, and so on). Permanent involvement in resource wars and repulsion fights against refugees at all borders leads to a militarizing of societies, but also to a more favorable view on elements of a war economy. This, together with the shortage of physical resources, has drastic political consequences.

Domestically, in most European countries and beyond, politicians have pulled the emergency brake and declared both a ‘climate war’ (mostly neglecting other environmental problems) and ‘identity defense’ (rejection not only of refugees, but all ‘foreign’ inhabitants – at the expense of lacking skills and workers in the labor force). As the permanent resource constraints and the high cost of enforcing access make it impossible to any longer ignore the problem of overconsumption, decisionmakers try to find ways to accommodate the internationally set resource quota. The limited materials are auctioned off nationally, with special purchase rights for non-commercial users. This mechanism, borrowed from war economics, leads to a massive restructuring of industry, as high resource efficiency becomes a prerequisite for a secured further existence. In order to limit overconsumption, those consumer goods that have become scarce are given away on non-tradable ration coupons. This ensures that scarce goods are available to all and are not consumed or hoarded by a privileged few at the expense of the general public.

2050

Rising temperature, rising sea levels, rising migration

The emergency measures introduced in 2040 have managed to prevent or at least postpone the collapse otherwise due. Nevertheless, global warming surpasses 2.5°C (that is, 5°C over land), triggered by tipping cascades such as the melting of permafrost regions since 2040, when the conditions for their permanent existence were no longer given, transforming large parts of Siberia, Alaska and northern Canada into barely usable, greenhouse gas emitting swamps (IPCC, 2021; Fewster et al, 2022) plagued by wildfires. Wetlands and moors are drying out – and thus releasing additional CO2. Deadly heat waves and temperatures of over 50°C are no longer uncommon in the tropics, and temperate latitudes exceed 40°C in summer, causing tens of thousands of heat deaths annually in Europe. In many regions in the South, but also in European regions such as the Spanish highlands, human life is no longer possible.

Anthropogenic warming is casting billions of people outside of the boundaries of normal human habitation, with abundant negative consequences for human wellbeing, mortality and levels of international migration (Scheffer et al, 2024). A billion people are facing coastal flooding risk from rising seas, and more people are forced out of their homes by weather disasters, in particular flooding, sea level rise and tropical cyclones (Selby et al, 2024). Once warming exceeds a few more tenths of a degree, it will lead to large areas becoming uninhabitable (IPCC, 2022).

While most refugees stay in neighbouring countries until their capacities are exhausted, many move to the North, only temporarily stopped at the crumbling military border defence of the EU (less so, and later, the United States). Migration is enhanced by the neocolonial economic policy of the dominant powers, with militarily supported land-grabbing where fertile ground and water are available (for example, Ukraine) to overcome domestic food supply volatility problems.

Freshwater scarcity

Heavy rainfall on land has increased by more than a third; summer precipitation comes in the form of flash floods, which only partly seep into the ground and replenish the groundwater available for dry periods. Freshwater has become scarce and is part of the rationing system. Private swimming pools, watering lawns or washing private cars have been banned. Not least because of the melting of the last glaciers in the Alps and the Andes/Rocky Mountains, river levels fluctuate extremely, affecting both shipping and summer water supplies. More than 390 million people are suffering from water scarcity, and their number is bound to rise. The thawing of the Himalayan glaciers accelerates (they had lost 40 per cent of their area by 2020 [Lee et al, 2021]), putting the regular water supply of two billion people at risk, who depend on the waters of Indus, Ganges, Brahmaputra, Irrawaddy, Mekong and Yangtzekiang (Wester et al, 2019).

Sea levels are rising faster than expected and are approaching one metre. Salt water penetrates the groundwater reservoirs in coastal regions and all major river deltas, putting some of the ‘bread baskets’ of the world at risk (for example, in Egypt, Vietnam, India, Bangladesh, Argentina, the United States). The tidal flats and salt marshes along the North Sea and similar coastal regions are under pressure – where dikes are not moved back, sacrificing land to the sea and allowing salt marshes to move inland, they are flooded and some of the most biologically diverse habitats on earth are thus lost (Saintilan et al, 2022). The oceans are not only becoming warmer and hence low-oxygen, but also more acidic, affecting countless species along the entire food chain. Shell-forming animal species are dying out, fish stocks – until 2040 a major protein source of humankind – have more or less collapsed due to past overfishing, persistent ocean pollution, acidification and the loss of breeding grounds (temperate salt marshes decline, coral reefs are gone). Habitat for nearly 20 per cent of all insect species has at least halved.

Food (in)security

The cultivation of wheat, barley, rye, oats and maize is hardly possible anymore (wheat becomes sterile at 30°C, maize pollen at 35°C); agriculture has switched to millet/sorghum and chickpeas instead of wheat, yams instead of potatoes, as well as cassava/ manioc and sweet potatoes. Small farmers have not survived the crisis economically. In addition, higher CO2 concentrations reduce the quality of proteins in cereals and fruits, and cows have to digest more grass for the same milk yield.

The number of frost days has decreased sharply, in many years they no longer occur – a problem for food production from fruit trees, vegetables and wheat. To these plants, prolonged cold exposure is required to provide competency to flower (vernalisation). In other years, non-moving polar air masses lead to weeks of deep low temperatures, which do not suit many of the new, drought-resistant agricultural plants. These are hot–cold times. Vegetation also feels the effects: native tree species are not adapted to heat and drought, but Mediterranean species are not adapted to the cold spells. As a result, more than half of Europe’s tree species are threatened with extinction. Forest fires accelerate that – burning areas in the Mediterranean region have grown by more than 60 per cent.

Health

Areas suitable for malaria transmission have grown by 15 per cent. Tropical disease vectors are well established, but tropical and emerging pathogens are spreading mainly through transmission by indigenous species; dengue, chika and West Nile fever are regular occurrences. New pathogens have emerged from zoonoses, pandemics with previously unknown pathogens regularly claim numerous victims worldwide – the ‘age of pandemics’, of which IPBES had warned urgently, has dawned (IPBES, 2020).

Alternative scenario for Europe (other regions unaffected)

Following the calculations of Ditlevsen and Ditlevsen (2023), the AMOC/Gulf Stream warm water circulation would collapse between 2025 and 2095 with a central estimate of 2050 (assuming emissions are not reduced, in line with our earlier assumptions). Such a collapse would result in Western Europe suffering far more extreme winters, rapidly rising sea levels on the east coast of the United States and a lack of vital tropical rainfall. During the last ice age, some major changes in AMOC flow caused winter temperatures to change by 5–10°C in just one to three years. The chilling effect would be moderated by the heating that has already occurred in the northern hemisphere (Spangenberg et al, 2012).

2070

A dystopian situation has emerged: planetary boundaries continue to be crossed, tipping cascades cause irreversible damage and have escaped human control, ecosystem cycles are collapsing. The loss of pollinators reduces food availability; fermented substitutes are consumed instead. Desperate attempts at geoengineering have not solved any problem, but created new damages and conflicts. The global heating has surpassed +2.5°C and is heading for 3°C – which implies 5–6°C heating over land (IPCC, 2021). All coral reefs and almost all large tropical forests have disappeared. The melting of the Greenland ice sheet, the increasing loss of South Polar ice and of almost all glaciers is driving up sea levels. Coastal cities around the world are being abandoned, partly because of direct flooding and ever stronger typhoons, partly because infrastructures cannot withstand rising sea levels despite high dikes. Life expectancy is decreasing, and water and food supply has become unreliable, even in the richest parts of the world.

For two billion people, survival in their homeland is no longer possible – flight or death is the alternative as a result of heat, drought, lost soil fertility or as a result of flooding and salinisation. As neighbouring countries and regions can no longer absorb the refugees – they are already overburdened and suffer just as much from climate and environmental destruction – a global migration of more than one billion of people has set in, upsetting all previous geopolitical power constellations. Countries are at permanent war to uphold the neocolonial status quo, but the threat of nuclear escalation is growing by the day. The mood of migrants is not only desperate, but also aggressive: those affected are well aware that they are innocent victims of the North’s overconsumption. Already in 2020, the richest 10 per cent of humanity (that is, all those with an annual income of over US$90,000) emitted almost half of all CO2 emissions, while the poorer half of the world’s population was only responsible for 12 per cent (Herrmann, 2022). Such facts have been sinking into the collective consciousness and attitudes. The Global North has been stealing the future as well as the present, not only from its own children but, above all, from those who live in the most affected parts of the world. The EU and the United States are losing their defensive wars against migrants, and their militarised societies fail to adapt to the inflow of refugees. The result of the conflict is unpredictable, but will certainly be paid for with high human sacrifices.

#### Only preserving labor corrects structural bias for maladaptive reorganization.

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

Structural bias in bankruptcy law leads to firm managers filing “too many” reorganization petitions, effectively giving judges the opportunity to choose which should be liquidations and which reorganizations. Firm managers file the vast majority of bankruptcy filings, and they tend to prefer Chapter 11 reorganizations over Chapter 7 liquidations.91 This preference creates an agency problem that drives the structural bias in favor of reorganization petitions. Since firm managers wish to keep their jobs, and managers are more likely to keep their jobs in a reorganization than in a liquidation, it is widely believed that there is a strong bias toward filing using Chapter 11 instead of Chapter 7, even when the reorganization value is less than the liquidation value.92 Creditors who believe that the firm is worth more liquidated than reorganized then file a § 1112(b) motion, allowing bankruptcy judges an opportunity to preserve firms and employment. Without this structural bias, bankruptcy judges would have fewer opportunities to preserve firms in which liquidation value is greater than reorganization value.

## Security K

### Security K---2AC

#### A. Foreign policy is reflexive, and failures spur positive changes to avoid mistakes.

Inboden et al. 20, \*William Powers Executive Director of the Clements Center for National Security, \*\*Distinguished Professor of Global Affairs at John Hopkins School of Advanced International Studies, \*\*\*Professor of Political Science, Duke University (\*William Inboden, \*\*Hal Brands, \*\*\*Peter Feaver, April 29, 2020, “In Defense of the Blob,” Foreign Affairs, https://www.foreignaffairs.com/articles/united-states/2020-04-29/defense-blob)

The only problem with this argument is that every component of it is wrong. The foreign policy establishment is not a closed cabal, American statecraft has not been a giant failure, and scrapping professionalism for amateurism would be a disaster. In truth, the foreign policy establishment is an American strength rather than weakness. It is more open-minded and accountable than its critics allow. It acts as a storehouse of accumulated professional wisdom, providing intellectual ballast to the ship of state. On balance, the establishment’s practical track record has been impressive, with some well-known fiascos outweighed by many quiet successes. And the current administration’s foreign policy blunders—including in its response to the current pandemic—demonstrate what happens when the establishment’s experience and expertise are rejected. In short, the Blob is not the problem. It is the solution.

A CONTENTIOUS CLUB

Blob theorists view the establishment as a club of like-minded elite insiders who control everything, take care of one another, and brush off challenges to conventional wisdom. In reality, the United States actually has a healthy marketplace of foreign policy ideas. Discussion over American foreign policy is loud, contentious, diverse, and generally pragmatic—and as a result, the nation gets the opportunity to learn from its mistakes, build on its successes, and improve its performance over time.

In both absolute and relative terms, the expert community dealing with foreign policy and national security in the United States is remarkably large and heterogeneous. Inside government, cadres of professionals make vast amounts of technocratic knowledge and institutional memory available to policymakers. Every department and agency with an international role has distinctive regional or functional expertise it can bring to bear. This inhouse knowledge is complemented by an even larger and more diverse network of experts in the many hundreds of think tanks and contract research institutions that surround the government and offer views ranging from right to left, hawk to dove, free trader to protectionist, technocratic to ideological. Pick any policy issue and you can put together a lively debate with ease. Should the United States engage with China or contain it? Negotiate with Iran or squeeze it? Withdraw from the Middle East or redouble its efforts? Reasoned arguments on all sides are widely available, in any form you want—all supplied from within the supposedly monolithic establishment.

Moreover, unlike such communities in other leading powers, the American foreign policy establishment is connected to society rather than cut off from it, because the top several layers of U.S. national security bureaucracies are staffed by political appointees rather than civil servants. The Blob comprises government officials, outside experts, and many people who go back and forth between the two. Insiders know how government works and what is practical. Outsiders think independently. And in-and-outers bridge the gaps. Other countries simply do not have comparably large, diverse, permeable, expert communities that encourage vigorous debate over national policy—which is why, say, the caliber of U.S. debate about nuclear policy is more nuanced and better informed than in other nuclear powers, and which is why other countries would love to have such a Blob of their own.

The American foreign policy establishment, finally, is generally more pragmatic than ideological. It values prudence and security over novelty and creativity. It knows that thinking outside the box may be useful in testing policy assumptions, but the box is usually there for a reason, and so reflexively embracing the far-out option is dangerous. Its members have made many mistakes, individually and collectively, but several features of the system enforce accountability over time. Foreign policy failures, for example, are politically toxic and often spur positive change. The monumental intelligence failures that allowed the September 11 attacks to happen were followed by policy and institutional reforms that have helped prevent other mass-casualty terrorist attacks on U.S. targets for almost two decades. Early misjudgments in the Iraq war led to the adoption of a new counterinsurgency strategy that restored stability, at least for a while. The international economic imbalances and financial procedures that led to the 2008 global financial crisis were addressed by policies that contributed to a decade-long recovery.

Taken together, these virtues reinforce one another and help the United States tackle the countless national and global challenges that confront a superpower. Blob critics claim there are no meaningful arguments over U.S. foreign policy. But this is just not true. Intense disputes over the Korean War, the Vietnam War, détente and arms control, the opening to China, and policies in Central America and the Middle East were followed by battles over the Gulf War, NATO expansion, military interventions in Haiti, Somalia, and the Balkans, and the wars in Afghanistan and Iraq—not to mention heated arguments over positions toward China, Iran, North Korea, Russia, and other issues today. It is true that beneath all this controversy lies a relatively stable consensus on the value of power, alliances, and constructive global engagement. Most members of the establishment believe that global problems usually improve when the United States engages responsibly and worsen when the United States retreats. Yet that reflects not some nefarious groupthink but the wisdom of professional crowds, arrived at through painful trial and error over more than a century.

#### B. No insular rent-seeking---people are fired for bad predictions.

Ravenal 9, Professor Emeritus, Georgetown University School of Foreign Service (Earl C. Ravenal, 2009, “WHAT’S EMPIRE GOT TO DO WITH IT? THE DERIVATION OF AMERICA’S FOREIGN POLICY,” Critical Review, Vol. 21, No. 1, pp. 21-75, University of Kansas Libraries, Taylor and Francis)

The underlying notion of “the security bureaucracies . . . looking for new enemies” is a threadbare concept that has somehow taken hold across the political spectrum, from the radical left (viz. Michael Klare [1981], who refers to a “threat bank”), to the liberal center (viz. Robert H. Johnson [1997], who dismisses most alleged “threats” as “improbable dangers”), to libertarians (viz. Ted Galen Carpenter [1992], Vice President for Foreign and Defense Policy of the Cato Institute, who wrote a book entitled A Search for Enemies). What is missing from most analysts’ claims of “threat inflation,” however, is a convincing theory of why, say, the American government significantly (not merely in excusable rhetoric) might magnify and even invent threats (and, more seriously, act on such inflated threat estimates).

In a few places, Eland (2004, 185) suggests that such behavior might stem from military or national security bureaucrats’ attempts to enhance their personal status and organizational budgets, or even from the influence and dominance of “the military-industrial complex”; viz.: “Maintaining the empire and retaliating for the blowback from that empire keeps what President Eisenhower called the military-industrial complex fat and happy.” Or, in the same section:

In the nation’s capital, vested interests, such as the law enforcement bureaucracies . . . routinely take advantage of “crises” to satisfy parochial desires. Similarly, many corporations use crises to get pet projects— a.k.a. pork—funded by the government. And national security crises, because of people’s fears, are especially ripe opportunities to grab largesse. (Ibid., 182)

Thus, “bureaucratic-politics” theory, which once made several reputations (such as those of Richard Neustadt, Morton Halperin, and Graham Allison) in defense-intellectual circles, and spawned an entire sub-industry within the field of international relations,5 is put into the service of dismissing putative security threats as imaginary.

So, too, can a surprisingly cognate theory, “public choice,”6 which can be considered the right-wing analog of the “bureaucratic-politics” model, and is a preferred interpretation of governmental decision-making among libertarian observers. As Eland (2004, 203) summarizes:

Public-choice theory argues [that] the government itself can develop separate interests from its citizens. The government reflects the interests of powerful pressure groups and the interests of the bureaucracies and the bureaucrats in them. Although this problem occurs in both foreign and domestic policy, it may be more severe in foreign policy because citizens pay less attention to policies that affect them less directly.

There is, in this statement of public-choice theory, a certain ambiguity, and a certain degree of contradiction: Bureaucrats are supposedly, at the same time, subservient to societal interest groups and autonomous from society in general.

This journal has pioneered the argument that state autonomy is a likely consequence of the public’s ignorance of most areas of state activity (e.g., Somin 1998; DeCanio 2000a, 2000b, 2006, 2007; Ravenal 2000a). But state autonomy does not necessarily mean that bureaucrats substitute their own interests for those of what could be called the “national society” that they ostensibly serve. I have argued (Ravenal 2000a) that, precisely because of the public-ignorance and elite-expertise factors, and especially because the opportunities—at least for bureaucrats (a few notable post-government lobbyist cases nonwithstanding)—for lucrative self-dealing are stringently fewer in the defense and diplomatic areas of government than they are in some of the contract-dispensing and more under-the-radar-screen agencies of government, the “public-choice” imputation of self-dealing, rather than working toward the national interest (which, however may not be synonymous with the interests, perceived or expressed, of citizens!) is less likely to hold. In short, state autonomy is likely to mean, in the derivation of foreign policy, that “state elites” are using rational judgment, in insulation from self-promoting interest groups—about what strategies, forces, and weapons are required for national defense.

Ironically, “public choice”—not even a species of economics, but rather a kind of political interpretation—is not even about “public” choice, since, like the bureaucratic-politics model, it repudiates the very notion that bureaucrats make truly “public” choices; rather, they are held, axiomatically, to exhibit “rent-seeking” behavior, wherein they abuse their public positions in order to amass private gains, or at least to build personal empires within their ostensibly official niches. Such sub-rational models actually explain very little of what they purport to observe. Of course, there is some truth in them, regarding the “behavior” of some people, at some times, in some circumstances, under some conditions of incentive and motivation. But the factors that they posit operate mostly as constraints on the otherwise rational optimization of objectives that, if for no other reason than the playing out of official roles, transcends merely personal or parochial imperatives.

My treatment of “role” differs from that of the bureaucratic-politics theorists, whose model of the derivation of foreign policy depends heavily, and acknowledgedly, on a narrow and specific identification of the roleplaying of organizationally situated individuals in a partly conflictual “pulling and hauling” process that “results in” some policy outcome. Even here, bureaucratic-politics theorists Graham Allison and Philip Zelikow (1999, 311) allow that “some players are not able to articulate [sic] the governmental politics game because their conception of their job does not legitimate such activity.” This is a crucial admission, and one that points— empirically—to the need for a broader and generic treatment of role.

Roles (all theorists state) give rise to “expectations” of performance. My point is that virtually every governmental role, and especially national-security roles, and particularly the roles of the uniformed military, embody expectations of devotion to the “national interest”; rationality in the derivation of policy at every functional level; and objectivity i

n the treatment of parameters, especially external parameters such as “threats” and the power and capabilities of other nations.

Sub-rational models (such as “public choice”) fail to take into account even a partial dedication to the “national” interest (or even the possibility that the national interest may be honestly misconceived in more parochial terms). In contrast, an official’s role connects the individual to the (state-level) process, and moderates the (perhaps otherwise) self-seeking impulses of the individual. Role-derived behavior tends to be formalized and codified; relatively transparent and at least peer-reviewed, so as to be consistent with expectations; surviving the particular individual and transmitted to successors and ancillaries; measured against a standard and thus corrigible; defined in terms of the performed function and therefore derived from the state function; and uncorrrupt, because personal cheating and even egregious aggrandizement are conspicuously discouraged.

My own direct observation suggests that defense decision-makers attempt to “frame” the structure of the problems that they try to solve on the basis of the most accurate intelligence. They make it their business to know where the threats come from. Thus, threats are not “socially constructed” (even though, of course, some values are).

A major reason for the rationality, and the objectivity, of the process is that much security planning is done, not in vaguely undefined circumstances that offer scope for idiosyncratic, subjective behavior, but rather in structured and reviewed organizational frameworks. Non-rationalities (which are bad for understanding and prediction) tend to get filtered out. People are fired for presenting skewed analysis and for making bad predictions. This is because something important is riding on the causal analysis and the contingent prediction.

For these reasons, “public choice” does not have the “feel” of reality to many critics who have participated in the structure of defense decision-making. In that structure, obvious, and even not-so-obvious, “rent-seeking” would not only be shameful; it would present a severe risk of career termination. And, as mentioned, the defense bureaucracy is hardly a productive place for truly talented rent-seekers to operate, compared to opportunities for personal profit in the commercial world. A bureaucrat’s very self-placement in these reaches of government testifies either to a sincere commitment to the national interest or to a lack of sufficient imagination to exploit opportunities for personal profit.

### Framework---Plan Focus---1AR

#### ‘Should’ is policy

COR ’15 [County of Riverside; February 2015; Draft General Plan Amendment No. 960, http://planning.rctlma.org/Portals/0/genplan/general\_plan\_2015/GPA%20960/General%20Plan%20Elements/Ch01\_Intro.pdf]

For a policy to be useful, it must be clear. However, not all policies are the same; they differ in terms of expected results, commitment of resources, and indication of importance or urgency. Therefore, it is important to simplify the language used in the General Plan and understand the distinctions between the different levels of policy. The following definitions of terms provide guidance in interpreting the policy language of the General Plan:

Ÿ Shall: Policies containing the word “shall” indicate that an action must be taken in all cases. This represents absolute commitment to the policy, and the expectation is that the policy will always be carried out.

Ÿ Should: Policies containing the word “should” indicate that an action will be taken in most cases, but exceptions are acceptable for good reason.

### No War---1AR

#### No impact---securitization is delinked from war.

Zimmerman ’15 [Vera; May 23; research analyst at the Hudson Institute, graduate student of political science in the Department of Public and International Affairs at George Mason University; https://verair.wordpress.com/2015/05/23/the-theater-of-operations-national-security-affect-from-the-cold-war-to-the-war-on-terror-by-joseph-masco-durham-and-london-duke-university-press-2014/]

In chapter four, “Biosecurity Noir: WMDs in a World without Borders,” Masco singles out concrete evidence of the amplification of the invisible biothreat triggered by the receipt of a few anthrax letters in 2001 to support his argument about the made-up ambiguous link to WMD. The author highlights that by proliferating visions (depictions) of catastrophic danger, biosecurity created a militarized response of global preemption in the name of domestic defense. Masco argues his case well and sharply, providing compelling evidence, but his interpretations of evidence at times seems exaggerated and biased. Though Masco does not deny the existence of the real threats, his recognition of them is too brief, while consideration of an alternative view is rather weak. He acknowledges that terrorist violence is not fictitious but insists that for the most part the United States inflated threats and politically exploited potential danger to declare and maintain the state of emergency. Such focus on the amplification of threats seems to suggest that for the most part the threats are not that real. Masco suggests that the link between terrorists and WMD is mainly inflated. Yet there is a real global concern about 2,000 tons of highly-radioactive nuclear materials being stored in poorly secured civilian locations around the world. The book never mentions the threat of a dirty bomb, which today is viewed as a more likely occurrence than an atomic bomb explosion. The IAEA cites a hundred reported thefts of nuclear materials on average each year. There is a good chance terrorists can get their hands on enough nuclear materials to produce a dirty bomb. The United States meets these challenges with increased international cooperation. Masco’s main argument that “the US is no longer constrained by territorial limits” is exaggerated. The only two cases cited when the United States appeared unconstrained were the invasion of Iraq. Though the invasion of Iraq was opposed by some U.S. allies (France, Germany, and New Zealand), it was still a combined force coalition from the U.S., the UK, Australia, and Poland. The United States does not have an unrestricted reach as Masco wants to depict. It is constrained by sovereignty and territorial integrity of other stable states. The unstable nuclear regimes in North Korea and Iran present that existential nuclear threat to the U.S. described by Masco, but the United States is in no rush to invade these countries. According to the anticipatory and preemptive logic Masco prescribes to the United States, it could have already invaded those states to prevent the disaster. Another limitation of his argument is that he paints the nuclear and counterterror states as consistent through all the presidencies, thus, drawing all administrations under a common denominator. Under Obama, the counterterror state became a liberal democracy again. The ‘unrestrained’ theater of operation has shrunk by ending the presence in Iraq and withdrawing from Afghanistan, even though our presence there could have been extended based on the preemption logic. Obama recognized the faults of the Bush administration in acting unilaterally, scaled back stability operations, and emphasized sharing the costs and responsibilities of global leadership. The emergence of the real ISIL threat undermines the book’s core argument of threat amplification, the U.S. preemption logic of response, and unconstrained global reach. The U.S.-led global effort against ISIL amounts to more than 50 nations, which shows the unified nature of the fight. Masco asserts that U.S. superpower depends on the ability of the state to monopolize a discourse of danger, but he doesn’t discuss how the United States succeeded in doing that. Masco could have developed his argument by tracing how the United States was able to use its soft power to mobilize like-minded states to agree with U.S. hegemony on WOT. It will be interesting to trace the U.S. internalization of fear and terror. He could have examined how allies responded to U.S. domestic mobilization of its population and whether other states imitated U.S. emotional management projects to mobilize their own populations. This would boost his argument that the U.S. was able to project its power on the global scale. In Theatre of Operations, Masco makes a compelling argument about the creation of the unrestrained theater of operations via domestication of fear and terror carried over from the Cold War days. His anthropological study reveals the extent to which a democracy is willing to use fear to assure the core principle of the social contract, defined by Hobbes as the exchange of public obedience for collective security. A democracy that chooses to be preoccupied with security risks to forgo core democratic values resulting in the lack of transparency, restriction of free flow of information, and negligence of non-military threats—no less threatening than nuclear terrorism. Making criticism of U.S. actions the main focus of the book, however, Masco’s interpretations are not properly balanced and sometimes appear biased. Still, reading Masco’s insight of the purpose of U.S. actions in the post-9/11 context offers opportunities to think critically about the effects of 9/11 emotional reprogramming of society and state of emergencies in U.S. history.