# 1AC---Dartmouth---Round 7

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### Filings Adv---1AC

#### Advantage 1---FILINGS:

#### 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

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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

Multiple internal links:

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

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

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

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

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

<<FIGURE OMITTED>>

The Disconnect Between Monetary Easing and Market Conditions

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

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

<<FIGURE OMITTED >>

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

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

The Lag

The Fed’s rate adjustments lag for several reasons.

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

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

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

Historical Fed Funds Rate Prescriptions from Simple Policy Rules

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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.

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

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

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

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

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

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

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

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

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

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

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

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

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

#### 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.

#### Dollar heg decline is existential.

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.

#### Independently, union related filings derail commercial aviation.

Ng ’23 [Kam To, Xiaowen Fu, Jaewoon Lee, Katsuhiro Yamaguchi, Chuanyan Zhu; October; Transport Policy, “The Effects of Bankruptcy on Airline Yield and Frequency: The case of the duopolistic domestic market in Japan,” vol. 142]

Bankruptcy is a term that has both negative and positive implications in the aviation industry. As in most other industries, bankruptcy is usually a strong indication of financial distress, often as the result of poor management or operational inefficiency. However, many airlines, including some of today's leading carriers (e.g., Delta, American Airlines, Air Canada, United), have facilitated major restructuring or labor union negotiations by relying on bankruptcy protection, which eventually made them stronger. In other cases, events such as the COVID-19 pandemic uncontrollably and fatally disrupted otherwise well-managed airlines, forcing them to file for bankruptcy because of shrunk liquidity. Understanding the consequences of bankruptcy and bankruptcy protection is not only critical to airlines under financial distress but also very important to government regulators and other airlines because an airline's strategy and operation during bankruptcy may depart significantly from those in normal conditions, generating spillover effects on the public and other carriers.

Numerous empirical studies have examined the effects of bankruptcy and bankruptcy protection policy (hereafter “bankruptcy”) in the aviation industry, mostly in the US domestic market and selected international markets. These investigations have revealed that airlines tend to lower their fares slightly while under bankruptcy protection (Barla and Koo, 1999; Bock et al., 2020; Borenstein and Rose, 1995; Ciliberto and Schenone, 2012b). However, their competitors' responses vary. Borenstein and Rose (1995) and Ciliberto and Schenone (2012b) found that the price-lowering behaviors of bankrupt carriers did not lead to a significant reduction in competitors' fares. Analyzing data from US domestic markets (Bock et al., 2020), observed that bankrupt airlines' competitors increased fares. However, other studies have found that bankrupt airlines’ rivals exhibited aggressive pricing behavior, especially on densely traveled routes (Barla and Koo, 1999). These varied findings suggest that the influences of bankruptcy are complex and can vary across time and markets.

Bankruptcy affects airlines' flight frequency and other operational decisions. An airline may want to reduce flight frequency and capacity in the interests of better utilization and efficiency in its operations. However, the positive feedback relationship between higher frequency and higher induced passenger demand discourages an airline from reducing flight frequency. Moreover, reducing flight frequency at slot-controlled airports creates a risk that the airline will lose precious slots because of the “use it or lose it” and “grandfathered” slot-allocation rules, the carrier's ability to compete with other airlines may be affected (Czerny et al., 2008; Berardino, 2010; Fukui, 2010, Fukui, 2014; Sheng et al., 2015, Sheng et al., 2019; Czerny & Lang, 2019). Ciliberto and Schenone (2012b) suggested that bankruptcy has negative impacts on the number of markets served, frequency, and capacity, all of which persist even after the bankrupt airline emerges from bankruptcy protection. Regulators are also concerned about bankruptcy's implications for an airline's air connectivity and overall service level (Borenstein and Rose, 2003). concluded that the impact of a bankrupt airline on airport service level in terms of flight frequency and the number of destinations was only significant at medium-sized US airports. That result seems to suggest that the aggregate level of airline services at an airport is not significantly affected by the bankruptcy of an individual carrier. However, the US domestic markets have long been fully deregulated, and many of their international routes are governed by open-sky agreements. A substantial number of full-service airlines (FSAs) and low-cost carriers (LCCs) compete with differentiated services (Dresner et al., 1996, 2015; Windle and Dresner, 1999; Fu et al., 2011; Zou et al., 2011; Zou & Yu, 2020). Accordingly, the pattern observed in the US may not be applicable to most other markets, especially those yet to be liberalized (Adler et al., 2014; Fu et al., 2015a, Fu et al., 2015b; Wang et al., 2020). Considering that the global aviation markets have been very dynamic, with frequent market entries and exits, it is important for airline managers and policy-makers to have a good understanding of the implications of airline bankruptcy. This need is particularly compelling in Japan, whose aviation market has been dominated by two FSAs, namely, Japan Airlines (JAL) and All Nippon Airways (ANA).

The Japanese domestic market can largely be characterized as a duopolistic market, with JAL and ANA, together with a few small affiliated airlines, controlling a majority of the market. In such a case, the failure of one major FSA can potentially lead to a monopoly by the surviving carrier. Therefore, it is even more important for the aviation industry and the government to have a good understanding of the implications of airline bankruptcy so that the best airline strategy can be identified and government intervention policy can be designed to safeguard market competition and social welfare. In Northeast Asia and many other aviation markets, the dominant carriers play important roles in shaping market competition and influencing government policies (Fu et al., 2015b). Therefore, the performance and operational strategies of the dominant carriers have important implications for the aviation sector. These considerations motivate us to perform a comprehensive analysis of the effects of a major airline's bankruptcy in markets dominated by a relatively small number of carriers. JAL's 2010 bankruptcy, which was partially attributable to the disruptions caused by the 2008 financial crisis, can serve as a good case study through which we can obtain valuable insights.

#### Commercial air checks existential disasters AND is the lynchpin for irregular-deterrence.

Mirghahari ’24 [Mohamad and Joshua Smith; July 1; IWC Subject Matter Expert, Contractor, Valens Global; Seton Hall University National Security Fellowship Graduate Student; Irregular Warfare Center, “The Vital Role of Airlines and Commercial Aviation in Irregular Warfare,” https://irregularwarfarecenter.org/publications/perspectives/the-vital-role-of-airlines-and-commercial-aviation-in-irregular-warfare/]

Commercial airlines and aviation have emerged as a critical yet often overlooked element in the context of irregular warfare (IW). These assets are not just part of a state’s infrastructure, but they also significantly contribute to a state’s response capabilities. A prime example of this was seen during the U.S. evacuation from Afghanistan, where commercial aviation extended beyond its traditional role of transportation. It played a crucial role in strategic operations and logistics, demonstrating how governments, like the U.S., are increasingly relying on commercial airlines for matters of national security and political significance. In the face of IW threats, commercial aviation’s capabilities encompass the ability to rapidly mobilize resources, ensure the continuity of critical services, and maintain the resilience of societal structures.

The use of commercial aviation in IW opens a new possibility for military strategy, reflecting a paradigm where the lines between civilian and military assets blur, offering unique advantages and posing complex ethical and legal challenges. From rapid troop deployments and evacuations to covert intelligence gathering, the versatility of commercial aviation is indispensable yet fraught with risks that warrant careful consideration.

In preparing for IW threats, commercial aviation emerges as both a potential vulnerability and a strategic asset. The infrastructure, cyber capabilities, and security of commercial airlines are liabilities for states, as they enable attackers to damage civilian infrastructure through methods that are not immediately recognizable as a traditional attack. An attack of this nature will have military, economic, and political ramifications. Fully understanding this threat is essential for preparing for the future of IW.

As such, it is imperative that commercial aviation is given a more integrated role within U.S. national defense. It is a strategic necessity aimed at bolstering national preparedness and responsiveness in the face of IW. It catalyzes innovation in areas pivotal to national security, including logistics, supply chain management, transportation capabilities, and security protocols.

The Strategic Importance of Commercial Aviation in IW

One of the most critical roles of commercial aviation in IW is providing logistical support. This includes the transportation of military troops, equipment, and supplies, often to remote or challenging locations where traditional military transport may not be feasible or practical. A prime example of this can be seen in the Civil Reserve Air Fleet (CRAF), which is a cooperative and voluntary program that involves a partnership between the Department of Transportation (DoT), DoD, and the U.S. civil air carrier industry to provide logistical support from civilian airlines during a national defense-related crisis.

Current notable commercial air carriers that are party to the program are Delta Air Lines, American Air Lines, United Air Lines, Southwest Air Lines, and a range of other carriers. While the CRAF has only been activated three times since its creation within the Defense Production Act of 1950, its effectiveness is evident. It was first used in Operations Desert Shield and Desert Storm, then in Operation Iraqi Freedom, and last to help U.S. citizens, Special Immigrant Visa (SIV) applicants, and others evacuate from Afghanistan in 2021. Under the CRAF, , six commercial airlines were utilized to help transport evacuees out of Afghanistan, highlighting the military, diplomatic, and humanitarian aspects of this kind of program.

In fact, according to a DoD directive effective from 2019, the use of commercial aircraft is actively encouraged for missions that can be effectively fulfilled outside of immediate threat or danger. This directive recognizes the strategic value of commercial airlines in non-combat situations. Commercial airlines can serve as a vital tool for the rapid mobilization of units and individuals, and the swift movement of large quantities of resources. They can also provide crucial logistical support in times of need. The DoD’s encouragement of their use underscores that the Department recognizes these capabilities and the strategic advantage they offer. Therefore, even in non-combat situations, commercial airlines play an integral role in the operational readiness and response capabilities of the DoD.

Commercial aerial surveillance is another capability that the private aviation industry can offer to augment DoD and other cabinet departments. Commercial aircraft equipped with advanced surveillance technologies and dual-use security management technologies can monitor communications, troop movements, and even gather photographic intelligence over territories that might otherwise be inaccessible. Commercial aerial surveillance contractors can support national or intergovernmental operations for a low cost. These commercial aerial surveillance providers can assist in missions such as routine border protection, while also providing data collection and processing of all data that comes off the aircraft. The data collected through these means can offer valuable insight into threat activity and strategies, directly impacting decision making during an IW scenario by providing data such as real-time tracking and monitoring.

However, the ownership and control of this data can be a contentious issue. While the data collected can offer valuable insight into threat activity and strategies, it also raises questions about privacy and security. If not properly managed and safeguarded, this information could potentially be exploited, posing a threat to national security. This was controversially proven during Baltimore’s 2016 and 2020 aerial surveillance pilot program. Surveillance data from a third party was used to monitor and track imagery data related to cases associated with a list of high-profile crime categories. The incident highlighted the need for clear policies and regulations regarding the ownership, use, and protection of data collected through commercial or private aviation surveillance.

The interconnected nature of global aviation networks fosters international cooperation and collaboration in addressing IW. Nations often rely on shared intelligence, coordinated air patrols, and joint training exercises to counter transnational threats. Beyond military applications, commercial aviation acts as a bridge for diplomatic efforts, promoting partnerships between nations to enhance collective security and response capabilities. The usage of Air Diplomacy, which is defined as a proactive approach to preventing conflict by empowering airpower in non-kinetic operations as an instrument of power, shows how impactful commercial and non-military aviation can be to diplomatic engagement. This approach encompasses aspects such as humanitarian airlifts, disaster response, and the transport of diplomatic delegations. By leveraging the speed and reach of commercial aviation, countries can rapidly respond to crises, deliver aid, and show solidarity in times of need, thereby strengthening diplomatic ties and promoting peace.

#### American irregular dominance caps nuclear escalation.

Jones ’22 [Laura; 2022; Air Force special operations pilot currently serving as a PhD student at the Fletcher School of Law and Diplomacy at Tufts University, CV-22B Osprey instructor pilot and a first assignment instructor pilot in the T-6A Texan II, led a RAND Corporation research team, provided translation support to the Office of Defense Cooperation at the U.S Embassy in Paris, France, and was deployed to East Africa as a liaison officer to the French Air Force, member of the Irregular Warfare Initiative and sits on the board of directors where she oversees production of the Irregular Warfare Podcast, National Defense University, Center for the Study of WMD Program for Emerging Leaders Fellow; The Fletcher Forum of World Affairs, “The Future of Warfare is Irregular,” vol. 46]

The topic of the future of warfare conjures thoughts of cyber war, autonomous vehicles on the battlefield and flying overhead, cutting-edge artificial intelligence that integrates warfighting and information, and sleek new weapons and aircraft that promise to revolutionize war. However, the future of war is simpler in concept: it is irregular. Irregular warfare capa- bilities need not be analog or archaic, as new technologies can be incorporated for low-intensity conflict or subversion operations. Irregular warfare is a way of war that can embrace cutting-edge technologies and capabilities to make operations more efficient, but even with technology irregular warfare remains population-centric. At its heart, future conflict will be relational and revolve around access and influence in contested regions. If a direct, open conflict between nuclear powers breaks out, where all this new technology would meet on the battlefield, the ramifications would be catastrophic. A state actor who controls competition at the level below the threshold of armed conflict will have the advantage going into any escalation to open conflict. Embracing irregular warfare provides a state the ability to take the advantage in open conflict, and out-compete nationstate adversaries, ensuring that any breakout of armed conflict occurs on the periphery or through proxies and can be contained. Even if this is the beginning of a new security paradigm, irregular warfare remains just as relevant, if not more so, in this supposedly new era of increased state versus state conflict.

First, it is important to establish what irregular warfare is and how it is implemented. The Irregular Warfare Annex to the National Defense Strategy lays out five core missions within irregular warfare: unconventional warfare (UW), stabilization, foreign internal defense (FID), counterterrorism (CT), and counterinsurgency (COIN). These core missions span capabilities and embrace interagency expertise. Although United States Special Operations Command includes four of these five within its core activities, irregular warfare is not just the domain of special operators. Irregular warfare often elicits images of the counterterror and counterinsurgency operations of the last twenty years, but to see it as only that is limiting. Irregular warfare and strategic competition are not mutually exclusive concepts. A more productive view of irregular warfare is as a means of competition in the space below the threshold of armed conflict, i.e. without the direct exchange of hostilities. Irregular warfare is a complement and key component of competition. Although the Global War on Terror era may be ending, the stage for irregular warfare has never been bigger.

It is also important to define strategic competition. “Strategic competition” has been thrown around as a term that is seen as an update to the obsolete term, “great power competition.” Although the phrase was used in the 2018 National Security Strategy and the Biden Administration’s Interim National Security Strategic Guidance, it remains ill-defined and exists more as a catchall for how each administration views competition with China and other aspiring rivals to American power. The Joint Staff has tried to clarify what constitutes competition through the publication of Joint Doctrine Note 1-19: Competition Continuum (JDN 1-19), where competition is defined as a continuum of “enduring competition conducted through a mixture of cooperation, competition below armed conflict, and armed conflict.”2 This joint document, however, is light on details and lacks strategic direction. The Biden Administration interim guidance does lay out a national security priority that is aimed to “promote a favorable distribution of power to deter and prevent adversaries from directly threatening the United States and our allies, inhibiting access to the global commons, or dominating key regions.”3 This priority highlights the need for irregular warfare capabilities within the strategic competition landscape. Irregular warfare provides the tools in which a country can stabilize, or destabilize, regional power relationships, providing the means to compete without resorting to direct military confrontation.

The major distinction made in the 2018 National Security Strategy is not just an embrace of the shift to strategic competition, it is the reorientation of the military from being able to fight two wars simultaneously, known as the two-war construct, to focusing on deterring and ultimately winning a single war against a great power rival, now known as the one-war construct.4 Dr. Jonathan Schroden notes that even though the Irregular Warfare Annex was published after irregular warfare was not mentioned in the 2018 NSS, “the IW Annex is a secondary document and IW is currently not a strategic priority.”5 Without focus on irregular warfare, American military dominance relies solely on deterring and winning a single great power conflict through conventional means. The merits of the one-war approach require another debate, but taken as that is the current standard, the one-war construct would be bolstered by embracing irregular warfare. Irregular warfare is instrumental in preparing the operating environment, shoring up alliances, fomenting resistance, and securing the influence and regional access necessary to be able to deter or win a great power conflict.

A comprehensive strategy of irregular warfare would allow the American military and its allies to compete with its main rivals in contested regions. An integrated strategy would be one where investments are still made to ensure technological advancement at parity or beyond the pacing threat to deter full-scale war while also investing in irregular capabilities, personnel, and access and influence among key populations. The competition phase is marked by a struggle for access and influence. To win at competition one must not only deter future aggression, but also comprehensively gain the advantage in the region through economic, diplomatic, and military efforts. Irregular warfare is well-suited to support whole-of- government efforts and provides the means to project soft, sharp, and hard power. It provides the joint force commander and the current political administration options with which to engage allies and push against adversaries. Irregular warfare activities and military modernization can coexist; in fact, marrying the two provides the best means of actively competing with adversaries while deterring and preparing for future conflict. However, as Schroden points out, over the last twenty years there has been a continuous line of thinking that irregular warfare “has somehow been a distraction from the harmonious conduct of national defense as opposed to an instrumental component of it.”6 Military leaders and policymakers have seemed impatient to return to focusing on large scale combat, failing to realize that irregular warfare is a key component of preparing the space for future conflict, and is integral to wider strategies.

Many in the American defense sector take the idea of strategic competition to mean a break from past irregular campaigns to embrace technology and return to preparation for multidomain warfare. The gusto with which the Services are promoting concepts like Joint All Domain Command and Control, the Marine Corps’ Force Design 2030, The Fourth Age of Special Operations Forces, and a return to investment in next generation technologies shows this in action.7 Although these concepts do not lack merit and mark a willingness to prepare for the next fight, they do not offer much material with which to win the competition phase. Instead, these modernization efforts put all the proverbial eggs in the deterrence basket, striving to ensure that the United States can continue to technologically outpace its rivals and deter adversary aggression through presence and technological overmatch. That is unrealistic. A more fruitful endeavor would be to pair these modernization efforts with investment in the competition phase to shape the environment and actively work to outmaneuver rivals.

Large-scale combat operations between two nuclear-capable great powers would be catastrophic and lead to unsustainable losses even before the use of nuclear weapons is considered. One need only to look at the incredible cost being incurred by the Russian army and air forces in Ukraine to see how lethal modern weapon systems can be. As the price of modern weapons systems increases, the American military’s ability to reconstitute after initial losses diminish. The F-35, for example, is often used as a punching bag for the excesses of the military-industrial complex. Although pilots and the Services that currently fly the jet find its capabilities to be stellar, the program cannot produce the jets fast enough to fill current orders and demand. The production line in 2021 was able to produce eleven jets a month8 which includes jets going to international customers, not just the US Services. It will take years to produce enough F-35s to fill the initial order made by the American Military Services. This is without factoring in replacing massive combat losses from a great power conflict. The F-22, the other fifth-generation fighter currently in the American inventory, paints an even bleaker picture. The initial order for the jet did not procure enough to be above the replacement level to account for normal wear and tear attrition,9 and the production line has been closed for years, meaning it would take an incredible industrial effort to replace any F-22 losses. These losses become compounded when paired against an adversary that has a robust indigenous production capability of high-tech weapon systems like China. When considering the cost and amount of manpower that would be required to replace entire squadrons of aircraft, large vulnerable bases, and aircraft carriers and other warships, it makes sense for policymakers to embrace concepts like irregular warfare to try to secure victory before direct conflict even begins. Military strategy based solely on conventional overmatch is a losing proposition.

However, these modern weapon systems are not without use in the competition phase. Enduring presence, military cooperation, and a robust commitment to regional allies go a long way in helping deter conflict, and things like rotating bomber task forces and continual deployments of carrier strike groups ensure America’s regional commitments have teeth. However, presence alone cannot win the competition phase. Through its five core activities, irregular warfare presents active measures that can be utilized to maneuver for advantage within the competition space.

Conventional overmatch is also being met with an evening of technology on the modern battlefield. As the world becomes more urbanized, it will be more and more difficult for military operations to bypass large urban centers. Urban warfare is considered a great equalizer, especially if the attacking force is concerned with civilian casualties. Although that claim is overblown,10 urban warfare does degrade some conventional capability, and defending forces can more easily exploit vulnerabilities in the attacking force. Along with the increase in urbanization, Dr. Audrey Kurth Cronin points out that accessibility to technological innovations in warfare is rapidly increasing.11 The lowering of barriers to entry for cyber tools, small drones, wireless communication, night vision, and other technology allows even remote armed groups to take advantage of modern military technology. This increases the burden of innovation for the United States military and pushes the goalposts for maintaining conventional overmatch across all battlefields. The fighting in Ukraine has shown how much damage a numerically inferior force can inflict with light, shoulder-fired weapons against armor and low-flying aircraft. Further, the war has highlighted the efficacy of arming a proxy force to fight a geopolitical rival on the periphery of their influence, a more irregular approach to warfare. The losses being suffered by both sides in Ukraine show how destructive conventional, large-scale combat operations can be with modern technology. A better way forward is to invest in the competition phase, before the costs of fullscale conflict must be paid.

### Bankruptcy Norms Adv---1AC

#### Advantage 2---BANKRUPTCY NORMS:

#### Correcting the presumption against CBAs in Section 1113 spills-over:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. IMPLICATIONS FOR BANKRUPTCY POLICY AND PRACTICE

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

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

A. Sales Restrike the Balance

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

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

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

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

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

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

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

B. Norm-Power Paradox

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

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

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

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

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

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

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

CONCLUSION

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

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

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

Scenario 1---SECURITIES:

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

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

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

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

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

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

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

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

#### Nuclear war---retaliation circumvents defense.

Klare ’19 [Michael; November 19; Professor Emeritus of Peace and World Security Studies at Hampshire College, Senior Visiting Fellow at the Arms Control Association; Arms Control Today, “Cyber Battles, Nuclear Outcomes? Dangerous New Pathways to Escalation” https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation]

Yet another pathway to escalation could arise from a cascading series of cyberstrikes and counterstrikes against vital national infrastructure rather than on military targets. All major powers, along with Iran and North Korea, have developed and deployed cyberweapons designed to disrupt and destroy major elements of an adversary’s key economic systems, such as power grids, financial systems, and transportation networks. As noted, Russia has infiltrated the U.S. electrical grid, and it is widely believed that the United States has done the same in Russia.12 The Pentagon has also devised a plan known as “Nitro Zeus,” intended to immobilize the entire Iranian economy and so force it to capitulate to U.S. demands or, if that approach failed, to pave the way for a crippling air and missile attack.13

The danger here is that economic attacks of this sort, if undertaken during a period of tension and crisis, could lead to an escalating series of tit-for-tat attacks against ever more vital elements of an adversary’s critical infrastructure, producing widespread chaos and harm and eventually leading one side to initiate kinetic attacks on critical military targets, risking the slippery slope to nuclear conflict. For example, a Russian cyberattack on the U.S. power grid could trigger U.S. attacks on Russian energy and financial systems, causing widespread disorder in both countries and generating an impulse for even more devastating attacks. At some point, such attacks “could lead to major conflict and possibly nuclear war.”14

These are by no means the only pathways to escalation resulting from the offensive use of cyberweapons. Others include efforts by third parties, such as proxy states or terrorist organizations, to provoke a global nuclear crisis by causing early-warning systems to generate false readings (“spoofing”) of missile launches. Yet, they do provide a clear indication of the severity of the threat. As states’ reliance on cyberspace grows and cyberweapons become more powerful, the dangers of unintended or accidental escalation can only grow more severe.

#### The damage of small attacks accumulates, forcing lash-out.

Shandler ’22 [Ryan, Gal Dor, and Daphna Canetti; September 13; postdoctoral research fellow at the Blavatnik School of Government and Nuffield College, University of Oxford; PhD candidate focusing on cyber decision-making, University of Haifa; professor of political psychology, University of Haifa; Political Violence at a Glance, "The Insidious Political Consequences of Cyberattacks," https://politicalviolenceataglance.org/2022/09/13/the-insidious-political-consequences-of-cyberattacks/]

In the summer of 2022, the FBI proudly announced that it had thwarted a cyberattack against a hospital in Boston. The announcement was a cause for celebration. The attack had failed to elicit any meaningful consequences. Equipment and networks were not damaged. Neither health data nor funds were stolen. Lives were not lost. By every metric, the attack caused no damage. Or so it seemed.

Like a predictable twist in an action movie, the real danger remained unseen. A fixation on a subset of high visibility consequences—degraded hardware, pilfered funds, stolen data, and fatalities—obscured a more insidious threat. If you look beyond the first order consequences, the hidden threat of cyberattacks is that they can undermine societal cohesion, diminish trust in government, traumatize the public, and encourage violent and isolationist worldviews. Even with the strongest cybersecurity software, democratic societies remain vulnerable.

Our research group has been exploring the subtle political effects of cyberattacks by running dozens of experiments that directly expose people to cyber operations under strictly controlled settings. The studies involved some 10,000 respondents in four countries—the US, England, Israel, and Germany.

In one study, we surveyed the public after a seemingly “failed” ransomware attack on a Dusseldorf hospital in Germany. Similar to the Boston attack, the authorities congratulated themselves on a job well done due to the absence of any lasting physical damage. Yet we found a precipitous and enduring reduction in the public’s trust in government. The authorities’ preoccupation with physical consequences obscured the fact that the attack had provoked a deep anxiety among voters at the authorities’ inability to protect them.

In another study, we ran an experiment that exposed participants to vivid media coverage of cyberattacks against railway services. We discovered that the news reports triggered overwhelming public demands for military retaliation. Even if authorities weren’t certain about the attacker’s identity, the public demanded strikes in an attempt to regain a sense of security.

In still another study that exposed people to frightening cyberattacks by terrorist groups, we tracked how cyber operations raised people’s perceptions of threat to extreme levels. As a result of the threatening environment, respondents agreed to sacrifice a broad swathe of civil liberties in a desperate pursuit for security. A short-term focus on the attack’s immediate effects disguises a subtler outcome: a stark shift in attitudes about surveillance that can upend the delicate balance between liberty and security.

These cases reveal an underlying threat that runs far deeper than any short-term financial or network harm. Even seemingly minor attacks can cause significant consequences by roiling public confidence, spurring demands for retaliation, and upending policy preferences. The cumulative effect of frequent minor attacks can inflame chaos as voters lose faith in the digitally mediated institutions at the heart of modern society. Our findings recur across countries, across partisan lines, and even in the face of seemingly minor cyberattacks. Social upheaval may not be the foremost intent of attackers, but it is certainly the most politically explosive consequence.

Why do cyber operations sway political preferences in such a meaningful way? The answer, we discovered, stems from the deep psychological distress that the attacks arouse. The public view cyber operations as tremendously threatening—more even than COVID-19, Russian militarism, or North Korean nuclear weapons. Cyberattackers are viewed as near-omniscient actors who can seamlessly avoid detection and strike from the shadows. In fact, when collecting cortisol samples after orchestrating exposure to cyber and conventional terrorism, we discovered that cyberattacks elicit physiological stress at levels equivalent to terror attacks that kill scores of innocents.

Everyone responds to threats in their own way, and distinct emotional reactions correspond with different outcomes. One particularly politically potent emotional response is anger. Following cyber operations, people experience a swell of anger—at their perceived impotence, at the inability of the government to protect them, and at the gall of the attackers. Such anger needs an outlet, and we show, through all our studies, that the widespread anger translates to forceful demands for vengeance. Another common response is dread, which undercuts voters’ trust that authorities can protect them. Emotional responses, in short, are the keys to unlocking the political repercussions.

Can cyberattacks manifest such consequential effects among policy officials and trained decision makers? The initial results of our simulations that expose senior decision makers to cyber threats reveal that even with all their training and expertise, experts are still influenced by the erstwhile perception of cyberspace as an irresistible threat. We find that officials are buffeted by biases that prevent them from clearly responding to cyber threats with the strategic restraint that they deserve.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Extinction

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

The accumulation of the fractures into polarization causes the human species—in the beginning of the twenty-ﬁrst century—to face once again deep existential risks. Those are the risks where humankind as a whole is imperiled as they imply major adverse consequences for the course of human civilization for all time to come. Risks in this cate- gory are a recent phenomenon. This is part of the reason why it is use- ful to distinguish them from other risks. We have not evolved mechanisms, either biologically or culturally, for managing the present risks (Bostrom 2002) that are largely “unintended consequences of radicalized modernity” (Beck 1999, 3). The concern about the extinction of the species we belong to is based on carcinogenic ingredients in food supplies, organized (cyber-)crime, pollution by poisonous materials (acid rains, chemical products), series of natural disasters (asteroids, comets, volca- noes), genetic experiments, collapse of ﬁnancial markets, the scarcity of water and energy sources, infectious pandemic diseases, the consequences of genetic engineering, artiﬁcial intelligence or molecular manufacturing, or on increasing global inequalities that endanger economies and politics (Stiglitz 2013). There is the persistent risk of nuclear, chemical and biological warfare with the observation that for the ﬁrst time in history weapons of mass destruction and the knowledge of how to manufacture them are available for individuals and small groups. There is also climate change, the loss of biological diversity and the largely underrated issue of overpopulation.2 The human species has survived over centuries many risks but contemporary risks have a planetary scale and “In the charged reﬂexive settings of high modernity, living on ‘automatic pilot’ becomes more and more difﬁcult to do, and it becomes less and less possible to protect any lifestyle, no matter how ﬁrmly pre-established, from the generalised risk climate” (Giddens 1991, 126). As Ulrich Beck writes in the world risk society we cannot be privately insured against the risks of modernity (Beck 1999, 4) and their global interdependence. Unprecedented technological progress that provided the conditions under which the mass murders organized on an industrial scale and made possible by an efﬁciently organized and managed modern bureaucratic state by the Nazi’s could take place. Technical skills and organizational talent is crucial to organize massive gemocide and massive addiction to industrially produced goods such as mobile telephones. Under conditions of modernity Auschwitz could happen again. The need for highly efﬁcient coordination makes modern society very vulnerable to disruptions and on a level of global interdependence such disruptions may have global consequences. Technological advances make humans ever more dangerous, and at the same time, humanity is incapacitated to deal with such unprecedented risks as it outsources its moral responsibilities increasingly to medical, psychotherapeutic, scientiﬁc, nutrition and technical-engineering experts. Whereas the Enlightenment promised to liberate humans from the self- imposed inability to use their minds independently of others (Kant), modern life is handed over to coaches and counsellors. As “the most likely global catastropic risks all seem to arise from human activities, especially industrial civilization and advanced technologies” (Bostrom and C´ irkovic´ 2008, 27) humanity has the responsibility to reﬂect on the unintended and unforeseen consequences of its actions. Most urgent in terms of human survival are the fractures between humans and the Earth System. In the planet’s history humanity ﬁnds itself now in a new phase: the “anthropocene”. This means that humans are with their immense and unprecedented power the most inﬂuential force in the evolutionary pro- cess. Interestingly enough the social sciences largely have refused to accept that the Earth sciences can contribute to our understanding of the world as no longer a “humans among themselves affair” (Hamilton 2017). The “humans only” focus that prevails in the social sciences leads to humans watching their own extinction as a televised spectacle that takes place out- side the cubicle of their daily lives. Humans may—as the most powerful species—be at the centre of the planet but are increasingly unable to con- trol the planet. “Our understanding of the Earth we inhabit is under- going a radical change. The modern ideas of the Earth as the environ- ment in which humans make their home, or as a knowable collection of ecosystems more or less disturbed by humans, is being replaced by the conception of an inscrutable and unpredictable entity with a violent his- tory and volatile ‘mood swing’” (ibidem, 47). It is debatable whether as Pope Francis states in Laudation Si: On Care for our Common Home (Encyclical published by the Vatican, May 24, 2015) nature “is the sis- ter that cries out to us” and “a beautiful mother who opens her arms to embrace us”. As Clive Hamilton notes “Now when Mother Earth opens her arms it is not to embrace but to crush us” (ibidem, 48). Because “Na- ture is no longer passive and fragile, suffering in silence” (ibidem, 48). As Hamilton argues, we no longer have to save nature but we should save ourselves from nature and from ourselves. The most existential threat is now in the fracture between the unprecedented human power to disrupt the earth system and “the uncontrollable powers of nature it unleashed in the Anthropocene” (ibidem, 49). The interesting conclusion is that we are not any longer free to treat the Earth as we please. Our enormous power comes with an unsettling moral responsibility: we no longer can choose between dominion and stewardship. We have to accept that the anthropocene is anthropocentric (ibidem, 50ff.) meaning that we have the power to change the course of the earth system. This leads to the ethical conclusion that “we must restrain ourselves and restrict what we do” (ibi- dem, 54). In the conﬂict between humanity’s unlimited desires and ambi- tions and the ﬁnitude of the earth system we must control the dark side of technological development. We must understand that the forces that were expected to bring us more freedom, more equality and more civi- lization also brought disruption of the earth system, lethal arms systems, unprecedented ubiquitous surveillance and a tweeting culture that effec- tively erodes whatever minimal deliberative social processes we had devel- oped. In this moral conﬂict, we must explore whether our conventional ethical repertoire is adequate. Can we rely upon the will of God or our love for nature? Can we trust enlightened self-interest? Can the notion of collective public duty stand up against the solid individualism of a modern capitalist society. Will the drive towards self-preservation outlive the ram- pant media-induced indifference? Our future is a confrontation between humans and an unpredictable earth system. This has a certain outcome if we think we can afford indifference and an uncertain outcome—at best— if we treat an angry mother Gaia with the care she deserves. The question is whether today’s global community is capable of dealing with the existential risk of extinction. Can we constitute a global resilient community that can avoid this?

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Conclusion As Abraham Lincoln, later president of the USA, on 16 June 1858 after he had accepted the Illinois Republican Party’s nomination as that state’s US senator, famously stated “A house divided against itself, cannot stand”.3 In order to deal effectively with a formidable existential risk, we must develop communal resilience. This involves the difﬁculty of accept- ing genuine dissimilarities. It implies recognizing the other as responsible agent. It demands the critically probing of the arguments for different positions and accepting that togetherness is only possible when groups no longer monopolize the truth. And learning that fractures do not nec- essarily exclude “togetherness” as long they do not end in the dead alley of polarization.4 If peace is conceptualized as “celebrating moments of sheer human togetherness” and if we aspire to peaceful living together, we must over- come the great obstacle of polarized fragmentation. It may not be the fragmentation in so many different terrains on our planet that creates the essential obstacle to the cosmopolitan togetherness that is basic to col- lective joy. But the greater problem is that fragmentation is based upon a mindset that is characterized by the belief in singular identities, in the exclusion of alterity, in rampant individualism and in “thinking alone”. This perspective ﬁts remarkably well in the hierarchical social orders that characterize also modern so-called democratic societies. For the concep- tualization of peace as moments of collective joy, it is also important to note that such orders are antagonistic to collective festivities. “Ecstatic rituals still build group cohesion, but when they build it among subor- dinates – peasants, slaves, women, colonized people- the elite calls out its troops. In one way, the musically driven celebrations of subordinates may be more threatening to elites than overt political threats from below” (Ehrenreich 2007, 252). Recent research on resilience seems to be shifting away from individ- ual resilience towards a focus on community resilience which does not ignore the importance of individual agency and capability but stresses the embeddedness of individuals in collective processes that relate the heal- ing of fractures to political and cultural factors and available resources in the forms of social, cultural and information capital. Communal resilience recognizes that the ability to meet existential risk goes beyond the indi- vidual and needs the involvement of the family, the local community, the nation and the global polity. Communal resilience requires at all those levels a readiness to cooperate, to accept diversity, to think inclusively, the ability to act autonomously—as empowered agents—and to engage in critical reﬂection. In order to deal with the complexity of all these fac- tors that stand in the way of living in peace, we need to turn to human- ity’s unique resource: humans are the most communicative animals with unique skills for pro-social, cooperative communication. Communication is never a neutral process and to bring about communal resilience it needs to be embedded in the “thinking together” mindset. This means that we need to communicate through the authentic conversational modality of human communication. I call this conversation the “deep dialogue” that combines human linguistic proﬁciency with human ecstatic emotional capabilities. [NOTES OMITTED] [CHAPTER 3 BEGINS] The ultimate explanation for how it is that human beings are able to communicate with one another in such complex ways with such simple gestures is that they have unique ways of engaging with one another socially in general. (Michael Tomasello) Humans are particularly socially interactive creatures, which makes communication central to our existence. (P. Th. Schoenemann) My conclusion at the end of Chapter 2 was that in order to create space for the celebration of sheer human togetherness we need to overcome the polarized fragmentation that today characterizes most global and local politico-economic and sociocultural processes. This requires the build- ing of resilient communities through communicating with each other in the modality of a “deep dialogue” that combines verbal proﬁciency with human playful capabilities. As I will argue in this chapter, the unique fea- ture of human communication is its cooperative nature. This enables us to engage in authentic conversations through storytelling and through sharing emotions. The Origins The longing for relation is an innate characteristic of the human being and constitutes the basis of human communication. Conversation is the most basic process in human life. “Not only is conversation the most per- vasively used mode of interaction in social life and the form within which, with whatever modiﬁcation…..language is ﬁrst acquired, but also it con- sists of the fullest matrix of socially organized communicative practices and procedure” (Heritage and Atkinson 1984, 12). Throughout human history conversation in myriad forms and constellations has been the cen- tral element in the organization of life. Humans are uniquely well wired for conversation because their communicative processes (different from all other species on the planet) are fundamentally cooperative as they are based on seeking common conceptual ground and shared intentionality. Human communication—as summarized by Tomasello—is grounded in shared understanding of the context of social interaction and is performed for fundamentally pro-social motives: informing others and sharing emo- tions. “Other primates do not structure their communication in this same way with joint intentions, joint attention, mutually assumed coopera- tive motives and communicative conventions…” (Tomasello 2010, 108). In order to understand where conversation comes from, we need to approach the origins of human communication from evolutionary theory. Although “evolutionary communication is a powerful theoretical perspec- tive that applies to all forms of biological and social interaction” (Lull and Neiva 2012, 16) and evolutionary theory “is one of the most powerful scientiﬁc explanations ever put forward” (ibidem, 16) there is little impact on communication theory. The social sciences have marginalized biology and particularly Darwinian evolutionary theory from its efforts to under- stand the world. Therefore, Lull and Neiva argue that there should be “a major infusion of Darwinian thinking into communication theory…” (ibidem, 16). This point is elaborated solidly in Lull’s recent on evolu- tionary communication (2020). Communication is a crucial instrument in cultural evolution and yet the social sciences and the humanities have been unable to provide a solid understanding of how culture evolves. The thinking has been too much focused on the individual and not on the group. Cultural evolution and with it the evolution of human communi- cation would be best studied at the level of the group since human life is characterized by living in large groups (nations, corporations, tribes). The focus of much research has been the individual whereas human com- municative behaviour can be best understood if studied as behaviour in social groups (see Richerson and Boyd 2005 on “population thinking”). An evolutionary approach helps to understand why we prefer communica- tion with person or group A over communication with person or group B? From our biological evolution, we learn that successful adaptation needs reciprocity. In chimpanzee colonies, the practice of grooming which is crucial to survival (the removal of parasites from places where the ani- mals themselves cannot reach) functions most effectively when there is reciprocal altruism. I groom you and you groom me. Free-riders are dan- gerous to social cohesion and will be dealt with: they become social out- casts. From this observation, the argument can be developed that peo- ple will prefer to communicate with those who (seem to) provide reci- procity. Through the application of evolutionary principles, we can also gain insights in the question why we prefer some information inputs over others. Across the world news media tend to bring primarily bad news: ﬂoods, earthquakes, wars, crimes or terrorist attacks. Many studies have been dedicated to this. In a study by Davis and McLeod (2003), 736 newspaper front-page stories that appeared between 1700 and 2001 were analysed. The results demonstrate a uniformity of sensationalist topics that refer to fear, survival and reproduction. Among the prominent ones are death, robbery, assault, injury and rape. Much analytical work on news focuses on what journalists do and a rapidly expanding volume of studies tells us that they use framing and priming mechanisms in their reporting of the world. Less research has been dedicated to the question why jour- nalists do what they do. Most explanations of “bad news“ focus on the analysis of so-called news values. Such analysis does enlighten us about how news gets to be constructed once these values that determine selec- tion are in place. However, they do not help us to understand where the values come from. In search for grounds, we ﬁnd references to profes- sional socialization, internal and external political and economic pressures, ideological biases, mechanisms of human perception and automatic cate- gorization. Explanations that tell us that the owners of news media prefer bad news because it sells best may have a point but fail to say why media audiences in such large numbers accept bad news about their world and do not massively demand other dimensions of reality. Attempts to answer the question why audiences are drawn to sensational forms of report- ing point to socialization, lack of empathy, compassion fatigue, stereo- typing or malicious delight in other people’s suffering. But what draws people in large numbers to the reporting about misery and abuse? As an eighteenth-century editorial worries, “let a Gazette inform us in detail of a plague, civil war or dreadful famine and this paper would deeply engage the attention, be read over and over again and pronounced a valuable paper” (Independent Ledger 1784 in Davis and McLeod 2003, 208). There are explanations from sociological and social-psychological perspectives, but it would seem that an evolutionary perspective holds the most solid cards. A Darwinian explanation would offer a reasoning that argues that the most preferred news topics are related to the human capacity to adapt to their environment. Among the successful and effec- tive adaptive mechanisms are the detection of cheaters and free-riders, the fear of violence and assault, and the readiness to ﬁght or ﬂee. For millions years, our predecessors lived on African savannahs. They were not as we might prefer to think the eminent sovereigns of their habitat. With a length of only 1.20 m, other animals like hyenas or saber-toothed cats (twice as big as lions) must have looked intimidatingly big to them. They must have lived in constant fear and must have acted with utmost prudence in order to survive. They could only hunt for their food when the real hunters, like the lions, were resting. Under these circumstances, it seems realistic to assume that their communication consisted primarily of warnings for imminent danger. We know from evolutionary studies on culture that when certain mental patterns have been imprinted on minds they will stay there for a very long time indeed and will change only very slowly. Today’s “bad news” is a relic of a stone age adaptive function that was once essential for survival on the savannah. Bad news appeals to audiences because it helps humans to give attention to information that is essential to their survival and their reproductive ﬁtness. This does not mean that today warnings would no longer have a function. But in a modern contemporary environment an adequate adaptation to reality requires that also “good news” stories are taken seriously. Survival of the human animal in the twenty-ﬁrst century is probably best secured if an alertness to risks is combined with openness to challenges. The problem with permanent warning for impending danger is that the alerts become a self-fulﬁlling prophecy. People may begin to meet others with such pre- conceived ideas about their hostility that the others begin to behave in accordance with the expectation. This is a very common occurrence as we know from social-psychological studies about stereotyping. Obviously, also in modern societies there can be solid grounds for fear. We do live in what Ulrich Beck has baptized a global “risk society” (1992). We can now blow up the planet several times over. But fear can be exaggerated and can be manipulated and exploited for political reasons (the terrorism fear which serves the erosion of basic civil rights and freedoms) or for commercial reasons (the virus-fear which helps to sell vaccines). Often, as the case of terrorism phobia demonstrates, the actual occurrence of terror acts and the probability of being a terrorism victim bears little rela- tion to the alarm bells that governments and media ring. A culture of fear creates serious obstacles to social cohesion and to living together. We need a more differentiated environments that are much more variegated than those of our ancestors. In the twenty-ﬁrst century, we need for our survival as species hope more than we need fear. More “good news” in daily newscasts and news reporting serves a more adequate adaptation to modern environments than that relic of the stone age: “bad news”. Dominique Moïsi has proposed a division in the world of cultures of fear, hope and humiliation. He concludes his study on the geopolitics of emo- tion by stating “To respond to the challenges we face, the world needs hope” (Moïsi 2009, 159). On the basis of these considerations, the thesis could be formulated that permanent warnings for danger and risk hamper an adequate twenty-ﬁrst-century adaptation to modern realities. For an evolutionary understanding of human communication, we need to start from the basic Darwinian algorithm for successful adaptation. This is based upon variation, selection and replication. In the domain of human communication, this can be applied as follows. Communicative behaviour evolves through variation. A great variety of modalities of communication evolve because of the need to adapt to different and changing environ- ments. This evolution is both non-intentional and intentional and limited by both genotypical and historical factors. Much of it proceeds (as in the evolution of knowledge in science) by trial and error. In the evolution- ary process, the best adaptive solutions are kept. Communication forms that optimally serve human survival and reproduction will be retained. Those forms of attention and memory that are designed to notice, store and retrieve information and that are useful to solving adaptive problems will further evolve. Inadequate communicative solutions will disappear. The most adequate adaptations will be transmitted to future generations. This leads to an understanding of human communication as a complex adaptive system that is largely driven by the instinct to cooperate. The species homo understood early on that their communities would bene- ﬁt from cooperative communication. Communication made the kind of coordination that hunting required possible and facilitated the organiza- tion of complex societies. There is a good deal of evidence to safely sug- gest that the origin of cooperative human communication emerged from the instinct to cooperate. Through cooperative communication, humans designed adequate adaptive systems that secured their survival and repro- ductive capacity, and thus, human communication became a key-player in the biological and cultural evolution of humanity. Understanding com- munication as a complex adaptive system helps to see how human inter- actions have to be diverse, innovative and dynamic so they can cater for the constant changes in the environment and adapt to them in non-linear and probabilistic ways. Communication is basic to all living species. Yet, in spite of this shared reality all species have developed their own characteristic communicative repertoire. Human communication displays distinctive design features. These are altruistic cooperation, shared intentionality and a complex vocal language. Human beings are able to communicate with each other in complex ways with the simple gestures of pointing and pantomiming because “they have unique ways of engaging with one another socially generally. More speciﬁcally, human beings cooperate with one another in species-unique ways involving ways involving processes of shared intentionality” (Tomasello 2010, 72). In the natural gestures of the great apes (pointing and pantomiming), we ﬁnd the basic structure of what will evolve as human communication. The transition from natural gestures to language relied on shared intentionality, on the meaningfulness of natural gestures. Apes use their gestures to demand action from others. They want others to see something and do something. Apes understand individual intentionality but do not participate in shared intentionality (ibidem, 331), they can synchronize actions but do not form joint goals or joint plans. Humans—contrary to the great apes—engage in the col- laborative activity of cooperative communication. Shared intentionality means that humans have joint goals and joint plans and share beliefs, motives and assumptions. “The skills and motivations of shared inten- tionality thus constitute what we may call the cooperative infrastructure of human communication” (ibidem, 7). We are able to communicate in cooperative ways because humans have the cognitive skills to create com- mon ground “even pre-linguistic infants communicate gesturally in much more complex ways than apes” (ibidem, 74). The crucial factor seems to be “context”. The communicative context is what is relevant for social interaction. A shared inter-subjective context requires common ground. “Common ground includes everything we both know (and know that we both know, etc.) from facts about the world, to the way that rational people act in certain situations, to what people typically ﬁnd salient and interesting” (ibidem, 75). We seek common ground by making efforts “to communicate in ways that are comprehensible to the recipient, who in turn makes efforts at comprehension by making obvious inferences, ask- ing for clariﬁcation when needed (Tomasello 2010, 83). This cooperative spirit is characteristic of human communication. “There is no evidence that other animals ever ask one another for clariﬁcation” (ibidem, 83). We can conclude from this that the evolution of human communication has been guided by the need and the capacity of “thinking together”. Human communication is motivated by mutualism and reciprocity. We request from others information that is helpful to us and offer others information that is useful to them. We also share information and emotions with others because we want to be linked to them. It is important here to take note of the narrative structure of human communication. We do things (like hunting, cultivating the land, building settlements, ﬁghting wars) and from beginning to end we tell each other stories about what we are going to do and about what we did. Storytelling is an essential condition to make human actions possible. Storytelling obviously only makes sense if we can understand each other through the sharing of a non-verbal signalling system or through a common verbal language. Crucial for the ability to communicate in humans was the co-evolution of brain and language. Human communication began to make sense when this co-evolution made it possible to speak to and with each other. Changes in the human brain made thinking and awareness possible and facilitated the basic skill of reading the intentions of others which created the com- mon conceptual ground for human communication. At the same time, language adapted to the possibilities and limitations of the human brain (Schoenemann 2009, 180). Increasingly complicated social interactions drove the evolution of language and the human brain adapted to better serve language since language presupposes a brain that facilitates the use of language (ibidem, 163). As language is crucial for human adaptation, it is likely to inﬂuence brain evolution. Language evolution is more complex than physical evolution where the environment determines what is beneﬁcial like a thicker fur in cold climates. This is an adaptation inde- pendent of the group. In linguistic development to be better than others serves no one if the others cannot hear what you say. The advantage is dependent upon the abilities of other members of the species. “Larger social groups have increasingly complicated social interactions, and suc- cessful social living depend upon how best to navigate them…Given that language is an inherently social activity, the usefulness of language would be greatest in the human species” (ibidem, 168). The cooperative motives of human communication are requesting, informing and sharing: “The facts that communicators operate with these cooperative motives and that recipients are inclined to respond appropriately …are part of the common ground between human communicators” (Tomasello 2010, 88). The new species homo was exposed to an impressive range of preda- tors (Sterelny 2012, 74). This required a collective defence based upon solid and efﬁcient coordination. Thus, communication was used to send warning signals in cases of imminent danger. The collective hunting also demanded cooperation and a fair distribution of the loot which implied the suppression of bullies. Cooperative foraging needed exper- tise which developed and expanded through information sharing. From earliest times on hominins and later humans were information junkies: constantly seeking and receiving information. “Human life depends on this informational commons and has done so at least since the regular harvesting of large game and the regular use of ﬁre, and this may be as deep in time as two million years” (ibidem, 76). These informational commons evolved in human history from the sharing of signals through gestures in pre-verbal times to storytelling when language developed and to modern soaps in high-technology media. The conclusion from evolutionary arguments is that human beings are well prepared for what Buber calls “the speech of genuine conversation in which men understand one another and come to a mutual understand- ing” (Buber 1999, 236). Yet, in his book On Dialogue Bohm (1996) asks “Why then is it so difﬁcult actually to bring about such communi- cation”? Human conversation has often taken the form of the polemical debate. Polemizing however is not without risk. It is a battle of words, a form of waging war. Using words like weapons is of course also a form of violence. Verbal violence can cause exceptional emotional damage and can also lead to physical violence. Verbal and physical violence are posi- tions on a sliding scale. Polemizing is playing with ﬁre. It is not innocent when opponents are described as fascists or terrorists. Such types can only be silenced with the help of physical violence. When words are used as weapons, a spiral of violence is used that can end in the use of weapons as words. The media have often greatly magniﬁed polemics. This provides entertaining and exciting spectacles. Politics suddenly becomes fun again. But in the end, nobody becomes any the wiser. There is little or no lis- tening in the polemic debate, false arguments and fallacies are used and there is constant reference to uncontrollable sources. The truth is cer- tainly not served by the polemic debate. Such a debate consists of a series of fundamentalist monologues in which the opponents want to surpass each other, do not let the other speak out, talk through each other and use one-liners to reduce reality to simple constructions. In most media around the world debate is a popular format whereas the opportunities for genuine conversation tend to be minimal. Oddly enough, the gos- siping that is essential in human evolution and that we seem to enjoy endlessly is better suited for conversing in togetherness. Most of peo- ple’s conversations are dominated by social topics. “These include discus- sions of personal relationships, personal likes and dislikes, personal experi- ences, the behaviour of other people, and similar topics” (Dunbar 1996, 123). As Dunbar concludes “language evolved to facilitate the bonding of social groups” and this is mainly achieved “by permitting the exchange of socially relevant information” (ibidem, 123). As social beings, we are fascinated by the minutiae of everyday social life “Who is doing what with whom and whether it’s a good or a bad thing; who is in and who is out, and why; how to deal with a difﬁcult social situation involving a lover, child or colleague” …..“we seem to be obsessed with gossiping about one another” (ibidem, 5, 7). In Dunbar’s vision, gossiping is the human version of grooming among primates. Gossip is an evolutionary universal from way back and “it manifests itself today in our national media in the form of gossip columns, TV ‘entertainment shows’ and soap operas, while in our workplaces and neighbourhoods we continue to discuss privately (and deliciously) the doings of others- just as been done in small com- munities of human foragers for dozens and dozens of millenia” (Boehm 2012, 34). Gossip has an important social function as it “functions as a court of public opinion. It’s a special court, however, the defendants don’t get to face the charges against them- and often there’s simply no way to defend themselves” (ibidem, 239). In many hunting bands “the critical court of public opinion isn’t interested in holding balanced and fair hear- ings but rather in knowing about what people will try to hide” (ibidem, 240). Gossiping is characterized by the contrast between enjoying talking about others and fearing that they might talk about you. It clearly has a social and moral function. “The fact that a solid public opinion can be quietly formed without personal risk or conﬂict and through highly spe- ciﬁc symbols provides a formidable social tool, against dangerous bullies, and when it’s time for action, the ﬁndings can be used surgically” (ibi- dem, 245). Our endless chatter (on radio and TV, via the Internet or via cell phone) has an important social function. It is the same ritual as that of the ﬂocking monkeys: we reassure our peers, because we show inter- est and we show that we are not aggressive. The grooming modality of human communication is important in strengthening communal interests for resilience. However, to overcome the polarization that obstructs the celebration of human togetherness it seems that the conversational modality of human communication has the best cards if we manage to combine our verbal proﬁciency with emotional narration. I call the conversation that employs language, song and dance and is based upon the features of cooperation, trust, mutuality, patience and the basic normative principle of communicative freedom “deep dialogue”. The “deep dialogue” is an exercise in slow thinking through which a polarized community (family, city and country) investigates a theme of urgent and current signiﬁcance. Despite fundamentally different views on the theme, participants in the dialogue are exploring whether they can ﬁnd common starting points. The usual forms of discussion—discussion and debate—are insufﬁcient to arrive at lasting common insights that can form the basis of cooperation towards collective resilience. Essential in the deep dialogue is listening attentively (have I actually heard what the other person is saying?) and talking attentively (do I know what I really want to say and do I know if this contributes to the subject under investigation?). In the deep dialogue there is time and space for all participants to tell their story and to be listened to with respect. All participants share personal experiences that relate to the subject under investigation. The deep dialogue is not so much about discussing a theme as it is about researching points of view regarding the theme and exploring common principles. It is an exploration of the validity of our knowledge, prejudices and assumptions. The Socratic qualities that are essential for the deep dialogue include the capacity of people to reason about what they believe or what they believe they know and to critically investigate their own assumptions (Nussbaum 1997, 19). For Socrates, this is the essence of all reﬂection. He suggested that our positions are often more determined by beliefs than by knowledge and we often fail to explain these beliefs. A Socratic investigation may reveal that we often talk about many matters we have little understanding of and that frequently we do not even understand our own thinking. I added the notion of “deep” to dialogue for the following reasons. Firstly, the word dialogue has undergone some devaluation as a result of its cavalier use by political and religious leaders. They are fond of embellishing their—often—unproductive encounters with the label of dialogue. Secondly, the mode of conversation I propose here is at the service of the cosmopolitan togetherness that I call peace. Therefore, this conversational modality cannot be based upon shallow agreements to cooperate, upon compromise deals, upon the sharing of ideas that provide attractive window dressings, or on the construction of similarity without alterity. Its features need to be building blocks of the greater aim it seeks to achieve. You cannot achieve this togetherness by babbling or gossiping or have a good talk or negotiating. In the way you interact, there needs to be recognition of the different assumptions that should be freely expressed but also freely questioned as a means to understand why we believe differently. The deep dialogue does not resolve disagreement it will seek to understand why we disagree and how might we live together in fundamental disagreement. This requires an extraordinarily strong moral commitment to the dignity of human agency as this conversation is liberated from all missionary and colonial intentions. Thirdly, the deep dialogue is a reiterative and dynamic process. An exercise in moral reason- ing. A method of moral argumentation that makes participants’ choices visible and justiﬁable. There are multiple interpretations of what people hold to be right versus wrong. There are no last words in law or morality since moral positions are forever contestable propositions. There is no single morality. The deep dialogue assists in ﬁnding minimal agreements on procedures that optimally accommodate the interests and principles of various parties. The deep dialogue opens the possibility to discover that the moral practices of “Us” are not always morally defensible and that those of “Them” are not always morally despicable. Fourthly, the deep dialogue is distinct from other conversations since it includes the non-human species we share the planet with. We may not be able to deeply dialogue with them but the concern about their well-being and the procedures for addressing this—as part of our common survival—is on the agenda of the “deep dialogue”. On Cooperation The deep dialogue is a cooperative relation that requires that we ﬁnd a balance between cooperation and competition. As Gambetta argues “a certain dose of competition is notoriously beneﬁcial in improving perfor- mance, fostering technological innovation, bettering services, allocating resources, spreading the ﬁttest genes to later generations, pursuing excel- lence, preventing abuses of power - in short, in enriching the human lot” (Gambetta, 215). Yet it needs to be realized that in essence the deep dia- logue is a collaborative activity.1 “In a dialogue nobody is trying to win” (Bohm 1996, 7). “The fundamentally cooperative nature of human com- munication is, of course, the basic insight of Grice” (Tomasello 2010, 6). Herbert Paul Grice (1913–1988) was a philosopher of language who pro- posed the general principles that he called the Cooperative Principle and the Maxims of Conversation. According to Grice, the cooperative princi- ple is a norm governing all cooperative interactions among humans. He formulated maxims on quantity and on quality. The maxim of quantity suggests to make your contribution as informative as is required for the current purpose of the exchange. That means do not provide more infor- mation than is required. The maxim of quality advises not to say what you believe to be false and not to say that for which you lack adequate evidence. Grice also proposed the maxim of clarity implying to be per- spicuous, to avoid obscurity of expression and ambiguity, and to be brief and orderly.2 On Trust Trust is “a device for coping with the freedom of others” (Gambetta 1988, 220). Relations with others imply the possibility of deceit and defection. As Giddens argues if someone’s activities were continually vis- ible and thought processes were transparent there would be no need for trust (Giddens 1990, 33). Since we never have full information about the thoughts and actions of others, we need to take the risk of trusting them if we want to cooperate with them. “All trust is in a certain sense blind trust!” (Giddens, ibidem, 33). Trust means that I need to know that what the other says is genuine and the other should be assured that what I say is authentic “…for I can only speak to someone in the true sense of the term if I expect him to accept my word as genuine” (Buber 1999, 238). Trust is essential to living together. It is the basis of social cooperative behaviour. We cooperate because we rely on others to be reli- able. If they turn out to be unreliable, there can be no cooperation. Trust is a dependency relation based upon the expectation that this dependence will not be abused and this expectation can be based upon knowledge about earlier behaviour of the other, or knowledge about his character, or strong affective feelings. If an encounter starts from distrust, i.e. the belief that the other cannot be relied upon to speak truthfully, to deliver what he/she promises or to meet a commitment, a conversation may be possible but not a “deep dialogue”. For the deep dialogue, you need to trust the conversational partners. Equally important however is that you can be trusted as partner. Thus, the deep dialogue is also an exercise in critical self-reﬂection. Can I be sure that I am to be trusted? Do I trust myself? Do I believe my own truth? “It is necessary not only to trust oth- ers before acting cooperatively but also believe that one is trusted by the other” (Gambetta 1988, 217). On Mutuality As cooperative relation the deep dialogue is a convivial and recipro- cal activity. Most people—with only few exceptions—live in commu- nities. For these communities to be sustainable, people need to seek mutual understanding. This becomes even more critical as communities— through changes in global demographics—evolve into multi-cultural and multi-religious communities. Lest these new communities get entangled in violent and possibly lethal conﬂict, they should engage in interactions in which others are seen as unique individuals with faces, stories and expe- riences. In such interactions, it is vitally important that we want to under- stand who this other is. “Cooperation frequently makes some demand on the level of trust, particularly of mutual trust. If distrust is complete, cooperation will fail among free agents. Furthermore, if trust exists only unilaterally cooperation may also fail, and if it is blind it may constitute rather an incentive to deception” (Gambetta 1988, 220). On Patience Patience means taking time for reﬂection. The authentic conversation is slow and needs time for ideas to sink in and to understand perspectives different from our own. Deep dialogue requires waiting and silence. For the deep dialogue, we need to learn the art of wasting time. We may tend to see the patient conversation as a waste of time but that is precisely what the dialogue requires: the willingness to waste time (Lightman 2018) and the praise of idleness (Russell 1935).The deep dialogue requires “kairos” versus “chronos”. In Greek mythology, there were two words for time: chronos and kairos. Chronos refers to mechanical and quantitative time: a measured and linear time in which the metrum mercilessly contin- ues. Chronos is the time of agenda’s and deadlines. Chronos is living in moment after moment. Much of our daily lives—certainly in modern western societies—is controlled if not terrorized by the linearity of the clock. However, there is another time. Kairos is the time of signiﬁcant events; it is the time of the seasons. Kairos represents the opportune time for action: qualitative, social and creative time. Kairos stands for “time out of time”. “Kairos time is forever. It is the time of memory. It is the time of being” (Lightman 2018, 73). Releasing the innate human ability to dialogue requires the creativity that comes with non-measured time. The Basic Principle: Communicative Freedom In many conversations, participants take positions that for them are no longer negotiable because they hold their assumptions to be truths and defend them even against overwhelming evidence of their absurdity. Caught up in our own prejudices, fears and feelings we often listen to ourselves and not to the others. We often accuse the other of not listen- ing and being prejudiced and prefer to not see those ﬂaws in our own thinking. We seldom ask real questions and more often than not produce opinionated statements to which we add a question mark. In many encounters that are termed dialogue the participants do not question their own assumptions and take positions that they see as non-negotiable. We all bring assumptions about ourselves, others, the world, our societies, relationships and ways of life to the encounter. In today’s world, people will encounter others that come from different cultures with different cultural assumptions. And here the problems is as Bohm writes (1996, 11) “And they may not realize it, but they have some tendency to defend their assumptions and opinions reactively against evidence that they are not right, or simply a similar tendency to defend them against somebody who has another opinion”. Many conversations are in fact negotiat- ing processes in which ideas are traded off against each other seeking accommodations that will satisfy all participants. Negotiating blocks the deep dialogue. Freedom as “communicative freedom” means that people should be free to accept or reject each other’s claims on the basis of reasons they can evaluate. The respect for the communicative freedom of others is a basic recognition of their human agency (Benhabib 2011, 68). It requires that we accept the other as fundamentally different from us and see their alterity as a unique feature that cannot be assimilated and reduced to similarity. Communicative freedom is the capacity “to agree or disagree with me on the basis of reasons the validity of which you accept or reject” (ibidem, 67). Freedom of communication means that people should be free to accept or reject each other’s claims on the basis of reasons they can evaluate and explore the arguments that seek to justify positions and beliefs. Positions can be justiﬁed from various perspectives. Justiﬁcation is inherently perspectivist. Different beliefs can be justiﬁed. The dialogue opens the possibility of recognizing that a different position is justiﬁed and that there can be real differences and genuine Otherness. In the deep dialogue, participants do not hold on to only one position as the absolute truth. They accept the willingness to cope with real and deep differences. The respect for the communicative freedom of the other— who shares in our common humanity, including those who communicate in different ways like children, or the mentally ill—is a recognition of the dignity of human agency. If we deny people agency we do not accept them as autonomous beings, as beings deﬁned by themselves and in charge of their own lives. Communicative freedom is characterized by the equality of communication partners to initiate communication, the symmetrical entitlement to speech acts, and the reciprocity of communication roles. The essential features or requirements of the deep dialogue are interre- lated. The deep dialogue is a cooperative relation which requires trusting the other in the sense of accepting the communicative freedom of the other and this works only if participants in the relation take their time to ﬁnd conﬁdence in the reliability of the other. Song and Dance However, meaningful our verbal discourse in our interaction with others may be, the expression of our feelings about ourselves and others requires the additional instruments of singing and dancing. Language is “a most wondrous invention for conveying bald information, but fails most of us totally when we want to express the deepest reaches of our innermost souls” (ibidem, 148). Dunbar argues that as we were acquiring the ability to argue and rationalize, we needed a more primitive emotional mecha- nism to bond our large groups. “Something deeper and more emotional was needed to empower the old logic of verbal arguments” (ibidem, 148). And he suggests that “language allowed us to ﬁnd out about each other, to ask and answer questions about who was doing what with whom. But of itself, it does not bond groups together….it seems that we needed music and physical touch to do that” (ibidem, 148). “One of the more intriguing features of human behaviour is the extent to which song and dance feature in our social life. No known society lacks these two phe- nomena” (ibidem, 142). The important thing about song and dance is that we love it! It is hard work but the remuneration is that it produces opiates that cause collective joy that overcomes the emotional inadequacy of human language. In the deep dialogue, human conversation needs to employ in addition to the tool of human language such age-old evolutionary tools as ecstatic song and dance. These “represent an important part of human cultural heritage” (Ehrenreich 2007, 19). Our ancestors seemed to invest a lot of time and energy in collective joy. The evolutionary function of dance was “to enable- or encourage- humans to live in groups larger than small bands of closely related individuals” (ibidem, 23). Collective dancing was experienced as a pleasurable way to build communities. Where words fail, music speaks. (Hans Christian Andersen) Recent research by Sebastian Kirschner and Michael Tomasello (2010) ﬁnds support for the hypothesis that joint music making among 4-year- old children increases subsequent spontaneous cooperative and helpful behaviour. They argue that group music making effectively satisﬁes intrin- sic human needs to share emotions, experiences and activities. In Paris one ﬁnds in the rue Saint-Jacques the Ecole Supérieure de Musique, Danse, et d’Art Dramatique. Satie, Debussy, Albéniz and Messiaen taught there. Cole Porter studied there. This imaginative school that began as Schola Cantorum genuinely cares for music. Its statement on the spirit of musical education declares “elle n’accepte pas l’esprit de competition qu’introduit trop souvent dans beaucoup d’etablissements la notion de ‘concours’”. In this school, one does not make music against one another but one makes music with one another (Carhart 2002, 174). The Portuguese piano vir- tuoso Maria Pires practises this counsel in her music education. For her, learning to play music is an adventurous exploration rather than an effort to impress parents and teachers. Because of the competitive drive in many conservatories around the world, most musical education is ﬁne for highly motivated and talented children, but does little to develop motivation and talent for all the others. Pires wants her students to discover the fun in music and the love for music and discourages them to participate in con- tests. The competitive drive stands in the way of really listening to the music and cooperating with others. One of the grand old men of jazz music, the late Hank Jones, once said after a concert, “I never compete with fellow musicians, I only try to play better than I did yesterday and I do this by listening to the others, particularly the young ones”. Music making has special qualities that can help us to learn the art of genuine conversation. From music we can learn that one does not communicate against each other but with each other. Music has a direct impact on our emotional state of mind. Music inﬂuences behaviour and the readiness to help others is greater after listening to pleasant music. Collective music making leads to surges of endorphin within the brain which makes peo- ple more friendly disposed towards each other. Music making is also likely to release the neurotransmitter oxytocin in the brain which particularly in musical ﬂash mobs stimulates social bonding. Music is a great teacher of “conviviality”. The concept convivial denotes the combination of cheer- fulness with helpfulness. A common association with music is the emotion of happiness (Higgins 2012, 142). The link is important as we know from a range of experiments in social psychology that happy people tend to be helpful and cooperative (Mithen 2006, 99). Collective live music making creates participation, inclusiveness and community. In relation to my plea for collective and communal resilience it also needs to be observed that “what seems one of music’s universal roles in human experience- its pro- motion of feelings of security-can, ironically, serve highly divisive ends” (Higgins 2012, 149). “Music’s impact on our sense of security and its power to create power cohesion makes it serviceable to sectarian purpos- es” (ibidem, 182). An interesting point that needs to be raised in connec- tion with the universality of collective joy is that “The diversity of ways in which cultures shape their musical styles can be impediments to cross- cultural musical understanding” (Higgins 2012, 68). These impediments can be unfamiliar cultural symbols and contents, but also unfamiliar tim- bres, tuning, musical schemes or rhythmic patterns. There are however ways to overcome this and to become more at ease with different types of music. We can develop new schemata to familiarize ourselves with non- familiar musical idioms. “Becoming acquainted” with a culture’s music is akin to learning a foreign language (ibidem, 74). And as she adds this is “inevitably a gradual process”. In becoming familiar with what is cultur- ally unfamiliar there are helpful universals. “Both transcultural universals –such as the preference for symmetry, balance and clarity- and pancul- tural universals –such as the preference for displays of vitality- can direct what we attempt to hear in foreign music as well as offer bases for tak- ing pleasure in it” (ibidem, 75). For celebrations of collective joy it is essential to recognize the universal signiﬁcance of music in rituals “be- cause it ‘signiﬁes’ other non-musical concepts involving human affect and communication” (Harwood, cited in Higgings, 61). Musical content is universally expressed by means of words that refer to universal human experiences such as joy, love, anger, protest, solitude and sadness. There are important universals in the experience of music. It is more often than not made in groups—it creates feelings of community, and is exercised in ceremonial-ritual contexts, it is strongly associated with basic human emotions that are expressed in words and movements, and has strong communicative signiﬁcance that makes it worldwide vulnerable to cen- sorship by the powers that be. Music can stimulate the recognition of a common humanity across cultural differences but it may at the same time stimulate divisiveness. The strong feeling of belonging to one’s own community may get stronger the more others are excluded. “Music has charms to soothe a savage breast, to soften rocks, or bend a knotted oak”. This statement by William Congreve in the seventeenth century is a beautiful wording of the general feeling that music has a positive function for individuals and communities. We must however be warned against over-romantic ideas about music. Music also has had in his history a very questionable relationship to inhuman forms of human behaviour. There is a substantial amount of historical evidence to show “the dark side of the tune” (Johnson and Cloonan 2009). Music has accompanied extreme violence—in Nazi death camps—and has incited to violence through war cries, national anthems and hate songs in vari- ous conﬂicts, such as in Northern Ireland, former Yugoslavia and Rwanda (ibidem, 96 and 97). Indian popstar Laxmi Dubey sings that we will chase the terrorists from our blessed country. Her songs in the Hindutva genre are enormously popular. They represent the Hindu nationalism that Mus- lims in India experience as a real threat. Laxmi Dubey incites her Hindu audiences to ﬁght against godless religions and cut tongues of people who speak ill of the Hindu god Ram. A dubious—but probably less lethal— practice of mind manipulation has also developed in shopping malls and restaurants where music is used to stimulate more consumptive behaviour. Music is also used to clean up public spaces. Youth gangs have been dispersed with the music of Bing Crosby and Cliff Richard. However innocent this control of human behaviour seems it raises serious issues of power relations, citizenship and access to public space (ibidem, 185). The dark side of music actually strengthens the argument for musical education and musical literacy. As Johnson and Cloonan argue “to be literate in the modern world- and thus to be an active citizen- a level of musical literacy is required as part of a broader notion of literacies. Genuine musical literacy would involve not only appreciation of music, but also a considered approach to one’s own use of music” (ibidem, 185). Sanctuaries The deep dialogue requires “sanctuaries”: open spaces without authority or hierarchy for creative and free encounters in which we can let any- thing be talked about. The deep dialogue requires safe and convivial envi- ronments. We need sanctuaries for creative critical thinking together. It requires what Gordon Burghardt calls “a relaxed ﬁeld” (Burghardt 2005). Conclusion The deep dialogue as essential form of human cooperative communica- tion is basic to creating resilient communities that can celebrate moments of sheer human togetherness which makes them: “communities of peace”. In this chapter, I have outlined the principles of such dialogue. We now need to see that “In opposition to them stand the elements that proﬁt from divisions between the peoples, the contra-human in men, the subhu- man, the enemy of man’s will to become a true humanity” (Buber 1999, 239). As Buber wrote “The name Satan means in Hebrew the hinderer. ….the designation for the anti-human in individuals and in the human race. Let us not allow this Satanic element in men to hinder us from real- izing man! Let us release speech from its ban! Let us dare, despite all, to trust”. In the following chapter, I want to explore and identify the “hinderers”: the conditions that stand in the way of the deep dialogue and thus obstruct peace as moments in which we celebrate the collec- tive joy of human togetherness. It will be a tall order to overcome these conditions. [NOTES OMITTED] [CHAPTER 4 BEGINS]

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Let me summarize the argument so far. I proposed to conceptualize peace as moments in which we celebrate the collective joy of sheer human togetherness. Following this I have suggested that collective celebrations are seriously challenged by our polarized societies. The deep fractures that divide us pose a serious existential risk to humanity and stand in the way of collectively celebrating cosmopolitan togetherness. The form of human cooperative communication we need to build resilient communities that can confront polarization is the genuine conversation that I called “deep dialogue”. This conversational mode of human communication is hindered by formidable adversaries. These are found in the features of common human communicative behaviour and in the ﬂaws of its facilitating environment.

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The ways in which many of us communicate daily with others are inimical to the requirements of the deep dialogue. I will focus especially on the challenges to trust since the issue of deceptive versus authentic communication has become so fundamental in our “post-truth era”. The three leading questions are: Can we trust each other in our conversations; can we trust those who govern us and can we trust the mediators between the reality of the world and our own reality? Can We Trust Each Other in Our Conversations? A little sincerity is a dangerous thing and a great deal is absolutely fatal. (Oscar Wilde) “We human beings are torn by a fundamental conﬂict- our deeply ingrained propensity to lie to ourselves and to others, and the desire to think of ourselves as good and honest people. So we justify our dishon- esty by telling ourselves stories about why our actions are acceptable and sometimes even admirable” (Ariely 2012, 166). Ariely gives two main motivations for lying. An economic and a psychological. “we want to ben- eﬁt from cheating……we want to be able to view ourselves as wonderful human beings” (ibidem, 237). We manage to do both by “our capacity for ﬂexible reasoning and rationalization” (ibidem, 237). This works as long as we cheat only a little bit. And “all of us are perfectly capable of cheating a little bit” (ibidem, 238). Although we have to recognize that we also often let opportunities at cheating pass by, Ariely concludes that the experiments he conducted “are indicative of dishonesty in society at large” (ibidem, 239). Good individuals, companies, credit card compa- nies, and banks all cheat but just a little. Liars We lie through our teeth.1 We are certainly lying when we say we never lie. Many of our interactions are characterized by untruthful communi- cation: between sales people and customers, between politicians and vot- ers, between employers and employees, parents and children, doctors and patients, between acquaintances, colleagues, neighbours and loved ones. The lie is an important instrument in our communication. Lying has been around since the beginning of time, in any culture, social class, any age and has probably been done by all types of animals. People cook up about two stories a day on average, according to social psychologist Bella M. DePaulo, of the University of California, Santa Barbara, who conducted a 2003 study in which participants ﬁlled out “lie diaries”. It takes time, however, to become skilled liars. A 2015 study with more than 1000 par- ticipants looked at lying by people in the Netherlands aged six to 77. Children, the analysis found, initially have difﬁculty formulating believ- able lies, but proﬁciency improves with age. Young adults between 18 and 29 do it best. After about the age of 45, we begin to lose this ability. Current thinking about the psychological processes involved in deception holds that people typically tell the truth more easily than they tell a lie and that lying requires far more cognitive resources. Telling a lie implies that we have to invent a plausible scenario that does not contradict observable facts. We must also assess the reactions of the listener to our lie so we can adapt our original story line. Moreover, we must consciously decide to transgress a social norm. According to psychologist Backbier, people tend to lie when this is functional. This is the case when the liar considers the lie the best way (or at least more effective than speaking the truth) of determining the progress of personal or social interactions (2001, 115). Her research also shows that a lot of lies are told about diseases people do or don’t have (ibidem, 146). A motive for lying about your health can be that people want to hide a condition if it is regarded as negative (scary, contagious or threatening) and fear that they will be rejected as a person. People also lie about their ailments if they want to achieve some- thing that could be hindered by an ailment. On the other hand, people also say they have a medical condition if they are trying to wriggle their way out of something, if they expect to receive something or if they want to keep something, they really like. People lie about all sorts of topics: facts, events, other people, feelings, dreams, wishes, desires, fears, per- sonal qualities and political views. Lying forms an inescapable part of the way in which people interact. Lying could be described as a deliberate and purposeful act to deceive. The liar makes a statement (active lying) or withholds something (passive lying) with the intention to deceive the other person, meaning that he intentionally tries to convince the other of something of which the liar knows or suspects that it is not true. This deﬁnition focuses on the intention of the liar and not on whether what said or withheld is true. Lying is therefore not just making untrue state- ments. The person making an untrue statement is not per deﬁnition a liar. If someone considers that an untrue statement is true and he does not intend to mislead the other, this concerns an inability, rather than lying. However, such statements can have the same effect as lies and deceive people. Also statements that are, in itself true, can be told in such a tone of voice or body language that the person spoken to is deceived and thinks: “Surely that cannot be true”. It is therefore also possible to mislead oth- ers with statements that are in fact true. This does involve (passive) lies, such as that in the story of Saint Athanasius who was accused of treason. He tried to escape. When the people who followed him caught up, they did not recognize him. They asked him if he knew where the traitor was. Athanasius looked back and said truthfully: “He was there just a minute ago. I am sure. He is very close by”. Athanasius spoke the truth and was deceptive at the same time. Who could blame him? We often consider passive lying as being not as bad as active lying, but it can still do a lot of damage. Passive lying is often a lot easier as you don’t need to remember as much and if you get caught, you can always say that you didn’t know or you were planning to say it. There are many different levels of lying. We usually distinguish between the white lie (which is usually not intended to harm others) and the inten- tional deception. There is also a distinction between pro-social lies and antisocial, damaging lies. And in between these forms there is a large grey area of statements that consist of a combination of true and untrue ele- ments, or the withholding thereof. White lies are often “routine lies”. These act as a lubricant of our social contacts. Still, this good-natured form of lying can easily evolve into a permanent lie whereby the liar can hardly tell the difference between a lie and the truth. But even well intended lies can have devastating consequences once the betrayal is dis- covered. The compliments one makes a host on the especially delicious food are part of civilized interaction. If the guests afterwards say that they will grab something nice to eat, unintentionally within the host’s earshot, then the good-natured lie can turn into a hostility for life. However good the white lie was intended, this is a form of deception and can seriously jeopardize the trust between people. Small and big lies form part of all human interactions. William Shakespeare’s sonnet says it all: “When my love swears she is made of truth, I do believe her, though I know she lies”. Many lies have been told by loved ones, and that may be a good thing, because the truth and nothing but the truth would increase the already extensive number of divorces. Parents lie to their children and children lie to their parents. But should parent share their vices, depres- sions and betrayal with their children? The evolutionary interest requires that parents present themselves as being better than they are. And children shouldn’t tell their parents everything in order for them to develop as independent people. A famous saying goes: “Children and drunk people tell the truth”. Although it is unclear to what extent drunk people tell the truth, it is certainly not true for children. They are good liars. Children lie to save themselves from sticky situations, to avoid punishment or because they are ashamed of something. They can tell the most fantastic stories, for example, that the cat ate all the candy or that an elephant broke the teacups. Particularly children of four or ﬁve years old love telling unbe- lievable tales and enjoy creating them. A conclusion of the research con- ducted by Wendy Gamble from the School of Family and Consumer Sci- ences at the University of Arizona in Tucson is that although the number of lies does increase as they get older, it is for a large part linked to social aspects. Children often try to help or protect others by lying. They get better as con artists when they realize that if you confess, you may be punished but if you lie, you may get away with your mischief. Our brain operates with feedback loops that make performance of similar actions in the future easier to perform. For lying this means that it gets easier the more you do it. But this also holds for honesty. A recent study out of the University of Chicago in which participants were asked to be more honest for a few days reported that participants discovered that honesty is actually way more pleasant than they thought it would be. “People gen- erally assume that others will react negatively towards increased honesty. As a result, people assume that honest conversations will be personally distressing and harm their relationships. In reality, honesty is much more enjoyable and less harmful for relationships than people anticipate”, writes Emma Levine (2015, 2013). In their study on deception and trust, Levine and Schweitzer challenge the assertion that deception harms trust. They demonstrated that some types of deception increase trust. “Across ﬁve studies, we demonstrate that pro-social lying increases both behavioural and attitudinal measures of trust. We ﬁnd that perceived benevolence is more important than perceived integrity in predicting trust behaviour. We also ﬁnd that deception, regardless of outcomes or intentions, harms integrity-based trust, a previously unexplored dimension of trust. This work expands our understanding of deception and deepens our insight into the mechanics of trust” (Levine and Schweitzer 2013). In 2003 DePaulo and her colleagues summarized 120 behaviour studies, conclud- ing that liars tend to seem more tense and that their stories lack vivid- ness, leaving out the unusual details that would generally be included in honest descriptions. Liars also correct themselves less. Their stories are often too smooth. Yet such characteristics do not sufﬁce to identify a liar conclusively and at most, they serve as clues. In another analysis of mul- tiple studies, DePaulo and a co-author found that people can distinguish a lie from the truth about 54% of the time, just slightly better than if they had guessed. But even those who encounter liars frequently—such as the police, judges and psychologists—can have trouble recognizing a con artist. In the Journal Nature Neuroscience (2016) psychologist Dan Ariely and colleagues showed how dishonesty alters people’s brains, mak- ing it easier to tell lies in the future. When people uttered a falsehood, the scientists noticed a burst of activity in their amygdala. The amygdala is a crucial part of the brain that produces fear, anxiety and emotional responses—including that sinking, guilty feeling you get when you lie. But when scientists had their subjects play a game in which they won money by deceiving their partner, they noticed the negative signals from the amygdala began to decrease. Not only that, but when people faced no consequences for dishonesty, their falsehoods tended to get even more sensational. Lying, in effect, desensitizes your brain to the fear of getting caught or hurting others, making lying for your own beneﬁt down the road much easier. Why do people lie? The series of motives is endless. (Gaspar et al. 2015) People lie to advantage or protect themselves or their loved ones, to dis- advantage others, to hide something, to keep something, to brag about something, to provoke, to exercise power, to be liked and to inﬂuence the behaviour or thinking of others. People also lie out of fear, anger, shame, jealousy, courtesy, love, hate, rancour, bullying, laziness or just thoughtlessness. A doctor can lie for therapeutic reasons when he con- siders the truth of the diagnosis too burdensome for the patient. There can be strategic motives, for example, lying to the enemy in times of war as one needs to prevent their own people from suffering damage, while causing as much damage as possible to the enemy. It can also be that personality disorders initiate lies. Lying can be a form of chronic sick behaviour. The pathological liar devises fantastic lies about all types of subjects, such as his wonderful performance, his special qualities, posses- sions, the higher or lower background, famous friends or terrible disasters he has experienced and whereby the liar acted as a hero. Conmen often use such fantastic stories and these chronic liars manage to gain the trust of others in a charming and intelligent way. A very nasty type of compul- sive lying is found in people suffering from a borderline syndrome. Bor- derliners are often impulsive, moody and self-destructive people who can lie in a very dramatic way. Their devious lies on the alleged incorrect or unreliable behaviour of people around them cause divides and arguments. When asked what they contributed to the argument, they play innocent or feign loss of memory. The category sick liars include the theatrical, affected personalities who can rationalize their own lies so well that they believe them or in any case do not have any feelings of guilt. This type of liar manipulates everything and everyone to achieve his goal and is a master at using deceptive ﬂattery. The classic type is the Don Juan. Then there is the narcissistic personality who lives with grand illusions about himself. He needs lies and deceit to maintain the illusion. The authen- tic pathological liar is someone who cannot lie. The extreme compulsive form of this psychological disorder is very rare. People lie to gain a ben- eﬁt, but they also lie because it makes it easier to live together. After all, the truth can be devilish and destructive. The theologian Dietrich Bon- hoeffer referred to this devilish truth. He wrote: “There is a truth which is of Satan” (1955, 328). He refers to the unmerciful truth of the cynic, who will, without reason, tell anyone what he considers to be the truth, and be equally rude to anyone anywhere: “He wounds shame, desecrates mystery, breaks conﬁdence, betrays the community in which he lives, and laughs arrogantly at the devastation he has wrought and at the human weakness which cannot bear the truth” (ibidem). “The truth and noth- ing but the truth” unhinges social and personal lives and ruins the trust between people. An example of such an unmerciful truth is the confessing during one’s death bed to having cheated during the marriage. It releases the dying person of the burden of the lie, but can have a devastating effect for the surviving partner. Recent psychological research has shown that lies are often not discov- ered. All the usual signs expected with regard to the revealing behaviour liars might display, appear not to be true. Indicators such as nervous behaviour, blushing, tone of voice, stuttering, speaking rapidly, blinking your eyes or looking away are not proof that someone is lying. When comparing test people who lie and those who speak the truth, the dif- ference in body language appears to be minimal. The saying “the truth will come out” is not always true. Liars very often get away it. However, much we reject lying in “theory”, a good liar is very much appreciated. Liars are generally considered nicer than people who always tell the truth. Until the lie is uncovered of course. The lie is even deeply anchored in our brains. If we consider our brains as a source of information we are always permanently lied to by our brains. Our brains show us things that are not there, leave certain information out or emphasize one detail over the other. We can show this by a simple experiment. Just look at two circles that are of equal dimensions. If they are in a different environment, our brains tell us that they are not equal in size. Our brains also tell us that the same colours are not the same when the colours in the background differ. Our brains have a strong tendency to ignore the similarities and to emphasize the differences. The animal kingdom is also familiar with the phenomenon of decep- tion. Animals can deceive their enemies. Some butterﬂies have drawings on their wings that deceive birds of prey. Many birds will boast their feath- ers in order to pretend that they are bigger than they are and impress their peers. In doing this, they scare off competition and increase their chances of reproduction. Some animals, like cats and dogs, may also discover that their deceit has good results in the form of attention and sympathy. Pri- matologists have collected a lot of data the past ten years that seem to show that various types of primates do indeed show intentional deceptive behaviour. They seem to realize that they are deceiving other animals. In particular with regard to hiding food chimpanzees seem to deceive each other intentionally and strategically on where food can be found. The lie is therefore a very natural occurrence. If lying is often so successful, why would anyone want to tell the truth? Speaking the truth is an ancient form of civilization. In the world of religions, truth is a basic understand- ing. The Old and New Testament are clear in their rejection of the lie. The ninth commandment in the Act of the Lords (Exodus 20:16) warns against making false statements. Psalm 5:7 says “You destroy those who speak lies; the Lord abhors the bloodthirsty and deceitful man”. In the bible book Leviticus (19:11) God told Moses: “Thou shalt not steal, lie or deceive”. According to John 8:44, Satan is the father of the lie and in his ﬁrst letter to Timothy Paul places liars in the same category as father killers, mother killers, harlots and abductors. Along with this strict moral truth requirement, the stories of the Old and New Testament confront the reader with a long series of liars. Deception and ruses are discussed immediately in the ﬁrst chapter of the bible. The snake in paradise lied to Eve that she would be equal to the God if she were to eat the for- bidden fruit. When Eve was seduced by this lie, this resulted in a nasty situation. When Adam and Eve were driven out paradise, they had two sons: Cain and Abel. Because Cain was jealous of his brother, he beat him to death and when God asked where Abel was, he lied: “I don’t know”. The wife of patriarch Abraham, Sarah, lied, just as Jacob who, in turn, was also deceived. And then there were liars, such as King David, the whore Rahab, the traitor Judas and the disciple Peter. The high standard was seemingly not achieved by many of the main characters of the holy writ. The Islam forbids the lie in respect of Allah and the prophet Mohammed. However, in the tradition of Islam teachers we do see that lies and deception are permitted under certain circumstances. The famous and respected Muslim-theologian Imam Abu Hammid Ghazali says the following about truth and lies: “Speaking is a means to achieve objec- tives. If a praiseworthy aim is attainable through both telling the truth and lying, it is unlawful to accomplish through lying because there is no need for it. When it is possible to achieve such an aim by lying but not by telling the truth, it is permissible to lie if attaining the goal is permissible” (from: Ahmad ibn Naqib al-Misri, The Reliance of the Traveller, Amana Publications, 1997, 745). Although speaking the truth is preferred, lying is permitted in certain situations. Classic Indian literature considers honesty and trust to be important standards. At the same time, we see that in the Ramayana epos even the noblest characters lie and cheat. This involves the “white lie” for which excuses can be made because someone needed to be protected. On the one hand, there is clarity on the moral principle. On the other hand, there is the necessity to deviate from this norm. People lie and deceive and are obsessed with the truth at the same time. The truth as the norm and the lie as practice often results in the peculiar moral paradox of liars who want to hear the truth and who don’t want others to lie. Parents who may regularly lie to their children still do not want their children to lie! In a study by Harding and Phillips in 1986 (in ten West-European countries) into the qualities parents preferably wish to transfer to their children, it appears that “honesty” scores highest. This conﬂict is understandable because although lying can be seen as inevitable it is also considered morally despicable. Moreover, there are good argu- ments for speaking the truth. The most powerful argument that is usually mentioned is the necessity of social and relational trust. In social and per- sonal relations mutual trust is essential. The lie undermines this trust and reduces the basis of human society. We realize that if everyone continu- ously lies to everyone else social life would be unbearable. In her ground breaking study on moral choice in public and private life Sissela Bok anal- ysed the lie and how it affects the basis of human society (Bok 1978). An argument against lying is that the liar uses the other person to do things that he would not have done without the lie. In doing so, lying damages the freedom of people. Lying limits the freedom of others to determine their own ideas and opinions. No matter how much we seek to ﬁnd the truth, as an individual we often are required to join in the lies. If you were the only one to speak the truth in an environment where everyone lies and deceives, you will probably lose. It is simply too risky to be honest always and everywhere and to be open while others tried to merchandise their doubtful products or doubtful qualities with faked enthusiasm or poker faces. It is just like at a reception where everyone starts talking louder and louder in order to be heard. When you con- tinue talking at a normal level, you will simply not be heard. You are better off going home. It is easy to see how lying reduces the level of trust between individuals and so threatens the stability of societies. Yet, societies survive all this lying. Probably because people manage to ﬁnd balances between the white lies that beneﬁt people being lied to, and the antisocial black lies that beneﬁt the liar. Gerardo Iñiguez and collabora- tors at Aalto University (2014) worked out a model in which the act of lying is considered to be antisocial when it tends to increase the differ- ence in opinion between two individuals and so weakens their ties. The act of lying is considered to be pro-social when it tends to reduce the dif- ference in opinion between two individuals and so strengthens their ties. The model captures the effect of both white lies and antisocial lies on the broader society. The results provide the insight that when everybody is an antisocial liar, society simply fragments because links between individ- uals are constantly broken. Nobody can trust anybody else. But the other extreme is equally strange. When everybody is honest, society becomes a uniform mass with no major difference of opinion. The greatest diversity occurs when there is a certain amount of deception. In that case, pro- social lies strengthen ties while antisocial lies weaken them. This tension allows diversity to ﬂourish. “The results of our study suggest that not all lies are bad or necessarily socially destructive; in fact, it seems that some lies may even enhance the cohesion of the society as a whole and help to create links with other people” (ibidem). This suggests that far from destroying society, lies actually help it to function properly and the bal- ance between pro- and antisocial lies looks to be crucial. “In effect, some kinds of lies might actually be essential to the smooth running of society” (ibidem). Surge in Dishonesty It seems to me that lying has reached epidemic proportions in recent years and that we have all become immunised. (Benjamin Bradlee)

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The standard of being truthful is almost permanently undermined by the increased dishonesty in society. There is number of reasons for this epidemic lying (Bradlee 1991). In any area (such as education, sports, politics and business) the necessity of competitive behaviour has strongly increased. In order to compete successfully, deceit is practically unavoidable. Being open and honest simply cannot win all those battles. Modern society is mainly a market economy. Social life is governed by all types of commercialization. All this buying and selling only work if people believe, it is in their interest and that they get value for their money. Due to the excessive amount of goods and services on offer, the purchase must be promoted as being unique, exclusive and available for a competitive price. As the daily stream of advertising de-sensitizes the public, more and more strong impulses are required to do things and buy things they really don’t need. In a commercial society, you will see what is referred to as the “calculating” person. This moral calculating person will ﬁnd it increasingly easy to weigh the beneﬁts and disadvantages of the deceit against each other and will often conclude that deceit is rewarding.

#### Scenario 2---FIFTH AMENDMENT:

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

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

V. IN SEARCH OF A PROPER CONSTITUTIONAL BALANCE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<<TEXT CONDENSED, NONE OMITTED>>

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

<<PARAGRAPH BREAKS RESUME>>

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

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

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

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

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

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

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

A. History of the Expanding Takings Clause

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

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

<<FOOTNOTE 48 BEGINS>>

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

<<FOOTNOTE 48 ENDS>>

B. Takings Clause Interactions with Bankruptcy Laws

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

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

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

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

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

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

Patents Are Not Equivalent to Physical Property Rights

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

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

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

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

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

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

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

Patents as a Regulatory Framework

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

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

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

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

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

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

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

Conclusion

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

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

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

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

Abstract

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

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

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

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

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

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

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

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

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

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

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

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

#### 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

#### 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.

### Solvency---1AC

#### SOLVENCY:

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

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

B. Recommendations for Judicial Interpretation

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

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

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

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

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

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

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

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

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

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

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

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

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

3. The Rule Favoring Continuity

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

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

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

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

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

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

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

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

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

#### That threads the needle legally, without derailing the bargaining process.

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]

Bankruptcy courts may be courts of equity, 317 but they are still required to follow the letter of the law. 318 While canons of statutory construction may not be in their usual wheelhouse, they are important tools to ensure that a statute is not misread. When there is ambiguity in a statue, a bankruptcy court can and should look to canons of statutory construction to parse congressional intent.3 19 When read closely and with these canons in mind, § 1113 does not allow for rejection of expired CBAs-it instead provides for interim changes to be made to those obligations that "continue in effect" after expiration. Courts interpreting § 1113 should be sure to give each word in the statute meaning; "interim" cannot be glossed over or read out of law. Likewise, variations in terms should be assumed to have significance; a "collective bargaining agreement" must have a different scope than a CBA that "continues in effect." Lastly, courts should be careful to not let the general § 1113 provision to nullify the specific rule in §1113(e). Congress made an exception for expired agreements, and this exception should not be overridden or substituted for judge-made rules based on desired outcomes. This reading not only comports with the text of the statute; it also allows for relief for the debtor without compromising the delicate bargaining process between unions and employers during the post-expiration period.

#### Balancing reduces the prevalence of bankruptcies, without disrupting bankruptcy itself.

Stef ’18 [Nicolae; April 27; Researcher at EconomiX, Paris Nanterre University; International Review of Law and Economics, “Bankruptcy and the difficulty of firing,” vol. 54]

Moreover, two firing regulations play a significant role as determinants of bankruptcy use. Firstly, the employer's legal obligation to notify a third party prior the dismissal of one employee increases the use of bankruptcy. It is very likely that a third party such as a public institution or a labor union act as a legal guardian for the dismissed employee. The employer may endure an intense *ex post* monitoring of the employment contracts and/or a strong legal opposition to the layoff decision from such third party. Secondly, labor codes that apply priority rules in case of reemployment can determine the firm's bankruptcy by harming *ex post* its financial health. It is very likely that the priority rules applied in case of reemployment of unskilled individuals can worsen the financial health of the firm that may be forced to file for bankruptcy. Hence, a legal alternative that could help diminish the growth of bankruptcies without modifying the content of the bankruptcy law could consist in acting on the content of the labor law. However, certain policymakers would want to protect employment at the expense of some bankruptcies in the economy. The trade-off between diminishing the bankruptcy risk and protecting the employees can be the subject of further research.