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# The Bankruptcy Code at Twenty-Five and the Next Generation of Lawmaking

by

Melissa B. Jacoby\*

To those who support traditional bankruptcy policies, or even who simply appreciate good statutory drafting, the Bankruptcy Code looks better than expected on its twenty-fifth birthday. Some post-1978 amendments have marred its elegance,<sup>1</sup> but the Code thus far has escaped unscathed from the four-hundred-and-ninety-one page omnibus bankruptcy bill pending in Congress.<sup>2</sup>

Had the omnibus bill become law, Congress would have left bankruptcy experts with a larger Code to celebrate, but with little enthusiasm for the celebration. Unlike the years preceding enactment of the Bankruptcy Code, members of Congress now hesitate—and may well refuse—to fix even typographical errors at the request of bankruptcy experts.<sup>3</sup> These days, many

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<sup>1</sup>Many post-1978 amendments were fairly narrow special interest exceptions that were not particularly well integrated into the structure of the Bankruptcy Code. See, e.g., Peter A. Alces & David Frisch, *On the UCC Revision Process: A Reply to Dean Scott*, 37 WM. & MARY L. REV. 1217, 1238 (1996) (identifying examples principally from the early 1980s and thereafter); Nancy Blodgett, *Bad Law? Brickbats for Bankruptcy Code*, 70 A.B.A. J. 28 (1984) (quoting Prof. Lawrence P. King criticizing 1984 amendments as special interest legislation not driven by public policy); Daniel J. Bussel, *Textualism's Failures: A Study of Overruled Bankruptcy Decisions*, 53 VAND. L. REV. 887, 900 n.46 (2000) ("In contrast, the many amendments to the Code since 1978 can often be fairly characterized as patchwork, ill thought-through, or special interest legislation insensitive to the overall structure of the Code and bankruptcy policy."); David G. Epstein & Steve H. Nickles, *The National Bankruptcy Review Commission's Section 365 Recommendations and the "Larger Conceptual Issues"*, 102 DICK. L. REV. 679, 698 (1998) ("To date, Congress seems to have avoided any reconsideration of the larger conceptual issues of section 365 by enacting special interest legislation.").

<sup>2</sup>The latest version is the Bankruptcy Abuse Prevention and Consumer Protection Act of 2004, S. 1920 108th Cong. (2004), which is 491 pages in the Government Printing Office edition. Earlier versions have been of varying lengths, but all would add substantially to the size and complexity of the Bankruptcy Code. For a detailed history recounting legislative events from the mid-1990s through the present, see Melissa B. Jacoby, *Negotiating Bankruptcy Legislation through the News Media*, 42 Hous. L. REV. (forthcoming 2004). See also Robert J. Landry III, *The Policy and Forces behind Consumer Bankruptcy Reform: A Classic Battle over Problem Definition*, 33 U. MEM. L. REV. 509 (2003).

<sup>3</sup>See *infra* text accompanying notes 18-30.

members of Congress consider bankruptcy professionals part of the problem, not the solution.<sup>4</sup> In addition, if its indifference to Chapter 12's repeated expiration is any indication, Congress is not actively concerned about the functioning of the system and deals negotiated in its shadow.<sup>5</sup> Bankruptcy experts are not of one mind about most issues, but they collectively have reason to harbor serious concerns about the future of Code-based bankruptcy lawmaking.

Even if Congress had a different attitude,<sup>6</sup> Bankruptcy Code amendment would be an imperfect and incomplete mechanism for system improvement. Overzealous pursuit of legislative solutions to past problems limits flexibility and will not necessarily address the problems of the future.<sup>7</sup> Furthermore, aspects of the federal legislative process may not be well suited to some of the oft-cited substantive goals of bankruptcy, such as equal treatment of similarly-situated creditors.<sup>8</sup> Also, the Code cannot be equipped to solve many of the problems that it confronts, such as overwhelming medical debt.<sup>9</sup> Finally, Congress does not have unfettered power to enact bankruptcy legislation

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<sup>4</sup>Senator Grassley, one of the leading sponsors, set the tone. See, e.g., 144 CONG. REC. S10695 (1998) (Statement of Sen. Grassley) ("Many lawyers who specialize in bankruptcy view bankruptcy as an opportunity to make big money for themselves. This profit motive causes bankruptcy lawyers to promote bankruptcy as the only option, even when a financially troubled client might obviously have the ability to repay some debt. This profit motive creates a real conflict of interest where bankruptcy lawyers push people into bankruptcy who do not belong there and they do it because they get paid up front."); 144 CONG. REC. S10649 (1998) (statement of Sen. Grassley) ("bankruptcy lawyers push people into bankruptcy who don't belong there simply because they want to make a quick buck. . . . I think there is a widespread recognition that bankruptcy lawyers are preying on unsophisticated consumers. . . . It is not surprising that bankruptcy lawyers are leading the charge against this bankruptcy reform legislation. . . . I think it is outrageous, Mr. President, that bankruptcy lawyers are helping deadbeats to cheat to force spouses out of alimony and to cheat children out of child support. . . . The integrity of the bankruptcy system depends in part on the honesty and the competence of bankruptcy lawyers.").

<sup>5</sup>See *infra* text accompanying notes 31-54.

<sup>6</sup>Congress of course is not a single being capable of having an attitude, but I am not the first to anthropomorphize this legislative body. See William W. Buzbee, *The One Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 180 (2000).

<sup>7</sup>See generally Lawrence Ponoroff, *The Dubious Role of Precedent in the Quest for First Principles in the Reform of the Bankruptcy Code: Some Lessons from the Civil Law and Realist Traditions*, 74 AM. BANKR. L.J. 173 (2000). Provisions like § 524(g) (the Johns-Manville amendments) would fit this description. See 11 U.S.C. § 524(g).

<sup>8</sup>See Susan Block-Lieb, *Congress' Temptation to Defect: A Political and Economic Theory of Legislative Resolutions to Financial Common Pool Problems*, 39 ARIZ. L. REV. 801, 870-871 (1997) (concluding that statutory bankruptcy laws are "unstable solutions" to financial common pool problems). Cf. Edward J. Janger, *The Locus of Lawmaking: Uniform State Law, Federal Law, and Bankruptcy Reform*, 74 AM. BANKR. L.J. 97, 113 (2000) (observing that the federal lawmaking process is "not pretty," but it may be better than alternatives). See also Robert A. Hillman, *The Rhetoric of Legal Backfire*, 43 B.C. L. REV. 819, 845-851 (2002) (noting difficulty of actually achieving intended result through legislation); Adam J. Hirsch, *Cognitive Jurisprudence*, 76 S. CAL. L. REV. 1331 (2003) (evaluating the "cognitive frailties" of various types of lawmakers).

<sup>9</sup>See Melissa B. Jacoby, *The Debtor-Patient: In Search of Non-Debt Alternatives*, 69 BROOK. L. REV. 453 (2004).

because the Constitution limits Congressional authorization.<sup>10</sup>

These principles and Congress's posture toward bankruptcy should remind experts to embrace a more complex picture of system development. After all, not only does the bankruptcy system have many attributes that the Code simply cannot explain, but the system has evolved substantially over the last twenty-five years even as the Code has remained relatively constant.<sup>11</sup> In other words, myriad factors contribute to the bankruptcy system.<sup>12</sup> The Code is but one.

As a consequence, Congress has the power to exclude bankruptcy experts from Code deliberations but not from system reform.<sup>13</sup> Bankruptcy professionals help change the system even as they engage in case-specific negotiations and transactions.<sup>14</sup> Bankruptcy experts also participate in system change through the appellate process (whether or not they represent parties in interest in those cases),<sup>15</sup> state legislatures,<sup>16</sup> and even the media, otherwise known as the fourth branch of government.<sup>17</sup> This Article briefly explores the limits of Bankruptcy Code-based lawmaking and these other avenues of reform.

## I. CONGRESS, EXPERTS, AND BANKRUPTCY

I'd like to say, just from a personal perspective, I no longer feel that it's even worth the effort to try and ask Congress to make a reform that should, by and large, be largely non-controversial. There are a number of those reforms I think all of us would agree on, but you don't see anything going to Congress or through Congress in that manner. . . . frankly, I don't care to work with Congress anymore.<sup>18</sup>

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<sup>10</sup>See U.S. CONST. art. I, § 8; Thomas E. Plank, *Bankruptcy and Federalism*, 71 FORDHAM L. REV. 1063, 1068 (2002).

<sup>11</sup>See *infra* text accompanying notes 64-83.

<sup>12</sup>See Lynn M. LoPucki, *The Systems Approach to Law*, 82 CORNELL L. REV. 479, 521 (1997).

<sup>13</sup>I use the term "reform" far more broadly in this Article, than, for example, Black's Law Dictionary, which not only offers a definition of "law reform," but refers to bankruptcy in it: "The process of, or a movement dedicated to, streamlining, modernizing, or otherwise improving a body of law generally or the code governing a particular branch of the law; specif., the investigation and discussion of the law on a topic (e.g., bankruptcy), usu. by a commission or expert committee, with the goal of formulating proposals for change to improve the operation of the law." BLACK'S LAW DICTIONARY 904 (8th ed. 2004). In my conception, system reform can and does happen incrementally.

<sup>14</sup>See *infra* text accompanying notes 75-85.

<sup>15</sup>See *infra* text accompanying notes 92-105.

<sup>16</sup>See *infra* text accompanying notes 106-13.

<sup>17</sup>See DOUGLASS CATER, *THE FOURTH BRANCH OF GOVERNMENT* (1959). See generally *infra* text accompanying notes 114-18.

<sup>18</sup>Roundtable Discussion, *Bankruptcy Reform: Then and Now*, 12 AM. BANKR. INST. L. REV. 299, 327 (2004) (statement of Gerald Smith).

Most members of Congress do not listen to bankruptcy experts today.<sup>19</sup> Not only may some be more receptive to the views of larger monetary contributors,<sup>20</sup> but some managers of bankruptcy legislation are affirmatively distrustful of people who make their living principally through the bankruptcy system.<sup>21</sup> According to Senator Grassley, a principal sponsor of the omnibus bill, bankruptcy professionals are among a “tiny handful of fringe radicals” trying to derail a good bipartisan bill for their own gain.<sup>22</sup> This is a stark change from a time when bankruptcy professionals were intensively involved in the shaping of legislation, particularly at the inception of the 1978 Bankruptcy Code.<sup>23</sup>

The shift in receptiveness to bankruptcy experts has revealed itself in

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<sup>19</sup>Even the Los Angeles Times editorial page knows this. See, e.g., *Bankruptcy Non-Reform*, L.A. TIMES, June 8, 1998, at B4 (“Bankruptcy judges, legal scholars and consumer groups are raising objections, yet Congress seems intent on ramming through frightfully flawed and sweeping changes in the complex law of bankruptcy. Virtually none of the recommendations from the 1997 congressional National Bankruptcy Review Commission are included.”).

<sup>20</sup>See, e.g., Robert J. Landry III, *The Policy and Forces behind Consumer Bankruptcy Reform: A Classic Battle over Problem Definition*, 33 U. MEM. L. REV. 509, 521-523 (2003); Stephen Nunez & Howard Rosenthal, *Bankruptcy Reform in Congress: Committees, Ideology, and Floor Voting in the Legislative Process*, 20 J.L. ECON. & ORG. 527 (2004). See generally Thomas Stratman, *Can Special Interests Buy Congressional Votes? Evidence From Financial Services Legislation*, 45 J.L. & ECON. 345 (2002) (“The results in this paper support the hypothesis that interest groups “buy” legislators’ votes with PAC contributions. The findings show that contributions are most effective in swinging the vote of more junior legislators.”).

<sup>21</sup>See, e.g., 145 CONG. REC. S11561 (1999) (statement of Sen. Kyl) (endorsing letter attributing lawyer criticisms of bill as money driven); 144 CONG. REC. S 10649 (1998) (statement of Sen. Grassley) (“Bankruptcy lawyers are the fuel which makes the engines of the bankruptcy mills run. It is not surprising that bankruptcy lawyers are leading the charge against this bankruptcy reform legislation.”); Rep. Bill McCollum, *Bankruptcy Reform: A Return to Responsibility*, THE HILL, May 20, 1998, at 38 (describing a “campaign of false information being disseminated by bankruptcy attorneys, bankruptcy ‘experts,’ and other people maligning the legislation to further their agendas. However, after subjecting the multitude of half-truths and false statements disseminated by the critics . . . to the light of day, they just don’t stand up.”). Bankruptcy lawyers would find work even if the bankruptcy system disappeared completely, of course. Individuals and firms would still have to work out disputes and financial problems. However, the perception is that bankruptcy lawyers have a vested interest in the status quo. See Tom Hamburger, *Auto Firms See Profit in Bankruptcy-Reform Bill Provision*, WALL ST. J., March 13, 2001, at A28 (industry lobbyist saying bankruptcy establishment likes bankruptcy system how it has been running it); Jacob M. Schlesinger, *Card Games: As Bankruptcies Surge, Creditors Lobby Hard To Get Tougher Laws*, WALL ST. J., June 17, 1998, at A1 (citing lobbyist saying bankruptcy establishment simply prefers status quo).

<sup>22</sup>The full quote from Senator Grassley’s floor statement is: “The tiny handful of fringe radicals who oppose bankruptcy reform have waged a disinformation campaign worthy of a soviet commissar.” Press Release, Floor Statement of Sen. Chuck Grassley of Iowa, Chairman, Subcommittee on Administrative Oversight and the Courts, Bankruptcy Reform (June 20, 2000) (on file with author).

<sup>23</sup>See, e.g., DAVID A. SKEEL, JR., *DEBT’S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* (2001); Jeb Barnes, *Bankrupt Bargain? Bankruptcy Reform and the Politics of Adversarial Legalism*, 13 J. L. & POL. 893 (1997); Bruce G. Carruthers & Terence C. Halliday, *Professionals in Systemic Reform of Bankruptcy Law: The 1978 U.S. Bankruptcy Code and the English Insolvency Act 1986*, 74 AM. BANKR. L.J. 35, 36 (2000) (arguing that bankruptcy professionals played an “exceptional role” in the Bankruptcy Reform Act of 1978); Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 MICH. L. REV. 47, 94-108 (1997); Elizabeth Warren, *The Changing Politics of Bankruptcy Reform*, 37 OSGOODE HALL L.J. 189 (1999).

multiple ways. Congress embraced only small portions of the National Bankruptcy Review Commission's report,<sup>24</sup> which relied heavily on the input of bankruptcy experts. Then, preempting the Commission's report, Congress introduced and nearly passed detailed and complex omnibus legislation that would restrict the discretion of courts and lawyers.<sup>25</sup> Congress generally did not respond to the reams of paper documenting problems—typographical, grammatical, procedural, technical, substantive, policy, and theoretical—with this bill.<sup>26</sup> Congress did not take heed even of organizations that generally represented creditor interests, such as the Commercial Law League,<sup>27</sup> of claims that the legislation would have the opposite effect of that it supposedly intended,<sup>28</sup> or of claims of separate unintended consequences.<sup>29</sup>

Based on these types of experiences, it is difficult to imagine that Congress will be particularly receptive to bankruptcy experts' affirmative requests for legislation in the near future. Consider a possible so-called critical

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<sup>24</sup>For examples of Commission proposals that found their way into the omnibus bill, see Melissa B. Jacoby, *Generosity versus Accessibility: Bankruptcy, Consumer Credit, and Health Care Finance in the US*, in CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE 283 n.77 (Johanna Niemi-Kiesiläinen, Iain Ramsay, William C. Whitford, eds., 2003).

<sup>25</sup>See generally Ted Janger, *Crystals and Mud in Bankruptcy Law: Judicial Competence and Statutory Design*, 43 ARIZ. L. REV. 559 (2001). During this period, Congress also separately enacted provisions to insulate religious contributions made by personal bankruptcy filers, with scant opposition from creditor representatives. See generally John J. Dyer & Gregory Todd Jones, *Judicial Treatment of Charitable Donations in Bankruptcy Before and After the Religious Liberty and Charitable Contribution Protection Act of 1998*, 2 DEPAUL BUS. & COM. L.J. 265 (2004); Steven Walt, *Collective Inaction and Investment: The Political Economy of Delay in Bankruptcy Reform*, 49 EMORY L.J. 1211 (2000).

<sup>26</sup>See William T. Bodoh & Lawrence P. Dempsey, *Bankruptcy Reform: An Orderly Development of Public Policy?*, 49 CLEV. ST. L. REV. 191 (2001); Ted Janger, *Crystals and Mud in Bankruptcy Law: Judicial Competence and Statutory Design*, 43 ARIZ. L. REV. 560 (2001); Ann Morales Olazábal, *Consumer Bankruptcy Reform and 11 U.S.C. § 707(b): A Case-Based Analysis*, 12 B.U. PUB. INT. L. J. 317 (2003); Charles Jordan Tabb, *The Death of Consumer Bankruptcy in the United States?* 18 BANKR. DEV. J. 1 (2001); Catherine E. Vance & Paige Barr, *The Facts & Fiction of Bankruptcy Reform*, 1 DEPAUL BUS. & COM. L. J. 361 (2003).

<sup>27</sup>Copies of testimony and position papers available at [http://www.clbankruptcy.org/bankruptcy/special\\_legislative\\_edition.htm#5](http://www.clbankruptcy.org/bankruptcy/special_legislative_edition.htm#5).

<sup>28</sup>See, e.g., Melissa B. Jacoby, *The Real Bankruptcy Bill*, NAT'L L.J., Nov. 17, 2003, at 42; Hank Hildebrand, *Survey Shows Big Impact of Anti-Lienstripping Provision in S. 625* (May 27, 1999) (on file with author) (finding that bill would produce reduction in unsecured creditor returns and would render some existing plans unconfirmable). For a critique of this approach to commenting on legislation, see Robert A. Hillman, *The Rhetoric of Legal Backfire*, 43 B.C. L. REV. 819, 852 (2002) (noting that "backfire rhetoric tends to create an atmosphere that is not conducive to serious and objective consideration of important issues," although using different types of examples, such as backfire arguments used to defeat consumer protection legislation).

<sup>29</sup>See, e.g., Pamela Kohlman Webster, *The Malpractice of Health Care Bankruptcy Reform*, 32 LOYOLA L.A. L. REV. 1045, 1046 (1999) (explaining that health care provisions in omnibus bill are poorly drafted and would result in "serious unintended consequences"). Of course, the 1978 Code itself had unintended consequences, see Lissa Lamkin Broome, *Payments on Long-Term Debt as Voidable Preferences: The Impact of the 1984 Bankruptcy Amendments*, 1987 DUKE L. J. 78, 99 n.101 (1987), as do other laws. See, e.g., Michael J. Borden, *PSLRA, SLUSA, and Variable Annuities: Overlooked Side Effects of a Potent Legislative Medicine*, 55 MERCER L. REV. 681 (2004).

vendor or employee amendment as an example. Even in the unlikely event that everyone agreed on whether the Code should permit, prohibit, or condition the ability of a debtor-in-possession to pay the pre-petition claims of employees or vendors early in a business bankruptcy case,<sup>30</sup> dare anyone broach Congress with a proposed amendment? Would lawmakers allow bankruptcy experts to help draft it well? What kind of efforts would be required to give Congress sufficient incentive to act on it? Would Congress insist on carving certain groups out of a general amendment, or tack on multiple unrelated and undesirable provisions? As the quote beginning this section suggests, many bankruptcy experts are both weary and wary, and, consequently, likely to stay away from Washington, D.C.

Legislators genuinely might be committed to a legal system even if they chose not to heed the advice of system "insiders." Unfortunately, Congress has demonstrated some indifference to the system too. Many strong proponents of the omnibus bill seem to be unaware of its contents; for example, they assert that the bill does not affect bankruptcy filers other than those with incomes exceeding the national median,<sup>31</sup> and yet this limitation applies to only a tiny fraction of a several-hundred page bill.<sup>32</sup>

Congress' handling of Chapter 12 offers an even more demonstrative and less controversial example. Congress originally enacted Chapter 12 for family farmers on a trial basis, and that initial trial period expired over a decade ago.<sup>33</sup> Congress has temporarily reauthorized Chapter 12 ten times.<sup>34</sup> Ac-

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<sup>30</sup>For a recent court of appeals statement on the issue, see *In re Kmart Corp.*, 359 F.3d 866 (7th Cir. 2004) (upholding district court decision overturning bankruptcy court authorization of \$300 million in critical vendor payments). *Cf. In re Just for Feet, Inc.*, 242 B.R. 821 (D. Del. 1999).

<sup>31</sup>See, e.g., Press Release, New Democrats Coalition Message of the Week, New Democrats Support Bankruptcy Reform (February 26, 2001), available at <http://www.ndol.org/print.cfm?contentid=3099> ("Keep in mind that those earning less than the national median income (about \$51,000 for a family of four) are not affected by this legislation. This bill appropriately targets those who can afford to repay some or all of their debt."). See also Tom Hamburger, *House Legislators Pass Measure to Curb Abuse of Bankruptcy-Protection Laws*, WALL ST. J., March 2, 2001, at B2 (Joe Rubin, former Rep. Gekas staffer, now with U.S. Chamber of Commerce told "wavering" House members "bill is targeted solely at wealthy debtors who have abused the bankruptcy system and can afford to repay their debts."); Stephen Labaton, *Promised Veto Appears to Doom Congressional Agreement on Overhauling Bankruptcy Law*, N.Y. TIMES, October 13, 2000, at A30 (Rep. Gekas saying "[w]e guarantee a fresh start to any American who needs it"); Katherine Ackley & Jacob M. Schlesinger, *House Panel Approves Bankruptcy-Reform Bill*, WALL ST. J., April 29, 1999, at B16 (Rep. Gekas saying bill simply requires filers capable of repaying portion of debts do so).

<sup>32</sup>See, e.g., Bankruptcy Abuse Prevention and Consumer Protection Act of 2004, S. 1920, 108th Cong. §§ 102, 318 (2004) (engrossed amendment as agreed to by the House) (providing that median income is relevant to whether party can move for dismissal or conversion based on abuse, whether new abuse calculation applies to disposable income test in Chapter 13, and to duration of Chapter 13 plans).

<sup>33</sup>See Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088.

<sup>34</sup>See Family Farm Bankruptcies, Extensions, Pub. L. No. 103-65, 107 Stat. 311 (Aug. 6, 1993); Omnibus Consolidated and Emergency Supplemental Appropriations Act 1999, Pub. L. No. 105-277, 112 Stat.

cording to members' statements, Chapter 12 permanence is not only uncontroversial, but desirable.<sup>35</sup> In fact, one reasonably can infer that members of Congress are more comfortable with Chapter 12 than with any other chapter of the Bankruptcy Code. Yet, Congress so far has not permanently authorized Chapter 12; rather, it has let Chapter 12 completely lapse four times, often for many months.<sup>36</sup>

Members of Congress who say they support making Chapter 12 permanent have been open about their interest in tying Chapter 12's fate with the omnibus bankruptcy bill, which itself addresses Chapter 12.<sup>37</sup> Representa-

2681-610 (Oct. 21, 1998); Bankruptcy: Extension of Reenactment of Chapter 12, Family Farmer Indebtedness, Pub. L. No. 106-5, 113 Stat. 9 (March 30, 1999) (effective April 1, 1999); Bankruptcy-Extension of Family Farmer Debt Adjustment, Pub. L. No. 106-70, 113 Stat. 1031 (Oct. 9, 1999) (effective Oct. 1, 1999); Bankruptcy-Chapter 12 Reenactment, Pub. L. No. 107-8, 115 Stat. 10 (May 11, 2001) (effective July 1, 2000); Bankruptcy Chapter 12-Reenactment, Pub. L. No. 107-17, 115 Stat. 151 (June 26, 2001) (effective June 1, 2001); Bankruptcy-Chapter 12 Reenactment, Pub. L. No. 107-170, 116 Stat. 133 (May 7, 2002) (effective Oct. 1, 2001); Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 532 (May 13, 2002) (effective June 1, 2002); Bankruptcy-Chapter 12 Reenactment, Pub. L. No. 107-377, 116 Stat. 3115 (Dec. 19, 2002) (effective Jan. 1, 2003); Family Farmer Bankruptcy Relief Act of 2003, Pub. L. No. 108-73, 117 Stat. 891 (Aug. 15, 2003) (effective July 1, 2003).

<sup>35</sup>See, e.g., Senator Patrick Leahy, Statement on Family Farmer Bankruptcy Protection, H.R. 2465 (July 31, 2003) available at <http://leahy.senate.gov/press/200307/073103d.html> ("Everyone agrees that Chapter 12 has worked."); 149 CONG. REC. H5674 (2003) (statement of Rep. Baldwin) ("there is great consensus that chapter 12 bankruptcy protections work well."); 148 CONG. REC. H6849 (2002) (statement of Rep. Tim Holden) ("Chapter 12 is by no means a controversial issue."); 148 CONG. REC. H6848, 6849-50 (2002) (statement of Rep. Sensenbrenner) (commending Rep. Gekas for leadership and unwavering efforts to make Chapter 12 permanent, and saying farmers and Chapter 12 have been priority from day one of legislation); 146 CONG. REC. H5101 (2000) (statement of Rep. Smith) ("No one disagrees that chapter XII (sic) should be made permanent. No one."). But see United States Department of Agriculture, Economic Research Service, *The Economics of Food, Farming, Natural Resources, and Rural America*, available at <http://www.ers.usda.gov/Briefing/Bankruptcies/questions/> (last modified Aug. 9, 2004) ("However, if one believes that marginal operations should not be given special consideration to keep them in business, then Chapter 12 has not worked well.")

<sup>36</sup>See generally Susan A. Schneider, The National Agricultural Law Center, *An Agricultural Law Research Note, Chapter 12 Bankruptcy: On Again, Off Again* (March 2003, updated February 2004) available at [http://www.nationalaglawcenter.org/assets/articles/schneider\\_ch12.pdf](http://www.nationalaglawcenter.org/assets/articles/schneider_ch12.pdf). The last effective extension (extending Chapter 12 to January 1, 2004) also stated as follows:

(b) All cases commenced or pending under chapter 12 of title 11, United States Code, as reenacted under subsection (a), and all matters and proceedings in or relating to such cases, shall be conducted and determined under such chapter as if such chapter were continued in effect after January 1, 2004. The substantive rights of parties in connection with such cases, matters, and proceedings shall continue to be governed under the law applicable to such cases, matters, and proceedings as if such chapter were continued in effect after January 1, 2004.

Family Farmer Relief Act of 2003, Pub. L. No. 108-73, 117 Stat. 891.

<sup>37</sup>See, e.g., Bankruptcy Abuse Prevention and Consumer Protection Act of 2003, H.R. 975, 108th Cong. § 1001 (2003); Press Release, Senator Chuck Grassley, Grassley: Chapter 12 Bankruptcy For Farmers Extended for Now; President Signs Legislation to Help Farmers Reorganize Debt (May 8, 2002), available at <http://grassley.senate.gov/releases/2002/p02r5-8a.htm> (referring to an extension as a "stopgap measure until we enact the bankruptcy reform bill"); 148 CONG. REC. H6850 (2002) (statement of Rep. Sensenbrenner) (blaming lack of Chapter 12 permanence on President Clinton's veto of omnibus bill);



tive Sensenbrenner even burdened the most recent Chapter 12 extension bill with the entire omnibus bill.<sup>38</sup>

To the extent they thought about it at all, some members of Congress may have believed their inaction to be irrelevant to the system. After all, Chapter 12 comprises only a small subset of bankruptcies unevenly spread throughout the country.<sup>39</sup> But what about lawmakers like Senator Grassley, a friend of family farmers and an early proponent in moving for permanent authorization?<sup>40</sup> Maybe he assumed that farmers would continue to file Chapter 12 petitions even without a currently authorized Chapter 12,<sup>41</sup> or would find appropriate relief in other chapters.<sup>42</sup>

One is reminded of the period following the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*<sup>43</sup> After the Supreme Court declared the bankruptcy court structure unconstitutional, it

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Letter from The Financial Services Roundtable to All Members of the U.S. Senate (Oct. 17, 2000) (praising conference report for omnibus bill for making Chapter 12 permanent, and urging senators to support) (on file with author); 149 CONG. REC. H5673 (2003) (statement of Rep. Baldwin) ("[W]e are told that permanent extension cannot be passed separately from the big bill because taking out a popular item might slow that bill's momentum. We were told we had to strip the permanent extension of chapter 12 from last year's farm bill because it would slow down the bankruptcy bill.")

<sup>38</sup>See Bankruptcy Abuse Prevention and Consumer Protection Act of 2004, S. 1920, 108th Cong. (2004) (engrossed amendment as agreed to by the House). See also *House Rejects NFU-Approved Chapter 12 Bankruptcy Legislation*, 51 NAT'L FARMERS UNION NEWS 6 (Feb. 2004).

<sup>39</sup>See Administrative Office of the United States Courts, Table F-2, U.S. Bankruptcy Courts, Business and Nonbusiness Bankruptcy Cases Commenced, By Chapter of the Bankruptcy Code, During the 12-Month Period Ending September 30, 2003 (1987-2003), available at <http://www.uscourts.gov/bnkrpcty/stats/FY1987-2003.pdf>; Ed Flynn & Gordon Bermant, *Who's Number One?*, AM. BANKR. INST. J., March 1, 2004, at 23 (reporting Nebraska as a leader in annual Chapter 12 filings four times and Texas ten times between 1989 and 2002).

<sup>40</sup>Senator Grassley introduced The Family Farmer Protection Act of 1997, S. 1024, 105th Cong. (1997), as well as the farm bill that initially included chapter 12 permanence. Press Release, Grassley Works to Extend and Expand Chapter 12 Protection for Farmers (January 20, 1999) (inclusion in SAFETY 2000 bill). See generally Jonathan K. Van Patten, *Chapter 12 in the Courts*, 38 S.D. L. REV. 52, 53 (1993) (discussing Senator Grassley's central role in initial enactment of Chapter 12).

<sup>41</sup>As it turns out, family farmers filed only a handful of Chapter 12 petitions during periods of expiration. For example, fewer than twenty Chapter 12 petitions were filed in January through March 31, 2002, and in January through March 31, 2004, when Chapter 12 had expired and not been reauthorized. See Administrative Office of the United States Courts, Business and Non-Business Bankruptcy Cases Commenced, By Chapter of the Bankruptcy Code, available at [http://www.uscourts.gov/Press\\_Releases/302f2\\_3.xls](http://www.uscourts.gov/Press_Releases/302f2_3.xls); [http://www.uscourts.gov/Press\\_Releases/f23mos.xls](http://www.uscourts.gov/Press_Releases/f23mos.xls).

<sup>42</sup>See 148 CONG. REC. H6848, 6849 (2002) (statement of Rep. Sensenbrenner) (noting that in absence of Chapter 12, family farmers can use other chapters, although these do not work as well); Bruce L. Dixon et al., *Factors Affecting State-Level Chapter 12 Filing Rates: A Panel Data Model*, 20 EMORY BANKR. DEV. J. 401, 405 (2004) (speculating that many consumers use Chapter 13 who fit some expansive definitions of family farmer); Bruce L. Dixon et al., *The Chapter 12 Experience in the U.S.: Regional Comparisons and Analysis of Filing, Discharge, and Failure Rates*, 55 AGRIC. FIN. REV. 47 (1995) (discussing use of Chapter 7 for farm bankruptcies).

<sup>43</sup>*Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 459 U.S. 1094 (1982).

stayed its order to give Congress time to act.<sup>44</sup> Yet, it was unclear how the bankruptcy judges had the authority to continue to hear and decide the hundreds of thousands of pending cases in the meantime.<sup>45</sup> Congress did not act in a particularly timely fashion,<sup>46</sup> allowing plenty of time for the legislation to become mired in various special interest issues.<sup>47</sup> The Judicial Conference of the United States tried to ameliorate the situation with its proposed Emergency Rule,<sup>48</sup> although that Rule itself seemed unconstitutional.<sup>49</sup> Yet, for

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<sup>44</sup>*Id.* The opinion was released in June of 1982, but the order was stayed until October 1982, and later extended until December.

<sup>45</sup>See Lynn M. LoPucki, *The Systems Approach to Law*, 82 CORNELL L. REV. 479, 493 (1997) (using Emergency Rule as example of "a system imperative overriding the unambiguous command of the formal law").

<sup>46</sup>Congress did not fix the problem until the Bankruptcy Amendment and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 353 (1984), which became effective in July of that year.

<sup>47</sup>The media framed the debates over this early 1980s bankruptcy legislation as being entangled in special interest lobbying. See *Bankrupt on Bankruptcy*, N.Y. TIMES, March 28, 1984, at 26 (transformation of clean bill into Christmas tree, "disgraceful" bills laden with special interests); *Bankruptcy Bill is Stalled*, N.Y. TIMES, March 30, 1984, at D13 ("lobbying free-for-all . . . deadlock . . . not the result of some lofty dispute of great moment. It is a result of spending both political clout and political dollars by the consumer finance industry, which wants to be protected from the consumer bankruptcies that its easy credit practices often create."); *Bankruptcy Courts are Going Bust*, N.Y. TIMES, September 28, 1982, at 22 (measure to fix court system "could be threatened by amendments that would make it a Christmas tree for creditors."); Bill Keller, *Senate Votes Bankruptcy Bill*, N.Y. TIMES, June 20, 1984, at D19 (discussing provisions desired by lobbying interests); *System in Bankruptcy*, WALL ST. J., April 5, 1984 ("Next, various special interests climbed aboard the legislative train. . . . You can't shed many tears for the special-interest aid in this collapsed legislation."); Stuart Taylor, Jr., *Bankruptcy Court Setup Extended Until April 30*, N.Y. TIMES, March 31, 1984, § 1, at 32 (stopgap measure for courts while working out special interest issues); Stuart Taylor, Jr., *The Free-For-All on the Bankruptcy Express*, N.Y. TIMES, March 2, 1984, at 16 (lobbying free-for-all, three ring circus, with sideshows involving shopping centers, drunk drivers, grain elevators); Jane Bryant Quinn, *Credit Industry Media Hype Pushes Bankruptcy Law Revision*, WASH. POST, December 7, 1981, at 51 ("Consumer-credit industry wants to rewrite the federal law on personal bankruptcies, and is using tactics that would make a sailor blush . . . . Newswriters and broadcasters are being peppered with press releases, asserting that America has become a nation of debt dodgers."). See also William H. Jones, *Creditors Miss Target in War on Bankruptcy Law*, WASH. POST, October 12, 1981, at 1; *Panel Bill Alters Personal Bankruptcy Law; Proposals Aid Creditors: Bid to Bar Some Debtors From Chapter 7 is Ended*, WALL ST. J., April 20, 1983, at 60; Lawrence P. King, *The Plague of the Special Interest Groups*, N.Y. TIMES, March 4, 1984, at § 3, at 2 (opinion piece saying "indeed we may all be the fools, victims of extraordinary lobbying efforts by special interest groups that have held up legislation that would establish a new court because of their selfish demands for unrelated bankruptcy amendments"); Richard B. Levin, *Where Some Fine Tuning Could Help*, N.Y. TIMES, March 4, 1984, § 3, at 2 (opinion piece explaining consumer finance industry's "horror stories of doctors and others with promising futures who escape debt" have not been shown to be frequent). See also Eric Gelman, Christopher Ma and Ann L. McDaniel, *Bankruptcy on the Brink*, NEWSWEEK, March 26, 1984, at 64 ("As Congress moved to correct that [jurisdictional] defect, eager lobbyists" representing lenders, farmers, and even federal judges "cut in to prosecute their own claims, blocking action and turning the orderly dance of legislation into a game of musical chairs," with the loudest objections coming from the consumer credit industry.).

<sup>48</sup>See, e.g., S. Elizabeth Gibson, *Jury Trials and Core Proceedings: The Bankruptcy Court's Uncertain Authority*, 65 AM. BANKR. L.J. 143, 158 (1991).

<sup>49</sup>See Vern Countryman, *Emergency Rule Compounds Emergency*, 57 AM. BANKR. L.J. 1 (1983); Lynn M. LoPucki, *The Systems Approach to Law*, 82 CORNELL L. REV. 479, 494 (1997).

the most part, the system soldiered on, even in the absence of constitutionally valid statutory authority for bankruptcy judges to adjudicate.

Realistically, few members of Congress would have had post-*Marathon* events in mind with respect to Chapter 12 reauthorization. Perhaps they assumed that family farmers would not notice the absence of Chapter 12 from the statute. As it turns out, however, others in and familiar with the small farm industry find the failure to act notable and consequential.<sup>50</sup> In addition to substantially deterring the filing of Chapter 12 cases,<sup>51</sup> the complete absence of Chapter 12 for months at a time may have affected negotiations between lenders and family farmers.<sup>52</sup> After all, although the bankruptcy system develops somewhat independently of the statute, the system can be only so resilient with respect to the disappearance of an entire chapter of the Code.<sup>53</sup>

Unlike the jurisdictional crisis of the early 1980s, the Chapter 12 fix was straightforward and not particularly controversial or time consuming. Congress declined to act. Likewise, Congress has kept the authorization of additional bankruptcy judgeships attached to the omnibus bankruptcy bill notwithstanding the substantial growth in per-judgeship caseload.<sup>54</sup> These examples do not bode well for less favored portions of the Code and for relying on Code amendments to accomplish reform.

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<sup>50</sup>United States Department of Agriculture, Economic Research Service, *The Economics of Food, Farming, Natural Resources, and Rural America* (September 23, 2003) available at <http://www.ers.usda.gov/Briefing/Bankruptcies/questions/>; *House Rejects NFU-Approved Chapter 12 Bankruptcy Legislation*, 51 NAT'L FARMERS UNION NEWS 6 (Feb. 2004) ("NFU President Dave Frederickson said the delay in approving an extension of Chapter 12 places agricultural producers and their families who are faced with bankruptcy in a serious position."); Senator Patrick Leahy, Statement on Family Farmer Bankruptcy Protection, H.R. 2465 (July 31, 2003) available at <http://leahy.senate.gov/press/200307/073103d.html> ("Too many family farmers have been left in legal limbo in bankruptcy courts across the country because Chapter 12 of the Bankruptcy Code is still a temporary measure. Our family farmers do not deserve these lapses in bankruptcy law that could mean the difference between foreclosure and farming."). For a study of the impact of financial failure in family farming generally, see KATHRYN M. DUDLEY, *DEBT AND DISPOSSESSION: FARM LOSS IN AMERICA'S HEARTLAND* (2000).

<sup>51</sup>See *infra* note 41; 146 CONG. REC. H5101 (2000) (explaining why Chapter 11 does not work as well for farmers as Chapter 12).

<sup>52</sup>See, e.g., REPORT OF THE NATIONAL BANKRUPTCY REVIEW COMMISSION 1015 (1997) (describing farmer negotiations in shadow of Chapter 12). Compare Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

<sup>53</sup>On the other hand, a very recent analysis of determinants of Chapter 12 filings does not mention instability of Chapter 12 as a potential determinant. See Bruce L. Dixon et al., *Factors Affecting State-Level Chapter 12 Filing Rates: A Panel Data Model*, 20 EMORY BANKR. DEV. J. 401, 405 (2004).

<sup>54</sup>See, e.g., J. Rich Leonard, *Having Thought About Private Matters: The Federal Courts' Initial Response*, 77 AM. BANKR. L.J. 9, 18 n.31 (2003) (noting how judgeship authorizations have become ensnared in omnibus bill, and comparing to Chapter 12 impasse); Michelle Arnopol Cecil, *Abandonments in Bankruptcy: Unifying Competing Tax and Bankruptcy Policies*, 88 MINN. L. REV. 723, 724 n.9 (2004) (citing Jim Wannamaker, *Record Bankruptcy Filings*, NABTALK, Fall 2002, at 35).

## II. LIMITED BANKRUPTCY CODE CONTROL OF THE CURRENT SYSTEM

Congressional indifference is disappointing, but how much does it matter? To be sure, the Code is the legal backbone for a bankruptcy system that involves hundreds of billions of dollars of assets and is otherwise relevant to the national economy.<sup>55</sup> The Bankruptcy Code also subtly but fundamentally structures the way we think about the law of financial problems of individuals and firms. Consider bankruptcy's role in corporate governance,<sup>56</sup> small business policy,<sup>57</sup> health care finance,<sup>58</sup> consumer protection,<sup>59</sup> consumer credit policy,<sup>60</sup> and debtor-creditor relations. Bankruptcy is closely linked with these issues, but, on account of the Bankruptcy Code, is legally distinct. For example, it is by human action and not inherent logic that consumer bankruptcy is legally separate from other programs for financially distressed families, which, in some instances, may be substitutes for bankruptcy (and vice versa).<sup>61</sup> On the federal level alone, we have a bankruptcy system, a host of cash or in-kind assistance programs,<sup>62</sup> and an entirely distinct military program with some bankruptcy-like features.<sup>63</sup> The choice to produce a

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<sup>55</sup>See Elizabeth Warren & Jay Lawrence Westbrook, *Financial Characteristics of Businesses in Bankruptcy*, 73 AM. BANKR. L.J. 499, 507 (1999), citing LEGAL DEPARTMENT, INTERNATIONAL MONETARY FUND, ORDERLY & EFFECTIVE INSOLVENCY PROCEDURES: KEY ISSUES (Washington 1999); Jay Lawrence Westbrook, *The Control of Wealth in Bankruptcy*, 82 TEX. L. REV. 795 (2004) (citing THE BANKRUPTCY YEARBOOK AND ALMANAC 2003, 38 (Christopher M. McHugh et al., eds., 13th ed. 2003)).

<sup>56</sup>See Karen Gross, *A Response to J.J. White's Death and Resurrection of Secured Credit: Finding Some Trees But Missing the Forest*, 12 AM. BANKR. INST. L. REV. 203, 216-17 (2004); David A. Skeel, Jr., *Corporate Anatomy Lessons*, 113 YALE L.J. 1519 (2004).

<sup>57</sup>See Elizabeth Warren & Jay Lawrence Westbrook, *Financial Characteristics of Businesses in Bankruptcy*, 73 AM. BANKR. L.J. 499 (1999); Wei Fan & Michelle J. White, *Personal Bankruptcy and the Level of Entrepreneurial Activity*, 46 J.L. & ECON. 543 (2003).

<sup>58</sup>See Melissa B. Jacoby, Teresa A. Sullivan & Elizabeth Warren, *Rethinking the Debates Over Health Care Financing: Evidence From the Bankruptcy Courts*, 76 N.Y.U. L. REV. 375 (2001); Melissa B. Jacoby, *The Debtor-Patient: In Search of Non-Debt Alternatives*, 69 BROOK. L. REV. 453 (2004).

<sup>59</sup>See William C. Whitford, *The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy*, 68 AM. BANKR. L.J. 397 (1994).

<sup>60</sup>See, e.g., Bob Herbert, *Living on Borrowed Money*, N.Y. TIMES, Nov. 10, 2003, at 21.

<sup>61</sup>See, e.g., JONATHAN D. FISHER, *THE EFFECT OF TRANSFER PROGRAMS ON PERSONAL BANKRUPTCY* (U.S. Department of Labor, Working Paper No. 346, Oct. 2001) (finding 37.7% of bankruptcy filers in Panel Study of Income Dynamics sample received income from one of several income transfer programs), available at <http://www.bls.gov/ore/pdf/ec010140.pdf>.

<sup>62</sup>See, e.g., A. Mechele Dickerson, *Bankruptcy Reform: Does the End Justify The Means?*, 75 AM. BANKR. L.J. 243 (2001) (arguing that bankruptcy should be viewed as part of the public assistance system).

The federal law and policy governing financial assistance to needy individuals actually spans dozens of programs. See, e.g., General Accounting Office, *Means Tested Programs: Determining Financial Eligibility is Cumbersome and Can Be Simplified*, GAO-02-58 (November 2001) (noting existence of about 80 different means tested federal programs and observing different standards, definitions, and forms used by various programs), available at <http://www.gao.gov/new.items/d0258.pdf>.

<sup>63</sup>The Soldiers' and Sailors' Civil Relief Act, now the Servicemembers Civil Relief Act, suspends

cohesive Bankruptcy Code separate from other laws has so powerfully shaped the architecture of financial distress that we often forget there ever were choices to be made.

Nonetheless, much of the bankruptcy system itself develops irrespective of the Bankruptcy Code. For example, one could never predict, solely from the Code, that Chapter 13 cases would comprise fewer than four percent of consumer filings in the Northern District of Iowa but hit seventy-two percent in the Southern District of Georgia.<sup>64</sup> These very important, and sometimes puzzling, attributes of the consumer bankruptcy system have developed almost entirely through non-statutory means.<sup>65</sup>

In addition, Chapters 7 and 13 are far more similar than the Code and its legislative history would lead a reader to assume.<sup>66</sup> Both Chapter 7 debtors and Chapter 13 debtors tend to keep their property; most consumer debtors

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certain debt obligations for a member of the military when pressed into service. See *Conroy v. Aniskoff*, 507 U.S. 511 (1993). Codified at 50 U.S.C. § 501 *et seq.*, a long-awaited update was signed into law in December 2003. See generally Gregory M. Huckabee, *Congress Does it Again—The Ghost of Major John Wigmores Returns!*, 51 FED. LAWYER 21 (May 2004) (outlining eleven major changes); John T. Meixell, *Servicemembers Civil Relief Act Replaces Soldiers' and Sailors' Civil Relief Act*, Department of the Army Pamphlet 27-50-367, ARMY LAWYER 38 (Dec. 2003); John F. Zink, *Legal Protection for the Citizen Soldier*, 19 ME. BAR J. 98 (2004). This Act has not prevented military families from seeking regular bankruptcy relief, however. See Letter from Derek B. Stewart, General Accounting Office to the Honorable Richard J. Durbin, Military Personnel; Bankruptcy Filings Among Active Duty Service Members, GAO-04-465R (February 27, 2004), available at <http://www.gao.gov/new.items/d04465r.pdf>. Perhaps the recent updates to the Servicemembers Act will make it a better replacement for bankruptcy.

<sup>64</sup>Many researchers have documented and discussed the non-uniformity of Chapter 13 filing ratios. See, e.g., Michael Bork & Susan D. Tuck, *Bankruptcy Statistical Trends: Chapter 13, Adjustment of Debts of an Individual with Regular Income* (Admin. Off. of the U.S. Courts Working Paper No. 1, Jan. 1994); Rafi Efrat, *Legal Culture and Bankruptcy: A Comparative Perspective*, 20 EMORY BANKR. DEV. J. 351 (2004); Ed Flynn et al., *Bankruptcy by the Numbers: A Tale of Two Chapters*, AM. BANKR. INST. J., Oct. 21, 2002, at 20 (2002); Teresa A. Sullivan et al., *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 HARV. J. L. & PUB. POL'Y 801 (1994). This is one of many persistent complaints about non-uniformity in the bankruptcy system. See, e.g., Bryan T. Camp, *Bound by the BAP: The Stare Decisis Effect of BAP Decisions*, 34 SAN DIEGO L. REV. 1643, 1680-82 (1997); John K. Eason, *Developing the Asset Protection Dynamic: A Legacy of Federal Concern*, 31 HOFSTRA L. REV. 24, 62 (2002); Barbara J. Van Gorder, *Section 523(a)(15) of the Bankruptcy Code: A Paving Stone on the Road to the Region of Hades Reserved for Litigation Nightmares*, 77 B.U. L. REV. 1121, 1125 (1997); Richard E. Mendales, *Rethinking Exemptions in Bankruptcy*, 40 B.C. L. REV. 851, 860, 875 (1999); Rose J. Murphy, *Bankruptcy Exemptions: The Need for Uniformity in the United States and Canada*, 21 N.Y.L. SCH. J. INT'L & COMP. L. 127, 128, 138-42 (2001).

<sup>65</sup>See generally Rafi Efrat, *Legal Culture and Bankruptcy: A Comparative Perspective*, 20 EMORY BANKR. DEV. J. 351 (2004).

<sup>66</sup>The chapters are not identical, of course. A cynic might observe that a principal difference between Chapters 7 and 13 is whether the debtor directly makes ongoing mortgage payments or is required to funnel them through the bankruptcy system. In addition, debtors are substantially less likely to receive a discharge in Chapter 13. See Melissa B. Jacoby, *Collecting Debts from the Ill and Injured: The Rhetorical Significance, But Practical Irrelevance, of Culpability and Ability to Pay*, 51 AM. U. L. REV. 229, 263 (2001).

do not forfeit non-exempt property even in Chapter 7.<sup>67</sup> They also are retaining homes and cars encumbered by security interests through ride-through (if permitted in the jurisdiction),<sup>68</sup> reaffirmation,<sup>69</sup> or redemption.<sup>70</sup> From the perspective of creditor returns, Chapters 7 and 13 also are producing similar winners and losers notwithstanding distinctions in the Code, with general unsecured creditors being the losers in both. Holders of general unsecured claims are known to get little through distribution of property in Chapter 7.<sup>71</sup> The publicly available data suggest that most of the money in Chapter 13 goes to everyone other than unsecured claims (namely, secured claims, priority claims, lawyers, trustees, and the cost of administering repayment plans).<sup>72</sup> According to United States Trustee Chapter 13 disbursement data on closed cases, many Chapter 13 cases in which unsecured debt is owed pay out only small portions on unsecured claims, and many others pay out nothing at all.<sup>73</sup> The Code plays some role in these patterns,<sup>74</sup> but the

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<sup>67</sup>See, e.g., Ed Flynn et al., *supra* note 64 (most distributions in Chapter 7 coming from few large cases which mostly involved commercial debtors).

<sup>68</sup>*Compare, e.g., In re Price*, 370 F.3d 362 (3d Cir. 2004) (finding that debtor may retain collateral and continue contract payments, and noting existing 4-4 circuit split on issue) and *In re Burr*, 160 F.3d 843 (1st Cir. 1998) (no authorization for ride-through).

<sup>69</sup>See 11 U.S.C. § 524; Marianne B. Culhane & Michaela M. White, *Debt After Discharge: An Empirical Study of Reaffirmation*, 73 AM. BANKR. L.J. 709, 713 (1999).

<sup>70</sup>See 11 U.S.C. § 722.

<sup>71</sup>Unsecured debt can get paid after Chapter 7 through voluntary repayment or through new agreements to remain liable on the debt. See 11 U.S.C. § 524; Marianne B. Culhane & Michaela M. White, *Debt After Discharge, An Empirical Study of Reaffirmation*, 73 AM. BANKR. L.J. 709, 713 (1999) (finding about twenty-five percent of case files with one or more reaffirmation agreements, and reporting that about sixty percent of these agreements were related to unsecured or nominally secured debts); Consumer Bankruptcy Project III (on file with author) (finding about twenty percent of case files included one or more reaffirmation agreement); Transcript, Presentation of National Consumer Bankruptcy Coalition to the National Bankruptcy Review Commission 166 (December 17, 1996) (representative of Sears testifying that reaffirmed debt portfolio performed 37.6% better than its overall portfolio) (on file with author).

<sup>72</sup>See Executive Office for United States Trustees, Chapter 13 Trustee Audited Annual Reports FY2003 (2004), available at <http://www.usdoj.gov/ust/library/chapter13/ch13lib.htm>. Looking at the universe of cases closed in FY2003, as the U.S. Trustee report does, general unsecured claims received only about twenty percent of total distributions. See also Scott F. Norberg, *Consumer Bankruptcy's New Clothes: An Empirical Study of Discharge and Debt Collection in Chapter 13*, 7 AM. BANKR. INST. L. REV. 415, 460 (1999) (in Mississippi study, finding secured debt payments accounted for about ninety percent of all Chapter 13 payments, excluding attorneys' fees). See generally Wei Fan & Michelle J. White, *Personal Bankruptcy and the Level of Entrepreneurial Activity*, 46 J.L. & ECON. 543, 545 (2003) (positing that there is little difference between chapters from creditors' viewpoint).

<sup>73</sup>See Executive Office for United States Trustees, Chapter 13 Trustee Audited Annual Reports FY2003 (2004), available at <http://www.usdoj.gov/ust/library/chapter13/ch13lib.htm>. This report identifies ranges of percentages of unsecured claims paid in cases closed in FY2003. Among these cases with unsecured debt and with payment information identified, almost forty percent paid nothing on their unsecured claims. More than a third paid thirty-nine percent or less. Even among the subset of cases closed due to plan completion (as opposed to dismissal or conversion), about 6.3% paid nothing on their unsecured claims and a bit over fifty percent paid thirty-nine percent or less. Using different data and after accounting for costs, one industry expert estimates that credit card lenders receive on average thirteen cents on the dollar from Chapter 13 repayment plans, and even less if they sell the debt to purchasers and

patterns do not appear to conform to any intentional design.

The Bankruptcy Code also does not explain or control changes over time in Chapter 11. Once upon a time, commentators noted that Chapter 11 took too long and cost too much, for little reward.<sup>75</sup> Debtors' managers seemed to exercise undue control over the Chapter 11 process.<sup>76</sup> In part due to these concerns, corporate and bankruptcy scholars believed the current system to be less efficient than alternative regimes they proposed.<sup>77</sup>

Today, heightened incorporation of commercial and corporate practices, and shrewd negotiation, give non-debtor parties considerable leverage and make asset sales an even greater component of the bankruptcy process.<sup>78</sup> The

brokers, *Bankruptcy Debt Recovery - Part 2*, THE NILSON REPORT No. 782, at 6 (Feb. 2003), although informal discussions with industry lawyers suggest that this estimate is too high.

<sup>74</sup>For example, the Code authorization to deaccelerate and cure a mortgage in default surely helps account for the significant amount of secured debt funneled through Chapter 13. See 11 U.S.C. §§ 1322, 1325.

<sup>75</sup>See, e.g., Edward I. Altman, *A Further Empirical Investigation of the Bankruptcy Cost Question*, 39 J. FIN. 1067, 1077 (1984); Lynn M. LoPucki, *The Trouble With Chapter 11*, 1993 WIS. L. REV. 729 (1993); Lawrence A. Weiss, *Bankruptcy Resolution: Direct Costs and Violation of Priority of Claims*, 27 J. FIN. ECON. 285, 285-89 (1990) (estimating direct costs for publicly held firms at three percent of assets). See also Elizabeth Warren & Jay Lawrence Westbrook, *Financial Characteristics of Businesses in Bankruptcy*, 73 AM. BANKR. L.J., 499, 500 (1999) (given size of most businesses when they file, Chapter 11 may be too expensive for them). For a summary and recent analysis of these arguments and sources, see Stephen J. Lubben, *The Direct Costs of Corporate Reorganization: An Empirical Examination of Professional Fees in Large Chapter 11 Cases*, 74 AM. BANKR. L. J. 509 (2000).

<sup>76</sup>See Lynn M. LoPucki, *The Debtor in Full Control—Systems Failure Under Chapter 11 of the Bankruptcy Code?*, 57 AM. BANKR. L.J. 247, 272-73 (1983); Lynn M. LoPucki & William C. Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 1991 WIS. L. REV. 11 (1991).

<sup>77</sup>See, e.g., Barry E. Adler, *Financial and Political Theories of American Corporate Bankruptcy*, 45 STAN. L. REV. 311 (1993); Lucian Arye Bebchuk, *A New Approach to Corporate Reorganizations*, 101 HARV. L. REV. 775 (1988); Michael Bradley & Michael Rosenzweig, *The Untenable Case for Chapter 11*, 101 YALE L.J. 1043 (1992); Robert K. Rasmussen, *Debtor's Choice: A Menu Approach to Corporate Bankruptcy*, 71 TEX. L. REV. 51 (1992); Mark J. Roe, *Bankruptcy and Debt: A New Model for Corporate Reorganization*, 83 COLUM. L. REV. 527 (1983); Alan Schwartz, *A Contract Theory Approach to Business Bankruptcy*, 107 YALE L.J. 1807 (1998). See generally Mark Jickling, *Chapter 11 Bankruptcy: The Economic Issues*, Congressional Research Service Report for Congress, 96-426E (April 30, 1996) (on file with author); Susan Block-Lieb, *The Logic and Limits of Contract Bankruptcy*, 2001 U. ILL. L. REV. 503 (2001); David A. Skeel, Jr., *Markets, Courts, and the Brave New World of Bankruptcy Theory*, 1993 WISC. L. REV. 465 (1993); Omer Teme, *Revisiting the Creditors' Bargain: The Entitlement to the Going-Concern Surplus in Corporate Bankruptcy Reorganizations*, 19 BANKR. DEV. J. 287, 288-95 (2003) (reviewing literature).

<sup>78</sup>See generally Douglas G. Baird & Robert K. Rasmussen, *The End of Bankruptcy*, 55 STAN. L. REV. 751 (2002); Douglas G. Baird, *The New Face of Chapter 11*, 12 AM. BANKR. INST. L. REV. 69, 75 (2004) ("The ability of creditors to control their debtor and negotiate with each other outside of chapter 11 is now vastly greater than it was during the equity receivership - or even in chapter 11 just 20 years ago. Often chapter 11 is needed only to put in place a plan that the key players negotiated before the petition was filed."); Harvey R. Miller, *Chapter 11 Reorganization Cases and the Delaware Myth*, 55 VAND. L. REV. 1987, 2014-15 (2002) (discussing role of distressed debt trading, and value of speed to speculators, in changing dynamics of Chapter 11 cases); David A. Skeel, Jr., *Creditors' Ball: The 'New' New Corporate Governance in Chapter 11*, 152 U. PA. L. REV. 917 (2003); Symposium, *Mega-Bankruptcies: Representing Creditors and Debtors in Large Bankruptcies*, 1 DEPAUL BUS. & COM. L.J. 603 (2003) (discussing esti-

literature also reflects a far diminished concern about weak cases languishing in Chapter 11 over long periods of time.<sup>79</sup> Indeed, to the extent that repeat filings are any indication,<sup>80</sup> cases may be moving too fast.<sup>81</sup> Even if reports of sweeping change in Chapter 11 are overstated,<sup>82</sup> it is clear that Chapter 11 is capable of transformation without Bankruptcy Code amendment.<sup>83</sup> The

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mates that as many as half of Chapter 11 cases are really just asset sales); Elizabeth Warren & Jay Lawrence Westbrook, *Secured Party in Possession*, 22 AM. BANKR. INST. J. 12 (2003); James J. White, *Death and Resurrection of Secured Credit*, 12 AM. BANKR. INST. L. REV. 139, 164 (2004) ("Well-heeled and well represented, secured creditors have made the most of these [secured creditor protective] provisions in the 25 years since the Code's adoption"). But see Lynn M. LoPucki, *The Nature of the Bankrupt Firm: A Response to Baird and Rasmussen's The End of Bankruptcy*, 56 STAN. L. REV. 645 (2003) (challenging empirical case for assertion of widespread change to Chapter 11 practice).

<sup>79</sup>See generally Douglas G. Baird & Edward R. Morrison, *Bankruptcy Decision Making*, 17 J.L. ECON. & ORG. 356 (2001) (finding, based on study of cases in Northern District of Illinois, that courts do good job of dealing with dead-on-arrival cases quickly); Douglas G. Baird & Robert K. Rasmussen, *Chapter 11 at Twilight*, 56 STAN. L. REV. 263 (2004); Douglas G. Baird, *The New Face of Chapter 11*, 12 AM. BANKR. INST. L. REV. 69, 76 (2004) (using LoPucki Bankruptcy Research Database to find high proportion of prenegotiated plans that are confirmed within several months after filing); Theodore Eisenberg & Lynn M. LoPucki, *Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations*, 84 CORNELL L. REV. 967, 982-83 (1999) (noting several trends coinciding including reduction in case processing time and increases in prepackaged bankruptcies); Robert K. Rasmussen & Randall S. Thomas, *Timing Matters: Promoting Forum Shopping by Insolvent Corporations*, 94 NW. U. L. REV. 1357, 1374-76 (2000); Elizabeth Tashjian et al., *Prepacks: An Empirical Analysis of Prepackaged Bankruptcies*, 40 J. FIN. ECON. 135, 142 (1996); James J. White, *Death and Resurrection of Secured Credit*, 12 AM. BANKR. INST. L. REV. 139, 151, n.42 (2004) (showing decline in mean Chapter 11 duration using LoPucki Bankruptcy Database).

<sup>80</sup>See, e.g., A. Mechele Dickerson, *A Behavioral Approach to Analyzing Corporate Failures*, 38 WAKE FOREST L. REV. 1, 35 n.128 (2003) (anecdotal and systematic evidence of repeat Chapter 11s); Lynn M. LoPucki & Sara D. Kalin, *The Failure of Public Companies in Delaware and New York: Empirical Evidence of a "Race to the Bottom"*, 54 VAND. L. REV. 231 (2001) (finding higher repeat filing rates in Delaware and New York); Lynn M. LoPucki & Joseph W. Doherty, *Why are Delaware and New York Bankruptcy Reorganizations Failing?*, 55 VAND. L. REV. 1933, 1964 (2002) (possible attribution of refiling frequency to higher proportion of prepackaged cases); Harvey R. Miller, *Chapter 11 Reorganization Cases and the Delaware Myth*, 55 VAND. L. REV. 1987, 2014-15 (2002) (attributing Chapter 11 recidivism in Delaware in part to distressed debt buyers who value speed over continuity of the enterprise).

<sup>81</sup>Some cases may be moving too fast even if no repeat filing follows. For example, Cannondale was on a fast track to a sale to a stalking horse bidder that left other creditors and potential investors with very little opportunity to evaluate the case. See Motion for Two-Week Continuance of Bidding Procedures Motion, *In re Cannondale Corp.*, No. 03-50017 (Bankr. D. Conn. 2003); Objection by Unsecured Creditors' Committee, *In re Cannondale Corp.*, No. 03-50017 (Bankr. D. Conn. 2003); Order Approving Sale of Substantially All Assets, *In re Cannondale Corp.*, No. 03-50017 (Bankr. D. Conn. 2003). See also Oversight Hearing on the Administration of Large Business Bankruptcy Reorganizations, Subcomm. on Commercial and Administrative Law, Comm. on the Judiciary, United States House of Representatives, 108th Cong. (July 21, 2004) (statement of Professor Lynn M. LoPucki) (discussing quickly moving pre-negotiated sale cases).

<sup>82</sup>See, e.g., Barry E. Adler, *Bankruptcy Primitives*, 12 AM. BANKR. INST. L. REV. 219 (2004); Lynn M. LoPucki, *The Nature of the Bankrupt Firm: A Response to Baird and Rasmussen's The End of Bankruptcy*, 56 STAN. L. REV. 645 (2003); Jay Lawrence Westbrook, *Bankruptcy Control of the Recovery Process*, 12 AM. BANKR. INST. L. REV. 245 n.4 (2004).

<sup>83</sup>See, e.g., Lynn M. LoPucki, *The Systems Approach to Law*, 82 CORNELL L. REV. 479, 498 (1997); James J. White, *Death and Resurrection of Secured Credit*, 12 AM. BANKR. INST. L. REV. 139 (2004).



Bankruptcy Code is important, but not all-important.

### III. RETHINKING THE MEANING OF BANKRUPTCY REFORM

In the prior section, I observed that changing the Code has not been the exclusive means of shaping and changing the bankruptcy system. Current Congressional attitudes place a heightened burden on these non-Code means of system evolution. In this section, I discuss discrete ways in which bankruptcy professionals remain involved in setting the direction of the bankruptcy system even as Code-based reform stagnates and excludes bankruptcy experts.

#### A. PROFESSIONAL-TO-PROFESSIONAL

As suggested in the Chapter 11 discussion in the prior section, negotiation among bankruptcy professionals on a case-by-case basis has been, and will continue to be, a major force. Bankruptcy professionals and their clients engage in a considerable amount of bankruptcy decision-making every day, including deals that technically violate the Bankruptcy Code.<sup>84</sup> Although the United States Trustee or Bankruptcy Administrator may have the capacity to limit this private lawmaking,<sup>85</sup> their intervention is not consistent. One can expect the system to continue to develop well-engrained patterns and practices through these means. This is not revolutionary reform; it is evolutionary reform.

Bankruptcy experts also can collaborate on broader system projects. For example, a recent dialogue by Chapter 13 professionals on non-uniformity resulted in a model Chapter 13 plan.<sup>86</sup> Although the Advisory Committee on Bankruptcy Rules declined to pursue the professionals' request to make their model plan an official form,<sup>87</sup> the model plan has the potential to change

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<sup>84</sup>Pre-packs confirmed within thirty days, notwithstanding the requirement of a meeting of creditors under 11 U.S.C. § 341, would fall within this category.

<sup>85</sup>For example, holders of claims in Chapter 11 cases may be routinely signing voting agreements, notwithstanding the fact that some interpret these agreements as violating § 1125. See *In re Stations Holding Co.*, 2002 Bankr. LEXIS 1617, 02-10882 (Bankr. D. Del. September 30, 2002) (explaining that votes were designated and disqualified for those who had executed postpetition voting agreements); Transcript of Hearing at 59-65, *In re NII Holdings, Inc.*, et al., No. 02-11505 (Bankr. D. Del. October 25, 2002) (designating and disqualifying votes by noteholders who formally executed voting agreements postpetition); Douglas E. Deutsch, *Ensuring Proper Bankruptcy Solicitation: Evaluating Bankruptcy Law, the First Amendment, The Code of Ethics, and Securities Law in Bankruptcy Solicitation Cases*, 11 AM. BANKR. INST. L. REV. 213, 259-61 (2003). But see Melissa B. Jacoby, *Prepacks and the Deal-Litigation Tension*, AM. BANKR. INST. J., March 2004, at 20; Robert J. Keach, *A Hole in the Glove: Why "Negotiation" Should Trump "Solicitation"*, AM. BANKR. INST. J., June 2003, at 22.

<sup>86</sup>See, e.g., Henry E. Hildebrand, III and Keith M. Lundin, *The San Juan 50: A Proposed Model Form for the Chapter 13 Plan*, 7 NORTON BANKR. L. ADVISER 1 (July 2002); Henry E. Hildebrand, III, *Toward a More Perfect Plan*, AM. BANKR. INST. J., Feb. 2003, at 10.

<sup>87</sup>See Advisory Committee on Bankruptcy Rules, Minutes, Meeting of April 3-4, 2003, Longboat Key Florida, at 11, available at <http://www.uscourts.gov/rules/Minutes/BKmin0403.pdf>. The Committee's

the system without any Bankruptcy Code amendments if its proponents can encourage its use through local rules or informal adoption.<sup>88</sup> In the past, by contrast, complaints of non-uniformity often generated proposed statutory amendments.<sup>89</sup> In addition to being infeasible, Code amendments actually may be inferior vehicles to this type of grassroots model plan effort.<sup>90</sup>

Of course, in some instances, a single statutory amendment might have been more efficient than alternative means. For example, with respect to the privacy concerns arising from the use of electronic files, an amendment to 11 U.S.C. § 107 may have been a more straightforward solution than a patchwork of changes to the Federal Rules of Bankruptcy Procedure and the Official Forms.<sup>91</sup> Nonetheless, professional-driven reform that is implemented through rules and forms can be potent and successful.

## B. COURTS OF APPEAL

Appellate judges are likely to be more receptive than members of Congress or Congressional staffers to careful and well-grounded arguments by bankruptcy experts. Even under a so-called plain meaning analysis, some judges believe that context is critical to accurate statutory interpretation and construction.<sup>92</sup> Bankruptcy experts have strong abilities to contribute to this approach to system change.<sup>93</sup>

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meeting minutes reflect that various committee members thought the project time consuming (to get agreement on a form), unrealistic (because everyone would like her own form better than the forms of others), and unnecessary (because Chapter 13 was working fine as is).

<sup>88</sup>See, e.g., Kenneth N. Klee, *The Future of the Bankruptcy Rules*, 70 AM. BANKR. L.J. 277, 280-81 (1996) (discussing various forms of local rules and practices).

<sup>89</sup>For example, a majority of the National Bankruptcy Review Commission proposed amendments to increase the uniformity of the Chapter 13 repayment process. REPORT OF THE NATIONAL BANKRUPTCY REVIEW COMMISSION 262 (1997). Specifically, the Commission proposed a statutory income-based template and timetable for debt repayment.

<sup>90</sup>Admittedly, even if the model Chapter 13 form is widely implemented, it will leave many non-uniformity problems unaddressed, including the very ones the Bankruptcy Commission tried to tackle.

<sup>91</sup>See generally J. Rich Leonard, *Having Thought About Private Matters: The Federal Courts' Initial Response*, 77 AM. BANKR. L.J. 9 (2003).

<sup>92</sup>See *In re Price*, 370 F.3d 362 (3d Cir. 2004) (reviewing and evaluating interpretation-related case law).

<sup>93</sup>For studies of the impact of more generalist statutory interpretation scholarship, see, e.g., Gregory Scott Crespi, *The Influence of a Decade of Statutory Interpretation Scholarship on Judicial Rulings: An Empirical Analysis*, 53 SMU L. REV. 9, 11 (2000) (observing that "almost half of the statutory interpretation articles published between 1988 and 1995 have been cited in at least one judicial opinion," and that "at least seven statutory interpretation articles published during the past decade have been rather extensively cited by the courts") and Deborah Merritt & Melanie Putnam, *Judges and Scholars: Do Courts and Scholarly Journals Cite the Same Law Review Articles?*, 71 CHI.-KENT L. REV. 871 (1996) (discussing role of academic writers in statutory interpretation). See also Karen Gross, *A Response to J.J. White's Death and Resurrection of Secured Credit: Finding Some Trees But Missing the Forest*, 12 AM. BANKR. INST. L. REV. 203, 213 (2004) ("perhaps academics have their greatest success when they proffer an approach to interpreting a particular statutory provision within the Code and argue for resolution among some well-known competing approaches").

The now-well-known *Cybergentics II* case offers a good example. A panel of the Court of Appeals for the Third Circuit decided that a creditors' committee is not authorized to bring an avoidance action on behalf of the estate.<sup>94</sup> The panel's reasoning was based in part on a U.S. Supreme Court decision interpreting an identical phrase in a different statutory section.<sup>95</sup>

In public writings, many members of the bankruptcy community reacted to the original panel decision with panic, anger, scorn, and general outcry.<sup>96</sup> This is not the place to recount the details, but the commentators essentially argued, among other things, that a literal statutory interpretation and construction actually supported the committee's authorization to pursue the action.<sup>97</sup> Commentators also suggested that the Court of Appeals needs a

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<sup>94</sup>Official Comm. of Unsecured Creditors of *Cybergentics Corp. v. Chinery*, 304 F.3d 316 (3d Cir. 2002), *vacated, reh'g en banc granted*, 310 F.3d 785 (3d Cir. 2002), *rev'd*, Official Comm. of Unsecured Creditors of *Cybergentics Corp. v. Chinery*, 330 F.3d 548 (3d Cir. 2003).

<sup>95</sup>*Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 120 S. Ct. 1942 (2000). *But see* David Gray Carlson, *Surcharge and Standing: Bankruptcy Code § 506(c) after Hartford Underwriters*, 76 AM. BANKR. L.J. 43, 56-61 (2002) (arguing that careful reading of *Hartford Underwriters* reveals that opinion does not always limit standing of parties other than trustees).

<sup>96</sup>*See, e.g.*, Michael A. Bloom & Joel S. Solomon, *Cybergentics II: Ignoring both Precedent and Pragmatism*, 11 J. BANKR. L. & PRAC. 417 (2002); *Creditor/Committee Derivative Litigation: Of Textualism and Equitable Powers*, 22 BANKR. L. LETTER 1. (Nov. 2002) ("*Cybergentics II* represents a new low in the modern mindless obsession with mechanical application of statutory text (to the exclusion of every other legitimate principle of American law) . . . a full understanding of the structural relationship the Bankruptcy Code establishes between 'the powers of the trustee' and 'the avenues for relief available under the Code for the benefit of creditors and the estate' (which the *Cybergentics II* court obviously did not possess) exposes the *Cybergentics II* court's textual analysis, and in particular, its reliance on *Hartford Underwriters*, to be exceedingly simplistic and woefully incomplete."); *Cybergentics Decision Leaves Many Stunned, Scrambling to Find Solution*, BANKR. CT. DECISIONS, November 19, 2002, at 1 (quoting lawyers opposing decision, including Martin Bienenstock saying "I think it's the wrong decision technically, the wrong decision policy-wise, the wrong decision based on the wording of the Code, and the wrong decision based on the jurisprudence." . . . "Bienenstock said the court's decision not only lacked sense, it didn't give direction to anyone about how they may proceed."); Shannon P. Duffy, *3rd Circuit Grants En Banc Review in Cybergentics Case*, LEGAL INTELLIGENCER, Nov. 21, 2002 (noting that bankruptcy lawyers "everywhere are breathing a sigh of relief" after en banc decision); *Past Decisions Make Cybergentics Look Strange, Lawyer Says*, BANKR. CT. DECISIONS, Nov. 19, 2002, at 4. *See also* Marianne B. Culhane, *Poking Holes in Golden Parachutes: Management Pensions at Risk in Bankruptcy*, AM. BANKR. INST. J., Dec./Jan. 2004, at 6 (referring readers to "lively comments" on *Cybergentics* on the American Bankruptcy Institute website); Robert J. Keach & Michael A. Fagone, *When the Committee is Not and When the Committee is No More*, 22 AM. BANKR. INST. J. 34 (Dec./Jan. 2004) (noting "momentary panic" after panel decision, "order appears restored" by en banc decision). *See generally* Nancy Haller, Comment, *Cybergentics II: Precedent and Policy versus Plain Meaning*, 56 ME. L. REV. 365 (2004).

<sup>97</sup>*See, e.g.*, Martin J. Bienenstock, *Recent Developments Affecting Chapter 11 Cases*, 850 PLI/COMM 7 (Apr. 2003) (arguing that *Cybergentics* panel decision should be overruled and generally not followed elsewhere because, among other reasons, decision violates several rules of statutory construction); Susheel Kirpalani, *The Importance of Being Plain: A Textual Response to Cybergentics II*, 21 AM. BANKR. INST. J. 1 (Nov. 2002); Alan R. Lepene & Sean A. Gordon, *The Case for Derivative Standing in Chapter 11: "It's The Plain Meaning, Stupid."*, 11 AM. BANKR. INST. L. REV. 313, 316 (2004) ("This article will demonstrate that by properly following *Hartford Underwriters*' road map to plain meaning construction of the Bankruptcy Code, the case for derivative standing in the context of chapter 11 cases is both compelling and clear.").

richer appreciation of bankruptcy practice when it interprets or construes the statute and decides these types of disputes.<sup>98</sup> With some similar arguments, bankruptcy lawyers and professors filed amicus briefs,<sup>99</sup> either on their own behalf,<sup>100</sup> or on the behalf of creditors' committees in other cases.<sup>101</sup>

The end of this story is known to most who will read this Article: The Court of Appeals for the Third Circuit vacated the panel decision, reheard the case en banc, and reversed the panel decision.<sup>102</sup> The published majority opinion—the citations, the serious engagement with the arguments of the amici—is a testament to the impact and persuasive authority of bankruptcy experts beyond those representing the parties in interest.<sup>103</sup> With respect to the question of pre-Code practice, the en banc *Cybergentics* majority placed “great weight” on the 1978 version of *Collier on Bankruptcy* and consumes two full columns of the opinion with string citations to this source closely associated with bankruptcy experts.<sup>104</sup> In other words, the bankruptcy ex-

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<sup>98</sup>See, e.g., George W. Kuney, *Let's Make it Official: Adding an Explicit Pre-Plan Sale Process as an Alternative Exit from Bankruptcy*, 40 *HOUS. L. REV.* 1265, 1292 n.98 (describing *Cybergentics* as being decided based on bankruptcy practice rather than explicit statutory authorization). Cf. Leonard P. Goldberg, *Cybergentics II: Sounds Great, But Will It Work?*, *AM. BANKR. INST. J.*, Dec./Jan. 2003, at 30 (noting, after original panel decision, that “Appellate courts have the luxury of making ground-breaking legal pronouncements without worrying (too much) about how they are actually implemented. This is especially so in bankruptcy practice, where legal principles must be road-tested in a highly practical, result-oriented court system.”). See generally Douglas G. Baird, *The New Face of Chapter 11*, 12 *AM. BANKR. INST. L. REV.* 69 (2004) (“The courts of appeal and the Supreme Court generate a regular flow of authoritative interpretations of the Bankruptcy Code, often focusing on its language, separate from its history or the practices that have taken deep root in large and small cases over the last 25 years.”).

<sup>99</sup>Official Comm. of Unsecured Creditors of *Cybergentics Corp. v. Chinery*, 330 F.3d 548, 555 (3d Cir. 2003) (“We have since accepted extensive supplemental briefing, including a number of amicus briefs, and heard oral argument by the parties and *amicus curiae*”).

<sup>100</sup>See, e.g., En Banc Brief of Amicus Curiae G. Eric Brunstad Jr. in Support of Appellant, *Cybergentics Corp. the Official Comm. of Unsecured Creditors of Cybergentics Corp. v. Chinery*, 2002 WL 32137102 (3d Cir. December 16, 2002) (No. 01-3805); Brief of Amici Curiae Law Professors In Support of The Appeal of The Official Comm. of Unsecured Creditors of *Cybergentics Corp.*, 2002 WL 32137095 (3d Cir. Dec. 13, 2002) (No. 01-3805). By contrast, Professor Keith Sharfman wrote a brief supporting the appellees, but using very different arguments. See Brief of Amicus Curiae Keith Sharfman in Support of the Appellees, Official Comm. of Unsecured Creditors of *Cybergentics Corp.*, 2003 WL 21745357 (3d Cir. Feb. 6, 2003) (No. 01-3805).

<sup>101</sup>Brief of Amicus Curiae, Official Comm. of Unsecured Creditors of *Hayes Lemmerz International, Inc. and Affiliated Chapter 11 Debtors*, in Support of Appellant and Seeking Reversal of the District Court, Official Comm. of Unsecured Creditors of *Cybergentics Corp. v. Chinery*, 2002 WL 32137101 (3d Cir. Dec. 16, 2002) (No. 01-3805); Brief of Amicus Curiae the Official Comm. of Unsecured Creditors of *Safety-Kleen Corp., et al.* in Support of Appellant and Reversal, *Cybergentics Corp.*, Official Comm. of Unsecured Creditors of *Cybergentics Corp. v. Chinery*, 2002 WL 32137094 (3d Cir. Dec. 13, 2002) (No. 01-3805).

<sup>102</sup>Official Comm. of Unsecured Creditors of *Cybergentics Corp. v. Chinery*, 330 F.3d 548 (3d Cir. 2003) (en banc).

<sup>103</sup>*Id.* at 562-63, 565, 572-73 (quoting and discussing perspectives, usually favorably, of amici Brunstad or law professors supporting appellant). By contrast, the dissenting opinion does not cite the briefwriters or rely as heavily on bankruptcy-specific sources. *Id.* at 580-87 (Fuentes, J., dissenting).

<sup>104</sup>*Id.* at 571 (citing multiple sections and paragraphs of *COLLIER ON BANKRUPTCY* (14th Ed. 1978),

perts of today and of twenty-five years ago were integral to determining that the creditors' committee had the right to bring avoidance actions notwithstanding certain Code language. Even if some disagree with the rationale of the en banc majority opinion,<sup>105</sup> this opinion is a testament to the role of bankruptcy experts in shaping the system.

### C. STATE LEGISLATURES

Bankruptcy relies heavily on non-bankruptcy state law.<sup>106</sup> Thus, even if one is excluded from working with Congress, she may affect bankruptcy outcomes, and transactions for which bankruptcy law is a backdrop, by seeking state law changes or clarifications, particularly through statutory means.

For example, Revised Article 9 affects bankruptcy outcomes regarding the treatment, priority, and protection of secured creditors.<sup>107</sup> In addition, while parties have so far failed in their competing attempts to define asset securitization in the federal law,<sup>108</sup> some state legislatures have defined asset securitization in ways intended to apply in bankruptcy.<sup>109</sup> Furthermore,

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noting that "Collier's view is persuasive on such matters, for the Supreme Court has itself cited to it as evidence" that a particular practice was "widely accepted" under the Bankruptcy Act and emphasizing the importance of "Collier's sense of the law").

<sup>105</sup>For example, one amicus argued in favor of appellees. See Brief of Amicus Curiae Keith Sharfman in Support of the Appellees, Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery, 2003 WL 21745357 (3d Cir. Feb. 6, 2003) (No. 01-3805). The court of appeals engaged in the arguments made in Professor Sharfman's brief, but, in the end, mostly disagreed. See Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery, 330 F.3d 548, 564, 565, 571, 574, 575, 576 (3d Cir. 2003).

<sup>106</sup>See generally *In re Earley*, 305 B.R. 837 (Bankr. N.D. Ill. 2004) (using Illinois state law to determine proper characterization of garnishing creditor in Chapter 13); Thomas E. Plank, *Bankruptcy and Federalism*, 71 FORDHAM L. REV. 1063 (2002); *Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15 (2000).

<sup>107</sup>See, e.g., Richard L. Barnes, *UCC Article Nine Revised: Priorities, Preferences, and Liens Effective Only in Bankruptcy*, 82 NEB. L. REV. 607 (2004); Karen Gross, *A Response to J.J. White's Death and Resurrection of Secured Credit: Finding Some Trees But Missing the Forest*, 12 AM. BANKR. INST. L. REV. 203, 216 (2004) (noting role of changes in Article 9 in enhancing secured creditor power in bankruptcy); Steven L. Harris & Charles W. Mooney Jr., *Revised Article 9 Meets the Bankruptcy Code: Policy and Impact*, 9 AM. BANKR. INST. L. REV. 85 (2001); Edward J. Janger, *The Reliance Interest in Insolvency Law: A Reply to Harris and Mooney*, 25 CARDOZO L. REV. 1895 (2004); Margit Livingston, *Survey of Cases Decided under Revised Article 9: There's Not Much New Under the Sun*, 2 DEPAUL BUS. & COM. L.J. 47, 48 (2003) ("many of the revisions seemed geared toward allowing secured creditors an easier time in bankruptcy"); G. Ray Warner, *The Anti-Bankruptcy Act: Revising Article 9 and Bankruptcy*, 9 AM. BANKR. INST. L. REV. 3 (2001).

<sup>108</sup>*Compare* Employee Abuse Prevention Act of 2002, H.R. 5221, 107th Cong. § 102 ("Durbin-Delahunt") (authorizing court recharacterization of transactions) with Bankruptcy Reform Act of 2001, S. 420, 107th Cong. § 912 (2001); H.R. 333, 107th Cong. § 912 (2001) (insulating transactions from recharacterization). See generally Edward J. Janger, *Muddy Rules for Securitizations*, 7 FORDHAM J. CORP. & FIN. L. 301 (2002).

<sup>109</sup>See, e.g., STEPHEN L. SCHWARCZ, BRUCE A. MARKELL & LISSA L. BROOME, *SECURITIZATION, STRUCTURED FINANCE, AND CAPITAL MARKETS* 76 (2004) (discussing state law efforts to preempt Bankruptcy Code). See, e.g., DEL. CODE ANN. tit. 6, § 2703A (2004); Ronald J. Mann, *The Rise of State Bankruptcy-Directed Legislation*, 25 CARDOZO L. REV. 1805 (2004); Edward J. Janger, *The Death of Secured Lending*, 25 CARDOZO L. REV. 1759 (2004). See also OHIO REV. CODE ANN. § 1109.75 (2004);

state statutes characterizing consumer rent-to-own arrangements essentially require full payment by Chapter 13 filers who wish to retain the property.<sup>110</sup>

To be sure, lobbying state legislatures is not easy. The examples mentioned above involved highly coordinated and probably well-funded efforts.<sup>111</sup> Preemption concerns are omnipresent.<sup>112</sup> Nonetheless, state law is a potent additive to bankruptcy and inherently is part of bankruptcy reform. Even if federal legislation remains the ideal, a state statute can be an important first step; members of Congress may perceive a state law as a model for federal legislation.<sup>113</sup>

#### D. THE NEWS MEDIA

For those who are unconvinced that the system can grow and develop regardless of Congressional action or inaction, this section discusses a way to be involved indirectly with the federal legislative process: experts may be able to affect perceptions of a legal system and policy developments through interactions with the news media. The media help set the policy agenda and frame debates in ways that mobilize public opinion and lead to particular types of solutions.<sup>114</sup> To the extent news reporters “co-produce” policy,<sup>115</sup>

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S.D. CODIFIED LAWS § 54-1-10(3) (2003); TEX. BUS. & COM. CODE ANN. § 9.109(e) (2004) (“For all purposes, in the absence of fraud or intentional misrepresentation, the parties’ characterization of a transaction as a sale of such assets shall be conclusive that the transaction is a sale and is not a secured transaction and that title, legal and equitable, has passed to the party characterized as the purchaser of those assets regardless of whether the secured party has any recourse against the debtor, whether the debtor is entitled to any surplus, or any other term of the parties’ agreement.”); VA. CODE ANN. § 6.1-473 (2004). See generally Jeffrey M. Carbino & William H. Schorling, *Delaware’s Asset-Backed Securities Facilitation Act: Will the Act Prevent the Recharacterization of a Sale of Receivables in a Seller’s Bankruptcy?*, 6 DEL. L. REV. 367 (2003).

<sup>110</sup>See, e.g., MICH. COMP. LAWS § 445.952 (2004); OHIO REV. CODE ANN. § 1351.01 (2004); VA. CODE ANN. § 59.1-207.18 (2004). See generally Barkley Clark et al., “Rent-to-Own” Agreements in Bankruptcy: Sales or Leases?, 2 AM. BANKR. INST. L. REV. 115, 118 (1994) (reporting that thirty-six states have adopted legislation regulating rental-purchase agreements, and that most courts honor state court definitions of these agreements). But see THE NATIONAL BANKRUPTCY CONFERENCE’S CODE REVIEW PROJECT 164 (1997) (noting that most bankruptcy courts have treated transactions as installment sales, and advocating Bankruptcy Code amendment to trump state law characterizations).

<sup>111</sup>On the other hand, some types of state legislative efforts can be quite effective without a nationally coordinated effort. For example, the bar association of a single state may develop proposed changes to state exemption statutes.

<sup>112</sup>See, e.g., Ronald J. Mann, *The Rise of State Bankruptcy-Directed Legislation*, 25 CARDOZO L. REV. 1805 (2004). For preemption problems in the closely related area of banking, see, e.g., Robert C. Eager & C.F. Muckenfuss, III, *Federal Preemption and the Challenge to Maintain Balance in the Dual Banking System*, 8 N.C. BANKING INST. 21 (2004).

<sup>113</sup>See, e.g., Center For Responsible Lending Policy Brief No. 6, *Miller, Watt, and Others Sponsor Anti-Predatory Lending Legislation Based on Landmark North Carolina Solution* (Mar. 2004) (explaining that “H.R. 3974 draws on North Carolina’s landmark 1999 law”).

<sup>114</sup>See generally KATHLEEN HALL JAMIESON & PAUL WALDMAN, *THE PRESS EFFECT: POLITICIANS, JOURNALISTS, AND THE STORIES THAT SHAPE THE POLITICAL WORLD* 122 (2003); Everett M. Rogers et al., *A Paradigmatic History of Agenda-Setting Research*, in *DO THE MEDIA GOVERN?* (Shanto Iyengar &

experts may wish to attempt co-producing news reporting.

Just as they did not set Congress's agenda, bankruptcy experts did not substantially participate in the framing of media reporting on bankruptcy in the mid-to-late 1990s.<sup>116</sup> Some bankruptcy experts (particularly Elizabeth

Richard Reeves, eds., 1997); MICHAEL SCHUDSON, *THE SOCIOLOGY OF NEWS* 35 (2003); Deborah A. Stone, *Causal Stories and the Formation of Policy Agendas*, 104 *POL. SCI. Q.* 281 (1989).

<sup>115</sup>See, e.g., TIMOTHY E. COOK, *GOVERNING WITH THE NEWS* 3, 10-13 (1998) (political actors and journalists "interact in constant but implicit series of negotiations over who controls agenda"); STEPHEN HESS, *LIVE FROM CAPITOL HILL: STUDIES OF CONGRESS AND THE MEDIA* (1991); M. ETHAN KATSH, *LAW IN A DIGITAL WORLD* 9 (1995) (law and media "intimately linked institutions"); SIDNEY KRAUS & DENNIS DAVIS, *THE EFFECTS OF MASS COMMUNICATION ON POLITICAL BEHAVIOR* (1976) (centrality of media to policymaking, particularly since rise of television imagery); MICHAEL SCHUDSON, *THE SOCIOLOGY OF NEWS* 21 (2003) (politicians as parajournalists); Achilles Skordas, *Hegemonic Custom?*, in *UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW* (Michael Byers & George Nolte, eds. 2003) (media as source of public conscience, playing role in policymaking); Frank R. Baumgartner et al., *Media Attention and Congressional Agendas*, in *DO THE MEDIA GOVERN? POLITICIANS, VOTERS, AND REPORTERS IN AMERICA* 350 (Shanto Iyengar & Richard Reeves, eds., 1997) ("[s]ometimes one leads and sometimes the other, and often both are following actions of some third party"); Robert H. Giles, *The Media and Government Regulation in the Great Tradition of Muckraking*, 11 *KAN. J.L. PUB. POL'Y* 567, 570 (2002) ("news plays a formative role in the development of policy, of legislation, of regulations, of reform and in the overlay of politics that is so characteristic of our contemporary democracy"); Jan Ellen Rein, *Misinformation and Self-Deception in Recent Long-Term Care Policy Trends*, 12 *J.L. & POL.* 195, 234 (1996) ("profound effect on policy decisions at every level of government"); Lucy A. Williams, *Race, Rat Bites, and Unfit Mothers: How Media Discourse Informs Welfare Legislation Debate*, 22 *FORDHAM URB. L.J.* 1159, 1174 (1995) (media imaging affecting poverty and welfare legislation).

<sup>116</sup>Individual bankruptcy experts did not get cited with particular regularity or consistency in the national press. Focusing only on law professors in the *New York Times*, *Washington Post*, and *Wall Street Journal* between September 1, 1997 and August 30, 2001, for example, fewer than ten academics other than Elizabeth Warren were cited at all, and even then, they were cited only one to three times. The late Professor Lawrence King was cited shortly before his death, in clear opposition to the bill, in the *New York Times*. Peter T. Kilborn, *Mired in Debt and Seeking a Path Out*, *N.Y. TIMES*, April 1, 2001, § 1, at 1 (most filers have job problems of no fault of their own or something else that "throws their lives out of kilter"); Philip Shenon, *How Bill in Senate Would Add Hurdles to Erasing of Debt*, *N.Y. TIMES*, March 14, 2001, at A1 ("I fear this will end up creating an underground economy. . . . In my 40 years of dealing with Congress on bankruptcy legislation, this is the worst I've ever seen. . . . It's the kind of bill that makes you want to point your fingers at individual congressmen and say, 'Shame on you.'"). Professor Todd Zywicki was cited favoring the legislation. Riva D. Atlas, *Bankruptcy Bill Tightens Rules For Businesses*, *N.Y. TIMES*, March 16, 2001, at C1 (defending absolute limit on time for assumption of non-residential lease); Peter T. Kilborn, *Mired in Debt and Seeking a Path Out*, *N.Y. TIMES*, April 1, 2001, at § 1, at 1 (most filers are legitimate but "there are large numbers who are not legitimate users. The bill eliminates the forms of abuse that are out there."); Philip Shenon, *How Bill in Senate Would Add Hurdles to Erasing of Debt*, *N.Y. TIMES*, March 14, 2001, at A1 ("no good reason why a schoolteacher earning \$30,000 a year should have to pay more for a mortgage or more for a new couch because some guy making \$100,000 a year finds it inconvenient to pay his debts"). Professors David Skeel and Jay Lawrence Westbrook were cited in connection with their books, although one of Skeel's citations is borderline critical of the bill. David Frum, *What Happens When the Money Runs Out*, *WALL ST. J.*, August 24, 2000, at A20 (reviewing the *THE FRAGILE MIDDLE CLASS* co-authored by Westbrook); Robert Samuelson, *Bad Timing on the Bankruptcy Bill*, *WASH. POST*, March 14, 2001, at A25 (citing Skeel for history of Chapters 7 and 13); David Wessel, *The Muddled Course of Bankruptcy Law*, *WALL ST. J.*, February 22, 2001, at A1 (legislation discourages filings by raising cost). Then Professor, now Judge Bruce Markell was cited twice: once about creditor practices and once about proponents' motivation for the bill. Caroline E. Mayer, *Night of the Living Debt; Discharged Bills Come Back—Often Illegally—to Haunt Bankruptcy Filers*,

Warren) eventually helped the media frame bankruptcy as a story of industry power and influence, as a story of loopholes for the rich, and as a women's and children's issue.<sup>117</sup> As reporters and editorial pages spoke more critically about bankruptcy through the lens of these universal themes,<sup>118</sup> the bill sputtered and stalled on several occasions. The omnibus bill did not become much better, but it also did not become law. I cannot prove causation, but close study of the reporting and legislative activities suggests interaction consistent with the media-related literature. An affirmative and earlier media strategy—before an omnibus bill was even introduced—could have made an even greater impact on Congressional receptiveness and enthusiasm.

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WASH. POST, September 13, 1998, at H1 (“pretty clear what’s going on. It’s harassment, if you want one word for it.”); Katherine Q. Seelye, *House to Vote Today on Legislation for Bankruptcy Overhaul*, N.Y. TIMES, June 10, 1998, at A18 (“They make money on being able to target those people who incur debt and can barely pay it off.”). Professor Karen Gross spoke about creditor practices. Caroline E. Mayer, *Night of the Living Debt; Discharged Bills Come Back—Often Illegally—to Haunt Bankruptcy Filers*, WASH. POST, September 13, 1998, at H1. Professor Gene Marsh was cited about the rising filings in his state. Karen Lundegaard, *Debt-Laden Alabamians Find Bankruptcy a Refuge*, WALL ST. J., December 17, 1998, at S1. Kenneth Klee was cited reacting to a letter sent by an advocate of the legislation. Jacob M. Schlesinger, *Card Games: As Bankruptcies Surge, Creditors Lobby Hard To Get Tougher Laws*, WALL ST. J., June 17, 1998, at A1. Professor Lynn LoPucki commented on Chapter 11’s effects on parties without standing. Jess Bravin, *Judges’ Actions Have Wide Reach With Bankruptcy*, WALL ST. J., August 24, 2001, at B1.

<sup>117</sup>Melissa B. Jacoby, *Negotiating Bankruptcy Legislation through the News Media*, 42 HOUS. L. REV. (forthcoming 2004).

<sup>118</sup>For example, the New York Times and Washington Post ultimately had harsh words for the omnibus bankruptcy bill. *A Business Dictated Bankruptcy Law*, N.Y. TIMES, March 16, 2001, at A18; *A Gift for the Credit Card Industry*, N.Y. TIMES, May 5, 2000, at A22; *A Retreat in the Senate*, WASH. POST, Jan. 27, 2000, at A26; *An Unfair Bankruptcy Bill*, N.Y. TIMES, December 13, 2000, at A34; *Bad Bankruptcy Legislation*, N.Y. TIMES, October 10, 1998, at A14; *Bad Ideas on Bankruptcy*, WASH. POST, Feb. 18, 2000, at A22; *Bankrupt Bipartisanship*, WASH. POST, December 15, 2000, at A40; *Loopholes for Millionaires*, WASH. POST, July 16, 2001, at A14; *Protecting Rich Bankrupts*, N.Y. TIMES, August 13, 1999, at A20; *Reform Choice for Mr. Bush*, WASH. POST, February 19, 2001, at A32; *The Rich Win*, WASH. POST, June 9, 2000, at A32. The Los Angeles Times editorial page’s views on bankruptcy evolved. *Compare Bankruptcy: Best Reform is a Stiff Dose of Discipline*, L.A. TIMES, Oct. 27, 1997, at B4 (“The nine-member congressional commission was supposed to come up with recommendations to revise federal bankruptcy law and close loopholes that critics say favor debtors. However, many debtors would come out ahead if Congress were to adopt certain recommendations among the 170 that the panel has offered. As it is, bankruptcy filings continue to go up, and the majority of those filing simply walk away from their debts.”) *with Bankruptcy Non-Reform*, L.A. TIMES, June 8, 1998, at B4 (“The credit card industry has hijacked efforts to reform bankruptcy laws. The House and Senate bills headed for floor votes are clothed cleverly in the rhetoric of reform, and change is certainly needed. But in reality they would significantly weaken protections for truly needy debtors and leave unchanged gaping loopholes in the law that savvy—and typically wealthy—filers use to put up the shield of bankruptcy to thwart creditors and lawsuits.”) *and Unjust Bankruptcy Reform*, L.A. TIMES, April 26, 2000, at B8 (Congress “ended up with a creditors’ bill of rights that is unsympathetic and unjust to most debtors.”).



## CONCLUSION

Some judges tell us that “the Code is the law.”<sup>119</sup> Bankruptcy experts tend to internalize that message and then conceptualize system improvements in terms of Bankruptcy Code amendment. Many statutory changes were suggested to or discussed with the National Bankruptcy Review Commission via more than 2300 written submissions and 600 in-person contributions,<sup>120</sup> and much of the 1028 page majority report discussed proposed statutory amendments.<sup>121</sup> Law professors and others regularly write articles proposing Code amendments as the answer.<sup>122</sup> The National Bankruptcy Conference developed two lengthy reports recommending Code revisions.<sup>123</sup> It is not surprising that one would shudder at the thought of being excluded from Congressional deliberations.

Much is at stake in a discussion about the direction of the bankruptcy system. The bankruptcy system affects many millions of individuals, families, firms, and communities.<sup>124</sup> The system intersects with a staggering range of substantive issues: the bankruptcy system encounters families being sued for

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<sup>119</sup>Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery, 330 F.3d 548, 585 (3d Cir. 2003) (Fuentes, J., dissenting) (emphasis added).

<sup>120</sup>See REPORT OF THE NATIONAL BANKRUPTCY REVIEW COMMISSION 64-74 (1997).

<sup>121</sup>See REPORT OF THE NATIONAL BANKRUPTCY REVIEW COMMISSION (1997).

<sup>122</sup>See generally Lawrence Ponoroff, *The Dubious Role of Precedent in the Quest for First Principles in the Reform of the Bankruptcy Code: Some Lessons from the Civil Law and Realist Traditions*, 74 AM. BANKR. L.J. 173, 209 (2000) (“And those of us who comment on the bankruptcy system are not free from blame either. We dribble out an endless series of articles saying this particular case or that is wrong and call for an instant legislative fix.”). The American Bankruptcy Law Journal itself dedicated many volumes to criticisms and proposals. See, e.g., *Symposium, Letters to the Commission*, 69 AM. BANKR. L.J. 431 (1995); *Symposium, Reforming Consumer Bankruptcy Law: Four Proposals*, 71 AM. BANKR. L.J. 431 (1997).

<sup>123</sup>THE NATIONAL BANKRUPTCY CONFERENCE’S CODE REVIEW PROJECT, REFORMING THE BANKRUPTCY CODE (May 1, 1994); THE NATIONAL BANKRUPTCY CONFERENCE’S CODE REVIEW PROJECT, REFORMING THE BANKRUPTCY CODE (Rev’d May 1, 1997).

<sup>124</sup>See, e.g., REPORT OF THE NATIONAL BANKRUPTCY REVIEW COMMISSION 722 (1997) (“The present bankruptcy system comes into contact with more individuals and entities and handles more money than the rest of the federal court system combined.”); Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5 (1995) (“No corner of our society seems immune from the ubiquitous reach of bankruptcy. It touches mass tort victims, mega corporations, mom-and-pop businesses, (supposedly) wealthy California counties, fraudulent schemers, polluters, unfortunate individuals—the list is endless.”); Elizabeth Warren, *The New Economics of the American Family*, 12 AM. BANKR. INST. L. REV. 1, 40 (2004). Even the 2004 Democratic National Platform acknowledges bankruptcy’s national relevance. 2004 Democratic National Platform Committee Report, 22 (2004) (noting that one of seven middle class families may be bankrupt by the end of the decade). This mention of bankruptcy does not include any mention of Democrats’—particularly New Democrat or “Blue Dogs”—support for the omnibus bill. See Press Release, New Democrat Coalition, New Democrats Provide Key Support for Bankruptcy Reform (March 1, 2001), available at <http://www.ndol.org/print.cfm?contentid=3111>; Press Release, New Democrat Coalition, New Democrat Leaders Criticize Republicans for Ignominious Defeat of Critical Economic Legislation (Nov. 14, 2002), available at <http://www.ndol.org/print.cfm?contentid=25108> (criticizing “group of right-wing, conservative Republicans” for preventing bankruptcy bill from passing due to abortion issue).

medical debts,<sup>125</sup> an Archdiocese defending against sexual abuse allegations,<sup>126</sup> major manufacturers of products that allegedly have caused widespread harm,<sup>127</sup> and small businesses fighting with the IRS,<sup>128</sup> all while the debtors have responsibilities to a wider range of claim or interest holders. Bankruptcy offers a collective approach to working through these and other problems.<sup>129</sup>

This system is too vast and too significant to be left in the hands of any one group, including bankruptcy experts. But believing that bankruptcy experts can be shut out of reform not only is counterproductive, but impossible. Bankruptcy experts know the system is not perfect, and do not speak with one voice regarding its ideal direction. But even if they did, they know that no version of the Code would capture it.<sup>130</sup> The Bankruptcy Code's birthday should be celebrated with the recognition that the Code's role in this vast and complex system is important but not all-encompassing. Twenty-five years from now, even if the Bankruptcy Code is largely the same, the bankruptcy system will have been remade again.

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<sup>125</sup>See generally *Hearing on a Review of Hospital Billing and Collection Practices Before the House Comm. on Energy and Commerce Subcommittee on Oversight and Investigations*, 108th Cong. (2004) (statement of Melissa B. Jacoby).

<sup>126</sup>See, e.g., Laurie Goodstein, *Oregon Archdiocese Files for Bankruptcy Protection*, N.Y. TIMES, July 7, 2004, at A12.

<sup>127</sup>See, e.g., S. Elizabeth Gibson, *A Response to Professor Resnick: Will This Vehicle Pass Inspection?*, 148 U. PA. L. REV. 2095 (2000); Alan N. Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability*, 148 U. PA. L. REV. 2045 (2000).

<sup>128</sup>See, e.g., Elizabeth Warren & Jay Lawrence Westbrook, *Financial Characteristics of Businesses in Bankruptcy*, 73 AM. BANKR. L.J. 499, 559 (1999) (reporting that one in five business bankruptcy filers in their sample identified problem with taxing authority, and nearly one in five also identified problem with specific creditor as reason for filing).

<sup>129</sup>See, e.g., Stanley D. Longhofer & Stephen R. Peters, *Protection for Whom? Creditor Conflict and Bankruptcy*, 6 AM. L. & ECON. REV. 249 (2004).

<sup>130</sup>See, e.g., *Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery*, 330 F.3d 548, 567-68 (3d Cir. 2003) ("We believe that the missing link is supplied by bankruptcy courts' equitable power to craft flexible remedies in situations where the Code's causes of action fail to achieve their intended purpose. . . . It is in precisely this situation that bankruptcy courts' equitable powers are most valuable, for the courts are able to craft flexible remedies that, while not expressly authorized by the Code, effect the result the Code was designed to obtain.").

