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The Structural Exceptionalism of Bankruptcy Administration

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ABSTRACT

The current system of administration of the Bankruptcy Code is highly anomalous. It stands as one of the few major federal civil statutory regimes administered almost exclusively through adjudication in the courts—not through a federal regulatory agency. This means that rather than fitting bankruptcy into a regulatory model, the U.S. Congress has chosen to give the courts primary interpretive authority in the field of bankruptcy, delegating to courts the power to engage in residual policymaking.

Although scholars have noted some narrow aspects of the structural exceptionalism of bankruptcy administration, Congress's decision to locate responsibility for bankruptcy policymaking almost exclusively with the federal judiciary, with little input from administrative agencies, has evaded scholarly attention. This Article aims to fill the gap by analyzing the congressional decision to locate residual policymaking power in the courts. After identifying the structural anomalies of the current court-centered model and some of the constitutional and policy-driven concerns that flow therefrom, this Article makes the case for moving bankruptcy toward an administrative model with a regulatory agency charged with setting bankruptcy policy. Such a shift away from bankruptcy exceptionalism could bring greater expertise, accountability, uniformity, accessibility, transparency, prospective clarity, and flexibility to policymaking in the bankruptcy arena. In addition, this shift could alleviate some of the constitutional issues that cast doubt on the legitimacy of our current system, such as Article III questions highlighted by the U.S. Supreme Court's 2011 decision in *Stern v. Marshall*.

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INTRODUCTION

Our current system of bankruptcy administration is highly anomalous. The Bankruptcy Code[1] is one of the few major federal civil statutory regimes administered almost exclusively through adjudication in the courts—not through a federal regulatory agency.[2] This means that rather than fitting bankruptcy into a regulatory model—as the U.S. Congress has done, for example, with the securities laws administered by the SEC or the tax laws administered by the IRS—Congress chose to delegate administration of the Bankruptcy Code to the courts, with little input from federal administrative agencies.[3]

Noting some of the structural anomalies of bankruptcy administration, a few scholars have analyzed some narrow consequences of Congress's decision to create a court-centered bankruptcy system, such as how the judicially administered system calls on courts to engage in non-judicial, administrative tasks.[4] Scholars have generally failed, however, to identify perhaps the most significant consequence of Congress's choice of delegate: Courts routinely engage in a lawmaking function by filling in the gaps in the Bankruptcy Code.[5] Congress, in other words, chose to

1. This Article uses the terms "Bankruptcy Code" and "Code" to refer to the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended primarily at 11 U.S.C. §§ 101–1532 (2006)).
2. *See* Adam J. Levitin, *Toward a Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime*, 80 AM. BANKR. L.J. 1, 84 (2006); Matthew Stephenson & Kristin Hickman, *The Administrative Law of Borrowed Regulations: Legal Questions Regarding the Bankruptcy Law's Incorporation of IRS Standards*, NORTON BANKR. L. ADVISER, Jan. 2008, at 1, 1.
3. *See* Jonathan C. Lipson, *Debt and Democracy: Towards a Constitutional Theory of Bankruptcy*, 83 NOTRE DAME L. REV. 605, 654 (2008) ("The current distribution of bankruptcy jurisdiction reflects a series of political decisions to make bankruptcy a matter of adjudication rather than agency administration."); *cf.* Lawrence Ponoroff & F. Stephen Knippenberg, *The Implied Good Faith Filing Requirement: Sentinel of an Evolving Bankruptcy Policy*, 85 NW. U. L. REV. 919, 963 (1991) ("It is the judiciary, far more than Congress, which controls the evolution of bankruptcy policy.").
4. *See infra* notes 416–421 and accompanying text.
5. A few scholars have recognized the lawmaking function currently played by the courts in the bankruptcy sphere. *See, e.g.*, Levitin, *supra* note 2, at 84 ("The exercise of lawmaking power by bankruptcy courts is consistent with the post–New Deal system of administrative agencies exercising law-making power through rule-making and adjudications."); *cf.* Thomas M. Mackey, *Post*-Footstar *Balancing: Toward Better Constructions of § 365(c)(1) and Beyond*, 84 AM. BANKR. L.J. 405, 478 (2010) ("[T]he fact that Congress chose not to make an administrative agency such as the PTO, Environmental Protection Agency (EPA), or Food and Drug Administration (FDA), but did choose to create specialized bankruptcy courts as the only means for formal, legally binding restructuring or liquidation bankruptcy procedures, implies that Congress saw bankruptcy courts as having quasi-administrative, as well as adjudicative, functions."). These scholars, however, either have touched on the issue only in passing or have discussed the judicial role in bankruptcy without evincing an

delegate policymaking power in the bankruptcy arena to the courts rather than an administrative agency, empowering courts to resolve "competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved."[6]

Our central claim—that courts function as lawmakers in the bankruptcy arena because of their delegated policymaking powers—runs right up against the longheld "fiction that courts, particularly Article III courts, do not make law."[7] Although it is well accepted that residual policymaking power stands as an inevitable consequence of gaps in statutory frameworks,[8] the literature focusing on Congress's delegation of interpretive powers tends to view "Congress's choice as binary: Congress can either resolve policy issues *itself* or leave the relevant decisions to *an agency*."[9] Courts are rarely viewed as potential recipients of delegated lawmaking authority. Instead, thanks to the fiction that the courts do not make the law, courts are often said to find the law by "discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be."[10] Thus, "the very same statutory instructions, yielding the very same level of ambiguity" that is viewed "as a delegation in the administrative context, will be treated outside the

awareness of the choice-of-delegate issues raised by Congress's empowerment of the courts rather than an agency.

6. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984). In using the term "policymaking" in this Article, we refer to situations in which Congress has not resolved a question of statutory meaning, leaving the resolution of competing interests to some other institution. *See generally* Richard J. Pierce, Jr., *Reconciling* Chevron *and Stare Decisis*, 85 GEO. L.J. 2225, 2228 (1997) ("[A]ny time Congress enacts a statute that does not resolve an interpretive question that arises in the process of administering the statute, Congress has created the need for some other institution to resolve a policy dispute."); Kathryn A. Watts, *Adapting to Administrative Law's* Erie *Doctrine*, 101 NW. U. L. REV. 997, 1024 (2007) ("[S]electing one reading of an ambiguous statute over another can be viewed as a 'political act' that turns on policy questions.").

7. Lisa Bressman, *The Judicial Playing Field: Courts as Lawmakers*, JOTWELL (July 11, 2011), http://adlaw.jotwell.com/the-judicial-playing-field-courts-as-lawmakers.

8. *See* THE FEDERALIST NO. 37, at 287 (James Madison) (John C. Hamilton ed., 1885) ("All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular . . . adjudications."); *see also* Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 428 (2008).

9. Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 365 (2010) (emphasis added).

10. James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring); *see also* Charles H. Koch, Jr., *Policymaking by the Administrative Judiciary*, 25 J. NAT'L ASS'N ADMIN. L. JUDGES 49, 54 n.18 (2005) (arguing that the "making of agency law or administrative policymaking must be sharply distinguished from statutory interpretation" conducted by judges).

administrative context as ordinary legislation subject to ordinary judicial interpretation" using traditional tools of statutory construction.[11]

Margaret Lemos recently highlighted this fiction, demonstrating that "Congress can and does delegate policymaking discretion to the federal courts."[12] Congress, for example, has done so in a variety of contexts, such as the Sherman Act,[13] Title VII,[14] and patent law.[15] Nonetheless, the fiction persists, leading many scholars to fail to acknowledge that courts exercise a policymaking function—just as agencies do—"when they fill in the gaps left by broad delegations of power."[16] Hence, it is perhaps understandable that bankruptcy scholars have generally failed to take note of, or perhaps have turned a blind eye to, the central policymaking role played by the courts in administering the Bankruptcy Code.

The inattention given to Congress's choice of delegate in the bankruptcy sphere is unfortunate because, given the significant differences between courts and agencies, Congress's choice of delegate implicates important questions of institutional design.[17] For example, bankruptcy judges' decisions, which are usually reviewed by generalist Article III judges, lack precedential effect,[18] and bankruptcy judges' decisions do not receive formal deference from Article III courts when questions of law are at issue on appeal.[19] This differentiates bankruptcy courts from

11. Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference With the Judiciary's Structural Role*, 53 STAN. L. REV. 1, 77 (2000).
12. Lemos, *supra* note 9, at 365. A few other scholars also have recognized the choice-of-delegate question between courts and agencies. *Cf.* Amnon Lehavi, *Judicial Review of Judicial Lawmaking*, 96 MINN. L. REV. 520, 576 (2011) ("Entrusting courts with the task of giving content to . . . a norm goes beyond resolving specific disputes. In fact, it requires courts to engage in lawmaking by delineating the broad contours of human conduct . . . ."). *Compare* H.L.A. HART, THE CONCEPT OF LAW 131 (2d ed. 1997) (discussing the scenario in which "the legislature sets up very general standards and then delegates to an administrative, rule-making body acquainted with the varying types of case, the task of fashioning rules adapted to their special needs"), *with id.* at 132 ("Where the decisions of the court . . . are regarded as precedents, their specification of the variable standard is very like the exercise of delegated rule-making power by an administrative body, though there are also obvious differences.").
13. *See* Thomas C. Arthur, *Workable Antitrust Law: The Statutory Approach to Antitrust*, 62 TUL. L. REV. 1163, 1166 (1988); Lemos, *supra* note 8, at 462.
14. *See* Lemos, *supra* note 9 (analyzing the judiciary's role in interpreting Title VII).
15. *See, e.g.*, Michael J. Burstein, *Rules for Patents*, 52 WM. & MARY L. REV. 1747, 1751 (2011); Arti K. Rai, *Engaging Facts and Policy: A Multi-institutional Approach to Patent System Reform*, 103 COLUM. L. REV. 1035, 1041 (2003).
16. Lemos, *supra* note 8, at 408; *see also id.* ("[V]irtually no [scholarly] effort has been made to fit delegations to courts into nondelegation theory or practice.").
17. Notably, Congress's choice of delegate may not always be made intentionally. *See* Lemos, *supra* note 9, at 366 n.10.
18. *See infra* note 266 and accompanying text.
19. *See infra* note 108 and accompanying text.

administrative agencies, which can invoke doctrines like *Chevron* deference once they have issued binding interpretations of statutory ambiguities.[20] Additionally, the judges interpreting the Bankruptcy Code are constrained by stare decisis principles when resolving legal questions once an Article III court has issued a precedential opinion, and hence the courts, unlike an administrative agency, do not enjoy the flexibility to easily adapt to changing circumstances.[21] The judges who decide bankruptcy matters are also more politically insulated than administrative agencies.[22] Furthermore, courts do not set policy through a transparent process that invites general public deliberation and participation. Nor can courts control which issues will present themselves for decision. Unlike policy set by regulatory agencies through notice-and-comment rulemaking, courts set policy through case-by-case adjudication and decide only the matters presented in a particular case.[23] Taking into account these and other institutional differences between courts and agencies, this Article ultimately concludes that courts are ill equipped to set bankruptcy policy and that the locus of bankruptcy policymaking should be shifted to an administrative agency with substantive rulemaking powers.

This Article's focus on institutional design in the bankruptcy context is particularly timely for a variety of reasons. Most prominently, the recent Great Recession and its accompanying increase in bankruptcy filings both by companies (including the spectacular business failures of Lehman Brothers, General Motors, and Chrysler) and by individuals (including a rising tide of student-loan borrowers) have highlighted the significance of bankruptcy policy in our country.[24] In addition, during the 2011 Term, the U.S. Supreme Court handed down *Stern v. Marshall*,[25] holding that bankruptcy courts could not constitutionally enter a final judgment on a state

20. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) (calling for deference to agencies' reasonable interpretations of ambiguous statutory provisions); *infra* notes 284–287 and accompanying text.
21. *See infra* Part II.B.6.
22. *See infra* Part II.B.2 (describing how bankruptcy judges are appointed by Article III judges through a process that insulates them from political control and how they serve fourteen-year terms).
23. *See infra* Part II.B.4; *see also* Mackey, *supra* note 5, at 479 ("The EPA can create environmental health and safety standards independent of any particular environmental source of harm or risk to health or safety, but the bankruptcy court is primarily driven by the individual debtor seeking liquidation or restructuring.").
24. *See* NAT'L ASS'N CONSUMER BANKR. ATTORNEYS, STUDENT LOAN DEBT CRISIS SURVEY (2012), *available at* http://nacba.org/Portals/0/Documents/Student Loan Debt/020712 NACBA student loan survey.pdf (reporting that approximately 81 percent of "bankruptcy attorneys [surveyed] say that potential clients with student loan debt have increased 'significantly' or 'somewhat' in the last three–four years" and that approximately 39 percent of such attorneys "have seen potential student loan client cases jump 25–50 percent in the last three–four years").
25. 131 S. Ct. 2594 (2011).

law tortious interference counterclaim.[26] In calling into doubt the constitutionality of bankruptcy courts' adjudication of common law counterclaims, Chief Justice Roberts was careful to distinguish the bankruptcy context from traditional regulatory adjudication.[27] Specifically, his opinion seemed to suggest that although the Court has allowed traditional agencies involved in administering complex regulatory regimes to adjudicate even common law claims, bankruptcy does not involve an administrative agency and, hence, is different.[28] His opinion, accordingly, highlights the need to query whether bankruptcy *should* be different.

This Article proceeds in three Parts. Part I develops our claim that Congress has located primary responsibility for bankruptcy policymaking within the federal judiciary. We describe how Congress has delegated policymaking to the federal judiciary despite the existence of two little known federal agencies in the bankruptcy arena: the United States Trustee (UST) Program, which is a component of the U.S. Department of Justice, and the Bankruptcy Administrators (BA) Program, which operates under the Judicial Conference of the United States.

Part II then analyzes a variety of constitutional and policy-driven concerns that flow from our current court-centered model. Specifically, Part II argues that the method used to remove BAs from office may well be unconstitutional and describes how the court-centered model of bankruptcy administration raises thorny Article III questions relating to the constitutionality of the bankruptcy courts themselves. Part II also considers the relevance of the nondelegation doctrine to Congress's choice of delegate. Although the current weakened version of the nondelegation doctrine does not render Congress's delegation to the courts unconstitutional per se, Part II argues that the relevance of the nondelegation doctrine cannot be dismissed out of hand. In the administrative law world, courts have condoned relatively standardless delegations of policymaking authority to agencies predominantly because of functional considerations that make agencies well suited to receive delegations of policymaking power, including agencies' relative expertise, accountability, flexibility, accessibility, and ability to achieve uniformity. As Part II describes, however, these same functional considerations do not similarly tip in favor of Congress's decision to delegate policymaking power to courts in the bankruptcy context.

Finally, Part III makes the case for moving bankruptcy toward an administrative model through the creation of a federal bankruptcy agency endowed, at a

26. *Id.* at 2620.
27. *Id.*
28. *Id.*

minimum, with substantive rulemaking powers. Part III begins with a story of path dependency, identifying the historical roots of the court-centered model and analyzing whether various reform efforts illuminate how bankruptcy could be redesigned moving forward. With this history in mind, Part III turns to consider how a federal bankruptcy agency might be created and charged with setting federal bankruptcy policy. In the end, although any such bankruptcy agency would need to be carefully designed so as to minimize the risk of capture by creditors, lawyers and dominant industry groups, we believe that such a shift away from bankruptcy exceptionalism toward an administrative model could help address some of the constitutional issues currently facing bankruptcy and could bring greater expertise, accountability, uniformity, accessibility, transparency, prospective clarity, and flexibility to bankruptcy administration.

I. JUDICIAL ADMINISTRATION OF THE BANKRUPTCY CODE

The Bankruptcy Code, which is primarily embodied in Title 11 of the United States Code, represents a complex federal statutory scheme consisting of nine chapters. The most recent comprehensive overhaul of the Code highlights its complexity: The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA)[29] constituted 195 pages in one volume of the official federal session laws.[30] The product of inartful drafting,[31] BAPCPA's suboptimal statutory design has produced myriad unintended consequences, including statutory gaps.[32]

Even though Congress has created federal administrative agencies for nearly all major, complex, federal civil statutory schemes—such as the securities laws, consumer protection laws, labor laws, environmental laws, food and drug laws, immigration laws, and tax laws—Congress did not create a federal administrative agency charged with filling in the statutory gaps that Congress either inadvertently or intentionally left unresolved in the Bankruptcy Code.[33] Rather, Congress chose to vest primary interpretation of the Code in the courts.

29. Pub. L. No. 109-8, 119 Stat. 23.
30. *See id.* at 23–217.
31. *See* David Gray Carlson, *Means Testing: The Failed Bankruptcy Revolution of 2005*, 15 AM. BANKR. INST. L. REV. 223, 227 (2007); Keith M. Lundin, *Ten Principles of BAPCPA: Not What Was Advertised*, AM. BANKR. INST. J., Sept. 2005, at 1, 70.
32. *See* Thomas F. Waldron & Neil M. Berman, *Principled Principles of Statutory Interpretation: A Judicial Perspective After Two Years of BAPCPA*, 81 AM. BANKR. L.J. 195, 228 (2007).
33. *See supra* note 3 and accompanying text.

A. The Current Structure of the Bankruptcy System

Before developing our central claim that the open-textured provisions in the Code require courts to fill statutory gaps and thereby to engage in policymaking, it is necessary to briefly sketch the current structure of bankruptcy administration and the key players operating within the system.

1. The Nature of a Bankruptcy Case

A debtor voluntarily commences a bankruptcy case by filing a petition under the operative chapter of the Code (that is, Chapter 7, 9, 11, 12, or 13) pursuant to which the debtor wishes the case to proceed.[34] For example, if a debtor seeks relief in the form of a Chapter 7 discharge, she must be eligible for such relief and must file a petition under that chapter.[35] In exchange for this relief, the debtor must give up all of her nonexempt assets, which will be liquidated by a trustee.[36] The proceeds from liquidation are used to pay the claims of the debtor's creditors,[37] and, in exchange, the Chapter 7 discharge releases the debtor from personal liability for most of her prebankruptcy debts.[38] In this fashion, the debtor obtains a fresh start.[39] Relief under the Code's other operative chapters proceeds according to the same basic principle—the discharge of debt in exchange for the debtor's assets and/or future income.[40]

A bankruptcy court, through referral from the district court,[41] has original and exclusive jurisdiction over a bankruptcy *case*,[42] and original but nonexclusive jurisdiction over all civil *proceedings* "arising under" the Code, or "arising in" or "related to" cases under the Code.[43] A proceeding "arises under" the Code if the cause of action

34. 11 U.S.C. § 301(a) (2006).
35. *See id.* §§ 109(b), 301(a).
36. *See id.* § 541(a)(1) (defining property of the bankruptcy estate); § 522(b)(1) (allowing the debtor to claim as exempt certain property from the bankruptcy estate); § 704(a)(1) (requiring the trustee to "collect and reduce to money the property of the estate").
37. *See id.* § 726(a) (providing for the distribution of property of the estate to holders of claims against the debtor).
38. *See id.* §§ 727(b), 523(a), 524(a)(2).
39. *See* Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).
40. *See, e.g.*, 11 U.S.C. §§ 1322(a)(1), 1328(a).
41. *See* 28 U.S.C. § 157(a) (2006). The federal district courts have entered standing orders that, in the first instance, refer bankruptcy cases to the bankruptcy courts. Jonathan Remy Nash & Rafael I. Pardo, *An Empirical Investigation Into Appellate Structure and the Perceived Quality of Appellate Review*, 61 VAND. L. REV. 1745, 1756 (2008).
42. *See* 28 U.S.C. § 1334(a).
43. *Id.* § 1334(b).

is created by the Code itself.[44] Proceedings "arising in" a case under the Code are "primarily those administrative proceedings that, while not based on any right created by [the Code], nevertheless have no existence outside bankruptcy."[45] Finally, a proceeding is "related to" a case under the Code if "the outcome of the proceeding could conceivably have any effect on the estate being administered in bankruptcy."[46] Given the distinction between a bankruptcy case and civil proceedings within the case, the case itself constitutes an administrative matter[47] within which disputes may, but need not, arise.[48]

Disputes in bankruptcy can involve a variety of litigants, including not only debtors and creditors but also either the UST or the BA, which are the representatives from one of the two federal agencies that operate in the bankruptcy system.[49] In addition, bankruptcy disputes generally involve private trustees. Although private trustees are selected and appointed by government actors (the UST or the BA),[50] they are not governmental employees. Instead, they are private individuals compensated to administer the bankruptcy estate. In Chapter 7 cases, for example, the private trustee's "principal duty is to collect and reduce to money the property of the estate for which he serves, and to close up the estate."[51] If assets are to be distributed, the private trustee may also be required to examine proofs of claim filed by creditors and "object to the allowance of any claim that is improper."[52]

In addition to involving a variety of litigants, bankruptcy disputes can involve a wide range of matters. The nature and extent of litigants and disputes within a bankruptcy case often turn on whether the case has been filed by an individual debtor (a consumer case) or by a legal entity (a business case). For example, in a

44. Menk v. Lapaglia (*In re* Menk), 241 B.R. 896, 909 (B.A.P. 9th Cir. 1999).
45. *Id.*
46. *Id.* at 908.
47. *See id.* at 910 ("[A bankruptcy case] has two main functions. It provides for the existence, and the *nonjudicial administration*, of the estate under which the prime function is the performance of the duties of the trustee under the supervision of the U.S. trustee. Second, it serves as the *administrative mechanism* by which the debtor receives a discharge and a fresh start." (emphasis added)).
48. *See, e.g.*, *id.* at 907–08 (referring to "the differences between the bankruptcy itself (i.e. the [28 U.S.C.] § 1334(a) case) and civil proceedings within the bankruptcy"); *In re* Attorneys at Law & Debt Relief Agencies, 353 B.R. 318, 322–23 (S.D. Ga. 2006) ("A 'case' refers to a matter initiated by the filing of a petition seeking relief under the Bankruptcy Code. A 'proceeding' refers to everything which happens within the context of a bankruptcy case."); *see also infra* note 186 and accompanying text (providing statistics for the number of bankruptcy cases and adversary proceedings filed during the 2009 and 2010 fiscal years).
49. *See infra* notes 86–92 and accompanying text.
50. *See infra* note 94 and accompanying text.
51. H.R. REP. NO. 95-595, at 379 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6335.
52. *Id.*

consumer case, creditors may object to property that a debtor claims as exempt;[53] they may argue that some of the debtor's debts are nondischargeable;[54] and they may argue that the debtor should be denied a discharge.[55] In a business case, creditors may object to the confirmation of a Chapter 11 debtor's reorganization plan;[56] they may object to the use of estate property by the reorganizing debtor;[57] they may seek relief from the automatic stay if their interest in the reorganizing debtor's property is not adequately protected;[58] and they may object to the financing that the reorganizing debtor seeks to finance its postbankruptcy operations.[59] Finally, whether in a consumer case or a business case, creditors may litigate against one another—for example, by challenging the validity or the secured status of each other's claims.[60]

2. Agency and Judicial Roles

In terms of governmental players operating within the bankruptcy system, both the courts and two federal agencies—the UST Program and the BA Program—play a role. These agencies—the latter located in the judiciary and the former located in the executive branch—split their authority along geographic lines and have narrowly defined duties. Moreover, they do not possess the power to set policy relating to the restructuring of debtor–creditor relationships under the Code. Rather, the courts fill that role.

a. The UST and BA Programs

The UST and BA Programs constitute two relatively obscure federal agencies involved in the bankruptcy arena.[61] First, the UST Program is a component of the Department of Justice. It consists of twenty-one regional UST Offices.[62] Each

53. *See* 11 U.S.C. § 522(*l*) (2006).
54. *See id.* § 523(a).
55. *See id.* § 727(a).
56. *See id.* § 1129.
57. *See id.* § 363(b)(1), (e).
58. *See id.* § 362(d)(1).
59. *See id.* § 364(b)–(d).
60. *See id.* §§ 502, 506.
61. By using the phrase "relatively obscure," we do not mean to suggest that the work of these agencies is unimportant. Rather, it is our sense that, if asked, most policymakers and legal academics would not know what the UST and BA Programs do.
62. *See* 28 U.S.C. § 581(a) (2006). While the twenty-one regions established by the Judicial Code encompass all federal judicial districts, *see id.*, including the judicial districts established for the states

regional office is run by one UST[63] and may also be staffed by assistant USTs.[64]

While the Judicial Code provides that the Attorney General of the Department of Justice (AG) shall supervise the UST Program,[65] the AG has delegated this task to the Executive Office for United States Trustees (EOUST), which the AG created and which is headed by a director appointed by the AG.[66] The supervisory and coordinating functions of the EOUST include providing leadership and policy direction to the USTs, evaluating the effectiveness of UST Program operations, coordinating the development of the Program's strategic plan, and collecting and disseminating data on UST operations.[67]

In creating the UST Program, Congress excluded all federal judicial districts located in Alabama and North Carolina.[68] Instead, Congress authorized the Judicial Conference of the United States (JCUS)[69] to promulgate regulations for the appointment of individuals in any of those judicial districts who would have similar duties to a UST.[70] This geographical carveout, which resulted in the BA Program operating in Alabama and North Carolina and the UST Program operating ev-

of Alabama and North Carolina, *see id.* § 581(a)(4), (a)(21), the UST Program does not operate in those two states, *see infra* notes 68–75, 81–83 and accompanying text.

63. *See* 28 U.S.C. § 581(a).
64. *See id.* § 582(a).
65. *See id.* § 586(c).
66. *See* 28 C.F.R. § 0.37 (2012) ("The Executive Office for United States Trustees shall be headed by a Director appointed by the Attorney General."); GEN. GOV'T DIV., U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-92-133, BANKRUPTCY ADMINISTRATION: JUSTIFICATION LACKING FOR CONTINUING TWO PARALLEL PROGRAMS 4 (1992), *available at* http://archive.gao.gov/d35t11/147775.pdf ("The Attorney General established the Executive Office for United States Trustees (EOUST) to provide legal, administrative, and management support to the individual UST districts."). Although no statute contains an express provision establishing the EOUST, the Judicial Code does make two references to the EOUST. *See* 28 U.S.C. §§ 156(f), 586(a)(3)(A)(i). Presumably, the AG created the EOUST pursuant to the AG's statutory right to delegate his or her authority, which includes authority over the UST Program. *See id.* § 510 ("The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General."); *id.* § 586(c) ("Each United States trustee shall be under the general supervision of the Attorney General, who shall provide general coordination and assistance to the United States trustees."); 28 C.F.R. § 0.38 ("The [EOUST] Director shall perform such duties relating to such functions and others under the Bankruptcy Reform Act of 1978 as may be assigned by the Attorney General or the Deputy Attorney General.").
67. *See Executive Office for United States Trustees*, U.S. DEP'T JUST., http://www.justice.gov/jmd/mps/manual/eoust.htm (last visited Oct. 24, 2012) (depicting an EOUST organizational chart).
68. *See* Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, § 302(d)(3)(A), (E), 100 Stat. 3088, 3121–22 (amended 1990 and 2000).
69. *See* 28 U.S.C. § 331 (establishing the JCUS).
70. *See* Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act § 302(d)(3)(I), 100 Stat. at 3123.

erywhere else, appears to have been the product of political compromise. The Bankruptcy Code enacted in 1978 established the UST Program as a six-year pilot program in which eighteen judicial districts participated, including the Northern District of Alabama.[71] The federal judiciary in that district did not have a positive experience with the pilot program,[72] and the judges apparently lobbied Senator Howell Heflin (D-AL) for Alabama to be excluded from the UST program when Congress expanded it nationally.[73] The bankruptcy judges from North Carolina appear to have similarly lobbied Senator Jesse Helms (R-NC) for exclusion from the UST program.[74] A political compromise resulted that allowed these districts to abstain from the UST program.[75]

The JCUS created the BA Program by approving regulations, commonly referred to as the "Regulations of the Judicial Conference of the United States Governing the Bankruptcy Administrator Program,"[76] in September 1987.[77] Those regulations establish a BA Program for the judicial districts in Alabama and North Carolina,[78] with a BA appointed to each district in those states.[79] The JCUS regulations describe BAs as "independent, non-judicial officers of the Judiciary when performing their official duties."[80]

Although Congress initially mandated that the federal judicial districts operating with BAs would ultimately be incorporated into the UST Program,[81] Congress

71. *See* Dan J. Schulman, *The Constitution, Interest Groups, and the Requirements of Uniformity: The United States Trustee and the Bankruptcy Administrator Programs*, 74 NEB. L. REV. 91, 121 & n.161 (1995).
72. *See* 132 CONG. REC. 10,008–10 (1986) (statement of Sen. Heflin).
73. *See* Schulman, *supra* note 71, at 123. Senator Heflin may have been particularly sympathetic to such complaints given that he had served as chief justice of the Supreme Court of Alabama prior to joining the Senate. *See* 132 CONG. REC. 10,013 (statement of Sen. Thurmond). Senator Heflin revealed his view regarding the primacy of the courts in making the following comments: "The decision to 'opt-out' [of the UST program] will be made based on a majority vote of the bankruptcy judges and the chief district judge within a judicial district. *This leaves the decision where it should be—within the judicial districts which will be most affected by the decision*." *Id.* at 10,009 (statement of Sen. Heflin) (emphasis added).
74. *See* Schulman, *supra* note 71, at 123.
75. *See* 132 CONG. REC. 10,009 (statement of Sen. Heflin).
76. 9 JUDICIAL CONFERENCE OF THE U.S., GUIDE TO JUDICIARY POLICY § 210(a) (2010) [hereinafter JCUS REG.].
77. *See* JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 49, 53–54, 81–82 (1987), *available at* http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings/Proceedings.aspx?doc=/uscourts/FederalCourts/judconf/proceedings/1987-09.pdf.
78. 9 JCUS REG., *supra* note 76, § 220.40(a).
79. *Id.* § 220.40(b).
80. *Id.* § 220.40(d).
81. *See* Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, § 302(d)(3)(A)(ii), 100 Stat. 3088, 3121 (requiring judicial districts in Alabama and

abandoned that mandate in 2000,[82] leaving the choice to each judicial district in Alabama and North Carolina to determine when, if ever, it will join the UST Program.[83] Hence, the BA Program currently operates in North Carolina and Alabama, and the UST Program operates everywhere else.

Despite covering different geographic territory, the duties of the UST and BA Programs largely mirror each other.[84] While many of these duties involve reporting or monitoring functions,[85] both USTs and BAs also have the power to raise any issue and to appear and be heard in any case or proceeding under the Bankruptcy Code.[86]

North Carolina to join the UST Program by October 1, 1992); Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 317(a), 104 Stat. 5089, 5115 (extending date for judicial districts in Alabama and North Carolina to join the UST Program to October 1, 2002).

82. *See* Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, § 501, 114 Stat. 2410, 2421 (codified at 28 U.S.C. § 581 note (2006)) (eliminating requirement that judicial districts in Alabama and North Carolina join the UST Program by a date certain).

83. *See* Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act § 302(d)(3)(A)(ii), 100 Stat. at 3121 (providing that any judicial district in Alabama or North Carolina will not join the UST Program unless "such district elects to be included in a bankruptcy region established in [28 U.S.C. § 581(a)]"); *id.* § 302(d)(3)(B), 100 Stat. at 3122 (providing that election of a judicial district in Alabama or North Carolina to join the UST Program "shall be made upon a majority vote of the chief judge of such district and each bankruptcy judge in such judicial district in favor of such election").

84. *See* GEN. GOV'T DIV., *supra* note 66, at 1 ("For the most part, the [UST and BA] programs use similar procedures for supervising trustees and monitoring individual bankruptcy cases."). There is, however, one major difference between the organizational structures of the UST and BA Programs. Specifically, there does not appear to be an analogue to the EOUST within the BA Program. *See* 28 U.S.C. § 601 (providing that the Administrative Office of the United States Courts (AOUSC) "shall be supervised by a Director . . . appointed and subject to removal by the Chief Justice of the United States, after consulting with the Judicial Conference"). Nonetheless, the JCUS regulations provide that the Director of the AOUSC, "under the [JCUS's] supervision through its Committee on the Administration of the Bankruptcy System, must oversee implementing the regulations governing bankruptcy administrators' qualifications and selection." 9 JCUS REG., *supra* note 76, § 230.30(b).

85. For example, UST duties include (1) monitoring repayment plans filed under Chapters 11, 12, and 13 of the Bankruptcy Code, and (2) notifying the appropriate U.S. Attorney of matters which may constitute a crime and, on the request of the U.S. Attorney, assisting the U.S. Attorney in carrying out prosecutions. 28 U.S.C. § 586(a); *see also* 11 U.S.C. § 701(a)(2) (2006) (providing that, under certain circumstances, a UST may serve on an interim basis as the private trustee in a bankruptcy case). Similarly, BA duties include (1) monitoring repayment plans filed under Chapters 11, 12, and 13 of the Bankruptcy Code, and (2) monitoring for abuses and reporting suspected abuses, including criminal activity. *See* 9 JCUS REG., *supra* note 76, § 240.10(e)(7), (e)(10), (f).

86. *See* 11 U.S.C. § 307 (UST standing); Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 317(b), 104 Stat. 5089, 5115 (codified at 11 U.S.C. § 307 note) (BA standing); *see also* 9 JCUS REG., *supra* note 76, § 240.20(b) ("Bankruptcy administrators may file objections, applications, responses, motions, appeals, and other pleadings concerning any matter affecting estate administration in accordance with the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and local rules."); *id.* § 240.20(b)(1) ("Bankruptcy administrators may appear and be heard concerning any matters affecting estate administration.").

In some instances, the BA or the UST is the only party that may raise certain issues.[87] When exercising this power to act as a participant in the bankruptcy process, the UST and the BA do "not represent the federal government's creditor interests: If the federal government is a creditor, other federal lawyers provide representation."[88] Instead, they simply participate as a litigant in "proceedings that essentially involve the resolution of private debtor–creditor relations,"[89] operating as watchdogs and seeking to ensure that the bankruptcy laws are enforced.[90] For example, USTs and BAs may move to have Chapter 7 debtors' cases converted or dismissed,[91] or their bankruptcy discharges denied or revoked, if the debtors do not comply with the law.[92]

Not only do USTs and BAs have the power to participate in bankruptcy cases as litigants seeking to enforce the bankruptcy laws, but both also enjoy significant power over some of the actors who operate within the bankruptcy system, such as private trustees, lawyers,[93] and financial counseling entities. For example, USTs and BAs have the power to select and supervise private trustees in bankruptcy cases,[94] and the UST and BA programs set the substantive qualifications for these private trustees' appointments.[95] In addition, most individual debtors must obtain

87. *See, e.g.*, 11 U.S.C. § 707(a)(3), (b)(6).
88. *See* Thomas D. Buckley, *The Untapped Power of Bankruptcy's Wild Card: The United States Trustee*, 6 J. BANKR. L. & PRAC. 249, 250 (1997).
89. *Id.*
90. *See* H.R. REP. NO. 95-595, at 4 (1977) (describing USTs as "bankruptcy watchdogs"), *reprinted in* 1978 U.S.C.C.A.N. 5963, 5966; U.S. DEP'T OF JUSTICE, LEGAL MANUAL FOR UNITED STATES TRUSTEES 38–39 (1988), *available at* http://www.justice.gov/ust/eo/ust_org/ustp_manual/docs/vol1-1988AUG-general.pdf.
91. *See* 11 U.S.C. § 707(a)(3), (b)(1).
92. *See id.* § 727(c)–(d).
93. *See* 28 U.S.C. § 586(a)(3)(A)(i) (2006) (granting USTs the power to review—in accordance with "procedural guidelines adopted by the Executive Office of the United States Trustee"—and to object to applications for compensation of reimbursement of fees that have been filed by professionals, such as attorneys). Pursuant to these powers, guidelines involving fees were published in the Federal Register in 1996. *See* Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed Under 11 U.S.C. 330, 61 Fed. Reg. 24,889 (May 17, 1996) (codified at 28 C.F.R. pt. 58 app. A). The EOUST is currently revising its guidelines covering compensation sought by attorneys in certain large Chapter 11 cases. *See New Proposed Fee Guidelines*, U.S. DEP'T JUST. (Nov. 8, 2012, 10:01 AM), http://www.justice.gov/ust/eo/rules_regulations/guidelines/proposed.htm.
94. *See* 28 U.S.C. § 586(a), (c) (giving USTs the power to appoint and supervise private trustees); 9 JCUS REG., *supra* note 76, § 240.10(a) (empowering BAs to establish, maintain, and supervise Chapter 7 panel trustees); *id.* § 240.10(g) (providing that BAs must recommend candidates to serve as trustees under Chapter 12 and 13 cases and must supervise Chapter 12 and 13 trustees).
95. Notably, Congress specifically gave the Attorney General the power to set substantive qualifications for private trustees. *See* 28 U.S.C. § 586(d); *see also* 28 C.F.R. §§ 58.3, 58.4 (2012) (setting forth the minimum qualifications for private trustees operating within the UST Program). Furthermore, with respect to standing trustees appointed to handle Chapter 12 and 13 cases, Congress expressly

statutorily required prebankruptcy credit counseling and postbankruptcy financial management instruction,[96] and Congress has given both USTs and BAs the power to approve such counseling entities.[97]

Hence, both the UST and BA Programs enjoy significant authority to control private trustees, credit counseling and educational agencies, and other professionals operating within the bankruptcy arena. Even when all these powers are taken into account, however, the powers that reside within the UST and BA Programs are carefully defined and limited.[98] Most notably, neither agency enjoys broad rulemaking powers that would enable it to set substantive bankruptcy policy at the heart of the Code: the restructuring of debtor–creditor relationships.[99] Instead, the courts hold the power to do so. Even though Congress has created some space for agency involvement and enforcement of the statutory regime, the courts maintain the ultimate authority to set substantive bankruptcy policy.[100]

b. The Courts: Specialized Bankruptcy Courts and Article III Courts

While bankruptcy jurisdiction is technically vested in the U.S. district courts, that jurisdiction is exercised by bankruptcy judges who are considered "unit[s] of the district court" and are known, in turn, as the bankruptcy courts.[101] The Judicial

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gave the Attorney General (in consultation with the relevant UST) the power to fix their compensation. *See* 28 U.S.C. § 586(e).

96. *See* 11 U.S.C. §§ 109(h), 727(a)(11), 1328(g).
97. *See id.* § 111(b)–(d).
98. *See In re* Gideon, Inc., 158 B.R. 528, 530–31 (Bankr. S.D. Fla. 1993) (discussing limited role of UST); *In re* Johnson, 106 B.R. 623, 624 (Bankr. D. Neb. 1989) (denying the UST's request to require debtor in possession to imprint checks with "debtor-in-possession," and holding that the UST Guidelines did not carry the force or effect of law); *In re* Crosby, 93 B.R. 798, 802 (Bankr. S.D. Ga. 1988) ("The 'requirements' of the United States Trustee are merely administrative in nature."); *cf. In re* Vance, 120 B.R. 181, 185 (Bankr. N.D. Okla. 1990) ("[T]he UST has literally nothing to work on until a bankruptcy case is filed in a Bankruptcy Court; all UST action is incident to bankruptcy proceedings in Bankruptcy Court. Even when acting as an agency instead of as a litigant, the UST is an auxiliary to the Bankruptcy Court.").
99. *See* Leif M. Clark, *Article III Issues in Bankruptcy—Preparing for the 21st Century*, 1997 ANN. SURV. BANKR. L. 143, 155 n.7 ("The executive branch is charged with the responsibility for selecting and monitoring private trustees, but the United States Trustee has no direct responsibility for the restructuring of the debtor/creditor relationship in bankruptcy.").
100. *See* Lemos, *supra* note 9, at 365 n.6 ("This Article treats statutes that contain substantial gaps or ambiguities, and give courts primary *interpretive* authority to resolve those uncertainties, as delegations to courts. . . . It may also involve the efforts of one or more agencies, for example if agencies have been given authority to initiate and conduct litigation to force compliance with statutory requirements or to sanction violators. Such statutes still are properly understood as judicially enforced, as any relief must come from the courts." (citation omitted)).
101. 28 U.S.C. § 151 (2006); *see also supra* notes 41–43 and accompanying text (discussing bankruptcy court jurisdiction). Some circuits have held that a bankruptcy court does not fall within the Judicial

Code authorizes bankruptcy judgeships for every federal judicial district in the fifty states, the District of Columbia, and Puerto Rico.[102] During the 2010 fiscal year, there were 338 active and 29 recalled bankruptcy judges.[103]

Bankruptcy judges have the authority to "hear and determine" all core proceedings that arise under the Bankruptcy Code or that arise in a case under the Bankruptcy Code.[104] These core proceedings lie at the heart of the bankruptcy case and include matters concerning (1) estate administration, (2) the allowance of creditor claims, (3) relief from the automatic stay, (4) the recovery of preferential transfers and fraudulent conveyances, (5) the dischargeability of debts, (6) discharge objections, and (7) confirmation of repayment plans.[105] Thus, when a core proceeding is at issue, the bankruptcy judge is at the front line of administering the Bankruptcy Code, acting as the trial court in the system and making the initial call as to how to resolve any ambiguities in the Code.[106]

Upon a decision by a bankruptcy court, appellate review may follow. Although in some jurisdictions appellate review may be first sought from a specialized bankruptcy appellate panel consisting of bankruptcy judges, appellate review is

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Code's definition of "court of the United States." *See* Jones v. Bank of Santa Fe (*In re* Courtesy Inns, Ltd.), 40 F.3d 1084, 1086 (10th Cir. 1994); Perroton v. Gray (*In re* Perroton), 958 F.2d 889, 896 (9th Cir. 1992). *But cf. In re* Schaefer Salt Recovery, Inc., 542 F.3d 90, 105 (3d Cir. 2008) ("We find that although a bankruptcy court is not a 'court of the United States' within the meaning of § 451, it is a unit of the district court, which is a 'court of the United States,' and thus the bankruptcy court comes within the scope of § 451.").

102. *See* 28 U.S.C. § 152(a)(2).

103. JAMES C. DUFF, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2010 ANNUAL REPORT OF THE DIRECTOR 40 (2011), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/JudicialBusinespdfversion.pdf.

104. 28 U.S.C. § 157(b)(1). The constitutional authority of bankruptcy courts to definitively resolve all such proceedings, however, has recently been called into question. *See infra* Part II.A.1. In addition, if a district court withdraws the reference to the bankruptcy court, then the district court will hear and determine the proceeding in the first instance. *See* 28 U.S.C. § 157(d).

105. *Id.* § 157(b)(2)(A)–(B), (F)–(J), (L).

106. On the other hand, if a non-core proceeding is at issue, then the bankruptcy judge may or may not be the initial policymaker. If the parties consent to the entry of a final order by the bankruptcy judge in a non-core proceeding, *see id.* § 157(c)(2), then the bankruptcy judge will be the initial policymaker. But without the consent of all parties, a bankruptcy judge may hear the matter but cannot enter a final order. Instead, the judge must submit findings of fact and conclusions of law to the district court, which must engage in de novo review of the findings and conclusions to which a party has specifically objected. *See id.* § 157(c)(1). In this instance, it is the district court that acts as the initial policymaker—albeit not on a clean slate, but rather on a slate with recommendations issued by a judicial officer with specialized expertise. This dynamic could result in deferential policymaking. *Cf.* Lawrence P. King, *Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984*, 38 VAND. L. REV. 675, 681–82 (1985) ("In practical terms, however, the nonarticle III court's proposed findings and conclusions will be *the* findings and conclusions. 'Consider' and 'review' will disintegrate into rubber-stamped acceptances of the bankruptcy court's findings and conclusions.").

most often conducted by Article III courts.[107] On appeal, these courts have the power to review bankruptcy judges' conclusions of law de novo.[108] Hence, when an appeal is brought, the ultimate authority to fill in the gaps in the Code—and thereby to engage in the task of policymaking in the bankruptcy arena—falls to generalist Article III judges.

B. Judicial Policymaking in the Bankruptcy Arena

With an understanding of the nature of a bankruptcy case and the key players operating within the current system of bankruptcy administration, we turn now to support our central claim: Congress has left numerous interpretive questions involving the Bankruptcy Code unanswered, thereby delegating significant policymaking powers to the courts and empowering them, rather than an administrative agency, to authoritatively construe the meaning of ambiguities at the heart of the Bankruptcy Code.[109]

Broadly speaking, the Code involves "the restructuring of debtor–creditor relations."[110] More specifically, bankruptcy law generally focuses on two core concepts: (1) providing debt relief for a financially distressed debtor, and (2) distributing a debtor's assets and/or income for the benefit of creditors.[111] Many of the Code's provisions are highly detailed and limit the range of interstitial lawmaking because Congress's intent is clear. Others are quite open textured and ambiguous, however, thus providing a great deal of discretion to courts in fleshing out the details for the manner in which the Bankruptcy Code ought to be implemented.[112]

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107. *See infra* notes 268–283 and accompanying text.
108. *E.g.*, Peklar v. Ikerd (*In re* Peklar), 260 F.3d 1035, 1037 (9th Cir. 2001); Rifino v. United States (*In re* Rifino), 245 F.3d 1083, 1087 (9th Cir. 2001).
109. *Cf.* Daniel J. Bussel, Essay, *Power, Authority, and Precedent in Interpreting the Bankruptcy Code*, 41 UCLA L. REV. 1063, 1085 (1994) ("Bankruptcy courts are Article I tribunals, arguably constitutionally analogous to administrative agencies, although they function within the judicial rather than the executive branch.").
110. N. Pipeline Constr. Co v. Marathon Pipe Line Co., 458 U.S. 50, 71 (1982) (plurality opinion).
111. *See, e.g.*, S. REP. NO. 95-989, at 7 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5793; H.R. REP. NO. 95-595, at 177–78 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6138; REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt. 1, at 75, 76–81 (1973); William O. Douglas, *Wage Earner Bankruptcies—State vs. Federal Control*, 42 YALE L.J. 591, 592–93 (1933); Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. CIN. L. REV. 405, 413–14 (2005).
112. *See, e.g.*, Bussel, *supra* note 109, at 1084–85 (noting that "the Supreme Court and Courts of Appeals have recently and frequently seen fit to remind the actors in the bankruptcy system that the courts' lawmaking function is *interstitial*" and that "courts will inevitably create a judicial gloss upon the Bankruptcy Code"); John T. Cross, *Congressional Power to Extend Federal Jurisdiction to Disputes*

In particular, as we describe below, Congress has left significant statutory gaps that implicate various core bankruptcy policies, including fresh-start and distributive policies, thereby enabling the courts to set policy while engaging in case-by-case dispute resolution.

1. Policymaking Concerning the Fresh-Start Policy

Bankruptcy law's goal to provide debt relief for a financially distressed debtor is generally referred to as the fresh-start policy.[113] The Code effectuates a debtor's fresh start through the discharge of the debtor's in personam liability for prebankruptcy debt.[114]

a. The Discharge Itself

The Bankruptcy Code generally mandates that, if a debtor is eligible for bankruptcy relief,[115] the court must grant the debtor a discharge.[116] Hence, in the spec-

Outside Article III: A Critical Analysis From the Perspective of Bankruptcy, 87 NW. U. L. REV. 1188, 1226 n.140 (1993) ("As with all federal statutes, the federal courts may create 'interstitial' federal common law when interpreting and applying the Bankruptcy Code."); Richard M. Hynes, *Optimal Bankruptcy in a Non-optimal World*, 44 B.C. L. REV. 1, 6 (2002) ("In many instances, the Code gives little guidance to courts that must adjust the utopian goal to the realities of the actual world."); *cf.* 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, 210 (2000) ("My point is that the art of judging ought to be focused on putting into action the principles enunciated by the legislature [regarding bankruptcy]; to develop and extend them by prudent and reasoned application consistent with the spirit in which those principles were promulgated.").

113. *See, e.g.*, THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 225–52 (1986) (discussing the fresh-start policy). Jackson takes the view that the fresh-start policy applies only to individual debtors rather than to non-individual legal entities, such as corporations or partnerships. *Id.* at 225. Others, however, take the view that the fresh-start policy plays a role in both consumer and business bankruptcies, albeit with greater salience in the consumer context. *See, e.g.*, Lawrence Ponoroff, *Vicarious Thrills: The Case for Application of Agency Rules in Bankruptcy Dischargeability Litigation*, 70 TUL. L. REV. 2515, 2521–22, 2554 & n.155 (1996).

114. *See* 11 U.S.C. §§ 524(a)(2), 727(b), 944(b), 1141(d), 1228, 1328 (2006).

115. *See id.* § 109 (setting forth rules for who may be a debtor under the Bankruptcy Code).

116. For example, consider an individual debtor who files for Chapter 7 relief. Such a debtor must be granted a discharge unless he or she falls within a particular class of individual, generally defined by reference to a limited set of congressionally specified circumstances. *See id.* § 727(a) (setting forth grounds for denial of Chapter 7 discharge). Hence, the statutory interstices are narrow and tend to cabin policymaking discretion. Similarly, consider a debtor who files for bankruptcy relief under one of the chapters involving a repayment plan, such as Chapter 11 and Chapter 13. If a Chapter 11 debtor that is a legal entity proposes a repayment plan that satisfies the Code's substantive requirements for plan confirmation, *see id.* § 1129, such confirmation generally results in an automatic discharge, *see id.* § 1141(d)(1)(A). If a Chapter 11 or Chapter 13 debtor who is an individual proposes

trum of residual policymaking power, it might appear as if Congress has left relatively little room for policymaking as it relates to the bankruptcy discharge itself.[117] Opportunities for courts to engage in significant gap-filling, however, do exist.

For example, consider the discharge of student loans.[118] If repayment of a student loan would impose an "undue hardship" on the debtor, the debt is dischargeable.[119] Thus, while student loans are not automatically discharged, a debtor may obtain a discharge of such debt upon establishing the existence of a financial condition rising to the level of undue hardship.[120] Importantly, the Code does not define what constitutes undue hardship for purposes of determining the dischargeability of a student loan.[121] As such, a great deal of residual policymaking inheres in determining the scope of discharge whenever educational debt is at issue.[122] Indeed, this residual policymaking is precisely the kind that agencies routinely engage in and for which they receive *Chevron* deference from the courts in non-bankruptcy

a confirmable repayment plan, *see id.* §§ 1129, 1325, the debtor must be granted a discharge once he has completed all payments under the plan, provided that certain statutory exceptions do not apply, *see id.* §§ 1141(d)(5)(A), 1328(a).

117. *See, e.g.*, Douglass G. Boshkoff, *Limited, Conditional and Suspended Discharges in Anglo-American Bankruptcy Proceedings*, 131 U. PA. L. REV. 69, 71 (1982) ("[T]he discharge process in the United States can be . . . rather inflexible.").

118. Another good example of the potential for statutory gap-filling centers around cases involving Chapter 13 repayment plans. An individual debtor who fails to complete all payments under a Chapter 13 repayment plan may be entitled to a discharge upon a finding, among others, that "the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable." 11 U.S.C. § 1328(b)(1). Referred to as the "hardship discharge," H.R. REP. NO. 95-595, at 430 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6386, this form of relief—unlike any other discharge provision in the Code—invites inquiry by the court into the cause of the debtor's financial distress and provides a statutory basis for denial of discharge on the basis of financial irresponsibility, *see* Pardo & Lacey, *supra* note 111, at 517.

119. *See* 11 U.S.C. § 523(a)(8).

120. *See* United Student Aid Funds, Inc. v. Espinosa, 130 S. Ct. 1367, 1379 (2010) ("[Code] § 523(a)(8) requires a court to make a certain finding before confirming the discharge of a student loan debt. . . . [T]his requirement is 'self-executing.' But that means only that the bankruptcy court must make an undue hardship finding even if the creditor does not request one . . . ." (footnote omitted) (citation omitted)).

121. Interestingly, while Code § 523 does not define "undue hardship" for purposes of that section, *see* 11 U.S.C. § 523, the Code's provision regarding reaffirmation agreements sets forth a presumption of undue hardship that arises in that context if the debtor's disposable income is insufficient to make the payments specified in the agreement, *see id.* § 524(m)(1). It has been argued elsewhere that this provision should inform the meaning of undue hardship as it relates to the discharge of student-loan debt. *See* Pardo & Lacey, *supra* note 111, at 510–14.

122. *See* Judith A. McKenna & Elizabeth C. Wiggins, *Alternative Structures for Bankruptcy Appeals*, 76 AM. BANKR. L.J. 625, 658 (2002) (noting the results of a questionnaire which showed that judges pointed to the undue-hardship standard as one unresolved issue that posed problems for judges); Pardo & Lacey, *supra* note 111, at 411 ("Bemoaning the fact that Congress did not define undue hardship, courts have devised a variety of tests aimed at implementing the standard in a more 'rule-like' fashion." (footnote omitted)).

contexts. For example, the Fourth Circuit has given *Chevron* deference to the Secretary of Health and Human Service's interpretation of the statutory term "undue hardship" in federal law involving Medicaid.[123]

b. Access to the Bankruptcy Forum to Obtain a Discharge

Congress has also indirectly delegated administration of the fresh-start policy by permitting its delegate to have a great deal of discretion in granting access to the bankruptcy forum. Specifically, Congress has created a variety of mechanisms by which courts may dismiss bankruptcy cases. This is quite significant because, without access to the bankruptcy forum, the opportunity for bankruptcy relief under the fresh-start policy does not exist.[124]

First, consider case dismissal for an individual debtor. An individual debtor—whether filing for Chapter 7 or Chapter 13 relief—faces the possibility of having the case dismissed "for cause."[125] The Code does not define what constitutes cause,[126] but rather provides a non-exhaustive list of factors that could constitute cause for dismissal.[127] Without specific criteria to demarcate the bounds of "cause," Congress has given courts substantial discretion to develop policy regarding how wide the gate to the bankruptcy forum ought to be open. For example, although unenumerated as a "for cause" dismissal factor, courts have deemed lack of good faith to be an appropriate basis for dismissing an individual debtor's bankruptcy case.[128]

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123. *See* West Virginia v. Thompson, 475 F.3d 204 (4th Cir. 2007).
124. *See* Rafael I. Pardo, *An Empirical Examination of Access to Chapter 7 Relief by* Pro Se *Debtors*, 26 EMORY BANKR. DEV. J. 5, 19 (2009) ("[D]ismissal of a debtor's case will dispositively result in the failure of the debtor to obtain a discharge and thus bankruptcy's fresh start.").
125. 11 U.S.C. §§ 707(a), 1307(c).
126. *See id.* § 101.
127. In listing illustrative examples constituting cause for dismissal, the Code uses the word "including," *id.* §§ 707(a), 1307(c), which is a term that is "not limiting," *id.* § 102(3).
128. *E.g.*, Indus. Ins. Servs., Inc. v. Zick (*In re* Zick), 931 F.2d 1124, 1127 (6th Cir. 1991) (concluding "that lack of good faith is a basis for dismissal under § 707(a)"); Leavitt v. Sotor (*In re* Leavitt), 171 F.3d 1219, 1224 (9th Cir. 1999) ("Although not specifically listed, bad faith is a 'cause' for dismissal under § 1307(c)."). *Contra, e.g.*, Neary v. Padilla (*In re* Padilla), 222 F.3d 1184, 1193 (9th Cir. 2000) ("The Bankruptcy Code's language and the protracted relationship between reorganization debtors and their creditors lead us to conclude that bad faith per se can properly constitute 'cause' for dismissal of a Chapter 11 or Chapter 13 petition but not of a Chapter 7 petition under § 707(a)."). Similarly, a legal entity's Chapter 11 case may be dismissed if it was not filed in good faith. *E.g.*, *In re* SGL Carbon Corp., 200 F.3d 154, 159–60 (3d Cir. 1999). It has been observed that this "judicially imposed" requirement represents "a useful instrument pressed into service by the courts to bring order and standards to the business of assuring that bankruptcy policy and purposes evolve in a sensible, purposeful way." Ponoroff & Knippenberg, *supra* note 3, at 923.

In addition, for individual debtors whose debts are primarily consumer debts and who file for Chapter 7 relief, such individuals face the prospect of having their case dismissed on the basis that "the granting of relief would be an abuse."[129] Although the Code does not provide a statutory definition for "abuse,"[130] it does establish a two-tiered framework for determining what constitutes abuse. First, courts should presume abuse if the debtor's disposable income, as determined pursuant to a means-test formula,[131] equals or exceeds a specific dollar threshold.[132] If the presumption does not arise or if it is rebutted, then abuse could be deemed to arise on the basis of the debtor's lack of good faith or the totality of the circumstances of the debtor's financial situation.[133] Both tiers represent an attempt at stripping discretion, the former through a rule-like approach and the latter through a standard-like approach.[134] It has been observed, however, that "by virtue of poor statutory design, both mechanisms will prove to be largely unsuccessful in accomplishing what Congress sought to achieve."[135] Accordingly, even with the more narrowly constrained provisions regarding case dismissal, a gap-filling function nonetheless exists for courts to determine access to the bankruptcy forum.

c. Implementing and Protecting the Fresh-Start Policy

In addition to operationalizing the fresh-start policy in the Code's provisions regarding the discharge of debt, Congress has structured the statutory scheme to provide relief that either implements or protects that policy.[136] One example is the automatic stay,[137] which immediately takes effect upon the filing of a bankruptcy pe-

129. 11 U.S.C. § 707(b). The "abuse dismissal" in Chapter 7 has aptly been described as a "statutory gateway." McDow v. Dudley, 662 F.3d 284, 289 (4th Cir. 2011).
130. *See* 11 U.S.C. § 101.
131. The disposable-income calculus set forth in the Code's means test requires that some of a debtor's expenses be determined by reference to certain monthly amounts specified by the IRS for purposes of calculating a delinquent taxpayer's repayment ability. *See id.* § 707(b)(2)(A)(ii)(I). It has been observed that "[t]his unusual statutory scheme raises a number of difficult administrative law problems." Stephenson & Hickman, *supra* note 2, at 2. The Supreme Court's opinion in *Ransom v. FIA Card Services*, 131 S. Ct. 716 (2011), however, which was written by Justice Kagan (an administrative law scholar), appears to dismiss these concerns. *See id.* at 726 n.7.
132. *See* 11 U.S.C. § 707(b)(2)(A)(i). For a formalistic reduction of the means-test formula, see Rafael I. Pardo, *Eliminating the Judicial Function in Consumer Bankruptcy*, 81 AM. BANKR. L.J. 471, 495–96 (2007).
133. *See* 11 U.S.C. § 707(b)(3).
134. *See* Pardo, *supra* note 132, at 481.
135. *Id.*
136. *See* Pardo & Lacey, *supra* note 111, at 416 n.39.
137. The Code's provision allowing a debtor to claim certain property as exempt, *see* 11 U.S.C. § 522(b), constitutes an example of a provision implementing the fresh-start policy by "provid[ing] the debtor

tition and enjoins, among other things, creditor attempts to collect prebankruptcy debts from the debtor.[138] Because of the breathing room it provides to the debtor, the automatic stay represents the first step in facilitating a path to relief from the financial distress that prompted the debtor to seek respite in the bankruptcy forum.[139] One might be tempted to conclude that Congress did not delegate much residual policymaking in this vein by virtue of having incorporated into the statutory scheme a legislative injunction that circumscribes a predetermined set of actions.[140] But such a conclusion would ignore, among other things, the following: (1) A court may grant the creditor relief from the stay in a variety of forms (including termination and modification of the stay) and on a variety of grounds;[141] and (2) a court may award actual damages and, in appropriate circumstances, punitive damages to a debtor who has been injured by a willful violation of the stay.[142] With respect to stay relief, such relief may be granted "for cause,"[143] an undefined phrase[144] that provides a court with the opportunity to make policy regarding how robust the reach of the

no longer burdened with past debts the means to support himself or herself with the aim that the fresh start have longevity and vitality." Pardo & Lacey, *supra* note 111, at 416 n.39. Exemption issues have given rise to residual policymaking, including "judicial attempts at regulating the prebankruptcy conversion of nonexempt property to exempt property." Lawrence Ponoroff & F. Stephen Knippenberg, *Debtors Who Convert Their Assets on the Eve of Bankruptcy: Villains or Victims of the Fresh Start?*, 70 N.Y.U. L. REV. 235, 246 (1995); *see also* Hanson v. First Nat'l Bank in Brookings, 848 F.2d 866, 870–71 (8th Cir. 1988) (Arnold, J., concurring) ("[A] debtor will be allowed to convert property into exempt form, or not, depending on findings of fact made in the court of first instance, the Bankruptcy Court, and these findings will turn on whether the Bankruptcy Court regards the amount of money involved as too much. With all deference, that is not a rule of law. It is simply a license to make distinctions among debtors based on subjective considerations that will vary more widely than the length of the chancellor's foot."). The Code's provision prohibiting discrimination both during and after a bankruptcy case against the debtor by a governmental unit on the basis that the debtor either sought bankruptcy relief, was insolvent, or did not pay a discharged debt, *see* 11 U.S.C. § 525(a), constitutes an example of a provision protecting the fresh-start policy. *See* Pardo & Lacey, *supra* note 111, at 416 n.39. For an example of the manner in which residual policymaking has inhered in this provision, see *FCC v. NextWave Personal Communications Inc.*, 537 U.S. 293 (2003).

138. *See* 11 U.S.C. § 362(a)(6).

139. *See* H.R. REP. NO. 95-595, at 340–41 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6296–97.

140. *See* Jove Eng'g, Inc. v. IRS, 92 F.3d 1539, 1546 (11th Cir. 1996) ("[T]he automatic stay . . . is actually a legislative creation with unique properties different from court-ordered injunctions."); *see also* Sunshine Dev., Inc. v. FDIC, 33 F.3d 106, 113 (1st Cir. 1994) ("Because the automatic stay is exactly what the name implies—'automatic'—it operates without the necessity for judicial intervention.").

141. *See* 11 U.S.C. § 362(d).

142. *See id.* § 362(k)(1).

143. *See id.* § 362(d)(1).

144. *See id.* § 101. In listing "lack of adequate protection" as an example of cause for granting relief from the automatic stay, the Code uses the word "including," *id.* § 362(d)(1), which is a nonlimiting term, *see id.* § 102(3).

automatic stay should be.[145] With respect to damage awards stemming from stay violations, the Code does not define what constitutes a "willful" violation,[146] thus providing yet another opportunity for a court to define further the contours of the automatic stay.

These kinds of opportunities for judicial interpretation look much less like traditional statutory interpretation when one considers that agencies frequently interpret ambiguous statutes containing similar words, such as "cause"[147] and "willful."[148] For example, in a non-bankruptcy case involving fireworks licensing, the Third Circuit recognized the ambiguity of the phrase "willful" in the statute at issue and hence deferred to the relevant agency's interpretation, noting that "Congress has not provided an 'unambiguously expressed intent' as to the meaning of 'willful'" and that the agency's resolution of the ambiguity was reasonable.[149]

2. Policymaking Concerning Distributive Policy

In addition to focusing on the substantive relief afforded to debtors, bankruptcy policy concerns itself with providing an orderly, collective proceeding pursuant to which the assets and/or income of the debtor are distributed to creditors.[150]

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145. *See, e.g.*, Christensen v. Tucson Estates, Inc. (*In re* Tucson Estates, Inc.), 912 F.2d 1162, 1166 (9th Cir. 1990) (noting that, for purposes of relief from the automatic stay, "'[c]ause' has no clear definition and is determined on a case-by-case basis"); Sonnax Indus., Inc. v. Tri Component Prods. Corp. (*In re* Sonnax Indus., Inc.), 907 F.2d 1280, 1288 (2d Cir. 1990) (noting that "broad discretion is accorded to bankruptcy and district courts" in determining whether cause exists for relief from the automatic stay). In certain circumstances, courts have identified discrete factors relevant to a determination of whether cause exists for relief from the automatic stay—arguably with the intention of providing a structure for implementing the standard in a more rule-like fashion. *See, e.g.*, Spencer v. Bogdanovich (*In re* Bogdanovich), 292 F.3d 104, 110 (2d Cir. 2002) ("Although the term 'for cause' is not defined in the bankruptcy code, we have adopted 12 factors to consider when deciding whether or not to lift a stay in order that litigation may continue to completion in another tribunal.").
146. *See* 11 U.S.C. § 101. Moreover, in determining whether a stay violation has occurred in the first instance (whether willful or not), it must be ascertained whether one of the twenty-eight exceptions to the automatic stay applies. *See id.* § 362(b)(1)–(28).
147. *See, e.g.*, United States v. Boyle, 469 U.S. 241, 246 n.4 (1985) (stating that the courts owe deference to the Treasury's definition of "reasonable cause" under *Chevron*); Long v. Soc. Sec. Admin., 635 F.3d 526, 534 (Fed. Cir. 2011) (giving *Chevron* deference to the Merit Systems Protection Board's interpretation of statutory term "good cause" relating to removal of an administrative law judge).
148. *See* Vineland Fireworks Co. v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 544 F.3d 509 (3d Cir. 2008); *see also* 38 C.F.R. § 3.301(c) (2012) (setting forth the Department of Veterans Affairs's interpretation of the term "willful misconduct").
149. *Vineland Fireworks Co.*, 544 F.3d at 517 & n.12.
150. *See* Andrew DeNatale & Prudence B. Abram, *The Doctrine of Equitable Subordination As Applied to Nonmanagement Creditors*, 40 BUS. LAW. 417, 418 (1985).

Such procedural relief is a direct response to the common pool problem that arises when a debtor has insufficient resources to fully repay its debts.[151]

Broadly speaking, the Bankruptcy Code efficiently effectuates the shift to a compulsory and collective proceeding in the following manner: The filing of a petition by a debtor simultaneously commences a bankruptcy case;[152] creates an estate that includes all of the debtor's legal and equitable interests in property existing as of the petition date;[153] stays the pursuit of individual remedies by creditors against the debtor and the property of its estate;[154] and triggers the exclusive jurisdiction of the bankruptcy court, through referral from the district court, over the debtor's case and property of the debtor's estate.[155] From this description it should be clear that Congress has located administration of bankruptcy's distributive policy within the court system.[156]

In fleshing out the details of distributive policy in bankruptcy, Congress has had to establish a framework for "determining *who* gets *what*, in *what order*."[157] Congress, using Chapter 7 liquidation as a baseline, has arranged creditors into distinct classes for purposes of ascertaining priority for distribution of funds from property of the debtor's estate.[158] Because distribution occurs on a pro rata basis by class,[159] no distribution will be made to creditors who find themselves classified below a class for which there are insufficient funds to pay its members in full.[160] This baseline has been incorporated into other operative provisions of the Bankruptcy Code for purposes of establishing the amount that should be distributed to creditors.[161]

151. *See* JACKSON, *supra* note 113, at 5, 7–19 (providing a comprehensive analysis of the role of bankruptcy as a "collective debt-collection device").
152. 11 U.S.C. § 301(a) (2006).
153. *Id.* § 541(a).
154. *Id.* § 362(a).
155. *See* 28 U.S.C. §§ 157(a), 1334(a), (e)(1) (2006).
156. *See* Sunshine Dev., Inc. v. FDIC, 33 F.3d 106, 114 (1st Cir. 1994).
157. JACKSON, *supra* note 113, at 20.
158. *See* 11 U.S.C. §§ 725, 726(a); *see also id.* § 704(a)(1) (requiring trustee to "collect and reduce to money the property of the estate").
159. *See id.* § 726(b).
160. *See, e.g.*, *In re* Soltan, 234 B.R. 260, 279 n.17 (Bankr. E.D.N.Y. 1999); *In re* Harris, 143 B.R. 957, 958 (Bankr. M.D. Fla. 1992); *cf.* H.R. REP. NO. 95-595, at 383 (1977) ("[Code § 726(b) specifies that claims within a particular class are to be paid *pro rata*. This provision will apply, of course, only when there are inadequate funds to pay the holders of claims of a particular class in full."), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6339.
161. *See, e.g.*, 11 U.S.C. §§ 1129(a)(7), 1325(a)(4).

While Congress has provided a great level of detail in constructing a framework for distribution,[162] substantial gaps nonetheless exist, thereby opening the door for the courts' residual policymaking. One example involves whether the future payments to creditors proposed in a debtor's repayment plan have a present value equal to the amount to which they are entitled on account of their claims. Although Congress has directed courts to engage in present-value analysis as part of the plan confirmation process,[163] it has not explicitly specified the discount rate itself or the method pursuant to which courts should calculate the rate.[164] When given the opportunity to bring uniformity to the multitude of approaches to present-value analysis that had proliferated within and across circuits subsequent to the Bankruptcy Code's enactment,[165] the Supreme Court in *Till v. SCS Credit Corp.*[166] failed to produce a majority opinion resolving the issue.[167] As one commentator has explained, the Court's unsuccessful efforts to settle the question did not involve the Justices "giving effect to Congress's intent so much as forging their own path, guided as best they could be by their understanding of the relevant evidence and the likely consequences of their decision[]."[168] In other words, rather than engaging in traditional statutory construction, the Justices—faced with an open-ended command for courts to discount future payments to their present value—took on a policymaking role in defining this aspect of distributive policy.[169]

Another prominent example of a gap in the distributional scheme involves determination of the price that an individual debtor must pay for a Chapter 13 discharge—that is, the amount of future income that a debtor must devote to the

162. *See, e.g.*, *id.* § 507(a) (setting forth the categories of allowed unsecured claims entitled to priority).
163. *See, e.g.*, *id.* §§ 1129(a)(7)(A)(ii), 1129(b)(2)(A)(i)(II), 1129(b)(2)(B)(i), 1325(a)(4), 1325(a)(5)(B)(ii).
164. *See* Till v. SCS Credit Corp., 541 U.S. 465, 473 (2004) (plurality opinion) ("The Bankruptcy Code provides little guidance as to which of the rates of interest advocated by the four opinions in this case—the formula rate, the coerced loan rate, the presumptive contract rate, or the cost of funds rate—Congress had in mind when it adopted the cramdown provision."). For an argument in favor of "a discount rate that accounts solely for expected inflation, but that does not take into account opportunity cost or the risk of nonpayment," see Rafael I. Pardo, *Reconceptualizing Present-Value Analysis in Consumer Bankruptcy*, 68 WASH. & LEE. L. REV. 113, 118, 133–64 (2011).
165. *See, e.g.*, David G. Epstein, *Don't Go and Do Something* Rash *About Cram Down Interest Rates*, 49 ALA. L. REV. 435, 443–59 (1998) (summarizing the various approaches to present-value analysis adopted by courts of appeals prior to the Supreme Court's decision in *Associates Commercial Corp. v. Rash*, 520 U.S. 953 (1997)).
166. 541 U.S. 465.
167. *Id.* at 473 (plurality opinion).
168. Lemos, *supra* note 8, at 434.
169. *Cf.* KENNETH N. KLEE, BANKRUPTCY AND THE SUPREME COURT 242 (2008) (noting that "the [Supreme] Court does its best to interpret the Bankruptcy Code in a manner consistent with fundamental bankruptcy policies").

repayment of unsecured claims. Claim repayment in Chapter 7 is asset based,[170] requiring a debtor to relinquish all property in which he had a "legal or equitable interest[]" prior to filing for bankruptcy (that is, property of the estate),[171] other than property that the debtor can claim as exempt.[172] In contrast, claim repayment in Chapter 13 is income based,[173] requiring a debtor to devote his future income to repay creditor claims (but allowing him to retain all property of the estate).[174] The difference in claim repayment under the two chapters has been described as "the basic chapter 13 bargain."[175]

Part of that bargain requires a Chapter 13 debtor to devote all of his "projected disposable income" to repay the claims of unsecured creditors if he cannot fully repay them.[176] To ascertain that amount, the Bankruptcy Code first requires a determination of the debtor's "disposable income,"[177] which the Code defines as the difference between (1) a debtor's current monthly income, which generally consists of the debtor's average monthly income over the six months preceding his or her bankruptcy filing;[178] and (2) the debtor's reasonably necessary expenses,[179] which include

170. *See* 11 U.S.C. § 704(a)(1) (2006) (requiring a trustee to "collect and reduce to money the property of the estate"); *id.* § 726(a) (arranging creditors into distinct classes for purposes of ascertaining priority entitlement to distribution from property of the estate).

171. *See id.* § 541(a)(1). Such property does not include the debtor's future income. *See id.* § 541(a)(6) (excluding from property of the estate "earnings from services performed by an individual debtor after the commencement of the case").

172. *See id.* § 522(b).

173. However, it need not be exclusively so. *See id.* § 1322(a)(8) (authorizing a debtor to use prebankruptcy assets, in addition to future income, to repay creditor claims).

174. *See id.* §§ 1306(a)(2), 1306(b), 1327(b).

175. David Gray Carlson, *Modified Plans of Reorganization and the Basic Chapter 13 Bargain*, 83 AM. BANKR. L.J. 585, 585–86 (2009).

176. 11 U.S.C. § 1325(b)(1)(B).

177. *Id.* § 1325(b)(2).

178. *Id.* § 101(10A)(A).

179. *Id.* § 1325(b)(2)(A)–(B). It should be noted that much residual policymaking inheres in the determination of the debtor's reasonably necessary expenses. For any debtor whose current monthly income is less than or equal to the state median income for a family size comparable to that of the debtor's household, the Code does not provide a framework for calculating such expenses, with the result that courts have broad latitude in conducting this standard-like determination. *See, e.g.*, Schultz v. United States, 529 F.3d 343, 348 (6th Cir. 2008). For any debtor whose current monthly income is greater than the state median income for a family size comparable to that of the debtor's household, the Code requires that the debtor's reasonably necessary expenses be calculated by reference to the expense amounts set forth in Chapter 7's formulaic means test. *See* 11 U.S.C. § 1325(b)(3). Such expenses include certain monthly amounts specified by the IRS for purposes of calculating a delinquent taxpayer's repayment ability. *See id.* § 707(b)(2)(A)(ii)(I). Even under these constraints, courts have had an opportunity to formulate distributive policy. *See, e.g.*, Ransom v. FIA Card Servs., N.A., 131 S. Ct. 716, 721 (2011) ("We must determine whether [an above-median Chapter 13] debtor . . . who owns his car outright, and so does not make loan or lease

expenses "for the maintenance or support of the debtor or a dependent of the debtor."[180] After a Chapter 13 debtor's disposable income has been determined, the question becomes whether the debtor's repayment plan devotes all "*projected* disposable income" to the repayment of unsecured claims. By failing to define that term, however, Congress delegated discretion to courts to shape distributive policy in bankruptcy by defining the relationship between the defined term (disposable income) and the undefined term (projected disposable income).[181]

C. The Frequency of Judicial Policymaking

Having demonstrated that a significant degree of residual policymaking inheres in the judiciary's administration of the Bankruptcy Code, the question remains of how often bankruptcy judges might be called upon to decide disputes that involve residual policymaking. To contextualize the scale of dispute resolution that occurs in bankruptcy, one must take account of the procedural distinctions in the types of disputes that arise in a bankruptcy case. The Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") divide disputes into one of two categories: (1) adversary proceedings and (2) contested matters. Adversary proceedings resemble other federal lawsuits insofar as Part VII of the Bankruptcy Rules governing such proceedings virtually incorporates (with occasional modification) the Federal Rules of Civil Procedure.[182] The Bankruptcy Rules classify only ten dispute types as adversary proceedings.[183] If a dispute cannot be classified as an adversary proceeding, it is deemed to be a "contested matter"[184] and proceeds according to less complex procedures than an adversary proceeding—including request for relief by motion rather than the filing of a complaint.[185] Given the increased complexity of an adver-

payments, may claim an allowance for car-ownership costs (thereby reducing the amount he will repay creditors).").

180. *See* 11 U.S.C. § 1325(b)(2)(A)(i).

181. *See* Hamilton v. Lanning, 130 S. Ct. 2464, 2469 (2010) ("We granted certiorari to decide how a bankruptcy court should calculate a debtor's 'projected disposable income.' Some lower courts have taken what the parties term the 'mechanical approach,' while most have adopted what has been called the 'forward-looking approach.'").

182. *See* FED. R. BANKR. P. pt. VII.

183. *See* FED. R. BANKR. P. 7001. Examples include (subject to certain exceptions) any proceeding to recover money or property, FED. R. BANKR. P. 7001(1), to object to or revoke a discharge, FED. R. BANKR. P. 7001(4), and to determine the dischargeability of a debt and to determine the dischargeability of a debt, FED. R. BANKR. P. 7001(6).

184. *See* FED. R. BANKR. P. 9014(a).

185. *See* Khachikyan v. Hahn (*In re* Khachikyan), 335 B.R. 121, 125 (B.A.P. 9th Cir. 2005) ("In a contested matter, there is no summons and complaint, pleading rules are relaxed, counterclaims and third-party practice do not apply, and much pre-trial procedure is either foreshortened or dispensed

sary proceeding, such a proceeding presents a greater opportunity—relative to the resolution of a contested matter—for policymaking.

The volume of docket activity in the bankruptcy courts demonstrates that bankruptcy judges do have ample opportunity to engage in dispute resolution. For example, during the 2009 and 2010 fiscal years, there were respectively 55,530 and 69,917 adversary proceedings commenced in the bankruptcy courts.[186] It is certainly not the case that a judge resolved each of these adversary proceedings. Quite the contrary, prior trends would suggest that most of the proceedings settled.[187] Nonetheless, a decreasing trial rate in adversary proceedings does not undermine our claim regarding the opportunity for policymaking by bankruptcy judges.

First, even a 5 percent trial rate[188] results in a nontrivial number of adversary proceedings resolved by judges.[189] Second, the decreasing trial rate may stem from the tendency of bankruptcy judges to be actively involved in case management, with respect to a debtor's underlying bankruptcy case as well as adversary proceedings within the case.[190] If such "managerial judging" has the effect of encouraging set-

with in the interest of time . . . ."). Some of the procedural rules governing adversary proceedings, however, equally apply in contested matters. *See* FED. R. BANKR. P. 9014(b).

186. DUFF, *supra* note 103, app. at 299 tbl.F-8. To place these figures in perspective, they are approximately between one-fifth and one-quarter of the number of all civil cases commenced in U.S. District Courts during the same time periods: respectively, 276,397 and 282,895 civil cases. *Id.* app. at 138 tbl.C. Also, the number of adversary proceedings commenced during the 2009 and 2010 fiscal years pales in comparison to the number of bankruptcy cases, *see supra* notes 34–48 and accompanying text (describing the nature of a bankruptcy case), commenced in U.S. Bankruptcy Courts during the same periods: respectively, 1,402,816 and 1,596,355 bankruptcy cases. DUFF, *supra* note 103, app. at 292 tbl.F.

187. *See* Elizabeth Warren, *Vanishing Trials: The New Age of American Law*, 79 AM. BANKR. L.J. 915, 930 (2005) (finding that, while 16 percent of all adversary proceedings went to trial in 1985, the trial rate had dropped to 5 percent by 2002).

188. *See id.*

189. The possibility exists, however, that the resolution of such proceedings is not evenly distributed across bankruptcy cases. Douglas Baird and Edward Morrison, for example, have found the distribution of adversary proceedings filed in business bankruptcy cases to be skewed because adversary proceedings are clustered in a few cases. *See* Douglas G. Baird & Edward R. Morrison, *Adversary Proceedings in Bankruptcy: A Sideshow*, 79 AM. BANKR. L.J. 951, 957 (2005); *cf.* Robert M. Lawless, *Are Bankruptcy's Trials Vanishing? If So, Who Cares?*, 79 AM. BANKR. L.J. 995, 1002 (2005) (noting that bankruptcy trials may become "centralized in a few places with the rest of the court system dealing principally with unlitigated, more routine matters"). If adversary proceedings are concentrated in a few cases, then the possibility exists that such proceedings will not be evenly distributed across judges. *See, e.g.*, W.D. WASH. LOCAL BANKR. R. 1073-1, *available at* http://www.wawb.uscourts.gov/read_file.php?file=3269 (providing that adversary proceedings are generally assigned to the judge to whom the underlying bankruptcy case has already been randomly assigned).

190. *See* Stacy Kleiner Humphries & Robert L.R. Munden, *Painting a Self-Portrait: A Look at the Composition and Style of the Bankruptcy Bench*, 14 BANKR. DEV. J. 73, 76, 82, 105 (1997) (reporting findings from an empirical study based on survey data from approximately 71 percent of active bankruptcy judges that, in business bankruptcy cases, "the bankruptcy judges' self-reported general

tlement,[191] the judicially influenced outcome will represent a form of privatized policymaking.[192] Finally, adversary proceedings likely represent a fraction of the overall pool of disputes subject to resolution by the bankruptcy judge. The number of contested matters arising in bankruptcy cases undoubtedly eclipses the number of adversary proceedings by an order of magnitude.[193] Even if the overwhelming majority of contested matters settle, the combination of non-settled adversary proceedings and contested matters constitutes a substantial number of instances for judicial resolution and its concomitant policymaking.

In sum, Congress has given courts primary interpretive authority over the Code, which contains substantial gaps. Although scholars often say that courts fill these gaps by using traditional tools of statutory construction to discern Congress's intent, we have demonstrated that courts have ample opportunity to engage in residual policymaking by resolving ambiguities in the Code that Congress either intentionally or inadvertently did not resolve. Accordingly, we now turn to a discussion of some of the consequentialist concerns that flow from this court-centered model of bankruptcy administration.

II. PROBLEMS POSED BY THE CURRENT STRUCTURE OF BANKRUPTCY ADMINISTRATION

Congress's decision to create a court-centered model of bankruptcy administration raises both constitutional questions and softer policy-driven questions concerning the current model's structure. This Part explores these questions, starting with the constitutional questions and then turning to various softer policy-driven concerns of institutional competence that are drawn from administrative law's lessons.

style . . . indicated clear and significant support for managerial judging"); *see also* Baird & Morrison, *supra* note 189, at 966.

191. *See* E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 323–26 (1986).

192. Such privatized settlement may, however, be publicly available through the Public Access to Court Electronic Records (PACER) system, http://www.pacer.gov. *See, e.g.*, Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179, 212–13 (2009).

193. *See* Randall J. Newsome, *Vanishing Trials—What's the Fuss All About?*, 79 AM. BANKR. L.J. 973, 975 (2005) (stating that contested matters "encompass[] a great portion of the activity in both business and non-business [bankruptcy] cases," and noting that, "[a]ccording to the [Administrative Office of the U.S. Courts], there were 509,458 relief from stay motions filed in the twelve-month period ending June 30, 2004").

A. Pure Constitutional Issues

The current model of bankruptcy administration has raised numerous constitutional questions. For example, some scholars have previously questioned whether the current model violates the Uniformity Clause of the Constitution,[194] whether the uncontested nature of many bankruptcy cases raises Article III "case or controversy" issues,[195] and whether the method of appointing bankruptcy judges is constitutional.[196] We, however, focus our attention on three constitutional issues that clearly highlight the need to reassess the current structure of bankruptcy administration: (1) Article III issues concerning the bankruptcy courts, (2) separation of powers issues relating to the removal of BAs, and (3) the nondelegation doctrine. We have picked

194. U.S. CONST. art. 1, § 8, cl. 4 (providing that Congress has the power to enact "uniform Laws on the subject of Bankruptcies"). *See generally* Randolph J. Haines, *The Uniformity Power: Why Bankruptcy Is Different*, 77 AM. BANKR. L.J. 129, 196 (2003) (discussing the Uniformity Clause and arguing that "the uniformity described by the Framers in the Bankruptcy Clause was a substantive power granted to Congress, not a limitation"). One specific Uniformity Clause issue that has arisen is whether the existence of both the BA Program and the UST Program, which split their powers along geographic lines, violates the Uniformity Clause. *See* St. Angelo v. Victoria Farms, Inc., 38 F.3d 1525, 1535 (9th Cir. 1994) (holding that parallel BA and UST Programs violated the Uniformity Clause and remedying the violation by striking down the BA Program). *But see* Dan J. Schulman, *Constitutionality of the United States Trustee/Bankruptcy Administrator Programs*, 4 J. BANKR. L. & PRAC. 319, 329 (1995) (noting the unenforceability of the Ninth Circuit's decision given that the BA Program "functions solely in six districts located within the Fourth and Eleventh Circuits" and is "not present in the Ninth Circuit"). If, as some have argued, the Uniformity Clause is best understood as a power granted to Congress rather than a limitation, *see, e.g.*, Haines, *supra*, at 196, then arguments that the coexistence of the BA and UST Programs is unconstitutional would seem to fail.

195. *See, e.g.*, Robert E. DeMascio, *For Fourteen Years . . . , in* FOURTEEN YEARS OR LIFE: THE BANKRUPTCY COURT DILEMMA 1, 6 (Nat'l Legal Ctr. for the Pub. Interest ed., 1983) ("[L]imited as it would be to actual 'cases or controversies,' an Article III bankruptcy court could not handle the myriad administrative work generated by the great bulk of bankruptcy filings."); Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545, 587 n.157 (2006) (discussing "case or controversy" issues that potentially inhere in bankruptcy proceedings). *But see, e.g.*, Kenneth Culp Davis, *Ripeness of Government Action for Judicial Review*, 68 HARV. L. REV. 1122, 1123–24 (1955) (pointing to various examples of situations in which the federal courts act despite the lack of a dispute between two opposing parties, such as criminal cases in which the defendant pleads guilty or bankruptcy cases in which "all parties affected are in agreement"); Frank R. Kennedy, *The Bankruptcy Court*, *in* THE DEVELOPMENT OF BANKRUPTCY & REORGANIZATION LAW IN THE COURTS OF THE SECOND CIRCUIT OF THE UNITED STATES 3, 5 (1995) ("No serious challenge based on the 'case-or-controversy' limitation on Article III has ever developed in reported cases or commentary regarding the constitutionality of the exercise of administrative functions in bankruptcy cases by bankruptcy courts, district courts, or the federal appellate courts.").

196. *See* Tuan Samahon, *Are Bankruptcy Judges Unconstitutional? An Appointments Clause Challenge*, 60 HASTINGS L.J. 233, 234, 295 (2008) (arguing that bankruptcy judges, "who are powerful officers," might be deemed principal officers who can constitutionally be appointed only by the President with the advice and consent of the Senate, and not by courts).

these three issues in part because the first issue has new salience in light of the Court's 2011 opinion in *Stern v. Marshall*[197] and because the other two issues have evaded scholarly attention.

1. Article III Issues Concerning the Bankruptcy Courts

Perhaps the most obvious (and most frequently noted and discussed) constitutional question flowing from the current system of bankruptcy administration is the constitutionality of the bankruptcy courts. Specifically, the issue involves Article III questions concerning what types of matters non–Article III bankruptcy courts can decide.[198] Central to the debate is the Supreme Court's fractured opinion in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[199] in which the Court "considered whether bankruptcy judges serving under the Bankruptcy Reform Act of 1978—appointed by the President and confirmed by the Senate, but lacking the tenure and salary guarantees of Article III—could 'constitutionally be vested with jurisdiction to decide [a] state-law contract claim' against an entity that was not otherwise part of the bankruptcy proceedings."[200] The Court ultimately concluded that the assignment of such claims to bankruptcy judges violated Article III.[201] In reaching this conclusion, the plurality opinion written by Justice Brennan acknowledged that the Court had upheld the constitutionality of "legislative courts and administrative agencies created by Congress to adjudicate cases involving 'public rights.'"[202] Justice Brennan concluded that the rights at issue in the case, however, were not public rights. Although he declined to give a precise definition of public rights, he noted that "public rights must, at a minimum, arise 'between the government and others.'"[203] With respect to bankruptcy, the Court noted (without deciding the matter) that the "restructuring of debtor–creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adju-

197. 131 S. Ct. 2594 (2011); *see also* Troy A. McKenzie, *Getting to the Core of* Stern v. Marshall*: History, Expertise, and the Separation of Powers*, 86 AM. BANKR. L.J. 23, 44–45 (2012) ("The teaching of *Stern*, apparently, is that the federal judiciary faces *more* danger of encroachment by the political branches when the non–Article III adjudicator is a bankruptcy court than when it is an administrative agency.").
198. *See generally, e.g.*, Douglas G. Baird, *Blue Collar Constitutional Law*, 86 AM. BANKR. L.J. 3, 4–5 (2012) (discussing the impact of *Stern v. Marshall* on bankruptcy jurisdiction); Ralph Brubaker, *A "Summary" Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction After* Stern v. Marshall, 86 AM. BANKR. L.J. 121 (2012) (same); McKenzie, *supra* note 197 (same).
199. 458 U.S. 50 (1982).
200. *Stern*, 131 S. Ct. at 2609–10 (quoting *N. Pipeline*, 458 U.S. at 87 n.40 (plurality opinion)).
201. *N. Pipeline*, 458 U.S. at 87 (plurality opinion).
202. *Id.* at 67.
203. *Id.* at 69 (quoting *Ex parte* Bakelite Corp., 279 U.S. 438, 451 (1929)).

dication of state-created private rights, such as the right to recover contract damages;" and that while "[t]he former may well be a 'public right,' . . . the latter obviously is not."[204]

Congress responded to *Northern Pipeline* by restructuring the bankruptcy courts in 1984. The Bankruptcy Amendments and Federal Judgeship Act of 1984 (BAFJA)[205] provided that the judges of the reconstituted bankruptcy courts would be appointed by the U.S. Courts of Appeals and would only have the authority to enter final judgments in core proceedings,[206] subject to normal appellate review under "the usual limited appellate standards."[207] In contrast, for a non-core proceeding otherwise related to a case under the Bankruptcy Code, the bankruptcy judge would only submit findings of fact and conclusions of law to the district court, allowing the district court to enter a final judgment after reviewing de novo any matter to which a party objects.[208]

After Congress implemented this fix, the Supreme Court decided a few non-bankruptcy cases involving the constitutionality of non–Article III adjudications carried out by administrative agencies. Most notably, in *Thomas v. Union Carbide Agricultural Products Co.*,[209] the Court addressed a federal statutory scheme involving data-sharing between companies that were required to provide the research data for registration of a pesticide with the Environmental Protection Agency.[210] The federal statute provided that disputes about compensation relating to data sharing between the companies would be decided by binding arbitration, and the Court held that the scheme did not violate Article III. Specifically, the Court held that "Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary."[211]

Similarly, in *Commodity Futures Trading Commission v. Schor*,[212] the Court upheld the constitutionality of the Commodity Futures Trading Commission's (CFTC's) exercise of jurisdiction to decide a state law counterclaim raised by a cus-

204. *Id.* at 71.
205. Pub. L. No. 98-353, 98 Stat. 333 (codified as amended in scattered sections of 11 and 28 U.S.C.).
206. *See supra* notes 104–106 (discussing core proceedings).
207. Stern v. Marshall, 131 S. Ct. 2594, 2611 (2011).
208. *Id.* at 2604.
209. 473 U.S. 568 (1985).
210. *Id.* at 568.
211. *Id.* at 593–94.
212. 478 U.S. 833 (1986).

tomer against a broker in the context of a reparations proceeding.[213] In upholding the scheme, the Court looked to a variety of factors, such as the fact that the CFTC's orders (unlike the bankruptcy court's orders at issue in *Northern Pipeline*) would be enforceable only by order of the district court and the fact that the parties initially consented to the CFTC's adjudication of the matter.[214] Perhaps most interesting, however, was the Court's willingness to sanction the traditional model of agency adjudication. Specifically, the Court stressed that the CFTC's adjudicatory powers "depart[ed] from the traditional agency model in just one respect: the CFTC's jurisdiction over common law counterclaims."[215] The Court found this "single deviation" from the traditional agency model allowable, in part, because "Congress intended to create an inexpensive and expeditious alternative forum through which customers could enforce the provisions of the [Commodities Exchange Act] against professional brokers."[216] Hence, whereas *Northern Pipeline* took a narrow reading of the permissibility of non–Article III adjudicators in the bankruptcy context, *Schor* and *Thomas* took much more liberal approaches to the permissibility of non–Article III adjudicators when faced with more traditional regulatory schemes involving agencies.

The Supreme Court's decision in *Stern v. Marshall* highlights this tension between the Court's Article III jurisprudence in traditional administrative agency cases versus its treatment of bankruptcy cases.[217] In *Stern*, the Court addressed the constitutionality of the scheme for adjudicating bankruptcy matters established by BAFJA, assessing whether a bankruptcy court could constitutionally be vested with jurisdiction to render a final judgment in a core proceeding that involved a debtor's state law tortious interference counterclaim.[218] In the majority opinion written by Chief Justice Roberts, the Court held that the district court could not constitutionally decide the state law counterclaim. In so holding, the Court rejected the notion that the counterclaim could "be deemed a matter of 'public right' that c[ould] be decided outside the Judicial Branch" by the bankruptcy courts.[219] Specifically, the Court noted that even though the public rights exception is not limited to actions involving the government as a party, the Court has continued "to limit the exception

213. *Id.* at 835–36, 841–42. Interestingly, even though the reparations proceeding itself involved a dispute between two private parties (that is, the customer and the broker), the Court noted that the "reparations scheme itself is of unquestioned constitutional validity." *Id.* at 856.
214. *Id.* at 849–56.
215. *Id.* at 852.
216. *Id.* at 852, 855.
217. *See supra* note 197.
218. Stern v. Marshall, 131 S. Ct. 2594, 2610–11 (2011).
219. *Id.* at 2611.

to cases in which the claim at issue derives from a federal *regulatory* scheme, or in which the resolution of the claim *by an expert government agency* is deemed essential to a limited regulatory objective within the *agency's authority*."[220] The Court went on to note that it dealt "here not *with an agency* but *with a court*, with substantive jurisdiction," and that this was "not a situation in which Congress devised an 'expert and inexpensive method for dealing with a class of questions of fact which are particularly suited to examination and determination by an administrative *agency* specially assigned to that task.'"[221] Instead, what was involved, according to the Court, was "the most prototypical exercise of judicial power: the entry of a final, binding judgment *by a court* with broad substantive jurisdiction, on a common law cause of action, when the action neither derives from nor depends upon any agency regulatory regime."[222]

Hence, Chief Justice Roberts's opinion highlights the fact that Congress's decision to place bankruptcy adjudication in the courts, rather than in an administrative agency, raises Article III concerns. In addition, *Stern*—when viewed alongside the Court's willingness in *Schor* and *Thomas* to condone agency adjudication of even traditional common law claims—suggests a potential path for minimizing Article III concerns and making bankruptcy less exceptional: Instead of vesting adjudicatory power in the courts, Congress might empower an agency to administer the bankruptcy laws and thereby attempt to align bankruptcy within the "public rights" model.[223]

2. Separation-of-Powers Issues Relating to the Appointment and Removal of BAs

Another constitutional issue surrounding the current system of bankruptcy administration involves separation-of-powers issues relating to the BAs. Specifically, this potential constitutional flaw—which has gone unnoticed by scholars—involves questions about the appointment and removal process specified for BAs.

The legislation creating the BA Program in North Carolina and Alabama provides that BAs may be appointed "under regulations issued by the Judicial Conference" to act as bankruptcy administrators.[224] The Judicial Conference, in

220. *Id.* at 2613 (emphasis added).
221. *Id.* at 2615 (emphasis added) (quoting Crowell v. Benson, 285 U.S. 22, 46 (1932)).
222. *Id.*
223. This possibility is explored in *infra* Part III.B.2.
224. *See* Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, § 302(d)(3)(I), 100 Stat. 3088, 3123 (amended 1990 and 2000).

turn, has promulgated regulations that allow the federal courts of appeals to appoint BAs to five-year terms for districts within North Carolina and Alabama.[225]

Although Congress provided that BAs are to be appointed pursuant to Judicial Conference regulations rather than expressly calling for the courts to appoint the BAs,[226] the method specified by the JCUS for appointing BAs—appointment by the courts of appeals—seems constitutionally permissible if BAs are inferior rather than principal officers.[227] In determining which officers are inferior rather than principal, the Court has looked to whether the officer is empowered to perform only certain, limited duties, whether the officer is limited in jurisdiction and tenure, and whether the officer is subject to removal by a higher official.[228] Applying these factors, BAs—assuming they are officers rather than mere employees[229]—seem to be inferior rather than principal officers given that they are appointed to limited five-year terms and that their jurisdiction is geographically constrained.[230] Hence, the method of appointment seems permissible.

Much more troubling, however, is the method of removal that the JCUS has specified for BAs. The problem lies in the fact that the Judicial Conference regulations provide that the court of appeals can remove a BA before the expiration of his five-year term only for cause, such as incompetence or misconduct.[231] In turn, the circuit court judges who may remove BAs enjoy lifetime appointment and may only be removed via impeachment.[232] In other words, both BAs *and* the circuit court judges who may remove them enjoy significant job security and insulation from

225. *See* 9 JCUS REG., *supra* note 76, §§ 230.10, 250.70.
226. *See* Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act § 302(d)(3)(I), 100 Stat. at 3123.
227. *See* U.S. CONST. art. II, § 2, cl. 2 (providing that inferior officers may be appointed by the courts of law).
228. *See* Morrison v. Olson, 487 U.S. 654, 671–72 (1988) (holding that the independent counsel was an inferior officer because, inter alia, the independent counsel was removable for cause by the Attorney General and enjoyed limited jurisdiction and tenure).
229. The test for determining whether one is an officer subject to the Appointments Clause rather than a mere employee asks whether the appointee exercises "significant authority pursuant to the laws of the United States." Buckley v. Valeo, 424 U.S. 1, 126 (1976); *see also* Myers v. United States, 272 U.S. 52 (1926) (finding a postmaster first class to be an inferior officer subject to the Appointments Clause); *Ex parte* Hennen, 38 U.S. (13 Pet.) 225 (1839) (finding the clerk of a district court to be an inferior officer within the meaning of the Appointments Clause). Applying *Buckley*'s significance test, BAs seem to qualify as officers given that they exercise significant executive powers. *See infra* text accompanying notes 238–239.
230. *Cf.* Stanley v. Gonzales, 476 F.3d 653, 659–60 (9th Cir. 2007) (concluding that a UST—if an officer at all—is clearly an inferior officer, not a principal officer, because the "position was limited geographically, temporally, and topically").
231. *See* 9 JCUS REG., *supra* note 76, § 230.20 ("Only the appointing court of appeals may remove a bankruptcy administrator from office before his or her term expires. Incompetence, misconduct, neglect of duty, or physical or mental disability are grounds for removal.").
232. *See* U.S. CONST. art. III, § 1.

presidential control. This double-layer of insulation between the President and BAs seems highly problematic in light of the Court's decision in *Free Enterprise Fund v. Public Company Accounting Oversight Board* (PCAOB).[233]

In *Free Enterprise*, the Court split 5–4 and held unconstitutional an arrangement pursuant to which members of the PCAOB were removable only for cause by members of the SEC, whom the Court in turn assumed to be removable by the President only for cause. In striking down this "double for-cause" removal arrangement, the majority opinion written by Chief Justice Roberts stressed that the PCAOB, which had the power to promulgate auditing and ethics standards and to initiate formal investigations and disciplinary proceedings, possessed executive power.[234] Although the Court had previously allowed one layer of tenure protection between the President and an officer possessing executive power, the Court held that two layers of tenure protection were impermissible because such a double layer of protection "withdraws from the President any decision on whether that good cause exists."[235] In other words, the decision whether to remove the PCAOB members was "vested instead in other tenured officers—the [SEC] Commissioners—none of whom is subject to the President's direct control," leading to a Board "that is not accountable to the President, and a President who is not responsible for the Board."[236] In short, the Court decreed that "[b]y granting the Board executive power without the Executive's oversight, th[e] Act subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts."[237]

This reasoning relating to double for-cause removal provisions—if applied to the removal of BAs—would seem to lead to the conclusion that the current method of removing BAs is unconstitutional. BAs exercise significant executive powers, including enforcement of the bankruptcy laws and control over certain bankruptcy professionals.[238] For example, in exercising their enforcement powers and acting as watchdogs in the bankruptcy system, BAs may move for the conversion or dismissal of a Chapter 7 case or move for the denial or revocation of a Chapter 7 discharge if the debtor has not complied with the law.[239] Yet BAs are removable only for cause by circuit court judges, who enjoy lifetime tenure and can only be removed via impeachment. Under the reasoning of *Free Enterprise*, this is problematic because the

233. 130 S. Ct. 3138 (2010).
234. *Id.* at 3148, 3159.
235. *Id.* at 3153.
236. *Id.*
237. *Id.* at 3155.
238. *See supra* notes 93–97 and accompanying text.
239. *See supra* note 86, 91–92.

President—as a result of the double layer of tenure protection—lacks the authority to ensure that the bankruptcy laws are faithfully executed in judicial districts subject to BA oversight.

One possible distinction between the double layer of tenure protection surrounding the PCAOB and the double layer surrounding BAs is that *Free Enterprise*, according to the Court, presented "an even more serious threat to executive control than an 'ordinary' dual for-cause standard" given that "Congress enacted an unusually high standard that must be met before Board members may be removed."[240] Under the Act, for example, the SEC would not even have the power "to fire Board members for violations of *other* laws that do not relate to the Act, the securities laws, or the Board's authority."[241] Nonetheless, the Court's opinion in *Free Enterprise* used very broad language that might well be read to reach all double for-cause situations. Furthermore, even though the cause standard that speaks to the removability of BAs is easier to meet than the cause standard that governed PCAOB's members, the removal standards that apply to the *circuit court judges* who appoint BAs are much more stringent than the removal standards in an ordinary for-cause scenario. This is because such judges—unlike the members of the SEC at issue in *Free Enterprise*—cannot be removed by the President for cause, but rather can be removed from office only via impeachment.

3. The Nondelegation Doctrine

A final constitutional question surrounding the current structure of bankruptcy administration involves the nondelegation doctrine. The nondelegation doctrine flows from Article I, Section 1 of the Constitution, which provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States."[242] For close to two hundred years, the Supreme Court has interpreted this provision in the Constitution "to prohibit Congress from delegating its legislative power and has equated legislative power with policymaking."[243] This interpretation is largely based on notions of political accountability, which seek to "ensur[e] that the most democratic branch conducts our lawmaking."[244]

240. *Free Enter.*, 130 S. Ct. at 3158.
241. *Id.*
242. U.S. CONST. art. I, § 1.
243. RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW 7 (2008).
244. Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PA. L. REV. 1, 26 (2011).

In its current form, the nondelegation doctrine prohibits Congress from delegating policymaking power unless Congress first sets forth an "intelligible principle" to guide and cabin the delegated discretion.[245] However, the intelligible principle requirement has actually been quite toothless. Indeed, the Supreme Court has found the requisite intelligible principle lacking in only two cases, both involving delegations in the National Industrial Recovery Act of 1933.[246] Indeed, the Court has routinely found the intelligible principle satisfied even when Congress includes only very vague statutory standards, such as delegations to regulate in the "public interest"[247] or to regulate what is "fair and equitable."[248]

If the nondelegation doctrine were to be applied to the current structure of bankruptcy administration, it seems unlikely that any constitutional infirmities would be found. There are several reasons why. First, although the nondelegation doctrine has played a longstanding role in the context of congressional delegations of rulemaking power to agencies, it "has been largely absent when it comes to delegations of lawmaking power to *the courts*."[249] There is good reason to argue that this should change. For example, Margaret Lemos has demonstrated that "there is no persuasive basis on which to exempt delegations to courts from the constitutional restrictions that apply to delegations to agencies"[250] given that ambiguities in court-administered statutes call for a degree of policymaking by courts, just as ambiguities in agency-administered statutes call for a degree of policymaking by agencies.[251] Yet little attention overall has been given to the question of whether the constitutional principles underlying the nondelegation doctrine should apply with full force to delegations to courts,[252] and hence applying the doctrine to these delegations would require expanding the doctrine into new territory.

Second, even if the nondelegation doctrine were applied in the bankruptcy context to assess the constitutionality of Congress's delegation of policymaking powers to courts, the minimal demands posed by the nondelegation doctrine would

245. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001); J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [regulate] is directed to conform, such legislative action is not a forbidden delegation of legislative power.").

246. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541–42 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388, 414–20 (1935).

247. *See, e.g.*, Nat'l Broad. Co. v. United States, 319 U.S. 190, 225–26 (1943); United States v. Rock Royal Coop., Inc., 307 U.S. 533, 576–77 (1939).

248. *See* Yakus v. United States, 321 U.S. 414, 420 (1944).

249. Watts, *supra* note 244, at 28.

250. *See* Lemos, *supra* note 8, at 443.

251. *Id.* at 433–34.

252. *Id.* at 435.

seem easily met. Congress's delegations of policymaking power to courts—giving courts, for example, the power to define what "undue hardship" means in the context of discharging student-loan debt[253] or what actions will be deemed "willful" violations of an automatic stay in bankruptcy[254]—seem to set forth a sufficiently intelligible principle to guide courts' discretion.

Nonetheless, even though the nondelegation doctrine does not seem to pose constitutional problems per se for Congress's decision to delegate bankruptcy policy to the courts, the nondelegation doctrine should not be dismissed out of hand. In the administrative law world, courts have routinely condoned relatively standardless delegations of policymaking authority to agencies (and have been willing to give the nondelegation doctrine no more than lip service) because of functionalist considerations that make agencies well suited to receive and exercise delegations of policymaking power. These considerations include agencies' relative expertise, accountability, flexibility, accessibility, and their ability to achieve uniformity.[255] These aspects of agencies' institutional structures and capacities suggest that broad delegations of policymaking power *to agencies* might well be desirable.[256] But the same functional considerations may not support Congress's decision to delegate policymaking to courts. In other words, the institutional advantages and disadvantages of courts relative to agencies should be taken into account when considering whether delegations to courts make sense. The next Subpart addresses this issue in the bankruptcy context by discussing how various functional and institutional considerations on balance do not favor Congress's decision to delegate bankruptcy policymaking power to courts.

B. Softer Questions of Institutional Design Drawn From Administrative Law's Lessons

Administrative law teaches that broad delegations of policymaking power to agencies may well be desirable—and, hence, will generally be tolerated as a constitutional matter—because of a variety of functional considerations relating to agencies' institutional structures and capacities. These functional considerations include the expertise that many agencies enjoy in specialized areas of the law, the fact that

253. *See supra* notes 118–123 and accompanying text.
254. *See supra* notes 142, 146, 148–149 and accompanying text.
255. *See* Lemos, *supra* note 8, at 445, 447.
256. *Id.* at 444 ("A growing body of commentary argues that broad delegations to agencies are not just something to be tolerated, but something to be desired. Pro-delegation commentators offer functional arguments in defense of agency lawmaking, focusing on institutional characteristics of agencies that make them valuable partners in the lawmaking enterprise . . . .").

agencies are politically accountable as a result of political control exerted over agencies by the President and Congress, the accessibility and transparency of agencies' rulemaking proceedings, the prospective clarity that occurs when agencies set forward-looking policy via rulemaking, the uniformity that agencies can bring to specific areas of the law, and the degree of flexibility that agencies can exercise when responding to changing circumstances or facts.[257] As this Subpart demonstrates, however, these same functional considerations do not tip in favor of Congress's decision to delegate policymaking power in the bankruptcy arena to courts. Indeed, far from justifying Congress's court-centered model of bankruptcy administration, these functional considerations call into question the wisdom of Congress's choice of delegate.

1. Expertise

One of the main factors supporting congressional delegations of broad policymaking power to agencies is that agencies possess specialized expertise.[258] But while agencies are viewed as experts, judges are mostly viewed as generalists[259] who "lack the ability to focus single-mindedly on a particular field (or subfield) in the same way that agencies do."[260]

Congress did avoid relying solely on generalist Article III judges in the current structure of bankruptcy administration by authorizing the creation of specialized, non–Article III bankruptcy judges to administer the Bankruptcy Code.[261] Much like how specialized administrative agencies are experts in their own fields, bank-

257. *See* Lemos, *supra* note 9, at 365; Lemos, *supra* note 8, at 445, 447.

258. *See, e.g.*, Lemos, *supra* note 8, at 445 ("One of the most common defenses of delegation to agencies is that agencies possess technical expertise that Congress lacks."); *see also* Stuart Minor Benjamin & Arti K. Rai, *Fixing Innovation Policy: A Structural Perspective*, 77 GEO. WASH. L. REV. 1, 33 (2008) ("[O]ne of the central rationales for creating administrative agencies was that they would have greater expertise and focus than generalist legislatures or courts."); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 440–41 (1987) (suggesting that the increase in grants of authority to regulatory agencies during the New Deal was motivated in part by a conception of administrative agencies as "technically sophisticated").

259. *See, e.g.*, Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) (noting that "[j]udges are not experts" when compared to specialized administrative agencies); Richard W. Murphy, *A "New" Counter-*Marbury*: Reconciling* Skidmore *Deference and Agency Interpretive Freedom*, 56 ADMIN. L. REV. 1, 40 (2004) ("[C]ourts are relatively ill-suited to the task of policymaking—judges are generalists who gather information through the incomplete, skewed process of litigation."); Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1111 (1990) ("The federal judiciary at the Article III level is predominantly generalist . . . .").

260. Lemos, *supra* note 8, at 446.

261. *See* 28 U.S.C. § 152(a)(2) (2006).

ruptcy judges are "expert in bankruptcy law."[262] Bankruptcy judges derive their expertise from a variety of sources. First, a bankruptcy judge is very likely to have been a bankruptcy practitioner—or, at a minimum, to have had a business law background—prior to ascending to the bench.[263] Second, a bankruptcy judge's law clerk may have previously been a bankruptcy practitioner.[264] Finally, a bankruptcy judge will develop specialized expertise in the course of deciding myriad bankruptcy matters during his fourteen-year term, which can be renewed.[265] Congress's establishment of the bankruptcy courts might thus be seen as helping to ensure valuable expertise in the bankruptcy arena—just as administrative agencies ensure expertise in the administrative law sphere.

The reality, however, is that expert bankruptcy judges merely decide issues at the trial level, and these decisions lack any kind of precedential effect.[266] Furthermore, because such decisions may be appealed and because the conclusions of law therein are reviewed de novo on appeal,[267] ultimate policymaking power does not rest with the expert bankruptcy judges but rather with those judges exercising appellate review—most of whom lack any specialized expertise in bankruptcy. Specifically, as Figure 1 below illustrates, three different appellate paths exist when a core proceeding is at issue. And, although one path calls for appellate review by judges who are experts in bankruptcy, the other two paths involve appellate review by generalist judges.

262. *See* Bussel, *supra* note 109, at 1086.

263. *See* Ralph R. Mabey, *The Evolving Bankruptcy Bench: How Are the "Units" Faring?*, 47 B.C. L. REV. 105, 123 (2005).

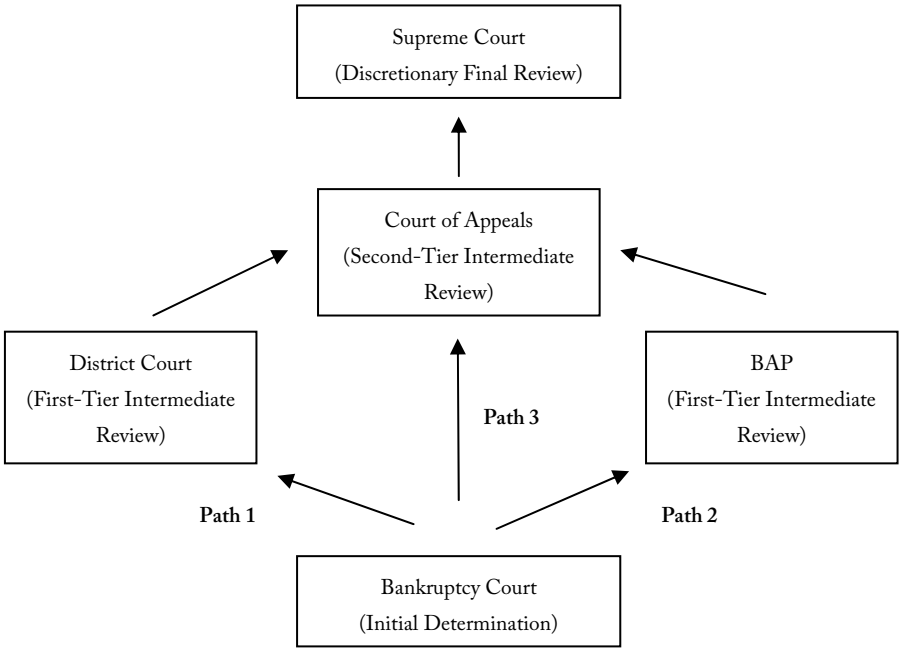
264. *See id.* at 113–16 (discussing the trend among bankruptcy judges to hire career clerks (as opposed to term clerks) and noting that those bankruptcy judges who preferred career clerks often hired clerks with legal experience, and in particular practice experience in bankruptcy law).

265. *See* 28 U.S.C. § 152(a)(1) (providing that bankruptcy judges are appointed for a term of fourteen years); Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 303, 110 Stat. 3847, 3852 ("When filling vacancies, the court of appeals may consider reappointing incumbent bankruptcy judges under procedures prescribed by regulations issued by the [JCUS]."); *cf.* Mabey, *supra* note 263, at 107 (noting that, of the 115 bankruptcy judges who left the bench in the decade prior to 2005, only ten did so as a result of not being reappointed).

266. *See, e.g.*, *In re* 400 Madison Ave. Ltd. P'ship, 213 B.R. 888, 890 n.2 (Bankr. S.D.N.Y. 1997) (stating that the decision of one bankruptcy judge in a multijudge bankruptcy court was not binding on the other bankruptcy judges); *In re* Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey, 160 B.R. 882, 898 (Bankr. S.D.N.Y. 1993) (same); *In re* Jones, 112 B.R. 975, 977 (Bankr. W.D. Mo. 1989) (stating that the decision of a bankruptcy court from one district is not binding on a bankruptcy court from another district).

267. *See supra* note 108 and accompanying text.

FIGURE1. Federal Bankruptcy Appellate Structure for Core Proceedings



First, as Path 1 depicts, a party may appeal to the district court from the specialized bankruptcy court.[268] A party may then appeal to the court of appeals[269] and finally to the Supreme Court via the discretionary writ of certiorari.[270]

Second, as Path 2 depicts, rather than appealing to the district court from the bankruptcy court, a party may appeal to a bankruptcy appellate panel (BAP) if the circuit judicial council has established one.[271] A BAP consists of a panel of three bankruptcy judges.[272] The BAP automatically hears appeals from the bankruptcy court unless a party timely files an election to have the appeal heard by the district

268. 28 U.S.C. § 158(c)(1).
269. *See id.* § 158(d)(1).
270. *See id.* § 1254(1).
271. *See id.* § 158(b)(1). Currently, the First, Sixth, Eighth, Ninth, and Tenth Circuits have operating BAPs. *See* Nash & Pardo, *supra* note 41, at 1757.
272. *See* 28 U.S.C. § 158(b)(1), (c)(1).

court.[273] From the BAP, a party may appeal to the court of appeals[274] and from there to the Supreme Court.[275]

Finally, as Path 3 depicts, appellate review of a bankruptcy court's decision can involve direct appeal from the bankruptcy court to the court of appeals—with the effect of bypassing the first tier of intermediate appellate review (that is, the district court or the BAP). An appeal may proceed directly to the court of appeals pursuant to a certification procedure if one of the following circumstances exists: (1) The appeal involves a question of law unresolved by the court of appeals for the circuit or by the Supreme Court; (2) the appeal involves a matter of public importance; (3) the appeal involves a question of law requiring resolution of conflicting decisions; or (4) the appeal may materially advance the progress of the case or proceeding in which the appeal is taken.[276] From the court of appeals (that is, from the second tier of intermediate appellate review), a party may seek discretionary and final review by the Supreme Court.[277]

Hence, only Path 2 draws on specialized expertise at the first level of appellate review by relying on a panel of bankruptcy judges.[278] In contrast, judicial review of bankruptcy court decisions along Paths 1 and 3 will not involve specialized courts with institutional bankruptcy expertise since neither the federal district courts nor the courts of appeals possess—or have the inclination to develop—bankruptcy expertise at an institutional level.[279] This is true for a variety of reasons. First and foremost, district court judges do not hear a sufficient number of bankruptcy appeals to develop bankruptcy expertise over time,[280] and the courts of appeals and the

273. *See id.* § 158(c)(1).
274. *See id.* § 158(d)(1).
275. *See id.* § 1254(1).
276. *See id.* § 158(d)(2)(A). For a detailed discussion of the use of this appellate path, see Laura B. Bartell, *The Appeal of Direct Appeal—Use of the New 28 U.S.C. § 158(d)(2)*, 84 AM. BANKR. L.J. 145 (2010).
277. *See* 28 U.S.C. § 1254(1).
278. *See supra* notes 262–265 and accompanying text.
279. Of course, individual judges and Justices may have bankruptcy expertise by virtue of their experiences prior to joining the bench. Two circuit court judges come to mind: the Honorable Edith H. Jones of the U.S. Court of Appeals for the Fifth Circuit and the Honorable Sidney R. Thomas of the U.S. Court of Appeals for the Ninth Circuit, both of whom were bankruptcy practitioners before becoming judges. *See* Douglas K. Moll, *"Less Is More": An Interview With Edith Hollan Jones, U.S. Court of Appeals for the Fifth Circuit*, HOUS. LAW., Nov./Dec. 2001, at 42, 42; John Schwartz, *Long Shot for Court Has Reputation for Compassion and Persuasion*, N.Y. TIMES, May 6, 2010, at A17. As for the Supreme Court, Justice William Douglas is the most prominent example. *See* DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 109 (2001).
280. *See* McKenna & Wiggins, *supra* note 122, at 627. Exceptions may occur, however, when a district court limits—pursuant to internal operating procedures—the pool of judges who may hear bankruptcy appeals. *See id.* at 650. One such example has been the U.S. District Court for the Southern District of Florida, which randomly assigns bankruptcy appeals to one of three judges in a bankruptcy appellate

Supreme Court hear significantly fewer bankruptcy appeals than the district courts.[281] Moreover, when Article III judges do have the opportunity to decide bankruptcy appeals, they may not find such matters interesting,[282] which may lead to suboptimal decisionmaking.[283]

Of course, even in the traditional agency model, generalist Article III judges can review agency decisions on questions of law,[284] and this layer of generalist review does not defeat or negate agency expertise in the administrative law world. But there is a fairly clear reason that generalist judges' review of agency action does not defeat agency expertise: Article III courts generally review agency interpretations of ambiguous statutes under deferential standards rather than de novo. For example, in his now famous *Chevron* decision, Justice Stevens—pointing to the fact that judges are "not experts"[285]—described how courts must defer to an agency's reasonable interpretation of ambiguity in the statute administered by the agency:

> If . . . the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction

pool. *In re* Assignment of Bankruptcy Appeals, Admin. Order No. 2011-61 (S.D. Fla. Aug. 8, 2011), *available at* http://www.flsd.uscourts.gov/wp-content/uploads/adminOrders/2011/2011-61.pdf; *see also* S.D. FLA. LOCAL BANKR. R. 87.4(a), *available at* http://www.flsd.uscourts.gov/wp-content/uploads/2011/12/FINALDecember2011LocalRules.pdf ("Appeals from orders or judgments entered by the Bankruptcy Court shall generally be assigned in accordance with the Court's Internal Operating Procedures.").

281. *See infra* notes 352–355 and accompanying text.

282. *See* New Jersey v. Reading Co., 451 U.S. 918, 918 (1981) (Rehnquist, J., dissenting from denial of certiorari) ("Bankruptcy cases seldom receive much notice outside of those who are familiar with this branch of the law . . . ."); KLEE, *supra* note 169, at 38–40 (discussing the Justices' lack of interest in bankruptcy cases); DAVID T. STANLEY & MARJORIE GIRTH, BROOKINGS INST., BANKRUPTCY: PROBLEM, PROCESS, REFORM 157 (1971) (referring to district "judges' lack of familiarity with and interest in bankruptcy law and procedure" when hearing a bankruptcy appeal); Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 791–92 (2010) (discussing "the disinclination of Article III courts toward matters arising from the bankruptcy courts"). The referral of bankruptcy appeals by district judges to magistrate judges may be concrete evidence of such disinterest. *See, e.g.*, Hall v. Vance, 887 F.2d 1041, 1045–46 (10th Cir. 1989) (determining that referral was proper); Minerex Erodel, Inc. v. Sina, Inc. 838 F.2d 781, 786 (5th Cir. 1988) (holding that referral was improper).

283. *Cf.* McKenna & Wiggins, *supra* note 122, at 678 ("There is anecdotal evidence that circuit judges find the BAP decisions they review better reasoned and the cases better prepared for review than decisions from the district courts, and that this impression is independent of the likelihood of affirmance or reversal.").

284. *See* Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967) (noting that both case law and the Administrative Procedure Act support a presumption in favor of judicial review of agency action); Ethyl Corp. v. EPA, 541 F.2d 1, 68 (D.C. Cir. 1976) (en banc) (Leventhal, J., concurring) ("Congress has been willing to delegate its legislative powers broadly and courts have upheld such delegation because there is court review to assure that the agency exercises the delegated power within statutory limits . . . ." (footnote omitted)).

285. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984).

> on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[286]

Thus, courts are not to second guess agencies' reasonable interpretations of the statutes they administer, thereby "allocat[ing] primary interpretive authority to . . . agenc[ies] rather than the courts."[287]

In contrast, legal issues in bankruptcy are reviewed de novo on appeal.[288] Hence, although the possibility of de facto deference exists pursuant to which an appellate court might choose to defer to the rationale of an expert bankruptcy judge or expert BAP,[289] no formal deference doctrines operate in the bankruptcy context as a matter of law to ensure that the reviewing courts give weight to the expert bankruptcy judges' policy determinations. At least one Supreme Court Justice has commented on this structural difference between bankruptcy courts and agencies, noting that even though no deference "is required with respect to decisions on the law made by bankruptcy judges," courts are "admonished to give substantial deference to [an administrative] agency's interpretation of the statute it is enforcing."[290]

Further complicating matters is the fact that the system's three hundred plus bankruptcy judges are not the only ones with expertise in the bankruptcy arena. To the contrary, some expertise may also rest with USTs and BAs. Even though these agencies generally lack the power to issue controlling constructions of the Bankruptcy Code that would warrant *Chevron* deference,[291] courts might nonetheless give their

286. *Id.* at 843 (footnote omitted).
287. *See* Watts, *supra* note 6, at 1004–05.
288. *See supra* note 108 and accompanying text.
289. *See, e.g.*, SNTL Corp. v. Ctr. Ins. Co. (*In re* STNL Corp.), 571 F.3d 826, 829 (9th Cir. 2009) (per curiam) ("We adopt the BAP opinion as our own and attach it as an appendix to this opinion." (citation omitted)); Wehrle v. City of Akron (*In re* Akron Thermal, Ltd. P'ship), No. 5:10CV0953, 2010 WL 2991516, at *2 (N.D. Ohio July 27, 2010) ("Having carefully reviewed the record, the applicable law and the parties' briefs, and entertained oral argument, this Court adopts the bankruptcy court's thorough and well-reasoned [opinion] that correctly sets out the facts and includes citations to the relevant statutes and caselaw."); McKenzie, *supra* note 282, at 778–79 (describing how deference to bankruptcy judges might be seen as implicit in the Bankruptcy Code's open-textured instructions).
290. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 102 (1982) (White, J., dissenting).
291. Some cases have acknowledged that the EOUST might possess, in certain narrow contexts, the power to authoritatively construe statutory ambiguities in a way that commands *Chevron* deference, or, at a minimum, in a way that receives *Skidmore* deference. *See* Foulston v. BDT Farms, Inc. (*In re* BDT Farms, Inc.), 21 F.3d 1019, 1023 (10th Cir. 1994) (giving *Chevron* deference to the EOUST's permissible interpretation of a statutory provision involving a standing trustee's compensation); *see also* Bolen v. Dengel (*In re* Dengel), 340 F.3d 300, 310 (5th Cir. 2003) (giving *Skidmore* deference); *In re* Jackson, 321 B.R. 94, 96–97 (Bankr. S.D. Ga. 2005) (same). These cases are of limited reach,

views some weight pursuant to so-called *Skidmore* deference, which rests on the persuasiveness of the agency's views.[292] This possibility is corroborated by a 2008 study, which noted that when bankruptcy cases reach the Supreme Court, the Solicitor General's office frequently relies on the EOUST's views in drafting its briefs.[293] Even though there is "no Bankruptcy Commission" and, hence, no agency to which the Court can formally defer, the analysis set forth in the Solicitor General's briefs "often influences the Court's judgment in ways that resemble *Skidmore* deference."[294]

In short, although bankruptcy judges and BAPs clearly possess expertise in the bankruptcy arena, policymaking does not rest solely in their hands. Rather, when litigants appeal matters from the bankruptcy courts or BAPs, generalized Article III appellate judges have the ultimate power to issue precedents deciding questions of law de novo. Furthermore, the fact that there are hundreds of bankruptcy judges—as well as BAs and USTs—suggests that subject-matter expertise in bankruptcy is highly diffuse and polyphonic, with no single institution serving as the clear locus of expertise.[295]

In thinking about why this lack of expert-driven policymaking in the bankruptcy system is highly problematic, it might be helpful to consider a concrete example of the type of policy question that experts equipped to handle empirical and economic analyses could best resolve. Here, consider the Bankruptcy Code's mandate that courts determine the present value of the stream of future payments

however, because they involve a specific statutory provision found outside the Bankruptcy Code that expressly provides that the "Attorney General . . . *shall fix* . . . a maximum annual compensation . . . and . . . a percentage fee" for standing trustees. 28 U.S.C. § 586(e)(1)(A)–(B) (2006) (emphasis added); *see also* Buckley, *supra* note 88, at 260 (describing *BDT Farms* as limited precedent because "*Chevron* deference was given to Trustee policy-making with respect to an administrative, not a substantive matter" and because the "statutory ambiguity opening the door to policy-making by the Trustee was not in the Bankruptcy Code itself"). Hence, these cases deal with the rare examples of areas in which the EOUST has in fact been delegated the power to fill in statutory gaps.

292. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (providing that even agency interpretations that do not control the courts, such as views set forth in an interpretive bulletin or amicus briefs, may "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance" based on the persuasiveness of the agency's views).

293. William N. Eskridge, Jr. & Lauren Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations From* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1113 (2008).

294. *Id.*

295. *Cf.* Christopher W. Frost, *Bankruptcy Redistributive Policies and the Limits of the Judicial Process*, 74 N.C. L. REV. 75, 132 (1995) ("A second institutional feature of the bankruptcy process that limits its competence to resolve distributional questions is that bankruptcy courts act on an uncoordinated basis. The economic effect of redistributive decisions made by any one bankruptcy judge may be small in comparison to the aggregate, economy-wide effect of decisions made by all judges.").

proposed in a debtor's repayment plan.[296] As previously discussed, this mandate requires a court to determine the discount rate that it will use to conduct present-value analysis, but the Code remains silent on the rate itself and the method for determining it.[297] Given that courts take into account considerations such as expected inflation, opportunity cost, and the risk of nonpayment when determining the discount rate,[298] the calculus is inherently forward looking and thus necessitates acquiring information about future events and conditions. The adversarial nature of litigation and the retrospective orientation of adjudication, however, make courts an ill-suited delegate to engage in such inquiry.[299]

A better approach would involve generating data and studies pursuant to which a more holistic and coherent policy for determining discount rates could be set—something that agencies are better suited for than courts.[300] Such coherence has particular salience given the widespread nature of the problem. Because discounting in bankruptcy is implicated in every case involving a repayment plan, such as Chapter 11 and Chapter 13 cases,[301] the substantial scale of this issue becomes readily apparent when one considers the number of cases filed and the dollar amounts involved each year—to wit, in Chapter 13 cases, "it seems reasonable to hypothesize that the amount at stake on an annual basis is at least a quarter of a billion dollars."[302]

296. *See, e.g.*, 11 U.S.C. §§ 1129(a)(7), (a)(9), (a)(15)(A), (b)(2)(A)(i)(II), (b)(2)(B)(i), (b)(2)(C)(i), 1325(a)(4), (a)(5)(B)(ii) (2006).
297. *See supra* notes 163–164 and accompanying text.
298. *See, e.g.*, Till v. SCS Credit Corp., 541 U.S. 465, 474 (2004) (plurality opinion).
299. *See* Pardo, *supra* note 164, at 185; *cf.* Frost, *supra* note 295, at 133 ("Judges do not look broadly at the direction they and their fellow judges are taking the economy. Even if judges attempted to develop a sense of the economy-wide effect of their collective views on bankruptcy redistributions, it is unlikely that they would have any reliable means of determining the causal relationship between their individual redistributive policies and particular economic phenomena. Judges and the lawyers practicing before them are not necessarily economists and statisticians. They often lack both the training and the resources to conduct the analyses required to determine the economic effects of such decisions.").
300. This is not to say that an agency-centered approach is a panacea. Discounting issues can be quite difficult to resolve, even in the agency context. *See, e.g.*, Richard L. Revesz, *Environmental Regulation, Cost–Benefit Analysis, and the Discounting of Human Lives*, 99 COLUM. L. REV. 941, 948 (1999) ("A central goal of this Article is to move the regulatory process towards a more thoughtful valuation of human lives threatened by environmental carcinogens, and away from OMB's deeply flawed technique of taking valuations from the workplace setting and reducing them by an inflated discount rate."). Nonetheless, we take the view that, given the institutional differences between courts and agencies, courts are the second-best policymaking delegate when it comes to issues like discount rates.
301. *See* 11 U.S.C. § 1121 (indicating who may file a Chapter 11 plan); *id.* § 1321 (providing that a Chapter 13 debtor shall file a plan).
302. Pardo, *supra* note 164, at 118.

2. Accountability

Another reason frequently given for allowing administrative agencies to engage in policymaking when filling the gaps in statutes relates to political accountability.[303] Although agency heads are not directly accountable to the voters, they are indirectly accountable because of both presidential and congressional control.[304] Congress, for example, has the power to create agencies, to control their budgets, and to hold oversight hearings.[305] In addition, the President has the power to appoint and remove certain agency officials.[306] The President also exerts control over agencies and their policies through informal jawboning,[307] the issuance of Executive Orders,[308] and regulatory review conducted by the Office of Information and Regulatory Affairs located within the Office of Management and Budget.[309]

Admittedly, not all agencies are subject to the same kind of political control. For example, although the heads of executive agencies are subject to the President's unfettered removal power, the heads of so-called independent agencies, such as the SEC and the Federal Reserve Board, are not.[310] Nonetheless, as Justice Scalia recently pointed out, even independent agencies that are insulated from direct presidential control are not insulated from politics or from congressional control.[311]

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303. *See, e.g.*, Lemos, *supra* note 8, at 448 ("Supporters of the . . . hands-off approach to delegations to agencies also maintain that agencies are democratically accountable, at least derivatively, because of their relationship with the president and Congress."); Watts, *supra* note 244, at 34 ("Political accountability and oversight are two of the most significant checks on agency discretion."); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 35 (2009) (noting that political control and accountability help legitimize agencies).
304. *See, e.g.*, Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 64 (2006); Philip J. Harter, *Executive Oversight of Rulemaking: The President Is No Stranger*, 36 AM. U. L. REV. 557, 568 (1987).
305. *See* Watts, *supra* note 244, at 34; *see also* Beermann, *supra* note 304, at 72, 84–85, 122.
306. *See* Watts, *supra* note 244, at 34–35.
307. *See* Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 944–47 (1980).
308. *See, e.g.*, Regulatory Planning and Review, Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993) (setting forth principles and requirements for agencies to follow relating to regulatory planning and review), *reprinted as amended in* 5 U.S.C. § 601 app. at 745 (2006).
309. *See id.* at 51,737 (describing the role of the Office of Management and Budget and the Office of Information and Regulatory Affairs).
310. *See* Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 600 (2010) ("The President cannot fire the members of these agencies for political reasons, including failure to follow administration policy, but only for 'good cause,' such as neglect of duty or malfeasance in office.").
311. FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1815 (2009) ("[I]ndependent agencies are sheltered not from politics but from the President, and it has often been observed that their freedom from presidential oversight (and protection) has simply been replaced by increased subservience to congressional direction.").

Hence, our federal regulatory agencies—whether executive or independent—are subject to a fair amount of political oversight and control, and it is precisely this political control that has helped justify Congress's delegations of broad policymaking powers to agencies.[312] For example, prominent scholars like Jerry Mashaw have argued that, in light of presidential elections, "it may make sense to imagine the delegation of political authority to administrators as a device for improving the responsiveness of government to the desires of the electorate."[313]

In contrast, the Article III judges exercising the authority to fill gaps in the Bankruptcy Code through the appeals process are not politically accountable. Rather, they enjoy lifetime tenure and salary protections that help insulate them from political control and accountability.[314] Furthermore, the bankruptcy judges who act as trial judges in the bankruptcy system face little political accountability. Bankruptcy judges are appointed by circuit court judges rather than by the President,[315] through a selection process that shelters bankruptcy judges "from day-to-day politics [even more] than the Article III judges who survive the Constitution's nakedly political appointment process."[316] Once appointed, they serve for lengthy fourteen-year, renewable terms, and they can be removed earlier only for cause.[317] Accordingly, judges who are generally autonomous and sheltered from politics[318] fill in substantive gaps in the Code, calling into question the legitimacy of the policymaking role that Congress has delegated to courts.

Indeed, outside the bankruptcy context, the *Chevron* Court recognized the concerns that might flow from allowing unaccountable judges to reconcile competing political interests and to make policy calls:

> Judges are not . . . part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast,

312. *See* Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95–99 (1985).
313. *Id.* at 95.
314. *See* U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").
315. *See* 28 U.S.C. § 152(a)(1) (2006).
316. McKenzie, *supra* note 282, at 794.
317. *See* 28 U.S.C. § 152(e).
318. *See, e.g.*, McKenzie, *supra* note 282, at 795 ("If the primary value we attach to Article III is adjudication before a neutral decisionmaker who does not owe allegiance to a political patron for continued employment, it seems well served by the current structure of appointment to the bankruptcy courts."); *see also* Nash & Pardo, *supra* note 41, at 1766 ("While judicial independence may be fostered by life tenure, the renewable, fourteen-year term of bankruptcy judges effectively allows them to serve as long as many of their Article III counterparts.").

> an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.[319]

The Court recognized that policy calls, which necessarily turn on the resolution of competing interests, are best handled by politically accountable agencies and not by unaccountable judges.

At its core, bankruptcy frequently turns on resolving political judgments about the distribution of losses and the rights of creditors and debtors.[320] James Madison noted this in the Federalist Papers when he categorized the creditor–debtor divide as a "common and durable source of faction[]" necessitating government regulation.[321] Given that bankruptcy policy involves difficult political judgments about distributive policies, bankruptcy presents a prime example of a situation in which allowing Congress to delegate policymaking powers to unaccountable judges, rather than to an administrative agency subject to political oversight and control, raises serious concerns.

3. Uniformity

In addition to citing agencies' expertise and accountability, scholars frequently support agencies' policymaking role by citing their ability to achieve national regulatory uniformity.[322] The thought is that "by committing ambiguous statutory provisions to executive [rather than judicial] interpretation, courts reduce the likelihood that circuit splits will cast a pall of uncertainty over unitary regulatory

319. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984).

320. *See generally* Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775 (1987).

321. THE FEDERALIST NO. 10, at 55 (James Madison) (Harvard Univ. Press 2009); *cf.* Hamilton v. Lanning, 130 S. Ct. 2464, 2483 (2010) (Scalia, J., dissenting) ("Bankruptcy protection is not a birthright . . . . How long to wait before throwing the debtor a lifeline is inherently a policy choice."); Jonathan Remy Nash & Rafael I. Pardo, *Does Ideology Matter in Bankruptcy? Voting Behavior on the Courts of Appeals*, 53 WM. & MARY L. REV. 919, 927 (2012) ("[T]o the extent that the argument is that bankruptcy is essentially devoid of issues over which judges divide ideologically, we flatly disagree.").

322. *See* Revesz, *supra* note 259, at 1114 ("[O]ne of the traditional reasons for creating administrative agencies is to produce a uniform interpretation of federal statutes.").

programs."[323] Agencies achieve this uniformity by adopting consistent, nationally applicable interpretations of ambiguous statutory provisions via notice-and-comment rules or formal adjudication that the courts must subsequently defer to under *Chevron*.[324]

In contrast to the agency model, the current court-centered model of bankruptcy administration depends on a multitude of courts at various levels to interpret ambiguities in the Bankruptcy Code; such a model is ill-equipped to achieve uniformity.[325] Indeed, scholars have frequently criticized the current system of bankruptcy administration for failing to "build a coherent body of law."[326] There are various issues in bankruptcy law—even basic issues—that lawyers must "litigate again and again" because of a lack of precedent to resolve the issues uniformly.[327] This lack of uniformity has affected judges: A Federal Judicial Center study found support for "the proposition that bankruptcy law is less settled than in other areas of law—and that it affects judges' work."[328] Specifically, the study reported that district court judges were "less likely to find sufficient precedent in bankruptcy than in other areas of the law."[329]

At least three different aspects of the current model of bankruptcy administration seem to be contributing to this overall lack of uniformity. One factor is the odd geographic split of power between the UST and BA Programs. Both agencies are designed to serve as watchdogs and to bring civil enforcement actions in the bankruptcy arena,[330] but the agencies and the enforcement policies and strategies that they advocate for in their own geographic jurisdictions may not always align.[331] Furthermore, even the narrow areas of bankruptcy law that the USTs and BAs are authorized to administer, such as the approval of financial counseling entities,[332] lack

323. Evan J. Criddle, Chevron*'s Consensus*, 88 B.U. L. REV. 1271, 1291 (2008).
324. *See* Peter L. Strauss, *One Hundred and Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1121 (1987).
325. *See* McKenna & Wiggins, *supra* note 122, at 635 ("The bankruptcy system is not structured to serve the law-declaration functions of an appellate system.").
326. Barbara B. Crabb, *In Defense of Direct Appeals: A Further Reply to Professor Chemerinsky*, 71 AM. BANKR. L.J. 137, 140 (1997).
327. Paul M. Baisier & David G. Epstein, *Resolving Still Unresolved Issues of Bankruptcy Law: A Fence or an Ambulance*, 69 AM. BANKR. L.J. 525, 526–27, 527 n.9 (1995); *see also* Crabb, *supra* note 326, at 140 ("Many of the most basic issues in bankruptcy law have no definitive resolution.").
328. McKenna & Wiggins, *supra* note 122, at 655.
329. *Id.*
330. *See supra* notes 89–90 and accompanying text.
331. *Cf.* J. Christopher Marshall, *Civil Enforcement: An Early Report*, J. NAT'L ASS'N BANKR. TRUSTEES, Fall 2002, *available at* http://www.justice.gov/ust/eo/public_affairs/articles/docs/nabtalkfall2002.pdf (describing the UST Program's civil enforcement initiatives).
332. *See supra* notes 96–97 and accompanying text.

uniformity. For example, in 2006, the EOUST issued interim rules defining the criteria and procedures to be used regarding applications for approval of such entities,[333] and then in 2008 it issued proposed rules to replace the interim rules.[334] It is unclear, however, whether the EOUST has the authority to promulgate such rules,[335] and the rules have not been finalized. In contrast, the BA Program has not promulgated any formal rules, but it has issued instructions clarifying the application process and criteria for applicants, which can be found on the website for the Administrative Office of the U.S. Courts.[336]

Second, in the absence of any administrative agency with substantive rulemaking powers, courts have seized on their local rulemaking powers, leading to the proliferation of non-uniform judicial rules. To illustrate this phenomenon, consider the example already discussed regarding present-value analysis. Recall that the Bankruptcy Code requires a court to discount to present value the stream of future payments to be made under a debtor's repayment plan, albeit without expressly specifying the discount rate itself or how to calculate it.[337] Further recall that, when given the opportunity to decide the proper approach to the discount-rate calculus, the Supreme Court in *Till v. SCS Credit Corp.*[338] failed to muster a majority opinion and thus did not definitively resolve for bankruptcy courts the proper approach to present-value analysis.[339] The Court's failure to announce a rule with nationwide effect has given bankruptcy courts the leeway to continue a practice, which they

333. *See* Application Procedures and Criteria for Approval of Nonprofit Budget and Credit Counseling Agencies and Approval of Providers of a Personal Financial Management Instructional Course by United States Trustees, 71 Fed. Reg. 38,076 (July 5, 2006) (codified at 28 C.F.R. pt. 58).

334. *See* Application Procedures and Criteria for Approval of Providers of a Personal Financial Management Instructional Course by United States Trustees, 73 Fed. Reg. 67,435 (proposed Nov. 14, 2008) (to be codified at 28 C.F.R. pt. 58); Application Procedures and Criteria for Approval of Nonprofit Budget and Credit Counseling Agencies by United States Trustees, 73 Fed. Reg. 6062 (proposed Feb. 1, 2008) (to be codified at 28 C.F.R. pt. 58).

335. Although the Bankruptcy Code expressly gives USTs (and BAs) the authority to "approve" counseling and instructional course providers, *see* 11 U.S.C. § 111(b)–(d) (2006), nothing in the Code specifically gives USTs or BAs rulemaking powers in this arena. Perhaps rulemaking powers could be inferred from language in the statute that states that "[t]o be approved by the United States trustee (or the bankruptcy administrator, if any), a nonprofit budget and credit counseling agency shall, *at a minimum*," meet certain statutorily defined criteria. *Id.* § 111(c)(2) (emphasis added).

336. *See* Admin. Office of the U.S. Courts, *Approval Process for Credit Counseling and Debtor Education Courses*, U.S. COURTS, http://www.uscourts.gov/federalcourts/bankruptcy/bankruptcyresources/approvalprocessforcreditcounseling.aspx (last visited Oct. 24, 2012) (providing instructions and application form).

337. *See supra* notes 163–164 and accompanying text.

338. 541 U.S. 465 (2004).

339. *See supra* notes 165–167 and accompanying text.

began prior to *Till*,[340] of fashioning their own approaches to administering the Code's present-value provision. Although the courts are clearly trying to make the Chapter 13 plan confirmation process more efficient and hopefully uniform (within their respective districts) by adopting presumptively appropriate discount rates, the end result has been disquieting because the courts are using their local rulemaking processes to enact rules or to promulgate official forms that affect substantive rights. Such rules, which may well contravene the limits imposed by the Rules Enabling Act,[341] create inter-district non-uniformity with regard to the amount of present-value interest that a debtor must pay to have a confirmable Chapter 13 plan.

Take, for example, the District of Hawaii, the District of South Carolina, the Southern District of California, and the Western District of Missouri. Through their local rules and/or forms, these districts have substantively created a presumption of what the appropriate discount rate should be in Chapter 13.[342] The presumptive rate is currently 3.69 percent in the Western District of Missouri,[343] 4.75 percent in the District of Hawaii,[344] 5.25 percent in the District of South Carolina,[345] and 7 percent in the Southern District of California.[346] The variability in these seemingly arbitrary rates is problematic when one considers that the differences

340. *See, e.g.*, Green Tree Fin. Servicing Corp. v. Smithwick (*In re* Smithwick), 121 F.3d 211, 213 (5th Cir. 1997), *overruled by* Drive Fin. Servs., L.P. v. Jordan, 521 F.3d 343 (5th Cir. 2008).

341. *See* 28 U.S.C. §§ 2071(a), 2075 (2006).

342. D. HAW. LOCAL BANKR. R. 3015-1(g)(1) ("[T]he clerk will set and publish a standard interest rate applicable to secured and other claims under a confirmed Chapter 13 plan. The setting of a standard interest rate does not bar a debtor or creditor from proposing a different interest rate."); D.S.C. LOCAL BANKR. R. 3015-6(a) ("In order to expedite the determination of an effective interest rate to be used by debtors in meeting the requirement of 11 U.S.C. § 1325, a presumed effective interest rate ('Periodic Interest Rate') will be set by the Court with the assistance of a committee of trustees and members of the consumer bar. If applied to a secured claim in a chapter 13 plan, there will be a rebuttable presumption that the Periodic Interest Rate—for plan confirmation purposes—is reasonable."); W.D. MO. LOCAL BANKR. R. 3084-1(g)(1), (3) ("The posted 'CHAPTER 13 RATE' shall be determined by the standing Chapter 13 trustee for the Western District of Missouri semi-annually . . . . The posted Chapter 13 rate is, absent evidence to the contrary, presumed to be the applicable rate."); U.S. BANKR. COURT FOR THE S. DIST. OF CAL., CHAPTER 13 PLAN (RECOMMENDED FORM) ¶ 5 (2005), *available at* http://www.casb.uscourts.gov/html/csdforms/Chapter13Plan.pdf (providing that, for claims secured by personal property, "[e]ach named creditor shall be paid in installments . . . until claim is paid in amount allowed secured plus interest at seven percent (7%) per annum unless a different percentage is specified").

343. *Richard Fink, Chapter 13 Trustee, Kansas City, Mo.*, 13NETWORK.COM, http://www.13network.com/kschome.htm (last visited Oct. 24, 2012).

344. U.S. BANKR. COURT FOR THE DIST. OF HAW., NOTICE OF STANDARD INTEREST RATE FOR CHAPTER 13 PLANS (2012), *available at* http://www.hib.uscourts.gov/news/2012_0601_Ch%2013%20Interest.pdf.

345. *In re* Interest Rate in Chapter 13 Cases, Amended Operating Order No. 09-02 (Bankr. D.S.C. Nov. 20, 2009), *available at* http://www.scb.uscourts.gov/pdf/oporder/opor09-02.pdf.

346. *See supra* note 342.

cannot be attributed to any geographical variance in inflation, opportunity costs, or the risk of nonpayment.[347] Hence, all else being equal, debtors subject to a higher discount rate must pay more to creditors to obtain Chapter 13 relief. This is just one example of policymaking by courts via their local rulemaking powers that creates non-uniformity and presents cause for serious concern.[348]

Finally, and perhaps most importantly, the current appellate structure of the bankruptcy system is also a significant contributor to the lack of uniformity in bankruptcy law. Questions of ambiguity in the Bankruptcy Code are resolved first by bankruptcy judges. Bankruptcy judges' decisions do not create binding precedent, however, and thus fail to provide clarity or uniformity surrounding the meaning of ambiguous questions of law.[349] Likewise, any decisions on questions of law issued by the district courts will generally be viewed as lacking precedential effect,[350] and there is dispute about the precedential nature of BAP decisions as well.[351]

Given the general lack of precedential effect of bankruptcy court, BAP, and district court decisions on bankruptcy matters, a decision with strong precedential effect cannot be handed down until a case reaches the court of appeals or the Supreme Court. Yet relatively few bankruptcy appeals make their way up to the circuit courts, and even fewer are heard before the Court. For example, during the 2010 fiscal year, 3,022 bankruptcy appeals were filed in the first-tier appellate courts (the district courts and BAPs),[352] whereas only 678 bankruptcy appeals were filed in the second-tier appellate courts (the circuit courts).[353] And, during the 2009 October Term, the Supreme Court handed down just four bankruptcy decisions,[354] a figure that is consistent with the Court's past practice.[355] As these statistics demonstrate, the bulk of

347. *See supra* note 298 and accompanying text.
348. For other examples, see Daniel A. Austin, *Bankruptcy and the Myth of "Uniform Laws,"* 42 SETON HALL L. REV. 1081 (2012).
349. *See supra* note 266 and accompanying text.
350. *See* Nash & Pardo, *supra* note 41, at 1762 & n.71.
351. *See* McKenna & Wiggins, *supra* note 122, at 652–53; Nash & Pardo, *supra* note 41, at 1761 & n.70, 1762 & n.73.
352. *See* DUFF, *supra* note 103, app. at 203 tbl.C-11 (indicating that 2177 bankruptcy appeals were filed nationally in all U.S. District Courts); *id.* app. at 133 tbl.B-10 (indicating that 845 bankruptcy appeals were filed nationally in all BAPs).
353. *See id.* app. at 119 tbl.B-6.
354. The four decisions were *Schwab v. Reilly*, 130 S. Ct. 2652 (2010); *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010); *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010); and *Milavetz, Gallop & Milavetz v. United States*, 130 S. Ct. 1324 (2010).
355. One empirical study analyzed certiorari petitions on the Court's paid docket that involved issues of federal bankruptcy law under the Code and that were filed at any point from the Court's 1978 October Term through its 1995 October Term. Robert M. Lawless & Dylan Lager Murray, *An Empirical Analysis of Bankruptcy Certiorari*, 62 MO. L. REV. 101, 113–14, 116–17, 116 n.57 (1997). The researchers found that "the Supreme Court receives approximately 50 to 60 bankruptcy certiorari

appellate-level policymaking occurs at the first-tier appellate level. Given that such lower-level judicial policymaking generally fails to create binding precedent,[356] the current structure of bankruptcy administration is poorly designed to achieve uniform, clear answers.

Uniformity seems even less achievable under the current system when one contrasts the court-centered model of bankruptcy administration with agency-administered statutes.[357] In the traditional agency realm, just as in the court-centered bankruptcy realm, the Supreme Court cannot be relied on to impose uniformity routinely in statutory construction given the small number of cases the Court hears each year. Yet in the traditional agency realm, where regulatory agencies can adopt binding interpretations of ambiguous statutes through notice-and-comment rulemaking or formal adjudication, *Chevron* deference operates as a device for achieving uniformity because "the national agencies responsible for that administration can be expected to reach single readings of the statutes for which they are responsible and to enforce those readings within their own framework."[358]

4. Accessibility and Transparency

A fourth major argument often made in favor of delegations of policymaking power to agencies is that agencies—at least when they set policy via rulemaking, rather than adjudication—"offer the most 'accessible,' 'meaningful,' and 'effective' site for public participation in lawmaking."[359] For example, when agencies promulgate rules via notice-and-comment rulemaking, they must issue a notice of the proposed rules, invite and consider comments from the public, and respond in a reasoned way to all significant public comments received.[360] Indeed, "[i]nterested members of the modern tech-savvy public have to go no further than their computers to easily locate proposed rules and file comments electronically."[361] Members

petitions per year, granting cert in an average of 7.0% of these cases and hearing an average of 3 or 4 bankruptcy cases per year." *Id.* at 132.

356. *See* Nash & Pardo, *supra* note 41, at 1761–62, 1761 nn.68–73 (discussing precedential effect of bankruptcy appeal decisions by district courts and BAPs).

357. *Cf.* Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2539–40 (2011) (noting in the context of the regulation of greenhouse emissions that the EPA is better suited than federal district courts sitting as sole adjudicators to regulate given that federal district courts, among other things, "lack authority to render precedential decisions binding other judges, even members of the same court").

358. Strauss, *supra* note 324, at 1121.

359. Lemos, *supra* note 8, at 450 (quoting Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 781–82 (1999)).

360. *See* Watts, *supra* note 244, at 36–37 (describing how rulemaking proceedings conducted by agencies are quite accessible to the public).

361. *Id.* at 37.

of the public can also play a role in prompting agency action and in pushing agency agendas by petitioning agencies to engage in rulemaking.[362]

In contrast, bankruptcy courts do not adopt substantive policy through a transparent process that invites public deliberation and participation. Thus, the general public does not have the opportunity to play a role in shaping the courts' agendas.[363] Unlike policy set through notice-and-comment rulemaking, courts resolve gaps in the Bankruptcy Code through case-by-case adjudication based on the issues presented in particular cases. In setting policy via case-by-case adjudication, courts hear only from the parties and amici, not from the general public. The terms of the discourse in the court are likely to focus on legal sources and hence are likely to be different than the terms of discourse that would be before an agency, which can frame its decisions in more policy-driven considerations. Additionally, as one commentator has noted, "there are substantial and important connections to be explored regarding the intersection of the bankruptcy system and issues of health care, labor, taxation, race, and how self-awareness influences use of credit."[364] Yet "[a]s long as clarification of the Code's standards occurs in the judicial setting, the institutional limits of the judicial process make it unlikely that the bankruptcy system can explore or address these connections in a thoughtful way."[365]

Another concern is that the litigants who do raise issues of bankruptcy law on appeal through the judicial system likely are not representative. "Many bankruptcy litigants cannot afford an appeal to the court of appeals (even if it were the initial forum),"[366] and the outcomes on appeal may skew in favor of creditors who might be able to fund better attorneys than cash-strapped debtors.[367] If bankruptcy policy were set by agency rules rather than by the courts in individual cases, then debtors—who might individually be unable to hire an attorney to bring an appeal in the bankruptcy context—would have the opportunity to have their collective voices heard via organizations dedicated to protecting debtors' rights, such as the National Consumer Law Center or the National Association of Consumer Bankruptcy

362. *Id.*; *see also* 5 U.S.C. § 553(e) (2006) ("Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.").

363. *Cf.* Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2539–40 (2011) (noting that the EPA is better suited than federal district courts to set policies for greenhouse gases because, among other things, courts do not "issue rules under notice-and-comment procedures inviting input by any interested person").

364. R. Wilson Freyermuth, *Crystals, Mud, BAPCPA, and the Structure of Bankruptcy Decisionmaking*, 71 MO. L. REV. 1069, 1078 (2006) (footnotes omitted).

365. *Id.*

366. McKenna & Wiggins, *supra* note 122, at 636.

367. *See* Nash & Pardo, *supra* note 321, at 940–46 (discussing why appellate outcomes of debt-dischargeability determinations will skew in favor of creditors).

Attorneys. Hence, an open, public, and transparent agency process for setting bankruptcy policy would be preferable to the closed judicial process from a good governance perspective, bringing more voices to the table, enabling broader issues to be considered, and allowing different terms of discourse that are better suited to policymaking.

5. Prospective Clarity

A fifth argument often voiced in favor of delegations of rulemaking power to administrative agencies is that rulemaking enables agencies to set policy in a way that fosters fairness (because rules are generally announced prospectively rather than retroactively) and also helps to achieve efficiency (because agencies can promulgate clear, blanket rules rather than repeatedly dealing with issues on a case-by-case basis).[368] In other words, rulemaking by agencies can help to achieve prospective clarity that brings fairness benefits to those being regulated and efficiency benefits to the agency itself.

In contrast, in the court-centered bankruptcy context, gaps in the Bankruptcy Code are filled in case-by-case adjudication and judicial decisions operate in a retroactive fashion by binding the parties. Consequently, prospective clarity is not achieved. Viewed through an efficiency lens, this lack of prospective clarity is particularly concerning given that lawyers must repeatedly litigate—and judges must repeatedly decide—even some basic issues of bankruptcy law that remain unresolved because of the lack of clear precedent.[369]

Moreover, viewed through a fairness lens, there is reason to be concerned about bankruptcy laws' lack of prospective clarity. Although one might think that individual consumers rarely plan to file for bankruptcy and hence are unlikely to act in reliance on certain bankruptcy policies prior to seeking such relief, the lack of settled precedent in bankruptcy may impede "business planning and other client counseling."[370] Specifically, one commentator has pointed out that the lack of precedent "means that attorneys acting in their planning capacity may have little guidance

368. *See generally* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules With the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 546 (2002) (describing how the twin concerns of efficiency and fairness helped increase reliance on rulemaking, which was viewed as much more likely than adjudication "to result in standards that apply prospectively, providing clear notice of the law's requirements to all concerned").

369. *See supra* notes 326–329 and accompanying text.

370. McKenna & Wiggins, *supra* note 122, at 657.

in advising a client on the best way to avoid adverse consequences should bankruptcy ensue."[371]

There may indeed be some situations in which litigants may be surprised in a "gotcha" manner by the judiciary's retroactive interpretation of ambiguity in the Bankruptcy Code—ambiguity that could fairly easily be resolved in a prospective manner via agency rulemaking. Take, for example, the Supreme Court's decision in *Schwab v. Reilly*.[372] In that case, Reilly, the debtor, filed for Chapter 7 relief after her one-person catering business failed.[373] Reilly sought to claim her cooking equipment as exempt from liquidation by the trustee and did so by listing her exemption claim in the equipment ($10,718) to be the same amount as the value she listed for the equipment ($10,718).[374] The relevant provision of the Bankruptcy Code provided that the property she listed was to be treated as "exempt" unless "a party in interest objects."[375] The trustee, Schwab, did not object to the exemption within the time period specified by the Bankruptcy Rules. Instead, he sought an appraisal of the equipment, which was determined to have a value of $17,200.[376] Following this appraisal, Schwab sought to sell the equipment to recoup for the benefit of the creditors the value in excess of the debtor's claimed exemption.[377] Reilly opposed this motion and indicated to the bankruptcy court that, rather than be forced to give up her cooking equipment, she would prefer that her case be dismissed because of the sentimental value of the equipment,[378] which her "parents purchased for her despite their own financial difficulties."[379] The bankruptcy court denied Schwab's motion to auction the equipment, and the district court and the court of appeals both affirmed the bankruptcy court.[380]

In a 6–3 decision, the Supreme Court held that the trustee was not required to object to the debtor's facially valid exemption claim (that is, an exemption claim that did not exceed the permissible amount that could be claimed under the Bankruptcy Code) in order to preserve the estate's right to any excess value above and beyond the debtor's claimed exemption.[381] This result clearly upended Reilly's expectations that

371. Lissa Lamkin Broome, *Bankruptcy Appeals: The Wheel Is Come Full Circle*, 69 AM. BANKR. L.J. 541, 542 (1995).
372. 130 S. Ct. 2652 (2010).
373. *Id.* at 2657.
374. *Id.* at 2657–58.
375. 11 U.S.C. § 522(*l*) (2006).
376. *In re* Reilly, 543 F.3d 173, 174 (3d Cir. 2008), *rev'd sub nom.* Schwab v. Reilly, 130 S. Ct. 2652 (2010).
377. *Schwab*, 130 S. Ct. at 2658.
378. *Id.*
379. *Id.* at 2658 n.3.
380. *Id.* at 2659.
381. *Id.* at 2669.

she had taken the necessary steps to claim an exemption in the entire equipment. In her dissent, Justice Ginsburg noted: "*In addition to departing from the prevailing understanding and practice*, the Court's decision exposes debtors to protracted uncertainty concerning their right to retain exempt property, thereby impeding the 'fresh start' exemptions are designed to foster."[382] Thus, the Court's decision provides an example of the kind of unfair surprise that sometimes occurs as a result of the judiciary's interpretation of gaps in the Code—and that could potentially be avoided if an agency armed with rulemaking powers sought to fill such gaps prospectively.[383]

6. Flexibility

A sixth argument often raised in favor of congressional delegations of policymaking authority to agencies relates to agencies' flexibility. The argument here is that agencies are better able to adapt rules to respond to new information, different facts, or changed circumstances than Congress (which is constrained by political roadblocks and institutional barriers) or the courts (which are constrained by stare decisis).[384] Once an agency has set a policy via notice-and-comment rulemaking or adjudication, it is free to revisit that policy and to change it down the road so long as it follows any required procedures, acknowledges the change, and adequately justifies its new policy.[385] The Supreme Court recognized as much in *Chevron*: "An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis."[386]

382. *Id.* at 2670 (Ginsburg, J., dissenting) (emphasis added).
383. Arguably, courts (like an agency) could achieve prospective clarity in areas such as this one—namely, by amending the Federal Rules of Bankruptcy Procedure—since *Schwab* involved a matter of procedure. Indeed, in light of *Schwab*, the Advisory Committee on Bankruptcy Rules has recommended amending the official form for claiming exempt property in bankruptcy. *See* Memorandum from the Honorable Eugene R. Wedoff, Chair of the Advisory Comm. on Bankr. Rules, to the Honorable Lee H. Rosenthal, Chair of the Standing Comm. on Rules of Practice and Procedure of the Judicial Conference of the U.S. 15–16 (May 6, 2011), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/BK05-2011.pdf. However, the process of amending the bankruptcy rules is a time-intensive one, which can span anywhere from thirty months to three years. *See* Alan N. Resnick, *The Bankruptcy Rulemaking Process*, 70 AM. BANKR. L.J. 245, 246 (1996). Agency rulemaking also can take significant time to complete, but procedural rules adopted by agencies are exempt from notice-and-comment requirements, *see* 5 U.S.C. § 553(b) (2006), and hence an agency likely could act fairly quickly to eliminate ambiguities in its procedural rules.
384. *See* Lemos, *supra* note 8, at 453–54.
385. *See* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1810–11 (2009) (discussing how agencies may change policy so long as they acknowledge the change and adequately explain the new policy).
386. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 863–64 (1984).

This same flexibility rationale does not tip in favor of Congress's decision to delegate a policymaking role to the courts, rather than an agency, in bankruptcy. Once a court has issued a precedential opinion, the judges interpreting the Bankruptcy Code are constrained by stare decisis principles, and hence courts do not enjoy the same flexibility as an administrative agency to adapt to changing circumstances.[387] Although perhaps some areas of the Code should be static, other areas in bankruptcy arguably could benefit from a flexible approach that would allow the views of the current administration or changing circumstances to influence bankruptcy policy.[388] Consider, for example, the recent Great Recession, which has brought with it a rising tide of bankruptcy filings by student-loan borrowers.[389] The country's changing economic circumstances—and the fact that those with college degrees and massive amounts of educational debt have been hit hard—might well be precisely the kind of changed circumstance that, if addressed by a regulatory agency instead of a court, could warrant revisiting policies about the dischargeability of student loans in bankruptcy.[390]

387. *Cf.* Ronald M. Levin, *Hard Look Review, Policy Change, and* Fox Television, 65 U. MIAMI L. REV. 555, 569 (2011) ("Stare decisis in the judicial sphere is closely bound up with the aspiration (or if you prefer, the myth) of the rule of law. Agencies, however, act in a quasi-legislative capacity as acknowledged policymakers, and the issues of legitimacy that arise when they jettison a precedent are simply not the same.").

388. *Cf. Chevron*, 467 U.S. at 865 ("[A]n agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments.").

389. *See supra* note 24.

390. *Cf.* Armstrong v. U.S. Dep't of Educ. (*In re* Armstrong), Bankr. No. 10-82092, Adv. No. 10-8118, 2011 WL 6779326, at *9 n.13 (Bankr. C.D. Ill. Dec. 27, 2011) ("The dischargeability of student loans is primarily a question of policy that is for Congress to determine. The judicially created *Brunner* test is not a source of Congressional policy. The vagueness of section 523(a)(8) fosters litigation and inconsistency of results. The student loan market has changed dramatically and section 523(a)(8) is in need of updating."). Courts have taken different views on the relevance of the Great Recession in determining whether a debtor is entitled to an undue hardship discharge of student-loan debt. *Compare* Sederlund v. Educ. Credit Mgmt. Corp. (*In re* Sederlund), 440 B.R. 168, 174 (B.A.P. 8th Cir. 2010) ("The Debtor also points to the current economic recession to support her argument that her loans should be discharged. However, as the Court pointed out, there is no way of knowing how long this, or any, recession will last."), *with* Thompson v. Loan to Learn (*In re* Thompson), Bankr. No. 11-61284-7, Adv. No. 11-00062, 2012 WL 2064509, at *7 (Bankr. D. Mont. June 7, 2012) ("In addition the overwhelming fact of the Great Recession which struck this nation, and the Flathead Valley, cannot be ignored when evaluating Leslie's employment prospects or chances for more lucrative earnings.").

Natural disasters are yet another example of changed circumstances that could warrant revisiting discharge policies in bankruptcy. *Cf.* Pigg v. BAC Home Loans Servicing, LP (*In re* Pigg), 453 B.R. 728, 733–34 (Bankr. M.D. Tenn. 2011) ("Under Congress' current legislation, victims of natural disasters such as Ms. Pigg, would lose their homes and be required to continue to pay HOA fees for houses they no longer occupy, have surrendered in bankruptcy, but cannot force lenders to accept by deed in lieu of foreclosure or force foreclosure. Section 523(a)(16) will require the victims of the Joplin,

In sum, the considerations that generally tip in favor of delegating policymaking powers to administrative agencies—expertise, accountability, uniformity, accessibility, transparency, prospective clarity, and flexibility—do not similarly tip in favor of delegating policymaking in the bankruptcy arena to the courts. Rather, these considerations suggest that an administrative agency, on balance, would be better equipped as a matter of institutional design to set bankruptcy policy.

III. REDESIGNING BANKRUPTCY ADMINISTRATION TO BE UNEXCEPTIONAL

Having demonstrated why an administrative agency endowed with substantive rulemaking powers would be better suited than courts to set bankruptcy policy, our focus now shifts to discuss what such an agency might look like. In thinking about this question, we begin in Part III.A with a historical examination of prior bankruptcy reform efforts, assessing whether the historical roots of the court-centered model or various past reform efforts help to illuminate how bankruptcy could be redesigned moving forward. With this history in mind, we turn in Part III.B to thinking about how a federal bankruptcy agency might be created and charged with setting federal bankruptcy policy. Rather than trying to set forth one definitive vision of how to structure a new bankruptcy agency, Part III.B tentatively proposes two different options—one more modest and one more robust.

A. Lessons From the Past: Institutional Inertia and the Persistence of the Court-Centered Model

The historical record reveals that, from the earliest days of the Republic and with every iteration of the bankruptcy laws, Congress tasked the federal courts with administration of the bankruptcy system—in all likelihood due to the seemingly private nature of individual disputes between debtors and creditors and the manner in which such disputes translate into competing claims to payment from a debtor's estate. As Frank Kennedy has observed, "It seems to have been assumed by Congress

Missouri tornadoes, the late April 2011 tornadoes in the South, the 2011 Mississippi River flood victims, the 2010 Nashville Flood victims, and all others who have suffered loss of their home from massive disasters to be denied a true fresh start because their lenders cannot be forced to foreclose or accept a deed in lieu of foreclosure. The perfect storm of the 'Great Recession' and these unspeakable natural disasters leaves debtors such as Ms. Pigg and other victims like her to suffer unbearable losses of their homes, all their belongings, and loved ones, and be denied the fresh start promised by bankruptcy. Ms. Pigg, and other like victims, suffer a wrong without a remedy." (footnotes omitted)).

from the beginning that bankruptcy should be administered by courts."[391] Moreover, in every instance in which Congress created a bankruptcy regime prior to the Bankruptcy Code's enactment in 1978,[392] it "authorize[d] courts of bankruptcy to appoint commissioners, assignees, registers, trustees, receivers, and referees to handle the actual administration of bankruptcy cases."[393] Thus, the congressional blueprint prior to the current bankruptcy system had always been—as it remains today—a court-centered model in which non–Article III adjuncts assisted the Article III court in administering bankruptcy estates.[394]

Importantly, the Bankruptcy Act of 1898 marked a significant shift in the orientation of the bankruptcy system from a creditor collection device to a forum for effectuating substantive relief for debtors.[395] Moreover, the 1898 Act marked the start of what would become an increasingly powerful role for the non–Article III adjunct in bankruptcy matters.[396] With these changes, there ostensibly existed an opportunity for Congress to reconceptualize bankruptcy administration—specifically, by charging an administrative agency with responsibility for the system. Perhaps because of path dependencies, however, Congress chose to follow the court-centered tradition. With this institutional inertia, the bankruptcy system continued its inexorable march down the path of judicial administration, even as the modern administrative state emerged and other areas of law turned toward agency administration.[397]

What is perhaps most interesting about this focus on court-centered administration is that, during the time period spanning enactment of the 1898 Act and passage of the Bankruptcy Code in 1978, reformers were dissatisfied with the

391. Kennedy, *supra* note 195, at 3.

392. Those regimes were the Bankruptcy Acts of 1800, 1841, 1867, and 1898. Act of Apr. 4, 1800, ch. 19, 2 Stat. 19 (repealed 1803); Act of Aug. 19, 1841, ch. 9, 5 Stat. 440 (repealed 1843); Act of Mar. 2, 1867, ch. 176, 14 Stat. 517 (repealed 1878); Act of July 1, 1898, ch. 541, 30 Stat. 544 (repealed 1978).

393. Richard B. Levin, *Towards a Model of Bankruptcy Administration*, 44 S.C. L. REV. 963, 965–66 (1993) (footnotes omitted).

394. *Id.* For a detailed account of the role of Article III courts and non–Article III adjuncts under each of these Acts, see Kennedy, *supra* note 195, at 5–9.

395. *See* Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 364–65 (1991).

396. *See, e.g.*, ADMINISTRATION OF THE BANKRUPTCY ACT: REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON BANKRUPTCY ADMINISTRATION 4–6 (1941); SKEEL, *supra* note 279, at 144.

397. *See* Baird, *supra* note 198, at 12 ("At the same time that modern bankruptcy came into being with its system of referees appointed by district courts, Congress created administrative agencies like the Interstate Commerce Commission."); *see also id.* at 15 ("One can easily imagine that bankruptcy law would have a different shape if Congress had waited to put it into place . . . . Congress might have created an agency charged with administering the bankruptcy laws.").

adjuncts' manner of managing bankruptcy cases and repeatedly sought to create an agency within the bankruptcy system.[398] The reformers were not concerned with whether to locate bankruptcy policymaking in the courts or in an agency; rather, their proposals—which ultimately were quelled by bankruptcy professionals whose economic self-interest motivated them to stave off institutional redesign[399]—were motivated largely by a perceived need for independent oversight that would safeguard against abuses in the managerial and ministerial administration of bankruptcy cases.[400] In other words, structural reform efforts between 1898 and 1978 focused primarily on the management[401] and busywork in the supervision and processing of bankruptcy cases and on concerns about judicial participation in non-judicial administrative tasks.[402]

Several reports published between 1931 and 1978 embody that focus. The 1931 Donovan Report proposed the creation of a federal bankruptcy commissioner's office in the executive branch to help separate the judicial functions from the administrative functions in bankruptcy proceedings.[403] The proposal envisioned a commissioner who would help coordinate and effectively supervise bankruptcy administration, investigate and correct abuses, and study major problems in bank-

398. *See, e.g.*, SKEEL, *supra* note 279, at 77 ("[T]he findings of the Donovan investigation were dramatic and shocking and suggested a wide-ranging conspiracy to control bankruptcy administration . . . . [T]he Thacher report reached essentially the same conclusions.").

399. *See, e.g.*, *id.* at 93 ("If Congress appointed administrative overseers to investigate debtors and make formal recommendations as to whether each debtor should get a discharge, bankruptcy lawyers and judges would figure much less prominently in bankruptcy practice."); Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 MICH. L. REV. 47, 80 (1997) ("Evidence of the bankruptcy judges' practice of appointing cronies to the position of trustee supports the hypothesis that the bankruptcy judges opposed the bankruptcy agency because they feared losing their patronage power.").

400. *See* STANLEY & GIRTH, *supra* note 282, at 197 (noting that, in its summary of deficiencies regarding the bankruptcy system, one proposal for reform listed "[m]anagement by a coalition of referees, trustees, and the bankruptcy bar which is of little benefit to debtors, creditors, or the public" and "[m]anagement characterized by loose supervision, infrequent field examinations, little concern for qualifications of personnel, archaic procedures, high costs, and unwarranted delays").

401. *See, e.g.*, *id.* at 200 (noting that "problems of guidance and management" in bankruptcy cases might not need to be retained in the courts); Honorable Earl Warren, Chief Justice of the United States, Address at the Annual Dinner of the Thirty-Sixth Annual Conference of the National Association of Referees in Bankruptcy (Oct. 23, 1962), *in* 37 J. NAT'L ASS'N REF. BANKR. 3, 4 (1963) (discussing the high costs of bankruptcy administration, such as the salaries and expenses of the referees and trustees).

402. *See* H.R. REP. NO. 95-595, at 4 (1977) ("The bill removes many of the supervisory functions from the judge in the first instance, transfers most of them to the trustee and to the United States trustee, and involves the judge only when a dispute arises."), *reprinted in* 1978 U.S.C.C.A.N. 5963, 5966.

403. *See* H. COMM. ON THE JUDICIARY, 71ST CONG., ADMINISTRATION OF BANKRUPTCY ESTATES 26–33 (Comm. Print 1931) (Colonel William Donovan).

ruptcy administration.[404] The Thacher Report, published in 1932, similarly proposed the creation of ten full-time, salaried administrators under the Attorney General who would study problems of bankruptcy administration, report on the qualifications of applicants for trusteeships, and monitor the work of trustees.[405] The Report of the Attorney General's Committee on Bankruptcy Administration, which was published in 1941 during the formative era of the modern administrative state, likewise focused on relieving the judiciary of non-judicial tasks.[406]

Decades later, two other notable reform proposals—the Brookings Report of 1971 and the Report of the Commission on the Bankruptcy Laws of 1973 (the Commission Report)—similarly focused on the system's inefficiencies and the problem of having "a judicial system to try to solve problems that are by nature adminitrative."[407] Yet both the Brookings and Commission Reports proposed an even more radical restructuring of the bankruptcy system than their predecessors, suggesting that bankruptcy move from its judicial model to an administrative model.

Specifically, the Brookings Report suggested eliminating the courts from the bankruptcy system by creating an agency that would process both uncontested and contested matters, with examiners adjudicating contested matters in compliance with the Administrative Procedure Act;[408] and, "[i]n the event that contested issues were not satisfactorily resolved by examiners, appeals would go first to a central appeals board in the agency and then, if necessary, to the courts of appeals."[409]

In contrast to the Brookings Report's proposal to eliminate the courts altogether, the Commission Report proposed divorcing the courts from managerial and ministerial administration by shifting non-judicial administrative tasks to a newly created United States Bankruptcy Administration.[410] The new agency would have been empowered to, among other things, handle voluntary petitions and grant discharges when no objections were filed;[411] the bankruptcy courts would receive

404. *See id.*
405. *See* STRENGTHENING OF PROCEDURE IN THE JUDICIAL SYSTEM, S. DOC. NO. 72-65, at 93–94 (1932) (Solicitor General Thomas Thacher).
406. *See* ADMINISTRATION OF THE BANKRUPTCY ACT, *supra* note 396, at 122, 127–32 (suggesting the creation of a Division of Bankruptcy in the Administrative Office of the U.S. Courts, which would examine and audit referees, collect bankruptcy statistics, make recommendations to Congress, and investigate complaints regarding bankruptcy officials).
407. *See* REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt. 1, at 117 (1973) (quoting the Brookings Report).
408. STANLEY & GIRTH, *supra* note 282, at 215.
409. *Id.*
410. *See* H.R. DOC. NO. 93-137, pt. 1, at 103.
411. *Id.* at 51–65, 121–25.

matters where disputes arose.[412] The Commission Report's recommendations also differed from the Brookings Report's recommendations in that the Commission Report expressly contemplated giving the new agency's administrator the power "to adopt, amend, and repeal such rules and regulations not in conflict with the provisions of this Act as he finds necessary to discharge his authority, duties, and functions."[413] Given that the Commission Report focused primarily on divorcing the courts from managerial and ministerial administration, however, it is unclear whether or not the Commission Report contemplated that this rulemaking grant would vest the proposed new agency with broad substantive rulemaking powers.[414] Regardless, had the Commission Report's proposal not "died an early death" because of vigorous opposition by judges and lawyers,[415] it would have come the closest of any proposal toward creating an agency vested with the power to set uniform bankruptcy policy via regulation.

Much like bankruptcy reformers, bankruptcy scholars who have considered the optimal design of bankruptcy administration have focused on the extent of court involvement in non-judicial, administrative tasks. Also like the bankruptcy reformers of the past, these scholars have generally failed to appreciate the distinct policymaking aspect of bankruptcy administration and hence have not considered whether an agency might be well-suited for setting bankruptcy policy.[416] For exam-

412. *See, e.g.*, *id.* at 121 ("Any involuntary petition will be referred immediately to the bankruptcy court for the territory in which the administrator's office is located."); *id.* at 122 ("When the administrator disallows a claim or allows a claim over an objection made thereto, he is required to notify the claimant and the objector, who may take the matter to the bankruptcy court by complaint.").

413. H.R. DOC. NO. 93-137, pt. 2., at 55.

414. On the one hand, the Commission Report did speak of the need for a national organization capable of developing "procedures, practices, and guidelines appropriate for national uniform application." H.R. DOC. NO. 93-137, pt. 1, at 126. Yet on the other hand, the Report seemed to suggest that the rulemaking grant would simply transfer to the new agency those rulemaking powers that were at the time already vested in the Judicial Conference and the Supreme Court. *See id.* In addition, the proposed rulemaking grant would have merely given the agency's administrator the power to make rules and regulations "necessary to discharge his *authority, duties and functions*." H.R. DOC. NO. 93-137, pt. 2, at 55 (emphasis added). In contrast to a grant that could have broadly given the administrator the power to promulgate any such rules as may have been necessary to administer the Commission's model act, this proposed language may have been purposefully narrow. *See* Merrill & Watts, *supra* note 368, at 482–83 (noting that different verbal formulations in rulemaking grants could be meant to convey broader or narrower rulemaking powers, but noting that the courts have rarely "suggested that different verbal formulations signify the conveyance of different types of powers").

415. SKEEL, *supra* note 279, at 143–46; Posner, *supra* note 399, at 80, 84.

416. Jonathan Lipson is one scholar who has failed to appreciate the distinction between bankruptcy administration involving policymaking and mere ministerial administration. *See* Lipson, *supra* note 3, at 654–57. Specifically, after noting that bankruptcy is "a matter of adjudication rather than agency administration," *id.* at 654, Lipson observes that "much of the work of bankruptcy courts is administrative, or at least so different in kind from the work of Article III district court judges as to be

ple, Richard Levin has argued that "authoritative decisions about disputed forensic matters in bankruptcy cases should be made in the judicial system."[417] On the other hand, he notes that "[t]he allocation of nonforensic decision-making responsibility involves selecting an officer or institution to perform that managerial job,"[418] and he proposes that a governmental supervisory official do so.[419] In a more particularized context, Angela Littwin has explored the implications of proposals to convert Chapter 7 consumer bankruptcy into an administrative program.[420] She focuses on the actual processing of bankruptcy cases, arguing that the court-centered model offers more manageable procedural hurdles, more widespread legal representation, and higher-quality decisionmakers than do administrative programs involving welfare, social security disability, and veterans' benefits.[421]

To date, the one scholar to express concern over the judicial model has been R. Wilson Freyermuth. In briefly discussing the Brookings Report's proposal to create a bankruptcy agency,[422] he notes:

> While the Brookings Report envisioned a bankruptcy agency that would have been primarily operational and not regulatory in nature, an administrative model could have created a system in which disputes over interpretational questions were resolved in a much more streamlined manner.

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unrecognizable as adjudication." *Id.* at 654–55. Yet in listing examples of what he views as the administrative work conducted by bankruptcy courts, Lipson notes that "bankruptcy judges . . . manage the filing, and allowance or disallowance, of claims." *Id.* at 655. Hence, Lipson fails to distinguish between (1) administrative tasks and (2) the policymaking that can result from administration of a statutory scheme. Lipson is correct that the claim-filing process entails ministerial administration (although the bankruptcy court clerk, *see* 28 U.S.C. § 156(b) (2006), rather than the bankruptcy judge, manages such filings). *See* FED. R. BANKR. P. 5005(a)(1). On the other hand, the claim-allowance process is one that potentially presents an opportunity for judicial policymaking. The Code provides that a filed claim "is deemed allowed, unless a party in interest . . . objects." 11 U.S.C. § 502(a) (2006); *see also* FED. R. BANKR. P. 3007(a). If such an objection is made, the court is to determine the validity and amount of the claim, *see* 11 U.S.C. § 502(b), with the possibility that the claim will be disallowed to the extent required by certain statutory limitations, *see id.* § 502(b)(1)–(9). Residual policymaking inheres in such a determination. *See, e.g.*, Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co., 549 U.S. 443, 449 (2006) ("This case requires us to consider whether the Bankruptcy Code disallows contract-based claims for attorney's fees based solely on the fact that the fees at issue were incurred litigating issues of bankruptcy law. We conclude that it does not."). Hence, it is descriptively incorrect to categorize the claim-allowance process, with its potential to give rise to a contested matter, as an administrative task.

417. Levin, *supra* note 393, at 978.

418. *Id.*

419. *Id.* at 983. Notably, Levin would not fit decisionmaking by this official within an agency adjudicatory structure. *See id.* at 990.

420. *See* Angela Littwin, *The Affordability Paradox: How Consumer Bankruptcy's Greatest Weakness May Account for Its Surprising Success*, 52 WM. & MARY L. REV. 1933, 1980–2022 (2011).

421. *Id.*

422. *See supra* note 408 and accompanying text.

> For example, Congress might have created broad statutory standards regarding certain policy issues—*e.g.*, the "substantial abuse" screen for Chapter 7 relief, as in the old § 707(b)—and an administrative mechanism for implementing those standards through rulemaking. This model might have provided for more consistent application of the Code's standards to similarly-situated debtors throughout the system, particularly by comparison to an adversarial model that produces clarity—*when* it produces clarity—only through percolation. Further, such a system would have permitted more frequent and effective refinement of the applicable regulations over time, as warranted by empirical evaluation of the system's operation and its external effects on the behavior of commercial actors. Last, but not least, judicial review in such a model would presumably come with appropriate deference for the administrator's interpretation of the statute, a concept that implicitly discourages disappointed litigants from aggressively seeking judicial review of merely debatable questions of statutory interpretation.[423]

Freyermuth's commentary highlights the fact that Congress's decision to locate regulation of a statutory scheme in the judiciary, rather than in an agency, raises consequentialist concerns given the institutional differences between the two models. In making these cursory observations, however, Freyermuth does not attempt to make the case for relocating administration of the Bankruptcy Code in an agency. Rather, his main point seems to be that, despite other potential options, we now "have the system we have" for better or for worse.[424]

In sum, both bankruptcy reformers and scholars have fixated on how to separate judicial tasks from managerial or mere ministerial tasks in bankruptcy, and both have repeatedly failed to focus on whether the courts or an administrative agency would be better equipped to set bankruptcy policy. Nonetheless, the Brookings and Commission Reports do provide useful blueprints for a shift toward an agency model. Hence, even if the reports do not focus directly on the setting of bankruptcy policy via rulemaking, they are helpful in thinking about the ideal structure of such an agency.

423. Freyermuth, *supra* note 364, at 1077–78 (footnotes omitted).
424. *Id.* at 1078.

B. Toward the Future: Sketching Out the Contours of a Federal Bankruptcy Agency

Federal agencies come in many different shapes and sizes,[425] and a new federal bankruptcy agency designed to engage in bankruptcy policymaking could take many different forms. Accordingly, rather than trying to set forth one definitive vision, we instead sketch out two permutations (one minimalist, one robust) and encourage a conversation among scholars and reformers about what an ideal federal bankruptcy agency might look like.

1. A Minimalist Model

Perhaps the most minimalist way of enabling an agency to engage in setting substantive bankruptcy policy would be to give the EOUST broad rulemaking powers while simultaneously leaving intact the current court system for handling bankruptcy matters. This approach would also involve eliminating the BA Program currently operating in North Carolina and Alabama, thereby wiping away constitutional issues that surround the BAs[426] and the odd geographical divide that currently exists between bankruptcy administration in those two states and in the rest of the country.[427] Because this approach, at bottom, would vest the EOUST with broad rulemaking powers but leave adjudicatory powers with the courts, this approach effectively hybridizes bankruptcy administration between two entities: the EOUST and the courts.[428]

There are several reasons why a hybrid model along these lines might be desirable. First, a few scholars have recently suggested that courts may produce better adjudicatory decisions than agencies. For example, Littwin has concluded that bankruptcy's court-centered model offers more manageable procedural hurdles, more widespread legal representation, and higher-quality decisionmakers than do administrative programs involving welfare, social security disability, and veterans'

425. *See* PIERCE, *supra* note 243, at 1–2.
426. *See supra* Part II.A.2.
427. *See supra* notes 68–83 and accompanying text; *see also* GEN. GOV'T DIV., *supra* note 66, at 2–3 (recommending the elimination of the BA Program because of "advantages in oversight and funding provided by the UST program and to make bankruptcy administration consistent across the country").
428. *Cf.* Lemos, *supra* note 9, at 381 n.74 ("[T]he choice between delegations to courts and delegations to agencies [need not] be all-or-nothing; Congress can and sometimes does divide power between courts and agencies, for example by giving an agency primary interpretive authority but providing for enforcement through the courts.").

benefits.[429] In addition, James Wright and Angela Diveley's preliminary findings from their recent study of the Federal Trade Commission (FTC) suggest that the FTC does not perform as well as generalist judges in its adjudicatory function.[430] Much more study is needed on the relative merits of court-centered versus agency-centered adjudication.[431] If courts are more efficient and effective than agencies at adjudicating disputes, however, then a distinct advantage of hybridizing bankruptcy administration would be that the courts could continue to adjudicate bankruptcy matters,[432] while the EOUST could set bankruptcy policy via regulation.

Second, a hybrid approach would clearly separate the rulemaking function, which often involves policy decisions and political oversight, from the adjudicatory

429. *See* Littwin, *supra* note 420, at 1988–2022. However, many of the arguments offered by Littwin in support of her conclusions are open to question. For example, with regard to procedural hurdles, Littwin touts the court-centered model for its ability to process Chapter 7 cases quickly (that is, from filing to discharge), partially attributing this phenomenon to attorney incentives. *See id.* at 1993 & n.311. She concludes that the experience of other administrative programs suggests that the shift to an agency-centered model would not likely result in any reduction of case-processing times. *See id.* at 1993–94. Missing from Littwin's argument is any acknowledgement that it is the Federal Rules of Bankruptcy Procedure that facilitate the quick processing of Chapter 7 discharges. *See* Pardo, *supra* note 124, at 8, 9 & nn.12–14. Similar (if not faster) claim-processing rules could be implemented in an agency-centered model.

Littwin also praises the court-centered model for "respect[ing] its beneficiaries' time," specifically noting that bankruptcy courts generally do not require debtors to appear in court to receive their discharges. Littwin, *supra* note 420, at 1994. She then observes that "[t]his process stands in stark contrast to the welfare approach, in which missing one of the many required face-to-face meetings is a significant factor in the denial and termination of benefits." *Id.* Missing from Littwin's argument is any acknowledgment that a debtor must attend the meeting of creditors, *see* 11 U.S.C. § 343 (2006) ("The debtor shall appear and submit to examination under oath at the meeting of creditors under section 341(a) of this title."), and that failure to attend the meeting is one of the primary grounds for dismissal of a debtor's case, *see* Pardo, *supra* note 124, at 27 tbl.4 (reporting that, among the consumer Chapter 7 cases that were dismissed in the Western District of Washington between 2003 and 2007, 31.6 percent of such cases were dismissed on the grounds that the debtor failed to attend the meeting of creditors). This is quite significant given that "dismissal of a debtor's case will dispositively result in the failure of the debtor to obtain a discharge and thus bankruptcy's fresh start." *Id.* at 19. These are just a few of the many instances in which Littwin overstates the advantages of the court-centered model over the agency-centered model.

430. James M. Wright & Angela M. Diveley, Do Expert Agencies Outperform Generalist Judges? Some Preliminary Evidence From the Federal Trade Commission (Jan. 23, 2012) (unpublished manuscript), *available at* http://ssrn.com/abstract=1990034.

431. More study is needed in part because scholars have reached different conclusions. *Compare id.* (finding that generalist judges perform adjudicatory functions better than the FTC), *with* Michael R. Baye & Joshua D. Wright, *Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals*, 54 J.L. & ECON. 1 (2011) (concluding that antitrust cases are too complex for judges).

432. The expeditious and efficient administration of bankruptcy estates is certainly a concern underlying the Bankruptcy Code. *See* REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt. 1, at 75, 81–82 (1973).

function, which demands independence and insulation to ensure fair decisions. Hence, the split model would respond to "criticisms of the impartiality of adjudications by agencies that combine rulemaking, adjudicatory, and enforcement functions,"[433] and it might instill more confidence in the fairness of the adjudicatory process than a traditional administrative model would.[434]

Third, the EOUST could still help achieve uniform interpretations of the Bankruptcy Code while the courts carry out adjudicatory functions. If Congress clearly specified that the EOUST were to have primary interpretative authority, the EOUST would be eligible for deference from the courts for its interpretations of ambiguous Code provisions.[435] Furthermore, if an unresolved issue of statutory ambiguity arose in the courts *before* the EOUST had a chance to resolve that particular policy question, the EOUST—under established administrative law precedent—could nonetheless adopt a contrary construction of the statutory ambiguity at a later point.[436]

Despite these advantages, the minimalist model has potential downsides. Although this approach would eliminate the BA Program, it would leave the bankruptcy courts intact. Hence, it would do nothing to address the Article III issues currently implicating the bankruptcy courts after *Stern*.[437] Furthermore, because the EOUST already has an established institutional structure, the ability to design the structure of an entirely new bankruptcy agency with an eye toward reducing the likelihood of agency capture would be forfeited.[438]

In addition, hybrid models of agency administration have faced criticism in recent years.[439] For example, critics have noted that administrative law generally gives agencies wide discretion to choose whether to proceed via adjudication or rulemak-

433. Revesz, *supra* note 259, at 1115.

434. *See* George Robert Johnson, Jr., *The Split-Enforcement Model: Some Conclusions From the OSHA and MSHA Experiences*, 39 ADMIN. L. REV. 315, 344–45 (1987) (suggesting that whether or not split models do achieve better results, there may be a perception that separating the adjudicatory and rulemaking functions better protects due process notions and instills confidence in the system).

435. For a discussion of deference standards, see *supra* notes 284–287 and accompanying text.

436. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982–83 (2005) ("Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.").

437. *See supra* Part II.A.1. *But see* Deitz v. Ford (*In re* Deitz), 469 B.R. 11, 23 (B.A.P. 9th Cir. 2012) ("[W]e conclude that the holding in *Stern* is not clearly irreconcilable with the existing precedent . . . that a bankruptcy court may liquidate a debt and enter a final judgment in conjunction with finding the debt nondischargeable.").

438. *See infra* notes 450–457 (discussing how an agency's institutional design can help to minimize agency capture).

439. *See* Sidney A. Shapiro & Thomas O. McGarity, *Reorienting OSHA: Regulatory Alternatives and Legislative Reform*, 6 YALE J. ON REG. 1, 62 (1989).

ing[440] and that split-function models offend this notion "by eliminating agency discretion to choose between policy development through rulemaking and adjudication."[441] Some have also criticized the competence of an adjudicatory arm to review a regulatory arm's legal and policy decisions, asserting that the split model can allow "independent review of legal and policy questions by an Agency not competent" to address those sorts of policy questions.[442]

Despite these potential downsides, a minimalist model that would simply seek to vest the EOUST with substantive rulemaking powers has real appeal as a means of bringing greater expertise, accountability, uniformity, accessibility, transparency, prospective clarity, and flexibility to bankruptcy policymaking. Perhaps most alluring is the fact that, rather than trying to muster the political support for the creation of a new agency, this model would draw on a preexisting agency and leave the current court structure intact, thereby increasing the political viability of the model.[443] Hence, we believe that the minimalist model deserves serious consideration.

2. A Robust Model

A much more robust—and more radical—approach would be to eliminate the current bankruptcy court system and the BA and UST Programs entirely, thereby enabling the creation of a brand new federal bankruptcy agency charged with both adjudicatory and rulemaking functions. In other words, bankruptcy administration would move from the courts to a traditional regulatory model.

In terms of how this might be done, the Brookings Report from 1971 provides perhaps the most useful roadmap. The Brookings Report describes in detail how an

440. *See* SEC v. Chenery Corp., 332 U.S. 194, 202–03 (1947) (holding that it is primarily in the discretion of agencies to decide whether to proceed via rulemaking or adjudication).

441. Koch, *supra* note 10, at 114.

442. Shapiro & McGarity, *supra* note 439, at 62.

443. The serious political battles that can erupt over the creation of new agencies is nicely illustrated by the new Consumer Financial Protection Bureau (CFPB). After Congress created the agency in 2010, President Obama was unable to get the Senate to consider his nomination to head the CFPB due to Republican Senators' displeasure with the structure and powers of the agency. *See* Binyamin Appelbaum, *Former Ohio Attorney General to Head New Consumer Agency*, N.Y. TIMES, July 18, 2011, at B1. Specifically, the Republican Senators argued that the single-headed CFPB was too politically insulated; they wanted the agency to be multi-membered rather than single-headed; and they wanted Congress to exercise more control over the agency's budget. *See id.* After President Obama's nomination to head the CFPB stalled out in the Senate because of the Republicans' concerns about the agency's structure, President Obama—in a highly controversial move—ultimately resorted to a recess appointment. *See* Helene Cooper & Jennifer Steinhauer, *Bucking Senate: Obama Appoints Consumer Chief*, N.Y. TIMES, Jan. 4, 2012, at A1.

agency could be created to take over the work done by courts, trustees, and others:[444] A single director would head the agency, but the agency would be "highly decentralized, with all possible decisions made at or near the place where the bankruptcy petition is filed."[445] Given the administrative, non-judicial nature of uncontested matters, agency personnel would handle them efficiently.[446] In contrast, contested matters would be heard and adjudicated in compliance with the Administrative Procedure Act,[447] with administrative law judges making initial determinations and a central agency appeals board and the circuit courts determining appeals.[448]

Because the Brookings Report envisioned an "operating agency, not a regulatory agency,"[449] its recommendations do not speak to giving the agency substantive rulemaking powers. Nonetheless, such powers could be engrafted into the adjudicatory powers that the Brookings Report envisioned, thereby creating a robust regulatory agency with both adjudicatory and rulemaking powers in the mold of many traditional administrative agencies, such as the SEC.

Such a bold move—which would necessitate the creation of a new agency and rewriting major portions of the Bankruptcy Code—would obviously face significant political hurdles. Bankruptcy judges, private trustees, and others whose economic interests align them with the current court-centered system of bankruptcy administration would likely object. In addition, the new agency's institutional design would remain a question. For example, should it be structured as an independent agency insulated from presidential removal powers (as many financial regulatory agencies are),[450] or as an executive agency subject to direct presidential control? Should it be single-headed or multi-membered?[451] Should appeals from the agency be subject to review in any of the courts of appeals or in a single Article III forum to

444. STANLEY & GIRTH, *supra* note 282, at 199.
445. *Id.* at 201.
446. *Id.* at 200.
447. 5 U.S.C. §§ 500–596 (2006).
448. STANLEY & GIRTH, *supra* note 282, at 215.
449. *Id.* at 201.
450. *See* Bressman & Thompson, *supra* note 310, at 607 ("Financial agencies, which exercise expansive influence over the nation's financial affairs, are among the most prominent independent agencies.").
451. *See* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 37 (2010) ("It is often remarked that independent agencies are characterized not only by their statutory for-cause removal protections but also by the fact that they are typically multimember bodies."); Bressman & Thompson, *supra* note 310, at 610 (noting that independent agencies "are generally run by multi-member commissions or boards, whose members serve fixed, staggered terms, rather than a cabinet secretary or single administrator who serves at the pleasure of the President and thus will likely depart with a change of administration, if not before").

try to maximize uniformity?[452] Should the agency be subject to normal congressional appropriations processes, or should the agency be self-funded through, for example, bankruptcy filing fees?[453] Should there be restrictions on the agency's personnel in terms of initial hiring requirements designed to reduce partisan decisionmaking?[454]

Careful consideration of these and other questions would be crucial because the institutional design of agencies can be "critically important for insulation against one-sided interest group dominance," known as agency capture.[455] Of particular concern would be the influence of lawyers, who historically have been the most dominant interest group to affect the shape of our bankruptcy system.[456] In addition, it should be noted that capture is not a problem unique to agencies. To the contrary, Lynn LoPucki has noted that bankruptcy courts are susceptible to capture—including capture by lawyers.[457] Thus, it is not clear that relocating bankruptcy

452. *See* McKenna & Wiggins, *supra* note 122, at 683–84 (exploring the possibility of creating a Federal Court of Bankruptcy Appeals staffed by Article III judges to engage in centralized review and to help bring uniformity to bankruptcy). *See generally* Revesz, *supra* note 259, at 1153 (discussing the issue of review by generalist Article III courts versus specialized reviewing courts and ultimately concluding that "specialized judges are likely to exhibit structural biases, and therefore that they are likely to decrease the effectiveness of congressional delegation to administrative agencies").

453. *See* REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt. 1, at 119 (1973) (recommending that the proposed bankruptcy agency be funded through fees and charges as well as any funds Congress chooses to appropriate because "[e]ffective Congressional oversight is best assured by control over the financing of the Administration"); *cf.* Barkow, *supra* note 451, at 43–44 (noting that the structure of an agency's funding can be critical in terms of protecting against capture and discussing the relevance of an agency's funding source).

454. *See* Barkow, *supra* note 451, at 48 ("Requiring appointees to possess certain qualifications can help limit partisan decision making, and it also facilitates expert decision making because individuals are hired not with an eye toward having them become experts on the job but with the idea that they will join the agency with the relevant skill set.").

455. *Id.* at 15.

456. *See* David A. Skeel, Jr., *Bankruptcy Lawyers and the Shape of American Bankruptcy Law*, 67 FORDHAM L. REV. 497, 498 (1998) ("The bankruptcy bar not only helped to assure the permanence of American bankruptcy law; the bar also has had an enormous influence on the [1898] Act's subsequent development. Other interest groups, from lenders and other creditors to debtors and potential debtors, have always had a big stake, too. Collective action problems and related considerations, however, have limited the influence of unsecured creditors and debtors. Although banks and other lenders are not similarly constrained, their priority status and ability to adjust their interest rates in response to debtor-friendly bankruptcy laws limit the range of issues they are concerned with. As a result, no other group has had nearly so pervasive an impact on bankruptcy law as the bankruptcy bar. Bankruptcy lawyers' influence on the evolution of bankruptcy law is, in a sense, the rest of the story of bankruptcy in the United States."). For a recent example of lobbying by bankruptcy lawyers, see Editorial, *The Trouble With Bankruptcy Lawyers*, N.Y. TIMES, June 10, 2012, at SR10 ("[A]t a contentious meeting at the Justice Department last week, law firms with big bankruptcy practices made clear that they were not about to accept [new Chapter 11 fee] guidelines willingly.").

457. *See, e.g.*, LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS 243 (2005) ("The courts' incentives were to serve managers and those managers' lawyers and contract allies. When any of those interests come into conflict

administration to an agency-centered model would exacerbate the capture problems that already inhere in the court-centered model, especially if careful attention is given to questions of institutional design that can help to minimize the new bankruptcy agency's risk of capture.

In light of the many unanswered questions of institutional design, any attempt to create a robust bankruptcy agency vested with both rulemaking and adjudicatory powers would likely engender heated political debates about the virtues and vices of different agency structures. Indeed, recent controversies that have engulfed the Consumer Financial Protection Bureau (CFPB), an agency created in 2010 with the passage of the Dodd-Frank Act, have focused heavily on Republicans' unhappiness with the CFPB's structural aspects, such as the Director's tenure protections.[458]

Nonetheless, despite these very real political hurdles, the robust approach described here merits careful consideration and discussion for several reasons. First, a robust model would align bankruptcy administration within the traditional agency model, thereby furthering notions of expertise, accountability, uniformity, accessibility, transparency, prospective clarity, and flexibility in the setting of bankruptcy policy. Second, it would avoid concerns that have plagued other split-function agencies,[459] and it would leave the agency with the option of setting policy via case-by-case adjudication rather than rulemaking where appropriate.[460]

Furthermore, the creation of a robust bankruptcy agency armed with both adjudicatory and rulemaking powers might well resolve some of the *Stern*-like Article III issues that have cast a shadow over the bankruptcy courts.[461] In the traditional administrative law context, in cases like *Commodity Futures Trading Commission v. Schor*,[462] the Court has been quite liberal in allowing agency adjudicators to adjudicate even traditional state law claims when Congress intended to create inexpensive and expeditious specialized administrative forums to administer regulatory regimes.[463] Indeed, as Douglas Baird has noted, "[t]he kind of counterclaim that was

with the interests of prepetition unsecured creditors, employees, taxing authorities, regulatory authorities, pensioners, and other corporate constituencies, competition forces the courts to squeeze the latter groups. The bankruptcy court competition is not a market but a market failure.").

458. *See supra* note 443; *see also* Letter From Senator Mitch McConnell to President Barack Obama (May 2, 2011), *available at* http://www.blunt.senate.gov/public/_cache/files/b78a4ff6-58c9-48d8-a708-9e62ee360cc3/5-5-11 Letter to President Obama regarding confirmation of CFPB nominee.pdf ("No agency or institution, including Congress, can review the CFPB budget, and no mechanisms were put in place to ensure that the director is effectively managing public money.").

459. *See supra* notes 439–442 and accompanying text.

460. *See supra* note 440 and accompanying text.

461. *See supra* Part II.A.1.

462. 478 U.S. 833 (1986).

463. *See supra* notes 213–216 and accompanying text.

found suspect in *Stern* is substantively no different from tort claims that are routinely folded into administrative proceedings in which the adjudicators do not have lifetime tenure."[464] Hence, a move toward a traditional administrative model in bankruptcy—pursuant to which an agency, rather than the courts, would adjudicate in the first instance matters arising in or related to bankruptcy—might go a long way in helping to alleviate some of the Article III issues highlighted by *Stern*.[465]

By suggesting that an agency model might *help* to alleviate some of these Article III issues, we mean just that. We do not mean to imply that the Article III concerns would completely disappear. Issues would still likely be raised about whether all of the new agency's orders could be enforceable without resort to the federal courts or whether some of the new bankruptcy agency's orders, such as those involving only so-called related-to claims, would be enforceable only by order of an Article III court.[466] In sorting this out, it would be necessary to develop a better understanding of what aspects of bankruptcy adjudication could fit squarely within the "public rights" model, which allows adjudication by a non–Article III agency of public rights, as well as those "seemingly 'private' right[s] that [are] so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary."[467]

Scholars have given this issue some attention in the past, although not nearly enough. Alec P. Ostrow, for example, has argued that the discharge in bankruptcy easily fits within the public rights model.[468] Analogizing to other distributive schemes in which the government doles out benefits, he argues that the discharge can be seen from the debtor's perspective as a government benefit that entitles the debtor to the release from the burden of preexisting debt.[469] Ostrow also sees portions of the distribution of a debtor's assets to creditors as falling within the public rights scheme given that, whether an unsecured claim is entitled to be paid ahead of others out of a common pool, "is a matter determined by the federal regulatory scheme, rather than state law."[470] Nonetheless, broad consensus has not yet been

464. Baird, *supra* note 198, at 15.
465. *Cf. id.* (noting that the Article III issues involved in *Stern* likely would have taken a different course if Congress had created an agency charged with administering the bankruptcy laws instead of creating a court-centered model).
466. *See* Stern v. Marshall, 131 S. Ct. 2594, 2610–11 (2011) (discussing whether a bankruptcy court's order is enforceable without resort to an Article III court under the current scheme).
467. Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 594 (1985).
468. Alec P. Ostrow, *Constitutionality of Core Jurisdiction*, 68 AM. BANKR. L.J. 91 (1994).
469. *Id.* at 101–02.
470. *Id.* at 106.

reached on these issues,[471] and if the move to a traditional agency model were to be made, we would need to know how bankruptcy could fit within the public rights model and what kind of Article III review would be required of the agency's orders so as to avoid the Article III issues that have plagued bankruptcy courts.

CONCLUSION

Our current court-centered system of bankruptcy administration is truly exceptional in many ways. Two federal administrative agencies, which split their authority along geographic lines, operate within the bankruptcy sphere but lack the authority to set policy at the heart of the Bankruptcy Code. Moreover, Congress has delegated to the courts, rather than either administrative agency, the power to fill gaps in the Code and thus to set bankruptcy policy. Additionally, the polyphonic nature of the current court-centered model often fails to yield uniform answers, causing confusion for litigants and courts alike.

Our goal in this Article has been to question whether bankruptcy administration should continue to be exceptional. We have made the case—grounded in both constitutional and policy-driven rationales—for moving bankruptcy administration toward a more traditional agency model. We recognize that such a move would be paradigm shifting for the bankruptcy field and might well face significant political hurdles, but we believe such a move is nonetheless advisable to bring greater expertise, accountability, uniformity, accessibility, transparency, prospective clarity, and flexibility to policymaking in the bankruptcy arena.

471. *Compare* Brief for the United States, N. Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982) (Nos. 81-150 & 81-546), 1982 WL 607231, at *34 ("Just as non–Article III administrative agencies constitutionally may grant government benefits such as radio station licenses, pilot licenses, or certificates for common carriers, an administrative agency could be established to adjudicate bankruptcy petitions and grant discharges."), *with* Douglas Baird, *Bankruptcy Procedure and State-Created Rights: The Lessons of Gibbons and Marathon*, 1982 SUP. CT. REV. 25, 38–39, 44–45 (arguing that it is difficult to fit bankruptcy into the public rights model), *and* David P. Currie, *Bankruptcy Judges and the Independent Judiciary*, 16 CREIGHTON L. REV. 441 (1983).