Judging Business Judgment: The Federal Common Law of Bankruptcy Transactions in Chapter 11

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When a federal judge encounters a statutory gap too wide to fill through ordinary statutory interpretation, should she borrow state law or make her own rule? The Supreme Court instructs judges to err on the former side, weighing the preservation of otherwise-applicable state law against federal needs that might compel a common-law (i.e., judge-made) rule. But in bankruptcy, a field long motivated more by equity than the strict letter of the Bankruptcy Code, judges frequently strive to create the best rule for the case. Products of this common-lawmaking enterprise include standards as weighty as those for transactions under §§ 363-365 of the Code, which allow corporate debtors to breach their contracts or compel counterparties to perform, subordinate their creditors' priority with new debt and, increasingly, sell themselves entirely.

Lately, however, the Court has taken a path of retrenchment toward this "bankruptcy exceptionalism." Its latest installment came in the reversal of Purdue*, but it stretches back decades. These rebukes cast a shadow over bankruptcy common law. Accordingly, this Article makes a new intervention in debates around common law's bounds by applying the Court's precedents to one of bankruptcy's most vital judge-made rules: the standard for transactions under §§ 363-365. In doing so, it reveals that state—not judge-made—law should govern. The prevailing standard is therefore unsound, with sobering consequences for the many stakeholders that rely on it and, by extension, the countless judge-made rules that the Court's prior laxity has permitted throughout federal statutory schemes, from tax to securities law.*

Determining the right rule for transactions in Chapter 11 impacts every corporate bankruptcy and dictates how billions of dollars are disposed of each year. More than that, it illuminates trans-substantive tensions—between textualism and bankruptcy exceptionalism, federalism and efficiency, and

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judicial lawmaking and the separation of powers—while informing strategies to reconcile the Court's common-law antipathy with the need for flexibility in adjudication.

Introduction

Much as popular thinking may have it, bankruptcy is not the death of a company but a new phase of corporate existence. Creditors become beneficial owners. Equity is often "wiped out."[1] And the company is replaced by an estate,[2] with management either continuing to run the debtor ("in possession"[3]) or, in cases of wrongdoing, replaced by a trustee.[4]

As part of this transformation from corporation to estate (and hopefully back again), the debtor undertakes numerous transactions. New debt, known as debtor-in-possession (DIP) financing, is usually needed to fund the bankruptcy.[5] Section 364 of the Bankruptcy Code outlines the process for obtaining this liquidity—a provision that offers little hint as to how controversial the debtor's choice of lender can be. DIP financers receive superpriority over all existing creditors[6] and generally control the bankruptcy case.[7] The debtor may also need to assume or reject pre-bankruptcy contracts and unexpired leases under § 365, either ratifying them or giving its counterparty an unsecured claim for breach.[8] Even this decision can be litigious, as when the lease to be jettisoned is one of the debtor's key assets.[9] However, the most significant juncture that many corporate debtors face is whether to proceed to confirmation of a reorganization plan[10] or take the "side door" of sale under § 363(b).[11]

From humble beginnings as a tool to liquidate surplus property, § 363 has grown to cover a much broader range of activities, up to and including a sale of the whole firm. Section 363 is not the Code's only mechanism to

1. Douglas G. Baird, *Priority Matters: Absolute Priority, Relative Priority, and the Costs of Bankruptcy*, 165 U. PA. L. REV. 785, 800 (2017).
2. 11 U.S.C. § 541(a) (2024).
3. *Id.* § 1107(a).
4. *Id.* § 1104(a).
5. *See id.* § 364.
6. *Id.* § 364(c).
7. Jared A. Ellias & Elisabeth de Fontenay, *Law and Courts in an Age of Debt*, 171 U. PA. L. REV. 2025, 2041 n.85 (2023).
8. 11 U.S.C. § 365(a) (2024).
9. *E.g.*, *In re* Fountain Bay Mining Co., 46 B.R. 122, 124 (Bankr. W.D. Va. 1985).
10. 11 U.S.C. §§ 1128-1129 (2024).
11. *See id.* § 363(b).

effect an all-asset sale.[12] Nor are all-asset sales its only use case. Nevertheless, it has become so popular as to now be synonymous with the all-asset sale,[13] largely due to its ability to skirt the Code's requirement of a creditor vote on sale at plan confirmation.[14] Presently, 363 sales are the endgame for more than a third of all large corporate reorganizations.[15]

Despite their outsized impact on the course of a bankruptcy case, §§ 363-365 enjoy little statutory guidance. The Code sets parameters, particularly around 363 sales.[16] However, it provides no standards for management to follow when executing these transactions or for judges to use in evaluating them.[17] Whether the debtor is rejecting a contract under § 365, incurring new debt under § 364, or selling some or even all of its property under § 363, the Code offers only minor variations of the same talismanic language: that the transaction may be had "after notice and a hearing"[18] or "subject to the court's approval."[19]

Outside of bankruptcy, the rules for transactions are hardly so blasé. Corporations are bound by fiduciary duties, such as the familiar duties of loyalty and care. When a plaintiff (often a shareholder) accuses management of breaching these duties, courts apply a sliding scale to determine how closely to second-guess the relevant decision. The business judgment rule—a presumption of management's reasoned decision-making—insulates the duty of care from challenge, while heightened scrutiny applies to alleged disloyalty and when the company is up for sale.[20] Comparable standards do not exist under the Code. And while Congress could provide some, it has neither done so itself nor given relevant agencies, such as the U.S. Trustee's Office within the Department of Justice, the necessary

12. *See id.* § 1123(a)(5)(D).

13. Melissa B. Jacoby & Edward J. Janger, *Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy*, 123 YALE L.J. 862, 865 (2014) (defining "all-asset sales" as "363 sales").

14. *Compare* 11 U.S.C. § 363(b)(1) (2024) (requiring only "notice and a hearing" for sale), *with id.* § 1129(a)(8) (requiring a creditor vote).

15. Mark J. Roe, *Three Ages of Bankruptcy*, 7 HARV. BUS. L. REV. 187, 206-07 (2017) ("[B]y 2007, 35% of the reorganized public companies were sold via § 363 sales."); Vincent S.J. Buccola, *Unwritten Law and the Odd Ones Out*, 131 YALE L.J. 1559, 1571 (2022) (reviewing DOUGLAS G. BAIRD, THE UNWRITTEN LAW OF CORPORATE REORGANIZATIONS (2022)).

16. Christopher D. Hampson, *Bankruptcy & the Benefit Corporation*, 96 AM. BANKR. L.J. 93, 132-33 (2022).

17. Daniel B. Bogart, *Liability of Directors of Chapter 11 Debtors in Possession: "Don't Look Back—Something May Be Gaining on You*," 68 AM. BANKR. L.J. 155, 159-60, 185, 253 (1994).

18. 11 U.S.C. §§ 363(b)(1), 364(b) (2024).

19. *Id.* § 365(a).

20. Williams v. Geier, 671 A.2d 1368, 1386 (Del. 1996) (Hartnett & Horsey, JJ., dissenting) (discussing the accepted rule that a transaction which "implicates the duty of loyalty . . . must be subject to full judicial scrutiny, not to judicial deference because of the business judgment rule").

rulemaking power.[21] Still, billions of dollars are funneled through §§ 363-365 each year,[22] making the question of how a judge should evaluate bankruptcy transactions unavoidable.

Paraphrasing Hannibal crossing the Alps, the judge must either find a way or make one. In practice, the latter approach has been far more popular. Through a series of cases during the 1980s and '90s, federal courts in the Second Circuit pioneered what has come to be known as the "business justification test."[23] Neither they nor later courts have offered much explanation for where this test comes from or even what it is: a standard to judge state-law fiduciary duties, or an independent federal duty on a bankrupt firm's managers. It was first extrapolated from what little the Code has to say about 363 sales before finding support "by analogy" in the Delaware business judgment rule applicable to most transactions outside of bankruptcy.[24] Even there, it has been an uncomfortable fit. The business judgment rule grants defendant managers near-immunity for acts not tainted by self-interest. But the business justification test scrutinizes a transaction's reasonableness—and makes management prove it.[25] Given these tests' divergence, while the bankruptcy courts often conflate "business judgment" and "business justification,"[26] this Article distinguishes them throughout. And while one may theorize whether the business justification test is in fact a distinct, bankruptcy-specific substitute for ordinary fiduciary duties,[27] its "biggest difference" from state law—and the one on which this Article hones—"is . . . the standard of review" that it prescribes.[28]

Raising or lowering the standard for consummating a transaction, and inverting which side must meet it, may, intuitively, reverse outcomes compared with state law. By the same token, strict scrutiny is worlds apart from rationality review.[29] To illustrate, consider one of the most famous 363

21. Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. REV. 384, 399 (2012) (observing that the U.S. Trustee does not "enjoy[] broad rulemaking powers that would enable it to set substantive bankruptcy policy" and that, "[i]nstead, the courts hold the power to do so"); Christopher D. Hampson, *Bankruptcy Fiduciaries*, 110 IOWA L. REV. 1701, 1728-29 (2025).

22. *See infra* notes 440 522 and accompanying text.

23. *See infra* note 72 and accompanying text.

24. Off. Comm. of Subordinated Bondholders v. Integrated Res., Inc. (*In re* Integrated Res., Inc.), 147 B.R. 650, 656 (S.D.N.Y. 1992).

25. *See infra* notes 92-95 and accompanying text.

26. *See infra* notes 72, 100 and accompanying text.

27. Akin to the differing duties of care applicable to trusts and corporations. Hampson, *supra* note 21, at 1717. For an argument that bankruptcy imposes its own fiduciary duties (as opposed to different standards for reviewing the same state-law duties), see John A.E. Pottow, *Fiduciary Principles in Bankruptcy and Insolvency*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW 205, 208-15 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., 2019); and C.R. Bowles, Jr. & Nancy B. Rapoport, *Has the DIP's Attorney Become the Ultimate Creditors' Lawyer in Bankruptcy Reorganization Cases?*, 5 AM. BANKR. INST. L. REV. 47, 55-57 (1997).

28. *See* Hampson, *supra* note 21, at 1717.

29. *See* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 319 (1976) (Marshall, J., dissenting) (noting that statutes subject to strict scrutiny are almost always struck down); Ellias & de Fontenay, *supra* note 7, at 2032.

cases and the progenitor of the business justification test, *In re Lionel Corp.*[30] There, the debtor moved to sell its majority stake in an electronics company, which amounted to thirty-four percent of its assets.[31] Under Delaware law,[32] this far-less-than-all-assets sale would enjoy business judgment protection.[33] Absent evidence of self-dealing, the plaintiff would be better off saving her legal fees. Instead, applying the business justification test, the court reallocated to management "the burden of demonstrating that . . . [the] sale . . . w[ould] aid the debtor's reorganization."[34] Finding "no good business reason for . . . sale,"[35] it denied the motion—despite an auction process that had moved bids from $43 to $50 million; "the insistence of the Creditors' Committee";[36] and the fact that "every feasible reorganization plan" would require the asset's eventual sale.[37]

Now suppose that, rather than one-third of its assets, Lionel decided to sell its entire business. With "dissolution of [the] company [having become] inevitable," Delaware law would subject managerial decision-making to an even higher bar than the business justification test, demanding the "best price" for the company.[38] Bidding incentives[39] would be prohibited to the extent they hinder this goal—not merely vetted for "some articulated business justification."[40] Attempts to placate particular creditors, like the committee in *Lionel*, would be forbidden.[41] Depending on how scrupulously the court wished to follow Delaware law, the debtor may even

30. 722 F.2d 1063 (2d Cir. 1983).

31. *Id.* at 1065.

32. Lionel was a New York corporation, but, as will be seen, that is not enough to stop certain bankruptcy courts from applying Delaware law. *See infra* notes 99-102 and accompanying text.

33. *See, e.g.*, Gimbel v. Signal Cos., 316 A.2d 599, 608 (Del. Ch. 1974) (observing that, when reviewing a transaction that "does not constitute a sale of all or substantially all' of [the defendant's] assets," a court must "start from the normal proposition that [the defendant's] Board of Directors acted in good faith in approving the sale").

34. *Lionel*, 722 F.2d at 1071.

35. *Id.* at 1072.

36. *Id.* at 1065, 1072.

37. *Id.* at 1072 (Winter, J., dissenting).

38. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 184 (Del. 1985); *see* Unocal Corp. v. Mesa Petrol. Co., 493 A.2d 946, 954 (Del. 1985) (noting that an "enhanced duty" governs the board's review of "a pending takeover bid"); *see also* Zachary J. Gubler, *What's the Deal with* Revlon*?*, 96 IND. L.J. 429, 431, 454 (2021) (observing that, although Delaware courts have softened the best-price requirement, "breakup fees tend to be smaller when in *Revlon* mode than not").

39. These include "lock-up options" and "breakup fees," by which the debtor pledges a key corporate asset or a specified sum, respectively, to a preferred bidder if that bidder does not win the auction. Paul B. Lackey, Note, *An Empirical Survey and Proposed Bankruptcy Code Section Concerning the Propriety of Bidding Incentives in a Bankruptcy Sale of Assets*, 93 COLUM. L. REV. 720, 722 (1993).

40. *Lionel*, 722 F.2d at 1070; *Revlon*, 506 A.2d at 183 (imposing liability on the board where a lock-up does not "draw bidders into the battle [to] benefit shareholders" but "end[s] an active auction and foreclose[s] further bidding . . . to the shareholders' detriment").

41. *Revlon*, 506 A.2d at 184 (holding that the board breached its fiduciary duties by capitulating to creditors' demands at the expense of shareholders).

need one-half of its shareholders to sign off.[42] Meanwhile, under the business justification test, the increased materiality of the sale would have had no effect on the applicable standard. As long as Lionel offered a better explanation than in our timeline, it would be free to liquidate its assets in toto, regardless of *Revlon*, *Unocal*, or any requirements of the Delaware General Corporation Law. When replacing the diversity of state corporate law with a uniform requirement of "some . . . justification," the potential distortions are endless.[43]

Whatever the proper effect of bankruptcy on fiduciary duties and the standards by which courts judge them, these duties and standards do not cease to matter when a company goes bankrupt.[44] Yet, although bankruptcy is not supposed to "change much" without an important federal interest,[45] transactions subject to the business justification test will often come out opposite to how they would under state corporate law. Despite its uncertain doctrinal source, this standard has come to govern not only 363 sales but also transactions under §§ 364-365,[46] which serve different purposes but are framed with the same empty language in the Code. The

42. DEL. CODE ANN. tit. 8, § 271(a) (2024). Of course, such a requirement would be anachronistic, given that equity is often "out of the money" in bankruptcy. *See* Baird, *supra* note 1; Vincent S.J. Buccola, *Bankruptcy's Cathedral: Property Rules, Liability Rules, and Distress*, 114 NW. U. L. REV. 705, 740 (2019) (expressing concern that shareholders, if entitled to vote on bankruptcy transactions, "may rationally withhold their approval, scotching a commercially reasonable transaction, in the hope either of a longshot recovery or extracting a concession from creditors"); *see also infra* notes 443-445 and accompanying text.

43. For example, benefit corporations are chartered with "a statutory mandate to consider public benefit alongside the interests of shareholders." Hampson, *supra* note 16, at 95. If such a corporation goes bankrupt and pursues an all-asset sale, does its state-law dual mandate survive the business justification test? *Id.* at 98-100; Hampson, *supra* note 21, at 7-8 (arguing that the debtor is not obligated to maximize estate value and must instead satisfy state-law fiduciary duties). On the other end of the spectrum, several Texas courts (federal and state) have suggested that managers have no duty to avoid even gross negligence: a position that appears to have been codified in recent amendments to Texas corporate law. David Bell, Dean Kristy & Ran Ben-Tzur, *Texas Corporate Law Challenges Delaware's Dominance*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 21, 2025), https://corpgov.law.harvard.edu/2025/05/21/texas-corporate-law-changes-challenge-delawares-dominance [https://perma.cc/W5PG-4D8C]; Floyd v. Hefner, No. CIV.A. H-03-5693, 2006 WL 2844245, at *28 (S.D. Tex. Sep. 29, 2006); Roels v. Valkenaar, No. 03-19-00502-CV, 2020 WL 4930041, at *9 (Tex. App. Aug. 20, 2020); Chapman v. Arfeen, No. 09-16-00272-CV, 2018 WL 4139001, at *15 (Tex. App. Aug. 30, 2018). Delaware likewise grants LLCs broad latitude to waive fiduciary duties. Benet J. O'Reilly & Lina Dayem, *New Ruling Highlights Unintended Consequences of Excluding Officers from Fiduciary Duty Waivers*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 29, 2023), https://corpgov.law.harvard.edu/2023/08/29/new-ruling-highlights-unintended-consequences-of-excluding-officers-from-fiduciary-duty-waivers [https://perma.cc/Y6RW-WK3L]. In these cases, applying state law in bankruptcy could potentially allow transactions to proceed without *any* "articulated business justification." However, in practice, state law that fails to equip a bankruptcy judge to sufficiently vet the transaction may prompt federalization of the applicable standard. *See infra* Section II.C.1.a.

44. Indeed, some of the states most relevant to the national corporate-law ecosystem, including Delaware and New York, have held that a company's creditors are owed these duties either directly or derivatively once it becomes insolvent. *See infra* notes 226-232 and accompanying text.

45. *See* Rodriguez v. FDIC, 589 U.S. 132, 137 (2020) (noting that a corporate-tax dispute remains governed by state law even if occurring during a federal bankruptcy case).

46. Bogart, *supra* note 17, at 196, 222-23.

business justification test has proven sticky in its native circuit and persuasive to judges elsewhere. *In re Integrated Resources, Inc.*[47]—the case that brought Delaware's business judgment rule to New York federal court[48]—was cited in forty percent of all 363 motions during the first six months of 2025.[49] Moreover, *Integrated Resources* is no New York quirk: its rule has spread to all eleven geographical circuits.[50] The question therefore remains: is this deviation from state law doctrinally justified?

While ultimately endorsing judicial innovation as a policy matter,[51] this Article suggests not. The business justification test does not arise from the *Erie* doctrine, since it inverts the state law that it purports to adopt. It strays too far from the Code to constitute statutory interpretation. And it cannot count on the equitable powers of the bankruptcy courts which, assuming they survived the Code's enactment, are insufficient to preempt state-law duties.

Instead, the business justification test must be justified, if at all, under the rules for federal common law. Broadly speaking, federal common law refers to rules of decision provided by neither a federal statutory or constitutional source nor state law—in other words, judge-made law.[52] Common-law doctrines are less the exception than the rule in bankruptcy. From the judge's pen have surged devices for substantive consolidation,[53] paying the most important vendors first[54] and, as the business justification test illustrates, setting salutary parameters around bankruptcy transactions. Moreover, bankruptcy is not unique in its affinity for common law. Judge-made rules have appeared all over federal practice, from tax to securities law.[55] Prior to its textualist turn, the Supreme Court even partook—and has yet to undo much of its old handiwork.

Yet, while bankruptcy courts (and occasionally, the Court itself) have taken liberties with federal common law, the Court has simultaneously endorsed a stricter stance. It has cabined common lawmaking to situations

47. 147 B.R. 650 (S.D.N.Y. 1992).

48. *See infra* notes 82-91 and accompanying text.

49. I obtained this figure from Octus (formerly Reorg), a credit-research database containing docket information for all Chapter 11 cases since 2012 in which the debtor's liabilities exceed $10 million. *First Day Intelligence*, OCTUS, https://octus.com/products/first-day-intelligence [https://perma.cc/G548-ZXMB].

50. *See infra* note 127 and accompanying text.

51. And suggesting strategies to harmonize this policy goal with doctrine. *See infra* Section III.B.

52. *See infra* notes 143-144 and accompanying text.

53. Substantive consolidation is a remedy for debtor misconduct that "treats separate legal entities as if they were merged into a single survivor left with all the cumulative assets and liabilities." *In re* Owens Corning, 419 F.3d 195, 205, 211 (3d Cir. 2005) (quoting Genesis Health Ventures, Inc. v. Stapleton (*In re* Genesis Health Ventures, Inc.), 402 F. 3d 416, 423 (3d Cir. 2005)); *see infra* note 151 and accompanying text.

54. Adam J. Levitin, *Toward a Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime*, 80 AM. BANKR. L.J. 1, 46 (2006) (citing *In re* Kmart Corp., 359 F.3d 866, 869 (7th Cir. 2004)).

55. *See infra* notes 458-472 and accompanying text.

where Congress authorizes it or federal interests so require.[56] Even when either prong yields an affirmative answer, courts are directed to adopt state law absent a need for national uniformity or risk of disrupting a federal program.[57] These considerations are balanced against the threat of upsetting state-law commercial expectations, placing a further check on the federal courts' lawmaking authority.[58] And while, in the past, these rules were of uncertain purchase in bankruptcy, the Court has applied its structural constitutional precedents to the field with increased fervor—including in the common-law domain.

None of the cases that developed the business justification standard, or the other judge-made doctrines above, hews to the Court's common-lawmaking tests.[59] Nor are they alone in that respect. While this Article is not the first to suggest that state law supplies the fiduciary duties and standards applicable to bankruptcy transactions,[60] prior authors and the bankruptcy courts themselves have largely overlooked that absorbing or replacing state law in this context is a question of common law dictated by the Court's precedents. That is cause for concern, because bankruptcy's "off-label innovations"[61] are as indispensable as they are doctrinally divorced from the Court's common-lawmaking cases. The status quo of corporate bankruptcy—how debtors contract, obtain funding, liquidate assets, and occasionally sell themselves—depends on whether the business justification test can be justified under the Court's case law. So, too, do the many common-law doctrines of bankruptcy and elsewhere that stray from this schema.

Through the lens of perhaps the most vivid application of §§ 363-365, the all-asset sale, this Article scrutinizes bankruptcy transactions under the Supreme Court doctrine missing from the cases that developed the business justification test. This involves assessing the fitness of state law for federal needs to determine whether they require it to be replaced with a judge-made rule. Setting aside the debate over *which* state law to compare against the prevailing common-law test—corporate law or the more

56. *See infra* notes 238-244 and accompanying text.

57. *Compare* United States v. Kimbell Foods, Inc., 440 U.S. 715, 728 (1979) ("[W]hen there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision."), *with id.* ("[But if] application of state law would frustrate specific objectives of the federal programs. . . ., we must fashion special rules solicitous of those federal interests."). Rodriguez v. FDIC, 589 U.S. 132, 136 (2020) ("In the absence of congressional authorization, common lawmaking must be 'necessary to protect uniquely federal interests.'" (quoting Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981))). *See infra* Section I.C..

58. *Kimbell Foods*, 440 U.S. at 728-29 ("Finally, our choice-of-law inquiry must consider the extent to which application of a federal rule would disrupt commercial relationships predicated on state law.").

59. *See infra* notes 75-77, 82-91, 453 and accompanying text.

60. Hampson, *supra* note 21, at 30; Hampson, *supra* note 16, at 100, 135-36; Robert W. Miller, *A Comprehensive Framework for Conflict Preemption in Federal Insolvency Proceedings*, 123 W. VA. L. REV. 423, 426-27 (2020).

61. Jonathan C. Lipson & Pamela Foohey, *The End(s) of Bankruptcy Exceptionalism:* Purdue Pharma *and the Problem of Social Debt*, 46 CARDOZO L. REV. 861, 867 (2025).

demanding law of trusts[62]—this Article follows the approach taken by bankruptcy courts since *Integrated Resources* and uses the former.

Under the Court's precedents, the common-law 363 standard may be justified. Congressional authorization is doubtful, since § 363 contains no express grant of common-lawmaking authority and several implied theories seem foreclosed by recent case law. Still, a common-law standard could be compelled by a federal interest in bankruptcy procedure (following *Erie*'s allocation of procedure to federal law and substance to the states) or achieving the goals of Chapter 11 (creditor compensation and debtor rehabilitation). To the extent that no interest exists—an outcome that may better reflect the modern Court's restricted view of federal power—state law fills any gaps in the Code, and the business justification test stumbles straight from the gates.

Even assuming a federal interest, the presumption in favor of absorbing state law as the 363 standard seems unrebutted. Uniformity is unnecessary and, for similar reasons, state standards may not frustrate federal objectives. The laws of most states on asset sales—although drafted to protect shareholders in good financial times, rather than creditors in bad ones—appear adequate to police the agency problems that bankruptcy invites. Applying different state standards, in lieu of a uniform federal rule, is apt to be burdensome, but no more so than prior scenarios in which the Court held this factor unmet.[63] The risk of forum shopping between federal and state courts is attenuated by the exclusively federal nature of the bankruptcy forum. Finally, state-law reliance interests are scarcely implicated by this question of federal procedure and, if anything, affirm the 363 standard's state-law source.

The revelation that state law governs 363 sales, and that courts nationwide have erred in applying a judge-made rule, is fraught with implications for theory and practice. If this reasoning is wrong, and judges are free to create their own 363 standards, the prevailing approach may still fail to give due scrutiny to bankruptcy transactions, insofar as it subjects material and immaterial ones alike to the same level of process. Yet, the likelier result—which calls into question the well-trodden path of the 363 sale and an even broader array of federal common law that ignores the Court's precedents—is more worrisome for bankruptcy practice.

However far from an ideal rule for 363 sales the status quo falls, the hybrid, federal-state approach contemplated by the Court's common-lawmaking cases falls further, requiring an analysis the length of this Article's Part II for each new rule. Delay is antithetical to the fast-paced nature of

62. *See infra* note 230 and accompanying text. For reasons discussed below—namely, the sufficiency of corporate law to vet 363 sales and resulting lack of need for a federal rule—the stricter standards of trust law would likely yield the same result under the Court's common-lawmaking tests. *See infra* note 334.

63. *See infra* Section II.C.1.b.

corporate bankruptcy, which relies on judicial dynamism to supply legal solutions to unforeseen problems. Imposed onto bankruptcy, the excessive deliberation of the Court's model would contravene the needs of litigants and the judicial economy. Nevertheless, the prevailing standard's reversal is likely, given the federalist and separation-of-powers interests implicated by bankruptcy courts' seizure of legislative power and ouster of state law—as well as the rising frequency with which litigants are challenging bankruptcy common law, including in petitions for certiorari.[64] Although practicality counsels against upending the existing system, such arguments find "the wrong audience" in the Court.[65]

Given the breadth of bankruptcy's reliance on common law, the risk of its use becoming subject to analytical roadblocks may demand congressional action—including broad authorization of common lawmaking, perhaps even before the Court moves to take it away. But given the Court's skepticism of vesting judicial power outside of Article III, expanding the authority of the bankruptcy bench—without addressing concerns over its constitutional fitness to wield this new authority—could invite the next *Stern v. Marshall*.[66] Restructuring the bankruptcy courts into administrative agencies, as prior work has proposed,[67] might grant them an alternative pathway to creating original rules of decision and a firmer footing in Article II than their current uncomfortable position between Articles. Yet, the Court's recent retrenchment of agency deference[68] could cause even this transformative effort to come up short of bankruptcy's need for flexibility. Albeit a greater departure from the status quo, and perhaps prohibitively so, the risk of incessant judicial incursions on bankruptcy common law and the constitutional foundation of the bankruptcy courts may demand—as the House of Representatives envisioned at the dawn of the Code[69]—their elevation to Article III status.

This Article proceeds in three parts. Part I describes the development of the prevailing standard for bankruptcy transactions, ties this standard to federal common law, and contends that the Court's case law on judge-made rules controls bankruptcy no less than other areas of federal practice. Part II uses the example of an all-asset sale under § 363 to illustrate how the Court would likely apply its precedents to a future case involving the business justification test. Within each element of the Court's framework, it weighs the arguments for state and federal law before determining that

64. *See infra* notes 406, 412 and accompanying text.

65. Harrington v. Purdue Pharma L.P., 603 U.S. 204, 226 (2024).

66. 564 U.S. 462 (2011).

67. *See infra* note 555 and accompanying text.

68. *E.g.*, Loper Bright Enters. v. Raimondo, 603 U.S. 369, 392 (2024) ("[A]gency interpretations of statutes . . . are *not* entitled to deference[; thus,] . . . . [u]nder the APA, it . . . 'remains the responsibility of the court to decide whether the law means what the agency says.'" (quoting Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 109 (2015) (Scalia, J., concurring))).

69. *See infra* notes 568-569 and accompanying text.

the proper standard is either state law or federal common law that absorbs the state-law rule of decision. Recognizing that the business justification test deviates from this result, Part III assesses the likelihood of reversal and its ramifications for bankruptcy and other common-law practice areas. To ward off the disruption of these fields, this Part also gestures at amendments to the Code, which would enable greater common lawmaking in bankruptcy and rebut the Court's other objections to the structure and powers of the bankruptcy courts, while offering considerations for future work. A brief conclusion follows.

I. Bankruptcy Transactions and the Supreme Court's Overlooked Common-Law Precedents

When a federal court confronts a statutory gap, such as the standard for reviewing transactions under §§ 363-365 of the Bankruptcy Code, how should it proceed? This Part traces the path that the courts *have* taken: a Delaware-derived test that fluctuates in practice between the "true" business judgment rule and demanding that the debtor explain itself at the outset. It first critiques the rationale for absorbing state corporate law that went unexplained in *Integrated Resources* and later cases. Finding that this standard stems from federal common law, and ruling out alternative explanations, it then summarizes the Supreme Court's precedents on judicial lawmaking and shows why they govern bankruptcy—despite the Court having never applied them to this context in full. These conclusions set the stage for Part II, which applies this case law to § 363 to determine the proper test for bankruptcy transactions.

A. The Business Justification Test Adopts and Distorts State Law Without Explaining Itself

Despite frequent nods to their roots in equity,[70] bankruptcy courts are limited in fashioning original rules beyond the Bankruptcy Code.[71] The Code's scant restrictions on bankruptcy transactions thus present a problem. Faced with a Hobson's choice between giving debtors free rein or exceeding their statutory limits by inventing new rules, courts reviewing these transactions have almost uniformly turned to the business justification test.[72] This test, which allows a transaction to proceed where the debtor

70. Levitin, *supra* note 54, at 1 & n.1 (collecting cases). One bankruptcy judge asserts that, in her courtroom, "the frequency of reference to the bankruptcy court as a court of equity is second only to introductions." Marcia S. Krieger, *"The Bankruptcy Court Is a Court of Equity": What Does that Mean?*, 50 S.C. L. REV. 275, 275 n.1 (1999).

71. Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206 (1988).

72. *See, e.g.*, *In re* Gen. Motors Corp., 407 B.R. 463, 488 (Bankr. S.D.N.Y. 2009), *aff'd sub nom.*, *In re* Motors Liquidation Co., 428 B.R. 43 (S.D.N.Y. 2010) (calling the business justification test "[the] standard[] [upon which] all of the cases considering pre-confirmation section 363 sales

produces "some articulated business justification,"[73] first appeared in the Second Circuit's "seminal" *Lionel* opinion.[74]

Lionel avoided gap-filling entirely by treating the question of standard as one of statutory interpretation. To that end, it seized on § 363's notice-and-hearing provisions.[75] These would be rendered formalities if, at the hearing on sale, the debtor were free to keep quiet.[76] *Lionel* therefore held that § 363 demands *some* business justification for the proposed transaction.[77]

As often said of New York, making it there means one will make it anywhere,[78] and the business justification test was no exception. *Lionel* spread nationwide—and beyond its original context. Its standard came to encompass not just 363 sales, but also the bidding incentives that accompany them,[79] the incurrence of postpetition debt,[80] and the assumption or rejection of prepetition contracts.[81] As *Lionel* strayed from asset sales, so, too, did the explanations given for its rule. Eventually, the business justification test became unmoored from the Second Circuit's rationale.

Less than a decade after *Lionel*, the U.S. District Court for the Southern District of New York published its opinion in *Integrated Resources*.[82] That case was an appeal from the bankruptcy court's approval of a breakup-fee agreement[83] between the debtor and its proposed acquiror.[84]

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have been based"); *In re* Castre, Inc., 312 B.R. 426, 428 (Bankr. D. Colo. 2004) ("The 2nd Circuit's [*Lionel*] decision . . . established the most cited authority that the proper standard for the Court's use in considering a proposed motion to sell is the 'business judgment' test."); Todd L. Friedman, Note, *The Unjustified Business Justification Rule: A Reexamination of the* Lionel *Canon in Light of the Bankruptcies of Lehman, Chrysler, and General Motors*, 11 U.C. DAVIS BUS. L.J. 181, 184 (2010); Kimon Korres, Note, *Bankrupting Bankruptcy: Circumventing Chapter 11 Protections Through Manipulation of the Business Justification Standard in § 363 Asset Sales, and a Refined Standard to Safeguard Against Abuse*, 63 FLA. L. REV. 959, 970 (2011).

73. Comm. of Equity Sec. Holders v. Lionel Corp. (*In re* Lionel Corp.), 722 F.2d 1063, 1070 (2d Cir. 1983).

74. Friedman, *supra* note 72.

75. 11 U.S.C. § 363(b)(1) (2024).

76. *See Lionel*, 722 F.2d at 1069 ("[T]he statute requires notice and a hearing, and these procedural safeguards would be meaningless absent a further requirement that reasons be given for whatever determination is made . . . .").

77. *Id.* at 1070.

78. FRANK SINATRA, *Theme from New York, New York*, *on* Trilogy: Past Present Future, at 02:55-03:02 (Reprise Records 1980).

79. *E.g.*, *In re* Castre, Inc., 312 B.R. 426, 428 (Bankr. D. Colo. 2004); Off. Comm. of Unsecured Creditors v. Bouchard Transp. Co. (*In re* Bouchard Transp. Co.), 639 B.R. 697, 719 (S.D. Tex. 2022); *In re* Metaldyne Corp., 409 B.R. 661, 667 (Bankr. S.D.N.Y. 2009); *In re* APP Plus, Inc., 223 B.R. 870, 874 (Bankr. E.D.N.Y. 1998).

80. *See supra* note 46 and accompanying text.

81. *In re* Stiletto Mfg., Inc., 588 B.R. 762, 768 (Bankr. E.D.N.C. 2018); *In re* Del Grosso, 115 B.R. 136, 138 (Bankr. N.D. Ill. 1990); *In re* Bos. Generating, LLC, 440 B.R. 302, 306 (Bankr. S.D.N.Y. 2010); *In re* Eastman Kodak Co., No. 12-10202, 2012 WL 2255719, at *2 (Bankr. S.D.N.Y. June 15, 2012); *In re* Filene's Basement, LLC, No. 11-13511, 2014 WL 1713416, at *12 (Bankr. D. Del. Apr. 29, 2014).

82. 147 B.R. 650 (S.D.N.Y. 1992).

83. Lackey, *supra* note 39.

84. *Integrated Res.*, 147 B.R. at 653.

As in *Lionel*, the court's task was to decide how to evaluate the transaction with minimal instruction from § 363. Reminiscent of the Second Circuit's analysis, *Integrated Resources* held that "the business judgment of the Debtor is the standard applied under the law in this district."[85] However, the source of this standard was not *Lionel* but the "Delaware business judgment rule" of corporate law.[86] Invoking the famed Delaware cases *Smith v. Van Gorkom*[87] and *Aronson v. Lewis*,[88] the court explained that the debtor's managers were entitled to a presumption of good business judgment.[89] Nevertheless, while "[b]reak-up fee arrangements outside bankruptcy are presumptively valid," greater scrutiny is needed within bankruptcy.[90] To that end, the court articulated several factors before upholding the fee as reasonable compensation for the acquiror's service as stalking horse.[91]

In arriving at its standard, *Integrated Resources* did several curious things. First, while purporting to incorporate Delaware law, it articulated a test unknown to Delaware and apparently of the court's own making. The business judgment rule allocates to plaintiffs the burden of "rebut[ting] the presumption that [the] business judgment [of the defendant's officers or directors] was an informed one."[92] "[W]ith respect to [the] substance" of managerial decisions, this "'presumption' is nearly irrebuttable."[93] By contrast, *Integrated Resources* made the *defendant debtor* rationalize its actions in the first place, subjecting its explanations to an "intermediate level of scrutiny"[94] that some have called "business-judgment-plus."[95] This test is substantively identical to *Lionel*, leading courts and commentators to cite them interchangeably.[96] Yet, while *Lionel* sourced its test from the Code (albeit debatably[97]), *Integrated Resources* relied on no recognizable doctrine. Despite canvassing Delaware law, the

85. *Id.* at 656 (quoting *In re* Integrated Res., Inc., 135 B.R. 746, 753 (Bankr. S.D.N.Y. 1992)).

86. *Id.*

87. 488 A.2d 858 (Del. 1985).

88. 473 A.2d 805 (Del. 1984).

89. *Integrated Res.*, 147 B.R. at 656 (quoting *Smith*, 488 A.2d at 872); *see also infra* notes 92-93 and accompanying text.

90. *Id.* at 657.

91. *Id.* at 661-62. A stalking horse is an initial public bidder that sets a floor price for an asset or company, inducing others to make competing bids. Lackey, *supra* note 39, at 739 n.160.

92. Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985); *see also* Bogart, *supra* note 17, at 196-97 (describing the application of the business judgment rule in bankruptcy).

93. Julian Velasco, *Structural Bias and the Need for Substantive Review*, 82 WASH. U. L.Q. 821, 830 (2004).

94. Lackey, *supra* note 39, at 722.

95. Hampson, *supra* note 21, at 23; Bogart, *supra* note 17, at 223-24 (observing that "[a] state court applying the business judgment rule would . . . have [asked] . . . only . . . whether the directors of [a] corporation were 'rational' when making the decision" but that one applying the business justification test would "evaluate whether the decision in question was in fact reasonable under the circumstances").

96. *See supra* note 72 and accompanying text; *infra* notes 407-408 and accompanying text.

97. *See infra* Section I.B.2.b.iii.

court devoted a single line to explaining the choice-of-law rules that justified it doing so: "[] Delaware business judgment rule principles have 'vitality by analogy' in Chapter 11, especially where, as here, the debtor . . . is a Delaware Corporation."[98]

The passage of time has not clarified *Integrated Resources*'s reasoning. On the contrary, later courts have extended it to cases having nothing to do with Delaware. In a recent published opinion, the U.S. Bankruptcy Court for the Eastern District of Wisconsin analyzed the all-asset sales of two corporate debtors.[99] The court opened by observing that the business judgment rule applies to such transactions, a premise for which it cited *Integrated Resources*.[100] As if to emphasize the state-law source of this standard, the court noted that, "at least under Delaware law," management's decision-making is presumed reasonable.[101] As to why Delaware law should control, it did not say. Both debtors were incorporated in Wisconsin.[102]

Second, the level of scrutiny that the business justification test entails is a reverse Goldilocks situation: too soft for some contexts but too hard for others. Certain extraordinary transactions—such as the sale of a debtor's business, the rejection of the lease that represents its primary asset,[103] or the incurrence of DIP financing at the expense of prepetition lenders—might warrant more than middle-of-the-road review. Writing soon after *Integrated Resources*, professor and future bankruptcy judge Bruce Markell warned that "blindly . . . adopt[ing] corporate rules" into bankruptcy, as that court had done, could lead judges to underscrutinize transactions.[104] After a company files, "the amount and quality of information" that it reports often plummets, along with the value of claims held by shareholders and unsecured creditors.[105] At the same time, "[monitoring] costs . . . remain[] constant or even increase[]."[106] The company's erstwhile owners now view its affairs through a murkier window and have less incentive to do so at all, demanding greater judicial review than under ordinary

98. Off. Comm. of Subordinated Bondholders v. Integrated Res., Inc. (*In re* Integrated Res., Inc.), 147 B.R. 650, 656 (S.D.N.Y. 1992) (quoting *In re* 995 Fifth Ave. Assocs., L.P., 96 B.R. 24, 28 (Bankr. S.D.N.Y. 1989)).

99. *In re* H2D Motorcycle Ventures, LLC, 617 B.R. 625, 628-29 (Bankr. E.D. Wis. 2020).

100. *Id.* at 629 (citing *Integrated Res.*, 147 B.R. at 656).

101. *Id.*

102. TONY EVERS & MARK V. AFABLE, BUSINESS OF 2018: WISCONSIN INSURANCE REPORT 189, 191 (2019).

103. *In re* Fountain Bay Mining Co., 46 B.R. 122, 124 (Bankr. W.D. Va. 1985) ("Here, the Debtor's tentative arrangements to transfer its most valuable asset, the coal leases, requires compliance with . . . . 11 U.S.C. § 363(b)(1).").

104. Bruce A. Markell, *The Case Against Breakup Fees in Bankruptcy*, 66 AM. BANKR. L.J. 349, 376 (1992).

105. Erica M. Ryland, Note, *Bracing for the "Failure Boom": Should a* Revlon *Auction Duty Arise in Chapter 11?*, 90 COLUM. L. REV. 2255, 2260 (1990); *see* Hampson, *supra* note 16, at 128 ("[T]he residual ownership interest of the shareholders approaches zero . . . .").

106. Ryland, *supra* note 105, at 2261.

corporate law to compensate for the heightened risk of managerial perquisites.[107]

Prior authors have proposed more searching standards attuned to the economic realities and potential conflicts of high-value bankruptcy transactions. Several have argued that a *Revlon*-like duty to auction should apply to all-asset sales, under which bidding incentives would not merely be granted on "some articulated business justification" but prohibited unless "directly related to the potential buyer's actual cost in preparing the initial bid or to an increase in the amount of money the creditors will receive."[108] Others would subject the debtor's actions to the "considerably stricter" standard of a trustee,[109] replacing the business justification test with objective duties to preserve the estate, treat creditors impartially, and exhibit the "punctilio of an honor the most sensitive" in serving them.[110] Instead, under the prevailing test, courts would second-guess the debtor's decision to liquidate its assets or rip up key leases no more than if it were rejecting a single supplier's contract.[111] The risk, then, is that "some articulated business justification" might not prevent wasteful transactions.[112] Indeed, a frequent criticism of the 363 sale, as it has developed under the business justification standard, is its potential for value destruction.[113]

On the other hand, the expense and disruption of litigation, which motivate Delaware's business judgment rule,[114] might sometimes endorse a *less* demanding standard. Many transactions are unremarkable: for

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107. Bogart, *supra* note 17, at 228-29.

108. Lackey, *supra* note 39, at 721; Ryland, *supra* note 105, at 2255-56; *see also* Bogart, *supra* note 17, at 265-66 (recounting how, before both the bankruptcy and district courts, the subordinated creditors' committee in *Integrated Resources* argued for subjecting the debtor to *Revlon* duties); Jared A. Ellias & Robert J. Stark, *Bankruptcy Hardball*, 108 CALIF. L. REV. 745, 785 (2020) (asserting that "management would be restrained if they knew they would be forced to justify their conduct under a judicia[l] inquiry with more bite," without directly citing *Revlon*).

109. Bogart, *supra* note 17, at 159.

110. *Id.* at 236-41 (quoting Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928)).

111. *See supra* notes 30-34 and accompanying text. While judges might in practice raise or lower their scrutiny depending on the transaction's importance, the resulting lack of clarity as to what the standard means invites its own problems. *See* Korres, *supra* note 72, at 971-72 (describing the "haphazard" manner in which judges scrutinize 363 sales).

112. Buccola, *supra* note 42, at 738 n.128 (asserting that "[t]he current practice," which "authorize[s asset] sales almost as a matter of course when bidding procedures are adequate[,] . . . . is too lax").

113. *E.g.*, Anne M. Anderson & Yung-Yu Ma, *Acquisitions in Bankruptcy: 363 Sales Versus Plan Sales and the Existence of Fire Sales*, 22 AM. BANKR. INST. L. REV. 1, 3 (2014) ("Compared with plan sales, section 363 sales are . . . associated with significantly lower sales prices . . . ."); Ellias & Stark, *supra* note 108, at 786 ("Bankruptcy judges should . . . be wary of procedural mechanisms like sale motions . . . that strip unsecured creditors of due process rights."); Jacob A. Kling, *Rethinking 363 Sales*, 17 STAN. J.L. BUS. & FIN. 258, 265-67 (2012).

114. *See* Gagliardi v. Trifoods Int'l, Inc., 683 A.2d 1049, 1051 (Del. Ch. 1996) ("In the absence of facts casting a legitimate shadow over the exercise of business judgment . . . , a court . . . ought not to subject a corporation to the risk, expense and delay of derivative litigation . . . ."); Michael R. Siebecker, *Political Insider Trading*, 85 FORDHAM L. REV. 2717, 2746 (2017) ("[T]he very purpose of the business judgment rule is to afford adequate leeway to managers to take risks and direct corporate affairs without undue distraction.").

example, rejecting an agreement for brokerage services,[115] trademark assignment,[116] or leasing computers.[117] However, under *Lionel* and *Integrated Resources*, each of these decisions demands the same showing as an all-asset sale—compelling the debtor's managers and advisors into court to "demonstrate a sound business justification for the proposed transaction."[118] To balance shareholder rights against the distraction that vindicating them may generate, the ordinary business judgment rule lets suits proceed only where a plaintiff rebuts the presumption that the challenged transaction was reasonable. One can envision a standard for bankruptcy transactions that similarly assigns the burden to the challenger—at least for ancillary matters like these—or makes the robustness of the debtor's showing depend on the materiality of the transaction.[119] Yet, the business justification test is a one-size-fits-all approach, wherein the only variance from case to case stems from judicial confusion over what the standard means.[120]

This leads to a third problem with *Integrated Resources*: its mid-tier scrutiny and unstated reasoning have yielded a capricious standard that demands as much or as little from the debtor as the judge decides.[121] Some courts, evidently persuaded by *Integrated Resources*'s "analogy" to Delaware law, review bankruptcy transactions under the true business judgment rule—absolving the debtor of any need to produce an "articulated business justification" and reallocating that burden to the challenger. For example, in the context of contract rejection, the influential U.S.

115. *In re* Providence Television Ltd. P'ship, 113 B.R. 446, 448, 451-52 (Bankr. N.D. Ill. 1990).

116. *In re* Exide Techs., 340 B.R. 222, 227-28 (Bankr. D. Del. 2006).

117. Comput. Sales Int'l, Inc. v. Fed. Mogul Glob., Inc. (*In re* Fed. Mogul Glob., Inc.), 293 B.R. 124, 125-26 (D. Del. 2003).

118. *Id.* at 126.

119. Corporate bankruptcy has arguably come close to such a materiality threshold through the mandatory appointment of an unsecured creditors' committee (UCC) in cases where unsecured-creditor recovery is expected. *See* 11 U.S.C. § 1102(a)(1) (2024). The UCC may be unwilling to "go to war" over minor issues in which its constituents have little interest, such as low-dollar 363 sales, instead focusing its attention (and by extension, the court's) on big-ticket items. Lynn M. LoPucki & William C. Whitford, *Bargaining over Equity's Share in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 139 U. PA. L. REV. 125, 152 (1990). However, evidence is mixed, with commentators raising concern over the risk of frivolous objections since the UCC's fees are paid by the debtor's estate. *See* D.J. BAKER ET AL., AM. BANKR. INST., COMMISSION TO STUDY THE REFORM OF CHAPTER 11: 2012-2014 FINAL REPORT AND RECOMMENDATIONS, 42 (2014), https://abiworld.app.box.com/s/vvircv5xv83aavl4dp4h [https://perma.cc/YTE5-9ZDW] (noting the potential for "harm to the estate" in cases where UCCs engage in tactics that delay the consummation of a transaction). By the same token, the UCC's support is not sufficient to procure a sale. Other creditors may still object; moreover, as *Lionel* illustrates, some judges treat satisfaction of the business justification test as an independent obligation of the debtor and vet its reasoning themselves. *See supra* notes 34-37, 92-96 and accompanying text. Hence, there remain theoretical benefits to be had from a common-law sale standard formally attuned to the materiality of a given sale.

120. *See infra* notes 121-126 and accompanying text.

121. *See* Korres, *supra* note 72, at 971 (critiquing bankruptcy's "discretionary and loose attempt at a standard" for 363 sales, dating back to *Lionel*).

Bankruptcy Court for the Eastern District of Virginia[122] has held that "[t]he party opposing a debtor's proposed exercise of business judgment bears the burden of rebutting the presumption."[123] Others—as with *Integrated Resources* itself—have denuded Delaware law by requiring the debtor to "show[] that the [transaction] . . . represents an informed decision . . . in the honest belief that it is in the best interest of the [estate]."[124] Still others have tacked on additional requirements, such as good faith and "dispositions that are 'fair and expeditious'"—factors that, rather than clarifying the standard, are generally treated "as merely non-determinative considerations in case-specific inquiries."[125]

While such flexibility partly addresses the Goldilocks problem raised above—allowing the degree of scrutiny to vary with the transaction's importance, in practice although not de jure—it does so at the cost of predictability. The march of the business justification test has been "haphazard . . . , such that it is no longer clear which factors determine whether a sale is permissible or how all of these factors relate to the actual efficiency of a given sale."[126] And yet, march it has. Courts in every geographical circuit have cited *Integrated Resources* as the authoritative standard,[127] and it remains a mainstay of bankruptcy transactions.[128]

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122. Lynn M. LoPucki, *Chapter 11's Descent into Lawlessness*, 96 AM. BANKR. L.J. 247, 257 (2022) (placing the Eastern District of Virginia, with its seat in Richmond, among the top five courts in the country for large Chapter 11 filings).

123. Ryan, Inc. v. Cir. City Stores, Inc., No. 10-CV-496, 2010 WL 4735821, at *3 (E.D. Va. Nov. 15, 2010) (citing Off. Comm. of Subordinated Bondholders v. Integrated Res., Inc. (*In re* Integrated Res., Inc.), 147 B.R. 650, 656 (S.D.N.Y. 1992)).

124. *In re* Caribbean Petrol. Corp., 444 B.R. 263, 269 (Bankr. D. Del. 2010); *see also In re* Filene's Basement, LLC, No. 11-13511, 2014 WL 1713416, at *12-13 (Bankr. D. Del. Apr. 29, 2014); *In re* Mattress Discounters Corp., No. 08-21642, 2008 WL 4542989, at *5 (Bankr. D. Md. Oct. 10, 2008).

125. Korres, *supra* note 72, at 972.

126. *Id.*

127. For an example from the First Circuit, see *In re Charles Street African Methodist Episcopal Church of Boston*, 499 B.R. 66, 104 (Bankr. D. Mass. 2013). For examples from the Second Circuit, see *In re Quigley Co.*, 437 B.R. 102, 156-57 (Bankr. S.D.N.Y. 2010); and *In re Celsius Network LLC*, No. 22-10964, 2022 WL 14193879, at *6 (Bankr. S.D.N.Y. Oct. 24, 2022). From the Third Circuit, see *Caribbean Petroleum Corp.*, 444 B.R. at 269; and *Filene's Basement, LLC*, 2014 WL 1713416, at *12-13. From the Fourth Circuit, see *Ryan, Inc.*, 2010 WL 4735821, at *3; and *Mattress Discounters Corp.*, 2008 WL 4542989, at *5. From the Fifth Circuit, see *Official Committee of Unsecured Creditors v. Bouchard Transportation Co.* (*In re* Bouchard Transp. Co., Inc.), 74 F.4th 743, 750 n.8 (5th Cir. 2023); and *In re ASARCO LLC*, 441 B.R. 813, 826 (S.D. Tex. 2010). From the Sixth Circuit, see *In re JW Resources, Inc.*, 536 B.R. 193, 197 (Bankr. E.D. Ky. 2015). From the Seventh Circuit, see *In re H2D Motorcycle Ventures, LLC*, 617 B.R. 625, 629 (Bankr. E.D. Wis. 2020); and *In re Tiara Motorcoach Corp.*, 212 B.R. 133, 137 (N.D. Ind. 1997). From the Eighth Circuit, see *Lange v. Schropp* (*In re* Brook Valley VII), 496 F.3d 892, 900 (8th Cir. 2007). From the Ninth Circuit, see *In re Kabuto Arizona Properties, LLC*, No. 09-bk-11282, 2009 Bankr. LEXIS 4961, at *66 (Bankr. D. Ariz. Dec. 9, 2009); and *In re Station Casinos, Inc.*, No. 09-52477, 2009 WL 8519660, at *4 (Bankr. D. Nev. July 28, 2009). From the Tenth Circuit, see *In re Twenver, Inc.*, 149 B.R. 954, 956 (Bankr. D. Colo. 1992); and *In re QuVIS, Inc.*, No. 09-10706, 2009 WL 4262077, at *4-5 (Bankr. D. Kan. Nov. 23, 2009). From the Eleventh Circuit, see *In re Wildwood Villages, LLC*, No. 20-BK-02569, 2021 WL 1784074, at *3 n.17 (Bankr. M.D. Fla. Feb. 22, 2021).

128. *See supra* note 49 and accompanying text.

Whatever may be said of absorbing Delaware law as a policy choice, fewer authors have criticized *Integrated Resources* from a choice-of-law standpoint. Markell observes that the court "uncritically borrowed standards for assessing breakup fees from corporate law" without "any citation to § 363(b)."[129] Yet, in his view, the problem is not that the court purported to adopt a state-law standard but that it did so without accounting for meaningful differences between bankruptcy and corporate law.[130] Daniel Bogart goes further, observing that *Integrated Resources* "seemed to be creating . . . a federal business judgment rule."[131] However, like Markell, he declines to pull at this thread. Bogart states only that attempts to sketch "a federal common law of fiduciary obligations"—"often without analysis [or] . . . fidelity to key distinctions and concepts in the sources that are drawn upon"—have left the law "confusing and untidy."[132]

No scholar has probed the doctrinal reasons why bankruptcy courts have taken a twist on Delaware corporate law to be the rule for bankruptcy transactions.[133] This is surprising, given the integral (at times, dispositive[134]) role that standards play in adjudication; the degree to which the Supreme Court, since *Erie Railroad Co. v. Tompkins*, has directed federal courts to mind the division of labor between state and federal rules;[135] and the multitude of transactions in bankruptcy currently subject to an unclear and unexplained test.[136] The integrity of the 363 sale—a procedure popular enough to rival reorganization itself—and of a great many other bankruptcy rules depends on whether the business justification test rests on valid doctrine.

B. The Business Justification Test as Federal Common Law

The source of the business justification test—albeit unstated in the cases that created it—is federal common law. To understand the significance of this claim, it is necessary to determine what "federal common law"

129. Markell, *supra* note 104, at 355, 358.

130. *Id.* at 358, 373-77.

131. Bogart, *supra* note 17, at 263-64; *see also supra* note 27 (collecting sources for the proposition that bankruptcy imposes its own federal fiduciary duties, rather than absorbing duties from state law).

132. Bogart, *supra* note 17, at 185; *see also* Hampson, *supra* note 21, at 1706 (noting that "[t]he ensuing quarter century" since Bogart's remarks "has not improved the outlook").

133. *See* Jason Brege, Note, *An Efficiency Model of Section 363(b) Sales*, 92 VA. L. REV. 1639, 1642 (2006) ("Scholarly discussions relating to Section 363(b) do exist, but they often focus on the practical texture of the law rather than theory; the precise nature of the section's interaction with the rest of the Code and its purposes has been under-theorized."). The absence of "anything close to a consensus on how fiduciary duties work in bankruptcy" may be to blame for both *Integrated Resources*'s lacking rationale and the inability of scholarship to clarify this decision after the fact. Hampson, *supra* note 21, at 1719.

134. Jonathan S. Masur & Lisa Larrimore Ouellette, *Deference Mistakes*, 82 U. CHI. L. REV. 643, 657-58 n.60 (2015).

135. 304 U.S. 64, 78 (1938).

136. *See supra* notes 46, 49, 79-81, 127 and accompanying text.

means. That can be easier said than done. Common law is inconsistently defined[137] and cohabitates with several other doctrines, making the process of identifying it as much one of classification as of exhausting the alternatives. The remainder of this Part takes up both of these tasks, clearing the way for the next Part to verify whether common law—a rarity in the federal system[138]—justifies the prevailing standard for bankruptcy transactions.

1. Federal Common Law, Defined

Like Jonathan Swift's Gulliver (and only slightly less fictional, in the current Court's eyes), federal common law is hard to pin down. One frequently cited definition,[139] proposed by Martha Field, interprets it broadly to include "any rule of federal law created by a court . . . when the substance of that rule is not clearly suggested by federal enactments—constitutional or congressional."[140] Yet, as Field admits, this conception obscures the line between statutory interpretation and a judge fashioning new rules out of thin air.[141] That conflicts with the Supreme Court's stated understanding of federal common law as "a rule of decision" defined by being "*not* simply . . . an interpretation of a federal statute . . . , but, rather, . . . the judicial 'creation' of a special federal rule."[142] Without weighing in on the outer bounds of federal common law, to assess the validity of the business justification test, the "modern standard"[143] definition will do. On this view, "federal common law" consists of "federal rules of decision whose content cannot be traced by traditional methods of interpretation to federal statutory or constitutional commands."[144]

Even after excising statutory interpretation from the definition, federal common law remains a spectrum of judicial activities.[145] On the circumspect side is interstitial lawmaking: "filling in the gaps where Congress has not spoken but working with the statutory structure."[146] The opposite

137. Paul Lund, *The Decline of Federal Common Law*, 76 B.U. L. REV. 895, 915 (1996) (noting that the Supreme Court "never has had an entirely consistent theoretical conception of the nature and extent of federal common law making power"); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883, 890 (1986) ("Definitions of the phrase 'federal common law' differ . . . . [and none] is inherently correct . . . .").

138. *See* Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981) (noting that federal common law, when used, is employed sparingly).

139. *E.g.*, Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 593 (2006); Levitin, *supra* note 54, at 66.

140. Field, *supra* note 137.

141. *See id.* at 893-94.

142. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 755 (1998) (emphasis added) (quoting Atherton v. FDIC, 519 U.S. 213, 218 (1997)).

143. Tidmarsh & Murray, *supra* note 139, at 590.

144. HENRY M. HART & HERBERT WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 685 (Richard H. Fallon, Jr., Daniel J. Meltzer & David L. Shapiro eds., 5th ed. 2003).

145. Levitin, *supra* note 54, at 66-67.

146. *Id.* at 87.

end is occupied by functions more frequently derided as legislating from the bench, such as implying rights of action.[147] Courts disagree as to whether bankruptcy courts wield these latter powers at all.[148] For example, the Fifth Circuit has refused to create a common-law claim for contribution among joint violators of the automatic stay,[149] observing that "bankruptcy is not an area where the courts have wide discretion to fashion new causes of action."[150] On the other hand, the Third Circuit has more readily endorsed judge-made remedies, calling substantive consolidation "a construct of federal common law" and yet allowing it in the appropriate case.[151] The validity of any instance of common lawmaking therefore turns on how far the court has strayed from a statutory source.

Were the business justification test to fall somewhere along the scale of federal common law, it would lie at the interstitial-lawmaking end. The Code allows for transactions under §§ 363-365—it simply declines to set duties for the debtor to follow when executing them or standards to judge compliance therewith.[152] This sort of common lawmaking is not subject to debates over whether it can ever be authorized, but its appropriateness as a source for the business justification test—and whether another doctrine would be better—remains to be seen.

2. Confounding Variables: The *Erie* Doctrine, Bankruptcy Exceptionalism, and Equity

The business justification test has characteristics of both state and federal judge-made law, cognizably implicating the *Erie* doctrine, the uniquely pliable approach to statutory interpretation that the Court has long allowed in bankruptcy, and the equitable powers of the bankruptcy courts. As the following Sections demonstrate, however, each of these doctrines falls short of justifying the replacement of state-law fiduciary duties (and the standards for judging them) with a bespoke bankruptcy rule. Whether by deduction or exclusion, the 363 standard is federal common law.

147. *Id.*

148. J. Maxwell Tucker, *Substantive Consolidation: The Cacophony Continues*, 18 AM. BANKR. INST. L. REV. 89, 135-36 (2010).

149. 11 U.S.C. § 362(a) (2024).

150. Walker v. Cadle Co. (*In re* Walker), 51 F.3d 562, 567 (5th Cir. 1995); *see also* Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206 (1988) ("[W]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code.").

151. *In re* Owens Corning, 419 F.3d 195, 205 (3d Cir. 2005).

152. See supra notes 16-19 and accompanying text.

a. *Erie* Is Inapposite Since the Business Justification Test Is a Federal Rule

For the business justification test to present a common-law issue, its self-proclaimed absorption of state law must not be a valid exercise of the *Erie* doctrine. *Erie* dictates that both state and federal law retain vitality in federal proceedings.[153] This is true even of courts not sitting in diversity.[154] And it is especially true of bankruptcy courts, whose *métier* is allocating property rights that arise under state law and generally cannot be unmade by bankruptcy.[155] Since bankruptcy courts must often apply rules whose source is neither federal statutory nor common law, deviating from the former is not proof of the latter.

Some of the first courts to articulate the business justification test, namely *Integrated Resources*, invoked Delaware law while overseeing the bankruptcies of Delaware corporations. In the absence of much doctrinal rationale from these cases, the test's state-law roots make *Erie* a cognizable basis. Although creditors are not the original beneficiaries of a company's fiduciary duties, under Delaware law, they enjoy them derivatively in insolvency.[156] Yet, while purporting to draw on Delaware corporate law "by analogy,"[157] *Integrated Resources* inverted the burdens prescribed by the Delaware business judgment rule, then affixed a set of requirements unknown to state law. Later courts have applied a variant of Delaware law to debtors devoid of a connection to that state,[158] eliminating any pretense of following *Erie*. Meanwhile, *Lionel* cited no state law at all, instead relying on statutory interpretation. The business justification test therefore cannot be explained as the mere application of state law by a federal court and so exceeds the scope of *Erie*.

b. Statutory Interpretation Cannot Justify the Business Justification Test Without an Exception from Ordinary Rules, Which the Modern Court Is Reticent to Give

Next, the business justification test would not be federal common law—a departure from statutory text that takes the court beyond mere interpretation—were it to fall within the ordinary ambit of statutory

153. Thomas E. Plank, *The* Erie *Doctrine and Bankruptcy*, 79 NOTRE DAME L. REV. 633, 643-44 (2004).

154. *Id.* at 638-39; Camacho v. Tex. Workforce Comm'n, 445 F.3d 407, 409 n.1 (5th Cir. 2006); Indep. Living Ctr. of S. Cal., Inc. v. Kent, 909 F.3d 272, 283 (9th Cir. 2018).

155. Butner v. United States, 440 U.S. 48, 54 (1979); Rodriguez v. FDIC, 589 U.S. 132, 137 (2020); Douglas G. Baird & Anthony J. Casey, *Bankruptcy Step Zero*, 2012 SUP. CT. REV. 203, 204.

156. *See infra* note 229 and accompanying text.

157. Off. Comm. of Subordinated Bondholders v. Integrated Res., Inc. (*In re* Integrated Res., Inc.), 147 B.R. 650, 656 (S.D.N.Y. 1992).

158. See supra notes 99-102 and accompanying text.

interpretation, as possibly broadened by "bankruptcy exceptionalism." Bankruptcy courts and practitioners have tended to treat their field as an exception to the general rules of civil litigation. The penchant of many bankruptcy judges to exceed a strict reading of their powers under the Code—often for the sake of achieving a "better and more efficient[ly] functioning . . . bankruptcy system"—is the subject of whole volumes.[159] Without needing to repeat those efforts here, the roots of this approach have been variously traced to the courts' historical equitable powers[160] and "fidelity to unwritten norms" held by members of the restructuring community.[161]

This exceptionalist bent muddies the already-murky line between statutory interpretation and common lawmaking, making it hard to categorize bankruptcy rules not expressly stated in the Code as products of one or the other doctrine. It is unclear whether bankruptcy exceptionalism works to expand the bounds of statutory interpretation, enabling further departure from the text without trotting into common lawmaking, or as a special dispensation to make common law despite the Court's usual aversion.[162] As the analytic imprecision surrounding the business justification test illustrates, bankruptcy courts rarely describe their actions in the language of general civil litigation, making any attempt at categorization post hoc and fuzzy.[163] At the very least, many bankruptcy judges embrace a purposive variety of statutory interpretation, being led by the Code's policy goals more than its text.

i. Bankruptcy Exceptionalism and the Court

Despite its unique methods, bankruptcy has not concocted "off-label innovations"[164] in open defiance of the higher courts. One throughline of the Supreme Court's bankruptcy jurisprudence is an occasional and not-altogether-explained embrace of judicial creativity. In *Segal v. Rochelle*, for example, the Court had to decide whether a claim that did not accrue under state law until after the debtor's bankruptcy filing was nevertheless property of the estate.[165] Looking neither to state law nor the then-operative Bankruptcy Act, the Court invoked the "purposes" of bankruptcy—namely, "to leave the bankrupt free after the date of his petition to accumulate new wealth in the future"—and created a rule that it thought

159. Jonathan M. Seymour, *Against Bankruptcy Exceptionalism*, 89 U. CHI. L. REV. 1925, 1938 (2022); *see also* DOUGLAS G. BAIRD, THE UNWRITTEN LAW OF CORPORATE REORGANIZATIONS, at x, 184 (2022).

160. *See infra* Section I.B.2.c.

161. Seymour, *supra* note 159, at 1938-39; BAIRD, *supra* note 159, at x, 184.

162. *See* Seymour, *supra* note 159, at 1938 (noting that "bankruptcy exceptionalism might take many different forms").

163. *See id.* at 1944.

164. Lipson & Foohey, *supra* note 61.

165. 382 U.S. 375, 377-78 (1966).

fulfilled them.[166] Echoes of this spirit are heard in several of the Court's more recent opinions. In dicta, *Martin v. Wilks* entertains "foreclosing successive litigation by nonlitigants" when it is part of "a special remedial scheme[,] . . . as for example in bankruptcy."[167] Likewise, Justice Kagan's opinion in *Allen v. Cooper*[168] credits "bankruptcy exceptionalism" for the Court's prior holding in *Central Virginia Community College v. Katz*[169] abrogating state sovereign immunity.[170]

Regardless of the Court's past (and some Justices' present) feelings about bankruptcy exceptionalism, its prospects as an interpretive tool have grown bleaker. In the decades since *Segal*, the Court has taken a textualist turn, opting to corral the "unruly" field of bankruptcy within substantively agnostic, "well established principles of statutory construction."[171] In *United Savings Association of Texas v. Timbers of Inwood Forest Associates*, a unanimous Court applied the *expressio unius* canon to prohibit the bankruptcy court from adding new items to the statutory list of grounds for which a secured creditor can demand adequate protection.[172] In another unanimous decision, *RadLAX Gateway Hotel v. Amalgamated Bank*, the "purposes of the Bankruptcy Code, pre-Code practices, and the merits of credit-bidding" were all consigned to the penultimate paragraph.[173] That opinion turned instead on the "general/specific canon," which "ha[d] full application" to the Code no less than any other statute.[174] In *Law v. Siegel*, the Court held—again unanimously—that the inequity of allowing a fake mortgagor to defraud his creditors was flaccid in the face of an express provision[175] empowering him to exempt the value of his state-law homestead from the estate.[176] More recently, in *Czyzewski v. Jevic Holding Corp.*, the Court foreclosed deviation from the Bankruptcy Code's priority scheme via the familiar "elephants in mouseholes" canon: if Congress had

166. *Id.* at 379-80 (assigning post-petition property to the estate when it is "sufficiently rooted in the prebankruptcy past"). Similarly, in *Pepper v. Litton*, 308 U.S. 295, 305, 312 (1939), what mattered to the Court was not "how technically legal each step" of its statutory analysis was but to ensure that "fraud will not prevail, that substance will not give way to form, [and] that technical considerations will not prevent substantial justice from being done."

167. 490 U.S. 755, 762 n.2 (1989) (dictum). However, *Wilks* used this phrase as an illustration—not to decide the case. Despite its appearance in several later opinions, none concerned bankruptcy. Jonathan C. Lipson, *"Special": Remedial Schemes in Mass Tort Bankruptcies*, 101 TEX. L. REV. 1773, 1773 n.5 (2023).

168. 589 U.S. 248, 257 (2019).

169. 546 U.S. 356 (2006).

170. *Allen*, 589 U.S. at 257.

171. RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 649 (2012).

172. "If the Code had meant to give the undersecured creditor . . . interest on the value of his collateral," the Court reasoned, it would have done so. 484 U.S. 365, 373 (1988).

173. 566 U.S. at 649.

174. *Id.* at 645.

175. 11 U.S.C. § 522(b)(3)(A) (2024).

176. 571 U.S. 415, 426-27 (2014) ("We acknowledge that our ruling . . . may produce inequitable results for trustees and creditors in other cases. . . . but it is not for courts to alter the balance struck by the statute.").

wanted to make an exception to such a "fundamental" aspect of the Code, it would have done so.[177]

The Court's modern bankruptcy precedents may be said to "demonstrate . . . [a] structural or holistic textualism"[178]—but textualism nonetheless. Rather than essentializing the section at issue, the Court takes stock of "the statute's overall structure"[179] and admits some consideration of its purpose. Still, widening the aperture is a far cry from elevating bankruptcy policy above the ordinary rules of statutory interpretation, suggesting that the Court has lost its appetite for giving bankruptcy special treatment.

ii. *Purdue Pharma* and Exceptionalism's End?

The Court delivered its most recent word on bankruptcy exceptionalism in *Harrington v. Purdue Pharma L.P.*[180] There, it split 5-4 over whether a bankruptcy plan could compel nonconsenting creditors to forfeit their causes of action against non-debtor third parties without an express provision in the Code from which to derive that power.[181] Consistent with the restrictive trend of the Court's recent precedents, the majority said no.

Purdue—manufacturer of the narcotic OxyContin—had been driven into bankruptcy by liabilities stemming from its role in causing a nationwide opioid epidemic.[182] Its one-time owners, the Sacklers, hoped to limit their potential liability by making a contribution to the debtor's estate in return for releases from its creditors under the plan.[183] Given the impracticality of enforcing a judgment against the Sacklers—whose assets were largely overseas by the time of the bankruptcy— "most [creditors] who returned ballots supported" the proposal.[184] A few holdouts pressed the

177. 580 U.S. 451, 465 (2017) (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001)); *see also* Seymour, *supra* note 159, at 1954-55 (reading *Jevic* to reject bankruptcy exceptionalism). Others have responded that *Jevic* "employed a bankruptcy exceptionalist approach" by rooting itself in "a strong policy background"—"the absolute priority rule"—rather than "classic canons of statutory interpretation." Jared I. Mayer, Response, *For Bankruptcy Exceptionalism*, U. CHI. L. REV. ONLINE 1, 9-10 (2023). But *Jevic* relied on *Whitman*, a non-bankruptcy case famous for the proposition that Congress does not do big things without giving some indication of its intent. *Whitman*, 531 U.S. at 484-85. Each element of this canon—congressional intent and the degree of departure from that intent that the proposed interpretation of a statutory section represents—requires some understanding of what the statutory whole is intended to accomplish, i.e., its purpose. *See* United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988) ("Statutory construction . . . is a holistic endeavor . . . . [and a] provision that may seem ambiguous in isolation is often clarified by [considering] the remainder of the statutory scheme . . . ."). It is not "bankruptcy exceptionalist" to consider purpose only to the extent necessary to apply a classic, trans-substantive canon to any statute. *See infra* notes 195-198 and accompanying text.

178. Seymour, *supra* note 159, at 1953.

179. *Id.*

180. 603 U.S. 204 (2024).

181. *Id.* at 207, 226-27.

182. *Id.* at 209.

183. *Id.* at 211.

184. *Id.* at 212.

bankruptcy court to reject the plan, but it refused. That decision was vacated by the district court, then reinstated by the Second Circuit, before finding its way to the Supreme Court. There, the majority—strange bedfellows, with Justice Gorsuch writing for five, including Justice Jackson—reversed again, denying the releases. The dissent—an equally eccentric coalition led by Justice Kavanaugh, joined by the Chief and the remaining liberal Justices—would have allowed them.

The most straightforward reading of *Purdue* "would purport to end [the] statutory exceptionalism" of the Bankruptcy Code.[185] Proponents of the third-party releases sought to ground them in 11 U.S.C. § 1123(b)(6), which authorizes the bankruptcy court to approve a plan including "any . . . appropriate provision not inconsistent with . . . this title."[186] However, in the majority's view, this catchall is constrained by the provisions that precede it. Since "all [of these] . . . concern *the debtor*[,] . . . . the catchall cannot be fairly read to endow a bankruptcy court with the 'radically different' power to discharge the debts of a nondebtor."[187] Recalling elephants in mouseholes, the majority observed that "Congress could have said . . . that 'everything not expressly prohibited is permitted'"— "[b]ut it didn't."[188] The opinion is thus carried by "the *ejusdem generis* canon, [which] seeks to afford a statute the scope a reasonable reader would attribute to it"[189] and leaves little room for purposivism—much less bankruptcy exceptionalism.

This minimalist take on the Code was not shared by all Justices, even within the Court's conservative wing. In dissent, Justice Kavanaugh penned a policy-driven endorsement of the bankruptcy courts' "broad discretion"[190] that would fit well alongside *Segal*. Under the dissent's reading, the reach of the "broad statutory term . . . 'appropriate'" is informed less by the enumerated items than by "the goal of bankruptcy[:] . . . to preserve the debtor's estate so as to ensure fair and equitable recovery for creditors."[191] To achieve that goal, "non-debtor releases are not merely 'appropriate,' but can be absolutely critical."[192]

185. Lipson & Foohey, *supra* note 61, at 872.

186. 11 U.S.C. § 1123(b)(6) (2024).

187. Harrington v. Purdue Pharma L.P., 603 U.S. 204, 218 (2024) (quoting Epic Sys. Corp. v. Lewis, 584 U.S. 497, 513 (2018)).

188. *Id.*

189. *Id.* at 219.

190. *Id.* at 227 (Kavanaugh, J., joined by Roberts, C.J., Sotomayor & Kagan, JJ., dissenting).

191. *Id.* at 231.

192. *Id.* at 231; *see* Anthony J. Casey & Joshua C. Macey, Essay, *In Defense of Chapter 11 for Mass Torts*, 90 U. CHI. L. REV. 973, 1001 (2023) ("[W]hen third-party releases induce individuals and corporations to make significant financial contributions, they benefit tort claimants by enlarging the pie of recoverable funds and reducing the duplicative administrative and legal expenses that arise when tort claimants sue the debtor in bankruptcy and the nondebtors in state and federal courts.").

The majority, notwithstanding its textualist methods, also takes a position on the goals of bankruptcy. Acquiescing that "[b]ankruptcy law may serve to address some collective-action problems," the opinion reiterates that "[n]o statute pursues a single policy at all costs."[193] The judicial task is to determine "*how far* Congress has gone in pursuing one policy or another."[194]

But statutory interpretation has never obligated courts to ignore a statute's purpose in giving meaning to its parts. Were that so, it would be impossible to determine what "scope a reasonable reader" would give the statute.[195] Exceptionalism demands a departure from how the Court would handle a similar case in some other field, and that is what is missing from *Purdue*. Consideration of statutory purpose is not unique to bankruptcy. The Court's common-lawmaking tests ask, *inter alia*, whether state law would frustrate the purposes of a federal program,[196] as do many other nonbankruptcy precedents.[197] Using *Purdue* as a litmus test for the modern Court's bankruptcy philosophy, a future case is unlikely to see policy permit deviation from general principles of statutory interpretation.[198]

iii. By Exceeding the Bounds of Statutory Interpretation, the Business Justification Test Comes Under Common Law

With the Court's track record in mind (and despite the doctrinal looseness that it once allowed in bankruptcy), the business justification test is not apt to be classified an exercise of statutory interpretation. The easiest route to this holding runs through *Integrated Resources* and other cases grounding the rule in Delaware law: citing state law is tough to equate with interpreting the Bankruptcy Code. Albeit more circuitously, the inability of statutory interpretation to yield the business justification test is clear from *Lionel*'s reasoning as well.

193. Harrington v. Purdue Pharma L.P., 603 U.S. 204, 220 (2024).

194. *Id.*

195. *Id.* at 218.

196. *See infra* Part II.

197. *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011) ("The overarching purpose of the [Federal Arbitration Act], evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings."); Paulsen v. Comm'r, 469 U.S. 131, 143 (1985) (contrasting "[t]he purpose of the Securities Acts [with] . . . the purpose of the Tax Code" to determine whether shares in a mutual association are more like stock or debt).

198. If anything, nonconsensual third-party releases were a prime case for broad, bankruptcy-empowering exceptionalism. "The key statutory term" for grounding these releases—"appropriate"—has long been afforded an "all-encompassing" construction by the Court, making it hard to accuse the bankruptcy courts of overstepping their bounds. Harrington v. Purdue Pharma L.P., 603 U.S. 204, 240 (2024) (Kavanaugh, J., joined by Roberts, C.J., Sotomayor & Kagan, JJ., dissenting). Moreover, the policy arguments were substantial: denying the releases meant "no $5.5 to $6 billion settlement payment," potentially leaving claimants without a "viable path to any recovery." *Id.* at 230.

Were the Court to assess whether the test enjoys textual support, exceptionalism would give way to ordinary "principles of statutory construction."[199] Under these principles, the test cannot be sustained. First, if *Lionel* were ever right to trace its rule to the Code, that rationale has been outmoded by subsequent cases. *Integrated Resources*—which forty percent of all 363 motions credit for the business justification test[200]—bound up the standard for bankruptcy transactions in Delaware law. Unless the Court were willing to wipe the slate clean after forty years, the logic of the preceding paragraph would apply here to the same effect.

Second, assuming the Court *did* view the issue with fresh eyes, the missing standard of §§ 363-365 would be too wide a gap to fill via statutory interpretation. "[Beginning] with the familiar canon . . . that the starting point for interpreting a statute is the language of the statute itself,"[201] none of these sections constrains the debtor's freedom to sell assets, obtain new credit, or assume or reject contracts.[202] Observing, as *Lionel* did,[203] that the notice-and-hearing provisions of § 363(b)(1) presuppose *some* showing by the debtor merely restates the problem: a rule is needed, but none is to be found. This does not mean that no standard applies. Confronted with open-ended language, "courts do not necessarily afford it the broadest possible construction it can bear."[204] They instead "look for guidance . . . in related provisions."[205] Yet, other sections are of little use here—unless, for example, the detailed requirements for sale as part of a reorganization plan are to be read into § 363(b).[206] In that case, however, the counterargument writes itself: had Congress intended to saddle 363 with these impediments, "one might have expected it to say so expressly."[207]

The failure of statutory interpretation to supply a standard is underscored by contrasting §§ 363-365 with the Court's recent bankruptcy cases.[208] Each is characterized by the Court prohibiting bankruptcy courts from doing something that the Code does not explicitly authorize. Section 1123(b)'s enumerated items concern the debtor, so its catchall cannot encompass non-debtors.[209] Every other way to exit bankruptcy must respect

199. *See* RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 649 (2012) (directing courts to interpret the Bankruptcy Code "clearly and predictably using [these] well-established . . . principles").

200. *See supra* note 49 and accompanying text.

201. Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

202. 11 U.S.C. §§ 363(b), 364(c), 365(a) (2024).

203. *See supra* notes 75-77 and accompanying text.

204. Harrington v. Purdue Pharma L.P., 603 U.S. 204, 217 (2024).

205. *Id.* at 221.

206. 11 U.S.C. § 1129(a) (2024).

207. *Purdue Pharma*, 603 U.S. at 224.

208. *See supra* notes 171-179 and accompanying text; Section I.B.2.b.ii.

209. *Purdue Pharma*, 603 U.S. at 218.

absolute priority, so structured dismissals[210] must, too.[211] Here, however, the Code *does* authorize the debtor to sell, incur debt, and make or unmake contracts—the Court cannot simply refuse. But neither can it discern any limits from the Code without making them.

The interpretive task must therefore become a generative one, if the range of permissible bankruptcy transactions is to be constrained. Yet, §§ 363-365 do not exist in a vacuum but against a background of state law. Where state law sets its own rules for corporate acts like the ones these sections authorize,[212] adopting or replacing them is not a question of statutory interpretation. It is federal common law.[213] Absent a bankruptcy-specific exception to the ordinary bounds separating statutory interpretation from common law—which the Court's case law offers no reason to envision—the standard for bankruptcy transactions must lie outside the Code.

c. Equity Is Unlikely to Persuade the Court to Allow Deviation from the State Law that Otherwise Governs Bankruptcy Transactions

While bankruptcy may not be an exception to general principles of statutory interpretation, the business justification test may still avoid the constraints of common law if a freestanding source of equitable power authorizes the bankruptcy courts to create rules that suit the needs of the case. Judges and litigants routinely refer to the bankruptcy courts as "courts of equity,"[214] and that phrase is no mere slogan. It has justified myriad judicial innovations for which the Code provides no express support,[215] from critical vendor motions[216] to the substantive consolidation of debtors' estates.[217] Even the Court has adopted this rationale in its more purposive opinions.[218] If the Code authorizes bankruptcy transactions, but declines to state standards for judging them, perhaps the bankruptcy courts should simply use their equitable powers to make some.

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210. A structured dismissal is a ruling by the bankruptcy court that dismisses a bankruptcy case but directs the preservation of any alterations to the parties' entitlements that occurred during the case. Czyzewski v. Jevic Holding Corp., 580 U.S. 451, 456 (2017).

211. *Id.* at 465.

212. *See infra* notes 225-236 and accompanying text.

213. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 755 (1998) (defining federal common law "not simply [as] an interpretation of a federal statute" but "the judicial 'creation' of a special federal rule of decision" (quoting Atherton v. FDIC, 519 U.S. 213, 218 (1997))); *infra* notes 225-236, 242-247 and accompanying text.

214. *See supra* note 70 and accompanying text.

215. Levitin, *supra* note 54, at 1.

216. *Id.* at 46-47 (citing *In re* Kmart Corp., 359 F.3d 866, 869 (7th Cir. 2004)).

217. *In re* Owens Corning, 419 F.3d 195, 205 (3d Cir. 2005).

218. Pepper v. Litton, 308 U.S. 295, 304 (1939) ("[T]his Court has held that for many purposes 'courts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity.'" (quoting Local Loan Co. v. Hunt, 292 U.S. 234, 240 (1934))).

A century ago, that reasoning might have been persuasive. Unfortunately, the modern Court's hostility to the small-scale exceptionalism of deviating from the ordinary rules of statutory interpretation seems to doom the broader exceptionalism needed to invent novel, non-Code rules in the name of "equity." For nearly four decades, the Court has admonished that "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code."[219] The repeated reversals summarized above suggest that the Court considers equity an insufficient basis to exceed those confines. None of *Timbers of Inwood*, *RadLAX*, *Jevic*, or *Purdue* entertained it as an alternative to the Code's text when rejecting the judge-made rules in those cases. Much as equity could have been the centerpiece of *Law*—the bankruptcy court having justified its extra-textual rule as an equitable exercise[220]—the Court devoted a single paragraph to dismissing it as a reason to overwrite the Code's list of exemptions.[221]

Yet, suppose it were argued that supplying the missing standard for bankruptcy transactions, which are themselves stipulated in the Code, represents an exercise of "equitable powers . . . within the confines of the . . . Code"[222] and is therefore consistent with the Court's precedents. More cognizably, what if § 105(a)[223]—the provision to which many bankruptcy courts have traced their equitable powers[224]—could justify judge-made law, despite being relegated to a footnote in *Purdue*? After all, the Court has stated that this section "serves . . . to 'carry out' authorities expressly conferred elsewhere in the Code,"[225] and bankruptcy transactions—more than nonconsensual third-party releases—enjoy statutory authorization.

Even so, equity would not allow the bankruptcy courts to craft standards for the debtor's business decisions from whole cloth. The actions of a corporation in bankruptcy remain subject to state-law fiduciary duties. These may arise from state corporate law, which many bankruptcy courts—including *Integrated Resources*—have asserted retains "vitality" in Chapter 11[226] and which the Court has held to be the proper source for resolving such corporate-governance issues as whether a bankruptcy filing

219. Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206 (1988).

220. Law v. Siegel, 571 U.S. 415, 419-20 (2014).

221. *Id.* at 426.

222. *Ahlers*, 485 U.S. at 206.

223. 11 U.S.C. § 105(a) (2024).

224. *In re* Stone & Webster, Inc., 286 B.R. 532, 539 (Bankr. D. Del. 2002); *In re* Wellman, 89 B.R. 880, 883 (Bankr. D. Colo. 1988); Stephen A. Stripp, *An Analysis of the Role of the Bankruptcy Judge and the Use of Judicial Time*, 23 SETON HALL L. REV. 1330, 1360-67 (1993); Brian Leepson, Note, *A Case for the Use of a Broad Court Equity Power to Facilitate Chapter 11 Reorganization*, 12 EMORY BANKR. DEV. J. 775, 778 (1996).

225. Harrington v. Purdue Pharma L.P., 603 U.S. 204, 218 n.2 (2024).

226. Off. Comm. of Subordinated Bondholders v. Integrated Res., Inc. (*In re* Integrated Res., Inc.), 147 B.R. 650, 656 (S.D.N.Y. 1992) (quoting *In re* 995 Fifth Ave. Assocs., L.P., 96 B.R. 24, 28 (Bankr. S.D.N.Y. 1989)).

was duly authorized.[227] The corporate laws of many states further provide that fiduciary duties are owed to a firm's creditors once it becomes insolvent, whether directly[228] or derivatively.[229] Alternatively, the source of these duties may be the law of trusts and estates, recalling that the Code creates an estate overseen by a trustee (or the debtor serving as one).[230] Wherever from, state law is the "readymade"[231] filler for gaps in federal law unless a "uniquely federal interest[]" demands otherwise.[232] This tenet has long motivated the Court's bankruptcy jurisprudence, from *Butner v. United States*[233] to the recent quip in *Rodriguez v. FDIC* that "bankruptcy . . . doesn't change much."[234] It is underscored by other provisions of federal law, namely 28 U.S.C. § 959(b), which commands the bankruptcy trustee to "manage and operate the property in his possession . . . according to the requirements of the valid laws of the State in which such property

227. Price v. Gurney, 324 U.S. 100, 106 (1945); *see also* Hager v. Gibson, 108 F.3d 35, 40 (4th Cir. 1997) (affirming the continued relevance of the holding in *Price*, a pre-Code case); Chitex Commc'n, Inc. v. Kramer, 168 B.R. 587, 589 (S.D. Tex. 1994) (same).

228. *See* N.Y. Credit Men's Adjustment Bureau, Inc. v. Weiss, 110 N.E.2d 397, 398 (N.Y. 1953) (treating the directors of an insolvent corporation "as . . . trustees . . . for the corporate creditor-beneficiaries").

229. *See* N. Am. Cath. Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 101-02 (Del. 2007) ("The corporation's insolvency 'makes the creditors the principal constituency injured by any fiduciary breaches that diminish the firm's value.'" (quoting Prod. Res. Grp., L.L.C. v. NCT Grp., Inc., 863 A.2d 772, 792 (Del. Ch. 2004)); Brad Eric Scheler, Gary L. Kaplan & Jennifer L. Rodburg, *Director Fiduciary Duty in Insolvency*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 15, 2020), https://corpgov.law.harvard.edu/2020/04/15/director-fiduciary-duty-in-insolvency [https://perma.cc/M7QB-FHB8] ("[O]nce a corporation is insolvent, a creditor obtains standing to assert *derivative* claims on behalf of the corporation for directors' breaches of fiduciary duties to the residual claimants . . . ."). As a matter of Delaware law, the *content* of these fiduciary duties may not transfer from shareholders to creditors on a one-to-one basis. Quadrant Structured Prods. Co. v. Vertin, 102 A.3d 155, 191-92 (Del. Ch. 2014); Scheler et al., *supra* (reading *Quadrant* to "suggest that creditors' derivative fiduciary claims likely would not succeed unless the directors were so uncareful or so disloyal in formulating the[ir business] plan, or the plan was so patently flawed, that the plan would not pass muster under business judgment deference"); Ellias & Stark, *supra* note 108, at 760-62. However, as to the standard by which a Delaware court would *review a proposed sale*—the relevant state-law comparator when evaluating § 363 under the Court's common-lawmaking tests—*Quadrant* offers no support for the unintuitive conclusion that a sale otherwise reviewed under *Revlon* (if the corporation were solvent) should instead benefit from business-judgment protection now that the corporation's managers have driven it into insolvency.

230. Hampson, *supra* note 21, at 31 ("Courts . . . disagree over whether the content of the duties comes from trusts, corporations, agency, or something *sui generis*."); *see also* Bogart, *supra* note 17, at 159, 234-41 (arguing for a federal common law of fiduciary duties but sourcing these duties from the state law of trusts).

231. United States v. Kimbell Foods, Inc., 440 U.S. 715, 740 (1979); Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 416 (2010) ("For where neither the Constitution, a treaty, nor a statute provides the rule of decision or authorizes a federal court to supply one, 'state law must govern because *there can be no other law*.'" (emphasis added) (quoting Hanna v. Plumer, 380 U.S. 460, 471-72 (1965))).

232. Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981); *see also* Hampson, *supra* note 21, at 30.

233. 440 U.S. 48, 54-55 (1979).

234. 589 U.S. 132, 137 (2020).

is situated."[235] And it further animates the Court's common-lawmaking tests, which exist to assist federal judges with deciding between state and judge-made law.[236] However much of their historical equitable discretion the bankruptcy courts retain, judicial lawmaking is much more tenuous when it erases state law than when it operates on a blank slate.

It strains the imagination that, while departing from bankruptcy exceptionalism at every turn, the Court would allow the bankruptcy courts to preempt whole bodies of state law, especially when it has developed finely calibrated tests for this exact scenario: the choice between state and judge-made law. The possibility of such an about-face cannot be eliminated, given the purposive counter-current of the Court's older cases, as more recently embraced by the *Purdue* dissent. More realistically, however, the formalist Court of *Purdue* and *Rodriguez* would disclaim equity as an answer to the Code's unanswered questions. It would therefore hold that the judge-made business justification test must find support (to the extent it can) in common law: the single vehicle that the modern Court has endorsed (and even then, narrowly) for judicial innovation at the expense of state law.

C. *The Court's Holdings in* Texas Industries *and* Kimbell Foods *Govern Bankruptcy Common Law But Were Ignored in Creating the Business Justification Test*

The business justification test derives from federal common law. Whether it does so defensibly is another matter. In keeping with *Erie*'s decree that "[t]here is no federal general common law,"[237] the Supreme Court has held that any remaining "enclaves"[238] of common lawmaking are "limited" and "restricted."[239] *Texas Industries, Inc. v. Radcliff Materials, Inc.* confines them to "essentially two" circumstances: where "Congress has given the courts the power to develop substantive law," and where "a federal rule of decision is necessary to protect uniquely federal interests."[240] The first set of circumstances denotes areas where Congress expressly or impliedly authorizes federal common lawmaking.[241] The second consists of

235. 28 U.S.C. § 959(b) (2024); Hampson, *supra* note 21, at 34-37 ("For business debtors, . . . section 959 imposes additional fiduciary duties stemming from state law."); Miller, *supra* note 60, 426-28.

236. *See infra* Section I.C.

237. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

238. Tidmarsh & Murray, *supra* note 139, at 588.

239. Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981).

240. *Id.* (internal quotation marks and citations omitted).

241. An example of express authorization is Federal Rule of Evidence 501, which provides that "claims of privilege" in federal court are governed by "[t]he common law—as interpreted by United States courts in the light of reason and experience." FED. R. EVID. 501. Implied authorization tends to be found in open-textured statutes like the Sherman Act, 15 U.S.C. §§ 1-7 (2024), which require judicial line-drawing to operationalize their standards. *See, e.g.*, Nat'l Soc.

four traditional "pockets": "(1) cases affecting the rights and obligations of the United States . . . , (2) interstate controversies, (3) international relations, and (4) admiralty."[242]

While these four pockets have received the Court's recognition, they are not exhaustive. The Court allows "federal judges [to] claim . . . new area[s] for common lawmaking" outside of its historical bounds, subject to the "strict condition[]" of a "uniquely federal interest[]."[243] Without such an interest, "matters left unaddressed in . . . a [federal statutory] scheme are presumably left subject to the disposition provided by state law."[244] Even so, identifying a situation ripe for federal common law is only half the battle. "The more difficult task," as the Court observed in *United States v. Kimbell Foods, Inc.*, "is giving content to this federal rule."[245]

Whether borne of federalism[246] or a "prudent" understanding of the legislature's advantage at drafting,[247] federal courts are loath to try their hands at lawmaking. Even where *Texas Industries* allows the creation of a federal rule of decision, the content of that rule is, by default, "adopt[ed from] the readymade body of state law."[248] To rebut this presumption, *Kimbell Foods* articulates three factors. These consist of the federal interest in "a nationally uniform body of law"; the degree to which "application of state law would frustrate specific objectives of [a] federal program[]"; and, on the other hand, whether "commercial relationships predicated on state law" would be frustrated by an unforeseen federal rule.[249]

The Supreme Court's common-law framework appears nowhere in *Lionel* or *Integrated Resources*. Viewed in light of the Court's bankruptcy jurisprudence, this oversight makes sense. Prior to the textualist turn exemplified by *Purdue*, the Court "tende[d] to tolerate off-label innovations" by the bankruptcy courts.[250] Judges therefore had little reason to limit themselves to the rules of common law. Even the bankruptcy academy has declined to use the Court's lawmaking tests to inform the choice between federal and state law in bankruptcy transactions.[251]

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of Pro. Eng'rs v. United States, 435 U.S. 679, 688 (1978) (noting that Congress "did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations"). It may also be found where Congress has absorbed common-law phrases or concepts into a federal statute as, for example, in the securities-fraud and insider-trading contexts. *See infra* note 471 and accompanying text.

242. Tidmarsh & Murray, *supra* note 139, at 594.

243. Rodriguez v. FDIC, 589 U.S. 132, 136 (2020).

244. O'Melveny & Myers v. FDIC, 512 U.S. 79, 85 (1994).

245. 440 U.S. 715, 727 (1979).

246. Tidmarsh & Murray, *supra* note 139, at 614-16.

247. Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 422 (2011) (quoting *Kimbell Foods*, 440 U.S. at 740).

248. *Kimbell Foods*, 440 U.S. at 740. In such cases, the court has not *applied* state law in the *Erie* sense. Rather, "the source of [the] law is federal, ... [but the court] adopt[s] state law as the appropriate federal rule." *Id.* at 718.

249. *Id.* at 728-29.

250. Lipson & Foohey, *supra* note 61.

251. *See supra* notes 60-61 and accompanying text.

Nevertheless, the Court's precedents govern judicial lawmaking in bankruptcy the same as any other practice area. To be sure, the Court has never extended *Kimbell Foods* to bankruptcy. But neither has it held that this test is limited to any substantive niche. On the contrary, the Court asserts that "bankruptcy . . . doesn't change much," unless there is some "special" reason to depart from "usual [non-bankruptcy] rules," of which *Kimbell Foods* is one.[252] The Court also *has* recently applied the first step of its *Texas Industries-Kimbell Foods* framework to a bankruptcy case. In *Rodriguez*, it addressed the predicate question (under *Texas Industries*) of whether a federal interest justified the common-law rule for intercompany allocation of tax returns articulated by *In re Bob Richards Chrysler-Plymouth Corp.*[253] Finding that it did not, the Court remanded without deciding whether to pull a standard from state law or create a new one.[254] However, as *Rodriguez* illustrates, the Court has subjected bankruptcy to its common-lawmaking tests to the extent required by the issues before it.[255]

The circuit courts are similarly convinced of this case law's relevance to bankruptcy. In *In re Columbia Gas Systems*, the Third Circuit applied *Kimbell Foods* to hold that a federal interest in uniformity and low likelihood of frustrating commercial expectations compelled a common-law rule that refunds owed to customers of a bankrupt gas utility were held in trust by the debtor, rather than property of the bankruptcy estate.[256] In *Dzikowski v. Northern Trust Bank of Florida, N.A.*, the Eleventh Circuit followed *Kimbell Foods* when interpreting § 550(d) of the Bankruptcy Code, which forbids double recovery for the same fraudulent transfers but does not indicate whether a trustee who partially settles a claim can seek the balance from third parties.[257] And in *United States v. Smith*,[258] the Second Circuit cited *Kimbell Foods* in "adopt[ing] the commercial law of New

252. *See* Rodriguez v. FDIC, 589 U.S. 132, 137 (2020) (deferring to state law, and vacating a federal common-law rule, in deciding a corporate-tax case); RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 649 (2012); *see also* Jackie Gardina, *The Perfect Storm: Bankruptcy, Choice of Law, and Same-Sex Marriage*, 86 B.U. L. REV. 881, 926-27 & n.342 (2006) (collecting bankruptcy cases in which "courts have looked to the Supreme Court's . . . decisions regarding the limitations on the creation and content of federal common law"); Seymour, *supra* note 152, at 1950-54 (interpreting the modern Court's bankruptcy precedents to foreclose expansive gap-filling in the Code by bankruptcy courts); Baird & Casey, *supra* note 155 ("In contrast to administrative agencies that give shape to federal policies, bankruptcy judges should not unsettle nonbankruptcy rights—rights that are largely creatures of state rather than federal law."); *supra* note 232 and accompanying text.

253. 473 F.2d 262 (9th Cir. 1973), *overruled by*, *Rodriguez*, 589 U.S. at 138.

254. *Rodriguez*, 589 U.S. at 138.

255. *See id.* at 718 ("[S]tate law is well equipped to handle disputes . . . . like the one now before us . . . involv[ing] corporate property rights in the context of a federal bankruptcy and a tax dispute . . . .").

256. 997 F.2d 1039, 1050-51, 1055-56 (3d Cir. 1993).

257. 478 F.3d 1291, 1295-96, 1298 (11th Cir. 2007).

258. 832 F.2d 774 (2d Cir. 1987). *Integrated Resources* would shortly after arise from this circuit without giving a nod to either the Court's common-lawmaking precedents or its own circuit's endorsement of them.

York" to determine whether the plaintiff's security interest extended to the relevant collateral.[259]

As Supreme Court and circuit-level precedent attests, the Court has set parameters around common lawmaking, which apply in bankruptcy no less than elsewhere. These went unheeded by *Lionel*, *Integrated Resources*, and later courts applying the business justification test. The remaining question is whether this test passes muster under *Texas Industries* and *Kimbell Foods*.

II. State Law Sets the Standard for Bankruptcy Transactions Under *Texas Industries* and *Kimbell Foods*: The Case of the 363 All-Asset Sale

In assessing the validity of the business justification test, the threshold issue is whether this is an area in which bankruptcy judges can make federal common law at all. As noted in Section I.B.1 above, supplying a missing standard is interstitial lawmaking and therefore not so far removed from the Code as to be *ultra vires*. Returning to the *Texas Industries-Kimbell Foods* framework, the courts' lawmaking authority thus depends in the first place on whether Congress has authorized them to fashion new rules of decision or whether their doing so is needed to achieve a federal interest.

The outcome of these inquiries varies with the purpose for which a court is considering common law. For example, the federal interest is greater when the government is a party[260] than when its role is limited to a general concern for the integrity of the bankruptcy process.[261] The business justification test subsumes many transactions and several sections of the Bankruptcy Code, implying correspondingly many analyses.[262] In the interest of manageability, where the Court's common-lawmaking tests demand fact-specific analysis, this Part focuses on the provision for which the business justification test was originally developed—§ 363—and the transaction with which that section has come to be most closely associated: the all-asset sale. Further recognizing that entire articles have been written to question the bankruptcy courts' reliance on corporate law in defining the debtor's duties (as opposed to the law of trusts),[263] it reserves the issue of which state law is the proper comparator and instead subjects the vast-majority choice—corporate law—to the Court's precedents.

259. *Smith*, 832 F.2d at 775-76 (2d Cir. 1987) (citing United States v. Kimbell Foods, Inc., 440 U.S. 715, 726-27 (1979)).

260. *See, e.g.*, *Kimbell Foods*, 440 U.S. at 734 (describing how the United States has a particularly strong interest in the proper operation of lending programs when it is the lender).

261. Juliet M. Moringiello, *(Mis)use of State Law in Bankruptcy: The Hanging Paragraph Story*, 2012 WIS. L. REV. 963, 985.

262. For a critique that this renders the Court's precedents unworkable, see Section III.A.3.b below.

263. *See supra* note 230 and accompanying text.

A. Texas Industries *Path 1: Congress Appears Not to Have Authorized Common Lawmaking Under § 363*

Beginning with the first prong of *Texas Industries*, arguments for congressional authorization of common lawmaking under § 363 are unlikely to persuade the modern Court. Express authorization is quickly eliminated for lack of any statutory language resembling Federal Rule of Evidence 501's command that "[t]he common law—as interpreted by United States courts"—dictate the rules of privilege.[264] But implied authorization is thornier. The Court has never said how explicit a command Congress must give,[265] and the "capacious statutory language" of provisions like § 363 supplies ample room for inferences about legislative intent.[266] Logically, there are two possibilities: a narrow grant of lawmaking authority limited to § 363, or a broader grant encompassing multiple sections, if not the whole Code.

Taking these in reverse order, and as discussed above,[267] the Court's precedents admit no blanket common-lawmaking power where it would abridge state law. Judicial innovation under § 363 functionally preempts state-law fiduciary duties and standards. Hence, a more tailored theory of authorization is needed.

Under a section-specific approach, the case for a congressional grant fares better. Authorization is unlikely to have existed at the Code's adoption, since Congress never anticipated bankruptcy courts expanding § 363 as they have.[268] Yet, amendments to the Code that postdate the early-'90s development of the 363 sale offer a more plausible basis to infer authorization. "[Courts] generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts."[269] Modifying a statute without addressing common-law devices that derive from it may therefore at times suggest congressional assent.[270] *Lionel* announced its business justification test in 1983, and *Integrated Resources* came down in 1992. Since the latter date, § 363(b) has been amended twice.[271] Neither amendment prescribes how judges should evaluate transactions under this section.

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264. *See* FED. R. EVID. 501; *see also supra* note 241 and accompanying text.

265. Levitin, *supra* note 54, at 74 ("It is not clear how explicit an authorization is required by *Texas Industries*.").

266. *See* Buccola, *supra* note 15.

267. *See supra* Section I.B.2.c.

268. Buccola, *supra* note 42, at 3; *see also* Buccola, *supra* note 15 ("It is at least odd that a provision meant to allow shrinking companies to get rid of surplus equipment would be used to justify the sale, outside the terms of a plan of reorganization, of one-third of all large companies that enter Chapter 11.").

269. Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 184-85 (1988).

270. Of course, "[i]t is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the [courts'] statutory interpretation." Cent. Bank, N.A. v. First Interstate Bank, N.A., 511 U.S. 164, 186 (1994). Hence, this so-called "acquiescence doctrine" carries limited weight with the Court. *Id.*

271. Bankruptcy Reform Act of 1994, H.R. 5116, 103d Cong. §§ 109, 201(a); Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, S. 256, 109th Cong. §§ 231(a), 309(c)(2).

Hence, one might reason that Congress is aware of the explosion in 363 activity but, by withholding a standard, has endorsed what the courts have done.[272]

However, given the extraordinary nature of federal common law, the above rings of "elephants in mouseholes."[273] Despite the presumption of congressional awareness, it seems odd to attribute to Congress knowledge of a tension between bankruptcy law and the Court's common-lawmaking precedents that has eluded four decades of bankruptcy courts applying the business justification test. Furthermore, in *Rodriguez*, the mere fact that Congress amended the Tax Code in the years after *Bob Richards* was not enough to merit comment from the Court, much less justify that common-law rule.[274] There is little reason to think that the Court would give any more credit to a theory of implied authorization under § 363.

B. Texas Industries *Path 2: There May Be a Federal Interest in Common Lawmaking Under § 363*

Although no smoking gun points to congressional authorization, *Texas Industries*'s second prong is more malleable to claims of a common-law 363 standard. As before, several possibilities must be struck out of hand. A general federal interest in bankruptcy[275] does not field preempt state law,[276] and the conventional enclaves—concerned mostly with interstate and international affairs[277]—are inapposite. While bankruptcy sometimes implicates the rights and obligations of the United States—as in *Kimbell Foods*, where the Small Business Administration (SBA) was one of multiple creditors vying for priority in the debtor's collateral[278]—its typically private character makes this too thin a reed to support widespread reliance on *Integrated Resources*.

The question remains whether some special interest in § 363 endorses common lawmaking, though the current Court may find a positive answer unpersuasive. In *Rodriguez*, a unanimous bench made short work of the

272. *See* Levitin, *supra* note 54, at 74. Contending that the common-law "pre-Code practices doctrine" grants bankruptcy courts a source of common-lawmaking power, Levitin discerns implied congressional ratification of this power in the fact that "Congress has repeatedly amended the Bankruptcy Code since the string of cases that have enunciated the pre-Code practices doctrine." *Id.*

273. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001); *see also Central Bank*, 511 U.S. at 186 ("It does not follow . . . that Congress' failure to overturn a statutory precedent is reason for this Court to adhere to it.").

274. *Compare* Tax Reform Act of 1976, H.R. 10612, 94th Cong., *with In re* Bob Richards Chrysler-Plymouth Corp., 473 F.2d 262 (9th Cir. 1973), *overruled by*, Rodriguez v. FDIC, 589 U.S. 132, 138 (2020).

275. Levitin, *supra* note 54, at 74 (arguing that, since naturalization and bankruptcy are situated in the same clause of Article I, and "[n]o one would doubt that [the former] is a 'uniquely federal interest[,]' . . . . [i]t follows . . . that bankruptcy too is a 'uniquely federal interest'").

276. *See supra* Section I.B.2.c.

277. Tidmarsh & Murray, *supra* note 139, at 594.

278. United States v. Kimbell Foods, Inc., 440 U.S. 715, 718-22 (1979).

idea that the federal government has any legitimate concern over how private parties divide a tax refund once it is returned to them.[279] While the judicial standard for 363 sales may more readily implicate federal interests than a tax return in private hands, its core is creditor interests distinct from both the archetypically federal enclaves noted above and less-obvious cases where the government is nonetheless involved.[280] Some Justices, advocating an even-more-reserved approach to the ouster of state law, have begun to question the propriety of probing unstated federal interests at all in the analogous context of obstacle preemption.[281] Taken together, these developments suggest that the Court may not be receptive to common law-making around an issue where the federal interest is less readily apparent, such as the 363 standard. In that case, the analysis may stop, the business justification test must be reversed, and the reader may proceed to wondering about the implications of depriving a flexible field like bankruptcy of the power to engage in legal innovation, as discussed in the latter portion of Section III.A.

Still, the common-law sale standard is not without defensible arguments. These include a federal interest in either gap-filling the Code's procedural laws consistently with their federal-law source or achieving the bankruptcy system's goals of creditor compensation and debtor rehabilitation. Both are assessed below, before the balance of this Section turns to whether, even assuming a federal interest, state law must go to safeguard that interest under *Kimbell Foods*.

1. A Federal Interest in Bankruptcy Procedure

The federal character of Bankruptcy Code procedures, such as the 363 sale, may warrant equally federal gap-fillers. The property rights that compose the bankruptcy estate are defined by state law.[282] Yet, "the process that administers those rights for all of the creditors at one time and in a single forum"—rather than the free-for-all that would obtain outside bankruptcy—"is defined by the federal law embodied in the Code."[283] A distinction can thus be drawn between "entry" rights—which the debtor takes with it into bankruptcy—and "exit" rights—which are produced by bankruptcy itself.[284] Consistent with the Court's view that "bankruptcy . . . doesn't change much,"[285] entry rights remain governed by state law. However, exit rights—including "the procedures for commencing a

279. *Rodriguez*, 589 U.S. at 136-37.
280. *See* Atherton v. FDIC, 519 U.S. 213, 225-26 (1997) (collecting cases).
281. Va. Uranium, Inc. v. Warren, 587 U.S. 761, 778 (2019).
282. Butner v. United States, 440 U.S. 48, 55 (1979).
283. Moringiello, *supra* note 261, at 984.
284. *Id.* at 984-85.
285. Rodriguez v. FDIC, 589 U.S. 132, 137 (2020).

case, filing a claim, and distributing the debtor's property to creditors"[286]—are meaningless apart from federal bankruptcy law. Where questions arise regarding the implementation of exit rights, and statutory interpretation does not supply an answer, there is a case to be made for federal common law.

For *Texas Industries* purposes, "[t]he federal interest . . . is the bankruptcy procedure itself, which includes the determination of how each state-defined right will be treated in bankruptcy."[287] The content of the resulting common-law rules of bankruptcy procedure might ultimately come from state law—indeed, the Court has made this the default.[288] But that is a question for *Kimbell Foods*. At the threshold stage, there may be a federal interest in developing common law to interpret original rights and remedies produced by bankruptcy. On this view, the standard for transactions under § 363—a Code-created power with no direct analogue in state law—should be defined by federal common law. While federal courts lack "the power to make [the] 'thing'" used, sold, or leased under this section,[289] the act of doing so—and by extension, any standard of review—is a federal matter.

The primary obstacle to the entry-exit framework is the Court's reticence to raise the lawmaking power of bankruptcy judges beyond "the most ministerial judgments."[290] This framework—while not so broad as some proposals[291]—turns gaps in bankruptcy procedure into *tabula rasa*. Yet, as Douglas Baird and Anthony Casey observe, "the Court has consistently found that, when the underlying statutory language is unclear, there should be a presumption in favor of interpretations that limit the extent to which the bankruptcy judge can exercise her discretion where it may impact nonbankruptcy rights."[292] By enabling a judicial sale of the debtor, § 363 contains the power to definitively dispose of *all* nonbankruptcy rights. The modern Court would likely balk at the idea of vesting bankruptcy judges with such trans-substantive gap-filling authority.

2. A Federal Interest in Compensating Creditors and Rehabilitating Debtors

Even if a comprehensive procedural lawmaking power fails to garner the Court's approval, § 363 might still implicate a federal interest. It is hornbook law that, in adopting Chapter 11, Congress sought to achieve

286. Moringiello, *supra* note 261.

287. *Id.*

288. United States v. Kimbell Foods, Inc., 440 U.S. 715, 740 (1979).

289. Plank, *supra* note 153, at 686-87.

290. Alan Schwartz, *The New Textualism and the Rule of Law Subtext in the Supreme Court's Bankruptcy Jurisprudence*, 45 N.Y. L. SCH. L. REV. 149, 153 (2000).

291. Levitin, *supra* note 54, at 74 (advocating for a comprehensive "federal common lawmaking power in bankruptcy" not necessarily limited to procedural gap-filing).

292. Baird & Casey, *supra* note 155, at 222.

"the twin goals of ensuring an equitable distribution of the debtor's assets to his creditors and giving the debtor a 'fresh start.'"[293] This outcome-oriented understanding of the Code was recently advocated by the four Justices dissenting in *Purdue*, who would have read § 1123(b)(6)'s catchall expansively to effectuate bankruptcy's purpose of "preserv[ing] the debtor's estate so as to ensure fair and equitable recovery for creditors."[294] Like an unduly narrow reading of the Code, reflexively applying state law not drafted with bankruptcy in mind jeopardizes this purpose.[295]

For example, in *WVSV Holdings, LLC v. 10K, LLC*, the Ninth Circuit had to decide whether state or federal law determines when an interest accrues so as to become property of the bankruptcy estate.[296] The property in question was a claim for malicious prosecution which, under state law, did not accrue until the plaintiff-debtor's victory in the underlying suit.[297] Since the debtor filed for bankruptcy before winning the case, if state law applied, the claim need not have been disclosed on its schedules of assets and liabilities. The debtor would retain the right to sue for its own gain after bankruptcy,[298] thereby lifting a potential $300 million in proceeds from its creditors.[299] However, all relevant facts existed at filing, and the debtor had been litigating for nearly twenty years.[300] Substituting state law with the federal common-law standard of *Segal v. Rochelle*, the court held that the claim was "sufficiently rooted in the pre-bankruptcy past"[301] and thus distributable to creditors.[302]

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293. DeNoce v. Neff (*In re* Neff), 824 F.3d 1181, 1187 (9th Cir. 2016) (quoting Sherman v. SEC (*In re* Sherman), 658 F.3d 1009, 1015 (9th Cir. 2011)); *see also* Hoseman v. Weinschneider, 322 F.3d 468, 475 (7th Cir. 2003); Checkers Drive-In Rests., Inc. v. Comm'r of Pats. & Trademarks, 51 F.3d 1078, 1084 (D.C. Cir. 1995). Protecting creditors from "bankruptcy fraud and abuse" is so important to Congress that it has dedicated an entire division of the Department of Justice to doing so: the U.S. Trustee Program. *About the United States Trustee Program*, U.S. DEP'T JUST. (Oct. 7, 2025), https://www.justice.gov/ust/about-program [https://perma.cc/U2JT-YNTV].

294. Harrington v. Purdue Pharma L.P., 603 U.S. 204, 231 (2024) (Kavanaugh, J., joined by Roberts, C.J., Sotomayor & Kagan, JJ., dissenting).

295. Lawrence Ponoroff, *Constitutional Limitations on State-Enacted Bankruptcy Exemption Legislation and the Long Overdue Case for Uniformity*, 88 AM. BANKR. L.J. 353, 356 (2014); *see also* Randolph J. Haines, *It's Time to Return to Our Roots: The Bankruptcy Common Law that Governs Insolvent Estates*, 95 AM. BANKR. L.J. 501, 535 (2021) (contending that state law "considers only the interests of the two parties to a contract, tort or property issue" and is therefore insufficient to resolve the multilateral disputes that are typical of bankruptcy).

296. No. 21-16874, 2023 WL 5548975, at *1-2 (9th Cir. Aug. 29, 2023), *cert. denied*, No. 23-724, 2024 WL 2709350 (U.S. May 28, 2024).

297. *Id.* at *2.

298. *See In re* Doemling, 116 B.R. 48, 48-49 (Bankr. W.D. Pa. 1990).

299. *See* Appellee/Cross-Appellant 10K, LLC's Cross-Appeal Reply Brief at 1, *WVSV Holdings*, 2023 WL 5548975 (No. 21-16874).

300. *WVSV Holdings*, 2023 WL 5548975, at *2.

301. 382 U.S. 375, 380 (1966).

302. *WVSV Holdings*, 2023 WL 5548975, at *2. *But see id.* at *3-4 (Collins, J., dissenting) (asserting that state law, not federal common law, governs when property accrues for bankruptcy purposes (citing Butner v. United States, 440 U.S. 48, 55 (1979))).

In other circumstances, state law might be fit for the case. After all, statutory gaps "are presumably left . . . to [its] disposition."[303] Yet, federal common law allows courts to consider the consequences of applying state or judge-made law—flexibility that is desirable when interpreting rules as impactful as § 363. Since myriad bankruptcy rules can affect the value of the estate, a limit must exist on the scope of this reasoning to keep the federal exception from swallowing the state-law default rule. Still, few rules rival the capacity of § 363 to determine creditor recoveries and the debtor's future. Without laying down a blanket principle, there may be a federal interest in transactions under § 363 that justifies a federal common-law standard.

C. Under Kimbell Foods*, Federal Interests Do Not Overcome the State-Law Presumption*

While questioning whether the current Court would hold that the business justification test satisfies *Texas Industries*, the preceding Section offers two conceivable paths for it to do so: a federal interest in either Code-defined procedures or § 363's unique impact on the "twin goals" of bankruptcy. If this reasoning is wrong, and another interest does not compel federal common law, the state-law presumption is unrebutted. State law, of its own force, would thus control transactions under § 363. *Integrated Resources*, which inverted the parties' burdens relative to state law, would be ultra vires. The same would go for *Lionel*, which paid even less lip service to state law before laying down a judge-made rule.

Assuming a federal interest *does* exist as to 363 sales, the court must decide whether to absorb state law or create its own rule. The answer turns on *Kimbell Foods*'s three-factor test.[304] Applying this test to § 363, state law again appears to govern. That result is not compelled by a concern for disrupting commercial relationships: after *Erie*, investors should not expect state law to govern federal bankruptcy procedure. Rather, it follows from the adequate scrutiny that the corporate laws of most states prescribe for all-asset sales, which cabins the need for uniformity, while posing little risk to federal interests. The implications of these findings, which undermine the judge-made 363 standard, are the subject of Part III below.

1. A Uniform 363 Standard Is Unnecessary

The first two *Kimbell Foods* factors serve a similar purpose: to determine whether a uniform common-law rule is needed to avoid the disruption of a federal program by "disparate state . . . rules."[305] In evaluating this

303. O'Melveny & Myers v. FDIC, 512 U.S. 79, 85 (1994).
304. United States v. Kimbell Foods, Inc., 440 U.S. 715, 728-29 (1979).
305. *Id.* at 720-21, 732.

"uniformity" prong, courts have emphasized direct federal interests, often typified by government participation in the litigation.[306] Where federal interests are more diffuse, some courts have analogized to obstacle preemption.[307] The Third Circuit, for instance, opted for a judge-made source when "the very purpose of the [federal rule being interpreted wa]s to supersede private contractual arrangements that interfere[d] with . . . federal objective[s]."[308] On the other hand, signs that the federal government has accommodated state-law differences favor preserving them.[309] Where state law would generate "minimal" burdens, there is no need for a uniform rule.[310]

As applied to § 363, uniformity yields a mixed choice between state and federal law. Since "the readymade body of state law" controls by default,[311] equipoise is an endorsement of state standards. Before that determination can be made, however, several considerations bear mentioning. These are evaluated below; within each item, arguments favoring uniformity precede those against.

a. Bankruptcy-Specific Conflicts Not Contemplated by State Corporate Law

The economic realities of bankrupt firms differ from those of healthy ones in ways that make corporate law a questionable fit for bankruptcy transactions.[312] The monitoring mechanisms of corporate governance are intended to benefit shareholders, a constituency that bankruptcy often eliminates. Even where state law provides for the fiduciary duties of an insolvent firm (and the standards that accompany them) to shift from shareholders to creditors, their residual function in bankruptcy is an afterthought.[313] Misalignment between corporate-law means and bankruptcy

306. *See infra* notes 315, 319 and accompanying text.

307. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000) (holding that state law is preempted where it "undermines the intended purpose and 'natural effect' of" federal law). Given the Court's increasingly narrow view of obstacle preemption, the federal interest in uniformity that suffices to create common law might similarly be subject to a higher bar going forward. *See* Va. Uranium, Inc. v. Warren, 587 U.S. 761, 778 (2019) (observing that an "express or implied" preemptive purpose is needed to oust state law but questioning the adequacy of implied purposes, given the "speculation" needed to "discern what motivates legislators individually and collectively").

308. Off. Comm. of Unsecured Creditors of Columbia Gas Transmission Corp. v. Columbia Gas Sys. Inc. (*In re* Columbia Gas Sys. Inc.), 997 F.2d 1039, 1055 (3d Cir. 1993); *see also In re* Westfall, 376 B.R. 210, 215 (Bankr. N.D. Ohio 2007) ("[C]ourts give regard to uniformity as a key factor when . . . 'compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" (quoting 2 NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 36:9 (6th ed. 2006))).

309. *Kimbell Foods*, 440 U.S. at 729.

310. *Id.* at 730.

311. *Id.* at 740.

312. *See supra* notes 104-107 and accompanying text.

313. *See supra* note 229 and accompanying text.

ends (rescuing debtors and compensating creditors) is a uniform problem: a byproduct of the priority scheme that subordinates shareholder interests. Thus, it may warrant a uniform common-law solution, rather than a patchwork of state standards that, transplanted to bankruptcy, will suit its needs (or not) by happenstance.

Yet, without denying these concerns, there are several reasons to doubt that they overcome *Kimbell Foods*'s state-law presumption.

First, other than when congressional intent to oust state law is readily inferable from a statute but not express,[314] federal interests generally compel uniformity only in those "few and restricted instances" where they are implicated directly.[315] Unlike the federal refund provision in *Columbia Gas*,[316] § 363's open-ended framing is difficult to read as an indication of congressional intent to wipe clean the state-law slate. Of deeper relevance to the business justification test—a standard for reviewing whether a proposed sale satisfies the fiduciary duties of debtor management—the Court has previously held that federal interests are insufficient to create "federal common-law corporate governance standards."[317] Declining to lay down a uniform rule for the negligence of a federally chartered financial institution, in *Atherton v. FDIC*, the Court observed that "[it] did once articulate [such] . . . standards" but that they "did not [survive *Erie*] and that . . . state law, not federal common law, provides the applicable rules for decision."[318] One would expect the federal interest in corporate-governance standards to be even weaker as to entities that, like the average Chapter 11 debtor proposing a 363 sale, are not created by federal law. By extension from *Atherton*, perhaps state law supplies the 363 standard *a fortiori*.

Even distinguishing *Atherton*'s liability rule for banks from the sale standard for debtors on factual or legal grounds, that case is an indication of the high threshold that the Court requires to replace state law. Observing (with reference to *Kimbell Foods*) that the presence of the government as a party is not *sufficient* to compel a common-law rule, *Atherton* suggests that it may be near-necessary, citing a string of cases that involved either the federal government, international affairs, or an interstate controversy.[319] Lower-court cases applying *Kimbell Foods* to create common-law bankruptcy rules are consistent, largely involving the government or an

314. *See* Off. Comm. of Unsecured Creditors of Columbia Gas Transmission Corp. v. Columbia Gas Sys. Inc. (*In re* Columbia Gas Sys. Inc.), 997 F.2d 1039, 1056 (3d Cir. 1993); *see also supra* notes 307-308 and accompanying text.

315. City of Milwaukee v. Illinois, 451 U.S. 304, 313 (1981) (citation omitted); Rodriguez v. FDIC, 589 U.S. 132, 135 (2020).

316. 997 F.2d at 1056.

317. Atherton v. FDIC, 519 U.S. 213, 217, 220-21 (1997).

318. *Id.* at 218.

319. *Id.* at 225-26.

adjacent entity such as the trustee.[320] In comparison, the federal interest in § 363 is less concrete. The participants in these sales are private parties, the government is seldom present, and its interests (assuming they exist) have more to do with process legitimacy or the goals of the bankruptcy system than pecuniary harm.[321] Supposing § 363 implicates a federal interest that crosses the *Texas Industries* threshold, that interest may yet fall short of compelling uniformity at the *Kimbell Foods* stage.

Second, even if the federal interest in § 363 is great enough to merit analyzing the need for uniformity, the laws of most states appear to safeguard this interest well enough to justify retaining them. To the extent there is a federal interest in rules that maximize recoveries and preserve going concerns, they need not be identical. So long as "local law . . . affords a convenient and fair mode of disposition," the task of federal common law is to prevent only "substantially diversified treatment."[322] As applied to § 363, such treatment might look like a state-law rule that fails to equip judges with sufficient scrutiny to avoid wasteful sales.[323]

In most cases, incorporating state standards would give bankruptcy judges ample authority to vet 363 sales, despite the potential for inter-state variance over the applicable rule.[324] Delaware courts applying *Revlon* and *Unocal* to a company whose sale is "inevitable" are apt to scrutinize managerial decisions more closely than the intermediate degree entailed by the business justification test.[325] If any state law were to govern the 363 sale of a Delaware company in bankruptcy, under the internal-affairs doctrine,[326]

320. *See, e.g.*, Dzikowski v. N. Tr. Bank of Fla., N.A. (*In re* Prudential of Fla. Leasing, Inc.), 478 F.3d 1291, 1299 (11th Cir. 2007) (holding that "applying state law has the potential to frustrate the purposes of the Bankruptcy Code" where it would impede "[t]he power of the trustee to avoid certain transfers"); *Columbia Gas*, 997 F.2d at 1057 (observing "an even greater federal interest in this case than in [prior case law]," given that the natural-gas refunds at issue were "the backbone of the federal scheme to regulate the gas industry").

321. *See supra* Section II.B.

322. United States v. Standard Oil Co., 332 U.S. 301, 309 (1947).

323. *See* Atherton v. FDIC, 519 U.S. 213, 216 (1997) (noting that a state-law standard need not be supplanted where federal law "provides only a floor" and the state standard is "stricter").

324. *See* Byron F. Egan & Curtis W. Huff, *Choice of State of Incorporation—Texas Versus Delaware: Is It Now Time to Rethink Traditional Notions?*, 54 SMU L. REV. 249, 259 (2001) ("[T]here are substantial differences between the Delaware and Texas judicial approaches to the business judgment rule."); *infra* notes 331-333 and accompanying text.

325. *See supra* notes 38-41 and accompanying text. Though these cases are native to the hostile-takeover context, "Delaware courts apply a heightened standard of review [to] . . . . a[ny] final stage transaction—be it a cash sale, a break-up, or a transaction like a change of control that fundamentally alters ownership rights." Lonergan v. EPE Holdings LLC, 5 A.3d 1008, 1019 (Del. Ch. 2010) (emphasis omitted); Ronald Gilson & Reinier Kraakman, *What Triggers* Revlon*?*, 25 WAKE FOREST L. REV. 37, 38 (1990) (observing that *Revlon* also applies "[o]utside the setting of a hostile takeover").

326. "[A] widely accepted choice-of-law principle[,]" the internal-affairs doctrine provides that "matters peculiar to the relationships among or between [a] corporation and its current officers, directors, and shareholders" should be decided by its state of incorporation. Mohsen Manesh, *The Contested Edges of Internal Affairs*, 87 TENN. L. REV. 251, 253-54 (2020). To be sure, a minority of bankruptcy courts hold that the court's forum state, not the debtor's state of incorporation, supplies the applicable duties. *See infra* note 346.

it should be Delaware's evidently adequate law.[327] Delaware is the long-time venue of choice for incorporation.[328] Together with California, Florida, New York, and Texas, it accounts for a majority of all incorporations.[329] The corporate laws of states other than Delaware, including these, are less tested and therefore less clear as to which level of scrutiny applies to various managerial decisions.[330] Yet, with the possible exception of New York,[331] each of these leading states of incorporation appears to subject firm sales to heightened scrutiny, even if not expressly following *Revlon* or *Unocal*.[332] Moreover, while literature on the subject is more equivocal,

327. That said, Delaware law is not monolithic. In relevant part, Delaware LLCs may disclaim effectively all fiduciary duties. O'Reilly & Dayem, *supra* note 43. As between federal common law and no duty under Delaware law, a federal judge would likely opt for the former, contrary to the result suggested above (though, in keeping with *Kimbell Foods*'s preference for preserving state law, she may still absorb the disclaimed Delaware standard as the common-law rule of decision, *see supra* Section I.C). Perversely, under the Court's common-lawmaking tests, the 363 standard would turn not on any theory or policy of bankruptcy, but on the fortuity of whether the debtor's state of incorporation adopts corporate-law sale standards and whether the debtor disclaims them before bankruptcy. *See infra* Section III.A.3.c.

328. Among public companies and LLCs, respectively, 92% and 85% of those that incorporate out of state choose Delaware, while 94% of private companies are incorporated either there or their home state. Andrew Verstein, The Corporate Census 14 & n.48, 29 (Apr. 30, 2025) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5154952 [https://perma.cc/5CV6-4Y8Y] .

329. *Id.* at 19 fig.8.

330. Amy Simmerman, William B. Chandler III & David Berger, *Delaware's Status as the Favored Corporate Home: Reflections and Considerations*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 8, 2024), https://corpgov.law.harvard.edu/2024/05/08/delawares-status-as-the-favored-corporate-home-reflections-and-considerations [https://perma.cc/ZB85-XEE5].

331. *Compare* Hanson Tr. PLC v. ML SCM Acquisition, Inc., 781 F.2d 264, 283 (2d Cir. 1986) (citing *Revlon* and holding that, under New York law, defendant directors could be held liable for breach of their fiduciary duties in approving a lock-up transaction), *with* Matthew D. Cain, Sean J. Griffith, Robert J. Jackson, Jr. & Steven Davidoff Solomon, *Does* Revlon *Matter?: An Empirical and Theoretical Study*, 108 CALIF. L. REV. 1683, 1692 (2020) (listing New York among the states whose courts "ultimately rejected *Revlon* by reversing earlier decisions holding that *Revlon* duties applied").

332. For evidence from California, see Cain et al., *supra* note 331, at 1692 (listing California among the "nine states" that have "adopted" *Revlon*); and Michal Barzuza, *The State of State Antitakeover Law*, 95 VA. L. REV. 1973, 2012 (2009) (same). From Texas, see William D. Regner, *Governance in the Corporate Control Context*, *in* 1 CORPORATE GOVERNANCE: LAW AND PRACTICE § 12.02 (Stephen M. Hass ed., 2025) ("Texas uses a more stringent standard than *Unocal* when judging defensive measures."); and Barzuza, *supra*, at 2012 (including Texas among the states that "adopted *Revlon*"). To be sure, Texas corporate law is in flux and seems to be moving toward greater insulation of director decision-making from judicial vetting, albeit not yet in the context of change-in-control transactions. Bell et al., *supra* note 43. To the extent that these changes cause Texas law to fall short of the *Kimbell Foods* hurdle, they may yield federalization of the sale standard in bankruptcy.

The scrutiny prescribed by Florida law, which "corporate law scholars [more rarely] discuss," *see* Verstein, *supra* note 328, at 19, is more debatable. *Compare* Adam Chodorow & James Lawrence, *The Pull of Delaware: How Judges Have Undermined Nevada's Efforts to Develop Its Own Corporate Law*, 20 NEV. L.J. 401, 411 & n.90 (2020) (observing that "some states have adopted . . . *Unocal*" and listing Florida among them), *and* William J. Carney & George B. Shepherd, *The Mystery of Delaware Law's Continuing Success*, 2009 U. ILL. L. REV. 1, 34 n.181 (observing that "[s]ome federal courts applying state law have concluded that *Unocal* would apply in those jurisdictions" and providing Florida as an example), *with* Stuart R. Cohn, *Dover Judicata: How Much Should Florida Courts Be Influenced by Delaware Corporate Law Decisions?*, 83 FLA.

most other states seem to have their own *Revlon*,[333] which would conceivably be activated whenever the debtor is to be sold under § 363.[334] In all of these states, where "the state standard . . . is stricter" than what federal interests require, there is no need for federal common law.[335]

Third and finally, while the laws of a minority of states may fail to adequately protect federal interests, their inadequacy is not likely to compel a uniform rule for all cases. Nevada, which some have placed at the "bottom" of the corporate-governance race,[336] does not permit courts to review sales under anything stricter than the "nearly irrebuttable"[337] business judgment rule.[338] In light of bankruptcy's potential for perquisites, such laxity is likely insufficient for all-asset sales. A federal judge choosing between the laws of a state like Nevada and a common-law rule would seem compelled by federal interests to adopt the latter. Mounting concerns over a corporate "DExit" from Wilmington to Las Vegas,[339] if borne out by a greater number of Nevada (and similar) debtors, may prompt greater judicial replacement of state-law standards with federal rules like the

BAR J., Apr. 2009, at 20, 28 (noting that, "in determining whether target management's action was justifiable under fiduciary standards," it is possible that "a Florida court [would] look to *Unocal* for guidance" but that Florida's specific statutory provisions "intended to protect against unfair back-end mergers" should take precedence).

333. *Compare* Guhan Subramanian, *The Drivers of Market Efficiency in* Revlon *Transactions*, 28 J. CORP. L. 691, 704 (2003) ("[M]ost states outside Delaware follow *Revlon* . . . ."), *with* Barzuza, *supra* note 332, at 1989 (noting that "[t]hirty-five states have adopted directors' duties statutes" which, *contra Revlon*, "allow directors to take into account the interests of constituencies other than shareholders and/or the long-term value of the firm").

334. Relative to the business justification test, the superiority of state law as a safeguard against wasteful transactions is especially manifest if the relevant state law is the "considerably stricter" law of trusts. Bogart, *supra* note 17, at 159.

335. Atherton v. FDIC, 519 U.S. 213, 216 (1997).

336. Stephen M. Bainbridge, *Is Delaware SB 21 the Start of a Race to the Bottom?*, PROFESSORBAINBRIDGE.COM (Feb. 26, 2025), https://web.archive.org/web/20250328153643/https://www.professorbainbridge.com/professorbainbridgecom/2025/02/is-delaware-sb-21-the-start-of-a-race-to-the-bottom.html [https://perma.cc/DX42-956X]; Michal Barzuza, *Market Segmentation: The Rise of Nevada as a Liability-Free Jurisdiction*, 98 VA. L. REV. 935, 944 (2012). *But see* Bruce H. Kobayashi & Larry E. Ribstein, *Nevada and the Market for Corporate Law*, 35 SEATTLE U. L. REV. 1166, 1168-69 (2012) (suggesting that firms incorporate in Nevada not to "make it easier for them to cheat" but "to reduce their costs of controlling cheating").

337. Velasco, *supra* note 93, at 830.

338. Barzuza, *supra* note 332, at 955-56 ("The[] famous, enhanced standards from *Unocal v. Mesa Petroleum*, *Revlon v. MacAndrews & Forbes Holdings*, and *Blasius Industries v. Atlas* do not apply to Nevada corporations.").

339. *E.g.*, Stephen M. Bainbridge, *DExit Drivers: Is Delaware's Dominance Threatened?* 4-5 (UCLA Sch. L., Law & Econ. Rsch. Paper No. 24-04, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4909689 [https://perma.cc/DZS8-ZYMB]; Eric Talley, *A Contractarian Path Forward for Delaware: A Modest Proposal for SB21*, CLS BLUE SKY BLOG (Mar. 7, 2025), https://clsbluesky.law.columbia.edu/2025/03/07/a-contractarian-path-forward-for-delaware-a-modest-proposal-for-sb21 [https://perma.cc/Y4LH-YFUQ]; Jai Ramaswamy, Andy Hill & Kevin McKinley, *We're Leaving Delaware, and We Think You Should Consider Leaving Too*, ANDREESEN HOROWITZ (July 9, 2025), https://a16z.com/were-leaving-delaware-and-we-think-you-should-consider-leaving-too [https://perma.cc/AG7S-ZRZ9].

business justification test. As of now, however, reports of Delaware's demise appear greatly exaggerated.[340]

So long as debtors incorporated in states with inadequate sale standards remain a minority, the real fear is that a finding against Nevada law's fitness for federal purposes would be given res judicata effect on future debtors from states like Delaware. Yet, for better or worse, the holdings of bankruptcy courts are not generally binding even on themselves,[341] meaning that an earlier decision on one state law's (in)adequacy would not render bankruptcy courts powerless to treat another state's law differently. The risk remains that an appellate holding federalizing (or declining to federalize) the 363 standard may carry precedential weight in future cases where state law would have pointed the opposite way on first impression.[342] Still, the likelier outcome would seem to be a re-rolling of the *Kimbell Foods* factors for each new state law: an outcome that raises its own problems,[343] although inadequate scrutiny of judicial sales is not one of them. While the laws of some states could prove too undeveloped to be workable,[344] and applying (and re-applying) *Kimbell Foods* would get messy over time, the unique conflicts that bankruptcy generates do not seem to require uniform treatment of all-asset sales.

b. Administrative Inconvenience of Differing State Laws

Beyond assessing whether federal interests demand a uniform rule, *Kimbell Foods* directs courts to consider whether *dis*-uniform state laws would hamper program administration. There, this was not the case because "the [SBA's] own operating practices" not only apprised agents of interjurisdictional differences but "mandate[d their] compliance" with state law.[345] Here, on the other hand, most courts scrutinize bankruptcy transactions under the common-law business justification test. Hence, a major factor that favored state law in *Kimbell Foods* at first appears to point the other way. Requiring judges to follow state standards would

340. Bainbridge, *supra* note 339, at 5, 19 (reporting only two reincorporations out of Delaware in 2024 plus another four pending and concluding that "the [DExit] debate has not yet manifested itself in a mass flight from Delaware").

341. David C. Walker, *Precedential Power Policies*, 114 LAW LIBR. J. 167, 174 n.48 (2022); Rick B. Antonoff, *Latin America Update, Bancredit and the Application of Bankruptcy Code § 108 in Chapter 15 Cases*, 26 AM. BANKR. INST. J., Dec. 2007, at 48, 93.

342. *See infra* Section III.A.3.b.

343. *See infra* notes 480-481 and accompanying text.

344. *See supra* notes 336-338 and accompanying text; *see also* Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 686-87 (2002) (theorizing that, because Delaware dominates the interstate market for incorporations, states that have lost the competition for incorporations are left with stagnant, "less innovative" laws); Simmerman et al., *supra* note 330 (contrasting the "substantial benefits of Delaware law, its judiciary, and its corporate infrastructure" with the "less developed" corporate laws of other states).

345. United States v. Kimbell Foods, Inc., 440 U.S. 715, 731-32 (1979).

entail a break from current practice, application of numerous unfamiliar laws,[346] and greater administrative burdens.

While adopting state law would complicate judicial review of bankruptcy transactions, the Court has set a lofty bar for uniform federal standards, rejecting them unless "*necessary* to ease program administration."[347] Without denying that a uniform rule would be more convenient for the SBA's interstate lending operations, the *Kimbell Foods* Court found "no indication that variant state priority schemes would burden current methods of loan processing."[348] Underwriting decisions would proceed individually regardless, meaning that variations in state law were just another factor for the agency to consider before extending a loan. Similarly, courts would review 363 sales on a case-by-case basis no matter what standard applied, meaning any difference in the amount of process (however great) would be one of degree rather than kind. Make no mistake, replacing the business justification test with fifty state standards could become convoluted in practice.[349] Yet, this is a risk that the Court considered—and rejected—in *Kimbell Foods*, where it arose in the more troubling context of loan servicers, who could hardly be ascribed the legal expertise of federal judges.[350]

There is also less daylight between the federal and state inquiries contemplated by § 363 than there is between the standards at issue in *Kimbell Foods*. In that case, a uniform rule was the difference between a nationwide policy and needing to apprise nonlawyer agents of state-by-state commercial-law distinctions in "painfully particularized detail."[351] Here, even if federal law were jettisoned, the judicial task would stay the same, aside from the effort needed to familiarize oneself with out-of-state corporate law. Although considerable, this is a burden that *Erie* already guarantees and one that, applied to bankruptcy judges, arguably falls on the least-cost bearers in the federal system: "the primary adjudicators of state-law rights"

346. Where state law controls, courts are split as to whether the relevant state is that in which the debtor is incorporated, the court is located, or some other possibility. *Compare* Sama v. Mullaney (*In re* Wonderwork, Inc.), 611 B.R. 169, 194 (Bankr. S.D.N.Y. 2020) ("The Debtor was incorporated under Delaware law and claims for breach of fiduciary duty are governed by Delaware law under the internal affairs doctrine."), *and* Russel C. Silbrrglied, *Litigating Fiduciary Duty Claims in Bankruptcy Court and Beyond: Theory and Practical Considerations in an Evolving Environment*, 10 J. BUS. & TECH. L. 181, 207 (2015) (observing that bankruptcy courts only "occasionally . . . apply a different state's laws" than the state of incorporation and that cases applying forum-state law are likely "outlier[s]"), *with* PHP Liquidating, LLC v. Robbins (*In re* PHP Healthcare Corp.), 128 F. App'x 839, 843 (3d Cir. 2005) ("[W]e will adopt the choice of law rule of Delaware—the state in which the Bankruptcy Court resides."). Suffice to say that, under a state-law regime, 363 sales would be subject to many more disparate standards than now.

347. *Kimbell Foods*, 440 U.S. at 729 (emphasis added).

348. *Id.* at 733.

349. *See infra* Section III.A.3.

350. *See Kimbell Foods*, 440 U.S. at 733 (expressing faith in lending agencies to "readily adjust [their] loan transactions" to account for fifty state priority laws); *see also infra* note 456 and accompanying text (collecting critiques of the Court's ambivalence toward the downstream effects of its bankruptcy holdings).

351. *Kimbell Foods*, 440 U.S. at 730.

among federal judges.[352] As in *Kimbell Foods*, the courts' "own operating practices belie the[] . . . need[]" for a uniform 363 standard.[353]

c. Forum Shopping

At the same time, uniformity trumps interjurisdictional variance when it comes to preventing forum shopping. Although not squarely addressed by the Court's common-lawmaking precedents,[354] this concern is salient in bankruptcy, where debtors enjoy free rein over where they file.[355] This discretion comes from lax venue rules, which allow them to establish the necessary ties to nearly any federal district.[356] If differences in state law cause different sale standards to become available between districts, debtors will (all else equal) file wherever they believe that review of a proposed sale will be most lenient. A common-law regime would eliminate such "horizontal" arbitrage between bankruptcy courts—and do so without inviting true "vertical" forum shopping between federal and state courts,[357] since bankruptcy is an exclusively federal forum.[358]

In most cases, however, a state-law approach to the 363 standard would *not* yield differences between districts as to the law governing a debtor's sale. The question would remain as to which state's law to apply. Pursuant to the internal-affairs doctrine, most bankruptcy courts would answer with that of the debtor's state of incorporation, rather than the court's forum state.[359] The debtor would thus bring with it the governing standard wherever it goes, eliminating any strategic advantage to filing in states with more favorable law on all-asset sales. If anything, applying state law would lessen the horizontal forum shopping that bankruptcy's loose venue system currently invites. A small number of "magnet" courts account for an outsized share of corporate bankruptcy filings—a result that many attribute, in part, to the debtor-friendly interpretations of the Bankruptcy Code that

352. Dolan D. Bortner, *Mind the Gap: Fighting Forum Shopping in Transnational Bankruptcies Under Chapter 15*, 98 AM. BANKR. L.J. 416, 469 (2024).

353. *See* 440 U.S. at 731-32 (emphasizing the SBA's existing use of state law in rebuffing the agency's assertion of the need for a uniform federal standard).

354. *See* Alan M. Trammell, *Toil and Trouble: How the* Erie *Doctrine Became Structurally Incoherent (And How Congress Can Fix It)*, 82 FORDHAM L. REV. 3249, 3275 (2014) ("The Supreme Court never has entertained a serious challenge to the horizontal choice-of-law principles that give states broad discretion to apply their own law . . . ."); *see also* Bianco v. Erkins (*In re* Gaston & Snow), 243 F.3d 599, 606 (2d Cir. 2001) ("Regarding the federal interest in avoiding forum shopping, we believe there are only a limited number of cases in which this interest is implicated.").

355. Bortner, *supra* note 352, at 423.

356. *Id.* at 428 n.63.

357. Trammell, *supra* note 354, at 3273; *see* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 504 (2001) (discussing how significant variations in outcomes between federal and state courts could prompt forum shopping).

358. U.S. CONST. art. I, § 8, cl. 4.

359. *See supra* note 346 and accompanying text.

these courts offer.[360] Rather than granting bankruptcy courts a degree of interpretive agency with respect to provisions such as § 363, a state-law approach would relegate them to applying the same state law and leave them with one less carrot to attract out-of-state filings.

Without discounting the threat of strategic, eve-of-bankruptcy reincorporations to more permissive states like Nevada or filing somewhere bankruptcy courts do not apply the internal-affairs doctrine, it bears mentioning that the Court's common-lawmaking tests set a lower bound on state-law laxity. In the corporate-law context, Mark Roe famously observes that Delaware's ability to attract incorporations through manager-friendly law is limited by the threat of federalization if it strays too far from shareholder protections.[361] Similarly, a state's failure to vest the bankruptcy judge with adequate scrutiny to vet all-asset sales may yield imposition of a uniform federal standard under *Kimbell Foods*.[362] Adherence to the Court's precedents in bankruptcy would disincentivize debtors from prospecting for lighter sale standards in other states, limiting the risk of forum shopping and, with it, any need to preempt state law ab initio.

Finally, however much forum shopping between bankruptcy courts might result from absorbing state law, this concern appears not to exceed the Court's interest in preserving state law. The *Erie* doctrine embraces shopping within the federal system to avoid it between federal and state courts.[363] While federalizing the sale standard would not yield differences in filing patterns between federal bankruptcy courts and their nonexistent state bankruptcy counterparts, it *could* prompt would-be Chapter 11 debtors to seek out laxer state insolvency laws, such as assignments for the benefit of creditors (ABCs).[364] Such intrastate vertical shopping, albeit largely hypothetical, is exactly the sort of gamesmanship that the Court's *Erie* jurisprudence seeks to prevent, in turn supporting application of the same state-law sale standard in both federal and state courts. Any risk of opportunistic filings to be had from applying state law appears minimal—both positively and in view of the policy choices reflected in the Court's

360. Bortner, *supra* note 352, at 428-29; LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS 73-74, 103-07 (4th ed. 2008). *But see* David A. Skeel Jr., *Bankruptcy Judges and Bankruptcy Venue: Some Thoughts on Delaware*, 1 DEL. L. REV. 1, 20 (1998) (attributing this concentration of cases to the preferred courts' expertise and ability to facilitate "speedy confirmation of reorganization plans"); Harvey R. Miller, *Chapter 11 Reorganization Cases and the Delaware Myth*, 55 VAND. L. REV. 1987, 1991-95 (2002) (same).

361. Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 598-600 (2003).

362. *See supra* Section II.C.1.

363. Trammell, *supra* note 354, at 3273.

364. *See* REPORT AND RECOMMENDATION FROM THE STUDY COMMITTEE ON ASSIGNMENTS FOR THE BENEFIT OF CREDITORS TO THE COMMITTEE ON SCOPE & PROGRAM, COM. L. LEAGUE OF AM. 3 (Feb. 28, 2023), https://clla.org/wp-content/uploads/2023/Resources/2023nov_ABCA_Updated-Report-Mtg-Comments.pdf [https://perma.cc/CP8B-6DNT] (describing assignments for the benefit of creditors (ABCs) as "less expensive and more flexible than . . . bankruptcy," though recognizing that "the ABC process continues to differ from state to state").

precedents—and is therefore unlikely to rebut the presumption in favor of state law.

2. State Law Would Not Frustrate the Purposes of the Bankruptcy Code

Kimbell Foods's second prong implicates many of the same considerations as the first.[365] Intuitively, where state law would frustrate federal interests, a uniform common-law rule may be appropriate, and vice versa. Based on its implementation in prior cases, the impediments analysis appears to serve a belt-and-suspenders function: ensuring that, before a court declares the "readymade body of state law" unfit for its presumptive purpose, common lawmaking is strictly necessary to achieve federal objectives.[366]

In declining to adopt a common-law rule, the *Kimbell Foods* Court observed that the relevant loan program served primarily to provide credit to needy farmers, rather than to line the public purse.[367] This ex ante, distributional goal did not depend on government loans receiving superpriority after a borrower's insolvency—a holding reinforced by the SBA's admission that *some* private liens took precedence over its own and its ability to account for borrowers' credit risk in advance.[368] By contrast, in *Columbia Gas*, the Third Circuit found that state law fell short of federal needs. The statute at issue was "plainly designed to protect . . . consumer[s] . . . against exploitation at the hands of private natural gas companies."[369] If a supplier went bankrupt, refunds that it owed to consumers would therefore ideally be held in trust, rather than being property of the estate. Given the limits of state trust law, a federal rule allowing for "a more expansive definition" of trust was needed.[370]

Following the template of these cases, and assuming a federal interest in bankruptcy's "twin goals,"[371] judges must wield enough scrutiny to ensure that transactions maximally compensate creditors while leaving debtors with manageable obligations.[372] However, unlike in *Columbia Gas*, state law is generally up to the task.[373] There, the relevant refunds could not be fitted into the mold of either an express or a constructive trust,

365. *See supra* note 305 and accompanying text.

366. United States v. Kimbell Foods, Inc., 440 U.S. 715, 740 (1979).

367. *Id.* at 734-35.

368. *Id.* at 735.

369. Off. Comm. of Unsecured Creditors of the Columbia Gas Transmission Corp. v. Columbia Gas Sys. Inc. (*In re* Columbia Gas Sys. Inc.), 997 F.2d 1039, 1056 (3d Cir. 1993) (quoting Fed. Power Comm'n v. Hope Nat. Gas Co., 320 U.S. 391, 612 (1944)).

370. *Id.*

371. DeNoce v. Neff (*In re* Neff), 824 F.3d 1181, 1187 (9th Cir. 2016) (quoting Sherman v. SEC (*In re* Sherman), 658 F.3d 1009, 1015 (9th Cir. 2011)); *see supra* Section II.B.2.

372. *See supra* note 293 and accompanying text.

373. *See supra* Section II.C.1.a.

meaning that failure to invent a common-law third category would give the refunds to the very utility companies from which Congress intended to protect consumers.[374] By contrast, drawing sale standards from the corporate law of the debtor's state of incorporation would in most cases subject 363 sales to equal or greater scrutiny than the prevailing common-law test.[375] While problems of application may cause the proverbial juice to be worth less than the squeeze,[376] such pragmatic concerns have seldom moved the Court toward greater common lawmaking in bankruptcy,[377] and the sufficiency of state corporate law itself does not seem to be in doubt.

Similarly, and again without addressing the broader ramifications of subjecting bankruptcy to the Court's common-lawmaking tests, state law on asset sales is a better safeguard of federal interests than the state priority rules adopted in *Kimbell Foods*. If subordinating the SBA's loans was not enough to frustrate its lending program, it is difficult to imagine why adequately stringent state corporate law would undermine bankruptcy. Similar to the alternative of pre-screening borrowers in *Kimbell Foods*, any residual risk of state law's inadequacy may be dealt with through case-by-case choice-of-law determinations, rather than flat preemption. And like the SBA's assent to some state-law priorities superseding its own, the fact that *Integrated Resources* and other courts have looked to Delaware in defining their standards underscores the "vitality" of state law in reviewing bankruptcy transactions.[378] Judging by the Court's common-lawmaking tests, the threat that state law would frustrate federal interests (no less than the need for a uniform rule) seems minimal.

3. Yet, Neither Would Federal Law Greatly Disturb State-Law Commercial Interests

The final *Kimbell Foods* factor asks whether a judge-made rule would thwart the expectations of "[c]reditors who justifiably rel[ied] on state law" when entering commercial relationships.[379] Consistent with *Butner*'s state-law default rule, the Court presumed that it would.[380] However, others have doubted that this same solicitude would apply in other contexts.[381] For example, *Columbia Gas* disclaimed any state-law commercial

374. *Columbia Gas*, 997 F.2d at 1056.

375. To be sure, in the minority of cases where state law inadequately equips judges to review 363 sales, *Kimbell Foods* would seem to compel a federal common-law standard. *See supra* notes 336-340 and accompanying text.

376. *See infra* Section III.A.3.

377. *See infra* notes 455-456 and accompanying text; *infra* Section III.A.4.

378. Off. Comm. of Subordinated Bondholders v. Integrated Res., Inc. (*In re* Integrated Res., Inc.), 147 B.R. 650, 656 (S.D.N.Y. 1992).

379. United States v. Kimbell Foods, Inc., 440 U.S. 715, 739 (1979).

380. *Id.* at 739-40 ("Because the ultimate consequences of altering settled commercial practices are so difficult to foresee, . . . the prudent course is to adopt . . . state law . . . .").

381. Moringiello, *supra* note 261, at 991.

expectations as to "federally created property rights," such as the statutory right to a refund in that case.[382]

Applying these principles to 363 sales, perhaps the strongest case against state-law reliance interests is the fact that bankruptcy creates a federal forum into which creditors should not expect state law to transfer one-to-one. Property interests arise under state law,[383] and "bankruptcy . . . doesn't change much."[384] But it does change *some things*. Section 363 is a procedural device and,[385] while the Court has adopted state law as the federal rule of decision for some procedural matters,[386] such matters are the traditional domain of federal law.[387] After *Erie*, a litigant would be hard pressed to claim that she reasonably expected state procedures to apply in a federal forum like bankruptcy.[388] Where surprise remains, it is dealt with via the liquidation (or "best interest") test, which entitles creditors in bankruptcy to at least what they would obtain at state law.[389] Given the procedural character of § 363 and the extent to which bankruptcy preserves state-law interests, reliance is not especially salient.[390]

Still, this factor remains relevant in at least two respects. First, state law is liable to change over time—and with it, the reasonable expectations of commercial parties. A strong argument can be made for rebalancing the *Kimbell Foods* factors when a future case involves a different state's law.[391] As for the *same state*, the same might be true—or laying down a uniform rule today may preclude rebalancing tomorrow, even if that state's law looks nothing like it did before. While state law may be modified by the state legislature and judiciary, federal appellate courts are generally bound by their own precedents (which, of course, bind the lower federal courts,

382. Off. Comm. of Unsecured Creditors of the Columbia Gas Transmission Corp. v. Columbia Gas Sys. Inc. (*In re* Columbia Gas Sys. Inc.), 997 F.2d 1039, 1056 (3d Cir. 1993).

383. Butner v. United States, 440 U.S. 48, 54 (1979).

384. Rodriguez v. FDIC, 589 U.S. 132, 137 (2020).

385. *See supra* notes 282-289 and accompanying text.

386. *See* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 509 (2001) ("[T]he claim-preclusive effect of [a] California federal court's dismissal . . . on statute-of-limitations grounds is governed by a federal rule that in turn incorporates California's law of claim preclusion . . . .").

387. Dzikowski v. N. Tr. Bank of Fla., N.A. (*In re* Prudential of Fla. Leasing, Inc.), 478 F.3d 1291, 1299 (11th Cir. 2007).

388. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 92 (1938) ("The line between procedural and substantive law is hazy but no one doubts federal power over procedure."); *see also* Daniel B. Bogart, *Unexpected Gifts and Chapter 11: The Breach of a Director's Duty of Loyalty Following Plan Confirmation and the Postconfirmation Jurisdiction of Bankruptcy Courts*, 72 AM. BANK. L.J. 303, 312 (1998) ("[C]reditors may reasonably expect trustees from different jurisdictions to be governed by the same standard, worded the same.").

389. *In re* Ecoventure Wiggins Pass, Ltd., 419 B.R. 870, 874 (Bankr. M.D. Fla. 2009); Rollex Corp. v. Associated Materials, Inc. (*In re* Superior Siding & Window, Inc.), 14 F.3d 240, 243 (4th Cir. 1994).

390. Investors in distressed assets may have entered commercial relationships in reliance on the reasonable assumption that *federal common law*, which has supplied the 363-sale standard for forty years, would govern the disposition of these assets. However, these interests are not likely captured by the third prong of *Kimbell Foods*. *See infra* notes 437-440 and accompanying text.

391. *See infra* notes 476-479 and accompanying text.

too).[392] Fixing a federal standard therefore threatens an ever-widening gap between the rule applied in state and federal courts, inviting the very vertical forum shopping that the Court abhors.[393] Supposing that this tension may be massaged by later re-running *Kimbell Foods* only undermines the predictability that justifies deviating from state law in the first place.

Second, conceiving of commercial relationships as not only between the debtor and its creditors (or the creditors *inter se*), but within the debtor itself, there is reason to hesitate before imposing a judge-made standard. Companies retain directors and officers pursuant to contractual terms both explicit and implicit. Among the latter is the business judgment rule which, as noted, establishes a near-impenetrable barrier to the scrutiny of managerial decisions not tainted by self-interest.[394] If bankruptcy courts abandon state law for a stricter federal standard, it may increase managers' exposure to litigation, compared with what they believed they were signing up for. This could discourage directors and officers from sticking around a bankrupt company, compounding the financial and reputational considerations that may already incentivize them to leave. It likewise opens the debtor to costly and time-consuming lawsuits at the worst time in its existence.

In fairness, these concerns do not strongly contraindicate judge-made law since they are mitigated by other policy goals and provisions of state law. In the sale context, state scrutiny is often stricter than federal law,[395] meaning that a judge-made rule should not inherently chill the debtor's decision-making. State law also offers strategies to insulate managers beyond lax judicial review, from indemnification[396] to insurance.[397] Yet, such counterarguments render reliance at most neutral toward the question of whether a common-law 363 standard should draw from state or federal law. In the face of two other *Kimble Foods* factors favoring a state-law source, this factor at least weakly supports the same result.

III. Doctrinal and Practical Implications

Arriving at the end of the Supreme Court's common-lawmaking tests, and assuming a cognizable federal interest, the proper standard for bankruptcy transactions appears to be a federal common-law rule that absorbs the applicable state-law rule of decision. The business justification test follows the first half of this equation but deviates as to the source of its rule.

392. *See, e.g.*, Martha Dragich, *Uniformity, Inferiority, and the Law of the Circuit Doctrine*, 56 LOY. L. REV. 535, 538-40 (2010).

393. Trammell, *supra* note 354, at 3273.

394. *See supra* notes 92-93 and accompanying text.

395. *See supra* Section II.C.1.a.

396. DEL. CODE ANN. tit. 8, § 145(a) (2024).

397. *Id.* § 145(g). Even if these protections fail to stem managerial flight, avoiding the bankruptcy-specific conflicts discussed above may justify melting a few ice cubes. *See supra* Section II.C.1.a.

Lionel gives no credence to state law, while *Integrated Resources* reverses the litigants' burdens compared with the Delaware law that it purports to adopt, laying down a test identical to *Lionel*. If the preceding Part has struck the wrong balance, and the Court's precedents instead endorse a judge-made law of bankruptcy transactions, the shortcomings of the business justification test may still favor creating a more fact-sensitive rule for these transactions.[398] More likely, however, §§ 363-365—which together dictate how all corporate debtors contract and finance their way through bankruptcy and how one-third of them exit[399]—are subject to an incorrect standard.

Section III.A.1 begins by discussing why this errant business justification test is likely to make an appearance in a future case, despite its lengthy tenure and the small size of the Court's bankruptcy docket. Anticipating the Court to reverse, Sections III.A.2-3 consider whether the federal-state overlap that the Court's common-lawmaking tests envision might be suitable for bankruptcy transactions, but they conclude that such overlap would replace an imperfect-but-workable, judge-made system with a convoluted hybrid one. The business justification test is imprecise and perhaps not the right level of scrutiny for all cases, but it is expedient, as its adoption by courts across the country and continued use for over forty years attest. The same cannot be said for requiring bankruptcy judges to engage in complex choice-of-law analyses whenever they make common law. Section III.A.4 considers the counterargument that the repercussions of reversing the common-law sale standard might dissuade the Court from doing so. Drawing from precedent, it asserts that practicality is unlikely to cause the Court to deviate from formalism.

To avoid the business justification test's reversal or minimize reversal's impact, Section III.B.1 sketches the parameters of a Code amendment to authorize judicial lawmaking in bankruptcy. Anticipating the Court to chafe at locating this power outside of Article III, Section III.B.2 explores alternative institutional structures that would enable flexibility in bankruptcy without raising constitutional objections from the Court. These consist of an administrative-agency model or coupling the authorization of common lawmaking with Article III status for the bankruptcy courts.

A. The Doctrinal Flaw in the Business Justification Test Could Spur the Supreme Court to Replace Decades of Bankruptcy Precedent with Impractical Restraints on Common Law

The preceding Part suggests that the Supreme Court *would* reverse the business justification test if it ever got the chance, whether due to the lack of a federal interest or the adequacy of state law to protect that

398. *See supra* notes 103-120 and accompanying text.
399. *See supra* note 15 and accompanying text.

interest (assuming it exists). This Section suggests that the Court *is* likely to reverse—and soon. That might be a good thing: federal and state law overlap endlessly in bankruptcy, and the loss of the prevailing standard may yield just another example of this dynamic. In all likelihood, however, the wrench that reversal would toss into the fine-tuned mechanisms of bankruptcy transactions, and the cumbersome standards that would replace them, are cause to fear the end of the existing system.

1. The Business Justification Standard Is Ripe for Supreme Court Review

The foregoing common-law analysis, much like the following review of what reversal would mean for bankruptcy and beyond, is largely academic if the Court never takes a case involving the business justification test. For nearly half a century, it has not. Yet, features of the Court's approach to bankruptcy, together with recent developments in its case law, both explain the length of the error and make the 363 standard a prime candidate for certiorari.

First, the fact that this standard has lasted so long may be less an implicit stamp of the Court's approval than a function of how seldom bankruptcy cases reach the appellate courts. Bankruptcy cases outnumber the entire federal district-court docket.[400] Yet, whether for judicial disinterest[401] or the challenge of unscrambling scrambled eggs,[402] appellate

400. *Compare Bankruptcy Filings Rise 16.8 Percent*, U.S. CTS. (Jan. 26, 2024), https://www.uscourts.gov/news/2024/01/26/bankruptcy-filings-rise-168-percent# [https://perma.cc/U3DZ-DYG4] [hereinafter *2023 Bankruptcy Data*] ("[A]nnual bankruptcy filings totaled 452,990 in the year ending December 2023 . . . ."), *with* JOHN G. ROBERTS, JR., SUP. CT. OF THE U.S., 2023 YEAR-END REPORT ON THE FEDERAL JUDICIARY, 10-11 (2024), https://www.supremecourt.gov/publicinfo/year-end/2023year-endreport.pdf [https://perma.cc/GED2-TVSJ] (indicating that 339,731 civil and 66,027 criminal cases were filed in the federal district courts, for a total of 405,758 cases). To be sure, the vast majority of bankruptcies are personal, rather than business, cases. *2023 Bankruptcy Data*, *supra*. Hence, the usual case will not involve a business selling assets under § 363, which might also explain why a case implicating the business justification test has yet to reach the Court.

401. *See* Robert M. Lawless, *Legisprudence Through a Bankruptcy Lens: A Study in the Supreme Court's Bankruptcy Cases*, 47 SYRACUSE L. REV. 1, 4 (1996) ("[B]ankruptcy does not carry the ideological and emotional baggage of many public-law issues . . . ."); Megan McDermott, *Justice Scalia's Bankruptcy Jurisprudence: The Right Judicial Philosophy for the Modern Bankruptcy Code?*, 2017 UTAH L. REV. 939, 940 ("[B]ankruptcy is often regarded . . . as a somewhat esoteric area of practice . . . .").

402. Under the doctrine of equitable mootness, "appellate courts will not disturb transactions that have been consummated during or after a bankruptcy case." Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 790 (2010). However, in a number of recent cases, the Court has crossed swords with this doctrine and overturned confirmed reorganization plans. These include *Purdue* as well as *MOAC Mall Holdings LLC v. Transform Holdco LLC*, where a procedural distinction—between jurisdictional and waivable limits on appellate review—was enough for the Court to claw back property from a good-faith assignee that had owned the property for three years. 598 U.S. 288, 292-93 (2023). Skepticism of equitable mootness may be developing into something that all corners of the Court can agree on. Justice Jackson wrote for a unanimous Court in *MOAC*, and Justice Alito questioned the

bankruptcy precedent develops at a glacial pace. Scholars and judges had been debating the legality of third-party releases for three decades[403] before the Court got around to it.[404] The suspect standard for bankruptcy transactions might also be awaiting a rare chance to rise above the public-law deluge.[405]

Second, the question of what rules apply to bankruptcy transactions—while never squarely presented to the Court before—has been implicated by several prior petitions for certiorari,[406] meaning the next case to raise it will not be starting from scratch with the Court. Most recently, in *NextEra Energy, Inc. v. Elliott Associates, L.P.*,[407] the Court was asked to determine whether a breakup fee "should be reviewed . . . under the deferential 'business judgment rule' of 11 U.S.C. § 363, as the Fifth Circuit has held, or under the heightened [administrative expense] standard of 11 U.S.C. § 503, . . . as the Third Circuit [has] held."[408] While the petitioner framed this question as a choice between standards, the Court might well have inquired whether the "business judgment" (i.e., business justification) test was good law at all.[409] However, since the parties had consented around

doctrine in his prior life on the Third Circuit. Nordhoff Invs., Inc. v. Zenith Elecs. Corp., 258 F.3d 180, 192 (3d Cir. 2001) (Alito, J., concurring in the judgment) (contending that "equitable mootness . . . can easily be used as a weapon to prevent any appellate review of bankruptcy court orders confirming reorganizations plans" and that it "places far too much power in the hands of bankruptcy judges").

403. *Compare* Judith R. Starr, *Bankruptcy Court Jurisdiction to Release Insiders from Creditor Claims in Corporate Reorganizations*, 9 EMORY BANKR. DEV. J. 485, 486-87 (1993) (asserting that nonconsensual third-party releases cannot be granted under the Bankruptcy Code and that third-party releases require "consideration . . . with the opportunity for objecting creditors to opt out"), *and* Peter M. Boyle, Note, *Non-Debtor Liability in Chapter 11: Validity of Third-Party Discharge in Bankruptcy*, 61 FORDHAM L. REV. 421, 421-22 (1992) (same), *with* Casey & Macey, *supra* note 192, at 1001 (endorsing nonconsensual third-party releases as a means of "reduc[ing] costs for all parties" and contending that any risk of abuse can be "prevent[ed] . . . through reforms while preserving their benefits").

404. Harrington v. Purdue Pharma L.P., 603 U.S. 204, 226 (2024).

405. *See* Angie Gou, Ellena Erskine & James Romoser, *STAT PACK for the Supreme Court's 2021-22 Term*, SCOTUSBLOG 4-6 (2022), https://www.scotusblog.com/wp-content/uploads/2022/07/SCOTUSblog-Final-STAT-PACK-OT2021.pdf [https://perma.cc/6R9T-8CJ3] (reporting that, during the 2021-22 term, the Court decided only one bankruptcy case out of sixty-six dispositions, or 1.5% of its docket).

406. *See, e.g.*, Petition for a Writ of Certiorari at i, NextEra Energy, Inc. v. Elliott Associates, L.P., 587 U.S. 970 (2019) (No. 18-957) [hereinafter *NextEra* Petition for a Writ of Certiorari] (noting a circuit split as to the proper standard for 363 sales); Petition for Writ of Certiorari at i, Parker v. Motors Liquidation Co. (*In re* Motors Liquidation Co.), 565 U.S. 1113 (2012) (No. 11-542) (asking the Court to review "[w]hether the Treasury's use of a section 363 sale . . . to nationalize General Motors exceeded its statutory authority"). Petitioner in *Parker* included a copy of the district court's opinion, which followed *Lionel* in determining that "the business judgment [rule] was [the] appropriate" standard. Parker v. Motors Liquidation Co. (*In re* Motors Liquidation Co.), 430 B.R. 65, 83 (S.D.N.Y. 2010), *aff'd*, No. 10-4882-bk, 2011 U.S. App. LEXIS 24215 (2d Cir. July 28, 2011).

407. 587 U.S. 970 (2019).

408. *NextEra* Petition for a Writ of Certiorari, *supra* note 406, at i.

409. *Id.* at 22 ("Most importantly, the District Court for the Southern District of New York has sided with Fifth Circuit . . . in concluding that breakup fees are subject only to Section 363's business judgment rule." (citing Off. Comm. of Subordinated Bondholders v. Integrated

the dispositive issue—their contract stipulated to the fee being an administrative expense[410]—*NextEra* was perhaps a poor vehicle for the Court to consider *Lionel* and *Integrated Resources*. Not surprisingly, certiorari was denied.[411] Still, *NextEra* confirms that litigants care about the impact that harsher or more lenient standards can have on their transactions and are therefore likely to keep pressing this issue to the Court where it benefits them.

Third, one particular litigant—the U.S. Trustee—has seized on its recent *Purdue* success to raise dozens of challenges against what amounts to bankruptcy common law.[412] Although *Purdue* eliminated nonconsensual third-party releases, it declined "to express a view on what qualifies as a *consensual* release."[413] Neither does the Code define "consent."[414] Instead, through a generative lawmaking process reminiscent of *Lionel* and *Integrated Resources*, bankruptcy courts have offered their own answers, with some favored venues holding that notice and an opportunity to opt out suffice.[415] In the Trustee's view, however, such gaps in the Code must be filled by state law,[416] where consent would almost surely require more than a creditor's mere awareness that she is being asked to grant a release.[417]

While the Trustee has yet to draw a parallel between "opt out" releases and 363 sales, in their unexplained, judge-made source, both share a common nucleus of inoperative doctrine. The U.S. Trustee participates in every corporate bankruptcy and, even beyond its current common-law moment, is tasked with safeguarding the creditor interests threatened by insufficiently vetted sales, as the business justification test may sometimes

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Res., Inc. (*In re* Integrated Res., Inc.), 147 B.R. 650, 657 (S.D.N.Y. 1992))); *id.* at 31 n.18 (citing *In re* Lionel Corp., 722 F.2d 1063, 1070 (2d Cir. 1983)).

410. Brief of Respondents in Opposition at 2, *NextEra*, 587 U.S. 970 (No. 18-957). "[P]arties may generally stipulate to the substantive law to be applied . . . ." Branch Banking & Tr. Co. of Va. v. M/Y Beowulf, 883 F. Supp. 2d 1199, 1213 (S.D. Fla. 2012).

411. *NextEra*, 587 U.S. at 139.

412. *See, e.g.*, Objection of the United States Trustee to Motion of Debtors for Conditional Approval of Disclosure Statement and Establishment of Solicitation Procedures ¶¶ 27-31, *In re* True Value Co., L.L.C., No. 24-12337 (Bankr. D. Del. Feb. 4, 2025), ECF No. 860 [hereinafter True Value Objection]; The United States Trustee's Objection to the Prepackaged Joint Plan of Reorganization of The Container Store Group, Inc. and Its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code ¶¶ 17-21, *In re* The Container Store Grp., Inc., No. 24-90627 (Bankr. S.D. Tex. Jan. 21, 2025), ECF No. 150 [hereinafter Container Store Objection]; United States Trustee's Objection to Debtors' Disclosure Statement and Plan at 5-8, *In re* Spirit Airlines, Inc., No. 24-11988 (Bankr. S.D.N.Y. Jan. 21, 2025), ECF No. 412 [hereinafter Spirit Airlines Objection].

413. Harrington v. Purdue Pharma L.P., 603 U.S. 204, 226 (2024) (emphasis added).

414. True Value Objection, *supra* note 412, ¶ 29.

415. Dolan D. Bortner, Private Inequity: Better Health Care Through Business Law 53 n.455 (Aug. 29, 2025) (unpublished manuscript) (on file with author).

416. Container Store Objection, *supra* note 412, ¶ 17 (asserting that "[w]hether parties have reached an agreement—including an agreement not to sue—is governed by state law," the "only exception [being] if there is federal law that preempts applicable state . . . law" (citing Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 559 U.S. 393, 416 (2010) (plurality opinion))).

417. *Id.* ¶¶ 27-29; True Value Objection, *supra* note 412, ¶¶ 32-35; Spirit Airlines Objection, *supra* note 412, at 8-10.

invite.[418] Section 363 thus implicates the priorities of a uniquely motivated litigant. If the Trustee has its way, bankruptcy common law will soon have its day before the Court, whether through a return to *Purdue*'s unanswered questions or the 363 standard.

Fourth and finally, getting common law right matters so much to the Court that aberrant rules have caught its eye even when they are longstanding or relatively insignificant. In *Rodriguez*, the choice between federal and state law made no difference to the outcome,[419] a possibility that the Court acknowledged.[420] Like the business justification test, *Bob Richards* had been on the books for decades.[421] And unlike the rule for an array of bankruptcy transactions, it answered a niche question: which of two insolvent affiliates gets a tax return? Nevertheless, the Court granted certiorari "to underscore the care federal courts should exercise before taking up an invitation to try their hand at common lawmaking."[422] Since the Court is reticent to allow judicial lawmaking and reversed in *Rodriguez* merely to emphasize the point, it may be especially inclined to do so when the choice of standard matters—both to the outcome of the case and more broadly in practice.

2. The "Feel Good" Outcome: The Federal-State Overlap that Results from Reversal Might Not Deviate from How Bankruptcy Normally Works

Were the Court to hear a case involving the business justification test, it would likely reverse, holding that state law supplies the fiduciary duties and standards for bankruptcy transactions. This would require bankruptcy judges to toggle between state and federal law when reviewing transactions. In the usual case, federal law would govern 363 sales to the extent of any express criteria in the Code—e.g., the requirements for notice and a hearing and whether the sale is in the "ordinary course of business"[423]—after which point the analysis would revert to state law. Rather than simply slotting state law into the Code's gaps, however, the judge would need to further assess whether state-law rules are an adequate safeguard of federal interests (and whether such interests exist) so as to decide whether the case at bar compels a common-law exception. Compared with the singular,

418. *See supra* notes 103-113 and accompanying text.

419. *Compare* Rodriguez v. FDIC, 589 U.S. 132, 135 (2020) ("[T]he Tenth Circuit employed . . . *Bob Richards* . . . to hold that the FDIC, as receiver for the bank, owned the tax refund."), *with* Rodriguez v. FDIC (*In re* United W. Bancorp, Inc.), 959 F.3d 1269, 1271 (10th Cir. 2020) ("[W]e conclude, applying Colorado state law, that the . . . FDIC . . . is the owner of the federal tax refund that gave rise to this adversary proceeding.").

420. *Rodriguez*, 589 U.S. at 133.

421. W. Dealer Mgmt., Inc. v. England (*In re* Bob Richards Chrysler-Plymouth Corp.), 473 F.2d 262 (9th Cir. 1973), *overruled by*, *Rodriguez*, 589 U.S. 132.

422. *Rodriguez*, 589 U.S. at 138.

423. 11 U.S.C. § 363(b)(1) (2024).

flexible business justification test (with all its warts), this hybrid regime can be expected to introduce certain inefficiencies.[424]

Yet, bankruptcy has long been an amalgam of federal and state sources. In many respects, it already exhibits the vacillation between systems that a state-law default rule for bankruptcy transactions would entail.[425] Relevant to the question of fiduciary duties in bankruptcy, corporate law and the Code interact to enable the survival of many standard tools of corporate governance, such as shareholder lawsuits and voting, to the extent they do not impede bankruptcy objectives.

To take a recent example, *In re Korean Western Presbyterian Church of Los Angeles*[426] required the bankruptcy court to decide whether lawsuits challenging the identity of the debtor's true owners could proceed through state court despite the automatic stay.[427] Observing that "governance disputes are [generally] not stayed,"[428] the court held that these disputes[429] were an exception because they "[we]re so intertwined with the control of Debtor's property that they constitute[d] acts 'to exercise control over property of the estate.'"[430] However, since the state-law proceedings intruded minimally on the bankruptcy case and the "balance of hurt" favored the claimants, cause existed to modify the stay so the proceedings could continue.[431]

Comparable interplay between federal and state law arises in disputes over whether property belongs to the estate or is held by the debtor in trust, with federal law defining estate property and state law supplying the applicable trust law.[432] The same goes for the Court's common-lawmaking scheme, which courts (at least at the appellate level[433]) have long followed in fashioning bankruptcy-specific exceptions to state law where federal interests so require. In the 363 context, sale proponents with ample

424. *See infra* Section III.A.3.

425. Some have advocated leaning even further into this dynamic. Buccola, *supra* note 42, at 746 (envisioning "a stripped-down bankruptcy" whereby "supervision of the debtor's business would, for the most part, be left to the institutions of corporate law" and "[t]he bankruptcy judge's responsibilities would center on the consideration of extraordinary balance-sheet transactions designed to relieve financial distress").

426. 618 B.R. 282 (Bankr. C.D. Cal. 2020).

427. *Id.* at 286.

428. *Id.* at 287; *see also In re* Marvel Ent. Grp., Inc., 209 B.R. 832, 839 (D. Del. 1997) (recognizing that "matters of corporate governance in the orthodox sense," such as "a shareholder seeking to invoke its corporate governance rights," may proceed in spite of bankruptcy).

429. Claimants disputed "not just control of Debtor itself, but also which . . . organization govern[ed the] Debtor's structure" and whether or not the debtor had been merged into another entity. *In re* Korean W. Presbyterian Church of L.A., No. 20-bk-11675, 2020 Bankr. LEXIS 1778, at *3 (Bankr. C.D. Cal. Apr. 21, 2020).

430. *Korean W. Presbyterian Church*, 618 B.R. at 286 (quoting 11 U.S.C. § 362(a)(3) (2024)).

431. *Id.* at 288 (quoting Truebro, Inc. v. Plumberex Specialty Prods., Inc. (*In re* Plumberex Specialty Prods., Inc.), 311 B.R. 551, 559 (Bankr. C.D. Cal. 2004)).

432. 11 U.S.C. § 541(d) (2024); McCrey v. Hughes (*In re* Hughes), 354 B.R. 820, 823 (Bankr. S.D. Tex. 2006).

433. *See supra* notes 256-259 and accompanying text.

justification for a proposed transaction could also minimize the hassle of shuffling between standards by arguing that they meet the stricter of either state law or the business justification test. While the outcome-determinative potential of sale standards may impede federal-state alternative arguments,[434] debtors have raised comparable arguments in response to the U.S. Trustee's objections to "opt out" third-party releases.[435] Viewed in this light, reversing the business justification test would simply fold bankruptcy transactions into a pattern broadly applicable throughout the field.

3. The "Feel Bad" Outcome: Reversal Might Subject Bankruptcy Transactions to Unworkable Tests, Disrupting the Field and Others Dependent on Common Law

While a similar federal-state dynamic has functioned well enough in other areas of bankruptcy, there is reason to doubt that the same would be true for bankruptcy transactions. One can assume (with some confidence) that state law which is inadequate to vet these transactions would be ousted by the Court's common-lawmaking tests—a failsafe that prior authors to raise this issue have overlooked.[436] Even so, replacing the expedience of judge-made law with the Court's fact- and time-intensive tests would inflict considerable collateral damage on bankruptcy transactions, the likes of which these tests fail to address.

a. The Court's Precedents Would Overturn Longstanding Reliance on Common Law and Provide Less Certainty than Existing Rules—in Bankruptcy and Beyond

Reversing the business justification test would undermine legal certainty, not only in the short term (as restructuring practice adjusts to a new rule for bankruptcy transactions) but over time (owing to the inferior predictability of the new rule).

Starting from the immediate implications, courts have adhered to the business justification test for over forty years. This standard has governed nearly "all of the cases considering pre-confirmation section 363 sales"[437]

434. *See supra* notes 29-43, 134 and accompanying text.

435. *See, e.g.*, Reorganized Debtors' Objection to the United States Trustee's Emergency Motion for a Stay of Confirmation Order Pending Appeal ¶ 51, *In re* The Container Store Grp., Inc., No. 24-90627 (Bankr. S.D. Tex. Feb. 24, 2025), ECF No. 232 (asserting that "[c]ourts in Texas have recognized" that "mere silence may amount to an acceptance if the offeror requested that mode of indicating assent, and, by remaining silent, the offeree intended to assent" (first citing Union Carbide Corp v. Jones, No. 01-14-00574-CV, 2016 WL 1237825, at *5-6 (Tex. App. Mar. 29, 2016); and then quoting 2 RICHARD A. LORD, WILLISTON ON CONTRACTS § 6:70 (4th ed. 2024))).

436. *See supra* notes 104-110 and accompanying text (critiquing the bankruptcy courts' reliance on inadequate state law in reviewing 363 sales).

437. *See In re* Gen. Motors Corp., 407 B.R. 463, 488 (Bankr. S.D.N.Y. 2009), *aff'd sub nom.*, *In re* Motors Liquidation Co., 428 B.R. 43 (S.D.N.Y. 2010).

and transactions under §§ 364-365.[438] Investors in distressed firms have doubtlessly accounted for it when valuing their opportunities. Insofar as these commercial relationships anticipate a *federal* sale standard, they are not "predicated on state law" and may not be captured when weighing federal and state sources under *Kimbell Foods*.[439] Yet, they are of no less concern than state-law contracts—particularly given the size of the market in distressed-debt investing, which averaged nearly $50 billion in newly committed capital each year from 2018 to 2022.[440] Swapping out the existing standard would require a multi-billion-dollar industry to overhaul how it handles bankruptcy transactions.

Even after absorbing the transition costs of reversal, industry participants would enjoy less certainty under a post-common-law standard. Just as *Stern v. Marshall* ignited a flurry of challenges to the bankruptcy courts' ability to adjudicate state-law claims,[441] substituting state law for the business justification test would invite strategic suits disputing which state's law controls or seeking to federalize the standard. These suits can be expected to raise transaction costs and sacrifice value-accretive deals, since an investor unable to gauge the odds of protracted litigation over a proposed sale or DIP loan (and of the court granting or denying it) is less likely to make a play. The losers in these scenarios are not merely "vulture" hedge funds, but the many stakeholders of corporate debtors who would benefit more from an expeditious sale than waiting potential years for confirmation.[442] Less predictability for DIP lenders may mean that fewer debtors survive long enough to even get the latter option.

Residual uncertainty and litigation would also persist around how much of "the old soil comes with" the state-law sale standard when it is lifted into federal bankruptcy court.[443] As prior authors have feared,[444] shareholders would likely press their right to vote on sale, especially if they are out of the money and, by doing so, can extract a nuisance settlement

438. Bogart, *supra* note 17, at 196, 222-23.

439. *See* United States v. Kimbell Foods, Inc., 440 U.S. 715, 728-29 (1979) (explaining that a need to avoid "disrupt[ing] commercial relationships predicated on state law" motivates the choice between federal common-law and state-law rules).

440. *Distressed Debt Fundraising: The Key Numbers*, PRIV. DEBT INV. (Apr. 3, 2023), https://www.privatedebtinvestor.com/distressed-debt-fundraising-the-key-numbers [https://perma.cc/UB5X-EB7D]; *see also* Carolina Mandl & Davide Barbuscia, *Focus: Betting on a Recession, U.S. Distressed Debt Funds Seek Fresh Capital*, REUTERS (July 27, 2022, 5:04 PM EDT), https://www.reuters.com/business/finance/betting-recession-us-distressed-debt-funds-seek-fresh-capital-2022-07-27 [https://perma.cc/4ECA-CYM9] (reporting that distressed-debt funds raised $40 billion in 2021 and $45 billion in 2020).

441. *See infra* notes 495-502 and accompanying text.

442. *See* Jared A. Wilkerson, *Defending the Current State of Section 363 Sales*, 86 AM. BANKR. L.J. 591, 619 (2012) (reporting that 363 sales "are predicted to be about 65% faster than other [bankruptcy] cases"); 4 POWELL ON REAL PROPERTY § 37C.08 (2024) ("[M]ost chapter 11 proceedings extend over a two to three year period . . . .").

443. *See* SEC v. Jarkesy, 603 U.S. 109, 125 (2024) (posing this question in evaluating the doctrinal overlap between federal securities fraud and "its common law 'ancestor'") .

444. Buccola, *supra* note 42.

from creditors. While *Kimbell Foods* accounts for the burdens that selecting state law would place on program administration,[445] it is unclear that such downstream strategic implications—which go afield of the narrow question of which sale standard to use—would factor into the Court's common-lawmaking tests.

Reversing the business justification test would hamper more than just 363 sales. Federal common law supplies much of bankruptcy's modern toolset: from substantive consolidation[446] to third-party releases[447] and the power to grant routine "first-day" motions, including for the payment of critical vendors[448] and employees,[449] continuation of cash-management systems,[450] and maintenance of insurance on the debtor's operations.[451] Since the Court once welcomed the innovation of new rules in bankruptcy,[452] many of these doctrines developed independently of *Texas Industries* and *Kimbell Foods*: *Lionel* and *Integrated Resources* make no mention of them, nor do numerous other cases articulating common-law standards.[453] And

445. *See supra* Section II.C.1.b.

446. *In re* Owens Corning, 419 F.3d 195, 205 (3d Cir. 2005).

447. *In re* Purdue Pharma L.P., 633 B.R. 53, 103 (Bankr. S.D.N.Y.), *vacated*, 635 B.R. 26 (S.D.N.Y. 2021), *aff'd in part*, *rev'd in part*, *remanded sub nom.*, Purdue Pharma L.P. v. City of Grand Prairie (*In re* Purdue Pharma L.P.), 69 F.4th 45 (2d Cir.), *rev'd sub nom.*, Harrington v. Purdue Pharma L.P., 603 U.S. 204 (2024) (explaining that the third-party releases of members of the Sackler family have their "source . . . in federal common law" (citing Levitin, *supra* note 54, at 79-80, 83-84)); Brief of Adam J. Levitin as Amicus Curiae in Support of Petitioner at 1, 3, *Purdue Pharma*, 603 U.S. 204 (disputing the bankruptcy court's interpretation of his article and arguing that "the Sackler release is outside the scope of the Bankruptcy Power as originally understood" (capitalization omitted)).

448. Levitin, *supra* note 54 (citing *In re* Kmart Corp., 359 F.3d 866, 869 (7th Cir. 2004)).

449. Debtors' Motion for Interim and Final Orders (I) Authorizing (A) Payment of Prepetition Wages, Salaries and Related Workforce Obligations, and (B) Continuation of Benefits Programs, and (II) Granting Related Relief ¶ 99, *In re* Del Monte Foods Corp. II Inc., No. 25-16984 (Bankr. D.N.J. July 1, 2025), ECF No. 10 (asserting that payment of wages "satisfies the business judgment rule" and "should be approved under section 363(b) of the Bankruptcy Code").

450. Debtors' Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to (A) Continue to Operate Their Cash Management System and Honor Prepetition Obligations Related Thereto, (B) Maintain Existing Bank Accounts, (C) Perform Intercompany Transactions in the Ordinary Course, and (D) Maintain Existing Business Forms; and (II) Granting Related Relief ¶ 45, *In re Del Monte Foods Corp.* (No. 25-16984), ECF No. 15 ("[T]he Debtors may determine, in their business judgment, that opening new bank accounts and/or closing existing Bank Accounts is in the best interests of the estates.").

451. Debtors' Motion for Interim and Final Orders (I) Authorizing Debtors to Maintain Prepetition Insurance Policies and Surety Bonds, and Pay Related Prepetition Obligations, and (B) Renew, Replace, or Otherwise Modify Such Insurance Policies and Surety Bonds; (II) Modifying the Automatic Stay with Respect to the Workers' Compensation Program; and (III) Granting Related Relief ¶ 35, *In re Del Monte Foods Corp.* (No. 25-16984), ECF No. 9 (summarizing the judge-made tests by which courts distinguish ordinary from extraordinary transactions and asserting that, if insurance payments fall under the latter heading, they "should be authorized . . . under section 363(b) of the Bankruptcy Code, as they satisfy the 'business judgment' standard").

452. *See supra* notes 164-170 and accompanying text.

453. Neither *Owens Corning*, *Purdue*, nor *Kmart* cites *Texas Industries*, 451 U.S. 630 (1981), or *Kimbell Foods*, 440 U.S. 715 (1979). *See In re* Owens Corning, 419 F.3d 195 (3d Cir. 2005) (substantive consolidation); Harrington v. Purdue Pharma L.P., 603 U.S. 204 (2024) (third-party releases); *In re* Kmart, 359 F.3d 866 (7th Cir. 2004) (critical vendors).

since the error in the business justification test is common to many essential bankruptcy doctrines, its reversal could demand a large-scale amendment to the Code.[454] The alternative—requiring the bankruptcy courts to retrofit fifty years of doctrine into an inflexible test through case-by-case adjudication—is fantastical. Depending on how the common-lawmaking factors balance, many of these precedents might not even transfer. While commentators dismiss such "rigid adherence to the Code [a]s simply impractical in bankruptcy law,"[455] that has not stopped the Court before.[456] In a field long dependent on the "creativity and flexibility [of judges] . . . to formulate orders that promote the ends of bankruptcy,"[457] cabining common law would leave judges without time-honored solutions and with limited power to replace them.

The reverberations of reversal would be felt even outside of bankruptcy. In tax, like bankruptcy, the Supreme Court was silent on common lawmaking for decades before *Rodriguez*.[458] Like the *Bob Richards* rule that case reversed, many judge-made doctrines developed during the half-century that the Court permitted them. These include "substance-over-form" tests to capture tax evasion that hews to the strict letter, but not the purpose, of the Tax Code.[459] Hence, *Rodriguez* has ushered in fears that the Court may overrule these tests, which are now among the "most important tools for . . . attacking corporate tax shelters."[460] Some contend that practicality counsels against reading *Rodriguez* "to overturn . . . decades-old anti-abuse doctrines" at the same time as the more niche *Bob*

454. The need for such an amendment would likely catch Congress unawares. Assuming Congress understands the legal background against which it operates, *see supra* note 269 and accompanying text, judicial gap-filling is likely to have become an expectation on the Hill, limiting interest in modifying the Bankruptcy Code.

455. Levitin, *supra* note 54, at 84.

456. Stern v. Marshall, 564 U.S. 462, 520-21 (Breyer, J., joined by Ginsburg, Sotomayor & Kagan, JJ., dissenting) (questioning the wisdom of the majority's holding, which invites "needless" adjudication over whether bankruptcy courts can hear a particular counterclaim, despite the already "staggering" size of the bankruptcy docket); McDermott, *supra* note 401, at 960 (characterizing the Court's bankruptcy jurisprudence under Justice Scalia as "almost Kantian [in its] approach to statutory interpretation: choosing what [it] believe[s] to be the fairest reading of statutory text, regardless of the consequences"); Baird & Casey, *supra* note 155, at 230 (accusing the Court of "embrac[ing] an approach to bankruptcy that, quite apart from its logical coherence, is divorced from reality"); Randolph J. Haines, *The Conservative Assault on Federal Equity*, 88 AM. BANKR. L.J. 451, 478, 493 (2014) (criticizing the Court's formalism for "fail[ing] to address practical realities" and "lead[ing] to de-regulation of financial markets"); Seymour, *supra* note 159, at 1965 ("The Supreme Court was prepared . . . to countenance a Pareto-inferior result in the case before it for the sake of the correct legal rule." (citing Czyzewski v. Jevic Holding Corp., 580 U.S. 451, 469 (2017))).

457. Seymour, *supra* note 159, at 1927.

458. Beckett G. Cantley & Geoffrey C. Dietrich, Rodriguez v. FDIC*: The Supreme Court's Federal Common Law Hostility & Its Effects on the Economic Substance Doctrine*, 4 BUS. & FIN. L. REV. 93, 94, 99 (2020).

459. Slone v. Comm'r, 810 F.3d 599, 606 (9th Cir. 2015) (citation omitted).

460. Cantley & Dietrich, *supra* note 458, at 94; *see also* Jacob D. Nielsen, Note, *Textualism Without Tax Shelters: A Proposal for Integrating Judicial Anti-Abuse Doctrines with Textualism*, 101 B.U. L. REV. 1471, 1510-11 (2021) (discussing the capacity of "judicial anti-abuse doctrines" to override the text of the Tax Code).

Richards.[461] But if a standard as ubiquitous as the business justification test were reversed, it would suggest that the modern Court's views are as cut-and-dry as those Justice Kavanaugh expressed at oral argument: "Federal common law. We don't do that."[462]

Likewise, insider trading "has evolved through a process of common-law adjudication."[463] Since *Dirks v. SEC*,[464] the Court has held that a breach of the defendant's fiduciary duties is a precondition for liability[465] under Rule 10b-5.[466] Like the Bankruptcy Code, however, federal securities law does not traditionally impose its own fiduciary duties[467] (or even define insider trading).[468] Consistent with the Court's common-lawmaking tests, a longstanding camp of corporate-law scholars has therefore argued that insider trading should absorb state-law duties, absent a "significant federal policy interest," the likes of which they dispute.[469] Yet, lower courts have exceeded state law in defining the applicable duties,[470] raising the specter of incongruence with the Court's common-lawmaking tests. The Court may be more willing to make an exception of insider trading than bankruptcy.[471] Still, by neglecting the interest analysis compelled by *Texas*

461. Cantley & Dietrich, *supra* note 458, at 117.

462. Transcript of Oral Argument at 14, Rodriguez v. FDIC, 589 U.S. 132 (2020) (No. 18-1269).

463. Stephen M. Bainbridge, *Incorporating State Law Fiduciary Duties into the Federal Insider Trading Prohibition*, 52 WASH. & LEE L. REV. 1189, 1269 (1995).

464. 463 U.S. 646 (1983).

465. *Id.* at 664.

466. 17 C.F.R. § 240.10b-5(b) (2024).

467. More recent iterations of Rule 10b-5 appear to define the predicate duties more broadly than at state law. *See id.* § 240.10b5-2(b) (2024) ("For purposes of this section, a 'duty of trust or confidence' exists[, *inter alia*,] . . . . [w]henever a person agrees to maintain information in confidence . . . ."); John C. Coffee, Jr., *Mapping the Future of Insider Trading Law: Of Boundaries, Gaps, and Strategies*, 2013 COLUM. BUS. L. REV. 281, 284 n.4 (noting that federal judges have expanded the scope of fiduciary duties that may sustain an insider-trading action). Query whether a post-*Loper Bright* Court would recognize duties created through rulemaking, rather than legislation, and unknown to state law. *See infra* notes 562-565 and accompanying text.

468. Bainbridge, *supra* note 463, at 1269.

469. *Id.*; Michael J. Kaufman, *A Little "Right" Musick: The Unconstitutional Judicial Creation of Private Rights of Action Under Section 10(b) of the Securities Exchange Act*, 72 WASH. U. L.Q. 287, 316 (1994); *see also* Coffee, Jr., *supra* note 467 ("Conservative law professors have long argued the thesis that only such a state law grounded violation could support a Rule 10b-5 violation.").

470. *See, e.g.*, United States v. Whitman, 904 F. Supp. 2d 363, 369 (S.D.N.Y. 2012) (asserting that the Court's insider-trading precedents "implicitly assume[] that the relevant fiduciary duty is a matter of federal common law," since "they have described it and defined it without ever referencing state law").

471. The Court seems to have inferred an authorization of common lawmaking from Congress's "decision to draw upon common law fraud" in legislating prohibitions on securities fraud and insider trading. SEC v. Jarkesy, 603 U.S. 109, 125-26 (2024) (observing that "Congress deliberately used 'fraud' and other common law terms of art in the Securities Act, the Securities Exchange Act, and the Investment Advisers Act" and that the Court's "precedents therefore often consider common law fraud principles when interpreting federal securities law"); *id.* ("[I]nsider trading liability under Rule 10b-5 is rooted in the common law duty of disclosure . . . ." (citing Chiarella v. United States, 445 U.S. 222, 227-29 (1980))). Such authorization would align Rule 10b-

Industries and *Kimbell Foods*, insider-trading law is liable to be swept up in a reversal of the business justification test as well.

The many other fields that have grown reliant on federal common law would find themselves in a similarly vulnerable position.[472] In some cases, stare decisis might save purposive statutory interpretations ratified by the Court before its shift to textualism. As recently as *Kimble v. Marvel Entertainment, LLC*, the Court has held that "*stare decisis* carries enhanced force when a decision . . . interprets a statute" since, unlike in the constitutional context, opponents of the Court's holding are free to "take their objections across the street . . . [to] Congress."[473] This enhanced force applies "even when [the] decision has announced a 'judicially created doctrine' designed to implement a federal statute" (i.e., federal common law).[474] Yet, stare decisis is of limited value to doctrines that, like the business justification test, have never received the Court's approval. Moreover, the notion that erroneous judgments should stand simply because they are old seems to have lost sway with the Court even since *Kimble*.[475]

b. Either *Kimbell Foods* Would Need to Be Repeated *Ad Infinitum*, or a Snapshot of One State's Law at the Time of the Case Would Bind All States Forever

Related to the question of predictability in bankruptcy transactions, the Court's common-lawmaking precedents raise a "repeat application" problem[476]: once a court determines that state law is (not) sufficient to plug a statutory gap (e.g., the standard for 363 sales), does that holding bind future cases involving the same gap but different state law?[477] An affirmative answer seems absurd, in light of the varying degree to which the laws of different states accommodate the federal interests in bankruptcy. Having found that Delaware law ensures sufficient scrutiny of 363 sales, it would be strange to estop litigants from challenging a future sale under the much laxer law of Nevada.[478] By the same token, granting preclusive effect to a holding that Nevada law is inadequate to scrutinize bankruptcy

5 with "common law" statutes like the Sherman Act and away from the Bankruptcy Code. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899 (2007); *see also supra* note 241 and accompanying text (describing how Congress may authorize federal common lawmaking).

472. Cantley & Dietrich, *supra* note 458, at 98 ("Federal common law exists to some degree in most areas of the law . . . .").

473. 576 U.S. 446, 456 (2015).

474. *See id.*

475. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 264 (2022) (asserting that "*stare decisis* is not an inexorable command" and overturning the fifty-year-old holding of *Roe v. Wade*, 410 U.S. 113 (1973) (citation omitted)). To be sure, *Dobbs* was a constitutional case; hence, per *Kimble*'s avowed statutory focus, maybe the two can be distinguished.

476. Ernest A. Young, *Preemption and Federal Common Law*, 83 NOTRE DAME L. REV. 1639, 1641 (2008).

477. *Id.* at 1646-48.

478. *See supra* notes 336-339 and accompanying text.

transactions would preempt the perfectly able laws of many other states.[479] Were the Court to do so, it would evict the business justification test while in the same breath allowing it through the back door.

The likelier answer—that the Court's common-lawmaking tests must be re-run whenever their factors would strike a different balance—is hardly a picture of practicality. Parties who believe that the applicable state standard[480] is unfavorable would be foolish not to argue for a different one before the bankruptcy court or on appeal.[481] The pliable factors that the Court has articulated—whether there is a federal interest in the subject matter and whether state or federal law better serves that interest—supply plenty of ammunition for their arguments. Yet, given the debtor's limited resources, let alone for matters beyond salvaging its business, inviting litigation disconnected from the merits of the bankruptcy case is worrisome. Transplanted to bankruptcy, the Court's precedents would be fodder for unproductive adversary proceedings.

c. Additional Concerns: Reverse Preemption of Common Law by State Law Unattuned to Bankruptcy, and the Problem of Corporate Groups

Two other issues bear mentioning. First, the Court's common-lawmaking tests would cause the choice between federal and state law to no longer depend on which better achieves the goals of the Code. Instead, it would turn on whether the debtor's state of incorporation[482] decides to create a rule close enough to a procedure in the Code for that rule to be absorbed as the filler for gaps in the procedure. Even if federalism (not mere fortuity) is credited with animating this outcome, the Court will have held that the innovative power of federal bankruptcy judges ends where that of the states begins. If a bankruptcy court is the first to fill a gap in the Code, but state law later supplies an answer, must the common-law rule give way? Reverse preemption of this kind is rare enough in the federal system,[483] and it is troubling to think that a state senate (or judge[484]) could, by

479. *See supra* Section II.C.1.a.

480. One can anticipate additional litigation over which state's standard applies, particularly if the debtor is incorporated in a state other than its principal place of business or the bankruptcy case is proceeding in yet another state. *See supra* note 346.

481. *See* McDermott, *supra* note 401, at 952 ("[I]f there is no standardized way in which courts are likely to evaluate an issue, a litigant may be more willing to roll the dice on the theory that a higher court will see the issue differently.").

482. Or in some districts, the bankruptcy court's forum state. *See supra* note 346.

483. Ann E. Carlson & Andrew Mayer, *Reverse Preemption*, 40 ECOLOGY L.Q. 583, 584-85 (2013).

484. Despite their partial codification, *see, e.g.*, DEL. CODE ANN. tit. 8, § 145(a) (2024) (stipulating the extent to which breaches of fiduciary duties are indemnifiable), fiduciary duties are judicial creations, and their continued refinement remains a judicial act, *see* Armstrong v. Pomerance, 423 A.2d 174, 178 (Del. 1980) ("[T]he law governing fiduciary duties of corporate management is largely judge-made law, based on rather skeletal statutory provisions . . . .").

defining due care in the context of an asset sale, unwittingly decide if a debtor can reject a contract in bankruptcy. Whether the relevant state-law source is corporate law or trusts and estates, the creators of these rules will seldom have intended for them to take on such significance. Whatever the merits of vesting states with this power, the natural result will be to subject bankruptcy transactions to inconsistent standards, sourced from federal and state law according to chance.

Second, there is the question of what rule should govern corporate groups with assets across the country (or even the world).[485] If the debtor moves to sell several companies incorporated in different states, should each state dictate the duties applicable to its local firms, or should the laws of a single state—perhaps that of the bankruptcy court—bind the group? The former path could mean that the same transaction satisfies the duties of some states while breaching those of others. But the latter raises the question of how the corporate "center" would be identified, if not by yet another common-law rule. Carried to their logical conclusion, *Texas Industries* and *Kimbell Foods* would become a matryoshka doll, requiring (i) the choice-of-law rules of each state of incorporation to be compared against the hypothetical common-law choice-of-law rule for the group to decide (ii) which state's fiduciary duties to weigh against the hypothetical common-law sale standard. Considering the imprecision, exploitability, and waste that the Court's common-lawmaking tests would impose on bankruptcy transactions, Justice Story's endorsement of a general commercial law—"without respect to the [law] of any state"[486]—begins to seem prophetic.

4. The Likely Outcome: Given the Practical Harms, Would the Court Actually Reverse?

Eliminating the business justification test and subjecting the creation of common law to rigid rules would jeopardize the efficacy of bankruptcy and all other statutory schemes that have overlooked the Court's precedents. Without getting ahead of the analysis, addressing the Court's concerns may demand drastic changes to the form and powers of the bankruptcy courts, perhaps even their elevation into Article III.[487] Such a large departure begs the question of whether the Court would open this Pandora's box at all. Unfortunately, the arc of its bankruptcy and structural-

485. *See* Bortner, *supra* note 351, at 484-85.

486. Swift v. Tyson, 41 U.S. (16 Pet.) 1, 14 (1842), *overruled by*, Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); *see also* STEPHEN J. LUBBEN, THE LAW OF FAILURE: A TOUR THROUGH THE WILDS OF AMERICAN BUSINESS INSOLVENCY LAW 7-8 (2018) (endorsing "appl[ication of] a single set of rules to a company's collapse, regardless of whether its assets might be located in Irvine or Nashua").

487. *See infra* Section III.B.2.

constitutional jurisprudence offers little indication that the Court would be dissuaded from reversal by the practical problems that this would cause.

First, practical concerns, such as ease of program administration, do not even enter the Court's common-law analysis until midway through, if at all. As Part I demonstrates, decades of the Court's bankruptcy precedents undermine the notion that it would treat the field as an exception to general meta-constitutional principles. The standard for 363 sales would thus depend on the same common-lawmaking rules as anywhere. This being so, the Court would ask, as a threshold matter, whether a federal interest in bankruptcy justifies the creation of a common-law 363 standard. Part II offers two possible interests and assumes, for purposes of argument, that one of them would persuade the Court. However, it is equally (if not more) likely that the Court would reject the claim that the federal government has any interest in whether 363 sales maximize private value as opposed to, say, ensuring the priority of its tax liens in the proceeds.[488] It is therefore also likely that analysis of the 363 standard would stop at *Texas Industries* with nothing more than the *Rodriguez* repartee, "Federal common law. We don't do that."[489] In the lead to that conclusion, there would have been no time for practical considerations.

Second, even assuming the Court reaches the pragmatic balancing of *Kimbell Foods*, the concerns outlined above are unlikely to find their way onto the scale. The unpredictability, ancillary litigation, and repeat-application problems that would result from reversing the business justification test, though all strains on program administration, may not be cognizable factors in the mode of the Court's common-lawmaking tests. They are products of the tests themselves, which subject an automatic, judge-made rule to a convoluted "Step Zero" choice-of-law analysis.[490] Reminiscent of how observing a particle may change its trajectory, bankruptcy is diverted from the path of efficiency from the moment it is scrutinized under the Court's common-lawmaking tests.

Third, recent memory is replete with instances of the Court spurning bankruptcy administration in an "almost Kantian"[491] fidelity to formalism when the stakes were no lower than the 363-sale standard. In *Purdue*, the Court toppled a confirmed plan, overriding both equitable mootness and the dissent's plea that this would deprive "opioid victims . . . of the substantial monetary recovery that they long fought for and finally secured after

488. As *Kimbell Foods* attests, even the federal interest in maintaining the priority of federal liens may not justify common law. 440 U.S. 715, 733 (1979).

489. Transcript of Oral Argument, *supra* note 462, at 14.

490. *See* Baird & Casey, *supra* note 155, at 222-23 (arguing that the Court imposes a similar "step-zero" threshold on the bankruptcy courts' power to gap-fill the Code whenever this power implicates nonbankruptcy rights).

491. McDermott, *supra* note 401, at 960.

years of litigation."[492] These policy arguments fell on deaf ears, with the majority asserting that it is "the wrong audience for them."[493] While the Sacklers would ultimately return to the bargaining table at a higher price,[494] the majority had no way of knowing this and would have consigned tort victims to bringing individual lawsuits in Switzerland for the sake of doctrinal precision.

Stern v. Marshall is a further testament to how little weight the Court places on the consequences of its decisions for bankruptcy practice.[495] Without retracing the well-trodden path of that case,[496] it raised the question of whether a non-Article III bankruptcy court could hear a state-law counterclaim.[497] Historically, the answer was yes, enabling the penumbra of claims that surround a bankruptcy case to be heard in a single, convenient forum.[498] However, the Court held otherwise, finding that the counterclaim consisted of "the stuff of . . . traditional actions at common law," such that "the responsibility for deciding [it] . . . rest[ed] with Article III judges in Article III courts."[499] This holding again sounded over the practical concerns of the dissent, which accused the majority of announcing "a constitutionally required game of jurisdictional ping-pong between courts [that] would lead to inefficiency, increased cost, delay, and needless additional suffering among those faced with bankruptcy."[500] The dissent's fears appear to have been founded, with one bankruptcy court after *Stern* writing that the case "ha[d] become the mantra of every litigant who, for strategic or tactical reasons, would rather litigate somewhere other than the bankruptcy court."[501] While bankruptcy courts have innovated ways around

492. Harrington v. Purdue Pharma L.P., 603 U.S. 204, 227 (2024) (Kavanaugh, J., joined by Roberts, C.J., Sotomayor & Kagan, JJ., dissenting).

493. *Id.* at 226 (majority opinion).

494. Aaron Katersky, *Purdue Pharma, Sackler Families Boost Contribution in Opioid Settlement to $7.4 Billion*, ABC NEWS (Jan. 23, 2025, 12:18 PM), https://abcnews.go.com/Health/purdue-pharma-sackler-families-boost-contribution-opioid-settlement/story?id=118015777 [https://perma.cc/H4AR-963V].

495. 564 U.S. 462 (2011).

496. For a more thorough review, see Erwin Chemerinsky, *Formalism Without a Foundation:* Stern v. Marshall, 2011 SUP. CT. REV. 183, 186-89; Jonathan C. Lipson & Jennifer L. Vandermeuse, Stern*, Seriously: The Article I Judicial Power, Fraudulent Transfers, and Leveraged Buyouts*, 2013 WIS. L. REV. 1161, 1173-75; and David A. Kazemba, *Granting Certiorari on* In re Bellingham*: A New Case to an Old Problem*, 49 GONZ. L. REV. 383, 386-94 (2013).

497. *Stern*, 564 U.S. at 469.

498. *See* Kazemba, *supra* note 496, at 387.

499. *Stern*, 564 U.S. at 484 (quoting N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring in the judgment)).

500. *Id.* at 520-21 (Breyer, J., joined by Ginsburg, Sotomayor & Kagan, JJ., dissenting).

501. *In re* Ambac Fin. Grp., Inc., 457 B.R. 299, 308 (Bankr. S.D.N.Y. 2011); *see also* Latoya C. Brown, *No More Ping-Pong: The Need for Article III Status in Bankruptcy After* Stern v. Marshall, 8 FIU L. REV. 559, 578 (2013) ("A survey of cases post-*Stern* reveal[s] that litigants are raising *Stern* for a plethora of issues, [including] . . . . subject matter jurisdiction; bankruptcy courts' authority to hear claims based on state law; the bankruptcy courts on the issue of consent; the bankruptcy court's authority in Chapter 5 actions; and especially, the bankruptcy court's authority in fraudulent conveyance actions." (footnotes omitted)); Joan N. Feeney, *Statement to the*

Stern's inefficiency in later years, such as submitting proposed findings of fact and conclusions of law to the district court when they cannot enter final orders themselves,[502] this is more an indication of bankruptcy's ability to roll with the Court's punches than of the Court's hesitance to deal them when the harm is serious enough.

To be sure, others have read the Court's bankruptcy jurisprudence to reflect a more pragmatic "wealth-maximization norm."[503] On this understanding, the Court permits deviations from black-letter law earlier in the case—when senior creditors may be biased toward inefficient liquidations, and altering creditor entitlements is likelier to increase surplus—but precludes them later in the case—by which point creditor entitlements are fixed and certain, so alterations are less likely to enhance value.[504] Consistent with this purposive approach, perhaps the Court would spare the business justification test, which seeks to maximize estate value by balancing judicial scrutiny with the expedience of a pre-confirmation sale. However, even granting this characterization of the sale standard, it seems to fall more naturally on the latter, entitlement-oriented side of the dichotomy: like the structured dismissals in *Jevic*,[505] all-asset sales end the case. It is unclear why the Court would allow judges the discretion to deviate from otherwise-applicable state law at this once-and-for-all moment in the case, particularly in the face of countervailing constitutional norms that the Court appears to value over and above wealth maximization.[506]

Fourth and finally, were the practical costs of reversing the business justification test to enter the Court's mind at all, they would be overshadowed by constitutional concerns nearer to its heart. Commentators[507] and the Court[508] alike have identified federal common law as a threat to federalism and the separation of powers. While some may have overstated the risk,[509] expansive common lawmaking enables the courts to invade

House of Representatives Judiciary Committee on the Impact of Stern v. Marshall, 86 AM. BANKR. L.J. 357, 374 (2012) (describing the "explosion of motions" that *Stern* generated).

502. Laura B. Bartell, Stern *Claims and Article III Adjudication—The Bankruptcy Judge Knows Best?*, 35 EMORY BANKR. DEV. J. 13, 40-46 (2019).

503. Vincent S.J. Buccola, *The Janus Faces of Reorganization Law*, 44 J. CORP. L. 1, 4 (2018).

504. *Id.*

505. *See supra* notes 210-211 and accompanying text.

506. *See infra* notes 507-520 and accompanying text.

507. *See, e.g.*, Lumen N. Mulligan, *A Unified Theory of 28 U.S.C. § 1331 Jurisdiction*, 61 VAND. L. REV. 1667, 1735-39 (2008); Nathan W. Raab, *Displacement of Federal Common Law*, 58 WAKE FOREST L. REV. 709, 754 (2023); Sam Kalen, *Expanding the Federal Common Law?: From* Nomos *&* Physis *and Beyond*, 96 MARQ. L. REV. 517, 580-82 (2012); Ernest A. Young, *A General Defense of* Erie Railroad Co. v. Tompkins, 10 J.L. ECON. & POL'Y 17, 75-76 (2013); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 2, 32-36 (1985).

508. *See supra* notes 237-239, 246-248 and accompanying text.

509. Tidmarsh & Murray, *supra* note 139, at 616 ("In a country with a centuries-old common law tradition, the claim that courts lack the institutional or constitutional competence to create federal common law is too weak to be sustained in its strongest form.").

congressional territory.[510] When federal judges make law, they are also liable to preempt state law.[511] This worry weighs heavily on corporate law, an area of traditional state control, and compels even greater circumspection than when preemption is wielded by the Legislative Branch.[512] Congress acts only through state representatives, granting the states a voice (albeit indirect) in the undoing of their own law.[513] In the hands of federal judges, preemption lacks such federalist accountability. Viewing federal common law as a stumbling block at multiple levels of constitutional theory, the Court restricts it to a "narrow" role. Even within these confines, the Court may be growing less tolerant, with several members having recently advocated a stricter standard for supplanting state law in the related context[514] of obstacle preemption.[515]

The business justification test exemplifies these critiques, making its reversal—whatever the costs—seem likely before the current Court. Although development of the 363 sale has had its benefits,[516] they have come with a sizeable (and unexpected[517]) expansion of judicial power into an area constitutionally committed to Congress.[518] From the states' perspective, applying a judge-made rule to these transactions denies them a say over their most troubled corporations, exacerbating the loss of control already effected by the automatic stay of state-court litigation.[519] Moreover, the *Integrated Resources* rule that has emerged—with its sub silentio inversion of the Delaware business judgment rule and choose-your-own-

510. Mulligan, *supra* note 507, at 1736-37.

511. *Id.* at 1737.

512. *See, e.g.*, Wallis v. Pan Am. Petrol. Corp., 384 U.S. 63, 68 (1966) (observing that the decision as to "[w]hether latent federal power should be exercised to displace state law is primarily . . . for Congress" and so declining to create a federal common-law rule).

513. Mulligan, *supra* note 507, at 1737-38; City of Milwaukee v. Illinois, 451 U.S. 304, 312-313 (1981) ("The enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress.").

514. *See supra* notes 307-308 and accompanying text.

515. Va. Uranium, Inc. v. Warren, 587 U.S. 761, 778 (2019) (questioning the practicality of "[t]rying to discern what motivates legislators individually and collectively" and, thus, the continued vitality of obstacle preemption); Mary Rassenfoss, Note, *Unstable Elements: What the Fractured Decision in* Virginia Uranium *Means for the Future of Atomic Energy Act Preemption*, 47 ECOLOGY L.Q. 507, 535 (2020) (noting that "[o]nly two Justices—Alito and Roberts—are consistent supporters of obstacle preemption claims" and that "Justices Gorsuch and Thomas appear likely to reject broad preemption claims" given their "strict textualist approach to identifying preemptive intent" and their "broad view of states' rights").

516. Buccola, *supra* note 42, at 709 ("Consistent with much commentary, I find that . . . going-concern sales can enhance investors' returns relative to nonbankruptcy alternatives."); Wilkerson, *supra* note 442, at 626 ("As long as junior creditors can protect themselves—and it currently appears that they can—the current state of § 363 sales, which protects value and saves time, is precisely what these creditors want."); Steven Fruchter, *Section 363 Sales After the Covid-19 Pandemic*, 95 AM. BANKR. L.J. 367, 368 (2021). *But see* Anderson & Ma, *supra* note 113 (finding that 363 sales net less value than plan sales).

517. *See supra* note 268 and accompanying text.

518. U.S. CONST. art. I, § 8, cl. 4.

519. 11 U.S.C. § 362(a).

adventure interpretation by later courts—gives some credence to the Court's view that lawmaking is better left to the federal and state legislatures.[520] The practical harms of reversing the business justification test are therefore unlikely to justify ignoring what, to the current Court, would seem to be the test's tension with bedrock principles of constitutional law.

B. Bankruptcy's Common-Lawmaking Conundrum May Be Resolvable, but Placating the Court Could Require Amending the Code

The business justification test is on precarious ground. A future case could sever this and, by implication, many other essential common-law rules from their doctrinal roots,[521] constraining judicial innovation to byzantine tests that may prove impractical in the fast-paced world of federal litigation. To avoid disrupting the multi-billion-dollar market in corporate bankruptcy,[522] these rules would need to be grafted onto a new rationale. Since operationalizing amendments to the bankruptcy system rightly demands the detail that it has received in prior work,[523] the below merely sketches strategies for future authors to contemplate, overwrite, or fill in.

Section III.B.1 considers perhaps the most intuitive fix for the common-law defect in the 363 standard and throughout bankruptcy: congressional authorization. It also evaluates how broadly to draw the resulting preemption of state law and the feasibility of implementing amendments to the Code *before* reversal by the Court. Yet, the Court's antipathy for the structure of the bankruptcy courts and hesitance to vest them with too much Article III power may compel a more substantial transformation of the bankruptcy system. To that end, Section III.B.2 explores remaking the bankruptcy courts into administrative agencies with rulemaking power or elevating them to Article III status. In each case, the upsides and downsides of either approach are weighed against how thoroughly it addresses the Court's opposition to common lawmaking and the constitutionality of the bankruptcy courts.

Still, even accepting the practical weight of 363 sales, which account for a third of large corporate bankruptcies,[524] one might argue that such transformative solutions are disproportionate to any one problem of bankruptcy doctrine. This concern is salient, since broad reforms invariably bring collateral consequences. For example, any benefits to an Article III bankruptcy bench would come at the cost of the field's current insulation

520. *See supra* notes 240, 246-248 and accompanying text.

521. *See supra* notes 446-451 and accompanying text.

522. *Aggregate Liabilities of Companies Filing for Chapter 11 Bankruptcy in the United States from 2010 to 2021*, STATISTA, https://www.statista.com/statistics/1118933/us-bankruptcy-liabilities-companies-filing-chapter-11 [https://perma.cc/B5MH-K6Z3] (reporting between $32 and $145 billion in total annual liabilities among corporate filers with liabilities exceeding $25 million); *see also supra* note 440 and accompanying text.

523. *See infra* notes 554-555 and accompanying text.

524. *See supra* note 15 and accompanying text.

from the politicized appointments process.[525] Life tenure may likewise dull judges' sensitivity to changes in the restructuring marketplace.[526]

To the issue of means-end proportionality, it should be said that the implications of bankruptcy's dissonance with the Court's common-law-making tests are likewise broader than § 363, posing existential questions for bankruptcy and federal adjudication more generally. Reversal here would undermine the many other areas where, without heeding the Court's tests, bankruptcy judges have created common law. These include staples of corporate restructuring practice, from the payment of wages, utilities, and other expenses on the first day of the case to the maintenance of vendor relationships and bank accounts and, where necessary, the granting of releases and consolidation of separate debtors' estates.[527] At a theoretical level, reversal would also be the latest judicial roadblock to the vehicle through which Congress chose to effectuate its Article I bankruptcy power—a pattern that has seen the Court repeatedly weaken the bankruptcy system over structural-constitutional objections. Where this Section contemplates changes to the structure of the bankruptcy system, these are therefore motivated not by an interest in preserving the business justification test per se, but in ending the inter-branch Jenga[528] that leaves the bankruptcy courts at constant risk of having their legal innovations knocked down.

1. Amending the Code to Authorize Common Lawmaking and Preempt Contrary State Law

Beginning with the most straightforward proposal, Congress could cure the weakness in the bankruptcy courts' common-lawmaking power by amending the Code to grant them authorization. *Texas Industries* embraces federal common law wherever "Congress has given the courts the power" to make it.[529] Indeed, the Court has recently invited Congress to expand the scope of bankruptcy authority.[530] Parroting the language of Federal Rule of Evidence 501, an amendment might therefore empower bankruptcy courts to draw upon "[t]he common law—as interpreted . . . in the

525. Douglas G. Baird, The Powers and Jurisdiction of the Bankruptcy Courts: Reconsidering an Article III Bankruptcy Court, Address at the American Bankruptcy Institute's 38th Annual Lawrence P. King and Charles Seligson Workshop on Bankruptcy and Business Reorganization 5 (Sep. 19, 2012) (transcript available on Westlaw).

526. Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 936 (1988).

527. *See supra* notes 446-451 and accompanying text.

528. Daniel J. Bussel, *Textualism's Failures: A Study of Overruled Bankruptcy Decisions*, 53 VAND. L. REV. 887, 929 (2000).

529. 451 U.S. 630, 640 (1981).

530. *See* Harrington v. Purdue Pharma L.P., 603 U.S. 204, 226 (2024) ("Members of Congress enjoy the power, consistent with the Constitution, to make policy judgments about the proper scope of a bankruptcy discharge.").

light of reason and experience"—whenever the Code does not supply an answer.[531]

Albeit a paradigm shift for the modern Court, for bankruptcy, this would entail scant departure from the status quo. It would codify how many lower courts have understood bankruptcy "equity"[532] since *Norwest Bank Worthington v. Ahlers*, where the Court held that "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code."[533] Structurally, this statement is not an affirmation that "equitable powers [in fact] remain," and the Court's recent case law casts doubt on whether these powers supply a cognizable basis for judicial innovation. But if Congress says so, they do.

Still, congressional authorization is no panacea. *Kimbell Foods* would in many cases require courts to absorb adequate-but-not-optimal state law as the federal common-law rule—and in every case, to wrangle with arguments over whether to draw from state law or create a new rule. The ideal approach would therefore couple authorization of common lawmaking with preemption of state law to the extent of any conflicts with the federal judge-made rule to be created. *Kimbell Foods*'s directive to absorb state law is functionally equivalent to the presumption against preemption that the Court reads into acts of Congress.[534] Just as an express statement may rebut this presumption,[535] Congress could exempt bankruptcy from the state-law default rule by amending the Code to clarify its intent.

To be sure, the Court's deference to state law is not without reason. Restricting federal common law vindicates federalism and the separation of powers,[536] safeguards state-law commercial interests,[537] and spares litigants the unpredictability of *ad hoc* lawmaking.[538] Even when congressional intent is express, courts therefore read preemption with an eye toward salvaging state law.[539]

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531. FED. R. EVID. 501.

532. Coleman v. Cmty. Tr. Bank (*In re* Coleman), 426 F.3d 719, 726 (4th Cir. 2005) (affirming that "[t]he Bankruptcy Code bestows certain equitable powers on bankruptcy courts" but limiting courts to "the confines of the . . . Code" (quoting Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206 (1988))); *see also* Jacobsen v. Moser (*In re* Jacobsen), 609 F.3d 647, 661-62 (5th Cir. 2010) (providing a similar endorsement of bankruptcy equity); *In re* Ockerlund Constr. Co., 308 B.R. 325, 330 (Bankr. N.D. Ill. 2004) (noting that the bankruptcy courts' equitable powers can be used to gap-fill the Code); Levitin, *supra* note 54, at 21-22 (offering a reading of *Ahlers* that grants the bankruptcy court "a free hand in deciding whether and how to use its equity powers" whenever "there is not a specific Code provision directly on point").

533. 485 U.S. at 206.

534. *See* Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 281 (1987) ("[P]re-emption is not to be lightly presumed.").

535. English v. Gen. Elec. Co., 496 U.S. 72, 79 n.5 (1990).

536. *See supra* notes 507-515 and accompanying text.

537. *See supra* Section II.C.3.

538. *See supra* Section I.A.

539. Altria Grp., Inc. v. Good, 555 U.S. 70, 77 (2008) ("[W]hen the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that

To balance these considerations against the need for flexibility in bankruptcy, Congress could further amend the Code to institute something like the entry-exit framework discussed above.[540] Rights that litigants bring into bankruptcy would remain governed by state law, per *Butner*,[541] while rights arising from bankruptcy itself would be subject to federal law (and their gaps fillable by the bankruptcy judge). Litigation would likely continue to percolate around the edges. For example, although a party seeking to have the 363-sale power deemed an exit right probably has the better argument, a colorable case exists for an entry classification: the debtor could have sold its assets before bankruptcy, too. Yet, despite the potential for multiple interpretations of this binary in certain applications, it is no more malleable than many of bankruptcy's other key distinctions (e.g., "core" versus "non-core" proceedings[542] and "the ordinary course of business" versus "other than . . . the ordinary course"[543]). A framework such as this would replace *Kimbell Foods*—whose fact-sensitive factors allow each new case to be distinguished, impeding the creation of precedent—with straightforward statutory interpretation, as supplemented by interstitial lawmaking. In this way, it would afford greater certainty from case to case and reduce suits by nuisance creditors.

Lastly, there is the question of timing: should Congress authorize a federal common law of bankruptcy now or wait for the Court to reverse a sufficiently important common-law doctrine, such as the business justification test? Political will may favor delaying until the harm has materialized, and Congress's track record of amendments to the Bankruptcy Code has generally been reactive. Even the current division of labor between the bankruptcy and district courts—which positions the former as "adjuncts" presiding over cases referred by the latter—was not a proactive choice by Congress but the solution it devised after the Court rejected earlier legislation vesting more authority in the bankruptcy courts.[544] Yet, bankruptcy's common-lawmaking problem is Code-wide, and waiting for a section-specific reversal is apt to yield an unduly narrow response. A spate of asbestos cases led to the enactment of a provision authorizing bankruptcy

disfavors pre-emption.'" (quoting Bates v. Dow Agrosciences LLC, 544 U.S. 431, 449 (2005))); *see* Nat'l Meat Ass'n v. Harris, 565 U.S. 452, 467 n.10 (2012) (construing preemption narrowly to uphold state penalties "equivalent" to federal law, despite an express federal prohibition on "addition[al]" or "different" state penalties (alteration in original)). *But see* Puerto Rico v. Franklin Cal. Tax-Free Tr., 579 U.S. 115, 125 (2016) ("Resolving whether Puerto Rico is a 'State' for purposes of the pre-emption provision begins 'with the language of the statute itself,' and that 'is also where the inquiry should end,' for 'the statute's language is plain.'" (quoting United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989))).

540. *See supra* Section II.B.2.a.

541. Butner v. United States, 440 U.S. 48, 54 (1979).

542. 28 U.S.C. § 157(b)(2), (4) (2024).

543. 11 U.S.C. § 363(b)(1), (c)(1) (2024).

544. Wendy Lynn Trugman, *The Bankruptcy Act of 1984:* Marathon *Revisited*, 3 YALE L. & POL'Y REV. 231, 235-37 (1984).

judges to grant nonconsensual third-party releases in these cases.[545] The Court would later read this provision's specificity to foreclose the use of such releases outside of asbestos cases.[546]

Congress could avoid having its solutions judicially circumscribed by adding a blanket authorization of common lawmaking to Title 11—and doing so preemptively. This would transform the Bankruptcy Code into a common-law statute in the mold of the Sherman Act,[547] a proposal less likely to enflame the partisan sentiment that has stifled other attempts at amending the Code. Common law does not inherently favor any of bankruptcy's constituencies. The doctrines it creates can defeat malfeasant debtors' attempts to evade liability (through the substantive consolidation of separate estates) just as well as they release a debtor's affiliates from the claims of unknowing tort victims. Moreover, unlike proposals for a more equitable approach to venue in corporate bankruptcy (all of which have failed), expanding the power of all bankruptcy courts should not draw opposition from the magnet courts.[548] Still, if past is prologue, the likelier outcome may be a piecemeal authorization of common law in response to the reversal of a discrete doctrine such as the 363 standard.

2. Replacing the Bankruptcy Courts with Administrative Agencies or Article III Courts

The trouble with any common-law amendment is that, by repeatedly interfering with the bankruptcy courts' lawmaking authority, the Court might be trying not to say the quiet part out loud[549]: it resents non-Article III tribunals acting too much like *real* courts.[550] Lodged neither within Article III, a historical exception,[551] nor an administrative agency, the bankruptcy courts have been subjects of the Court's skepticism from the start.[552] The judge-made rules that undergird their day-to-day stand on an unsound foundation, which the Court could implode at any time. But if Congress

545. 11 U.S.C. § 524(g)(2)(B) (2024).

546. Harrington v. Purdue Pharma L.P., 603 U.S. 204, 222 (2024) (observing that, "[f]or asbestos-related bankruptcies—and only for such bankruptcies—Congress has provided" an exception to "the usual rule that a debtor's discharge does not affect the liabilities of others on that same debt").

547. See *supra* note 241 and accompanying text.

548. Bortner, *supra* note 352, at 480-81.

549. THE SIMPSONS*: A Star Is Burns* (Fox Broadcasting Co., aired Mar. 5, 1995).

550. *See, e.g.*, RONALD MANN, BANKRUPTCY AND THE U.S. SUPREME COURT 231-34 (2017); Bussel, *supra* note 528; *see also* COLLIER ON BANKRUPTCY app. at 6(b), pt. IV (16th ed. 2025) (observing that "[t]he strongest opposition" to Article III bankruptcy judges, as originally provided for in the act that created the Code, "came from the Judicial Conference of the United States under the Chairmanship of Chief Justice Warren Burger, which feared that the creation of so many Article III bankruptcy judges would dilute the prestige of the federal district judges"); LOPUCKI, *supra* note 360, at 83-85 (same).

551. Stern v. Marshall, 564 U.S. 462, 505 (2011) (Scalia, J., concurring) ("Article III judges are not required in the context of territorial courts, courts-martial, or true 'public rights' cases.").

552. Pardo & Watts, *supra* note 21, at 415-18.

were to front-end the Court by authorizing a common law of bankruptcy, the resulting rise in the bankruptcy courts' power could call into question their constitutional fitness to wield it. Compared with the Court's embrace of federal common law within insider trading and antitrust[553]—each of which is overseen by Article III judges—its opposition to judge-made doctrine in bankruptcy may have less to do with congressional authorization or a federal interest than with a residual discomfort over the constitutionality of non-Article III bankruptcy courts.

A hydraulic relationship may thus exist between the Court's suspicion of non-Article III common lawmaking (on the one hand) and of non-Article III jurisdiction (on the other), whereby legislation that drives down the former increases the latter. Albeit beyond the scope of this Article to explore exhaustively, the risk of further incursions from the Court galvanizes proposals that would either elevate the bankruptcy courts into Article III courts[554] or "demote" them into administrative agencies.[555] Bankruptcy's footing in the tripartite field of federal government remains unsteady, and the conventional exceptions to Article III are inapposite after *Stern*.[556] However, as evidenced by the replacement of bankruptcy "referees" under the 1898 Act with fully fledged judges under the 1978 Code,[557] Congress can and does revise the vehicle for its bankruptcy power over time. By reformulating the bankruptcy courts to suit the Court's pronouncements, Congress could avoid the existential crisis that occurs whenever a bankruptcy case implicating Article III beats the odds and survives the cert pool.[558]

In a vacuum, the agency approach may be preferable. It brings the benefit of notice-and-comment rulemaking, enabling flexibility in bankruptcy without the constitutional concerns of judge-made law.[559] It may also be more feasible, since rulemaking power could be grafted onto the authority of the U.S. Trustee's Office without a root-and-branch reform of the existing system.

Unfortunately, the Court has cabined common law in parallel with a retrenchment of its administrative-law jurisprudence. Commentators have

553. *See supra* note 471 and accompanying text.

554. Christopher F. Carlton, *Greasing the Squeaky Wheels of Justice: Designing the Bankruptcy Courts of the Twenty-First Century*, 14 BYU J. PUB. L. 37, 47-51 (1999); Robert G. Skelton & Donald F. Harris, *Bankruptcy Jurisdiction and Jury Trials: The Constitutional Nightmare Continues*, 8 EMORY BANKR. DEV. J. 469, 516 (1991); Jason C. Matson, Comment, *Running Circles Around* Marathon*?: The Effect of Accounts Receivable as Core or Noncore Proceedings on the Article III Courts*, 20 EMORY BANKR. DEV. J. 451, 522-25 (2004).

555. Pardo & Watts, *supra* note 21, at 455-60; Brook E. Gotberg, *Restructuring the Bankruptcy System: A Strategic Response to* Stern v. Marshall, 87 AM. BANKR. L.J. 191, 235-37 (2013).

556. 564 U.S. 462, 487-88 (2011) (rejecting "the application of the 'public rights' exception" to bankruptcy cases and further holding that bankruptcy courts are not "mere adjuncts of Article III courts").

557. LOPUCKI, *supra* note 360, at 83-84; Stern v. Marshall, 564 U.S. 462, 495 (2011).

558. *See supra* note 405.

559. *See supra* note 513 and accompanying text.

wondered for at least a decade whether the seemingly fangless nondelegation doctrine[560] might have bite in bankruptcy.[561] Now, having overturned the *Chevron* rule, the Court has "ma[de] clear that agency interpretations of [their statutory powers] . . . are *not* entitled to deference."[562] This is true even "[w]hen the best reading of a statute is that it delegates discretionary authority to an agency."[563] Given the further interplay of the major-questions doctrine,[564] whatever interpretive authority agencies retain has no bearing on "issue[s] . . . of 'deep economic and political significance.'"[565] As *Purdue* demonstrates, such issues are the usual fare of major bankruptcies. The tremendous effort of transforming the bankruptcy courts into agencies,[566] were it ever achieved, might thus amount to moving them from the frying pan into the fire.

The downsides of the alternatives beg the question of whether the bankruptcy courts should instead be lifted into Article III. As Douglas Baird notes, this would be "[t]he easiest way to put *Marathon* and *Stern* behind us."[567] It would also give effect to the original intent of Congress in enacting the Bankruptcy Code. The version that passed the House of Representatives provided for Article III bankruptcy judges.[568] The House deemed this essential because "Article III is the constitutional norm, . . . the limited circumstances in which the courts have permitted departure from [Article III] are not present in the bankruptcy context," and, "[e]ven if they were," a non-Article III court "most likely could not exercise the power needed by a bankruptcy court to carry out its proper functions."[569] After *Marathon*, *Ahlers*, *Stern*, *Rodriguez*, *Purdue*, and the many other cases in which the Court has chipped away at the congressional bankruptcy project, these words seem prescient.

560. The rule that Congress may delegate its legislative authority to the extent that it provides "an intelligible principle to which the person or body authorized . . . is directed to conform." J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928). Agency action has been invalidated on nondelegation grounds in only two cases, both nearly a century old. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541-42 (1935); Panama Refin. Co. v. Ryan, 293 U.S. 388, 414-20 (1935). However, some have doubted whether the usual justifications for this doctrine's limited application—namely, the "expertise, accountability, flexibility, [and] accessibility" of executive agencies—would "support Congress's decision to delegate policymaking to [bankruptcy] courts." Pardo & Watts, *supra* note 21, at 421-23.

561. Pardo & Watts, *supra* note 21, at 421-23.

562. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 371 (2024).

563. *Id.*

564. Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent "Major Questions" Doctrine*, 49 CONN. L. REV. 355, 358 (2016); *Loper Bright*, 603 U.S at 475 (Kagan, J., joined by Sotomayor & Jackson, JJ., dissenting).

565. *Loper Bright*, 603 U.S. at 405 (internal quotation marks omitted) (quoting King v. Burwell, 576 U.S. 473, 486 (2015)).

566. Pardo & Watts, *supra* note 21, at 456.

567. Baird, *supra* note 525, at 4.

568. H.R. 8200, 95th Cong. § 152 (1978).

569. H.R. REP. NO. 95-595, at 39 (1977).

The notion of Article III bankruptcy courts is not without its downsides,[570] which may ultimately balance in favor of maintaining the status quo, however great its tension with the Court's common-lawmaking and structural-constitutional precedents. Troy McKenzie argues that the formalities of Article III (i.e., life tenure and salary protection) are unnecessary in bankruptcy. He finds adequate substitutes in the field's limited exposure to appellate review and the insulation of its judges from political pressure on account of their receptivity to the bankruptcy bar.[571]

Others maintain that, more than redundant, Article III status would be harmful to bankruptcy and perhaps even the separation of powers. Thomas Plank contends that bankruptcy's placement outside of Article III—with its "judicial Power" over "Cases[] in Law and Equity"—puts a salutary check on Congress's temptation to exceed its bankruptcy power and intrude on the domain of the federal judiciary.[572] The risks associated with consolidating the powers of multiple branches into a specialist bureaucracy are potentially illustrated by the interplay of the Office of the U.S. Trade Representative (USTR), an administrative agency, and the U.S. Court of International Trade, an Article III tribunal. Coordination between these bodies grants the USTR both rulemaking power and the benefit of having its rules reviewed in the first instance by a sympathetic bench, whose specialization in international trade causes it to function "primarily as an administrative law court," despite possessing all the powers of Article III.[573] This favorable setup may allow the organs of foreign trade to supersede "[t]he normal limits on statutory delegations to administrative agencies"[574]: an outcome likely to be repeated on a greater scale if the same bankruptcy courts were vested with both authority to engage in the pseudo-legislative enterprise of common lawmaking and the adjudicative power of an Article III court. Additional concerns include replacing expert appointment with a politicized confirmation process[575] and stiffening the bankruptcy courts' mutability to new facts and policy goals.[576]

Yet, if bankruptcy cannot otherwise function within the constitutional scheme that the Court is erecting, these arguments lose considerable

570. Gotberg, *supra* note 555, at 217-19 (summarizing commentary on the subject).

571. McKenzie, *supra* note 402, at 751-52. Query whether limited appellate review of bankruptcy decisions will remain the norm for much longer. *See supra* note 402.

572. Thomas E. Plank, *Why Bankruptcy Judges Need Not and Should Not Be Article III Judges*, 72 AM. BANKR. L.J. 567, 568 (1998) (quoting U.S. CONST. art. III, § 1).

573. Kathleen Claussen & Timothy Meyer, *Economic Security and the Separation of Powers*, 172 U. PA. L. REV. 1955, 1967-68 (2024); *see also* John S. Baker, Jr. & Lindsey Keiser, *NAFTA/USMCA Dispute Settlement Mechanisms and the Constitution*, 50 U. MIAMI INTER-AM. L. REV. 1, 11 (2019) ("In any suit against the U.S. Department of Commerce in the U.S. Court of International Trade (CIT), the odds are the U.S. will prevail . . . . because the CIT is generally required to defer to the defendant-agency's interpretation of the laws and rules as a result of Congress having delegated rule-making authority to the agency.").

574. Claussen & Meyer, *supra* note 573, at 1968.

575. Baird, *supra* note 525, at 4.

576. Fallon, Jr., *supra* note 526.

weight. Article III status might not be needed to keep politics out of judging—but could prove essential to avoiding the disruption of another *Stern*. Many of the bankruptcy authors cited above were writing before that case, and all before *Rodriguez* and *Purdue* intimated the Court's increasing distaste for common lawmaking. While a functional approach to the separation of powers might allow bankruptcy to thrive within the interstices between Articles, that does not seem to be the view of the current Court. Bankruptcy courts remain vulnerable to the charge of unauthorized common lawmaking and, if ever their lawmaking becomes authorized, of exceeding the powers of Congress to delegate. To escape this catch-22, the constitutional beatification of bankruptcy may be in order.

Conclusion

Transactions under §§ 363-365 are everyday fare in Chapter 11. Yet, the duties and standards that govern them have been hampered by a murky rationale since the dawn of the Code. The most common rule for these transactions, the business justification test, is a departure from Delaware law foreign to bankruptcy, corporate law, and the district of the court that created it. Confusion around the prevailing standard comes from its roots in federal common law, a nebulous area in its own right. Reasoning that Congress and the states—not the federal judiciary—are the proper source for rules of decision, the Supreme Court has long subjected the lower courts' creation of common law to formulaic tests. These went unnoticed by the courts that pioneered the business justification standard. Applying them now, this Article has revealed that they compel a very different outcome from the consensus approach: the absorption of state law as the standard for bankruptcy transactions.

The resulting infirmity of the business justification test before an increasingly formalist Court is a clarion call not only for bankruptcy but for the many areas of federal practice that have developed common law independently of the Court's pronouncements. In taking aim at the jurisdiction and powers of the bankruptcy courts, the modern Court exhibits a conviction that neither time nor practicality should stand in the way of ideal law. Perhaps the same ought to compel Congress in the other direction. The risk of bankruptcy being denied its historical power to evolve with the facts on the ground, or its courts having their constitutionality questioned if that power receives congressional assent, is reason to ponder larger changes to the bankruptcy system than merely legislating a standard for § 363. Whether those changes involve a special dispensation for bankruptcy common law or even elevation into Article III, perhaps the time to ponder them is not in the wake of another watershed reversal, but now.