2013

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The Virtue in Bankruptcy

Matthew Bruckner*

In response to a gap in the corporate bankruptcy literature, this Article offers a new positive theory of corporate bankruptcy law based on virtue ethics. The dominant theory of corporate bankruptcy law—the creditors’ bargain model—is necessarily incomplete because it does not account for bankruptcy courts’ equitable and discretionary powers, or for bankruptcy courts’ need to consider decision-making criteria other than economic efficiency. By contrast, virtue ethics offers insights about these features of corporate bankruptcy law for at least three reasons. First, bankruptcy courts appear to give content to bankruptcy laws by using virtue ethical principles. Second, virtue ethics’ decision-making process—practical wisdom—provides insights into how bankruptcy judges balance concerns about efficiency, justice, and fairness when reaching decisions. This is particularly true when the bankruptcy court’s equitable jurisdiction or discretionary powers are implicated. Third, virtue ethics’ symbiotic consideration of means and ends parallels the process bankruptcy judges are called on to use when exercising their discretionary or equitable powers under numerous provisions of the Bankruptcy Code.

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INTRODUCTION

“From its founding the Nation’s basic commitment has been to foster the dignity and well-being of all persons within its borders.”

Bankruptcy courts are courts of equity. Congress has empowered
the bankruptcy courts to modify the contractual relationships between debtors and creditors, and to craft flexible remedies designed to ensure “complete justice” is done. \(^3\) To provide complete justice for parties to a bankruptcy case, the bankruptcy judge must consider principles such as equity, honesty, fairness, and justice. \(^4\) These principles must be considered for at least two reasons. First, the bankruptcy laws often specifically direct the bankruptcy courts to consider such principles. \(^5\) Second, as courts of equity, bankruptcy courts are obligated to “prevent injustice or unfairness in the administration of bankruptcy estates.” \(^6\) As a result, bankruptcy judges regularly “eschew[] mechanical rules” to ensure that the bankruptcy process achieves fair and just results. \(^7\)

The Bankruptcy Code \(^8\) also commits a substantial number of

“equitable authority to ensure ‘that substance will not give way to form, that technical considerations will not prevent substantial justice from being done’” (citing Pepper v. Litton, 308 U.S. 295, 305 (1939)). But see Hon. Alan M. Ahart, A Stern Reminder that the Bankruptcy Court is not a Court of Equity, 86 A.M. BANKR. L.J. 191, 200 (2012) (concluding that a bankruptcy court is not one of equity).


4. In re Kaiser Aluminum Corp., 456 F.3d at 340 (noting that because bankruptcy courts are courts of equity, they must invoke equitable principles like fairness and justice); see also Marrama v. Citizens Bank, 549 U.S. 365, 373 (2007) (denying conversion of a Chapter 7 proceeding to a Chapter 13 proceeding in spite of language in the Bankruptcy Code suggesting that conversion was mandatory because of dishonesty by the debtor).

5. See, e.g., 11 U.S.C. § 552(b)(1) (2012) (providing that prepetition security agreements cover related postpetition property unless “the equities of the case” require otherwise); id. §§ 1113(b)(1)(A), 1114(g)(3) (allowing the rejection or modification of collective bargaining agreements and retirements savings plans, respectively, only if “all creditors, the debtor and all of the affected parties are treated fairly and equitably”); id. § 1129(b) (allowing cramdown unless the plan discriminates unfairly, or if it is not “fair and equitable”); see also Allied Signal Recovery Trust v. Allied Signal, Inc., 298 F.3d 263, 268 (3d Cir. 2002) (“[E]quitable is defined as ‘signal[ing] that which is reasonable, fair, or appropriate.’” (quoting Things Remembered, Inc. v. Petracca, 516 U.S. 124, 133 (1995) (Ginsburg, J., concurring))); In re Patio & Porch Sys., Inc., 194 B.R. 569, 575 (Bankr. D. Md. 1996) (“This ‘equities of the case’ provision is intended to prevent secured creditors from receiving windfalls and to allow bankruptcy courts broad discretion in balancing the interests of secured creditors against the general policy of the Bankruptcy Code, which favors giving debtors a ‘fresh start.’”); In re Crouch, 51 B.R. 331, 332 (Bankr. D. Or. 1985) (discussing § 552(b)’s “equities of the case” rule).

6. In re Kaiser Aluminum Corp., 456 F.3d at 340 (citing Pepper, 308 U.S. 295 at 305). In a number of provisions of the Bankruptcy Code, bankruptcy judges are specifically directed to consider principles such as justice, fairness, honesty, and equity in rendering decisions. See, e.g., 11 U.S.C. § 1113(c)(3) (providing that collective bargaining agreements can only be rejected if “the balance of the equities clearly favors rejection”); see also id. § 1114(g)(3) (stating that certain pension plans are only subject to modification if “all of the affected parties are treated fairly and equitably, and is clearly favored by the balance of the equities”).


8. This Article uses the terms “Bankruptcy Code” and “Code” to refer to the Bankruptcy
decisions to the discretion of the bankruptcy judge. 9 For example, the Bankruptcy Code empowers bankruptcy judges to confirm a plan of reorganization, provided that the plan is feasible. 10 However, the Code does not define feasibility, nor does it provide any substantive guidance as to how feasibility should be determined. 11 Instead, the Code empowers bankruptcy courts to use their discretion to determine the relevant considerations in a particular case and then to apply those factors to the facts of that case. 12

9 See, e.g., 11 U.S.C. § 105; id. § 107(c)(1); id. § 303; id. § 324; id. § 349; id. § 350; id. § 362; id. § 363; id. § 365; id. § 502; id. § 503; id. § 1104; id. § 1112; id. § 1113; id. § 1114; id. § 1121; id. § 1129; see also In re Lionel Corp., 722 F.2d 1063, 1069 (2d Cir. 1983) (“[A] bankruptcy judge must not be shackled with unnecessarily rigid rules when exercising the undoubtedly broad administrative power granted him under the [Bankruptcy] Code.”). Precisely how much discretion bankruptcy judges possess is hotly contested. See, e.g., Law v. Siegel (In re Law), 435 Fed. Appx. 697, 698 (9th Cir. 2011) (holding that the Bankruptcy Appellate Panel “properly affirmed the bankruptcy court’s order granting the trustee’s surcharge motion because the surcharge was calculated to compensate the estate for the actual monetary costs imposed by the debtor’s misconduct and was warranted to protect the integrity of the bankruptcy process” (citing Latman v. Burdette, 366 F.3d 774, 786 (9th Cir. 2004)), cert. granted, 133 S. Ct. 2824 (2013); cf. Adam Feibelman, Defining the Social Insurance Function of Consumer Bankruptcy, 13 AM. BANKR. INST. L. REV. 129, 153–54 (2005).

10 See 11 U.S.C. § 1129(a)(11) (stating that the court shall not confirm a plan unless it finds that “[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan”); see also In re Geijsel, 480 B.R. 238, 256–57 (Bankr. N.D. Tex. 2012) (describing how feasibility is required for confirmation).

11 “Feasibility” is a shorthand reference to the requirements of § 1129(a)(11) of the United States Code. See In re Geijsel, 480 B.R. at 256.

12 In response, bankruptcy courts have generally considered factors such as the debtor’s proposed capital structure, the earning power of the business, economic conditions, the ability of the debtor’s management, and the probability that existing management will remain in place. See Consolidated Rock Prods. Co. v. Du Bois, 312 U.S. 510, 526 (1941); see also In re Nellson Nutraceutical, Inc., No. 06-10072, 2007 WL 201134, at *27–28 (Bankr. D. Del. Jan. 18, 2007) (citing Consolidated Rock Prods. with approval for the proposition that an estimate of earning capacity must be based on all relevant facts); In re Geijsel, 480 B.R. at 257 (“Courts have employed the following factors in determining whether a plan is feasible: the debtor’s capital structure, the earning power of the business, economic conditions, the ability of debtor’s management, the probability of continuation of management, and other related matter (citing In re Mortg. Inv. Co. of El Paso, 111 B. R. 604, 611 n.8 (Bankr. W.D. Tex. 1990))). However, the test is a loose one that allows courts to weigh the various factors at their discretion, including weighing any particular factor at zero. See Harbin v. IndyMac Bank FSB (In re Harbin), 486 F.2d 510, 521 (9th Cir. 2007) (noting that bankruptcy courts may exercise equitable discretion); see also In re Geijsel, 480 B.R. at 257 (noting that bankruptcy courts may ignore various factors (citing In re Landing Assocs., Ltd. 157 B.R. 791, 819 (Bankr. W.D. Tex. 1993)); NATHALIE MARTIN & OCEAN TAMA, INSIDE BANKRUPTCY LAW: WHAT MATTERS AND WHY 178 (2008) (“[T]he feasibility test is applied by the courts on a case-by-case basis within the very broad discretion of the bankruptcy court.”); Robert A. Sauro, Chapter 11 Confirmation: Increasing Judicial Discretion, 4 BANKR. DEV. J. 191, 206 (1987) (noting that courts consider many factors
Existing bankruptcy scholarship has addressed neither the role of bankruptcy courts as courts of equity nor their substantial discretionary powers. Instead, scholars have largely focused on debating the appropriate goals for our bankruptcy laws. Some scholars have

when determining feasibility).

13. But see Karen Gross, Failure and Forgiveness: Rebalancing the Bankruptcy System 216 (1999) (criticizing textualist interpretations of the Code and claiming that judges must be able to look to policies that lay behind the text in order to reach correct decisions).

advanced a view of bankruptcy based on the so-called creditors’ bargain model.\textsuperscript{15} They suggest that bankruptcy laws should only seek to accomplish two things: (i) maximize the value of the bankruptcy estate and (ii) respect ex ante contractual entitlements to the greatest extent possible.\textsuperscript{16} Other scholars have taken a wider view and suggest that bankruptcy laws are appropriately focused on reorganizing struggling businesses, preserving jobs, protecting taxing authorities, redistributing assets, enhancing community stability, and other similar aims.\textsuperscript{17} Missing from the debate, however, has been an attempt to develop a positive theory of bankruptcy law that adequately explains the most salient features of our current bankruptcy system, including the equitable and discretionary powers of bankruptcy courts, and Congress’ decision to privilege decision-making criteria other than economic efficiency.\textsuperscript{18}

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\textsuperscript{16} See Jackson, supra note 15, at 24 (“Bankruptcy law is best approached by separating . . . the question of how the process can maximize the value of a given pool of assets and the question of how the law should allocate entitlements.”); see also Butler & Gilpatric, supra note 15, at 270–71 (describing that the two goals of bankruptcy are maximizing values and dealing with allocating entitlements); Casey, supra note 15, at 766 (noting that the “only goal of bankruptcy law is to maximize the value of the firm in bankruptcy”); Jackson & Scott, supra note 15, at 170.

\textsuperscript{17} See Warren, Bankruptcy Policy, supra note 14, at 776, 788 (asserting that bankruptcy serves “the public interest” beyond the interests of the disputing parties” in recognition “of the larger implications of a debtor’s widespread default and the consequences of permitting a few creditors to force a business to close”); see also Charles J. Tabb, The Future of Chapter 11, 44 S.C.L. Rev. 791, 804 (noting that the greater good of the community has always been relevant to bankruptcy policy); Warren, Bankruptcy Policymaking, supra note 14, at 355 (recognizing the Code gives protection to persons with no formal legal rights); Warren, Untenable Case, supra note 14, at 467 (stating that bankruptcy serves to redistribute value); Haviv-Segal, supra note 14, at 11 (“[A]dvocates of the social approaches stress the numerous aims and values that form the basis of bankruptcy law.”).

\textsuperscript{18} Although they do not address themselves to these points, some scholars have offered normative theories of bankruptcy from outside the dominant perspective. See, e.g., Gross, supra note 13 (justifying the “fresh start” for individual and business debtors, explaining why some creditors are more deserving of payment than others, and justifying the role of community in the
This Article seeks to fill the gap in the corporate bankruptcy literature by offering a new, positive theory of bankruptcy law based on virtue ethics. Virtue ethics is one of the three major schools of moral philosophy, and offers a normative account of how citizens should live their lives so that they might achieve eudaimonia (human flourishing). Eudaimonia is the ultimate good: the goal that individuals (and the law) should work to achieve. Achieving the ultimate good is only possible if individuals act virtuously.


19. See infra Part I (discussing existing bankruptcy theory and the need for an alternative). For the purposes of this project, all references to virtue ethics should be considered as references to the “broad range of theories of practical philosophy that . . . place high priority on virtue and on happiness.” Eric R. Claeys, Response: Virtue and Rights in American Property Law, 94 CORNELL L. REV. 889, 891 (2008). Although many contemporary virtue theorists work within the “neo-Aristotelian” framework (or the closely related neo-Thomistic tradition), there are exceptions. This Article draws heavily from Aristotelian understandings of virtue ethics, but also from other sources, particularly Rosalind Hursthouse and Alasdair MacIntyre. See ROSALIND HURSTHOUSE, ON VIRTUE ETHICS (1999) [hereinafter HURSTHOUSE, VIRTUE ETHICS]; ALASDAIR MACINTYRE, AFTER VIRTUE (2d ed. 1981).

20. Deontology and consequentialism being the other two traditions. See Lee J. Strang, Originalism and the Aristotelian Tradition: Virtue’s Home in Originalism, 80 FORDHAM L. REV. 1997, 2017 (2012) (recognizing that the “two other competing ethical traditions are deontology and consequentialism”); see also MACINTYRE, supra note 19, at 118 (describing Aristotelianism as “philosophically the most powerful of pre-modern modes of moral thought”).

21. Eudaimonia means something akin to ultimate happiness, human flourishing, or the qualities necessary to lead a good life. See, e.g., Peter Koller, Law, Morality, and Virtue, in WORKING VIRTUE: VIRTUE ETHICS AND CONTEMPORARY MORAL PROBLEMS 191, 192 (Rebecca L. Walker & Philip L. Ivanhoe eds., 2007) (defining eudaimonia as “a human life that is intrinsically good from the individual’s viewpoint and the general perspective as well”); see also MACINTYRE, supra note 19, at 147–48 (noting the link between virtue and happiness); ROBERT C. SOLOMON, ETHICS AND EXCELLENCE: COOPERATION AND INTEGRITY IN BUSINESS 105 (1992) (describing eudaimonia as “‘flourishing or doing well’” (citations omitted)).


23. See ARISTOTLE, NICOMACHEAN ETHICS, reprinted in ARISTOTLE: SELECTIONS 347, 350 (Terence Irwin & Gail Fine trans., 1995) (noting that happiness “is the highest of all the goods pursued”); see also MACINTYRE, supra note 19, at 147–48 (noting the link between virtue and happiness); SOLOMON, supra note 21, at 106 (noting that happiness is the ultimate end to be pursued).

24. See ARISTOTLE, supra note 23, at 371–72 (“It should be said, then, that every virtue
action takes practice, and only by repeated, conscious efforts to internalize virtuous behavior is eudaimonia achievable.  

Virtue jurisprudence differs from consequentialist theories of law, such as the creditors’ bargain model, because it does not focus on achieving a single type of outcome in all cases, such as the most efficient outcome. And, although it aims to promote the end of human flourishing, virtue jurisprudence is not outcome-centered in the same sense as the creditors’ bargain model. Eudaimonia—the outcome virtue ethics seeks to promote—is both an internal and a multi-variable concept. As such, promoting the ability of each person to achieve eudaimonia may involve trade-offs between and among individuals, trade-offs that may be irreducible to a single, decision-making criteria, such as efficiency.

Virtue ethics promises to offer insight into our bankruptcy laws for at least three reasons. First, virtue jurisprudence and bankruptcy law are both moored on similar values and principles. Bankruptcy law, like

causes its possessors to be in a good state and to perform their functions well . . . ”); see also Cimino, Virtue and Contract, supra note 22, at 713 (“At its broadest level, Aristotelian virtue causes human beings to be happy and function well.”).

25. See SOLOMON, supra note 21, at 4–5 (1992) (noting that acting virtuously must be practiced in order to be fully developed).

26. See ARISTOTLE, supra note 23, at 367 (“[Q]uestions about actions and expediency, like questions about health, have no fixed and invariable answers.”); see also MACINTYRE, supra note 19, at 149; Cimino, Virtue and Contract, supra note 22, at 715 (noting that virtue jurisprudence does not focus on a single type of outcome).

27. An outcome-centered theory must offer a theory for what should count as the good, right, just, or legally valid decision. Lawrence B. Solum, Virtue Jurisprudence. A Virtue-Centered Theory of Judging, 34 METAPHILOSOPHY 178, 184 (2003) [hereinafter Solum, Theory of Judging]. For example, law and economics typically offers the maximization of preference satisfaction as the preferred outcome for decisions. See, e.g., JACKSON, supra note 15, at 222; Aghion, Economics of Bankruptcy Reform, supra note 14, at 543 (noting that shareholders hold value maximization as a “common objective”). Virtue ethics focuses on achieving human flourishing, which may require different outcomes in difference cases. But see MACINTYRE, supra note 19, at 185 (noting Benjamin Franklin’s emphasis on a utilitarian variety of virtue ethics).

28. See Gregory S. Alexander, The Social-Obligation Norm in American Property Law, 94 CORNELL L. REV. 745, 751 (2009) (arguing that human flourishing is a multivariable concept and that the multiple relevant components of human flourishing are incommensurable); see also MACINTYRE, supra note 19, at 184 (noting the incommensurability of “internal goods and external goods”).

29. See MACINTYRE, supra note 19, at 198–99 (“[T]he notion of summing goods . . . in terms of one single formula or conception of utility . . . makes no sense.”).

30. Professor Lawrence B. Solum has coined the phrase “virtue jurisprudence” to refer to “a normative and explanatory theory of law that utilises [sic] the resources of virtue epistemology, virtue ethics, and virtue politics to answer the central questions of legal theory.” Solum, Theory of Judging, supra note 27, at 178; see also Cimino, Virtue and Contract, supra note 22, at 707 (noting that some in the legal academy have coined the phrase “virtue jurisprudence”). This Article will use Professor Solum’s phrase to refer to virtue ethics as applied to legal problems.
most law, was shaped by values and principles such as fairness, justice, equity, honesty, and loyalty that underlie common notions of morality. These concerns also lay at the heart of virtue jurisprudence. As such, virtue jurisprudential concerns about fairness, justice, and equity are often explicitly considered and cited by bankruptcy judges. The content of these often-cited principles appears to be derived from virtue ethics. At a minimum, virtue ethics may offer insight into what judges mean when they write that “justice” or “fairness” dictates a result in a particular case. As such, understanding virtue jurisprudence helps to explain bankruptcy law.

Second, virtue jurisprudence’s decision theory (practical wisdom) provides useful insights into how bankruptcy judges decide cases.


32. See, e.g., Reading Co. v. Brown, 391 U.S. 471, 477 (1968) (noting the Bankruptcy Code’s “decisive, statutory objective: fairness to all persons having claims against an insolvent”); see also In re SubMicron Sys. Corp., 432 F.3d 448, 449 (3d Cir. 2006) (noting bankruptcy court’s “equitable authority to ensure ‘that substance will not give way to form, that technical considerations will not prevent substantial justice from being done’” (quoting Pepper v. Litton, 308 U.S. 295, 305 (1939))); Onick v. Cardelucci (In re Cardelucci), 285 F.3d 1231, 1234 (9th Cir. 2002) (asserting that the interests of “‘fairness, equality, and predictability’” justified its holding (internal citations omitted)); Matthew Nozemack, Note, Making Sense Out of Bankruptcy Courts’ Recharacterization of Claims: Why Not Use § 510(c) Equitable Subordination?, 56 Wash. & Lee L. Rev. 689 (1999) (examining the authority of bankruptcy courts to subordinate claims on equitable grounds).

33. Cf. Macintyre, supra note 19, at 192 (discussing the requirements of justice and courage).

34. See, e.g., In re Kaiser Aluminum Corp., 456 F.3d 328, 341 (3d Cir. 2006) (rejecting a preferred reading of the Employee Retirement Income Security Act of 1974 because of the “unfair result” that would follow); see also In re Federated Dept. Stores Inc., 44 F.3d at 1320 (“[W]e are of the view that fairness and equity dictate allowing Lehman Brothers to be compensated . . . ”); In re Greystone, 305 B.R. at 463 (noting the demands of fairness and equity on its decision); In re Edwards, 228 B.R. at 562 (noting that bankruptcy courts have “ample latitude to strike a satisfactory balance between the relevant factors of fairness, finality, integrity and maximization of assets”).

35. See Hursthouse, Virtue Ethics, supra note 19, at 12 (discussing practical wisdom). Practical wisdom has variously been referred to as prudence, practical reason, phronesis, and situation-sense. See Heidi Li Feldman, Prudence, Benevolence, and Negligence, in Virtue
Practical wisdom is the intellectual virtue that helps decision makers make good decisions, even when several potentially competing virtues apply to a particular situation and appear to call for disparate results.\textsuperscript{36} Bankruptcy judges often must decide how to balance uncertain, indeterminate, or incommensurate\textsuperscript{37} values or policies in order to reach the correct result in a particular case; virtue ethics may offer some insights into how they do so. Practical wisdom offers insights that can help explain how bankruptcy judges perform this balancing act because the process of choosing among competing bankruptcy policies is similar to the process of choosing among competing virtues.\textsuperscript{38}

Finally, virtue jurisprudence calls for a decision maker to simultaneously consider both the means and the ends of the law in a “fully symbiotic way.”\textsuperscript{39} Virtue jurisprudence’s symbiotic consideration of means and ends allows virtue ethics to offer insights into the decision-making process of judges who are considering whether to authorize discretionary relief.\textsuperscript{40} A virtue jurisprudential approach
requires decision makers to consider whether to authorize discretionary relief to consider two questions: (i) what ends does the Bankruptcy Code seek to achieve; and (ii) what is the best way to achieve those ends.\textsuperscript{41} Virtue ethics’ dual focus better\textsuperscript{42} accounts for how bankruptcy judges decide whether to grant discretionary relief because it parallels the requirements of many sections of the Bankruptcy Code. Virtue ethics, like the Code, calls on a bankruptcy judge to consider the purpose of the relevant provision: both what it seeks to achieve and how best to achieve that goal.\textsuperscript{43}

The remainder of this Article will proceed as follows. Part I discusses the dominant model of bankruptcy theory—the creditors’ bargain. After providing a brief overview of this theory, this Part focuses on one particular flaw of the creditors’ bargain: its focus on efficiency poorly explains existing corporate bankruptcy doctrine. Part I also explains why a new theory of corporate bankruptcy law would be useful. Part II introduces virtue ethics and explains three key features of virtue jurisprudence that allow it to provide an attractive descriptive account of corporate bankruptcy law.\textsuperscript{44} Part III provides three specific examples where virtue jurisprudence more accurately explains current bankruptcy doctrine. A conclusion follows.

I. EXISTING BANKRUPTCY THEORY AND THE NEED FOR AN ALTERNATIVE

A. The Creditors’ Bargain Theory

The creditors’ bargain has been the dominant theory of bankruptcy law for decades,\textsuperscript{45} and although several other normative theories of

\textsuperscript{41} See infra Part II.B.3 (discussing virtue jurisprudence’s consideration of means and ends).

\textsuperscript{42} Virtue ethics offers a “better” approach than other theories because it calls for an analysis more closely aligned with the text of the Code itself. See Paul R. Thagard, \textit{The Best Explanation: Criteria for Theory Choice}, 75 J. Phil. 76, 79 (1978) (stating that theories are comparable based on their “consilience,” which is a measure of how much a particular theory explains—if an alternative theory has greater consilience, it might fairly be said to be a better theory).

\textsuperscript{43} Cf. Cimino, \textit{Virtue and Contract}, supra note 22, at 737 (noting that “a court would . . . inquir[e] into the parties’ goals for both the means and the ends of the contract” (emphasis in original)).

\textsuperscript{44} Virtue jurisprudence may also offer an attractive normative account of bankruptcy law, but the normative implications of virtue ethics are beyond the scope of this Article. I expect to address the normative implications of virtue jurisprudence for bankruptcy law in a follow-up article.

\textsuperscript{45} See generally \textsc{Christopher F. Symes, Statutory Priorities in Corporate Insolvency Law: An Analysis of Preferred Creditor Status} 70 (2008) (noting the dominance of the creditors’ bargain theory); Adam J. Levitin, \textit{Bankrupt Politics and the Politics of Bankruptcy}, 97 CORNELL L. REV. 1399, 1454 (2012) (same); Rolef J. de Weijs, \textit{Too Big to Fail as a Game of Chicken with the State: What Insolvency Law Theory has to say about TBTF and Vice Versa} 3 (Amsterdam Law School, Research Paper No. 2012-90, 2012), available at
bankruptcy law exist, none have had as profound an impact as that model. The creditors’ bargain model is a “contractarian” approach to bankruptcy law derived from early law and economics theory. Originally proposed by Thomas Jackson, the creditors’ bargain model claims that bankruptcy should mirror the hypothetical agreement creditors would be expected to form among themselves if they were able to negotiate from a pre-bankruptcy position. As originally stated, the creditors’ bargain model tells us that the optimal bankruptcy system should have only two aims: (i) respect nonbankruptcy contractual rights, such as state law priority schemes; and (ii) maximize the expected value of the assets of the bankruptcy estate.

The creditors’ bargain model makes a number of assumptions common to classical law and economics, including that actors are entirely rational welfare maximizers, and that the costs and benefits of any action can be compared along a single, scalar metric. The creditors’ bargain model also assumes that parties would not strike a


46. See supra note 17 and accompanying text (noting that some scholars have taken a wider view of bankruptcy law); see also Donald Korobkin, The Role of Normative Theory in Bankruptcy Debates, 82 IOWA L. REV. 75, 78–79 [hereinafter Korobkin, Normative Theory] (noting that while many traditionalists “maintain that bankruptcy law should pursue the full range of purposes that it currently does … they also seem to dismiss the use of normative theory to support this view”); Levitin, supra note 45, at 1452.

47. See LoPucki, Team Production Theory, supra note 18, at 744 (discussing this point); see also Levitin, supra note 45, at 1405 (same).


49. See supra note 16 and accompanying text.

50. See JACKSON, supra note 15, at 18–19 (discussing two bankruptcy assumptions—(1) “insolvency occurs without warning” and (2) “bankruptcy proceedings take no time”—and, while acknowledging that these two assumptions are “somewhat unrealistic,” asserting that imposing these assumptions “clarifies several key features of bankruptcy law”); see also SOLOMON, supra note 21, at 220 (discussing the concept of “[h]omo economicus who has no attachments or affects other than crude self-interest and the ability to calculate how to satisfy that interest vis-à-vis other people”); supra note 37 and accompanying text (noting that the creditors’ bargain model is based on an assumption of incommensurability).

51. Professor Jackson expects that debtors would negotiate with their shareholders and creditors, but would exclude non-creditor employees, local communities, taxing authorities and other similar interests. JACKSON, supra note 15, at 222; see also Martin, supra note 48, at 439 (asserting that Chapter 11’s rehabilitative goals “run not merely to the reorganizing company, its creditors, and shareholders, but also to third party interests”). But see SOLOMON, supra note 21, at 231.
hypothetical bargain unless it was in their interests to do so. In other words, bargains are only struck when they are efficient and maximize value. These assumptions lead creditors’ bargain theorists to suggest that considering non-creditor interests or distributing estate assets other than in accordance with non-bankruptcy law is per se improper. For example, when a debtor is deciding whether to continue its business as a going concern or liquidate, its only considerations should be to maximize returns to creditors (even at the expense of non-creditors) and to ensure that non-bankruptcy rights are respected. Under the creditors’ bargain theory, debtors should consider only the best interests of its creditors, and not whether reorganization or liquidation would be in the interests of employees, taxing authorities, or the local community, among others.

B. Flaws with the Creditors’ Bargain Theory

The creditors’ bargain theory has been heavily criticized for its assumptions, methodology, and the ends it pursues. The most cogent

52. See Jackson, supra note 15, at 59 n.80 (“[I]t is unlikely that secured creditors would agree to the bargain unless they received some of the gains resulting from the bargain.”).


55. See Jackson, supra note 15, at 24 (arguing that incorporating the policy of preserving jobs into a bankruptcy statute “would be to mix apples and oranges”); see also LoPucki, Team Production Theory, supra note 18, at 748–49 (noting that the creditors’ bargain theory is only concerned with creditor interests).

56. It is unclear how the creditors’ bargain theory would account for assertions that creditor behavior is not always value maximizing. If creditors’ bargain theorists would acknowledge that creditors may properly pursue individually (but not collectively) wealth maximizing strategies, see, e.g., Baird & Rasmussen, supra note 53, at 651, they might have to reconsider whether bankruptcy courts should protect non-creditor interests. Cf. Martin, supra note 48, at 429–30 (discussing non-creditor interests).

57. See, e.g., Jane Baron & Jeff Dunoff, Against Market Rationality: Moral Critiques of Economic Analysis in Legal Theory, 17 Cardozo L. Rev. 431, 449 (1996) (“To assume, as economists do, the appropriateness of economic analysis is to evade what is actually the prior and deeper ethical question.”); Duncan Kennedy & Frank Michelman, Are Property and Contract Efficient?, 8 Hofstra L. Rev. 711, 715–16 (1980) (challenging certain empirical assumptions
criticisms are that the creditors’ bargain model: (i) makes assumptions that are too crude to yield accurate predictions about bankruptcy law;\(^{58}\) (ii) fails to acknowledge that sophisticated creditors have impliedly consented to the current bankruptcy regime;\(^{59}\) and (iii) is a flawed normative theory.\(^{60}\) Space constraints prevent a thorough discussion of the theory’s many flaws, and this Article will focus on only one: the disjunction between the theory’s singular focus on economic efficiency and Chapter 11’s focus on other norms. However, even if the creditors’ bargain model were a fault-free normative account of bankruptcy law, an alternative approach would still be useful because the creditors’ bargain fails to account for several key features of bankruptcy law.

A gap exists in the corporate bankruptcy literature because existing theories, including the creditors’ bargain model, cannot and do not accurately describe how Chapter 11 actually works.\(^{61}\) Economic analysis tends to assume that the parties’ intent can be uncovered by applying an efficiency norm, but for many corporate debtors and their creditors (including non-contractual creditors) there are other norms at work that may be more important to understanding the parties’ intent.\(^{62}\)


58. See e.g., Korobkin, \textit{Normative Theory}, supra note 46, at 114–16; Woo, \textit{supra} note 53, at 1617; see also Sunstein, \textit{Incommensurability}, \textit{supra} note 37, at 794 (“[W]ith the assumption of a unitary kind of valuation, we will sometimes offer inadequate predictions . . . .”).


62. Multiple interests are typically at work. Even when one of those rationales is efficiency, a theory that focuses exclusively on efficiency can be problematic. See, e.g., \textit{In re} Cardelucci, 285
The creditors’ bargain fails to account for behavior that is guided by forces other than efficiency, even though corporate bankruptcy law is clearly guided by other social norms and moral intuitions. Even if the creditors’ bargain model were capable of accurately predicting the behavior of insolvent or bankrupt companies, if the model misunderstands the underlying motivations of actors, it may offer seriously flawed policy prescriptions.

The Bankruptcy Code specifically directs courts to consider non-efficiency rationales, but the creditors’ bargain model’s relentless focus on efficiency blinds it to these directions. Bankruptcy law appears to be grounded in the same principles of fairness and justice that undergird other areas of law and, like other areas of law, expects that individuals will act reasonably, diligently, and carefully. Bankruptcy law is exceptionally concerned with these values. Both as a matter of statutory command, and as a result of bankruptcy courts’ role as courts of equity, bankruptcy judges have a greater obligation than most judges to ensure that “substantial justice” is done.

The creditors’ bargain model cannot adequately explain bankruptcy
law because it is grounded in principles that could not have shaped bankruptcy law. The creditors’ bargain model is founded on principles derived from the clever insights of efficiency-minded academics, such as the effect of bankruptcy discharges on interest rates. These principles were only “discovered” because the economic approach to law requires efficiency-minded academics to look for costs to be avoided. Efficiency is relevant to bankruptcy law, but it is not the only relevant value. The creditors’ bargain model cannot provide an accurate description of the current state of the law because its efficiency-minded evaluative framework is not up to the task.

C. The Need for a New Bankruptcy Theory

Some bankruptcy scholars claim that our bankruptcy laws are the product of “social exigency, moral conflict, and political compromise”

69. Efficiency is surely relevant to bankruptcy law, but is not the only relevant virtue. James Gordley, The Moral Foundations of Private Law, 47 AM. J. JURIS. 1, 2 (2002) [hereinafter Gordley, Moral Foundations] (arguing that the virtues of prudence and distributive and commutative justice enable people to live their lives); see also Korobkin, Rehabilitating Values, supra note 18, at 739–40 (discussing the limitations of the economic account of bankruptcy law).

70. See Gordley, Moral Foundations, supra note 69, at 8 (discussing attempts to explain the doctrine of necessity in terms of economic efficiency); see also Korobkin, Rehabilitating Values, supra note 18 at 739–40 (detailing the shortcomings of the economic approach); Robert K. Rasmussen, An Essay on Optimal Bankruptcy Rules and Social Justice, 1994 U. ILL. L. REV. 1, 13 (1994) [hereinafter Rasmussen, Optimal Bankruptcy].

71. See Gordley, Moral Foundations, supra note 69, at 6 (“[T]heir economic approach requires them to look for a cost to be avoided.”); see also Ronald Dworkin, Seven Critics, 11 GA. L. REV. 1201, 1205–06 (1977) (discussing consequentialist arguments in the context of debates about rights); Richard A. Epstein, A Theory of Strict Liability, 2 J. LEGAL STUD. 151, 154 (1973) (noting that although there was a shift toward an economic model, some judges retained concern for traditional concepts like “reasonableness”); Frank I. Michelman, Norms and Normativity in the Economic Theory of Law, 62 MINN. L. REV. 1015, 1047 (1978) (noting that while efficiency “has been an influential factor in prior law,” it “has not been the only influential factor”).

72. It is important to note that neither virtue jurisprudence nor bankruptcy law is antagonistic toward the economic analysis of the law. Far from it. Many Bankruptcy Code provisions require judges to promote efficiency and avoid unnecessary costs. For example, the bankruptcy system embraces some overtly utilitarian principles, including the requirement that creditors with a state law right to repossess collateral be forestalled from doing so. See 11 U.S.C. § 362 (2012). This imposes a cost on the individual creditor in order to maximize aggregate welfare for all creditors. In addition, § 363 requires that debtors accept the highest and best offer when selling assets of the estate, which courts have interpreted to mean the highest monetary offer. Id. § 363. Sections 327–330 address judicial oversight of the fees for bankruptcy professionals, and are intended to help control costs. Id. §§ 327–330. Section 105 is often used to justify consolidation of multiple bankruptcy cases for procedural purposes, which also helps to reduce costs. Id. § 105. Efficiency and thrift are both virtues that may apply in bankruptcy. However, while these goals are not anathema to virtue jurisprudence or bankruptcy law, neither are they raison d’être.

73. See AMARTYA SEN, ON ETHICS AND ECONOMICS 78 (Basil Blackwell ed., 1987) (“[T]he distancing of economics from ethics has impoverished welfare economics, and also weakened the basis of a good deal of descriptive and predictive economics.”).
rather than “the logical outcome of ethical principles consciously adopted and consistently applied by perfectly rational legislators.” 74 As a result, these scholars—notably David Carlson—have claimed that it is “unrealistic to expect to find ethical principles that would justify all of bankruptcy law.” 75 Carlson is correct that it is specious to assume that any particular theoretical model can possibly explain every detail and every rule in an area of law as complex as bankruptcy. 76 Nevertheless, our bankruptcy laws represent the collective judgments about bankruptcy policy that various Congresses have reached over time. 77 This Article assumes that these value judgments are mostly rational and “based on logically coherent reasons.” 78 Any mostly rational, logically coherent system should contain some common principles that have some unifying force for that system.

As such, there are at least two reasons to continue to pursue the hunt for a deep structure in bankruptcy. First, most extant bankruptcy theories, including the creditors’ bargain theory, are normative theories that seek to offer an authoritative theoretical perspective from which to criticize the current bankruptcy system and determine what ends an ideal bankruptcy system should seek to achieve. Most of these proposals fail to make any assertions whatsoever about the reality of the

74. Korobkin, Normative Foundations, supra note 18, at 543 (citing David G. Carlson Philosophy in Bankruptcy, 85 Mich. L. Rev. 1341, 1389 (1987)); see also Warren, Bankruptcy Policy, supra note 14, at 778 (“I see bankruptcy as a more complex and ultimately less confined process than [Professor] Baird.”). Bankruptcy is highly politicized and therefore bankruptcy law will always have elements that are incoherent from any theoretical prospective. See Levitin, supra note 45, at 1451–58 (discussing the “politics of bankruptcy”).

75. Korobkin, Normative Foundations, supra note 18, at 543 (1993) (citing David G. Carlson, Philosophy in Bankruptcy, 85 Mich. L. Rev. 1341, 1389 (1987)); see also John D. Ayer, Through Chapter 11 with Gun or Camera, But Probably Not Both: A Field Guide, 72 Wash. U. L.Q. 883, 884 (1994) (asserting that there are different approaches to bankruptcy); Raymond T. Nimmer, Negotiated Bankruptcy Reorganization Plans: Absolute Priority and New Value Contributions, 36 Emory L.J. 1009, 1023 (1987) (contending that it would be “irresponsible . . . to suggest that for all outcomes, special and general protections in bankruptcy can be justified by one, or even several overarching policies”); Linda J. Rusch, Bankruptcy Reorganization Jurisprudence: Matters of Belief, Faith, and Hope-Stepping into the Fourth Dimension, 55 Mont. L. Rev. 9, 16 (1994) (asserting that the “beliefs and values” at the core of bankruptcy law cannot “be subject[ed] to the test of truth or falsity, but are really matters of individual faith and aspiration”).


77. Korobkin, Normative Theory, supra note 46, at 94.

78. Id.; see also Levitin, supra note 45, at 1405 (suggesting that a proper theoretical understanding of bankruptcy must be based on a political theory). Even at their best, models are “gross, oversimplified approximations of reality.” Ponoroff, supra note 76, at 452–53. However, models have explanatory prowess specifically because of their reductive nature.
current bankruptcy system. No other theory of corporate bankruptcy law has done an adequate job of providing a positive account of current bankruptcy law and the equitable principles that have motivated corporate bankruptcy law and policy since its inception. As such, it appears that corporate bankruptcy law is currently “under-theorized,” and this Article seeks to fill this gap in the literature. For many, a theory that offers a positive account of our current bankruptcy system would be a welcome alternative. An alternative account of corporate bankruptcy law that is able to tap into insights about the purposes of our bankruptcy policies would be even more valuable.

Second, virtue jurisprudence can provide a useful theoretical counterweight to existing corporate bankruptcy theories and prevent the terms of the debate from becoming solely focused on any one theory. If this Article’s sole accomplishment is to leave readers with an introduction to virtue ethics, and the first glimmers of virtue ethics’ potential explanatory power for corporate bankruptcy law, it will be a success. As it stands, corporate bankruptcy scholarship has been dominated by the creditors’ bargain approach for some time. This is not surprising because, with a few notable exceptions, there has not been a serious theoretical alternative presented. Unless a vibrant alternative theory can be presented, the very terms of the debate may continue to shift into the language of economics. For those scholars who remain doubtful of the benefits of an exclusive and relentless focus

79. See LoPucki, Reorganization Realities, supra note 61, at 1309 (noting that economists have failed to explain how they will deal with current problems in implementing their proposals); see also Korobkin, Normative Theory, supra note 46, at 116 (asserting that Professor Jackson’s “common pool account” of bankruptcy law fails as an explanatory theory); Jody S. Kraus, Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis, 93 Va. L. Rev. 287, 358 (2007) (noting that some scholars remain “mystified that anyone takes [economic analysis] seriously, especially as an explanatory theory” (emphasis in original)); cf. Zamir & Medina, supra note 63, at 391 (suggesting that deontologically constrained cost-benefit analysis would make economic analysis “descriptively more valid”).

80. See supra note 5 and accompanying text (noting that bankruptcy laws force bankruptcy courts to consider equitable principles like fairness, honesty, and justice).

81. But see LoPucki, Reorganization Realities, supra note 61, at 1310–11 (calling for a better approach that does not “miss most of the economic interrelationships”).

82. See Susan Block-Lieb, A Humanistic Vision of Bankruptcy Law, 6 Am. Bankr. Inst. L. Rev. 471, 472 (1998) (acknowledging that economic analysis has dominated bankruptcy scholarship); Claey s, supra note 19, at 893 (same).

83. Among those offering competing theories are Donald Korobkin, Ronald Mann, Karen Gross, and Lynn M. LoPucki. See, e.g., Korobkin, Normative Theory, supra note 46, at 78–79 (noting the existence of competing theories).

84. For some, this is precisely the point. See LoPucki, Reorganization Realities, supra note 61, at 1310–11 (suggesting that creditors’ bargain theorists are engaged in “a deadly serious endeavor” to dominate the terms of the debate over bankruptcy law).
on economic efficiency and ex ante entitlements, a competing framework for understanding bankruptcy law would be very valuable. 85

II. VIRTUE JURISPRUDENCE AS BANKRUPTCY THEORY

A. Introducing Virtue Ethics

Virtue ethics is the oldest of the three major schools of moral philosophy, 86 and is rooted in the philosophies of Aristotle and Thomas Aquinas, among others. 87 Like alternative theories, virtue ethics is not a monolithic approach to moral philosophy. Nevertheless, most accounts of virtue ethics focus on the relationship between law and character, and tend to be concerned with the lived experiences of human life. 88 They tend to offer a normative account of contemporary moral issues predicated on encouraging virtues such as fairness, equity, and justice in human relations. 89 While virtue ethics has ancient roots, it is also essentially a new theory, and one that draws on recent developments in moral philosophy to update its historical antecedents. 90

Virtue ethical accounts generally focus on how citizens may achieve eudaimonia (human flourishing). 91 Virtue ethics conceives of eudaimonia as the ultimate good: the state of being that all people should seek to achieve. 92 Virtue ethicists also believe that achieving the ultimate good is only possible by acting in accordance with the

85. The debate in the corporate bankruptcy literature parallels debates happening in other disciplines as well. See, e.g., Penalver, supra note 57, at 863–64 (offering virtue ethics as an alternative to the dominant law and economics model of property law).

86. See Strang, supra note 20, at 2017 (recognizing that “[t]he other two competing ethical traditions are deontology and consequentialism”).

87. Other noted advocates of virtue ethics include Confucius, Hume, the Late Scholastics, Plato, and the Stoics. See Rebecca L. Walker & Philip L. Ivanhoe, Introduction to Working Virtue: VIRTUE ETHICS AND CONTEMPORARY MORAL PROBLEMS 1, 3 (Rebecca L. Walker & Philip L. Ivanhoe eds., 2007) (noting proponents of virtue ethics); see also MacIntyre, supra note 19, at 118 (same); Gordley, Moral Foundations, supra note 69, at 1 (same).

88. Solum, Theory of Judging, supra note 27, at 179; see also Soloman, supra note 21, at 99 (discussing the need for a theory that “provides not just an abstract set of principles”).

89. See Walker & Ivanhoe, supra note 87, at 3 (asserting that while a variety of approaches to virtue ethics exist, “all share something in common by offering virtue-based analyses of contemporary moral issues”). Among the various normative approaches to virtue theory are those offered by Alasdair MacIntyre, Julia Driver, and Rosalind Hurthouse. See JULIA DRIVER, THE VIRTUES AND HUMAN NATURE, IN HOW SHOULD ONE LIVE?: ESSAYS ON THE VIRTUES 116, 116 (Roger Crisp ed., 1996); Hurthouse, supra note 19, at 28–29; MacIntyre, supra note 19, at 150–52.

90. Rosalind Hurthouse’s book, ON VIRTUE ETHICS, offers an excellent introduction to virtue ethics. See Hurthouse, supra note 19, at 1–25; see also MacIntyre, supra note 19, at 146–64.

91. Eudaimonia is discussed further in the text accompanying notes 21–29.

92. See MacIntyre, supra note 19, at 140 (noting the link between virtue and happiness).
virtues. People must practice acting virtuously and only by repeated, conscious efforts to internalize virtuous behavior can eudaimonia be achieved.

Virtue ethics relies on concepts of vice and, correspondingly, of virtue. Virtue refers to something like an admirable character trait, and simultaneously, to a person’s propensity to act in accordance with that character trait. Acting virtuously helps a person “fit into” and contribute to society. Virtuous action requires more than simply acting in accordance with the virtues, and is not simply “the result of a cost/benefit calculation of utility.” A virtuous action is the right action taken for the right reasons; “right action” requires a unity of reason and feeling.

Vice is the converse. Vice refers to something like an admirable character trait, and simultaneously, to a person’s propensity to act in accordance with that character trait. Acting virtuously helps a person “fit into” and contribute to society. Virtuous action requires more than simply acting in accordance with the virtues, and is not simply “the result of a cost/benefit calculation of utility.” A virtuous action is the right action taken for the right reasons; “right action” requires a unity of reason and feeling.

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The Virtue in Bankruptcy

like a person’s despicable character traits and a disposition to act in accordance with that character trait.101

Virtues are not abstract concepts.102 In the abstract, virtues lack moral content; they gain meaning only in the context of human activity.103 Considering a virtue in the abstract renders the content of that virtue incoherent and meaningless.104 Put differently, “[v]irtues tend to be context-bound.”105 For example, charity is often considered to be a virtue.106 However, if a person is overly-charitable, that person may be considered foolish.107 Consider both a single parent working a low-wage job to support his family and a wealthy socialite who doesn’t have such concerns. Charity might require that each contribute a personally significant amount to the needy, but the absolute amount of each individual’s charitable giving will depend on their particular circumstances. As a result, society might judge the single parent to be generous to a fault if he were to give his family’s grocery money to a charitable cause instead of buying enough food for his children. Yet, society might consider the wealthy socialite stingy and lacking in charity if he donated twice as much to the same cause, because doing so does not deprive his loved ones of essential needs, and is a less personally significant amount. Because the virtue of charity is context-bound, society may fairly expect that the wealthy should contribute more to charity than the poor.108

This example also highlights the Aristotelian concept of the “golden mean.” The golden mean suggests that virtues are just the right amount of a particular trait for a particular situation.109 Virtues are not just
labels, but rather involve choices along a spectrum. For example, the virtue of charity requires giving an appropriate amount: not so little as to be uncharitable and not so much as to be a spendthrift.\textsuperscript{110}

Virtues are also role-related.\textsuperscript{111} As the nature of appropriate action differs from role to role, we should expect people who occupy different roles to exhibit different virtues.\textsuperscript{112} For example, we can contrast the respective roles of a judge and a legislator.\textsuperscript{113} Society has very different expectations for individuals occupying these positions. People might believe that a Congresswoman who aligns her views with those of her constituents on a contentious political issue is doing her job well and exhibits the virtue of prudence.\textsuperscript{114} By contrast, a judge who molded her views to those of the electorate would fairly open herself up to claims that she had behaved imprudently, perhaps even corruptly. In part, the difference between prudent and imprudent action depends on the actor because our conceptions of virtuous action are role-related. Legislators should be responsive to their constituents, but judges should decide cases based on principles divorced from popular sentiment.\textsuperscript{115}

The contextual and role-dependent nature of virtue means that acting virtuously requires more than simplistic conformity to a code of behavior\textsuperscript{116} and that virtue cannot be reduced to definite and universal...
The lack of definitive rules recognizes that a certain amount of subjectivity inheres in all decisions, but it does not mean that all decisions are correct just because a decision maker says so. Although somewhat fuzzier than deontological or consequentialist decision making, virtue ethics can provide guidance to decision makers. It does so through the use of the intellectual virtue known as practical wisdom (phronesis), which is discussed further below.

B. Three Reasons Why Virtue Jurisprudence Can Undergird a Descriptive Theory of Bankruptcy Law

Virtue jurisprudence offers an interesting new way of thinking about bankruptcy law, and is better suited than existing theories to explain some of bankruptcy law’s key features for at least three reasons. First, virtue jurisprudence appears grounded in the same values and principles that underlie bankruptcy law. Second, adopting a virtue jurisprudential framework for analyzing how bankruptcy judges balance the competing demands of bankruptcy law’s multiple dimensions and incommensurable ends can help provide a rich and fulsome understanding of the law. In particular, phronesis—virtue jurisprudence’s decision-making apparatus—can explain how bankruptcy judges reconcile these demands and arrive at an appropriate decision in a particular case. Third, virtue ethics’ simultaneous consideration of means and ends can offer insights into how bankruptcy judges use their Bankruptcy Code-sanctioned discretion and commercial judgment. Each is discussed in greater detail below.

179. Nor is there one for bankruptcy.

117. Kyron Huigens, Virtue and Inculpation, 108 HARV. L. REV. 1423, 1426 (1995); see also SOLOMON, supra note 21, at 179 (“[T]hose who try to follow such a calculus or procedure will almost inevitably get caught up in its simple-mindedness.”).

118. See infra Part II.B.2; see also supra notes 8–13 and accompanying text.

119. See Gordley, Moral Foundations, supra note 69, at 2–5 (discussing the moral foundations of private law); see also MACINTYRE, supra note 19, at 257 (suggesting that modern morality is Aristotelian). Particularly as compared to the creditors’ bargain theory, virtue jurisprudence and bankruptcy law share a notably parallel vocabulary. See Korobkin, Rehabilitating Values, supra note 18, at 739–40 (noting that “the economic account . . . neglect[s] bankruptcy law’s unique history and distinctive function[s]”).

120. Certain values take lexical priority over others despite a claim of incommensurability. See Nussbaum, Flawed Foundations, supra note 57, at 1202 (noting the “plural valued approach inspired by Aristotle”). As such, the notion of incommensurability does not mean that two values are incomparable. See generally Sunstein, Incommensurability, supra note 37 (noting that while “goods are not assessed along a single metric,” public and private choices can be evaluated).

121. Phronesis and practical wisdom are used interchangeably throughout this Article. See Feldman, supra note 35, at 58 (noting that phronesis is sometimes translated as “practical wisdom”); see also MACINTYRE, supra note 19, at 153 (discussing phronesis).

1. The Shared Language of Virtue

Both virtue jurisprudence and bankruptcy law evince concern with virtues such as honesty, fairness, equity, and justice. To some extent, these virtues provide a foundation for all law; however, bankruptcy law appears to draw particularly heavily on notions of virtue. The use of a shared, virtue-centric vocabulary suggests that a greater understanding of virtue jurisprudence can lead to insights about the Bankruptcy Code.

For example, both virtue jurisprudence and bankruptcy law emphasize virtues such as justice and equity. In virtue jurisprudence, justice requires that each person receive what he or she is due, which is directly proportional to his or her merit. Bankruptcy law mirrors this conception of justice in its focus on ensuring that similarly situated creditors receive equal distributions from the estate, unless they agree otherwise. In this way, both virtue jurisprudence and the Bankruptcy Code evidence a shared concern with justice as equality.

The creditors’ bargain theory suggests that bankruptcy law should focus relentlessly on economic efficiency, thereby ensuring that the plan if it is feasible, but allowing the bankruptcy courts to define feasibility; see also Matthew Bruckner, Improving Bankruptcy Sales by Raising the Bar: Imposing a Preliminary Injunction Standard for Objections to Section 363 Sales, 62 CATHOLIC U. L. REV. 1, 8–9 (2012) (noting that bankruptcy judges enjoy an enormous amount of discretion in approving § 363 sales).

123. See supra notes 3–7 and accompanying text (discussing the relevance of these concepts to virtue ethics); see also supra note 5 and accompanying text (discussing specific Code sections that draw on these virtues).

124. Like most law, bankruptcy law was built on the foundations of virtue and crafted by lawmakers indoctrinated in the philosophy of virtue. See MACINTYRE, supra note 19, at 257 (discussing the “distinctive kind of morality” of the Aristotelian tradition which is “so predominant in modern conceptions of morality”); see also SOLOMON, supra note 21, at 17 (“Business . . . depends upon and presupposes the virtues and that basic sense of community and minimal mutual trust without which no activities of production or exchange or mutual benefit would be possible.”); cf. GORDLEY, PHILOSOPHICAL ORIGINS, supra note 31, at 1–10 (discussing the virtues underlying contract law).

125. See supra notes 3–7.

126. See SOLOMON, supra note 21, at 232 (“The basic idea is that justice has much to do with merit—giving each student what he or she deserves on the basis of effort and accomplishment.” (emphasis in original)).

127. The ability to claw back payments to creditors is grounded in an attempt to equalize distributions among creditors and avoid the debtor’s ability to prefer one creditor over another. See, e.g., 11 U.S.C. § 547 (providing bankruptcy trustees with the power to avoid preferential transfers); see also Sydney Krause, Homer Kripke & Charles Segelson, The Code and the Bankruptcy Act, 42 N.Y.U. L. REV. 278, 292 (1967) (“A cornerstone of the bankruptcy structure is the principle that equal treatment for those similarly situated must be achieved.”). There are, of course, many instances where the Code authorizes a departure from this norm. See, e.g., 11 U.S.C. § 507 (providing priority payment of the claims of certain special interests). Nevertheless, these exceptions only help prove the rule.
pool of assets distributed to creditors is as large as possible.\textsuperscript{128} This theory also suggests that ex ante contract rights should be respected to the greatest extent possible.\textsuperscript{129} While bankruptcy law is concerned about efficiency and contract rights, it is also concerned about fairness, justice, and other similar principles, and with the notion that the enforcement of contracts “should not offend deeply held social norms.”\textsuperscript{130} As a result, virtue jurisprudence may be better suited to provide a positive theory of bankruptcy law than alternative theories, which have a more limited focus because they do not rest on the same foundations.\textsuperscript{131}

For example, 11 U.S.C. § 1114(g) provides that a court may not modify retiree benefit plans unless the court finds that, among other things, modification is necessary to permit the debtor’s reorganization, all “affected parties are treated fairly and equitably,” and modification is “clearly favored by the balance of the equities.”\textsuperscript{132} The Code’s references to fairness and equity are not defined, and courts appear to rely, in part, on a virtue ethical definition to give contest to these phrases.\textsuperscript{133} One example is found in the 2006 case of \textit{In re Kaiser Aluminum Corporation}.\textsuperscript{134}

In that case, the debtors were a corporate group of twenty-six companies involved in the aluminum industry (“Kaiser”). Due to weak industry conditions, credit lines that could not be rolled over, ongoing asbestos litigation, and legacy obligations to retirees, Kaiser filed for bankruptcy.\textsuperscript{135} While in bankruptcy, Kaiser sought to terminate six of its pension plans, which covered more than 13,000 current and former

\begin{footnotes}
\textsuperscript{128} See supra notes 45–49 and accompanying text (explaining that the creditors’ bargain model provides that the optimal bankruptcy system should maximize the expected value of the assets of the bankruptcy estate).
\textsuperscript{129} See supra notes 45–49 and accompanying text.
\textsuperscript{130} See Warren, \textit{Bankruptcy Policy}, supra note 14, at 780; supra note 5 (discussing specific Code sections that draw on these virtues).
\textsuperscript{131} See \textsc{MacIntyre}, supra note 19, at 257.
\textsuperscript{132} The relevant text of 11 U.S.C. § 1114(g) reads:
\begin{quote}
(g) The court shall enter an order providing for modification in the payment of retiree benefits if the court finds that—
(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (f);
(2) the authorized representative of the retirees has refused to accept such proposal without good cause; and
(3) such modification is necessary to permit the reorganization of the debtor and assures that all creditors, the debtor, and all of the affected parties are treated fairly and equitably, and is clearly favored by the balance of the equities.
\end{quote}
\textsuperscript{133} See, e.g., \textit{In re Kaiser Aluminum}, 456 F.3d 328 (3d Cir. 2006).
\textsuperscript{134} \textit{Id.} at 330.
\textsuperscript{135} \textit{Id.} at 331.
\end{footnotes}
workers.\textsuperscript{136} If Kaiser were able to shed these obligations, its ability to reorganize would be improved, but covered employees would end up receiving only those minimum benefits guaranteed by the Pension Benefit Guaranty Corporation (the “PBGC”).\textsuperscript{137}

In determining whether the debtor should be allowed to terminate its six pension plans, the court had to decide if the debtor could consider these pension plans in the aggregate, or if it was required to consider them on an individual basis. It was undisputed that if the debtor analyzed each plan separately, it was not necessary to terminate all six in order to facilitate the company’s reorganization.\textsuperscript{138} In other words, the debtor had sufficient resources to meet its obligations under some of the pension plans and to reorganize. Employees who participated in plans that were not terminated would receive their full, expected benefits in the normal course. But employees who participated in plans that were terminated would receive only the PBGC-guaranteed minimum amounts, which were often substantially lower than the fully vested pensions due to plan participants. The statute is silent on whether decisions to terminate can be made using an aggregate approach or if each plan must be separately considered.

The Third Circuit allowed the debtor to terminate all six plans despite the PBGC’s objection.\textsuperscript{139} Among other reasons, the court held that the plan-by-plan approach advocated by the PBGC was arbitrary and therefore inequitable within the meaning of § 1114(g).\textsuperscript{140} The PBGC’s approach was arbitrary and inequitable because it would have forced the debtor to pick and choose among similar plans—often involving members of the same union—without any standards to guide its choices. The court’s focus on avoiding arbitrary and inequitable action reflects some of the same considerations that a virtue ethicist would use. Although the result was that more employees ended up receiving smaller pensions than they might have otherwise, the Third Circuit determined that this was the equitable result because it avoided arbitrary decision making.

Although the result in In re Kaiser is not an obviously just result, this case is an example of a court speaking in and drawing on virtue ethical terms to give content to some of the obligations of the bankruptcy courts. Admittedly, it is counter-intuitive to claim that equity has been

\textsuperscript{136} Id. at 332.
\textsuperscript{137} Id. at 333.
\textsuperscript{138} Id.
\textsuperscript{139} Id. at 347.
\textsuperscript{140} Id. at 342.
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done when fewer individuals receive the benefits that they anticipated receiving. However, the Third Circuit clearly manifested a concern with avoiding arbitrary determinations, which lies at the heart of the virtue of equity. It is also important to note that if the court had explicitly considered the virtue of justice, it may well have reached a different conclusion. The In re Kaiser court appeared to use a partial conception of virtue jurisprudence to reach its conclusion. This Article suggests that judges should rely more explicitly on virtue jurisprudential conceptions of bankruptcy law in order to decide cases involving statutes that speak in virtue jurisprudential terms.

2. Practical Wisdom

Practical wisdom is a particular type of virtue—an intellectual virtue—that helps order and make sense of the potentially competing demands of the other virtues. Practical wisdom is particularly important to virtue jurisprudence because virtue jurisprudence does not offer a definite list of virtues that apply in a particular case. Instead, virtue jurisprudence offers a method for identifying the relevant virtues and for applying these inherently general virtues to particular cases. Practical wisdom can be understood as the intellectual quality of decision makers that enables them to perform this task well and thereby reach the correct result in a particular situation.

One way to think about practical wisdom is by considering the concept of the virtuous person. A virtuous person is one who possesses and exercises only the virtues, and who shuns vice. Whether or not such a person actually exists, the virtuous person sets the standard for how judges should think about how people ought to act. In many ways, the virtuous person is a construct akin to the

141. See SOLOMON, supra note 21, at 174 (discussing practical wisdom).

142. See supra notes 111–17 (explaining that virtue is contextual and role-dependent, and therefore irreducible to a definite rule).

143. See Solum, Natural Justice, supra note 36, at 84 (“Practical wisdom is the virtue that enables one to make good choices in the choosing of legal ends and means.”); see also HURSTHOUSE, VIRTUE ETHICS, supra note 19, at 40 (noting that practical wisdom “might be required both to interpret the rules and to determine which rule was most appropriately to be applied in a particular case” (emphasis in original)).

144. See HURSTHOUSE, ETHICS, HUMANS, AND OTHER ANIMALS, supra note 95, at 148 (discussing the “virtuous person” concept).

145. See Solum, Theory of Judging, supra note 27, at 189 (describing judicial virtues); see also HURSTHOUSE, ETHICS, HUMANS, AND OTHER ANIMALS, supra note 95, at 147 (contending that virtuous people condemn those who are “self-interested, mean, callous, cruel, spiteful, dishonest, silly and thoughtless, unjust, dishonorable, disloyal, lazy, unfair, irresponsible, uncaring, cowardly, materialistic”).

146. See HURSTHOUSE, ETHICS, HUMANS, AND OTHER ANIMALS, supra note 95, at 148.
reasonable person standard in contract law: it is a hypothetical decision maker against which judges can measure the appropriateness of certain actions in particular circumstances.147

Practical wisdom requires the decision maker to take two actions. First, decision makers must identify the relevant virtues. And second, they must consider what decision these virtuous traits would dispose a virtuous person to make.148 In easy cases, practical wisdom can be regarded as a working theory of the world on which people rely, perhaps unconsciously, when making decisions.149 For example, a person possessing the virtue of honesty might instinctively return any excess change given to them by a clerk after having made a purchase. It is not necessary for a habitually honest person to reflect on the relevant virtues and the proper course of actions because they have internalized this decision-making process.

But practical wisdom is also a distinct form of judgment that enables a person to bring to bear her past experiences to help inform the right action to take in a new situation.150 It can also be thought of as the combination of common sense, refined by practice and experience, and analogical reasoning.151 In more difficult cases, decision makers may need to reason more consciously about the relevant virtues and the actions a virtuous person would take. Put differently, decision makers may need to perform a sort of thought experiment to ascertain how a person possessing the specific virtues relevant to the particular situation would act.

147. Id.; see also Cimino, Virtue and Contract, supra note 22, at 730–31 (contending that virtue jurisprudence can suggest common themes, provide guidance to judges, and give context to broad legal standards). Note that because virtue ethics is context specific, see supra text accompanying notes 99–105, the correct way to behave will differ with the circumstances. See Chapin Cimino, Private Law, Public Consequences, and Virtue Jurisprudence, 71 U. PITT. L. REV. 279, 282 (2010) [hereinafter Cimino, Private Law, Public Consequences] (asserting that practical wisdom “rej[e]ct[s] formalism in favor of contextualism”); see also MACINTYRE, supra note 19, at 123 (noting the context-specific nature of virtues); Sunstein, Incommensurability, supra note 37, at 852–53 (contending “most answers must be developed in the context of particular problems”).

148. See Feldman, supra note 35, at 58–59 (contending that “good judgment in the choice and pursuit of one’s ends” is a virtuous trait); see also HURSTHOUSE, ETHICS, HUMANS, AND OTHER ANIMALS, supra note 95, at 147 (asserting that “[v]irtue ethics assesses people and actions in terms of the virtues and vices” (emphasis in original)).

149. See SOLOMON, supra note 21, at 195 (stating that virtues become engrained in a person’s character); Lawrence B. Solum, A Virtue-Centered Account of Equity and the Rule of Law, in VIRTUE JURISPRUDENCE, supra note 35, at 142, 159–60 [hereinafter Solum, Virtue-Centered Account] (noting that judges using practical wisdom act unconsciously).

150. See Solum, Virtue-Centered Account, supra note 149, at 160 (asserting that “experience . . . is required for practical wisdom”).

151. See SOLOMON, supra note 21, at 175–76 (noting that “[d]ecision making . . . takes practice” and that good judgment can only be developed through experience).
would behave in that situation. Through this experiment, the virtuous decision maker engages in a virtue-centered decision process and chooses a “correct” decision from among the available alternatives.

The process by which bankruptcy judges evaluate the multiple demands of various potentially applicable but competing bankruptcy policies can be usefully compared to practical wisdom. Bankruptcy courts must do more than simply balance the expected costs and benefits of a particular decision. Bankruptcy courts are courts of equity, and bankruptcy judges must be able to determine which rule is the most appropriate for a particular case and to correctly apply inherently general laws to the facts of that case. Although this may seem simply like guesswork, excellent judges do not simply guess at the correct answer. Rather, repeated encounters with similar problems refine a judge’s ability to analogize to similar cases, which can be developed into an internalized set of rules and procedures for deciding cases.

Although bankruptcy courts are generally required to follow black letter law when making decisions, as courts of equity it is expected that they must sometimes depart from the law in order to do justice in

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152. See Feldman, supra note 35, at 52–53 (noting that “virtue ethics identifies particular traits as more or less worthy, asks what sort of acts these traits dispose a person to perform, and then rates acts according to whether or not they are of the kind a person possessed of worthy character traits would perform”).

153. This requires a context-specific, deliberative evaluation. Id. at 53. It belittles the role of judges to reduce such inquiries into questions of maximizing utility. See id. (noting the necessity of context-specific deliberation); see also Hursthouse, VIRTUE ETHICS, supra note 19, at 12 (noting that virtues become “strongly entrenched” and are difficult to change, keeping a “virtuous person” virtuous).

154. See Hursthouse, VIRTUE ETHICS, supra note 19, at 12 (noting that practical wisdom is the “ability to reason correctly about practical matters”).

155. See id. at 40 (contending that “a certain amount of virtue and corresponding moral or practical wisdom . . . might be required both to interpret the rules and to determine which rule was most appropriately to be applied in a particular case” (emphasis in original)); Solum, Natural Justice, supra note 36, at 173 (recognizing that judges must possess practical wisdom).

156. Through experience, judges digest and synthesize the various competing concerns and considerations involved in common disputes, so that their decision-making may appear spontaneous. See Solomon, supra note 21, at 233 (noting that the accumulation of precedent gives rise to more efficient decision-making). Acting virtuously develops into a kind of understanding as to how to act, but a person must also consciously aim to act virtuously and practice doing so. Id. at 5, 174; see also Gross, supra note 13, at 105 (discussing the role of intuition in bankruptcy decision-making).

particular cases. 158 This is sensible; the existence of consistently followed rules helps ensure predictability, certainty, and respect of legitimate expectations. 159 At the same time, granting bankruptcy courts the powers of equity allows them to fill the gaps left when legislators draft laws of general applicability. These powers also allow judges to make exceptions in cases where the straightforward application of the law would lead to unanticipated or unjust results. 160 In these ways, equity furthers legislative intent.

Equity is particularly important in the bankruptcy context, where bankruptcy judges have more than just the interstitial gap-filling power that all courts have. 161 Several Code provisions specifically direct bankruptcy judges to consider equitable principles. 162 In addition, section 105 of the Code is also a powerful tool in a bankruptcy judge’s equitable arsenal. 163 Although several circuit courts have said that

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158. See Hecht v. Bowles, 321 U.S. 321, 329 (1944) (“The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case.”); see also Colin Farrelly & Lawrence B. Solum, An Introduction to Aretaic Theories of Law, in VIRTUE JURISPRUDENCE, supra note 35, at 1, 19 (“A common understanding of equity is that legal decision makers sometimes ought to depart from the rules in order to do justice in particular cases.”); Solum, Virtue-Centered Account, supra note 149, at 143 (same).

159. In a virtue jurisprudential account of the law, predictability and certainty are provided by the use of analogical reasoning, stare decisis, and by focusing on the consequences of decisions. See Sunstein, Incommensurability, supra note 37, at 858 (“Much of the relevant work here is done in two ways: through analogies and through understanding consequences . . . “); see also Gross, supra note 13, at 217 (noting that “prior decisions and legislative history can help guide the decision maker” when while leaving room for individualized justice); MacIntyre, supra note 19, at 232 (contending that questions cannot be answered without prior formulations of “rules of justice”); Solomon, supra note 21, at 233 (noting that conflicts in law become well defined through “accumulation of precedents”).

160. See Solum, Theory of Judging, supra note 27, at 205 (contending that virtue theory allows exceptions for departures from rules); see also Farrelly & Solum, supra note 158, at 19 (asserting justice can require departures from rules).

161. Supreme Court cases like Marrama suggest that bankruptcy courts have broad equitable powers that non-bankruptcy courts do not enjoy. See Marrama v. Citizens Bank of Mass., 549 U.S. 365, 375 (2007) (noting that bankruptcy judges are given “broad authority” by § 105(a)).

162. See, e.g., 11 U.S.C. § 552(b)(1) (2012) (providing that prepetition security agreements cover related postpetition property unless “the equities of the case” require otherwise); id. §§ 1113(b)(1)(A), 1114(f)(1)(A) (allowing the rejection or modification of collective bargaining agreements and retirements savings plans, respectively, only if “all creditors, the debtor and all of the affected parties are treated fairly and equitably”); id. § 1129(b) (allowing cramdown unless the plan discriminates unfairly, or if it is not “fair and equitable”).

163. Id. § 105(a) provides:

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

(emphasis added).
section 105 does not change bankruptcy courts into roving courts of equity. The Supreme Court recently confirmed that section 105 is a broad grant of equitable power to the bankruptcy courts.

For example, in *Malley v. Agin (In re Malley)*, the First Circuit upheld the bankruptcy court’s decision to surcharge the value of an otherwise exempt asset as a remedy for a Chapter 7 debtor’s fraudulent concealment of assets. In other words, the court remedied the debtor’s fraudulent failure to identify assets that could have been used to repay creditors by depriving him of an asset that he would have otherwise been able to keep for his own use. The First Circuit found that the surcharge order was “an appropriate and necessary way to vindicate” provisions of the Code requiring full and honest disclosure by a debtor of its assets. The First Circuit upheld the bankruptcy court’s exercise of its section 105 equitable powers, despite the

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164. See United States v. Sutton, 786 F.2d 1305, 1308 (5th Cir. 1986) (recognizing that § 105 “does not authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission to do equity”); see also S. Ry. Co. v. Johnson Bronze Co., 758 F.2d 134, 141 (3d Cir. 1985) (noting that “section 105(a) does not authorize the bankruptcy court to create rights not otherwise available under applicable law”); Gross, supra note 13, at 227 (“The equitable powers derive from what is actually in the Code.”); Timothy E. Graulich, *Substantive Consolidation—A Post-Modern Trend*, 14 AM. BANKR. INST. L. REV. 527, 553–54 (2006) (emphasizing that “section 105 is not an authorization to convert the court into a ‘roving commission to do equity’ and may be used only to implement powers already expressed in the provisions of the Bankruptcy Code” (citation omitted)); Joshua M. Silverstein, *Hiding in Plain View: A Neglected Supreme Court Decision Resolves the Debate over Non-Debtor Releases in Chapter 11 Reorganizations*, 23 EMORY BANKR. DEV. J. 13, 38 (2006) (“According to this ‘narrow view,’ § 105(a) ‘does not authorize bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission to do equity.’” (citation omitted)).

165. See, e.g., *Marrama*, 549 U.S. at 375 (noting bankruptcy judges are given “broad authority” by section 105(a)); *In re Rodriguez*, 396 B.R. 436, 458 (Bankr. S.D. Tex. 2008) (“Courts . . . have used § 105 to grant plaintiffs a broad range of remedies . . . .”); *In re Kellett*, 379 B.R. 332, 339 (Bankr. D. Or. 2007) (explaining that the Supreme Court “broadly interpreted” the bankruptcy court’s authority under section 105(a) in *Marrama*; see also Gross, supra note 13, at 227 (observing that bankruptcy courts frequently invoke section 105 “when they sense that the Code produces an unfair result”)); Patrick D. Fleming, *Credit Derivatives Can Create a Financial Incentive For Creditors to Destroy a Chapter 11 Debtor: Section 1126(e) and Section 105(a) Provide a Solution*, 17 AM. BANKR. INST. L. REV. 189, 211 (2009) (“Section 105 could be interpreted to provide broad authority for disclosures of certain credit derivative positions to be obtained.”). The extent of the court’s equitable powers remains hotly contested. See, e.g., Law v. Seigel (*In re Law*), 435 Fed. Appx. 697 (9th Cir. 2011), cert. granted, 133 S. Ct. 2824 (June 17, 2013).


167. *In re Malley*, 693 F.3d at 30; see also 11 U.S.C. § 521 (listing debtors’ duties).
Bankruptcy Code’s failure to specifically authorize surcharge orders as a remedy for section 521 violations.

The Code does not specifically address how to remedy the fraudulent concealment of assets, and the court had to determine what remedy—if any—was the most appropriate in this particular case. The court’s process of explicitly considering various potentially applicable and potentially competing principles is akin to practical wisdom. The court had to consider its role as a court of equity, its powers under section 105, the interests of justice for creditors, the debtor’s violation of his obligation to be truthful, and whether the Code’s silence suggested that no remedy was available.

There is not one clearly correct solution to the problem the court confronted. Ultimately, the bankruptcy court decided that departing from the normal rules (i.e., allowing the debtor to keep his exempt assets) was an appropriate sanction for the debtor’s dishonest conduct. The court fashioned a remedy to address the debtor’s dishonest conduct despite the lack of a specific remedy set forth in the Code. In the absence of clear solutions, and confronted with the need to reconcile the competing demands of the Code and equity, courts, like the In re Malley court, explicitly reason in a manner reminiscent of practical wisdom. This is particularly true in cases where they must consider whether to depart from the express statutory text. For this reason, virtue jurisprudence may offer a rich understanding of decision making in the bankruptcy courts.

Even when bankruptcy judges exercise their equitable powers, their ability to do justice in a particular case remains constrained. Bankruptcy judges, like other judges, are bound by stare decisis. In

168. See In re Malley, 693 F.3d at 29 (finding that the debtor failed to disclose approximately $25,000 in assets).
169. Creditors’ bargain theorists would likely disagree. Despite the difficulty of measuring and comparing the costs and benefits to parties in various hypothetical states of the world, creditors’ bargain theorists would likely claim that one state of the world would be the most likely to maximize the pool of assets to be distributed and demonstrate the most respect for creditor rights.
170. Their equitable powers are derived from the Code itself. GROSS, supra note 13, at 227; see also supra note 156 (contending that judges use experience and knowledge to make decisions).
171. See Sunstein, Incommensurability, supra note 37, at 858 (describing the consistency that results from using precedent to inform legal reasoning); see also SOLOMON, supra note 21, at 233 (discussing the importance of precedent). Principles of stare decisis serve at least three valuable ends. First, they enhance efficiency. If appellate precedents are followed, there is no need to litigate the same issue repeatedly in different cases. After a question is decided in an appellate court, lower courts in that jurisdiction are obligated to follow that decision. Second, binding appellate precedents foster consistency. If each bankruptcy judge is free to decide an issue for
addition, analogical reasoning\textsuperscript{172} can be understood both as comprising a part of practical wisdom and serving to limit the discretion of lower court judges.\textsuperscript{173} When combined with stare decisis, it should be clear that acknowledging that bankruptcy judges have wide-ranging powers of equity is not akin to sanctioning subjective and unprincipled decisions.\textsuperscript{174} It does mean, however, that there may be several possible outcomes that are all correct because they are the product of virtuous decision making.\textsuperscript{175}

3. Virtue Jurisprudence Focuses on Both the Means and Ends of the Law

The symbiotic analysis of means and ends is the third leg of virtue jurisprudence’s power to elucidate our bankruptcy laws.\textsuperscript{176} A virtue jurisprudential approach requires decision makers to consider two questions: (i) what are the appropriate outcomes to pursue in a particular case; and (ii) what is the best way to achieve those outcomes. These two questions should not be collapsed into a single inquiry, such as himself or herself, varying results are inevitable. The outcome of the legal questions is likely to depend on the identity of the judge. Binding appellate precedents thus foster fairness and equity among litigants. Third, binding appellate precedents foster predictability in the law. Individuals can know the law and base their conduct accordingly. Lawyers can know the law and advise their clients accordingly. Without binding precedent, the law is uncertain and the benefits of predictability are lost. \textit{In re Cormier}, 382 B.R. 377, 411 n.41 (Bankr. W.D. Mich. 2008) (citing Erwin Chemerinsky, \textit{Decision-makers: In Defense of Courts}, 71 AM BANKR. L.J. 109, 128 (1997)).

172. Analogical reasoning is commonly employed by judges to reach the correct outcome in cases. See Sunstein, \textit{ Analogical Reasoning}, supra note 60, at 787 (discussing the manner in which judges should reason to produce certain outcomes).


174. Nevertheless, it is true that “what counts as ‘fair’... is always in some sense a subjective judgment, based not just on the individual feelings and needs of the immediate participants, but on the larger collective consciousness as well.” SOLOMON, supra note 21, at 209; see also MACINTYRE, supra note 19, at 139 (arguing that conceptions of justice are always relative and that “[t]here is no such thing as ‘justice-as-such,’” but only context-specific justice (citation omitted)).

175. The lack of a “right answer” does not mean that it is impossible to reach a correct decision. Good judgment requires only that a person make the best decision available by following a virtuous decision-making process. SOLOMON, supra note 21, at 179.

what is the most efficient outcome. Instead, virtue jurisprudence offers this method of reasoning about both the means and ends in order to explicitly consider both aspects of a problem and arrive at the virtuous decision for a particular situation.

This means-ends analysis distinguishes virtue jurisprudence from other practical philosophies that focus exclusively on the ends to be pursued (i.e., consequentialism), or on one’s duties under the law (i.e., deontology), by forcing a decision maker to more explicitly account for both means and ends. Virtue jurisprudence also differs from consequentialist theories of law because the end it focuses on—eudaimonia—is both an internal and a multi-variable concept. As such, promoting the ability of each person to achieve eudaimonia may involve trade-offs between and among people. And different means of promoting eudaimonia are likely to affect individuals differently. Therefore, virtue jurisprudence denies that all decisions can be reduced to a single inquiry without eliding the differential impact that such a move would have on distributional outcomes.

Because virtue jurisprudence is concerned with distributional outcomes, the means that people adopt to obtain particular outcomes are as relevant to virtue jurisprudential decision making as the outcomes themselves. In addition, virtue jurisprudence recognizes that

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177. This is, of course, just what the creditors’ bargain theory requires. See MacIntyre, supra note 19, at 198–99 (contending that the summing of happiness “makes no sense”).

178. See Cimino, Private Law, Public Consequences, supra note 147, at 299 (asserting that the “hallmarks of virtue jurisprudence” include “reasoning over both means and ends, and start[ing] from the premise that the ‘right’ result is probably found at the mean between the two extremes”); see also MacIntyre, supra note 19 at 149 (noting that the exercise of virtue should be considered not only a means to an end, but also an integral part of the end itself).

179. See Solomon, supra note 21, at 113 (distinguishing virtue theory from utilitarianism which is a consequentialist theory).

180. See id. (distinguishing virtue theory from deontological theory).

181. See Cimino, Virtue and Contract, supra note 22, at 738 (“[U]nder a virtue theory approach, a court could more explicitly account for the parties’ intent as to means, as well as ends . . . ”).

182. See Alexander, supra note 28, at 751 (claiming that human flourishing is a multivariable concept and that the multiple relevant components of human flourishing are incommensurable); see also MacIntyre, supra note 19, at 178 (noting the incommensurability of “internal goods and external goods”).

183. See MacIntyre, supra note 19, at 198–99 (“[C]ultivation of the virtues always may and often does hinder the achievement of those external goods which are the mark of worldly success.”).

184. See Cimino, Virtue and Contract, supra note 22, at 716 (arguing that “a virtue is not a single, universal good in opposition to a single, universal bad”); see also MacIntyre, supra note 19, at 149 (“The immediate outcome of the exercise of a virtue is a choice which issues in right action.”).

185. See Feldman, supra note 35, at 61; see also Cimino, Virtue and Contract, supra note 22,
different virtuous decision makers might choose quite different means to achieve the same end. An important benefit of the virtue jurisprudential framework is that it forces decision makers to recognize that trade-offs between and among people will likely be necessary. As such, there is not necessarily a “best means” to adopt, just as there is not a single outcome to be achieved. Instead, there are a variety of solutions that a court might employ, each with its own benefits and drawbacks for particular parties-in-interest. Virtue jurisprudential theories highlight this fact and explicitly encourage the open and full consideration of both means and ends.

The Bankruptcy Code also encourages the explicit consideration of both methods and outcomes. These Code provisions require a decision maker to consider both: (i) the ends to be achieved; and (ii) the best way to achieve those ends. They commonly do so by giving discretion to the bankruptcy judge to grant relief if “cause” exists. “Cause” is rarely defined by the Bankruptcy Code. As such, these provisions require bankruptcy judges to consider what standards are relevant to its determination and how to apply those standards to the facts of a particular case.

For example, section 1104(a) allows a bankruptcy court to appoint a trustee to manage the debtor’s estate if the court determines that cause exists or because appointment “is in the interests of creditors, any equity security holders, and other interests of the estate.” However, the Code does not explain how judges should evaluate the interests of creditors, equity security holders, or the vague notion of “other interests of the estate.” Complicating matters further, section 1104(c) provides that if the court declines to appoint a trustee, it “shall

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186. See MACINTYRE, supra note 19, at 149 (“[A] number of quite different means may be employed to achieve one and the same end.”).

187. See, e.g., id. § 105; id. § 107(c)(1); id. § 303; id. § 324; id. § 349; id. § 350; id. § 362; id. § 363; id. § 365; id. § 502; id. § 503; id. § 1104; id. § 1112; id. § 1113; id. § 1114; id. § 1121; id. § 1129.

188. See, e.g., id. § 105; id. § 107(c)(1); id. § 303.

189. Somewhat unusually, § 1104 defines cause. Id. § 1104(a)(1) defines cause to include “fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause.” See id. § 1104(a)(1).

190. Id. § 1104(a)(2).
order the appointment of an examiner . . . if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate . . . .” In other words, if a court determines that appointment of a trustee is not in the interests of parties to the case, the Code explicitly contemplates that the court might still find that appointment of an examiner is in the interests of those parties. But it does not instruct the courts on how to make these determinations. It does not explain how courts should evaluate the interests of the parties, whether appointment of an examiner or trustee better serves those interests, or how to compare potentially conflicting benefits and burdens on the parties.

Although the Code does not explain the circumstances under which bankruptcy judges should appoint an examiner rather than a trustee, it does provide a process for reaching that decision. The process set forth in the Code requires judges to consider the various interests of creditors, equity security holders, and other interest holders (the ends) and whether appointment of a trustee or an examiner is the best way to achieve those ends (the means). This means-ends analysis is the correct process to follow, but this process does not dictate a “correct” outcome. Instead, a “correct” outcome is reached by following this particular process. Similarly, virtue jurisprudence suggests that a “correct” decision is the decision made by a virtuous decision maker who engaged in a virtue-centered decision process.  

IV. VIRTUE JURISPRUDENCE BETTER EXPLAINS SOME OF THE BANKRUPTCY CODE’S MOST SALIENT FEATURES

Virtue jurisprudence is a theory that helps to explain both bankruptcy law’s broad policy objectives and its specific content. The three examples that follow are areas of corporate bankruptcy law and policy

191. In full, § 1104(c) provides:
If the court does not order the appointment of a trustee under this section, then at any time before the confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by current or former management of the debtor, if—
(1) such appointment is in the interests of creditors, any equity security holders, and other interests of the estate; or
(2) the debtor’s fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed $5,000,000.

Id. § 1104(c).

192. This requires a context-specific, deliberative evaluation. See Feldman, supra note 35, at 59 (discussing practical wisdom).
that virtue jurisprudence helps explain and that other theories have failed to explain (or have failed to even attempt to explain). Virtue jurisprudence is better situated to explain these aspects of corporate bankruptcy law because it provides a decision-making framework that accounts for bankruptcy courts’ equitable and discretionary powers, and because it accounts for bankruptcy law’s focus on virtues other than efficiency.

A. Virtue Jurisprudence Explains Chapter 11’s Focus on Job Preservation

One of Chapter 11’s primary purposes is to preserve jobs. Chapter 11 is most commonly associated with the reorganization of struggling business, and reorganization is usually thought to be job preserving. As a result, these two ends—reorganization and job preservation—are closely related (if not wholly distinct), and Congress and the courts have clearly stated that job preservation is one of Chapter 11’s most important goals. A number of creditors’ bargain theorists do not recognize that job preservation is an important goal that can be achieved through our bankruptcy system, and even those who acknowledge that preserving jobs is important often deny that the bankruptcy system is the appropriate forum to deal with such issues.

These theorists generally claim that if bankruptcy law favors non-contractual counterparties (e.g., employees) at the expense of


195. See, e.g., In re Motors Liquidation Co., 430 B.R. 65, 84 (Bankr. S.D.N.Y. 2010) (noting the “substantial public interest” in preserving jobs (citing In re Trans World Airlines, Inc., No. 01-00056, 2001 WL 1820326, at *14 (Bankr. D. Del. Apr. 2, 2001)); see also Gross, supra note 13, at 224 (asserting that “the interests of workers were considered sufficiently important [and were] to be treated specially”).

196. See, e.g., Jackson, supra note 15, at 25 n.8.

contractual claimants (e.g., lenders), then the debtor’s contractual counterparties will, ex ante, raise the cost of credit. More expensive credit will decrease overall economic activity, which will, in turn, lead to less job creation. Thus, bankruptcy laws that focus on preserving jobs in specific instances will have the unintended consequence of decreasing overall employment in the economy.

In some ways, the creditors’ bargain theorists are expressing a concern with fairness when they make such arguments. In business, fairness requires “a certain kind of ‘attunement,’ a sense of value and a willingness to exchange value for value,” even in the absence of objective guideposts. Mutual agreement may be one of the only objective market signals to suggest that a bargain was fair. As such, it is possible to conceive of the creditors’ bargain theorists’ focus on preserving ex ante contractual entitlements as an attempt to ensure fairness for a debtor’s contractual counterparties. But it is a limited concern with fairness, one that is restricted to ensuring the fair treatment of a debtor’s contractual counterparties.

The creditors’ bargain theorists’ exclusive focus on ensuring the fair

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198. See Rasmussen, Optimal Bankruptcy, supra note 70, at 13–14 (“When a bankruptcy regime protects certain persons who have dealt with a bankrupt firm, this protection may come at the expense of others in society who would have obtained jobs but for the rise in interest rates caused by the bankruptcy regime.”); see also Michelle J. White, Personal Bankruptcy Under the 1978 Bankruptcy Code: An Economic Analysis, 63 Ind. L.J. 1, 2 (1987) (“These losses raise the cost of risk taking and cause lenders to reduce their willingness to make loans to consumers generally.”); Todd J. Zywicki, An Economic Analysis of the Consumer Bankruptcy Crisis, 99 NW. U. L. REV. 1463, 1466 (2005) (“[T]he option of bankruptcy created a moral hazard problem and increases the risk associated with consumer lending . . . .”); cf. Joshua Goodman & Adam Levitin, Bankruptcy Law and the Cost of Credit: The Impact of Cramdown on Mortgage Interest Rates 14 (Harvard Kennedy Sch. Faculty Research, Working Paper No. RWP12-037 2012), available at http://dash.harvard.edu/handle/1/9403179 (arguing that cramdown raises the cost of credit for some borrowers by ten to twenty basis points, but those same borrowers benefit from a sort of public insurance in the form of bankruptcy protection). But see Carlson, supra note 63, at 616–17 (contesting the claims that additional bankruptcy entitlements increase the cost of credit for “good” companies); but see also Feibelman, supra note 9, at 168 n.216 (noting that “the effect of a prior bankruptcy in an individual’s ability to obtain credit is not well understood”); Warren & Westbrook, Contracting Out of Bankruptcy, supra note 193, at 1222 (arguing that many creditors will not raise the cost of credit because they are mal- or non-adjusting creditors); Zhang, supra note 54, at 6 (same).

199. See Rasmussen & Skeel, Jr., supra note 197, at 87; see also Aghion, Improving Bankruptcy, supra note 14, at 852 n.7 (suggesting that a general employment subsidy would be preferable to saving jobs by using the bankruptcy system). But see Warren & Westbrook, Contracting Out of Bankruptcy, supra note 193, at 1215 (arguing that alternatives to Chapter 11 have substantial inefficiencies that may swamp any purported efficiencies from change).

200. SOLOMON, supra note 21, at 210.

201. See Coleman, supra note 57, at 516 (“Exchanges among knowledgeable, rational persons in a free market are generally Pareto superior; rational individuals do not strike bargains with one another unless each perceives it to be in his or her own interest to do so.”).
treatment of a debtor’s contractual counterparties excludes considerations of fairness for non-contractual counterparties, such as employees, tort victims, and taxing authorities. Nevertheless, if it were demonstrably true that Chapter 11’s focus on preserving jobs in specific instances decreased the overall number of jobs in the economy, it would be reasonable to reconsider Chapter 11’s focus on job preservation. However, the available empirical evidence does not clearly support the conclusions of the creditors’ bargain theorists. But it does suggest that the arguments commonly made about why Chapter 11 should not focus on preserving jobs may be overly simplistic. And even if protecting jobs did raise the cost of commercial credit, it is far from clear that these costs are not offset by an increase in social welfare that may result because jobs are saved and human flourishing increased. For example, Joshua Goodman and Adam Levitin have suggested that small increases in the cost of credit that result from the existence of cramdown may be efficiency enhancing because cramdown creates a form of insurance that the market does not otherwise provide. In addition, the creditors’ bargain theory ignores

202. See Warren & Westbrook, Contracting Out of Bankruptcy, supra note 193, at 1220 (defining involuntary creditors as having “no contractual relationship with the debtor”); see also Lucien Arye Bebchuk & Jess M. Fried, The Uneasy Case for the Priority of Secured Claims in Bankruptcy, 105 YALE L.J. 857, 908 (1996) (identifying four categories of nonadjusting creditors: (i) involuntary creditors, such as tort claimants; (ii) small claim holders, such as customers, employees and trade creditors; (iii) taxing authorities and government regulatory claimholders; and (iv) creditors who have extended credit on fixed terms).

203. In any case, it would still be useful to consider why Congress prioritized preserving jobs when it enacted Chapter 11.


205. See Block-Lieb, supra note 14, at 527–28 (arguing that “claims that bankruptcy law should have no goal other than to minimize the cost of debt capital . . . exaggerate[] the absence of socially beneficial effects for bankruptcy provisions that protect specific creditor groups.”).

206. See Warren, Untenable Case, supra note 14, at 467 (arguing that bankruptcy’s redistributive goals are “sufficiently important to justify slight inefficiencies”); see also Gross, supra note 13, at 129 (presenting arguments in favor of curtailing creditor’s ex ante rights in favor of debtor rehabilitation); Russell Hardin, The Morality of Law and Economics, in LAW AND PHILOSOPHY 331, 360 (11th ed. 1992) (noting that “we might have to give up some efficiency for other gains”).

207. See Goodman & Levitin, supra note 198, at 15 (finding that the availability of cramdown raised interest rates on certain debtors by 1–2% per month, but noting that this might be
that human flourishing is person-specific and that maximizing aggregate welfare may have unacceptable distributional outcomes. Congress may fairly have chosen to tolerate some level of aggregate inefficiency in an attempt to preserve jobs and create acceptable distributional outcomes, because human flourishing is person-specific.

There are at least three other concerns that could have informed Congress’ decision to orient Chapter 11 towards job preservation, concerns that a virtue jurisprudential understanding of bankruptcy law can help to explain. First, virtue jurisprudence recognizes that the loss of jobs can be more than just a side effect of closing a business: it can mean the loss of dignity for workers. Second, shuttered businesses eliminate jobs, jobs that might be critical to a particular community. Communities that developed around one large employer can be easily decimated if that employer closes its doors and unemployed workers move on in search of other work, or seek relief in alcohol or narcotics. Third, virtue jurisprudence recognizes that the “losses flowing from the failure of a business are never completely absorbed by the parties who voluntarily elect to make an economic investment in the debtor-business.” In part, this is because employees tend to be poor risk-spreaders because they can usually have only one job at a time. These examples illustrate some of the social costs of business failure.

“efficiency-enhancing by creating a form of insurance that the private market does not provide”). But see Feibelman, supra note 9, at 160 (contending that “bankruptcy serves the same social insurance functions” as many other common forms of insurance and suggesting that these other forms may be better vehicles for providing social insurance).

208. See Zhang, supra note 54, at 52–53 (arguing that it is an “uncomfortable fact that secured lending is a double-edge sword: it may benefit our society as a whole, but only if some of its members suffer a loss; it improves our well-being sometimes, but causes damage at others”).

209. See Warren, Untenable Case, supra note 14, at 467; see also Gross, supra note 13, at 138 (arguing that “[b]ankruptcy involves much more than maximizing creditors’ recovery”); Hardin, supra note 206, at 360 (recognizing that a degree of efficiency may need to be sacrificed in favor of other interests).

210. See Martin, supra note 48, at 482 (recognizing that “job displacement has high social costs”); see also Gross, supra note 13, at 119 (discussing the role of dignity and self-respect in the bankruptcy context); cf. Rasmussen, Optimal Bankruptcy, supra note 70, at 35–36 (suggesting that overall dignity among workers is increased when the overall number of jobs is maximized because “a person’s self-respect stemming from employment” may increase with time).

211. See Martin, supra note 48, at 474 (discussing the “moral upheaval of losing a community” through job loss, which can eliminate or at least damage the links among people); see also Feibelman, supra note 9, at 166 (noting the hard to measure but still important “intangible costs, especially emotional costs” associated with financial collapse).

212. Ponoroff, supra note 76, at 495; see also Ondersma, supra note 193, at 248 (noting that workers develop job-specific skills that cannot be easily redeployed elsewhere).

213. See Zhang, supra note 54, at 8 (arguing that employees cannot mitigate risk through diversification); see also Ondersma, supra note 193, at 248 (noting that workers typically gain skills particular to only a certain job).
that a virtue jurisprudential understanding of bankruptcy requires judges to engage with. Virtue jurisprudence suggests that it is reasonable to consider whether shareholders and creditors are better situated to bear the costs of business closures than employees and their communities.\textsuperscript{214} Virtue jurisprudence’s engagement with such concerns allows it to make sense of a focus on job preservation, even if it comes at the expense of some aggregate inefficiency.

However, it may be the case that preserving jobs is economically efficient, but that the non-economic benefits are simply hard to measure.\textsuperscript{215} Congress’ acknowledgement that preserving jobs has independent value might be seen as building a bias into Chapter 11 toward a hard-to-measure end because of the likelihood of systemic undervaluation by efficiency-minded judges.\textsuperscript{216} For example, many employees make firm-specific investments expecting to share in the rents and surpluses of a business, despite failing to protect those investments through “direct contracting, personal trust, or reputation.”\textsuperscript{217} In such cases, it would be inefficient (not to mention inequitable) to deny employees protections equal to or greater than those enjoyed by other creditors because the business should be viewed as a joint enterprise created through the owner’s assets and the workers’ labor.\textsuperscript{218} In this way, Chapter 11’s focus on job preservation might be viewed simply as taking a wider view of the efficiency rationale for bankruptcy and attempting to ensure that bankruptcy law maximizes the wealth of all parties affected by financial distress and not just

\textsuperscript{214} Employees, communities and others are usually deeply invested and may be affected deeply or even disastrously by business failure. They are rarely just disinterested spectators. See Solomon, supra note 21, at 122.

\textsuperscript{215} See Gross, supra note 13, at 199 (noting that noneconomic values are “not always measured in traditional economic terms”); see also Feibelman, supra note 9, at 166 (noting that self-insurance costs are difficult to evaluate).

\textsuperscript{216} To be certain, the Code’s protection for parties without formal legal rights (non-creditor interests) are derivative in nature and limited in scope, but they certainly exist. See Warren, Bankruptcy Policymaking, supra note 14, at 355 (“The Code accounts for the rights of other parties that a business failure affects by giving a failing company an opportunity to sell itself . . . in chapter 7 or to reorganize in chapter 11.”); see also Warren, Bankruptcy Policy, supra note 14, at 787 (“The bankruptcy system goes so far as to anticipate the consequences of default on a host of potential creditors, including . . . future tort claimants who have not yet discovered their injuries or their legal rights . . .”).

\textsuperscript{217} LoPucki, Team Production Theory, supra note 18, at 749; see also Francisco Cabrillo & Ben W.F. Depoorter, Bankruptcy Proceedings, in Encyclopedia of Law and Economics 261, 272 (Edward Elgar & The University of Ghent eds., 1999) (noting that employees may “also expect the right to a part of the company assets as indemnity for the loss of their jobs”).

\textsuperscript{218} See Martin, supra note 48, at 483 (noting that a joint enterprise is created through the owner’s assets and the workers’ labor (citing Joseph W. Singer, The Reliance Interest in Property, 40 Stan. L. Rev. 611 (1998))).
There are costs to closing down businesses, dislocating workers, and disrupting communities. Virtue jurisprudence encourages judges to fully consider these costs, whereas the creditors’ bargain model casts these costs as mere externalities. Virtue jurisprudence explains Chapter 11’s focus on job preservation because it understands human lives can be path-determinative and that human flourishing might be harmed by actions taken by debtors or their creditors. Even assuming that closing down a business and selling off its pieces increases aggregate welfare, it is likely to hinder the ability of some citizens to flourish in the short-term. And it can short-circuit “long-term plans, deeply held commitments, and carefully constructed identities.” This has a measurable cost, but only a theory that recognizes that human flourishing is a phenomenon of actual, living human beings, and that there is an “organic integrity and coherence to its individual experience that resists disassembly and substitution” can fully account for these costs. Virtue jurisprudence does so. By

219. See Korobkin, Normative Theory, supra note 46, at 119–20 (“If maximizing social wealth is the ultimate ideal, then it becomes unclear why the principle of bankruptcy law should be to maximize only the wealth of creditors, rather than all parties affected by financial distress.” (emphasis in original)); see also Gross, supra note 13, at 224 (arguing that § 1113 (relating to collective bargaining agreements) essentially forced courts “to take the interests of the community into account”); Martin, supra note 48, at 492 (rejecting the notion that non-creditor interests cannot be quantified).

220. See Martin, supra note 48, at 474 n.202 (discussing the “moral upheaval of losing a community” through job loss, which can eliminate or at least damage the links among people). “Meaningful life work is necessary on a large scale for the long-term sustainability of meaningful human existence.” Id. at 476; cf. Penalver, supra note 57, at 871 (discussing three goals that can be accomplished by laws that override private decisions and command land owners to “act in accordance with virtue”).

221. This blindness to the human costs of our bankruptcy policies may be a result of the use of a unitary metric of valuation, which ignores the possibility of qualitatively distinct valuations. See Sunstein, Incommensurability, supra note 37, at 783–84; see also In re After Six, Inc., 154 B.R. 876, 883 (Bankr. E.D. Pa. 1993) (indicating the court was “appalled” at the failure to consider the debtor’s former employees employment prospects as a relevant factor in choosing a successful bid for the debtor’s assets).

222. “Meaningful life work is necessary on a large scale for the long-term sustainability of meaningful human existence.” Martin, supra note 48, at 476; see also Penalver, supra note 57, at 871.

223. See Feibelman, supra note 9, at 166 (noting the negative effects of financial collapse on individuals). But see Rasmussen, Optimal Bankruptcy, supra note 70, at 35–36 (arguing that “the longer one holds a job, the more one can prepare for the dislocations which occur if the job is lost”).

224. Penalver, supra note 57, at 881; see also Martin, supra note 48, at 483 n.237 (noting scholars who focus on the concerns of workers).

225. Penalver, supra note 57, at 881.

226. Id.
contrast, the creditors’ bargain model treats humans as possessors of welfare, ready to be maximized, but argues—curiously—that bankruptcy is not the mechanism by which to promote human flourishing.

Recognizing that job displacement wastes human capital does not mean that jobs are always preserved, no matter the cost. That is neither sensible, nor what the Code or virtue jurisprudence requires. The extent to which jobs should be protected depends on various factors, such as the harm faced by the laid-off employees (and their families and communities), the employees’ ability to protect themselves, and the potential harm to creditors and other parties. It may often be the case that after balancing all of the competing values at stake, the business is liquidated anyway and jobs are lost. But focusing on Chapter 11’s jobs purpose may help to avoid particularly severe harms to employees, their dependents, and their communities, and ensures that harm to laid-off workers is fully considered. Only virtue jurisprudence addresses and accounts for Chapter 11’s focus on job preservation; the creditors’ bargain does not.

B. Virtue Jurisprudence Explains Chapter 11’s Reorganization Bias

Chapter 11 is biased toward the rehabilitation of financially distressed companies and their reorganization into viable, going concerns. The Supreme Court has stated that the Bankruptcy Code’s “fundamental purpose . . . is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources.” This purpose is also clearly evident from the

227. See Korobkin, Normative Theory, supra note 46, at 105 (discussing bankruptcy law’s jobs purpose); see also Sunstein, Incommensurability, supra note 37, at 857.

228. See 123 Cong. Rec. 35,444 (1977) (statement of Rep. Rodino) (“For businesses, the bill facilitates reorganizations, protecting investments, and jobs.”); see also Lynn M. LoPucki, Courting Failure: How Competition for Big Cases Is Corrupting the Bankruptcy Courts 184 (2005) (noting that in “the United States, managers have the option or reorganizing the firm”; Martin, supra note 48, at 436 n.26 (“[A]s long as rehabilitation is possible, it is clearly preferable to liquidation.”); Harvey R. Miller & Shai Y. Waisman, Is Chapter 11 Bankrupt?, 47 B.C. L. Rev. 129, 143 (2005) (noting that the “1978 Act was designed to provide ‘bankrupt businesses another opportunity to survive’” (citation omitted)); David Hahn, Concentrated Ownership and Control of Corporate Reorganizations 2 (Bar-Ilan Univ. Working Paper No. 6-03, 2003), available at http://www.biu.ac.il/law/anger/wk_papers.html (noting that in the United States, “financially ailing firms turn to reorganization and file a bankruptcy petition under Chapter 11”).

Code itself. Some of the Bankruptcy Code provisions that foster the rehabilitation of debtors include: (i) the automatic stay of most actions against the debtor, its properties, and properties in the possession of the debtor upon commencement of a Chapter 11 case;\textsuperscript{230} (ii) the debtor’s broad authority to obtain post-petition financing;\textsuperscript{231} (iii) the authority to reject unfavorable executory contracts;\textsuperscript{232} (iv) an expansive definition of “property of the estate”;\textsuperscript{233} (v) broad powers to recover property of the estate removed from the debtor’s possession in the months and years leading up to the commencement of a Chapter 11 case;\textsuperscript{234} and (vi) the debtor’s broad powers to administer its bankruptcy case, including the exclusive right to file a proposed plan of reorganization.\textsuperscript{235}

Chapter 11’s reorganization bias has puzzled some theorists whosubscribe to the creditors’ bargain model.\textsuperscript{236} These theorists suggest that when the residual owners of a firm would prefer an outright sale of the firm to the highest bidder, allowing a company to be reorganized is inappropriate.\textsuperscript{237} These theorists assume that if the firm’s residual owners prefer liquidation, then liquidation would maximize the economic value of the firm.\textsuperscript{238} They frequently suggest that Chapter 11 is flawed because it allows existing management to seek to reorganize the company even when reorganization is not value maximizing for the residual owners.\textsuperscript{239}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{230}11 U.S.C. § 362 (2012).
\item \textsuperscript{231}Id. § 364.
\item \textsuperscript{232}Id. § 365.
\item \textsuperscript{233}Id. § 541.
\item \textsuperscript{234}Id. §§ 542–550; see, e.g., United States v. Whiting Pools, Inc., 674 F.2d 144 (2d Cir. 1982) (holding that a Chapter 11 debtor can require the Internal Revenue Service to turn over tangible property seized by it), aff’d, 462 U.S. 198 (1983).
\item \textsuperscript{235}11 U.S.C. §1121.
\item \textsuperscript{236}See Douglas G. Baird, The Uneasy Case for Corporate Reorganizations, 15 J. LEGAL STUD. 127, 128 (1986) (“[T]he entire law of corporate reorganizations is hard to justify under any set of facts and virtually impossible when the debtor is a publicly held corporation.”); see also Barry E. Adler, Bankruptcy and Risk Allocation, 77 CORNELL L. REV. 439, 489 (1992) [hereinafter Adler, Bankruptcy and Risk] (asserting that “there is no need for bankruptcy reorganization, which serves no purpose other than reorganization”); Aghion, Economics of Bankruptcy Reform, supra note 14, at 529 ("We believe that there are serious theoretical and practical problems with Chapter 11."); Bradley & Rosenzweig, supra note 14, at 1050–52 (advocating the repeal of Chapter 11); Jackson, supra note 14, at 894 (“Reorganization proceedings provide nothing more than a method by which the sale of an enterprise as a going concern may be made to the creditors themselves.”); Hahn, supra note 228, at 2 (noting the “continuous questioning” of reorganization under Chapter 11 by commentators).
\item \textsuperscript{237}See, e.g., Hahn, supra note 228, at 29; see also Woo, supra note 53, at 1618, 1623 (noting the “standard assumption of value maximization”).
\item \textsuperscript{238}See, e.g., Hahn, supra note 228, at 28–29; see also Aghion, Economics of Bankruptcy Reform, supra note 14, at 529 (“Chapter 11 mixes two decisions together: the decision of who
\end{enumerate}
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Creditors’ bargain theorists commonly offer two explanations for why management would seek to reorganize a company when its creditors (normally its secured creditors) believe that liquidation would be value maximizing. One claim is that existing management may be attempting to keep their jobs, if even for only a short time, by choosing to reorganize. Because these (managerial) job-preserving reorganization attempts are said to come at the expense of the residual owners, many have called for the repeal of Chapter 11’s reorganization provisions.

Another persistent claim is that Chapter 11’s reorganization provisions encourage shareholders of financially distressed firms to make inefficient production and investment decisions. Specifically, they encourage shareholders to “underinvest” in positive net value projects and “overinvest” in high-risk/large-return projects. The
alleged reason for these inefficient investments is that the minimal returns yielded by low-risk projects will be devoted largely to paying down debt obligations and that only high-risk projects offer any hope of providing a return to shareholders of a financially distressed company.245

Neither explanation appears to capture why Congress has favored reorganization. This is unsurprising because both of these claims depend on unreliable assumptions246 and limited empirical evidence.247 Such evidence that does exist does not appear to support the creditors’ bargain theorists’ claims.248 The economic analysis of law does not seem to be able to explain Chapter 11’s reorganization bias and so it has limited itself to critiquing Congress for having favored reorganization. But since the creditors’ bargain theorists’ normative conclusions are premised on shaky foundations, alternative explanations may be well-

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245. See Donald R. Korobkin, The Unwarranted Case Against Corporate Reorganization: A Reply to Bradley and Rosenzweig, 78 IOWA L. REV. 669, 708 (1993) [hereinafter Korobkin, Unwarranted Case] (“Economists observe that, in a capital structure with risky debt, shareholders may have incentives to reach investment and production decisions that are inefficient from the perspective of maximizing firm value.”); see also Zhang, supra note 54, at 65–67 (discussing the underinvestment problem).

246. See, e.g., Woo, supra note 53, at 1661 (asserting that bank regulation can explain decision to pursue liquidation even when reorganization would be value maximizing).

247. The most common explanation for a managerial preference for non-value maximizing reorganizations is that it allows existing management to keep their jobs, if even for only a short time. However, empirical evidence suggests that senior managers usually suffer a loss of their jobs shortly before or soon after entering Chapter 11. See, e.g., Ponoroff, supra note 76, at 484 (noting that “empirical evidence reveals that more often than not the first thing to occur in public company reorganizations is the removal and replacement of old management”); see also Lois LoPucki & William Whitford, Corporate Governance in the Bankruptcy Reorganization of Large, Publicly-Held Companies, 141 U. PA. L. REV. 669, 685 (1993) (same); LoPucki, Reorganization Realities, supra note 61, at 1313 (same); Ondersma, supra note 193, at 247 (same); Robert K. Rasmussen, The Search for Hercules: Residual Owners, Directors, and Corporate Governance in Chapter 11, 82 WASH. U. L.Q. 1445, 1448 (2004) (same).

248. Evidence suggests that the efficiency effects of reorganization are ambiguous. Robert Gertner & David Scharfstein, A Theory of Workouts and the Effects of Reorganization Law, 46 J. FIN. 1189, 1209 (1991); see also Arturo Bris et al., The Costs of Bankruptcy: Chapter 7 Liquidation vs. Chapter 11 Reorganization, 61 J. FIN. 1253, 1269 (2006) (studying almost 300 corporate bankruptcy cases from Arizona and New York filed between 1995 and 2001 and concluding that reorganization appears to preserve asset values better than liquidations); Stuart C. Gilson, Bankruptcy, Boards, Banks, and Blockholders: Evidence on Changes in Corporate Ownership and Control When Firms Default, 26 J. FIN. ECON. 355 (1990) (suggesting “that corporate default engenders significant changes in the ownership of firms’ residual claims and in the allocation of rights to manage corporate resources”); Korobkin, Unwarranted Case, supra note 245, at 708–11 (providing a detailed discussion of Gertner and Scharfstein’s work as it relates to this claim); Skeel, Jr., supra note 244, at 935 n.66 (discussing empirical evidence suggesting that the underinvestment/overinvestment problem is something of a red herring).
taken.

By contrast, virtue jurisprudence is able to offer a positive explanation for Chapter 11’s reorganization bias. Unlike the creditors’ bargain and its narrow focus on economic efficiency, virtue jurisprudence simultaneously focuses on promoting multiple virtues and choosing the right means to do so. Whereas the economic analysis of law tends only to focus on bankruptcy law’s effect on contractual counterparties, virtue jurisprudence considers the laws’ effects on both contractual and non-contractual counterparties. When bankruptcy judges are called on to evaluate non-monetary interests, such as the interests of the local community, they may believe that they lack an adequate medium to compare these interests with potentially competing economic concerns. Although nothing inherent in economic theory forecloses consideration of non-contractual interests, non-contractual interests regularly receive short shrift in approaches based on economic theory.

Chapter 11’s reorganization bias can be viewed as an acknowledgement that it is difficult to make precise ex ante predictions about the efficiency of various economic arrangements, and that decision makers tend to elide hard-to-quantify costs or benefits. These valuable, but difficult to quantify ends include “maintaining

249. It is certainly true that if “welfare” were given a sufficiently capacious definition, the economic analysis of law might also be able to explain Chapter 11’s reorganization bias. The point of this Article is not to suggest that virtue ethics is the only theory that can explain bankruptcy law, but that it does a better job than the existing theories. This Article does suggest, however, that the creditors’ bargain theory gives short shrift to non-economic stakeholders and non-creditor interests.

250. See James W. Bowers, Groping and Coping in the Shadow of Murphy’s Law: Bankruptcy Theory and the Elementary Economics of Failure, 88 Mich. L. Rev. 2097, 2143 (1990) (noting that the common-pool analysis “is premised on the unspoken assumption that if the market value of the debtor’s estate is maximized everything will be hunky dory”); Martin, supra note 48, at 437 n.31 (noting that law and economics scholars typically ignore concerns about community interests).

251. Bankruptcy may also be conceived as prioritizing future economic growth over short-term economic gains. See Gross, supra note 13, at 138 (“Bankruptcy is concerned with rehabilitating debtors, which may not benefit creditors’ short term recovery.”).


254. See Miller & Waisman, supra note 228, at 144 (“Such provisions reflected Congress’ intent to balance the interests of all parties involved in the Chapter 11 reorganization process.”); see also Gross, supra note 13, at 195, 199, 208 (taking the view that certain societal goods cannot be measured in economic terms).
employment, preserving the local tax base, and advancing community stability.”

Virtue jurisprudence can account for the need to consider each of these goals because of the means-ends symbiosis. In addition, practical wisdom provides a method for reconciling the competing demands of corporate bankruptcies. Through the use of practical wisdom and by simultaneously considering means and ends, a virtue jurisprudential account can provide appropriate consideration of contractual and non-contractual interests. Chapter 11’s reorganization bias can be seen as an attempt to preserve the positive externalities of reorganization despite the difficulty in balancing competing, and perhaps inconsistent, goals.


Individual preferences are not exogenous; human beings have some control over shaping their own preferences. The endogeneity of human preferences leaves room for the law to actively educate citizens in virtue. Aristotle believed that one of the law’s central roles was to encourage a virtuous citizenry. But he believed that the law should do more to encourage virtue than merely prohibiting certain actions with the hope that citizens will avoid those actions out of fear of punishment. As previously discussed, the virtuousness of action is not judged by compliance with some set of pre-existing rules.

255. Warren & Westbrook, The Success of Chapter 11, supra note 57, at 625; see also 123 CONG. REC. 35,444 (1977) (statement of Rep. Rodino) (“For businesses, the bill facilitates reorganizations, protecting investments, and jobs.”); In re Motors Liquidation, 430 B.R. 65, 84 (Bankr. S.D.N.Y. 2010) (noting the “substantial public interest in preserving the value of TWA as a going concern”) (citing In re Trans World Airlines, No. 01-00056, 2001 WL 1820326, at *14 (Bankr. D. Del. 2001)); GROSS, supra note 13, at 195; Butler & Gilpatric, supra note 15 at 282–83 (arguing that law and economics undervalues non-contractual relationships); Martin, supra note 48, at 437 n.31 (noting that law and economics scholars typically ignore concerns about community interests); Tabb, supra note 17, at 804 (noting the relevance of community interests).

256. See Martin, supra note 48, at 445 (discussing the consideration of “general societal interests”).

257. See ARISTOTLE, supra note 23, at 355 (“Though apparently there are many ends, we choose some of them . . . .”); see also Nussbaum, Flawed Foundations, supra note 57, at 1207–08 (noting that “we have some control over the shaping of our tastes”).

258. See Sunstein, Incommensurability, supra note 37, at 822 (noting the “effects of law on social attitudes”); see also MACINTYRE, supra note 19, at 154 (noting that some virtues can be acquired through teaching).

259. See ARISTOTLE, supra note 23, at 348 (asserting that happiness should be acquired for people and cities through virtue); see also Cimino, Virtue and Contract, supra note 22, at 715 (“Aristotle believed the most proper and central role of government was to make its citizens virtuous.”).


261. Penalver, supra note 57, at 865; see also MACINTYRE, supra note 19, at 153 (asserting that “[t]he solution is the result of rough and ready reasoning” rather than the “application of a
Therefore, to help citizens become virtuous, the law should provide a framework that supports and encourages good decision making by citizens.262

One way of educating citizens and developing a supportive framework for their virtuous development is by showcasing examples of both virtuous and non-virtuous action.263 The Bankruptcy Code provisions regarding examiners can be seen as one way that bankruptcy law works to instill virtue in citizens.264 An examiner is an individual appointed in a bankruptcy case to perform certain specified duties, including investigating “the acts, conducts, assets, liabilities, and financial condition of the debtor, the operation of the debtor’s business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan.”265 In short, examiners can help root out malfeasance, and also help parties-in-interest decide whether a business can be successfully reorganized.266 By exposing prior instances where parties have acted inappropriately and criticizing those actions, the Code’s examiner provisions can help teach future actors to make virtuous decisions.267 This is not about punishment; examiners who ferret out past wrongful actions do not prosecute those who have acted wrongfully.268 Instead, the

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263. See Cimino, Virtue and Contract, supra note 22, at 731 (noting the state’s obligation to educate its citizens in virtue).

264. See 11 U.S.C. § 1104(c) (2012), which provides, in relevant part:

[A]t any time before the confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by current or former management of the debtor, if—(1) such appointment is in the interests of creditors, any equity security holders, and other interests of the estate; or (2) the debtor’s fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed $5,000,000.

265. Id. § 1106(a)(3).

266. Examiners have other purposes as well, such as uncovering potential causes of action for the estate to pursue. See, e.g., Order Directing Appointment of an Examiner Pursuant to Section 1104(c)(2) of the Bankruptcy Code, In re Lehman Bros. Holdings Inc., No. 08-13555, slip op. at 3–5 (Bankr. S.D.N.Y. Jan. 16, 2009) (ordering an examiner to investigate whether there were any colorable causes of action arising from the failure of Lehman Brothers).

267. Although it might also be seen as a stick with which to threaten future actors, acting out of fear of punishment is not virtuous. Virtuous behavior requires taking action for the right reasons.

268. Typically causes of actions uncovered by examiners are prosecuted, if at all, by the
appointment of examiners can serve to teach the right way to act by highlighting non-virtuous actions.269

By contrast, the creditors’ bargain model would conceive of the question of whether to appoint an examiner as an option to be weighed via cost-benefit analysis. Creditors’ bargain theorists would suggest that an examiner should not be appointed unless he or she is likely to uncover enough colorable causes of action such that appointment would essentially earn the estate a profit. Unfortunately, this view has taken root in certain courts.270 This view appears to misunderstand both the history of the examiner provisions271 and the statutory text.272 The appointment of an examiner is mandatory in cases where the debt threshold has been met and a party in interest or the United States Trustee requests appointment.273

The mandatory nature of examiner appointments cannot be explained through an efficiency analysis, but it can be understood from a virtue jurisprudential perspective.274 The law can help shape preferences—and therefore actions.275 Examiners serve to increase human flourishing by helping to make the many who are not virtuous more so by “shaming them, habituating, teaching, and then ultimately persuading them.”276

representatives of the unsecured creditors’ committee.

269. The Bankruptcy Code provisions relating to examiners came about as part of a compromise in which the SEC took a step back from the active role it had under Chapter X of the Chandler Act. See Lipson, supra note 193, at 1638 n.117; see also Warren, Untenable Case, supra note 14, at 469. Although the role of the SEC diminished, the appointment of an examiner was intended to fulfill some of the duties that the SEC had previously played. See Lipson, supra note 193, at 1627.


271. See Lipson, supra note 193, at 1627 (noting that Congress created the examiner position to be, in part, a proxy for the “investigative functions played by the Securities and Exchange Commission and mandatory trustee under prior law”).

272. See, e.g., Walton v. Cornerstone Ministries Invs., Inc., 398 B.R. 77, 82 (N.D. Ga. 2008) (noting that the meaning of the statutory text “depends on context” (citation omitted)).


274. See SOLOMON, supra note 21, at 7 (“[I]f one thinks of business as a ‘dog-eat-dog’ fight for survival or calculates all business decisions in the limited language of cost/benefit analysis, unethical behavior is bound to follow.”).

275. See Sunstein, Incommensurability, supra note 37, at 822 (noting “the effects of law on social attitudes”).

276. Claey, supra note 19, at 919–20; see also MACINTYRE, supra note 19, at 154
Being more explicit about enshrining additional obligations to act virtuously into the law would help to constrain the behavior of non-virtuous actors, and over time, “teach them to act virtuously of their own accord.”

CONCLUSION

Bankruptcy law and policy is formed and operated in a world that has imperfect markets, imperfect information, and significant transaction costs. Chapter 11 reflects these imperfections and messy realities, but few of the hypothetical bankruptcy models offered up by creditors’ bargain theorists do the same. And yet, creditors’ bargain theorists often compare their over-simplified, hypothetical bankruptcy models, such as Chameleon Equity or Contingent Equity, with our current system—Chapter 11. Based on such comparisons, it is no wonder that they take the view that Chapter 11 is costly, cumbersome, and in need of significant reform, if not outright repeal. However, while there is a lot to learn from thought experiments into hypothetical bankruptcy structures, it is important to extrapolate those conclusions back into the real world before making policy choices. Unfortunately, this crucial, final step is often omitted, impairing our ability to compare the idealized theories derived from the creditors’ bargain model to our actual bankruptcy laws.

The creditors’ bargain model seems ill-equipped to account for Chapter 11’s complexities. By contrast, virtue jurisprudence has the ability to offer useful insights about under-theorized aspects of

(discussing moral education).

277. Penalver, supra note 57, at 871.
279. Adler, Financial and Political Theories, supra note 14, at 312, 327.
280. Bradley & Rosenzweig, supra note 14, at 1079.
281. See Butler & Gilpatric, supra note 15, at 277; cf. Solomon, supra note 21, at 220 (stating that virtue ethics confronts “the darkest dogma of traditional business thinking, the impoverished idea of Homo economicus who has no attachments or affects other than crude self-interest and the ability to calculate how to satisfy that interest vis-à-vis other people”).
282. See, e.g., Adler, Bankruptcy and Risk, supra note 236, at 489; Bradley & Rosenzweig, supra note 14, at 1052–53.
283. See LoPucki, Reorganization Realities, supra note 61, at 1311 (noting that Professor Adler has referred to Chameleon Equity as a “thought experiment”).
284. See id. (“Most economists are bad at reality; their simplistic models do not begin to capture phenomenological reality.”); see also Warren, Bankruptcy Policymaking, supra note 14, at 379 (“We must consider bankruptcy policies in light of their application to cases that arise in the real world.”).
bankruptcy law. By focusing on achieving a just result, the bankruptcy
judge can quiet the chaos of financial distress that is often occasioned
by a bankruptcy filing. The bankruptcy judge can help prevent creditors
(and debtors) from aiming at cross-purposes because they lack a larger
perspective as to their effects on the enterprise.285

In light of the frailty of human institutions, a consequentialist
approach that seeks to distill every competing claim to a dollar figure
(or some imaginary unit of welfare) and compare such claims on that
basis may be the best way to promote human flourishing. It may be
that, in order to overcome certain institutional weaknesses, we should
resolve disputes by comparing claims according to a unitary metric,
even though this will not reflect a fully adequate understanding of those
claims.286 “[Assuming commensurability] makes things simple and
orderly where they would otherwise be chaotic. In certain areas of the
law, this may be a decisive advantage, all things considered.”287 If this
is the argument that creditors’ bargain theorists wish to make, then they
must make it. Creditors’ bargain theorists must claim that they can do
better than any other system, or they must aim to do less. But it is for
creditors’ bargain theorists to prove that their vision of the world is
practically superior, despite being non-ideal.

Until recently, virtue ethics had more or less fallen out of favor.
Deontological and consequentialist theories ruled the philosophical and
legal academy, and the creditors’ bargain model dominated the
Corporate bankruptcy literature. Virtue ethics was rarely even
mentioned. This seems, in part, because “[b]oth deontological ethics
and utilitarianism stress the importance of broad general principles,
which can then be applied to particular cases.”288 Whereas, it is the
nature of virtue ethics “to start with the particular community and
context and understand cases (and abstract principles) within that
community and context.”289 Similarly, the Code often requires that
bankruptcy judges make context-bound decisions in the exercise of their
discretion.

One of the primary aims of this Article is to introduce virtue ethics
into the corporate bankruptcy literature and to offer it as the right kind
of theory to provide a way to understand the day-to-day dynamics of

285. See Korobkin, Rehabilitating Values, supra note 18, at 773 (noting that the bankruptcy
process can be constructive for its participants).
286. Cf. Colin Farrelly, Civic Liberalism and Judicial Review, in VIRTUE JURISPRUDENCE,
supra note 35, at 107, 129.
287. Sunstein, Incommensurability, supra note 37, at 853.
288. SOLOMON, supra note 21, at 113.
289. Id.; see also Farrelly, supra note 286, at 129.
bankruptcy law. Virtue ethics is less determinate than the creditors-bargain theory. But the inability to formulate general rules or prescriptions that can be followed in all situations is a result of virtue ethics’ recognition that “much depends on the historical, cultural, economic and political situation of any given society.”

This Article has argued that virtue jurisprudence offers a potentially rich and fruitful descriptive account of the nature, means, and ends of bankruptcy law. It also has the potential to offer a unifying normative theory of bankruptcy law—a theory that simultaneously resolves some of the problems of existing theory and poses a new set of challenges. This next step will be addressed in a follow-up article.

290. Farrelly, supra note 286, at 129; see also Gross, supra note 13, at 216 (discussing “contextualized decision making”).