
Mandatory Aggregation of Mass Tort Litigation in Bankruptcy

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ABSTRACT. This Response to *Bankruptcy Grifters* by Lindsey Simon shares her concerns about the inequities of a solvent entity, which has not filed bankruptcy, discharging its mass tort liability in the bankruptcy proceedings of a codefendant. Such a nondebtor discharge, effectuated through a so-called nondebtor release and channeling injunction, imposes upon tort victims a mandatory non-opt-out settlement of the released nondebtor's mass tort liability. Simon's proposed reforms of nondebtor-release practice do not go far enough. Nondebtor releases are an illegitimate and unconstitutional exercise of substantive lawmaking powers by the federal courts. Moreover, the bankruptcy "necessity" proffered as justifying a mandatory settlement of nondebtors' mass tort liability—a mandatory settlement that is otherwise impermissible and unconstitutional—is nothing more than pretext. The Supreme Court should resolve the circuit split over the permissibility of nondebtor releases by flatly repudiating them. Bankruptcy can serve as a powerful aggregation process for efficient (and fair) resolution of the mass tort liability of *both* debtors *and* nondebtor codefendants even (and especially) without nondebtor releases, particularly if the Supreme Court also clarifies the full expanse of federal bankruptcy jurisdiction.

INTRODUCTION

Professor Lindsey Simon's fascinating and revealing article, *Bankruptcy Grifters*,¹ comes in the midst of a collective epiphany regarding the astonishing means by which federal bankruptcy courts impose mandatory settlements of mass tort liabilities. Of course, with respect to an insolvent debtor's liability, such a power has always been incident to collective insolvency proceedings, even before the

1. Lindsey D. Simon, *Bankruptcy Grifters*, 131 YALE L.J. 1154 (2022).

enactment of the current Bankruptcy Code.² What is remarkable (and profoundly disturbing) about the bankruptcy grifter phenomenon Simon documents, however, is that bankruptcy courts have, entirely at their own behest, invented the immense, extraordinary power to impose mandatory non-opt-out settlements of mass tort victims' claims against eminently solvent *nondebtors*, who have *not* filed bankruptcy themselves.

I wholeheartedly share Simon's concerns regarding the inequities the bankruptcy grifter phenomenon has wrought. Indeed, I predicted as much twenty-five years ago,³ in the wake of the first big bankruptcy grift involving the Dalkon Shield contraceptive device manufactured by A.H. Robins. Those who succeeded in discharging their liability exposure in the Robins bankruptcy case included a long list of alleged joint tortfeasors: Robins's insurer (Aetna), members of the Robins family, and other officers, directors, employees, and attorneys for Robins. Personal injury claimants asserted that Robins and Aetna affirmatively concealed from the public the dangers of the Dalkon Shield and that individual actors personally participated in defrauding the public through the marketing of the Dalkon Shield.⁴

The pending Purdue Pharma bankruptcy, implicating the Sackler family's personal responsibility for the ravages of the opioid OxyContin,⁵ initially unfolded as essentially a replay of the A.H. Robins case. But the Robins bankruptcy grift went largely unnoticed, except in the insulated community of bankruptcy professionals, who aggressively exploited the precedent, fueling the proliferating and rapidly accelerating system of bankruptcy grifting.⁶ The prospect of liability releases for the Sacklers in the Purdue Pharma case, however, finally awakened

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2. See generally Troy A. McKenzie, *The Mass Tort Bankruptcy: A Pre-History*, 5 J. TORT L. 59 (2012) (recounting the resolution of the litigation spawned by the 1944 Ringling Brothers circus fire through a state-court equitable receivership proceeding).
 3. Ralph Brubaker, *Bankruptcy Injunctions and Complex Litigation: A Critical Reappraisal of Non-Debtor Releases in Chapter 11 Reorganizations*, 1997 U. ILL. L. REV. 959.
 4. See *id.* at 963; *In re A.H. Robins Co.*, 88 B.R. 742, 751-55 (E.D. Va. 1988) (confirming plan of reorganization), *aff'd*, 880 F.2d 694, 700-02 (4th Cir. 1989); *In re A.H. Robins Co.*, 131 B.R. 292, 294-96 (E.D. Va. 1991) (quoting plan of reorganization's nondebtor release and injunction provisions), *rev'd*, 972 F.2d 77 (4th Cir. 1992).
 5. See Samir D. Parikh, *The New Mass Torts Bargain*, 90 FORDHAM L. REV. (forthcoming 2022), <https://ssrn.com/abstract=3649611> [<https://perma.cc/49VW-TWJ5>].
 6. See Ralph Brubaker, *A Case Study in Federal Bankruptcy Jurisdiction: Core Jurisdiction (or Not) to Approve Non-Debtor "Releases" and Permanent Injunctions in Chapter 11*, 38 BANKR. L. LETTER, no. 2, Feb. 2018, at 1, 6 (noting that "until the Fourth Circuit's 1989 decision in the A.H. Robins reorganization, it was virtually unthinkable . . . that a bankruptcy court could enter an order discharging the *in personam* liability of a nondebtor party to a debtor's creditors").

a wider realization, even and perhaps particularly among the general public,⁷ with all of the shock, disbelief, and outrage that bankruptcy grifting should have elicited from its infancy.⁸

While I agree with Simon that bankruptcy grifting is a momentous, pressing problem, I disagree with her regarding the appropriate response. Simon seems resigned to the inevitability of the highly controversial practice that makes bankruptcy grifting possible: so-called nonconsensual nondebtor (or third-party) “releases,” which extinguish creditors’ claims against a nondebtor without the

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7. See, e.g., Patrick Radden Keefe, *The Sackler Family’s Plan to Keep Its Billions*, NEW YORKER (Oct. 4, 2020), <https://www.newyorker.com/news/news-desk/the-sackler-family-plan-to-keep-its-billions> [<https://perma.cc/98TA-FT4B>]; Libby Lewis, *The Sackler Family’s Bankruptcy Scheme*, AM. PROSPECT (Mar. 31, 2021), <https://prospect.org/justice/sackler-family-bankruptcy-scheme> [<https://perma.cc/V9WG-JP56>]; Gerald Posner & Ralph Brubaker, Opinion, *The Sacklers Could Get Away With It*, N.Y. TIMES (July 22, 2020), <https://www.nytimes.com/2020/07/22/opinion/sacklers-opioid-epidemic.html> [<https://perma.cc/9Y6E-5KFZ>]; Jonathan Randles, *Congressional Democrats Target Legal Releases for Purdue Pharma Owners*, WALL ST. J. (Mar. 19, 2021), <https://www.wsj.com/articles/congressional-democrats-target-legal-releases-for-purdue-pharma-owners-11616185184> [<https://perma.cc/7CQK-67AR>]; Last Week Tonight with John Oliver, *Opioids III: The Sacklers*, YOUTUBE (Aug. 8, 2021), <https://www.youtube.com/watch?v=uaCaIhfETsM> [<https://perma.cc/7P72-2LYD>]; *How Asbestos Saved the Sackler Family from Bankruptcy*, ECONOMIST (Sept. 9, 2021), <https://www.economist.com/united-states/2021/09/09/how-asbestos-saved-the-sackler-family-from-bankruptcy> [<https://perma.cc/CP33-SFFZ>].
 8. The bankruptcy court approved liability releases for the Sacklers in September of 2021. *In re Purdue Pharma L.P.*, 633 B.R. 53 (Bankr. S.D.N.Y. 2021). In a dramatic development in December of 2021, while this Response was in the final stages of production, the district court vacated the bankruptcy court’s decision, holding that nonconsensual nondebtor releases are not authorized by the Bankruptcy Code and thus are impermissible. *In re Purdue Pharma, L.P.*, No. 21 cv 7532, 2021 WL 5979108 (S.D.N.Y. Dec. 16, 2021); see *Third-Party, Non-Consensual Releases Nixed in the Purdue “Opioid” Reorganization*, ROCHELLE’S DAILY WIRE (Dec. 20, 2021), <https://www.abi.org/newsroom/daily-wire/third-party-non-consensual-releases-nixed-in-the-purdue-%E2%80%99opioid%E2%80%99-reorganization> [<https://perma.cc/JHR9-P3GB>] (describing the district court’s decision as “remarkable” and “one of the most consequential decisions for the chapter 11 system that’s ever been handed down”); Vince Sullivan, *Seismic Purdue Ruling May Finally Get the High Court’s Attention*, LAW360 (Dec. 17, 2021), <https://www.law360.com/articles/1449858/seismic-purdue-ruling-may-finally-get-high-court-s-attention> [<https://perma.cc/VAS2-6PLU>]. The Second Circuit granted leave for an expedited, interlocutory appeal of that decision, and as of this writing, that appeal is pending. *Purdue Pharma, L.P. v. Washington*, No. 22-85 (2d Cir. Jan. 27, 2022) (order granting expedited, interlocutory appeal).

consent (and even over the objection) of creditors⁹ in the same way that a bankruptcy discharge extinguishes a bankruptcy debtor's debts.¹⁰ Such nondebtor-release provisions most frequently appear in the terms of a Chapter 11 debtor's plan of reorganization. And in confirming a plan containing such a nondebtor-release provision, the court will typically enter an order permanently enjoining assertion of the released claims (now commonly known as a "channeling" injunction¹¹), replicating the effect of the Bankruptcy Code's statutory discharge

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9. This Response addresses only nonconsensual nondebtor releases. Many courts will approve releases that are binding upon only those creditors who consent to release of their claims against a nondebtor. *See, e.g., In re Specialty Equip. Cos.*, 3 F.3d 1043, 1045-47 (7th Cir. 1993). All references herein to nondebtor releases are solely to nonconsensual nondebtor releases.
 10. The bankruptcy court's confirmation of a plan of reorganization in a Chapter 11 case "discharges the debtor from any debt that arose before the date of such confirmation." 11 U.S.C. § 1141(d)(1)(A) (2018).
 11. The "channeling" terminology, in reference to injunctions effectuating nondebtor releases, has its origins in a beguiling effort to portray nondebtor releases as consistent with bankruptcy courts' longstanding, traditional *in rem* injunctive powers. In reality, though, nondebtor releases are a perversion of bankruptcy courts' conventional *in rem* injunctive powers. *See* Ralph Brubaker, *Nondebtor Releases and Injunctions in Chapter 11: Revisiting Jurisdictional Precepts and the Forgotten Callaway v. Benton Case*, 72 AM. BANKR. L.J. 1, 14-22 (1998) [hereinafter Brubaker, *Nondebtor Release Jurisdiction*]; Lewis, *supra* note 7 ("In the guise of something designed to protect property, a liability release for [a nondebtor] does something radical. It forcibly converts the rights of victims to seek redress for *personal* misconduct by the [nondebtor] into a kind of *property* of [the debtor]. Property that [the debtor] can dispose of any way it wants as part of its bankruptcy . . ."). Nonetheless, the "channeling" terminology is now widely employed to describe injunctions that effectuate a discharge of personal liability (of either a debtor or a nondebtor) that leaves specified property as the only source of recovery for those whose claims have been discharged – that is, their claims are "channeled" away from the discharged person and toward and against that property (and only that property).

"Channeling" can also connote a more limited, purely procedural, forum-consolidating and centralizing injunction, known as an anti-suit injunction amongst complex litigation scholars, that prevents assertion of a claim in any court other than the one issuing the anti-suit "channeling" injunction. *See* JAY TIDMARSH & ROGER H. TRANGSRUD, *COMPLEX LITIGATION AND ITS ALTERNATIVES* 101 (2d ed. 2018). With respect to creditors' claims against a bankruptcy debtor, including the disputed claims of tort victims, bankruptcy's statutory automatic stay functions as a channeling injunction in both senses. By enjoining creditors from asserting their claims against the debtor personally, the automatic stay has the indirect effect of forcing creditors to file their claims (if at all, given the prospect of a bankruptcy discharge of the debtor's personal liability) in the bankruptcy court as claims against the debtor's bankruptcy estate (i.e., the debtor's property). *See* Ralph Brubaker, *Money Judgments in Governmental Regulatory Actions: A Lesson in the Multiple Functions of Bankruptcy's Automatic Stay*, 36 BANKR. L. LETTER, no. 10, Oct. 2016, at 1 (noting that "the stay serves a *channeling function* that promotes judicial economy and efficiency in administration of bankruptcy estates – channeling all claims against the debtor's estate into one forum, the federal bankruptcy court, for efficient, centralized resolution, rather than allowing piecemeal adjudications in various state and fed-

injunction (which is, of course, applicable to only *the debtor's* discharged debts).¹²

Unlike Simon, I do not believe that we should simply abandon what she recognizes as an “obvious solution”¹³ to the bankruptcy grifter problem: prohibiting nonconsensual nondebtor releases.¹⁴ As Simon points out, the ever-larger waves of bankruptcy gifting and the degree to which gifting disadvantages claimants is a significant and urgent problem, one that I believe warrants the attention of the Supreme Court. Indeed, there is a prominent, longstanding circuit split over the propriety of nondebtor releases that begs for resolution.¹⁵

eral courts”); *Stern v. Marshall*, 564 U.S. 462, 493 (2011) (observing that a creditor “had nowhere else to go if he wished to recover from [the debtor]’s estate”); Ralph Brubaker, *The Erie Doctrine, Code Common Law, and Choice of Law Rules in Bankruptcy (Part II)*, 32 BANKR. L. LETTER, no. 6, June 2012, at 1, 7, 4 (explaining how “the automatic stay of all nonbankruptcy suits against the debtor operates in conjunction with the requirement that a creditor (in order to receive a distribution from the debtor’s bankruptcy estate) must file a proof of claim with the ‘home’ bankruptcy court in the district in which the debtor’s bankruptcy case is pending,” and “the combined effect of the automatic stay and the discharge injunction typically means that a creditor’s only recourse with respect to [a] claim against the debtor, once the debtor files bankruptcy, is to assert that claim against the debtor’s bankruptcy estate”); *infra* Section III.A.

12. 11 U.S.C. § 524(a) (2018).

13. Simon, *supra* note 1, at 1205.

14. And the sensational recent decision of the district court in the *Purdue Pharma* case, discussed *supra* note 8, gives me renewed hope that pressing for outright prohibition may not be a futile endeavor, even in the face of the “long-established practice in Chapter 11 and general acceptance . . . by the bench and bar.” Simon, *supra* note 1, at 1205; *see also* *Patterson v. Mahwah Bergen Retail Grp.*, No. 21cv167, 2022 WL 135398 (E.D. Va. Jan. 13, 2022) (invalidating non-consensual nondebtor releases approved by a bankruptcy court, on multiple grounds, including violation of the claimants’ due-process rights).

15. The Fifth, Ninth, and Tenth Circuits prohibit nonconsensual nondebtor releases. *See In re Zale Corp.*, 62 F.2d 746, 759–62 (5th Cir. 1995); *In re Lowenschuss*, 67 F.3d 1394, 1401–02 (9th Cir. 1995); *In re W. Real Estate Fund, Inc.*, 922 F.2d 592, 600–02 (10th Cir. 1990), *modified on other grounds sub nom.* *Abel v. West*, 932 F.2d 898 (10th Cir. 1991); *cf.* *Blixseth v. Credit Suisse*, 961 F.3d 1074, 1081–85, 1082 (9th Cir. 2020) (approving a narrow exception to its ban on nondebtor releases for claims “focused on actions of various participants in the Plan approval process and relating only to that process”); *In re Pac. Lumber Co.*, 584 F.3d 229, 251–53 (5th Cir. 2009) (approving nondebtor releases for members of the official committee of unsecured creditors that did “not insulate them from willfulness and gross negligence,” consistent with their “qualified immunity for actions within the scope of their duties”). The Fourth, Sixth, Seventh, and Eleventh Circuits permit nonconsensual nondebtor releases. *See In re A.H. Robins Co.*, 880 F.2d 694, 700–02 (4th Cir. 1989); *Class Five Nev. Claimants v. Dow Corning Corp.* (*In re Dow Corning Corp.*), 280 F.3d 648, 656–58 (6th Cir. 2002); *In re Ingersoll, Inc.*, 562 F.3d 856, 864–65 (7th Cir. 2008); *In re Seaside Eng’g & Surveying, Inc.*, 780 F.3d 1070, 1078–79 (11th Cir. 2015). The Third Circuit—important because of the large number of big Chapter 11 cases filed in the District of Delaware—has expressly equivocated. *See In re Cont’l*

Moreover, nondebtor releases pose much larger questions than the typical statutory-interpretation disputes that comprise the bulk of the Supreme Court's bankruptcy jurisprudence. As I explain in Part I of this Response, the fundamental illegitimacy of nondebtor releases is of a constitutional magnitude, implicating constraints imposed by the separation-of-powers dimensions of both the Bankruptcy Clause and *Erie's* constitutional holding.

Moreover, the process by which bankruptcy courts approve nondebtor releases departs dramatically from the baseline requirements for resolving disputed nonbankruptcy claims and causes of action, in ways that raise serious due-process concerns. Giving bankruptcy courts the unique power to impose mandatory non-opt-out settlements of tort victims' claims against nondebtors – settlements that are otherwise impermissible and unconstitutional – requires an explanation of why this extraordinary settlement power with respect to claims against a solvent *nondebtor* should exist *only* when a codefendant happens to be a bankruptcy debtor. But as I discuss in Part II, the only proffered justification is nothing more than empty, false rhetoric – what I dub bankruptcy's “necessity” fiction. Nondebtor releases do not advance any legitimate bankruptcy policy; they simply provide a contrived means for solvent nondebtors to impose extraordinary mandatory settlements of their mass tort liabilities upon nonconsenting victims.

Efficient (and fair) joint settlements of both debtors' and nondebtors' mass tort liability will still be possible, even (and particularly) if nonconsensual nondebtor releases are prohibited. As Part III demonstrates, the essential architecture for facilitating powerful aggregation and corresponding settlement of tort victims' claims against nondebtors already exists in the bankruptcy jurisdiction, removal, and venue provisions of the Judicial Code. And a much-needed rationalization of the scope of federal bankruptcy jurisdiction would unleash bankruptcy's full aggregation potential.

As a practical and institutional matter, the Supreme Court is the one body that can (relatively quickly and within the confines of existing law) both end the disturbing bankruptcy grifting we are now witnessing and preserve bankruptcy

Airlines, Inc., 203 F.3d 203, 213-14 (3d Cir. 2000). The also-important Second Circuit, which encompasses another popular destination for large Chapter 11 cases, the Southern District of New York, has sent mixed signals regarding their permissibility. See *In re Metromedia Fiber Network, Inc.*, 960 F.3d 136, 142-43 (2d Cir. 2005); *In re Johns-Manville Corp.*, 517 F.3d 52, 66 (2d Cir. 2008), *rev'd on other grounds sub nom.* *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 155 (2009); Ralph Brubaker, *Supreme Court Validates “Clarified” Manville Insurance Injunction: Channeling . . . and So Much More!*, 29 BANKR. L. LETTER, no. 8, Aug. 2009, at 1, 5; *In re Purdue Pharma, L.P.*, No. 21 cv 7532, 2021 WL 5979108, at *53-60 (S.D.N.Y. Dec. 16, 2021) (reviewing Second Circuit case law).

as a viable forum for comprehensive, efficient, and fair resolutions of nondebtors' mass tort liability. Accordingly, my response to the troubling rise in bankruptcy grifting, in Part IV, is a plea for action by the Supreme Court.

I. THE ILLEGITIMACY AND UNCONSTITUTIONALITY OF NONDEBTOR RELEASES

One of the principal justifications courts rely upon to approve a nonconsensual nondebtor release — one of the so-called *Master Mortgage*¹⁶ or *Dow Corning* factors¹⁷ — is that the released “non-debtor has contributed substantial assets to the reorganization.”¹⁸ Nothing in the Bankruptcy Code expressly authorizes a “release” or discharge of a nondebtor’s liability on this basis (or any other).¹⁹ Nonetheless, such power purportedly flows from bankruptcy courts’ general equitable powers under § 105(a) of the Bankruptcy Code.²⁰ But such a judicially designed discharge of debt is an unconstitutional judicial usurpation of a quintessential legislative function, as revealed by both *Erie*’s constitutional holding and the Bankruptcy Clause itself.

16. See *In re Master Mortg. Inv. Fund, Inc.*, 168 B.R. 930, 934-35 (Bankr. W.D. Mo. 1994).

17. See *Dow Corning*, 280 F.3d at 658.

18. *Id.* The *Master Mortgage* factors are the following:

- (1) There is an identity of interest between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete assets of the estate.
- (2) The non-debtor has contributed substantial assets to the reorganization.
- (3) The injunction is essential to reorganization. Without the [sic] it, there is little likelihood of success.
- (4) A substantial majority of the creditors agree to such injunction, specifically, the impacted class, or classes, has “overwhelmingly” voted to accept the proposed plan treatment.
- (5) The plan provides a mechanism for the payment of all, or substantially all, of the claims of the class or classes affected by the injunction.

Master Mortg., 168 B.R. at 934-35 (footnotes omitted).

19. This is with the exception of certain third-party releases expressly authorized in asbestos bankruptcies. See 11 U.S.C. § 524(g)(4)(A)(ii)-(iii) (2018). See generally Joshua M. Silverstein, *Overlooking Tort Claimants’ Best Interests: Non-Debtor Releases in Asbestos Bankruptcies*, 78 UMKC L. REV. 1 (2009) (discussing nondebtor releases authorized by § 524(g)).

20. 11 U.S.C. § 105(a) (2018) (providing that “[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title”). Through this provision, Congress sought to give federal bankruptcy courts the same equitable powers granted to all federal courts in the All Writs Act to “issue all writs necessary or appropriate in aid of their respective jurisdiction,” 28 U.S.C. § 1651(a) (2018), as well as “any powers traditionally exercised by a bankruptcy court that are not encompassed by the All Writs Statute,” H.R. REP. NO. 95-595, at 317 (1977).

Since Congress does have the power to explicitly provide for discharge of the obligations of a nondebtor, it is common to analyze the legality of nonconsensual nondebtor releases strictly as a matter of statutory interpretation, setting aside any consideration of constitutional issues.²¹ However, that approach is incomplete, even as a matter of statutory interpretation, because fundamental principles of constitutional structure guide and inform the appropriate construction of the Bankruptcy Code. The separation-of-powers implications of *Erie* and the Bankruptcy Clause provide substantive constitutional canons of statutory interpretation that cogently elucidate why nothing in the Bankruptcy Code can plausibly be read to authorize nonconsensual nondebtor releases.

A. *Erie's Constitutional Imperative*

A revealing manner of framing *Erie's* relevance to nondebtor releases is to consider practice before enactment of the Bankruptcy Code in 1978. The Supreme Court has repeatedly emphasized that it “will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.”²²

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21. See, e.g., *In re Purdue Pharma, L.P.*, No. 21 cv 7532, 2021 WL 5979108, at *4 (S.D.N.Y. Dec. 16, 2021) (“Because I conclude that the Bankruptcy Court lacked statutory authority to impose the [nonconsensual nondebtor] Release, I need not and do not reach the constitutional questions that have been raised by the parties.”); Brubaker, *supra* note 3, at 996 n.130 (acknowledging that “non-debtor releases raise serious constitutional concerns,” but suggesting “that an appropriate construction of the Bankruptcy Code, which denies courts the power to approve non-debtor releases, properly avoids any constitutional infirmity”).
 22. *Pa. Dep’t of Pub. Welfare v. Davenport*, 495 U.S. 552, 563 (1990); see RONALD J. MANN, *BANKRUPTCY AND THE U.S. SUPREME COURT* 145 (2017) (“The strength of that principle is apparent from the pattern of its use.”). If a departure from pre-Code law is not clear from the text of the statute itself, the Court looks for at least some “indication of intent to do so in the legislative history,” because “it is most improbable” “that a major change in the existing rules” “would have been made without even any mention in the legislative history.” *United Sav. Ass’n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 380 (1988). This is bankruptcy’s version of “the dog that did not bark” (or Sherlock Holmes) canon of statutory interpretation. See WILLIAM N. ESKRIDGE, JR., JAMES J. BRUDNEY & JOSH CHAFETZ, *LEGISLATION AND STATUTORY INTERPRETATION* 284 (3d ed. 2022); Anita Krishnakumar, *The Sherlock Holmes Canon*, 84 GEO. WASH. L. REV. 1 (2016); SIR ARTHUR CONAN DOYLE, *Silver Blaze*, in *SHERLOCK HOLMES: THE COMPLETE NOVELS AND STORIES* 521, 540 (2003) (when Holmes refers to “the curious incident of the dog in the night-time” and Detective Gregory quizzically responds that “[t]he dog did nothing in the night-time,” Holmes replies, “[t]hat was the curious incident”).

The predecessor Bankruptcy Act of 1898²³ contained a provision virtually identical to Code § 105(a),²⁴ and the 1898 Act cases uniformly held that this provision did not authorize nonconsensual nondebtor discharge provisions.²⁵ Likewise, the Supreme Court held that bankruptcy courts' equitable injunctive powers did not authorize a nonconsensual nondebtor release via permanent injunction in *Callaway v. Benton*.²⁶ The 1898 Act gave the courts no such substantive discharge power. Moreover, there is nothing in the current Bankruptcy Code or its legislative history to indicate any intention of overturning the 1898 Act practice prohibiting nondebtor discharges and permanent nondebtor injunctions.

The only remotely relevant statutory change in 1978, with enactment of the Bankruptcy Code, was an enlargement of federal bankruptcy jurisdiction to reach all proceedings "related to" a debtor's bankruptcy case.²⁷ That provision, quite purposefully, expanded the reach of federal bankruptcy jurisdiction to encompass a broad range of *third-party* claims and causes of action—that is, claims that are asserted neither by nor against the debtor's bankruptcy estate, but that are nonetheless sufficiently "related to" the debtor's bankruptcy case.²⁸ That grant of third-party "related to" jurisdiction is what convinced bankruptcy courts

23. Act of July 1, 1898, ch. 541, 30 Stat. 544 (amended variously from 1903-1976 and repealed in 1978).

24. *Id.* § 2a(15), as reprinted in 1 COLLIER ON BANKRUPTCY 134 (James Wm. Moore et al. eds., 14th ed. 1974) (authorizing bankruptcy courts to "[m]ake such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act").

25. See, e.g., *Com. Wholesalers, Inc. v. Invs. Com. Corp.*, 172 F.2d 800, 801 (9th Cir. 1949); *Weber v. Diversey Bldg. Corp. (In re Diversey Bldg. Corp.)*, 86 F.2d 456, 457-58 (7th Cir. 1936); *In re Nine N. Church St.*, 82 F.2d 186, 188-89 (2d Cir. 1936). See generally Brubaker, *Nondebtor Release Jurisdiction*, *supra* note 11, at 29-33 (discussing nondebtor discharge under the 1898 Act).

26. 336 U.S. 132, 136-41 (1949). See generally Brubaker, *Nondebtor Release Jurisdiction*, *supra* note 11, at 54-59 (discussing *Callaway v. Benton*).

27. That grant now resides in 28 U.S.C. § 1334(b) (2018).

28. See *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 n.5 (1995); Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 WM. & MARY L. REV. 743, 777-800 (2000) ("[T]here was explicit recognition in the legislative process that 'related to' bankruptcy jurisdiction went beyond claims by and against the estate and would embrace disputes between third parties having some relationship to the bankruptcy case.").

that they now have the power (that did not exist before 1978) to enjoin the assertion of creditors' claims against a nondebtor.²⁹ In fact, in approving nondebtor releases, most courts simply collapse the "related to" jurisdictional inquiry into their analyses regarding whether a release should be approved because "[t]here is an identity of interest between the debtor and the third party . . . such that a suit against the non-debtor is, in essence, a suit against the debtor"³⁰ or—according to the most crucial of the *Master Mortgage* or *Dow Corning* factors—the release is "necessary" or "essential" to the debtor's reorganization.³¹

As the Supreme Court recognized in *Callaway v. Benton*,³² though, a bankruptcy jurisdiction statute, in and of itself, cannot supply grounds for substantive discharge relief.³³ The right to such substantive relief must exist independent of the jurisdictional grant via the express terms of the bankruptcy statute. To derive the substantive power to discharge debts (which are usually obligations grounded in state law) from the "related to" jurisdictional grant runs afoul of *Erie*.³⁴ Indeed, *Erie* is a pervasive presence in bankruptcy, where it typically travels incognito under the rubric of the *Butner* doctrine,³⁵ pursuant to which "state law governs the substance" of parties' rights and obligations in bankruptcy proceedings.³⁶

The *Erie* decision—in its constitutional holding, construction of the Rules of Decision Act, and broader policy penumbra—is not limited to diversity cases.³⁷

29. See Brubaker, *Nondebtor Release Jurisdiction*, *supra* note 11, at 31–35, 59. For example, the bankruptcy court in *Purdue Pharma* disregarded *Callaway v. Benton* because "[t]hat decision . . . preceded 28 U.S.C. § 1334(b)'s jurisdictional grant, which . . . significantly broadened the jurisdictional scheme that existed before the Bankruptcy Code's enactment." *In re Purdue Pharma L.P.*, 633 B.R. 53, 98 (Bankr. S.D.N.Y.), *vacated*, No. 21 cv 7532, 2021 WL 5979108 (S.D.N.Y. Dec. 16, 2021).

30. *Class Five Nev. Claimants v. Dow Corning Corp.* (*In re Dow Corning Corp.*), 280 F.3d 648, 658 (6th Cir. 2002); see, e.g., *Purdue Pharma*, 633 B.R. at 95–98, 103–05; see also 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, 72 (2006) (stating that the identity-of-interest factor overlaps with requisite subject-matter jurisdiction).

31. *Dow Corning*, 280 F.3d at 658; see Brubaker, *Nondebtor Release Jurisdiction*, *supra* note 11, at 48–49. I have more to say about the vacuity of this supposedly stringent requirement in Part II, *infra*.

32. 336 U.S. 132, 136–41 (1949).

33. See Brubaker, *Nondebtor Release Jurisdiction*, *supra* note 11, at 57–59.

34. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

35. So-named for the case of *Butner v. United States*, 440 U.S. 48 (1979).

36. *Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 20 (2000) (citing *Butner*, 440 U.S. at 57).

37. See generally Peter Westen & Jeffrey S. Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 MICH. L. REV. 311 (1980) (discussing the applicability of *Erie* in nondiversity cases).

While the suggestion to the contrary is an “oft-encountered heresy,”³⁸ “the *Erie* doctrine applies, whatever the ground for federal jurisdiction, to any issue or claim which has its source in state law.”³⁹ Consequently, *Erie* is particularly important in federal bankruptcy proceedings.⁴⁰

Indeed, by its very nature, bankruptcy “law” is more procedural than substantive.⁴¹ As I have noted before,

[B]ankruptcy ‘law,’ for the most part, functions not to create distinct federal grounds for recovery or relief, but to create an alternative means for enforcing existing substantive rights, most of which are grounded in state law. . . . Thus, . . . congressional power to enact uniform national bankruptcy ‘laws’ necessarily, and even primarily, envisions the power to place adjudication of all disputes incident to administering bankruptcy estates in federal court.⁴²

The Supreme Court’s famous reasoning in the bankruptcy case *Butner v. United States*, therefore, was simply an unattributed expression of the *Erie* doctrine:

Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. Uniform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from

38. Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 408 n.122 (1964).

39. *Maternally Yours, Inc. v. Your Maternity Shop, Inc.*, 234 F.2d 538, 541 n.1 (2d Cir. 1956) (typeface altered).

40. See Alfred Hill, *The Erie Doctrine in Bankruptcy*, 66 HARV. L. REV. 1013, 1033 (1953) (stating that, as regards the applicability of *Erie* in nondiversity cases, “[n]owhere is this more true than in bankruptcy”); Thomas E. Plank, *The Erie Doctrine and Bankruptcy*, 79 NOTRE DAME L. REV. 633, 650 (2004).

41. See Ralph Brubaker, *Explaining Katz’s New Bankruptcy Exception to State Sovereign Immunity: The Bankruptcy Power as a Federal Forum Power*, 15 AM. BANKR. INST. L. REV. 95, 127 (2007).

42. Brubaker, *supra* note 28, at 807–08; see also Ralph Brubaker, *The Regulatory Authority of Administrative Agencies Versus the Bankruptcy Code (and Bankruptcy Court Jurisdiction)*, 23 BANKR. L. LETTER, no. 23, May 2003, at 1, 10 (noting that “to a very large extent, it is impossible to separate bankruptcy ‘laws’ from their administration by the federal bankruptcy courts”).

receiving “a windfall merely by reason of the happenstance of bankruptcy.”⁴³

Moreover, the *Butner* Court made clear that those “justifications for application of state law” in bankruptcy proceedings “are not limited to ownership interests.”⁴⁴ And those justifications precisely replicate “the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws” in the sense “that it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in federal court.”⁴⁵

Erie is grounded in two synergistic principles of constitutional structure: federalism and separation of powers. Likewise, *Butner*’s instantiation of *Erie* in bankruptcy also fortifies those same two cornerstones of our constitutional system, which illuminate the unconstitutionality of nondebtor releases.

1. Federalism

The twin aims of *Erie* flow from “the policy that underlies *Erie*,” which is vitally “important to our federalism.”⁴⁶ Indeed, it seems that an implicit premise of *Erie*’s policy reasoning was the federalism impetus that “federal courts . . . must respect the definition of state-created rights and obligations.”⁴⁷ The *Erie*/*Butner* doctrine in bankruptcy—that all parties’ rights and obligations must be governed by state law in the absence of countervailing federal bankruptcy law—is likewise animated by overt federalism sensitivities.⁴⁸ And wholesale extinguishment of creditors’ state-law rights against nondebtors via non-consensual liability releases is obviously troubling from a federalism

43. *Butner v. United States*, 440 U.S. 48, 55 (1979) (quoting *Lewis v. Mfrs. Nat’l Bank*, 364 U.S. 603, 609 (1961)); see Plank, *supra* note 40, at 650; Lawrence Ponoroff, *Neither ‘Twixt Nor ‘Tween: Emerging Property Interests in Bankruptcy*, 61 ARIZ. L. REV. 101, 135-36 (2019).

44. *Butner*, 440 U.S. at 55. Thus, for example, “[w]hat claims of creditors are valid and subsisting obligations against the bankrupt at the time a petition in bankruptcy is filed, is a question which, in the absence of overruling [nonbankruptcy] federal law, is to be determined by reference to state law.” *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 161 (1946).

45. *Hanna v. Plumer*, 380 U.S. 460, 467-68 (1965).

46. *Guar. Tr. Co. v. York*, 326 U.S. 99, 109-10 (1945); see also *Hanna*, 380 U.S. at 474 (Harlan, J., concurring) (“I have always regarded that decision as one of the modern cornerstones of our federalism . . .”).

47. *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 535 (1958).

48. See *In re Village Props., Ltd.*, 723 F.2d 441, 446 (5th Cir. 1984) (noting the “federalism concerns that underpin the *Butner* decision”); CHARLES J. TABB & RALPH BRUBAKER, *TEACHER’S MANUAL FOR BANKRUPTCY LAW: PRINCIPLES, POLICIES, AND PRACTICE* 219-20 (4th ed. 2015).

perspective.⁴⁹ But those federalism concerns play only a subsidiary, supporting role in pinpointing the unconstitutionality of nondebtor releases under *Erie*.

Erie's constitutional holding is multifaceted and the full extent of its applicability in bankruptcy is uncertain.⁵⁰ Nonetheless, it unquestionably does have significance for the third-party claims discharged via nondebtor release. The federal courts' "related to" bankruptcy jurisdiction over third-party claims (such as those discharged via nondebtor releases) is a species of supplemental jurisdiction,⁵¹ and claims before a federal court through supplemental jurisdiction are a classic example of a nondiversity context in which *Erie*'s constitutional holding compels that "state law must govern because there can be no other law."⁵² As the Supreme Court has acknowledged, then, for a state-law claim within the federal courts' "related to" bankruptcy jurisdiction, "[i]t is clear, under *Erie R. Co. v. Tompkins*, that [state] law governs the substantive elements of [the] claim."⁵³

49. And those federalism instincts also align with one of the most influential normative theories of bankruptcy law, creditors' bargain theory. See Brubaker, *supra* note 3, at 1012-13.

50. For example, as applied to creditors' claims against the debtor's bankruptcy estate, discussed *supra* note 44, the applicability of state law appears to be a matter of *Erie* policy, which (ironically enough) is a federal common-law principle. See *Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 20 (2000) ("The 'basic federal rule' in bankruptcy is that state law governs the substance of [creditors'] claims . . ." (emphasis added) (quoting *Butner v. United States*, 440 U.S. 48, 57 (1979))); Caleb Nelson, *A Critical Guide to Erie Railroad Co. v. Tompkins*, 54 WM. & MARY L. REV. 921, 986 (2013) (noting that to the extent it is compelled by neither the Constitution nor the Rules of Decision Act, "the *Erie* doctrine might best be characterized as what modern lawyers call 'federal common law'").

51. See Ralph Brubaker, *Supplemental Bankruptcy Jurisdiction*, 27 BANKR. L. LETTER, no. 3, Mar. 2007, at 1. Supplemental jurisdiction is attributable to the concept, first recognized in Chief Justice Marshall's opinion in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), that federal "[j]urisdiction attaches to the entire case, including federal claims (that ground the court's jurisdiction) and accompanying questions of general or state law." JAMES E. PFANDER, *PRINCIPLES OF FEDERAL JURISDICTION* 157 (3d ed. 2017).

52. *Hanna v. Plumer*, 380 U.S. 460, 471-72 (1965); see *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966) (stating that federal courts are "bound to apply state law to" supplemental claims, citing *Erie*). There are, of course, instances in which a "related to" claim is asserted under nonbankruptcy federal law, in which case bankruptcy jurisdiction simply provides another basis for federal jurisdiction and may also provide both a different venue for that claim and reference of the claim to a non-Article III bankruptcy judge. See 28 U.S.C. §§ 157, 1408-1409 (2018).

53. *Marshall v. Marshall*, 547 U.S. 293, 313 (2006) (citation omitted). *Stern v. Marshall*, 564 U.S. 462 (2011), was a subsequent decision in the same litigation as *Marshall v. Marshall* and involved the litigants' constitutional right to final judgment from an Article III judge. The *Stern v. Marshall* Court made a cryptic suggestion that there is a link between that constitutional right and *Butner* (and hence, also *Erie*). See *id.* at 495; CHARLES J. TABB & RALPH BRUBAKER, *BANKRUPTCY LAW: PRINCIPLES, POLICIES, AND PRACTICE* 873 (5th ed. 2021). The most plausible connection is that if a state-law claim within federal bankruptcy jurisdiction is one for

That focus on identifying the “*substantive* rules . . . applicable in a [s]tate”⁵⁴ for the claim at issue is the standard doctrinal formulation of that which must govern the rights and obligations of the parties in federal court under *Erie*’s constitutional holding. Wholly extinguishing parties’ state-law rights and obligations via nondebtor release would certainly seem to qualify as “‘substantive’ in every traditional sense.”⁵⁵ Indeed, in the largely procedural process that comprises bankruptcy, the principal and clearest example of a right to substantive relief afforded by federal bankruptcy law is the right to receive a discharge of one’s obligations. But that “substantive” characterization does not explicate the constitutional provisions and principles at stake in *Erie* and, in particular, its implications for nondebtor releases.

In its purest constitutional-federalism aspect, *Erie* “recognized that the scheme of our Constitution envisions an allocation of law-making functions between state and federal legislative processes which is undercut if the federal judiciary can make substantive law affecting state affairs beyond the bounds of congressional legislative powers in this regard.”⁵⁶ Presumably, though, it is within Congress’s discharge power under the Bankruptcy Clause to expressly authorize discharge of the obligations of even a nondebtor,⁵⁷ such as Congress has done in § 524(g) of the Bankruptcy Code for certain asbestos claims.⁵⁸ Moreover, by virtue of implicit field preemption, the states have *no* debt discharge

which the parties have a constitutional right to final judgment from an Article III judge (i.e., the claim is within non-core “related to” bankruptcy jurisdiction, *see* 28 U.S.C. § 157(c) (2018); Brubaker, *supra* note 6, at 7-8), then *Erie*’s constitutional holding also requires that substantive state law must govern resolution of that non-core “related to” claim. *Stern* made clear that there is a similar linkage between the Article III right in bankruptcy proceedings and a Seventh Amendment right to a jury trial. *See* 564 U.S. at 487, 492-93, 495-99; Ralph Brubaker, A “Summary” Statutory and Constitutional Theory of Bankruptcy Judges’ Core Jurisdiction After *Stern v. Marshall*, 86 AM. BANKR. L.J. 121, 150-51 (2012) [hereinafter Brubaker, “Summary” Theory]. That, of course, points up the fact that nonconsensual nondebtor releases, by extinguishing damages (i.e., legal, as opposed to equitable) claims on which creditors have *both* a right to final judgment from an Article III judge *and* a Seventh Amendment right to a jury trial, contravene creditors’ constitutional jury-trial rights.

54. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (emphasis added).

55. *Hanna*, 380 U.S. at 472; *see* Brubaker, *Nondebtor Release Jurisdiction*, *supra* note 11, at 60-61.

56. *Hanna*, 380 U.S. at 474-75 (Harlan, J., concurring).

57. *But cf.* Thomas E. Plank, *The Constitutional Limits of Bankruptcy*, 63 TENN. L. REV. 487, 567-70 (1996) (suggesting that enjoining a creditor’s action against a nondebtor might exceed Congress’s Bankruptcy Power under certain circumstances, particularly if the nondebtor is solvent).

58. 11 U.S.C. § 524(g)(4)(A)(ii)-(iii) (2018); *see supra* note 19.

power.⁵⁹ Nondebtor releases, therefore, do not exceed the limits of federal law-making authority vis-à-vis that of the states.

2. Separation of Powers

The constitutional infirmity of nondebtor releases is most directly attributable to *Erie*'s constitutional separation-of-powers implications.⁶⁰ In the bankruptcy context in particular, the *Erie/Butner* doctrine (in both its policy and constitutional manifestations) is grounded in separation-of-powers principles. The *Butner* Court itself stated:

The constitutional authority of Congress to establish “uniform Laws on the subject of Bankruptcies throughout the United States” would clearly encompass a federal statute defining the [extent of parties’ rights to] property in a bankrupt estate. But Congress has not chosen to exercise its power to fashion any such rule. . . . Congress has generally left the determination of property rights in the assets of a bankrupt’s estate to state law.⁶¹

The corollary of the *Erie/Butner* separation-of-powers principle is the constraint that it imposes on federal bankruptcy courts’ authority to create substantive federal common law. Indeed, in its recent *Rodriguez v. FDIC* opinion,⁶² the Court invoked both *Erie* and *Butner* “to underscore the care federal courts should exercise before taking up an invitation to try their hand at common lawmaking,” which hazards “the mistake of moving too quickly past important threshold questions at the heart of our separation of powers.”⁶³ And, of course, separation-

59. See CHARLES JORDAN TABB, LAW OF BANKRUPTCY § 1.10.d, at 59-60 (5th ed. 2020); Ralph Brubaker, *The Preemptive Effect of the Bankruptcy Code for Preference Avoidance Under State-Law Assignments for the Benefit of Creditors*, 25 BANKR. L. LETTER, no. 4, Apr. 2005, at 1, 3-9. The Contracts Clause also prohibits states from enacting legislation that would retroactively discharge preexisting contractual obligations, even in the absence of any preemptive federal bankruptcy legislation. See *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 266-68, 303-04 (1827); *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 199 (1819).

60. As Professor Ernest A. Young points out, even “*Erie*’s critics have generally acknowledged that the most plausible constitutional rationale incorporates not only federalism but also separation of powers.” See Ernest A. Young, *A General Defense of Erie Railroad Co. v. Tompkins*, 10 J.L. ECON. & POL’Y 17, 76 (2013).

61. *Butner v. United States*, 440 U.S. 48, 54 (1979) (footnotes omitted); see also *Raleigh v. Ill. Dep’t of Revenue*, 530 U.S. 15, 21 (2000) (“Congress of course may do what it likes with entitlements in bankruptcy . . .”).

62. 140 S. Ct. 713, 717-18 (2020).

63. *Id.* at 718.

of-powers restrictions on federal lawmaking indirectly preserve states' lawmaking authority (i.e., federalism values).⁶⁴ Thus, *Erie/Butner* "is completely consistent with notions of *judicial* federalism—that is, limits on the lawmaking power of *courts* that impose no parallel limits on the power of Congress."⁶⁵

Moreover, that *Erie/Butner* limitation on bankruptcy courts' creation of substantive federal common law is directly incorporated into the Supreme Court's jurisprudence restraining bankruptcy courts' equitable powers, as the *Butner* decision itself made clear: "The equity powers of the bankruptcy court play an important part in the administration of bankrupt estates in countless situations," but "undefined considerations of equity provide no basis for adoption of a . . . federal rule" giving a party substantive "rights that are not his as a matter of state law,"⁶⁶ such as the right to a discharge of his debts without filing bankruptcy. Thus, the same constitutional constraint that restricts federal bankruptcy courts' power to create substantive federal common law for such third-party "related to" claims under *Erie* and *Butner*—and in service of the same constitutional values of federalism and separation of powers—provides a constitutional meta-norm⁶⁷ (or a so-called substantive canon of statutory construction⁶⁸) that like-

64. "The Constitution protects federalism primarily by limiting federal lawmaking." Young, *supra* note 60, at 80. "By insisting that federal courts may not make federal law outside the constitutionally ordained legislative process, *Erie* became the central decision of modern process federalism." *Id.* at 115.

65. *Id.* at 67.

66. *Butner*, 440 U.S. at 55-56.

67. See WILLIAM N. ESKRIDGE, JR., *INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION* 307-08 (2016) (discussing "the background role played by constitutional . . . norms widely accepted as fundamental" in giving rise to "meta-norms in statutory interpretation").

68. ESKRIDGE ET AL., *supra* note 22, at 275 (distinguishing between "text-based" canons of interpretation, "which are guidelines for evaluating the linguistic, semantic, and structural meaning of enacted text," and "substantive" canons that "attempt to harmonize statutory meaning with policies rooted in the common law, other statutes, or the Constitution"); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 117, 124 (2010) (distinguishing between "linguistic" canons that "apply rules of syntax to statutes" and "substantive" canons whose "purpose is to promote policies external to a statute" such as "constitutional values"); Caleb Nelson, *Statutory Interpretation and Decision Theory*, 74 U. CHI. L. REV. 329, 356-57 (2007) (distinguishing between "descriptive" canons "for determining intended meaning" and "normative" canons that promote values reflected in "our Constitution or . . . other aspects of our legal traditions").

wise prohibits alteration of the parties' state-law substantive rights and obligations via the vague equitable-powers provision⁶⁹ of the Bankruptcy Code.⁷⁰ Indeed, the Supreme Court's jurisprudence limiting bankruptcy courts' equitable powers is a wonderful illustration of Justice Barrett's conception of how substantive canons of statutory interpretation can properly function as constitutional implementation.⁷¹

The federal courts are illicitly creating substantive federal common law through their jurisprudence authorizing nondebtor releases. Indeed, that is apparent from the list of criteria – exclusively the product of judicial imagination – that supposedly trigger bankruptcy courts' power to grant discharge relief for nondebtors.⁷² With respect to the third-party nondebtor claims extinguished via

69. Such substantive canons are least controversial when used to construe vague or ambiguous statutory language. See ESKRIDGE ET AL., *supra* note 22, at 288; Barrett, *supra* note 68, at 123, 155, 158, 163–67, 175–76, 177, 181; Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 393–98 (2005). Indeed, as now-Justice Barrett's scholarship reveals, from the earliest days of the Republic, “the historical record clearly establishes that federal courts believed themselves empowered to deploy a substantive canon . . . for the purpose of clarifying truly ambiguous language.” Barrett, *supra* note 68, at 158 (analyzing cases from 1789 to 1840).

70. 11 U.S.C. § 105(a) (2018). And the Supreme Court has made clear that such a substantive canon restricts bankruptcy courts' equitable powers not only with regard to “related to” claims governed by *Erie*'s constitutional holding, but also for claims governed solely by the extraconstitutional policy of *Erie*, such as creditors' claims against the debtor's bankruptcy estate. See *supra* notes 50–54 and accompanying text. As the Court stated:

Bankruptcy courts do indeed have some equitable powers But the scope of a bankruptcy court's equitable power must be understood in the light of the principle of bankruptcy law . . . that the validity of a claim is generally a function of underlying substantive law. Bankruptcy courts are not authorized in the name of equity to make wholesale substitution of underlying law controlling the validity of creditors' entitlements, but are limited to what the Bankruptcy Code itself provides.

Raleigh v. Ill. Dep't. of Revenue, 530 U.S. 15, 24–25 (2000). This substantive canon is bankruptcy's version of the traditional antipreemption canon reflected in the longstanding presumption against federal preemption of state law. See ANTONIN SCALIA & BRIAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 290 (2012); ESKRIDGE ET AL., *supra* note 22, at 289, 301; Barrett, *supra* note 68, at 153–54.

71. Barrett, *supra* note 68, at 168–82.

72. For a particularly elaborate and energetic derivation and rationalization of the criteria for approval of nondebtor releases that (1) not only differs substantially from the courts' interpretation and application of those criteria, but also (2) vividly illustrates the substantive lawmaking that is inevitably taking place, see Ben H. Logan, *A New Millennium of Article III Analysis: Which Court—a Bankruptcy Court or a District Court—Must Decide Whether to Confirm a Plan That Contains a Nonconsensual Third-Party Release? (Part I)*, 37 BANKR. L. LETTER, no. 12, Dec. 2017, at 1, 13–17; see also Silverstein, *supra* note 30, at 71–80 (constructing a modified version of the *Master Mortgage* requirements); *In re Purdue Pharma L.P.*, 633 B.R. 53, 103 (Bankr. S.D.N.Y.) (suggesting that the “source for third-party releases and injunctions under a plan

nondebtor releases, *Erie*'s constitutional holding is that the parties' substantive state-law rights and obligations must be respected in federal bankruptcy proceedings, notwithstanding the grant of "related to" jurisdiction over such claims, in the absence of any explicit congressional authorization of nonconsensual nondebtor releases. Extinguishing the parties' substantive state-law rights and obligations via mere judicial edict is unconstitutional under *Erie*. Moreover, such a judicially crafted, federal common-law discharge power is also unconstitutional under the separation-of-powers limitations implicit in the Bankruptcy Clause itself.

B. The Bankruptcy Clause's Separation of Powers

The Supreme Court famously captured the essence of the constitutional Bankruptcy Power as follows:

[I]t extends to all cases where the law causes to be distributed the property of the debtor among his creditors; this is its least limit. Its greatest is the discharge of a debtor from his contracts. And all intermediate legislation, affecting substance and form, but tending to further the great end of the subject—distribution and discharge—are in the competency and discretion of Congress.⁷³

The "great" discharge power, in particular, provided the impetus for inclusion of the Bankruptcy Clause in the Constitution.⁷⁴ The power to grant a discharge of indebtedness, however, does not descend from the equity powers of

i[s] federal common law" (citing Adam J. Levitin, *Toward a Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime*, 80 AM. BANKR. L.J. 1, 79-80, 83-84 (2006))), vacated, No. 21 cv 7532, 2021 WL 5979108 (S.D.N.Y. Dec. 16, 2021).

73. *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 186 (1902) (quoting *In re Klein*, 14 F. Cas. 716, 718 (Catron, Circuit Justice, C.C.D. Mo. 1843) (No. 7,865)).

74. "Provision for a uniform federal bankruptcy power was in response to concerns regarding the extraterritorial effect of state-court discharge orders under state bankruptcy and insolvency legislation." Brubaker, *supra* note 41, at 128. "The authorization for Congress to enact 'uniform Laws on the subject of Bankruptcies throughout the United States,' therefore, assured a debtor's discharge order from a federal court acting under a federal statute would have nationwide effect." *Id.* (footnotes omitted).

the Lord Chancellor. Bankruptcy discharge has always been a creature of statute.⁷⁵ Thus, the Constitution explicitly provides that “Congress shall have Power . . . [t]o establish . . . uniform Laws on the subject of Bankruptcies.”⁷⁶

At the heart of Congress’s Bankruptcy Power is determining the appropriate distribution of someone’s assets that warrants discharge of their obligations.⁷⁷ But nondebtor-release practice, as evidenced by the judicially divined factors or requisites for approval—including the requirement that a discharged nondebtor “has contributed substantial assets to the reorganization”⁷⁸—presumes to lodge plenary authority for such a determination in the courts. Therefore, the distribution-discharge scheme effectuated via nondebtor release violates the separation-of-powers principle embedded in the text of the Bankruptcy Clause, which provides for legislative supremacy over matters of distribution and discharge.⁷⁹

The Supreme Court’s jurisprudence limiting bankruptcy courts’ equitable powers also directly incorporates this structural constitutional bulwark for Congress’s core legislative prerogatives. As the Court has directed, exercise of bankruptcy courts’ equitable powers “must not occur at the level of policy choice at which Congress itself operated in drafting the [Bankruptcy] Code.”⁸⁰ An exercise of equitable powers “that takes place at the legislative level of consideration” is “tantamount to a legislative act and therefore” is “beyond the scope of judicial authority.”⁸¹ The Bankruptcy Clause’s separation-of-powers dimension, therefore, also supplies a nondelegation substantive canon of statutory construction

75. See generally Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325 (1991) (providing a history of the bankruptcy discharge in Anglo-American jurisprudence); John C. McCoid, II, *Discharge: The Most Important Development in Bankruptcy History*, 70 AM. BANKR. L.J. 163 (1996) (discussing the English history).

76. U.S. CONST. art I, § 8, cl. 4 (emphasis added).

77. See *Kuehner v. Irving Tr. Co.*, 299 U.S. 445, 453 (1937) (considering a challenge to Congress’s Bankruptcy Power when stating that “if the [creditor]s’ claims were to be discharged in the reorganization they must be admitted to participation on an equitable basis with other claims in shaping the reorganization and in distribution of that which is to go to creditors pursuant to any plan adopted,” as “determined in the light of all circumstances Congress might properly consider”).

78. *Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648, 658 (6th Cir. 2002).

79. Cf. Steve H. Nickles & David G. Epstein, *Another Way of Thinking About Section 105(a) and Other Sources of Supplemental Law Under the Bankruptcy Code*, 3 CHAP. L. REV. 7, 17 (2000) (opining that by “stretching the discharge to protect non-debtors” the “courts are making law to the extent of violating constitutional separation of powers”).

80. *United States v. Noland*, 518 U.S. 535, 543 (1996).

81. *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 517 U.S. 213, 229 (1996).

limiting the scope of bankruptcy courts' equitable powers under § 105(a) of the Bankruptcy Code.⁸²

Moreover, one of the larger systemic implications of the Court's important decision in *Czyzewski v. Jevic Holding Corp.*⁸³ is that implicit authority for such legislative-order determinations does not reside in the interstices of other vague Bankruptcy Code authorizations either.⁸⁴ Discharge of debt is the "greatest" power granted to Congress by the Bankruptcy Clause.⁸⁵ Hence, a general statutory "necessary and proper" authorization⁸⁶ "is too weak a reed upon which to rest [delegation of] so weighty a power."⁸⁷ As is equally true with the distribution priority issue the Court addressed in *Jevic*, given that the Bankruptcy Code

82. 11 U.S.C. § 105(a) (2018). On nondelegation substantive canons, see ESKRIDGE, *supra* note 67, at 330-31; William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 630-31 (1992).

83. 137 S. Ct. 973, 983-85 (2017).

84. See Ralph Brubaker, *Taking Bankruptcy's Distribution Rules Seriously: How the Supreme Court Saved Bankruptcy from Self-Destruction*, 37 BANKR. L. LETTER, no. 4, Apr. 2017, at 1, 4-6, 11-12.

85. *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 186 (1902) (quoting *In re Klein*, 14 F. Cas. 716, 718 (Catron, Circuit Justice, C.C.D. Mo. 1843) (No. 7,865)).

86. For example, as statutory authority for nondebtor releases, courts frequently point to the authorization in § 1123(b)(6) of the Bankruptcy Code, which states that a plan of reorganization may "include any other appropriate provision not inconsistent with the applicable provisions of this title," 11 U.S.C. § 1123(b)(6) (2018); see Brubaker, *supra* note 3, at 1017 n.209, or § 1123(a)(5), which merely provides a basis to deny confirmation if the plan does not "provide adequate means for the plan's implementation," 11 U.S.C. § 1123(a)(5) (2018).

87. *Jevic*, 137 S. Ct. at 985; accord *In re Purdue Pharma, L.P.*, No. 21 cv 7532, 2021 WL 5979108, at *61-69 (S.D.N.Y. Dec. 16, 2021) (stating that such provisions, "like Section 105(a), confer[] on the Bankruptcy Court only the power to enter orders that carry out other, substantive provisions of the Bankruptcy Code. None of them creates any substantive right; neither do they create some sort of 'residual authority' that authorizes" nonconsensual nondebtor releases). Indeed, § 105(a) is itself a global "necessary and proper" authorization to "carry out" any and all "provisions of" the Bankruptcy Code. 11 U.S.C. § 105(a) (2018); see Daniel B. Bogart, *Resisting the Expansion of Bankruptcy Court Power Under Section 105 of the Bankruptcy Code: The All Writs Act and an Admonition from Chief Justice Marshall*, 35 ARIZ. ST. L.J. 793, 843-76 (2003). If discharge of a nondebtor's obligations is beyond a court's power under that provision, then, subsidiary "necessary and proper" authorizations, such as § 1123(b)(6) or 1123(a)(5), are equally impotent. Accord *Purdue Pharma*, 2021 WL 5979108, at *62 (stating that "[i]f [§ 105(a)] does not confer any substantive authority on the bankruptcy court . . . then [§ 1123(b)(6)] can in no way be read to do so"). Thus, the Court in *Jevic* relied upon its jurisprudence limiting bankruptcy courts' equitable powers under § 105(a), even though the parties had not argued that the priority-violating distribution at issue was a proper exercise of the bankruptcy court's equitable powers. See *Jevic*, 137 S. Ct. at 987 (citing and quoting *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 207 (1988)); Brubaker, *supra* note 84, at 11-12.

does not explicitly authorize discharge of a nondebtor's obligations,⁸⁸ "such statutory silence should be interpreted as *denying* bankruptcy courts any power to authorize" such a nondebtor discharge.⁸⁹

With respect to matters of distribution and discharge, therefore, the non-delegation constitutional canon for interpretation of the Bankruptcy Code is, at a minimum, a "no elephants in mouseholes" canon⁹⁰ and may even rise to the level of a stronger-form clear-statement rule.⁹¹ Regardless of the strength of the presumption associated with the Bankruptcy Clause's separation-of-powers nondelegation canon, though, nothing in the Bankruptcy Code or the legislative record surrounding its enactment provides even a hint of congressional delegation to the bankruptcy courts of a power to create a common-law distribution and discharge scheme for nondebtors.⁹²

There is no common-law discharge power. Nonconsensual nondebtor releases are an unconstitutional encroachment upon the exclusive "competency and discretion of Congress" concerning discharge of indebtedness.⁹³ Nondebtor releases contravene the constitutional restrictions that both *Erie* and the Bankruptcy Clause place upon the lawmaking powers of the federal courts.

88. Indeed, the Bankruptcy Code explicitly states that a debtor's bankruptcy discharge "does *not* affect the liability of any other entity." 11 U.S.C. § 524(e) (2018) (emphasis added).

89. Brubaker, *supra* note 84, at 4; accord *Purdue Pharma*, 2021 WL 5979108, at *65-66. In the words of the *Jevic* opinion, "[t]he importance of [discharge] leads us to expect more than simple statutory silence if, and when, Congress were to intend" to authorize discharge of nondebtors' obligations. *Jevic*, 137 S. Ct. at 984. "Put somewhat differently, we would expect to see some affirmative indication of intent," such as that expressed in § 524(g). *Id.*; see 11 U.S.C. § 524(g)(4)(A)(ii)-(iii) (2018); *supra* note 19.

90. See *Jevic*, 137 S. Ct. at 984 (citing and quoting *Whitman v. Am. Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001) ("Congress . . . does not, one might say, hide elephants in mouseholes.")). On the "no elephants in mouseholes" substantive canon, see ESKRIDGE, *supra* note 67, at 337-40; and ESKRIDGE ET AL., *supra* note 22, at 285-86, 322-23.

91. See ESKRIDGE ET AL., *supra* note 22, at 275-76, 287-90; Barrett, *supra* note 68, at 171-73; Eskridge & Frickey, *supra* note 82, at 596-97.

92. *Contra In re Kirwan Offs. S.à.r.l.*, 592 B.R. 489, 511 (S.D.N.Y. 2018) (opining that §§ 105(a) and 1123(a)(5) and (b)(6) authorize approval of a plan of reorganization containing nonconsensual nondebtor releases because "[t]his statutory scheme reflects Congress's exercise of its preemptive powers" and its "exceedingly broad" powers under the Bankruptcy Clause, which powers Congress "has delegated . . . to bankruptcy courts"), *aff'd on other grounds*, 792 F. App'x 99 (2d Cir. 2019). The *Kirwan* court appears to have been applying presumptions of (rather than *against*) preemption of state law, see *supra* note 70, and delegation of Congress's Bankruptcy Power to the courts.

93. *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 186 (1902).

II. JUSTIFYING AN EXTRAORDINARY MANDATORY SETTLEMENT POWER ONLY IN BANKRUPTCY

As Simon points out, the judicially decreed criteria for approval of nonconsensual nondebtor releases do not replicate the Bankruptcy Code's substantive and procedural protections for the third-party nondebtor claims being discharged thereby.⁹⁴ For example, in conjunction with a Chapter 11 debtor's discharge, each and every creditor has the right to insist that it receive at least as much under the debtor's plan of reorganization as that creditor would receive in a liquidation of the debtor's assets.⁹⁵ Indeed, as Simon discusses,⁹⁶ if the courts were to impose such a requirement in conjunction with nondebtor releases, particularly for solvent nondebtors, many (if not all) releases could never be approved.⁹⁷ And for individual nondebtors, releases shield the individual from liability (and, indeed, from even being sued and the accompanying public scrutiny)

94. Simon, *supra* note 1, at 1206-15; *see also* Brubaker, *supra* note 3, at 980-1001 (explicating the many ways in which nondebtor releases are inconsistent with the Bankruptcy Code).

95. This is the so-called "best interests of creditors" requirement for confirmation of a plan of reorganization, set forth in 11 U.S.C. § 1129(a)(7) (2018).

96. Simon, *supra* note 1, at 1212-13.

97. *See* Brubaker, *supra* note 3, at 991-93. And on those occasions that courts have imposed such a requirement, it has typically been fatal to approval. *See, e.g., In re Ditech Holding Corp.*, 606 B.R. 544, 606-21 (Bankr. S.D.N.Y. 2019).

for alleged fraud and other intentional misconduct,⁹⁸ which the Bankruptcy Code provides *cannot* be discharged.⁹⁹

Equally if not more importantly, though, approval of nondebtor releases also does not replicate nonbankruptcy standards for resolution of disputed claims.¹⁰⁰ As the discussion in Section I.A reveals, by simply granting the federal courts “related to” bankruptcy jurisdiction over third-party nondebtor claims, the statutory design (pursuant to *Erie*) is for those claims to be heard and adjudicated in federal court, if at all, according to applicable nonbankruptcy substantive law

98. Through the smoke and mirrors of the so-called “channeling” injunction, *see supra* note 11, the fraud or intentional-tort claim against the individual debtor is extinguished, “leav[ing] the creditor with only its claim against the debtor’s estate, without even purporting to address the merits of the released non-debtor claim.” Brubaker, *Nondebtor Release Jurisdiction*, *supra* note 11, at 19. When the individual nondebtor was acting as an agent on behalf of a corporate debtor with respect to the alleged misconduct, then, nondebtor releases essentially assign primary (and *exclusive*) responsibility for that agent’s misconduct to the corporate debtor. That, however, turns the relative responsibility for such tortious misconduct completely upside down and (even worse) collapses the individual’s primary responsibility into nothingness:

A corporate agent who engages in wrongful conduct, such as fraud, is directly responsible [to fraud victims] as a tortfeasor and is not shielded from liability by virtue of the fact that the agent’s fraudulent conduct was taken on behalf of a corporate principal. Because a corporation (a fictional person) cannot “do” anything, except through the actions of its corporate agents (real people), the corporation’s fraud liability is purely *vicarious* liability, through which the corporation (*i.e.*, the corporate property) is *also* subjected to liability for the corporate agent’s fraudulent conduct.

Ralph Brubaker, *Taking Exception to the New Corporate Discharge Exceptions*, 13 AM. BANKR. INST. L. REV. 757, 772 (2005) [hereinafter Brubaker, *Corporate Discharge Exceptions*] (footnotes omitted); *see also In re Purdue Pharma, L.P.*, No. 21 cv 7532, 2021 WL 5979108, at *29–30 (S.D.N.Y. Dec. 16, 2021) (perceptively recognizing that involuntarily released “claims against the [nondebtor] Released Parties are effectively being extinguished for nothing, even though they are described as being ‘channeled’” and emphasizing that the “Debtors sidestepped” that inconvenient fact and “made no effort to clarify this”). The nondebtor-release factor that justifies extinguishing the corporate agent’s primary liability based upon “an identity of interest between the debtor and the third party . . . such that a suit against the non-debtor is, in essence, a suit against the debtor,” *Class Five Nev. Claimants v. Dow Corning Corp.* (*In re Dow Corning Corp.*), 280 F.3d 648, 658 (6th Cir. 2002), is the distracting shiny object that makes this “channeling sleight of hand” possible. Brubaker, *Nondebtor Release Jurisdiction*, *supra* note 11, at 19; *see Brubaker, Corporate Discharge Exceptions*, *supra*, at 772–73, 773 n.84.

99. *See, e.g.*, 11 U.S.C. § 523(a)(2), (6) (2018); Brubaker, *supra* note 3, at 999–1001; Posner & Brubaker, *supra* note 7. Approving discharge of such debts via nonconsensual nondebtor release, therefore, is not an appropriate exercise of a bankruptcy court’s general equitable powers. *Accord Purdue Pharma*, 2021 WL 5979108, at *62; *see Law v. Siegel*, 571 U.S. 415, 421 (2014) (“Section 105(a) confers authority to ‘carry out’ the provisions of the Code, but it is quite impossible to do that by taking action that the Code prohibits. That is simply an application of the axiom that a statute’s general permission to take actions of a certain type must yield to a specific prohibition found elsewhere.”).

100. *See Brubaker, supra* note 3, at 972–80.

and the incident procedural apparatus for adjudicating those claims, such as the Federal Rules of Bankruptcy Procedure (which incorporate nearly all of the Federal Rules of Civil Procedure¹⁰¹). The extraordinary resolution of those claims effected via nondebtor release, however, is unknown to any of those governing sources of substantive or procedural law. And there is no bankruptcy-unique normative or policy justification for nondebtor releases' exceptional alteration of the parties' nonbankruptcy rights and obligations.

A. Mandatory Settlement via Nondebtor Release

Nondebtor releases are often clothed in the rhetoric of “compromise” and “settlement” of the third-party nondebtor claims at issue. Given the nonconsensual nature of the nondebtor releases of concern, though, the “settlement” effectuated via nondebtor release departs from the fundamental baseline norm that settlement of a claim cannot be imposed on a party without that party's consent.¹⁰² That principle is undoubtedly borne of constitutional due-process guarantees, as “part of our ‘deep-rooted historic tradition that everyone should have his own day in court.’”¹⁰³

101. See FED. R. BANKR. P. 7001-7071, 9014(a)-(c); TABB & BRUBAKER, *supra* note 53, at 925-28. Consequently, “[b]ankruptcy practice, especially bankruptcy litigation, is governed in large measure, by the same rules of procedure that apply in general federal civil practice.” Christopher M. Klein, *Bankruptcy Rules Made Easy (2001): A Guide to the Federal Rules of Civil Procedure That Apply in Bankruptcy*, 75 AM. BANKR. L.J. 35, 35-36 (2001).

102. See *Martin v. Wilks*, 490 U.S. 755, 761-62, 768 (1989) (“[A] voluntary settlement . . . cannot possibly ‘settle,’ voluntarily or otherwise, the conflicting claims of [those] who do not join in the agreement.”); Loc. No. 93, *Int’l Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501, 529 (1986) (“Of course, parties who choose to resolve litigation through settlement may not dispose of the claims of a third party . . . without that party’s agreement.”). As Professor Richard A. Nagareda aptly noted, “[w]ords like ‘peace,’ ‘settlement,’ and ‘resolution’ have a certain soothing tone to them. When we hear those words in connection with mass torts, however, we also should hear the word ‘coercion.’” RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* 219 (2007).

103. *Martin v. Wilks*, 490 U.S. at 762 (quoting 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 4449, at 417 (1st ed. 1981)). See generally Douglas Laycock, *Consent Decrees Without Consent: The Rights of Nonconsenting Parties*, 1987 U. CHI. LEGAL F. 103 (examining the due-process rights of nonparties to consent decrees). The “day in court” sobriquet, however, only imperfectly captures the nature of the due-process right. A more accurate appellation is that which the text of the Due Process Clause protects and which an inchoate cause of action is characterized as for purposes thereof: property belonging to the claimant. See NAGAREDA, *supra* note 102, at 60; Ryan C. Williams, *Due Process, Class Action Opt Outs, and the Right Not to Sue*, 115 COLUM. L. REV. 599, 618-44 (2015).

Nondebtor releases, therefore, work a kind of representational settlement, akin to a class-action settlement, in which someone else is negotiating and compromising creditors' claims against released nondebtors. As I have noted before, nonconsensual nondebtor releases impose a mandatory non-opt-out settlement of creditors' third-party nondebtor claims, wholly without regard to whether such a mandatory non-opt-out settlement is appropriate, permissible, or even constitutional.¹⁰⁴

The approval process for nondebtor releases does not adhere to the constitutional due-process requirement of an adequate unconflicted litigation representative for the third-party nondebtor claims compromised thereby.¹⁰⁵ Even

104. Brubaker, *supra* note 3, at 974-80.

105. See *Taylor v. Sturgell*, 553 U.S. 880, 900-01 (2008); *Richards v. Jefferson Cnty.*, 517 U.S. 793, 798-802 (1996); *Hansberry v. Lee*, 311 U.S. 32, 40-46 (1940). “[N]o such representative speaks for the interests of any properly constructed ‘class’ of creditors whose non-debtor claims are extinguished through non-debtor releases.” Brubaker, *supra* note 3, at 976; *accord* *Patterson v. Mahwah Bergen Retail Grp.*, No. 21cv167, 2022 WL 135398, at *29-30 (E.D. Va. Jan. 13, 2022) (noting that “in the context of a non-debtor release in a bankruptcy action . . . no party litigates on behalf of the” releasing claimants, and since releasing claimants “had no one to adequately represent their interests . . . allowing the release of claims . . . does not comport with due process”); *In re Aegean Marine Petroleum Network Inc.*, 599 B.R. 717, 724 (Bankr. S.D.N.Y. 2019) (noting that “[w]hen third-party releases are proposed,” releasing claimants are not “adequately protected by court-certified . . . representatives” with “similar claims, who have incentives to pursue them, and who can be trusted to litigate or settle the . . . claims in a way that will fully protect the . . . interests” of the releasing claimants). Indeed, the representative of the debtor’s bankruptcy estate (the trustee or debtor-in-possession) or collective claimant constituencies (such as official and unofficial committees) lack any authority or standing whatsoever to assert the claims of individual creditors against a nondebtor. See *Caplin v. Marine Midland Grace Tr. Co.*, 406 U.S. 416 (1972). Moreover, any decision to permit such a representative assertion of creditor claims against nondebtors “is one that only Congress can make.” *Id.* at 435. And as the Supreme Court has made clear, “virtual representation” simply from an alignment of interests does not satisfy due process because that would improperly “allow[] courts to ‘create *de facto* class actions at will.’” *Taylor v. Sturgell*, 553 U.S. at 901 (quoting *Tice v. Am. Airlines, Inc.*, 162 F.3d 966, 973 (7th Cir. 1998)). *Contra In re Purdue Pharma L.P.*, 633 B.R. 53, 82, 86 (Bankr. S.D.N.Y.) (stating that “those who negotiated the plan’s [nondebtor-release] settlements in essence represented all of the creditors in these cases”), *vacated*, No. 21 cv 7532, 2021 WL 5979108 (S.D.N.Y. Dec. 16, 2021).

Lack of adequate representation is also a significant structural deficiency of many non-class-action aggregate settlements. See ELIZABETH CHAMBLEE BURCH, *MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION* 94-96, 117, 131, 178-80, 208 (2019); Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1, 12-15, 67-71 (2021); Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 554-55 (2013). See generally Samuel Issacharoff, *The Governance Problem in Aggregate Litigation*, 81 FORDHAM L. REV. 3165 (2013) (analyzing representation and control issues in aggregate litigation); Howard Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519 (analyzing attorney representation issues in aggregate litigation).

more significantly, claimants are not provided any opportunity to opt out of the “settlement” imposed on them via nondebtor release.¹⁰⁶ In a series of decisions over the last thirty-five years, the Supreme Court has repeatedly and strongly suggested, if not explicitly held, that for the kinds of money damages claims typically compromised via nondebtor release, the “absence of . . . opt out violates due process.”¹⁰⁷ Within the due-process triad of exit, loyalty, and voice,¹⁰⁸ then, nonconsensual nondebtor releases deny claimants both loyalty and by definition exit. In addition to their facial unconstitutionality on separation-of-powers grounds,¹⁰⁹ nondebtor releases thus raise grave due process concerns.¹¹⁰

In her article, Simon expresses no opinion on whether nonconsensual nondebtor releases are permissible or constitutional under existing law. Rather, her acceptance of nondebtor releases is a more practical response to the realities of existing nondebtor-release practice. She proposes salutary reforms, but her proposals would not alter the basic nature of any settlement produced by nonconsensual nondebtor release as a *mandatory* non-opt-out settlement.¹¹¹

It is worth reemphasizing the unique and extraordinary nature of these nonconsensual nondebtor release “settlements,” which simply *cannot* occur in any

106. See Brubaker, *supra* note 3, at 978-80.

107. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 362-63 (2011); see AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 349 (2011); Ortiz v. Fibreboard Corp., 527 U.S. 815, 847-48 (1999); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-12 (1985); Williams, *supra* note 103, at 606-11.

108. See AM. L. INST., PRINCIPLES OF THE L. OF AGGREGATE LITIG. § 2.07 & cmts. & reporters’ notes (2010) (discussing the relationship between claimants’ due-process rights and preclusive effect of aggregate proceedings); *id.* cmt. c, at 148 (organizing “various due process rights in terms of the typology of exit, voice, and loyalty rights often used to describe the array of ways that individuals might advance their interests within a variety of arrangements that are collective or aggregative in nature”).

109. See *supra* Part I.

110. Indeed, “third-party releases strike at the heart of [claimants’] foundational [due process] rights.” Patterson, 2022 WL 135398, at *1. And to the extent that nondebtor releases violate claimants’ due process rights, they may be subject to collateral attack. See AM. L. INST., *supra* note 108, § 2.07 & cmt. b, at 148 (“Strictures of constitutional due process comprise the most significant constraints on the preclusive effect of the aggregate proceeding.”). See generally Debra Lynn Bassett, *Just Go Away: Representation, Due Process, and Preclusion in Class Actions*, 2009 BYU L. REV. 1079 (discussing the relationship between due-process right to adequate representation and preclusive effect); Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057 (2002) (discussing the relationship between due-process opt-out right and preclusive effect).

111. Her proposals also do not address the problem of lack of adequate (unconflicted) representation of the interests of claimants with respect to their claims *against the released nondebtor*. See *supra* notes 105, 108-110, and accompanying text. The importance of adequate representation is intensified by the mandatory nature of nonconsensual nondebtor-release “settlements.” See AM. L. INST., *supra* note 108, § 1.02 reporters’ notes at 19.

other context. Why, then, should this extraordinary mandatory settlement power exist *only* in cases in which a codefendant has filed bankruptcy? After asking and diligently exploring that question for over twenty-five years, I have yet to receive or discover a credible response.

B. Bankruptcy's "Necessity" Fiction

The truth about nonconsensual nondebtor releases and the mandatory settlements they impose on claimants is that they are a manifestation of a more general deceit indulged throughout the bankruptcy reorganization system, in order to disregard cornerstone principles governing parties' fundamental distributional entitlements.¹¹² I will call this bankruptcy's "necessity" fiction. And as Simon's article starkly demonstrates, bankruptcy's necessity fiction (via the bankruptcy grifter phenomenon) is now also distorting the tort system.

The bankruptcy reorganization process is extremely complex and, by design, incredibly flexible and fluid. That is its genius. Those who administer the system, particularly judges and lawyers, do so with an earnest and ever-present desire to, whenever possible, preserve the debtor's business intact and prevent the value destruction, job loss, and other unfortunate collateral consequences that would accompany a fire-sale liquidation.¹¹³

However, in many different contexts throughout the bankruptcy reorganization process, parties with significant control over that process seize upon and opportunistically exploit the exigencies surrounding the debtor's financial difficulties in order to alter various parties' distribution rights, as expressed in the Bankruptcy Code's explicit priority and distribution provisions.¹¹⁴ The various

112. As the Supreme Court has recognized, "[t]he priority system applicable to [creditor] distributions has long been considered fundamental to the Bankruptcy Code's operation" and "constitutes a basic underpinning of business bankruptcy law." *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 984, 983 (2017). Indeed, such a formal system of distribution and priority "is an indispensable, defining feature of any bankruptcy system." Brubaker, *supra* note 84, at 1.

113. See AM. BANKR. INST. COMM'N TO STUDY THE REFORM OF CHAPTER 11, 2012-2014 FINAL REPORT AND RECOMMENDATIONS 2-3, 6, 12 (2014); NAT'L BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 303, 309 (1997); Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 802, 798 (2010) (noting that "the bankruptcy bar has historically been [relatively] unified and public-minded in its views about the core aims and operation of the bankruptcy process" and that bankruptcy judges "share the outlook of the bar from which they were selected and to which they remain responsive—that of skilled professionals who place a high value on pragmatic solutions to financial distress").

114. See David A. Skeel, *The Empty Idea of "Equality of Creditors,"* 166 U. PA. L. REV. 699 (2017); Mark J. Roe & Frederick Tung, *Breaking Bankruptcy Priority: How Rent-Seeking Upends the Creditors' Bargain*, 99 VA. L. REV. 1235 (2013). Examples include: (1) so-called "roll ups" and "cross collateralization" in debtor-in-possession (DIP) financing orders, see David A. Skeel,

judicial doctrines created to approve these priority-altering distribution techniques frequently rely upon the justification (and even required factual findings) that doing so is “important,” “necessary,” or “essential” to the debtor’s successful reorganization and, at least in the earliest stages of the institutionalization of these practices, that the variation is an “exceptional” one that is to be approved in only “rare” circumstances. That is the necessity fiction, which time and eventual institutionalization of these practices expose as little more than a rote incantation of magic words.¹¹⁵

Nonconsensual nondebtor releases follow the same pattern in altering the fundamental rights of creditors with respect to their claims against released non-debtors. As pronounced by the Courts of Appeals, such releases “should be reserved for those unusual cases in which such an order is necessary for the success of the reorganization.”¹¹⁶ That standard for approval, however, and the dynamics of the context in which these releases are bargained for and approved, ensure that nonconsensual nondebtor releases will *not* be limited to rare or exceptional cases.

Jr., *The Past, Present and Future of Debtor-in-Possession Financing*, 25 CARDOZO L. REV. 1905 (2004); Charles J. Tabb, *A Critical Reappraisal of Cross-Collateralization in Bankruptcy*, 60 S. CAL. L. REV. 109 (1986); George G. Triantis, *A Theory of the Regulation of Debtor-in-Possession Financing*, 46 VAND. L. REV. 901 (1993); (2) “critical vendor” orders, see Ralph Brubaker, *Reassessing Our Commitment to Unsecured Creditor Equality: Critical Vendor Orders After Kmart (Part I)*, 24 BANKR. L. LETTER, no. 5, May 2004, at 1; Charles Jordan Tabb, *Emergency Preferential Orders in Bankruptcy Reorganizations*, 65 AM. BANKR. L.J. 75 (1991); (3) settlements approved under FED. R. BANKR. P. 9019, see Christopher W. Frost, *Settlements, Absolute Priority, and Another Look at Inter-Class Give-Ups*, 27 BANKR. L. LETTER, no. 6, June 2007, at 1; (4) “363 sales” of the debtor’s business, see Ralph Brubaker & Charles Jordan Tabb, *Bankruptcy Reorganizations and the Troubling Legacy of Chrysler and GM*, 2010 U. ILL. L. REV. 1375; (5) “gifting” provisions in a plan of reorganization, see Ralph Brubaker, *Taking Chapter 11’s Distribution Rules Seriously: “Inter-Class Gifting Is Dead! Long Live Inter-Class Gifting!”*, 31 BANKR. L. LETTER, no. 4, Apr. 2011, at 1; Bruce A. Markell, *The Clock Strikes Thirteen: The Blight of Horizontal Gifting*, 38 BANKR. L. LETTER, no. 12, Dec. 2018, at 1; and (6) “structured dismissals,” see Brubaker, *supra* note 84; Christopher W. Frost, *Structured Dismissals: Smooth Off-Ramp or Artful Dodge?*, 35 BANKR. L. LETTER, no. 10, Oct. 2015, at 1.

115. For example, full and immediate payment of a “critical” vendor’s prebankruptcy unsecured claim was originally founded upon the premise, derived from equity-receivership practice in railroad reorganizations, that payment of that creditor “*is necessary for the continued operation of the railroad during reorganization*, (e.g., if a previously unpaid creditor occupies a monopoly position vis-a-vis the railroad during reorganization and threatens to withhold his supplies unless paid).” *In re N.Y., New Haven & Hartford R.R. Co.*, 278 F. Supp. 592, 602 n.15 (D. Conn. 1967), *aff’d*, 405 F.2d 50 (2d Cir. 1968). Entry of such orders now, however, is commonplace and routine in many districts. See DEBRA I. GRASSGREEN, JOHN W. LUCAS, VICTORIA A. NEWMARK & MICHAEL R. SEIDL, *FIRST DAY MOTIONS: A GUIDE TO THE CRITICAL FIRST DAYS OF A BANKRUPTCY CASE* 58–68 (3d ed. 2012); Brubaker, *supra* note 84, at 9 (observing that “no one could credibly” claim that critical vendor orders are rare “these days (and would undoubtedly burst into laughter and/or elicit a similar response with any attempt to do so)”).
116. *In re Seaside Eng’g & Surveying, Inc.*, 780 F.3d 1070, 1078 (11th Cir. 2015).

Given the extraordinary nature of the relief at stake and the supposed rarity of its grant, one might legitimately expect that the concept of “necessary to successful reorganization” means reorganization in the sense of saving the debtor’s business from destruction. But that is not what it means, according to the necessity fiction. Consider, for example, the *Blitz* case (and Walmart’s nondebtor release therein) that Simon discusses,¹¹⁷ which involved liquidation of a defunct business’s assets.¹¹⁸

If successful reorganization does not mean saving the debtor’s business, then all it means is confirming a plan of reorganization, the terms of which are the product of negotiations among the dominant players.¹¹⁹ In practice and as applied, therefore, “necessary to successful reorganization” for purposes of the necessity fiction simply means necessary to do the deal embodied in the plan of reorganization.¹²⁰ Moreover, given that a successful reorganization is the product of negotiations, nondebtor-release beneficiaries themselves, as key participants in the negotiations, can always manufacture the “evidentiary” record required for approval, merely through their negotiation behavior.

To understand why that is the case, consider the negotiations over a nonconsensual nondebtor release, given in exchange for a nondebtor’s contribution to a settlement fund. In order for a judge to approve the release as “necessary to successful reorganization,” the judge will have to find that the only means of procuring the nondebtor’s contribution to the settlement fund is by giving the nondebtor a nonconsensual liability release.¹²¹ Therefore, the negotiation position

117. See Simon, *supra* note 1, at 1175.

118. See Clifford Krauss, *A Factory’s Closing Focuses Attention on Tort Reform*, N.Y. TIMES (Oct. 4, 2012), <https://www.nytimes.com/2012/10/05/business/in-a-shuttered-gasoline-can-factory-the-two-sides-of-product-liability.html> [<https://perma.cc/E32J-BV6E>]; see also Melissa B. Jacoby, *Shocking Business Bankruptcy Law*, 131 YALE L.J.F. 409, 420–21 (2021) (discussing nondebtor releases in the liquidating Chapter 11 of a defunct retail electricity provider). This limitless nature of the concept of a “reorganization” was apparent from one of the earliest big bankruptcy grifts, the *Drexel Burnham Lambert* case, which was also a liquidation of a shuttered business. See Brubaker, *supra* note 3, at 962–63, 1018–21.

119. See Anthony J. Casey, *Chapter 11’s Renegotiation Framework and the Purpose of Corporate Bankruptcy*, 120 COLUM. L. REV. 1709, 1751 (2020) (“Chapter 11 implements a structured renegotiation framework.”).

120. Indeed, the Eleventh Circuit recently dropped the pretense that a nondebtor release can only be approved if it is necessary to a successful reorganization. See *Markland v. Davis (In re Centro Group, LLC)*, No. 21-11364, 2021 WL 5158001 (11th Cir. Nov. 5, 2021). The court in *Centro Group* held that a nonconsensual nondebtor release can be approved even if “the purpose of the [release] is not to ensure success for a reorganized entity by eliminating liability against third parties but is instead to facilitate a settlement agreement.” *Id.* at *3.

121. See, e.g., *id.*, 2021 WL 5158001, at *3 (stating that a nonconsensual nondebtor release “is ‘integral’ to the settlement” if “the parties would not have entered into a settlement agreement without it”).

of the nondebtor is preordained by the operative legal rule. The nondebtor will absolutely insist upon receiving a nonconsensual nondebtor release as an inviolable deal-breaker condition of making any contribution to the settlement fund, and when the resulting release is presented to the bankruptcy court for approval, will enthusiastically testify accordingly. And truthfully so, since the operative legal rule itself turns on a negotiating position. Even the most obvious bluff, on the stand and under oath, does not risk punishable perjury, because the nondebtor is not so much testifying about objectively verifiable past facts as the nondebtor is testifying about its negotiating position: “I will not contribute anything to a settlement without a nonconsensual nondebtor release.”

Permitting the practice of approving nonconsensual nondebtor releases that are “necessary to successful reorganization,” while “preach[ing] caution”¹²² (as Courts of Appeals have done) is simply extreme naivete – especially if the hope is that this approach will exert any principled restraint on the practice. “Necessary to successful reorganization” is a negotiating position proffered by a nondebtor who will directly benefit from that which it insists is essential to any settlement deal.¹²³ By positively inviting the nondebtor to manufacture the “evidence” necessary for approval, through its negotiating behavior, this standard virtually guarantees that approval will not and cannot be limited to “rare” and “unusual” cases, which the growing prevalence of the bankruptcy grifter phenomenon vividly illustrates.¹²⁴

As Justice Breyer’s opinion in the *Jevic* case insightfully observes, in striking down an extra-statutory priority deviation approved on the basis of the necessity fiction, such a standard “will lead to similar claims being made in many, not just a few, cases,” which “threatens to turn a ‘rare case’ exception into a more general

122. *In re Ingersoll, Inc.*, 562 F.3d 856, 864 (7th Cir. 2008).

123. As the Second Circuit accurately noted in *Metromedia*, then, “a nondebtor release is a device that lends itself to abuse.” *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 142 (2d Cir. 2005). And “[i]t is . . . ‘precisely this conditioning of financial participation by non-debtors on releases that is subject to the sort of abuses foreseen’ in *Metromedia*.” *In re Johns-Manville Corp.*, 517 F.3d 52, 66 (2d Cir. 2008) (quoting *In re Karta Corp.*, 342 B.R. 45, 55 (S.D.N.Y. 2006)), *rev’d on other grounds sub nom. Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 155 (2009).

124. And even if (1) there were, in fact, cases in which the only way, from an ex ante perspective, to save an operating debtor’s business is to grant a nondebtor a nonconsensual liability release (theoretically possible, but extremely unlikely), and (2) it were possible, as a practical evidentiary matter, to reliably restrict grants of nonconsensual nondebtor releases to such cases (even more unlikely), they would still be a fundamentally objectionable robbing of Peter to pay Paul. See Brubaker, *supra* note 3, at 1021-33; Douglas G. Baird, Anthony J. Casey & Randal C. Picker, *The Bankruptcy Partition*, 166 U. PA. L. REV. 1675, 1686-90 (2018).

rule.”¹²⁵ “[O]nce the floodgates are opened, [the negotiating parties] can be expected to make every case that ‘rare case.’”¹²⁶ Indeed, bankruptcy judges are intimately familiar with this “transformation of relief circuit courts describe as ‘extraordinary’ into a routine part of nearly every chapter 11 case.”¹²⁷

This is not to say that requested nondebtor releases are always approved, but it does demonstrate that the determining factors for when they will be approved are not transparent. Given the influence of the Chapter 11 forum-shopping phenomenon,¹²⁸ one suspects that a “big case” dynamic may be operative.¹²⁹ Because necessary to reorganization means nothing more than necessary to do the deal, nondebtor releases will often be necessary to reorganization in an ex post sense: if the court does not approve the nondebtor-release deal embodied in the plan of reorganization, the deal will fall apart, and the parties will have to start over in trying to negotiate a new deal. The larger the case, the more consequential this “necessity” will be. In extremis, this ex post “necessity” of saving the deal could even present the prospect that the costs of negotiating a new deal (when added to the costs already incurred in negotiating the nondebtor-release deal) would completely exhaust the incremental going concern value of the debtor entity (over and above liquidation value), necessitating liquidation in order to maximize creditor recoveries. That, however, is a “necessity” produced solely by the rule

125. *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 986 (2017).

126. *Id.* (quoting Frederick F. Rudzik, *A Priority Is a Priority—Except When It Isn’t*, 34 AM. BANKR. INST. J., Sept. 2015, at 16, 79).

127. *In re Astria Health*, 623 B.R. 793, 801 n.25 (Bankr. E.D. Wash. 2021) (“This is an example of the Lake Wobegon effect whereby many ordinary and average things are postured as extraordinary, causing the very concept of extraordinariness to lose meaning.”); *see also In re Aegean Marine Petroleum Network Inc.*, 599 B.R. 717, 726 (Bankr. S.D.N.Y. 2019) (“Almost every proposed Chapter 11 Plan that I receive includes proposed releases.”); *In re Purdue Pharma, L.P.*, No. 21 cv 7532, 2021 WL 5979108, at *3 (S.D.N.Y. Dec. 16, 2021) (“When every case is unique, none is unique.”); *Patterson v. Mahwah Bergen Retail Grp.*, No. 21cv167, 2022 WL 135398, at *2 (E.D. Va. Jan. 13, 2022) (noting that despite court-of-appeals admonitions that nonconsensual nondebtor releases are to be granted cautiously and infrequently, in only rare, unusual, and exceptional circumstances, “the Bankruptcy Court for the Richmond Division of this district regularly approves third-party releases,” and the “ubiquity” and “prevalence” of releases “undermines assertions that they are integral to the success of this particular reorganization”).

128. *See infra* notes 132, 133, 198, and accompanying text.

129. *Cf.* Lawrence Ponoroff & F. Stephen Knippenberg, *The Implied Good Faith Filing Requirement: Sentinel of an Evolving Bankruptcy Policy*, 85 NW. U. L. REV. 919, 973 (1991) (finding that bankruptcy cases of public companies are never dismissed for lack of good faith, despite the presence of circumstances that prompt dismissal in other cases).

permitting nondebtor-release deals.¹³⁰ That “necessity” will never exist if nondebtor releases are prohibited because the parties simply will not negotiate nondebtor-release deals.

The emptiness of the necessity fiction lays bare the absence of any legitimate justification for giving bankruptcy courts the unique, extraordinary power to impose mandatory non-opt-out settlements (that are otherwise impermissible and unconstitutional) of tort victims’ claims against solvent entities who have not themselves filed bankruptcy. Nonconsensual nondebtor releases are not about saving an operating debtor’s business or any other bankruptcy-unique policy objective. In mass tort bankruptcies, they are all about creating an alternative system for resolving the mass tort liability of solvent nondebtors – an ad hoc system that adheres to neither bankruptcy nor nonbankruptcy norms for achieving fair aggregate settlements.¹³¹

With nondebtor releases and bankruptcy grifting, bankruptcy’s necessity fiction, and its artful manipulation of parties’ distributional rights vis-à-vis a bankruptcy debtor, has jumped from the bankruptcy system into the tort system, where it is trampling core tenets of compensatory and procedural justice in connection with victims’ claims against bankruptcy grifters. The availability of this ad hoc and superpowerful mandatory non-opt-out settlement device only in bankruptcy, combined with the well-known and rapidly escalating phenomenon of unrestricted forum shopping (and now even judge shopping) in corporate

130. And that ex post “necessity” bootstrap is also then frequently used to immunize nondebtor releases from any scrutiny on appeal, by dismissing any appeal using the also highly controversial “equitable mootness” doctrine. See, e.g., *R² Invs., LLC v. Charter Commc’ns, Inc.* (*In re Charter Commc’ns, Inc.*), 691 F.3d 476, 483–86 (2d Cir. 2012); see Christopher W. Frost, *Pragmatism vs. Principle: Bankruptcy Appeals and Equitable Mootness*, 15 N.Y.U. J. L. & BUS. 477, 506 (2019) (“*Charter* rests on the notion that equitable mootness is necessary to protect the deal itself.”). As my good friend, the late great Professor Christopher W. Frost incisively observed, the “tendency to protect the deal,” through an ex post “necessity” standard, “carries over to the equitable mootness decision” on appeal. *Id.* at 515. Equitable mootness doctrine, therefore, mirrors nondebtor release doctrine in that “[t]he very existence of the doctrine creates the circumstances that make it necessary.” *Id.* at 523. Consequently, appropriate skepticism regarding the “necessity” of releases also exposes the unstable foundations of claims that appellate challenges thereto should be dismissed as equitably moot. See, e.g., *Patterson*, 2022 WL 135398, at *40–41 (characterizing such a claim as “the height of irony” given that “the Released Parties have given themselves broad releases and have sought to immunize the unconstitutional releases from appellate review with the inclusion of an inflexible Nonseverability Provision” in the plan of reorganization).

131. If the nondebtor’s mass tort liability poses a credible threat of insolvency for the released nondebtor, there is even less reason for the courts to fashion an ad hoc distribution and discharge scheme for that nondebtor. That nondebtor can simply file bankruptcy. The unique function and utility of bankruptcy – indeed, its entire purpose and *raison d’être* – is to deal with the intercreditor equity and entity viability threats posed by that sort of debt overhang, including (and perhaps even especially) debt overhang precipitated by massive disputed obligations.

Chapter 11 filings,¹³² is causing a migration of mass tort litigation out of the tort system and into the bankruptcy system.¹³³ We thus see the rise in bankruptcy grifting that Simon's article rightly decries.

III. MANDATORY BANKRUPTCY AGGREGATION WITHOUT NONDEBTOR RELEASES

Simon's reluctance to embrace an outright ban on nonconsensual nondebtor releases is also motivated by her expressed fear of losing beneficial settlements if nonconsensual nondebtor releases are prohibited.¹³⁴ She holds up the Takata settlement as a model of a beneficial settlement produced by giving the settling nondebtors (Honda/Acura and Nissan/Infiniti¹³⁵) a discharge from their Takata airbag liability in exchange for their contributions to the settlement fund.¹³⁶

I am less optimistic about the prospects of mandatory settlements facilitating just resolutions,¹³⁷ and tend to place much more confidence in the power of claimants' exit rights to produce fair settlement terms.¹³⁸ As Professor Richard A. Nagareda trenchantly observed, "[a]bsent the ability to alter unilaterally [claimant]s' preexisting rights to sue in tort . . . settlement designers must purchase those rights by way of the benefits promised to [claimants] for remaining

132. See Adam J. Levitin, *Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 TEX. L. REV. (forthcoming 2022), <https://ssrn.com/abstract=3851339> [<https://perma.cc/Z9F6-7G4V>]; Adam J. Levitin, *Judge Shopping and the Corruption of Chapter 11* (Georgetown Univ. L. Ctr., Working Paper, Sept. 3, 2021), <https://ssrn.com/abstract=3900758> [<https://perma.cc/2NKQ-RFWA>].

133. See Gluck & Burch, *supra* note 105, at 47-51 (noting that "bankruptcy court has emerged as an alternative centralizing federal court"); *Patterson v. Mahwah Bergen Retail Grp.*, No. 21cv167, 2022 WL 135398, at *2 (E.D. Va. Jan. 13, 2022) (noting that the fact that "the Bankruptcy Court for the Richmond Division of this district regularly approves third-party releases" is a "practice [that] contributes to major companies . . . using the permissive venue provisions of the Bankruptcy Code to file for bankruptcy here").

134. See Simon, *supra* note 1, at 1205 ("Without the possibility of channeling or releasing claims, many nondebtor companies and individuals would withhold significant contributions that benefit claimants.").

135. See TAKATA AIRBAG TORT COMPENSATION TRUST FUND, <http://www.takataairbaginjurytrust.com> [<https://perma.cc/K45Q-T26M>].

136. See Simon, *supra* note 1, at 1205. Although she also acknowledges that the Takata settlement is aberrational and the circumstances producing it were unique. *Id.* at 1182-83.

137. And that is especially so when no serious attention is paid to separate (unconflicted) representation of creditors' distinct interests regarding their claims *against the released nondebtor*. See *supra* notes 105, 111, and accompanying text.

138. See John C. Coffee, *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 417-28 (2000); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 367-70.

in the settlement. [Claimant]s’ preexisting rights to sue truly must be purchased rather than simply appropriated.”¹³⁹ Preserving claimants’ right to agree (or not) to participate in a proposed settlement, therefore, “furnish[es] a kind of market test of a settlement’s fairness and adequacy, particularly of the specific compensation offers that will be made under the settlement.”¹⁴⁰ And conjecture regarding released nondebtors’ willingness to pay plaintiffs a “peace bonus” in excess of the aggregate sum they would pay without a nondebtor release is just that—unverified (and perhaps unverifiable) speculation. It seems just as, if not more, likely that any value created by a nonconsensual nondebtor release is captured entirely by the released nondebtors and the lead plaintiffs’ lawyers who negotiate the nondebtor-release deal.¹⁴¹

139. NAGAREDA, *supra* note 102, at 158–59; *see id.* at 121, 136.

140. Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 964 (1995); *see also* BURCH, *supra* note 105, at 205, 212 (“If a mass exodus occurs after a global deal, that can signal that something is amiss. . . . The more [claimants] vote with their feet, the stronger the message becomes that the deal is unattractive.”); Coffee, *supra* note 138, at 424 (arguing that “[i]f plaintiffs’ counsel and defendants have struck a ‘sweetheart’ deal that shortchanges” claimants, the best remedy is “to invite [claimants] to ‘vote with their feet’”). And in that regard, I would note that the mandatory nondebtor settlements in Takata did not actually provide for “full payment” of all released nondebtors’ liability to every individual claimant, as ultimately determined through the claims resolution process. The nonconsensual nondebtor releases for Honda/Acura and Nissan/Infiniti gave them immunity from any liability for punitive damages. *See* Disclosure Statement for Third Amended Joint Chapter 11 Plan of Reorganization of TK Holdings, Inc. and Its Affiliated Debtors at 34, *In re* TK Holdings, Inc., No. 17-11375-BLS (Bankr. D. Del. Jan. 5, 2018) [hereinafter Takata Disclosure Statement], <https://restructuring.primeclerk.com/takata/Home-DocketInfo?DocAttribute=3105&DocAttrName=PLANDISCLOSURESTATEMENT> [<https://perma.cc/DKX7-E9AA>]. And in any case in which a claimant opts to litigate its compensatory damages claim to judgment in a court, that judgment is not paid immediately; it is paid over a five-year period, without interest. *Id.* at 34–35.

141. *See, e.g.*, Takata Disclosure Statement, *supra* note 140, at 36–37 (disclosing that released nondebtors will pay compensation to lead plaintiffs’ counsel for “work in designing, negotiating, and implementing the Channeling Injunction and [claims resolution] trust”). As Professor Nagareda observed, “the challenge lies in lending a structure to peacemaking that affords latitude for creativity to generate value but, at the same time, inhibits plaintiffs’ lawyers and defendants from largely appropriating that value for themselves.” NAGAREDA, *supra* note 102, at xi; *cf.* BURCH, *supra* note 105, at 63–64 (stating, in the context of multidistrict litigation (MDL) settlements, that “the limited evidence available suggests that if these premiums exist, the gains unlocked in exchange for delivering peace may be [paid to lead plaintiffs’ attorneys for] common-benefit fees—not bigger plaintiff awards”). Simon’s proposed “best interests” test would require inherently uncertain (and manipulable) claim valuation estimates, which does not give me confidence that each individual nonconsenting claimant would reliably receive at least as much they would in the absence of the nondebtor release, let alone a “peace bonus,” if her proposal were implemented. *See* Simon, *supra* note 1, at 1212–14. Such a purely monetary calculus also ignores the nonmonetary values that many individual claimants attach

I am also more sanguine about the prospects for aggregate bankruptcy settlements with nondebtors, even if *mandatory* settlements via nondebtor release go away. Part of the rhetorical power of bankruptcy's necessity fiction is creating the false impression that nondebtors simply will not settle without nonconsensual discharge of all their liability. Indeed, as Professors Howard M. Erichson and Benjamin C. Zipursky have pointed out, a similar non sequitur pervades discussions of mass tort resolutions generally: "[O]ne sees a conflation of the *desire* for closure and the *need* for closure, a merger of ideas that occurs even more easily when one party takes the [negotiating] stance that it needs closure."¹⁴² Of course, the forces that make aggregate settlements beneficial for plaintiffs (or their lawyers), defendants, and the judiciary will not suddenly disappear in a world without nonconsensual nondebtor releases.¹⁴³ Rather, aggregation will be achieved through other mechanisms, just as the decline of class-action aggregation and mandatory class-action settlements of mass torts in the wake of *Amchem Products, Inc. v. Windsor*¹⁴⁴ and *Ortiz v. Fibreboard Corp.*¹⁴⁵ (and then *Wal-Mart Stores, Inc. v. Dukes*¹⁴⁶) led to the rise of the so-called quasi-class action through multidistrict litigation (MDL) consolidations.¹⁴⁷

to their "day in court." See BURCH, *supra* note 105, at 31-34, 201-04. Such nonmonetary values, however, are fully protected by assigning individual claimants a "property" right in their individual causes of action, which (not coincidentally) is what due process jurisprudence does. See Michael I. Krauss, *Property Rules vs. Liability Rules*, in 2 ENCYCLOPEDIA OF LAW AND ECONOMICS § 3800, at 788-90 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000); *supra* notes 103, 107, and accompanying text.

142. Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 319 (2011). "The question is not, however, whether [certain] participants *want* closure — of course they do. The question is whether closure, or a very high level of comprehensiveness in settlement, is *needed* . . . from a social perspective." *Id.* "Any adequate evaluation of the comparative value of a comprehensive settlement must include broad considerations that scholars have not even begun to address," particularly if one adopts the extreme position necessary to sustain nonconsensual nondebtor releases — "that closure trumps consent." *Id.* at 320.

143. See BURCH, *supra* note 105, at 24-30; Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769, 1771-80 (2005); Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1574 (2004) ("Indeed, since the very beginnings of U.S. tort law, a variety of aggregate settlement institutions have powerfully shaped the resolution of particular cases in some of the most important fields of tort practice.").

144. 521 U.S. 591 (1997).

145. 527 U.S. 815 (1999).

146. 564 U.S. 338 (2011).

147. See Andrew D. Bradt, *Something Less and Something More: MDL's Roots as a Class Action Alternative*, 165 U. PA. L. REV. 1711, 1711-12, 1714-15 (2017); Troy A. McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. REV. 960, 965-86 (2012); Edward F. Sherman, *The MDL Model for Resolving Complex Litigation If a Class Action Is Not Possible*, 82 TUL.

The most important element of any judicial process that can facilitate comprehensive aggregate resolutions is getting all claims into one court, which can then bring to bear the full range of judicial-management techniques for producing efficient, fair, and comprehensive resolutions.¹⁴⁸ In that regard, there is tremendous untapped potential for mandatory bankruptcy *consolidation* of tort victims' claims against both debtors and nondebtors to replace the bankruptcy grifter system of mandatory bankruptcy *settlements* through nonconsensual nondebtor releases. And the essential architecture for such mandatory consolidation already exists in the bankruptcy jurisdiction, removal, and venue provisions of the Judicial Code.

A. Tort Victims' Claims Against the Debtor

With respect to creditors' claims against bankruptcy debtors, including the disputed, unliquidated claims of tort victims, bankruptcy is a powerful aggregation device. Many components work together to produce bankruptcy's immense aggregation power. At the heart of it is bankruptcy's extremely broad definition of the bankruptcy "claims" that are eligible to receive a distribution from the debtor's bankruptcy estate,¹⁴⁹ which expressly include not only "disputed" and "unliquidated" tort claims, but also the "contingent" claims¹⁵⁰ of future claimants who have not yet been (but will be) injured from the debtor's prebankruptcy conduct.¹⁵¹

L. REV. 2205, 2205-09 (2008); Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 113-14 (2010).

¹⁴⁸ The state of the art for such techniques is helpfully compiled by the Federal Judicial Center in its *Manual for Complex Litigation*, now in its fourth edition. FED. JUD. CTR., *MANUAL FOR COMPLEX LITIGATION* (4th ed. 2004). For a concise and scholarly overview, see TIDMARSH & TRANGSRUD, *supra* note 11, at 289-455. For a compilation of best judicial practices in mass tort bankruptcies, see S. ELIZABETH GIBSON, *JUDICIAL MANAGEMENT OF MASS TORT BANKRUPTCY CASES* (2005).

¹⁴⁹ A debtor's bankruptcy estate is comprised, *inter alia*, of "all legal or equitable interests of the debtor in property as of the commencement of the case," as well as "[a]ny interest in property that the estate acquires after the commencement of the case," such as through the debtor's postpetition business operations, and until confirmation of a plan of reorganization, which "vests all of the property of the estate in the [reorganized] debtor." 11 U.S.C. §§ 541(a)(1), (7), 1141(b) (2018).

¹⁵⁰ 11 U.S.C. § 101(5)(A) (2018).

¹⁵¹ Binding such unknown, uninjured future claimants to bankruptcy proceedings in which they cannot meaningfully participate obviously raises many difficult due process issues. Due process, though, is not an insuperable obstacle if, *inter alia*, an adequate fiduciary representative is appointed to represent the interests of future claimants. See TABB & BRUBAKER, *supra* note

Bankruptcy's statutory automatic stay immediately enjoins assertion of any "claim" against the debtor outside of the bankruptcy court.¹⁵² This leaves filing a "proof of claim" against the debtor's bankruptcy estate in the bankruptcy court in which the debtor's bankruptcy case is pending as creditors' only recourse with respect to their claims against the debtor.¹⁵³ Confirmation of a plan of reorganization establishes the aggregate distribution "fund" available to pay each class of creditor claims.¹⁵⁴ Each individual creditor's pro rata distribution from that "fund" (which is typically a less than payment-in-full distribution for general unsecured creditors such as tort victims) is then determined by the claims "allowance" process.¹⁵⁵

The plan of reorganization may well establish various alternative-dispute-resolution processes for voluntary settlement of disputed claims.¹⁵⁶ But the Bankruptcy Code also provides creditors recourse to a judicial claims allowance determination by the bankruptcy judge, in a "summary" proceeding without a jury.¹⁵⁷ In the case of personal injury and wrongful death claims, however, the tort victim has a statutory right to a jury trial in a federal district court.¹⁵⁸

53, at 937-70. See generally Ralph Brubaker, *Back to the Future Claim: Due Process In and Beyond the Mass Tort Reorganization (Part I)*, 34 BANKR. L. LETTER, no. 11, Nov. 2014 (formulating a comprehensive framework for analyzing future claimants' due-process rights in bankruptcy); Ralph Brubaker, *Back to the Future Claim: Due Process In and Beyond the Mass Tort Reorganization (Part II)*, 35 BANKR. L. LETTER, no. 1, Jan. 2015 [hereinafter Brubaker, *Future Claim II*] (same).

152. 11 U.S.C. § 362(a) (2018).

153. See *id.* § 501(a).

154. See Brubaker, *supra* note 3, at 968-69; Brubaker, *Corporate Discharge Exceptions*, *supra* note 98, at 761.

155. See TABB, *supra* note 59, § 7.1, at 636, 639, § 7.26, at 724.

156. For further discussion, see S. ELIZABETH GIBSON, CASE STUDIES OF MASS TORT LIMITED FUND CLASS ACTION SETTLEMENTS & BANKRUPTCY REORGANIZATIONS (2000), which provides a detailed description and analysis of such claims resolution facilities in mass tort bankruptcy cases, as compared to those produced by pre-*Ortiz* mandatory class settlements. See also S. Todd Brown, *Bankruptcy Trusts, Transparency and the Future of Asbestos Compensation*, 23 WIDENER L.J. 299 (2013) (examining the bankruptcy trust system as part of the broader asbestos personal-injury compensation framework). For a revealing and insightful analysis of the claims resolution facilities under MDL settlements, see BURCH, *supra* note 105, at 134-67. For general background on claims resolution facilities, see Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 STAN. L. REV. 1361 (2005).

157. See 11 U.S.C. § 502 (2018); 28 U.S.C. § 157(b)(1), (2)(B) (2018); *Katchen v. Landy*, 382 U.S. 323, 336-37 (1966). The "summary" label is a reference to the traditional process, inherited from English bankruptcy practice, of so-called summary proceedings in equity before bankruptcy commissioners appointed by the Lord Chancellor. See Ralph Brubaker, *Justice Story, Bankruptcy Injunctions, and the Anti-Injunction Act of 1793*, 92 TEX. L. REV. SEE ALSO 67, 76 (2014); see also Brubaker, "Summary" Theory, *supra* note 53, at 122-26.

158. See 28 U.S.C. §§ 157(b)(2)(B), (O), 157(b)(5), 1411(a) (2018).

The ultimate aggregative power of bankruptcy comes from the fact that confirmation of a plan of reorganization not only fixes creditors' distribution rights from the debtor's bankruptcy estate, it also "discharges" the debtor from any pre-bankruptcy claim, "whether or not a proof of the claim . . . is filed" or "such claim is allowed."¹⁵⁹ All creditors (broadly defined to include even future, unknown, uninjured claimants) are thus bound to the distribution rights established by the confirmed plan of reorganization, whether or not they file a claim or otherwise appear and participate in the bankruptcy proceedings – and they cannot thereafter assert their discharged claims against the debtor or the debtor's property.¹⁶⁰ Indeed, another automatic statutory injunction, the discharge injunction, enjoins creditors from doing so.¹⁶¹ And the bankruptcy court's territorial jurisdiction to bind creditors extends to any and all who have "minimum contacts" with the United States of America.¹⁶²

That is bankruptcy's "special" statutory preclusion design to which the Supreme Court has alluded, most recently in *Taylor v. Sturgell*.¹⁶³ Like class actions,¹⁶⁴ that preclusion mechanism is how bankruptcy effectuates its powerful aggregation of all prebankruptcy claims against a bankruptcy debtor of every stripe, including disputed tort claims.¹⁶⁵ Indeed, bankruptcy claims aggregation, which is a form of mandatory aggregation by preclusion, functions in precisely

^{159.} 11 U.S.C. § 1141(d)(1)(A)(i)-(ii) (2018).

^{160.} Bankruptcy's statutory free-and-clear sale and vesting provisions essentially "discharge" the debtor's property (and bankruptcy purchasers of the debtor's property) from any continuing liability on prebankruptcy claims also. *See id.* §§ 363(f), 1141(c); Brubaker, *Corporate Discharge Exceptions*, *supra* note 98, at 771.

^{161.} 11 U.S.C. § 524(a)(2) (2018).

^{162.} Nationwide service of process is available in all federal bankruptcy proceedings. *See* FED. R. BANKR. P. 7004(d), 9014(b). "With nationwide service, the forum is the United States. So minimum contacts with the United States (Fifth Amendment due process) suffice; minimum contacts with a particular state (Fourteenth Amendment due process) are beside the point." *Double Eagle Energy Servs., LLC v. MarkWest Utica EMG, LLC*, 936 F.3d 260, 264 (5th Cir. 2019).

^{163.} 553 U.S. 880, 895 (2008) (quoting *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989) (stating that "where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate, legal proceedings may terminate preexisting rights if the scheme is otherwise consistent with due process")).

^{164.} *See* NAGAREDA, *supra* note 102, at 9, 71-73; TIDMARSH & TRANGSRUD, *supra* note 11, at 139 (pointing out that "the class action's preclusive effect on the claims of class members is the crux of why class actions are . . . so powerful").

^{165.} "When the bankruptcy court confirms a plan, its terms become binding on debtor and creditor alike. Confirmation has preclusive effect, foreclosing relitigation of 'any issue actually litigated by the parties and any issue necessarily determined by the confirmation order.'" *Bullard v. Blue Hills Bank*, 575 U.S. 496, 502 (2015) (quoting 8 COLLIER ON BANKRUPTCY ¶ 1327.02[1][c], at 1327-6 (16th ed. 2014)).

the same manner as settlement of a mandatory class action in achieving *universal* aggregation.¹⁶⁶

In combination, those are the means by which bankruptcy “channels” creditors’ claims: (1) out of the various otherwise available nonbankruptcy state and federal fora and into one court, the federal bankruptcy court presiding over the debtor’s bankruptcy case, and (2) away from the debtor and toward and against only the “fund/s” the plan establishes for payment of creditors’ claims.¹⁶⁷

B. Tort Victims’ Related Claims Against Nondebtors

1. Mandatory, Universal Settlement via Nondebtor Release

By replicating the effects of the bankruptcy discharge and discharge injunction for creditors’ claims against solvent nondebtors, nonconsensual nondebtor releases and permanent injunctions allow nondebtors to get in on bankruptcy’s mandatory, universal aggregation by preclusion.¹⁶⁸ Most importantly from the perspective of both nondebtors and tort victims, that mandatory, universal aggregation by preclusion puts a hard cap on released nondebtors’ liability exposure at the amount of the “substantial assets [contributed] to the reorganization.”¹⁶⁹ But that criterion for approval of a nondebtor release is extremely (and troublingly) vague. Indeed, “nothing in the process by which releases are approved requires contributions by released nondebtors to approximate the value

166. See Brubaker, *Future Claim II*, *supra* note 151, at 11 (noting that “a class action settlement is extremely analogous to the binding distribution scheme effectuated by a confirmed plan of reorganization in Chapter 11, complete with a preliminary injunction analogous to bankruptcy’s automatic stay, an anti-suit injunction upon final approval of the settlement analogous to bankruptcy’s discharge injunction, and in the case of the limited-fund [mandatory] class action at issue in *Ortiz*, no ability whatsoever for individual claimants to opt-out of the settlement, which is of course precisely the function of the bankruptcy discharge effectuated by confirmation of a plan of reorganization” (footnotes omitted)).

167. See *supra* note 11.

168. See *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 151–54 (2009) (confirmation of plan containing nonconsensual nondebtor release precludes subsequent suit on released claims); *Stoll v. Gottlieb*, 305 U.S. 165 (1938) (same); Brubaker, *supra* note 6, at 9–11. “Indeed, that is the entire purpose and function of a nonconsensual non-debtor ‘release’—to forever and definitively extinguish and bar, by final judgment of a federal court, any collateral suit on the third-party non-debtor claims ‘released’ thereby.” *Id.* at 11.

169. *Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648, 658 (6th Cir. 2002).

of the released claims”¹⁷⁰ nor any other meaningful review of the structural or substantive fairness of the nondebtor release deal.¹⁷¹

In the taxonomy of aggregation devices, mandatory universal aggregation by preclusion is the most powerful and thereby carries the most potential to ride roughshod over individual claimants’ substantive, procedural, and constitutional rights, as nonconsensual nondebtor releases and the resulting bankruptcy grifter phenomenon amply illustrate. But a range of other aggregation mechanisms exist.¹⁷² And with respect to the third-party nondebtor tort claims resolved via nondebtor release (i.e., mandatory *settlement*), bankruptcy contains another very powerful aggregation structure for mandatory *consolidation*.

2. Mandatory, Universal Consolidation of Personal Injury Claims

The essential architecture for mandatory consolidation of mass tort claims against nondebtors is already present in existing bankruptcy law. Section 157(b)(5) of the Judicial Code provides for single-district consolidation of all creditors’ related personal injury claims against a nondebtor, in a manner similar to an MDL consolidation.¹⁷³ But a § 157(b)(5) bankruptcy consolidation of personal injury claims is even more powerful than an MDL consolidation in two significant respects. First, unlike an MDL consolidation, which can only consolidate cases pending in the federal courts, a § 157(b)(5) bankruptcy consolidation can centralize claims pending in both federal and state courts, through the broader removal power available under the bankruptcy removal statute.¹⁷⁴ Second, unlike an MDL consolidation, which is solely “for coordinated or consolidated pretrial proceedings,”¹⁷⁵ a § 157(b)(5) bankruptcy consolidation is for *all* purposes, including trial in a federal district court.

170. Brubaker, *supra* note 3, at 992 (typeface altered). Curing that deficiency is the principal object of Simon’s proposed reforms of nondebtor-release practice, particularly her proposed “best interests” requirement. See Simon, *supra* note 1, at 1212-14; *supra* notes 95-97, 141, and accompanying text.

171. See Brubaker, *supra* note 3, at 977-78.

172. For an excellent survey of the landscape, see TIDMARSH & TRANGSRUD, *supra* note 11, at 39-256.

173. 28 U.S.C. § 157(b)(5) (2018). For other discussions of § 157(b)(5) as an aggregation device, see TIDMARSH & TRANGSRUD, *supra* note 11, at 234-35, 239-42; TABB & BRUBAKER, *supra* note 48, at 866-76; Douglas G. Smith, *Resolution of Mass Tort Claims in the Bankruptcy System*, 41 U.C. DAVIS L. REV. 1613, 1649-62 (2008); Georgene Vairo, *Mass Tort Bankruptcies: The Who, the Why, and the How*, 78 AM. BANKR. L.J. 93, 121-25 (2004).

174. 28 U.S.C. § 1452(a) (2018).

175. *Id.* § 1407(a).

The consolidation power of § 157(b)(5) for tort victims' claims against non-debtors starts with the breadth of federal bankruptcy jurisdiction, which as previously noted,¹⁷⁶ extends to creditors' third-party claims against nondebtors that are "related to" the debtor's bankruptcy case.¹⁷⁷ For any such third-party "related to" claim pending in state court when the debtor files bankruptcy (or filed in state court thereafter), the bankruptcy removal statute provides that either party may remove that "claim or cause of action" into federal court.¹⁷⁸ Bankruptcy removal, therefore, is a more surgical removal of only a "claim or cause of action" within a pending civil action, rather than the entire "civil action," which is the object of a general civil removal.¹⁷⁹ Moreover, bankruptcy removal is at the instance of only one of the parties to an individual "claim or cause of action."¹⁸⁰ Consequently, it is impossible for an opposing party to frustrate bankruptcy removal through the kind of jurisdictional and removal spoilers that can prevent general civil removal of state-law tort claims.¹⁸¹

For example, imagine hundreds or thousands of personal injury suits against two alleged joint tortfeasors (*D* and *ND*) are pending in state and federal courts all over the country, and one of those alleged joint tortfeasors (*D*) files Chapter 11. All the tort claims against *D* now become subject to the mandatory, universal bankruptcy aggregation process previously discussed.¹⁸² In addition, though, as long as the pending tort claims against *ND* are "related to" *D*'s bankruptcy case, *ND* can immediately remove all of those pending tort claims from state court into federal court,¹⁸³ and any such claims that are subsequently filed in state court will likewise be immediately removable.¹⁸⁴

¹⁷⁶. See *supra* notes 27-28 and accompanying text.

¹⁷⁷. 28 U.S.C. § 1334(b) (2018).

¹⁷⁸. *Id.* § 1452(a).

¹⁷⁹. See *id.* § 1441(a).

¹⁸⁰. See *id.* § 1452(a).

¹⁸¹. For example, if a plaintiff sues on only state-law claims and names even one nondiverse defendant, then there is no basis for federal jurisdiction and, thus, no basis for removal under 28 U.S.C. § 1441(a) (2018). Even if a plaintiff sues only diverse defendants on only state-law claims, if the suit is in the state of at least one defendant's citizenship, then § 1441(b)(2) precludes removal based on diversity jurisdiction. And even if there is a good basis for federal jurisdiction and removal, all defendants must consent to a removal under § 1441(a). Gamesmanship to prevent removal under the special class- and mass-action removal statutes is also possible. See TIDMARSH & TRANGSRUD, *supra* note 11, at 93-96.

¹⁸². See *supra* Section III.A.

¹⁸³. See FED. R. BANKR. P. 9027(a)(2).

¹⁸⁴. See *id.* 9027(a)(3).

Like general civil removal, bankruptcy removal is “to the district court for the district where [the removed claim was] pending.”¹⁸⁵ *ND*’s bankruptcy removal, therefore, places all of the tort claims against it in federal court, but scattered across federal districts all over the country. This is where § 157(b)(5) becomes important.

Section 157(b)(5) provides that a district-court judge in the district where *D*’s bankruptcy case is pending (the so-called “home court” district) “shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in which the claim arose.”¹⁸⁶ After (or in conjunction with) removing all of the “related to” tort claims to federal court, therefore, *ND* can file a § 157(b)(5) motion in the district court in *D*’s home-court bankruptcy district, requesting that all of the tort claims against it in federal court (those that were just removed, those that were previously pending, and those that might subsequently be filed or removed) be transferred to *D*’s home-court bankruptcy district for consolidation there.¹⁸⁷

Notice, then, that § 157(b)(5) gives one district-court judge in *D*’s home-court bankruptcy district a discretionary power, much like the MDL statute gives to the Judicial Panel on Multidistrict Litigation (JPMDL), to impose mandatory

¹⁸⁵. 28 U.S.C. § 1452(a) (2018).

¹⁸⁶. *Id.* § 157(b)(5). The principal purpose and effect of § 157(b)(5) and its companion personal injury and wrongful death (PIWD) claim provisions enacted in 1984, 28 U.S.C. §§ 157(b)(2)(B) & (O), (b)(4), (b)(5), 1411(a) (2018), are directed at claims against the debtor’s estate, discussed *supra* Section III.A. See Ishaq Kundawala, *Unveiling the Mystery, History, and Problems Associated with the Jurisdictional Limitations of Bankruptcy Courts over Personal Injury Tort and Wrongful Death Claims*, 42 MCGEORGE L. REV. 739, 756–58 (2011). With respect to creditors’ PIWD claims against the estate, those provisions change (1) the allocation of adjudicatory power as between Article III district courts and their non-Article III bankruptcy court units, (2) creditors’ jury trial rights, and (3) the presumptive centralized venue for all claims allowance proceedings only in the home bankruptcy-court district. The PIWD claim provisions (1) take away bankruptcy courts’ power to finally adjudicate PIWD claims against the estate (2) without a jury, by giving PIWD creditors a right to a jury trial in a federal district court in their claims allowance proceedings. In addition, (3), § 157(b)(5) explicitly provides an alternative venue for claims allowance proceedings and, thus, has a decentralization purpose and effect as applied to creditors’ PIWD claims against the debtor’s estate. As the Sixth Circuit held in the *Dow Corning* case, though, by its terms § 157(b)(5) is *not* limited to PIWD claims against the debtor’s estate, and thus, at least with respect to “related to” PIWD claims (i.e., *not* against the debtor’s bankruptcy estate), § 157(b)(5) can (somewhat incongruously) be construed and applied in furtherance of a *centralization* objective. *Lindsey v. O’Brien, Tanski, Tanzer & Young Health Care Providers of Conn. (In re Dow Corning Corp.)*, 86 F.3d 482, 495–97 (6th Cir. 1996); see TABB & BRUBAKER, *supra* note 53, at 913–14.

¹⁸⁷. I use the term consolidation herein loosely to mean the equivalent of centralization in one district, whether or not there is a formal consolidation of related claims pursuant to FED. R. CIV. P. 42(a).

consolidation in one federal district of all of the “related to” tort claims against *ND*. And just like the tort claims against bankruptcy debtor *D*, which are subject to bankruptcy’s universal, mandatory aggregation process,¹⁸⁸ a § 157(b)(5) mandatory consolidation of the tort claims against *ND* can also be universal, encompassing any and all of the “related to” tort claims that have been or will be filed against *ND* in any court in the country.

Such a § 157(b)(5) consolidation can not only capture the efficiencies and settlement facilitation potential from consolidating all of the tort claims against *ND* in one court, but also enable the *joinder* efficiencies and settlement facilitation from placing the claims of all victims whose claims are against both *D* and *ND* in the same court.¹⁸⁹ And each and every victim will have the right to a jury trial in a federal district court in *D*’s home-court bankruptcy district for both of its claims—its proof of claim against bankruptcy debtor *D* and its third-party “related to” claim against nondebtor *ND*.¹⁹⁰

To say that a mandatory, universal consolidation of all “related to” claims against *ND* can occur via § 157(b)(5) is, of course, not to say that the district court *should* order consolidation of those claims in *D*’s bankruptcy case. But the district court would have at its disposal the same kinds of considerations the JPMDL weighs in deciding whether to order an MDL consolidation.¹⁹¹ Moreover, if the district court decides that a § 157(b)(5) consolidation is not appropriate, the district court can also order a mandatory, universal *remand* of all removed state-law claims under bankruptcy’s unique discretionary abstention and remand provisions.¹⁹²

188. See *supra* Section III.A.

189. See AM. L. INST., *supra* note 108, § 1.03 & cmts. b–c; Robert G. Bone, *Revisiting the Policy Case for Supplemental Jurisdiction*, 74 IND. L.J. 139, 140 & n.7, 143, 149 (1998).

190. See 28 U.S.C. §§ 157(b)(5), 1411(a) (2018); *supra* note 186 and accompanying text.

191. See John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225 (2008); Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel’s Transfer Power*, 82 TUL. L. REV. 2245 (2008).

192. “[A] Section 157(b)(5) motion ‘requires an abstention analysis.’” *Lindsey v. O’Brien, Tanski, Tanzer & Young Health Care Providers of Conn. (In re Dow Corning Corp.)*, 86 F.3d 482, 497 (6th Cir. 1996) (quoting *Coker v. Pan Am. World Airways Inc. (In re Pan Am Corp.)*, 950 F.2d 839, 844 (2d Cir. 1991)). The bankruptcy jurisdiction statute contains a very broad, discretionary authority to abstain from hearing any claim within federal bankruptcy jurisdiction “in the interest of justice, or in the interest of comity with State courts or respect for State law.” 28 U.S.C. § 1334(c)(1) (2018). Likewise, the bankruptcy removal statute provides that a removed claim or cause of action may be remanded “on any equitable ground.” *Id.* § 1452(b). “Codification of a discretionary abstention power [in 1978] acknowledged (and likely expanded) an existing body of Supreme Court precedent recognizing the propriety of a federal bankruptcy court staying its hand, in cases such as *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940).” Brubaker, *supra* note 28, at 798 n.204; see *id.* at 840 & n.360 (summarizing

There is also tremendous underexplored potential in hybrid approaches, similar to the originally intended operation of the MDL statute, that exploit the efficiency and settlement advantages of pretrial centralization, but that permit any individual trials to occur in victims' local communities.¹⁹³ As Professor Nagareda insightfully recognized, "aggregation in a world in which the modern class action does not, and will not, realistically shoulder the entire regulatory load" requires "*hybridization*—the combination of individual actions with some manner of centralizing mechanism" that combines "traditional litigation features with aggregate ones."¹⁹⁴ The flexible, discretionary nature of both § 157(b)(5)¹⁹⁵ and the bankruptcy abstention and remand provisions¹⁹⁶ can accommodate all manner of such creative hybrid-resolution models.

IV. THE ROLE OF THE SUPREME COURT

Simon envisions reforming nonconsensual nondebtor-release practice. My vision is for mandatory, universal consolidation to replace mandatory, universal settlement via nondebtor release. Can either prospect be realized?

Simon's reforms would likely depend on some combination of judicial or congressional intervention. Given our cumulative experience with nondebtor releases, I am pessimistic about the likelihood of the courts "organically"¹⁹⁷ reforming nondebtor-release practice, particularly given the forum-shopping dynamic that will likely continue to fuel and accelerate a race to the bottom on

that body of Supreme Court case law). The closest analogy to bankruptcy's discretionary abstention and remand statutes is codification in the general supplemental jurisdiction statute, 28 U.S.C. § 1367(c) (2018), of the discretionary power to decline to exercise supplemental jurisdiction. See Brubaker, *supra* note 28, at 863-65 & n.444.

193. See BURCH, *supra* note 105, at 162-66, 210-14.

194. Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105, 1113-14, 1171 (2010).

195. Section 157(b)(5) permits the home-court district judge to set the venue of a personal injury or wrongful death claim in the home-court district "or in the district court in the district in which the claim arose." 28 U.S.C. § 157(b)(5) (2018). Nothing in § 157(b)(5) would preclude the home-court district court from making an initial centralization transfer of all tort claims against *ND* to the home-court district of *D*'s pending bankruptcy case and then later transferring individual tort claims to the districts where the claims arose for trial.

196. There are no time limits for discretionary bankruptcy abstention or remand. See, e.g., FED. R. BANKR. P. 9027(d). Thus, even after a § 157(b)(5) centralization of all tort claims against *ND* in the home-court district of *D*'s pending bankruptcy case, the home-court district court could permit trials of individual tort claims against *ND* to take place in the (state or federal) courts in which the claims were originally filed, via remand or abstention.

197. Simon, *supra* note 1, at 1215.

nondebtor releases.¹⁹⁸ As for congressional action, I fear that corporate interests, and even certain powerful segments of the plaintiffs' and bankruptcy bars, could frustrate any meaningful legislative reforms.¹⁹⁹

My proposal's comparative implementation advantage is that its actualization resides within the authority of one actor—the Supreme Court—in fulfilling its conventional function of resolving circuit splits. Nonconsensual nondebtor-release practice is illegitimate and unconstitutional substantive lawmaking by the federal courts, which the Supreme Court should put an end to. And in navigating the innate mass tort tension between individual victims' rights and autonomy, on the one hand, and the relentless forces of aggregation, on the other, the Supreme Court appears to be the only meaningful watchdog that can ensure structural protections for individual victims—at least from the most egregious systemic abuses, which nondebtor releases are.²⁰⁰

Were the Supreme Court to prohibit nonconsensual nondebtor releases, there are credible indications that § 157(b)(5) bankruptcy consolidations would fill the space created by prohibition of nonconsensual nondebtor releases. Even in a world in which nonconsensual nondebtor releases are permissible, codefendants have on occasion, with mixed results, attempted the bankruptcy removal and consolidation strategy outlined in Part III.²⁰¹

198. See *supra* notes 128, 132, 133, and accompanying text.

199. Moreover, recent legislative activity indicates that if Congress were to address nonconsensual nondebtor releases, outright prohibition may be just as (if not more) likely than reforms of the kind Simon proposes. See S. 2497, 117th Cong. (2021) (proposing 11 U.S.C. § 113(a) to prohibit nonconsensual nondebtor releases and permanent injunctions); H.R. 4777, 117th Cong. (2021) (same); Jonathan Randles, *Elizabeth Warren Targets Sacklers' Legal Protection in Purdue Bankruptcy*, WALL ST. J. (July 23, 2021), <https://www.wsj.com/articles/elizabeth-warren-targets-sacklers-lawsuit-exemptions-in-purdue-bankruptcy-11627041600> [https://perma.cc/MC9H-DHD8].

200. And that view of the Supreme Court's institutional role in mass torts may help explain the *Amchem* and *Ortiz* decisions. See Coffee, *supra* note 138, at 437 ("Indeed, the goal of [claimant] autonomy . . . seems to be the one thread that unites *Amchem* and *Ortiz* with earlier Supreme Court decisions such as *Hansberry v. Lee* and *Martin v. Wilks*." (footnotes omitted)); cf. Thomas D. Morgan, *Client Representation vs. Case Administration: The ALI Looks at Legal Ethics Issues in Aggregate Settlements*, 79 GEO. WASH. L. REV. 734, 741 (2011) ("The only people with a powerful bias toward particularized representation, in short, are the clients whose interests the law purports to protect.").

201. See, e.g., *In re Fed.-Mogul Glob., Inc.*, 300 F.3d 368 (3d Cir. 2002) (affirming the denial of a § 157(b)(5) consolidation of brake-pad claims against automotive manufacturers in bankruptcy case of brake-pad manufacturer); *Lindsey v. Dow Chem. Co.* (*In re Dow Corning Corp.*), 113 F.3d 565 (6th Cir. 1997) (ordering a § 157(b)(5) consolidation in Dow Corning's bankruptcy case of breast-implant claims against Dow Chemical and Corning Inc., corporate parents of breast-implant manufacturer Dow Corning); *In re Imerys Talc Am., Inc.*, No. 19-mc-103, 2019 WL 3253366 (D. Del. July 19, 2019) (denying a § 157(b)(5) consolidation of talc

The only significant obstacle to fully effective use of § 157(b)(5) consolidations is the circuits' disagreement over the scope of third-party "related to" bankruptcy jurisdiction, which was consciously designed to be as broad as the Constitution permits.²⁰² Here, too, the Supreme Court can and should resolve this critical issue of federal jurisdiction, whose importance transcends mass tort bankruptcies and pervades the entirety of bankruptcy courts' dockets,²⁰³ including even the most prosaic consumer bankruptcy cases.²⁰⁴

The vast and sprawling case law regarding the scope of third-party "related to" bankruptcy jurisdiction is in a state of utter and dizzying disarray, all of which can best be understood and explained through one straightforward, central question: is third-party "related to" bankruptcy jurisdiction simply a grant of conventional transactional supplemental jurisdiction? If so,²⁰⁵ then all the confusion surrounding third-party "related to" bankruptcy jurisdiction vanishes, and a nightmarishly unwieldy and problematic corner of federal jurisdiction is greatly simplified and modernized. If not, then there is seemingly no escape from

claims against Johnson & Johnson (J&J) in the bankruptcy case of J&J's talc supplier); see TABB & BRUBAKER, *supra* note 53, at 905-19.

202. See Brubaker, *supra* note 28, at 793-99.

203. Most significantly, the confusion regarding the scope of third-party "related to" bankruptcy jurisdiction frustrates the full implementation of modern joinder devices, embodied in both the Federal and Bankruptcy Rules of Civil Procedure, in bankruptcy litigation. See Brubaker, *supra* note 51, at 1-9; Ralph Brubaker, *One Hundred Years of Federal Bankruptcy Law and Still Clinging to an In Rem Model of Bankruptcy Jurisdiction*, 15 EMORY BANKR. DEV. J. 261, 274-84 (1999) [hereinafter Brubaker, *One Hundred Years*]; Brubaker, *supra* note 28, at 921-40.

204. For example, the uncertainty regarding the scope of third-party "related to" bankruptcy jurisdiction bedevils a bankruptcy court's ability to liquidate and enter a money judgment on the debt of an individual (i.e., not corporate) debtor declared nondischargeable, because the court has determined, for instance, that the debtor committed fraud. See Ralph Brubaker, *Federal Bankruptcy Jurisdiction to Enter a Money Judgment on a Nondischargeable Debt (Part I): A Tale of Two Seventh Circuit Decisions and Related-To Jurisdiction*, 40 BANKR. L. LETTER, no. 5, May 2020, at 1; Ralph Brubaker, *Federal Bankruptcy Jurisdiction to Enter a Money Judgment on a Nondischargeable Debt (Part II): A Tale of Two Seventh Circuit Decisions and Related-To Jurisdiction*, 40 BANKR. L. LETTER, no. 8, Aug. 2020, at 1; Brubaker, *supra* note 28, at 910-21.

205. The Second, Seventh, Ninth, and Eleventh Circuits have all indicated that third-party "related to" bankruptcy jurisdiction is a grant of transactional supplemental jurisdiction. See *Townsquare Media, Inc. v. Brill*, 652 F.3d 767, 771-72 (7th Cir. 2011); *Hosp. Ventures/Lavista v. Heartwood II, LLC* (*In re Hosp. Ventures/Lavista*), 265 F. App'x 779 (11th Cir. 2008), *aff'g* 358 B.R. 462, 468-81 (Bankr. N.D. Ga. 2007); *Sasson v. Sokoloff* (*In re Sasson*), 424 F.3d 864, 868-69 (9th Cir. 2005); *Klein v. Civalo & Trovato, Inc.* (*In re Lionel Corp.*), 29 F.3d 88, 92 (2d Cir. 1994). Ironically, given the *Pacor* decision discussed *infra* notes 207-209 and accompanying text, even the Third Circuit has, at times, indicated that the reach of third-party "related to" bankruptcy jurisdiction is coextensive with that of the general supplemental jurisdiction statute. See, e.g., *Pelora v. United States*, 488 F.3d 163, 172 n.8 (3d Cir. 2007).

the quagmire into which the courts have thoughtlessly stumbled by blindly following the Third Circuit's badly misguided *Pacor* decision.²⁰⁶

In the *Pacor* case, the Third Circuit assuredly declared that third-party “related to” bankruptcy jurisdiction most definitely is *not* supplemental jurisdiction.²⁰⁷ But as I have explained elsewhere at length, every credible indication points to the conclusion that third-party “related to” bankruptcy jurisdiction is a statutory grant of modern transactional supplemental jurisdiction.²⁰⁸ Indeed, “use of the identical term ‘related to’ in both [the bankruptcy jurisdiction statute] § 1334 and [the general supplemental jurisdiction statute] § 1367 . . . suggests that supplemental jurisdiction is what Congress always intended when it used that term in § 1334.”²⁰⁹

If third-party “related to” jurisdiction is a grant of conventional supplemental jurisdiction, then there is federal bankruptcy jurisdiction over any third-party “claims [that] arose from the same nucleus of operative fact”²¹⁰ as a claim

206. *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984). For a discussion of *Pacor*'s many missteps, see Brubaker, *supra* note 28, at 869-87.

207. *Pacor*, 743 F.2d at 994. For an explanation of why that was a manifestly erroneous conclusion, see Brubaker, *supra* note 28, at 878-80; and TABB & BRUBAKER, *supra* note 53, at 883-84.

208. My book-length exploration of these issues is Brubaker, *supra* note 28. For more concise treatments, see Brubaker, *supra* note 51; and Brubaker, *One Hundred Years*, *supra* note 203.

209. *Pierce v. Conesco Fin. Servicing Corp. (In re Lockridge)*, 303 B.R. 449, 455 (Bankr. D. Ariz. 2003). In fact, every time “Congress has sought to expressly create supplemental jurisdiction, it has used the ‘related’ terminology, and to the extent that a grant of ‘related’ jurisdiction has a plain or ordinary meaning, it is recognized as connoting supplemental jurisdiction.” Brubaker, *supra* note 28, at 862-63 (footnotes omitted); accord *Townsquare Media*, 652 F.3d at 771 (“One might think that the bankruptcy court . . . would have the same supplemental jurisdiction as the district court . . . especially since Congress has given the district courts (including therefore bankruptcy courts) jurisdiction over proceedings ‘related to’ bankruptcy.” (citing *Sasson*, 424 F.3d at 868-69 (holding that “the bankruptcy court’s ‘related to’ jurisdiction also includes the district court’s supplemental jurisdiction pursuant to 28 U.S.C. § 1367 ‘over all claims that are so related to claims in the action within [the court’s] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution’ (emphasis added))))); Frank R. Kennedy, *The Bankruptcy Court Under the New Bankruptcy Law: Its Structure, Jurisdiction, Venue, and Procedure*, 11 ST. MARY’S L.J. 251, 285-88, 287 (1979) (executive director of the congressional commission that led to the 1978 legislation opining that the new statutory grant of “related to” jurisdiction over third-party disputes “requires a consideration of the potential reach of a concept or doctrine of ancillary [now known as supplemental] jurisdiction”); see also George Brody, *Frank R. Kennedy*, 82 MICH. L. REV. 189, 192 (1983) (describing Frank Kennedy’s work as the executive director of the congressional commission).

210. *United Mine Workers v. Gibbs*, 383 U.S. 715, 728 (1966).

by or against the debtor's bankruptcy estate.²¹¹ In my previous example, then, all of the tort claims against *ND* undoubtedly would be within "related to" bankruptcy jurisdiction, and a § 157(b)(5) bankruptcy consolidation is permissible.²¹²

Crucially, this mandatory, universal consolidation of the personal injury claims against *ND* could even include any future claim of an as-yet-uninjured victim, to the extent that a future claimant's related claim against *D* is a bankruptcy "claim" within the meaning of the Bankruptcy Code, eligible for a distribution and subject to discharge (and thus mandatory, universal aggregation) in *D*'s bankruptcy case.²¹³ The inability to aggregate such future claims is one of the principal shortcomings of other aggregation devices.²¹⁴ But bankruptcy has the means—entirely within its existing statutory structure—to aggregate not only future claims against the debtor, but also future claims against nondebtors via § 157(b)(5).

211. A claim by or against the federally created bankruptcy estate is a constitutional federal-question claim under the "original ingredient" or federal-entity theory of constitutional federal questions, first articulated by Chief Justice Marshall's opinion in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 823-26 (1824). See Brubaker, *One Hundred Years*, *supra* note 203, at 282-83; Brubaker, *supra* note 28, at 813-31. Thus, "the relationship between that claim and the [third-party nondebtor] claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.'" *Gibbs*, 383 U.S. at 725.

212. Thus, in the 1997 *Dow Corning* case, discussed *supra* note 201, the critical prior ruling—which cleared the way for the Sixth Circuit to order a § 157(b)(5) consolidation of breast-implant claimants' third-party claims against codefendants Dow Chemical and Corning Inc. in the bankruptcy case of Dow Corning—was the Sixth Circuit's previous decision in 1996 that there was federal bankruptcy jurisdiction over those third-party nondebtor claims because they were "related to" Dow Corning's bankruptcy case. See *Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers of Conn. (In re Dow Corning Corp.)*, 86 F.3d 482, 485-95 (6th Cir. 1996). The Sixth Circuit is among those courts that apply the grant of third-party "related to" bankruptcy jurisdiction in a manner that is indistinguishable from supplemental jurisdiction. See Brubaker, *supra* note 28, at 905-10.

213. See *supra* Section III.A. The primary stand-alone claim in an Article III constitutional category, to which a future claimant's claim against *ND* would be supplemental, could be either (1) the future claimant's subsequently filed proof of claim in *D*'s bankruptcy case, or (2) *ND*'s proof of claim filed in *D*'s bankruptcy case (even *before* the future claimant is injured) asserting a *contingent* right to indemnification or contribution from *D*. See Brubaker, *supra* note 28, at 875-77. To the extent that a § 157(b)(5) consolidation contemplates consolidation of even *future* tort claims against a nondebtor, due process would seem to require appointment of an adequate fiduciary representative for the claims of future claimants *against the nondebtor* in conjunction with consideration of the § 157(b)(5) consolidation motion. See *supra* notes 150-151 and accompanying text.

214. See AM. L. INST., *supra* note 108, § 3.10 cmt. b, at 233-34; TIDMARSH & TRANGSRUD, *supra* note 11, at 17-18, 213-15, 242-45. Indeed, "the need to fashion a binding peace for both pending claims and future ones . . . represents the central challenge in mass tort litigation generally." NAGAREDA, *supra* note 102, at 167.

Under *Pacor*'s interpretation, which concludes that third-party "related to" bankruptcy jurisdiction is not supplemental jurisdiction, the absence of any federal bankruptcy jurisdiction over the tort claims against *ND* is an absolute non-starter for a § 157(b)(5) consolidation.²¹⁵ By correcting the severe systemic flaw that *Pacor* introduced into the critical infrastructure of federal bankruptcy jurisdiction, therefore, the Supreme Court would, in the process, also open the door to maximally effective § 157(b)(5) consolidations and aggregate settlements. Indeed, one of the prominent policy rationales for modern transactional supplemental jurisdiction is facilitating joinder of related claims in one court and, thereby, settlement of complex disputes.²¹⁶ In fact, § 157(b)(5) consolidations would be an immensely more powerful and fairer centralization process than MDL consolidations.

The comprehensiveness of a § 157(b)(5) consolidation will be particularly appealing to nondebtor defendants,²¹⁷ who would be the necessary drivers of the centralization process, through exhaustive removals and § 157(b)(5) consolidation motions. Even more importantly, § 157(b)(5) consolidations should prove more advantageous to tort claimants than MDL consolidations.

MDL consolidations are hamstrung by the inability of MDL transferee courts to try transferred cases without the consent of all parties. Moreover, remands to transferor courts for trial are exceedingly rare.²¹⁸ MDL consolidations, therefore, have become a procedure focused almost exclusively upon settlement, in which plaintiffs cannot wield their most effective settlement cudgel: a credible threat of taking cases to trial.²¹⁹ This "sharply skews the MDL bargaining process in favor of defendants."²²⁰ A § 157(b)(5) bankruptcy consolidation, by contrast, in which

215. See, e.g., *In re Fed.-Mogul Glob., Inc.*, 300 F.3d 368, 379-84 (3d Cir. 2002); *In re Imerys Talc Am., Inc.*, No. 19-mc-103, 2019 WL 3253366, at *2-7 (D. Del. July 19, 2019).

216. See Brubaker, *supra* note 28, at 906-07 & nn.571-72, 935.

217. See AM. L. INST., *supra* note 108, § 3.10 cmt. b, at 233; BURCH, *supra* note 105, at 26-27; Erichson, *supra* note 143, at 1775-80.

218. See BURCH, *supra* note 105, at 209-10 (reporting a remand rate of only three percent of the over 500,000 consolidated civil actions since JPMDL's inception in 1968). And it is not uncommon for an MDL settlement to occur without any merits-based rulings in the MDL transferee court that can clarify potential settlement values. See *id.* at 108, 110, 113-14; Gluck & Burch, *supra* note 105, at 15-16, 54-57.

219. See NAGAREDA, *supra* note 102, at 19-20 ("In the face of defendants' intransigence, mass tort plaintiffs' lawyers have only one real bargaining chip, but it is a big one: their power to take cases to trial."); Silver & Miller, *supra* note 147, at 123 (noting that the "standard economic model of settlement" indicates that "the weapon that pressures a defendant to pay a reasonable amount in settlement" is "the threat of forcing an exchange at a price set by a jury").

220. *Delavventura v. Columbia Acorn Tr.*, 417 F. Supp. 147, 153-54 (D. Mass. 2006); see also Silver & Miller, *supra* note 147, at 123-24 ("Being stuck forever in a court that cannot preside over a trial

every personal injury claimant would have a statutory right to a jury trial on their claims against *ND* in the transferee federal district court (where *D*'s bankruptcy case is pending),²²¹ could restore a more level playing field for both aggregate settlement negotiations with *ND* and resolution of residual "opt out" cases against *ND*.²²²

CONCLUSION

Simon's *Bankruptcy Grifters* article shines a bright and penetrating light on alarming injustices occurring through the intimidatingly complex and mysterious machinations of corporate bankruptcy proceedings. As a practical matter, the Supreme Court is the only institution that can put a stop to bankruptcy grifting, by prohibiting nonconsensual nondebtor releases. By reversing *Pacor*'s error, the Supreme Court can also pave the way for a fairer bankruptcy process for aggregate resolution of mass tort claims against nondebtors.

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and that wants a global settlement at all costs, plaintiffs caught up in MDLs have little bargaining leverage."); cf. BURCH, *supra* note 105, at 108 ("When [MDL transferee] judges don't engage with the merits through pretrial motions and trials, the relative strength of plaintiffs' cases may matter little in settlement negotiations.").

221. See 28 U.S.C. §§ 157(b)(5), 1411(a) (2018).

222. Technically, nonconsenting plaintiffs do not affirmatively "opt out" of a non-class aggregate settlement, such as an MDL settlement or, for example, a settlement in conjunction with a § 157(b)(5) consolidation of victims' claims against *ND*. Rather, they fail to affirmatively "opt in." See Erichson, *supra* note 143, at 1812. As discussed *supra* notes 191-196 and accompanying text, the district court in *D*'s home-court district would have substantial venue flexibility for resolution of the tort claims of such residual "opt out" plaintiffs against *ND*. It could (1) retain those cases in the home-court district, (2) transfer them to the districts where each claim arose (e.g., where the plaintiff was injured), or (3) permit them to proceed in the (state or federal) courts in which they were originally filed via abstention and remand.