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The Proceduralist Inversion–A Response to Skeel

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ABSTRACT. In *Distorted Choice in Corporate Bankruptcy*, David Skeel offers a nuanced description of restructuring support agreements (RSAs) and how they can help a debtor to achieve the necessary consensus around a proposed Chapter 11 plan of reorganization. In this Essay we take issue with Skeel's permissive view toward RSAs that include provisions, such as pre-disclosure lock-ups, milestones, and coercive deathtraps, that short circuit the "process" protections contained in Chapter 11. Chapter 11 contemplates bargaining in the shadow of certain basic statutory "distributional" entitlements: equal treatment, best interests, full cash payment of administrative expenses, and a guaranteed minimum-cramdown distribution. As such, RSAs can either reinforce the link between entitlement and distribution, or they can sever it. Skeel insufficiently appreciates the purpose of process—how procedural protections such as classification, disclosure, and solicitation surrounding the vote forge the crucial link between bankruptcy bargaining and core principles of corporate governance and prebankruptcy entitlement. We offer, instead, an approach which sorts between process-enhancing RSAs and those that facilitate end-runs.

INTRODUCTION

Historically, there have been two camps in the world of bankruptcy scholarship: the "proceduralists" and the "traditionalists." The first wave of law-and-economics scholars in bankruptcy assigned the names, and they chose "proceduralist" for themselves.[1] The term "traditionalist" had—and still has—a pejorative ring. Proceduralists viewed bankruptcy as a "procedure" for winding up, restructuring or selling the firm and distributing value according to prebankruptcy entitlements. Thus, the defining case for proceduralists has been *Butner v. United States*, which declared that bankruptcy law should generally respect

1. *See, e.g.*, Douglas G. Baird, *Bankruptcy's Uncontested Axioms*, 108 YALE L.J. 573, 585-86 (1998).

state-law property interests.[2] Traditionalists, by contrast, were labeled as defenders of a corrupt redistributive order, built on professional cronyism, path dependence, and the ability to capitalize on technical statutory expertise. The proceduralists occupied a clean, efficient world of contract, property, and entitlement-based bargaining, while the traditionalists were consigned to a messy and cumbersome world of politics and law.

David Skeel has always identified with the law-and-economics school of bankruptcy scholars, though his work cannot and should not be facilely characterized as "proceduralist." In his thoughtful and useful article, *Distorted Choice in Corporate Bankruptcy*,[3] Skeel provides a truly useful exploration of restructuring support agreements (RSAs)—agreements whereby a key creditor or group of creditors indicates its willingness to support a proposed plan of reorganization. By examining RSAs, Skeel carefully considers transaction costs and bargaining impediments that exist in the post-default environment. Nonetheless, his focus on achieving agreement illustrates, perhaps unintentionally, how the positions of proceduralists and traditionalists have inverted, both in the academy and in practice. To the extent that law-and-economics scholars view bankruptcy as "merely procedure" in service of contract, they undervalue the crucial importance of process itself. Indeed, they cast doubt on whether they are (or were) serious about respect for prebankruptcy entitlements.[4] Procedures like solicitation, disclosure and voting in the shadow of liquidation or cramdown are the mechanism for maintaining the link between prebankruptcy entitlements and bankruptcy distributions. In our own work on RSAs, we have focused on distinguishing between RSAs that reinforce the plan process and those that undercut it. It is Skeel's failure to appreciate this distinction that concerns us.

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2. 440 U.S. 48, 55 (1979) ("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."). As a sign of *Butner*'s importance in the proceduralist worldview, it is the first case excerpted in Barry E. Adler, Anthony J. Casey & Edward R. Morrison, *Baird & Jackson's Bankruptcy: Cases, Problems, and Materials*, the standard "proceduralist" casebook. BARRY E. ADLER, ANTHONY J. CASEY & EDWARD R. MORRISON, BAIRD & JACKSON'S BANKRUPTCY: CASES, PROBLEMS, AND MATERIALS 29 (5th ed. 2020). Baird carried the point further, arguing that the point should apply to nonbankruptcy entitlements generally, and that bankruptcy-specific rules should be avoided. Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. CHI. L. REV 815, 822 (1987).

3. David A. Skeel, Jr., *Distorted Choice in Corporate Bankruptcy*, 130 YALE L.J. 366 (2020).

4. In a recent manuscript, Anthony Casey is express in his rejection of the importance of prebankruptcy entitlements. *See* Anthony M. Casey, The New Bargaining Theory of Corporate Bankruptcy and Chapter 11's Renegotiation Framework (unpublished manuscript) (on file with author).

The law-and-economics worldview has always been based on a sleight of hand. For the proceduralist, the word "contract" represented a particular idealized "Coasean" form of contracting accomplished through costless bargaining over crystalline Demsetzian property rights.[5] Meanwhile, "politics" and "law" were associated with a dysfunctional "public-choice"-theory-informed view of legal institutions, a view characterized by special pleading and interest-group deals. As such, the proceduralist view of bankruptcy as procedural was always offered in counterdistinction to supposed substantive reallocation of entitlements by the traditionalists. Bankruptcy should be limited to process and should not redistribute. The irony is that it is now the "traditionalists" who advocate attention to bankruptcy procedure and distribution with reference to nonbankruptcy entitlement,[6] while recent law-and-economics scholarship turns a blind eye to both process and legal entitlement in favor of peace at practically any cost.

Skeel's discussion of restructuring support agreements illustrates this inversion. RSAs are contracts about process; pursuant to these agreements, creditors bind themselves to vote for a proposed reorganization plan when votes are solicited. This facilitates confirmation of a plan but can also distort the confirmation process itself—in particular the vote. Skeel evaluates these distortive RSAs through the lens of transaction costs. In this respect, Skeel's article makes a set of truly useful contributions: (1) identifying the distortions; and (2) exploring situations where bargaining obstacles may mean that a plan proponent needs more help than current bankruptcy practice provides.[7] In the end, however,

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5. Edward J. Janger, *Crystals and Mud in Bankruptcy Law: Judicial Competence and Statutory Design*, 43 ARIZ. L. REV. 559, 559-64 (2001); *cf.* R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 8-15, 10 (1960) ("With costless market transactions, the decision of the courts concerning liability for damage would be without effect on the allocation of resources."); Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 356 (1967) ("[A]n owner, by virtue of his power to exclude others, can generally count on realizing the rewards associated with husbanding the game and increasing the fertility of his land. This concentration of benefits and costs on owners creates incentives to utilize resources more efficiently.").

6. Melissa B. Jacoby & Edward J. Janger, *Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy*, 123 YALE L.J. 862, 874-83 (2014) [hereinafter Jacoby & Janger, *Ice Cube Bonds*]; Melissa B. Jacoby & Edward J. Janger, *Tracing Equity: Realizing and Allocating Value in Chapter 11*, 96 TEX. L. REV. 673, 682-709 (2018) [hereinafter Jacoby & Janger, *Tracing Equity*].

7. Note that we refer to practice rather than the Code, because, by and large, the Code provides remedies to the problems Skeel identifies, but they must be adapted to current abuses. Here, Skeel is concerned with holdout behavior and obstruction by various creditor constituencies. The Code contains a panoply of procedural mechanisms that are designed to help identify and limit the effects of such behavior. These include the automatic stay, 11 U.S.C. § 362 (2018), and a variety of features in the plan confirmation process, such as the requirement of disclosure, 11 U.S.C. § 1125 (2018), the power of the court to designate votes cast in bad faith, 11 U.S.C. § 1126(e), the power to subordinate claims, 11 U.S.C. § 510 (2018), the power to bind non-consenting class members, 11 U.S.C. § 1129(a), and the power to cram-down a non-con-

Skeel proposes a permissive approach to these agreements that fails to recognize the integral role of the plan-confirmation process in maintaining bankruptcy bargaining's tie to prebankruptcy entitlements. Skeel's approach would effectively allow creditors to sever the link between bargaining over value allocation and the prebankruptcy entitlements that establish the creditors' claim to that value. Without an account of the purpose of process, Skeel is left without a normative basis for distinguishing the entitlement-based bargaining in the face of uncertainty, contemplated by Chapter 11, from a free for all where reorganization surplus is carved up through a process characterized by bribery and hostage taking.

The plan-confirmation process contemplates that similarly situated creditors will vote to accept or reject their treatment under the plan based on adequate information and without coercion. Skeel recognizes that the "distortions" contained in RSAs undercut these assumptions. They undercut the assumption of adequate information by obtaining binding commitments to support the plan prior to the approval of a disclosure statement. They undercut the assumption of equal treatment by offering creditors different treatment under the plan based on whether and when they sign up to the RSA. Finally, while the Bankruptcy Code limits the power of individual creditors to hold out, RSAs can escalate the level of coercion well beyond that permitted by the Code.

Having identified these distortions, Skeel analyzes the market failures inherent in bankruptcy bargaining and provides an important set of insights into when distortion is, perhaps, necessary, and therefore permissible, and when it is not. Skeel's perspective is myopic, however. While he ably examines the tension between the "legal" aspects of the disclosure and voting process contemplated by the statute and the practicalities of bargaining in the current world of financial players and financial instruments, he fails to appreciate fully the importance of these "legal" aspects and is therefore too quick to acquiesce in their abandonment.

Bankruptcy law does not assume that the idealized conditions for Coasean bargaining ever exist. Quite the contrary. It recognizes that there are always informational and transaction costs as well as resource disparities that render true Coasean bargaining impossible. Skeel knows this story well. Indeed, he tells it himself in his book, *Debt's Dominion: A History of Bankruptcy Law in America*.[8] The genesis of modern Chapter 11 is itself a response to the abuses of protective-

senting class of creditors, 11 U.S.C. § 1129(b). These tools are available to the court to reinforce the plan confirmation process, but they can also be subjected to short cuts and end-runs. The pulling and tugging between debtor, creditors, and the court sometimes resembles nothing more than a game of whack-a-mole.

8. DAVID A. SKEEL, DEBT'S DOMINION: A HISTORY OF BANKRUPTCY IN AMERICA (2003).

committee deposit agreements—the predecessor instrument to RSAs. The defining feature of pre-New Deal restructurings were "protective committees," a collective-action device for dispersed securityholders.[9] Bondholders were encouraged to enter into "deposit agreement[s]" with the committees that gave the committees the right to vote on the bonds in the bankruptcy.[10]

The perceived inequities resulting from these restructurings led the Securities and Exchange Commission to undertake a massive study of protective committees in the 1930s.[11] The findings of the study were the basis for both the Chandler Act of 1938,[12] on which modern Chapter 11 is based, and the Trust Indenture Act of 1939,[13] a sister act covering out-of-court bond restructurings. The Chandler Act embodied the "traditionalist" approach to bankruptcy, which was deeply suspicious of these RSA-type coordination devices precisely because they were understood to lock-in abuses of the restructuring process by senior creditors and incumbent management. The response of the Chandler Act, and later Chapter 11, to these abuses was to establish: (1) a set of process protections that guard creditors against attempts by debtors and powerful creditors to steamroll the process; and (2) an entitlement baseline to limit the power of creditor holdouts to obstruct.

The "process" protections imposed by the Code include classification, disclosure, solicitation, and voting rules.[14] These process protections, in turn, en-

9. SEC. EXCH. COMM'N, REPORT ON THE STUDY AND INVESTIGATION OF THE WORK, ACTIVITIES, PERSONNEL AND FUNCTIONS OF PROTECTIVE AND REORGANIZATION COMMITTEES PART II: COMMITTEES AND CONFLICTS OF INTEREST 1-2 (1937).

10. SEC. EXCH. COMM'N, REPORT ON THE STUDY AND INVESTIGATION OF THE WORK, ACTIVITIES, PERSONNEL AND FUNCTIONS OF PROTECTIVE AND REORGANIZATION COMMITTEES PART I: STRATEGY AND TECHNIQUES OF PROTECTIVE AND REORGANIZATION COMMITTEES 586 (1937) ("The deposit agreement has in many respects been the foundation of the control which committees dominated by the inside group have been able to obtain over the security holders.").

11. *Id.*; *see also* Charles J. Tabb, *The History of the Bankruptcy Laws in the United States*, 3 A.B.I. L. REV. 5, 29-31 (1995).

12. The Chandler Act of 1938, Pub. L. 75-696, 52 Stat. 840; *see also* Tabb, *supra* note 11, at 29-31.

13. REPORT ON THE STUDY AND INVESTIGATION OF THE WORK, ACTIVITIES, PERSONNEL AND FUNCTIONS OF PROTECTIVE AND REORGANIZATION COMMITTEES: PART VI, TRUSTEES UNDER INDENTURES (1936); Trust Indenture Act of 1939, Pub. L. 76-253, 53 Stat. 1149 (codified at 15 U.S.C. §§ 77aaa-77bbbb (2018)).

14. 11 U.S.C. § 1122 (2018) (classification); 11 U.S.C. § 1125 (disclosure and solicitation); 11 U.S.C. § 1126 (voting). In *Czyzewski v. Jevic Holding Corp.*, the Supreme Court cautioned against "transactions that . . . circumvent the Code's procedural safeguards." 137 S. Ct. 973, 986 (2017) (citing *In re* Braniff Airways, Inc., 700 F.2d 935, 940 (5th Cir. 1983) (prohibiting an attempt to "short circuit the requirements of Chapter 11 for confirmation of a reorganization plan by establishing the terms of the plan sub rosa in connection with a sale of assets")); *In re* Lionel Corp., 722 F.2d 1063, 1069 (2d Cir. 1983) (reversing a Bankruptcy Court's approval of

sure that bargaining happens in the shadow of certain basic statutory "distributional" entitlements: equal treatment,[15] best interests,[16] full cash payment of administrative expenses,[17] and a guaranteed minimum-cramdown distribution.[18] The process requirements surrounding the vote thus forge the crucial link between bankruptcy bargaining and both core principles of corporate governance and prebankruptcy entitlement.

It is here that Skeel falls short: he ignores the tie between process and entitlement when allocating value in a Chapter 11 case. As we will explore later, Skeel falls into three classic proceduralist traps: (1) confusing the enforceability of prebankruptcy legal entitlements against the debtor with their entitlement to priority over other creditors upon default; (2) confusing formal priority with realizable value of that priority under nonbankruptcy law; and, most importantly, (3) failing to appreciate the relevance of realizable prebankruptcy entitlements to bankruptcy bargaining. The result is that Skeel would tolerate distortive RSAs that sweep away both the respect of process and the respect for prebankruptcy entitlements that informed the proceduralists' vision of the Bankruptcy Code as "process" rather than "substance."

This is the proceduralist inversion (and it is not unique to Skeel). By failing to appreciate the link between process and entitlement, Skeel would allow distortion of the voting process in service of contract. And, by focusing only on the goal of achieving a "contract," Skeel misses that the purpose of bankruptcy's process is not merely to facilitate creditor coordination, but also to ensure fairness in distribution. The "distortions" that Skeel would tolerate in RSAs include: (1) vote buying by enhancing distributions to creditors who sign the RSA; (2) death traps that punish creditors who do not sign the RSA; and (3) commitments to vote before full information is available. Skeel's approach would thus facilitate a world characterized by corruption, duress, and deception.[19]

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an asset sale after holding that 11 U.S.C. § 363 does not "grant[] the bankruptcy judge carte blanche " or "swallow[] up Chapter 11's safeguards"); *In re* Biolitec, Inc., 528 B.R. 261, 269 (Bankr. D.N.J. 2014) (rejecting a structured dismissal because it "seeks to alter parties' rights without their consent and lacks many of the Code's most important safeguards"); *cf. In* re Chrysler LLC, 576 F.3d 108, 118 (2d Cir. 2009) (approving an 11 U.S.C. § 363 asset sale because the bankruptcy court demonstrated "proper solicitude for the priority between creditors and deemed it essential that the [s]ale in no way upset that priority"), *vacated as moot*, 130 S. Ct. 1015 (2009).

15. 11 U.S.C. § 1129(b)(1).

16. 11 U.S.C. § 1129(a)(7).

17. 11 U.S.C. § 1129(a)(9)(A).

18. 11 U.S.C. § 1129(b)(2).

19. The statutory deathtrap ties bargaining to entitlement. The restructuring support agreement (RSA) deathtrap allows powerful players to use their situational leverage to distort those entitlements.

In previous works, we have argued together, and with others, for a different approach. In our view, the way to preserve the link between bankruptcy bargaining and legal entitlement is to address the problems of corruption, duress, and deception directly—by protecting the process, rather than tolerating distortions.[20] We advocate that approach here.

This Essay will proceed in four steps. First, it will offer a capsule version of Skeel's argument. That argument is framed as a critique of the "badges of opportunism" approach to RSAs—a position we take in a recent article.[21] Second, it will briefly lay out the comprehensive vision of Chapter 11 (largely descriptively) developed in earlier articles by us[22] and Melissa Jacoby.[23] Third, we will show that Skeel's approach to RSAs is likely to result in an elevation of power over entitlement, with dangerous consequences for both governance and fairness. Fourth, this Essay proposes an alternative solution to the problems, helpfully identified by Skeel, that maintains the link between entitlement and value allocation in Chapter 11 cases.

I. WHAT IS AN RSA?

RSAs are contracts, but they are a special kind of contract: a contract under which a creditor pledges to vote in favor of a plan of reorganization. Pledging one's vote, or endorsing a candidate or outcome, is a common attribute in voting systems, but the law often places limits on such practices. Votes procured through corruption, coercion, or deception are generally not recognized.[24] The

20. We note a parallel debate in antitrust law. The law-and-economics view of antitrust eliminated bright-line "per se" rules that characterized traditional (i.e., pre-1980) antitrust, in favor of a much more permissive "rule of reason" analysis that prioritizes "consumer welfare" over competitive markets. Lina M. Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655, 1675-76 (2020) (reviewing TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018)). Progressive antitrust scholars are calling for the field to return to its doctrinal roots. *Id.* at 1663-64; *see also* Harry First & Spencer Weber Waller, *Antitrust's Democracy Deficit*, 81 FORDHAM L. REV. 2543, 2544 (2013) ("Today's unbalanced [antitrust] system puts too much control in the hands of technical experts, moving antitrust enforcement too far away from its democratic roots.").

21. Edward J. Janger & Adam J. Levitin, *Badges of Opportunism: Principles for Policing Restructuring Support Agreements*, 13 BROOK. J. CORP. FIN. & COM. L. 169 (2018).

22. Edward J. Janger & Adam J. Levitin, *One Dollar, One Vote: Mark-to-Market Governance in Bankruptcy*, 104 IOWA L. REV. 1857, 1860-67 (2019).

23. Jacoby & Janger, *Ice Cube Bonds*, *supra* note 6, at 874-83; Jacoby & Janger, *Tracing Equity*, *supra* note 6, at 682-709.

24. This prohibition is not directly stated, but it inheres in the combined effect of 11 U.S.C. § 1126(b)(1) (2018), which governs the manner in which the acceptance is procured by the debtor, and 11 U.S.C. § 1126(e), which governs the manner in which the vote is cast by the claimant or interest holder.

line dividing permissible horse trading and bribery, or freely given support from coerced support, or good-faith disclosure and fraud, is not always easy to ascertain. Skeel's discussion of "distortions" seeks to identify the point at which soliciting support for the plan by obtaining pledged votes becomes corrupt, involuntary, or a scam.

A. RSAs and the Chapter 11 Plan Process

To draw this line, it is necessary to situate RSAs within the broader context of Chapter 11.

In brief, a Chapter 11 reorganization proceeds as follows. First, the debtor finds itself in financial difficulty, unable, or imminently unable, to pay all of its creditors in a timely fashion. The debtor then attempts to negotiate with its creditors, hoping to stay afloat.[25] This may involve seeking adjustments to repayment terms, interest rates, or even reducing the debtor's principal. If the debtor can reach a sufficient number of agreements with its creditors individually or collectively, it can avoid bankruptcy.

If a sufficient number of agreements cannot be reached, the debtor files for bankruptcy. This may be because the debtor concluded that no reorganization was feasible (in which case it liquidates), or the debtor may desire a second opportunity to finalize a restructuring—this time with the benefit of bankruptcy law's coercive procedures and creditor protections.[26]

Bankruptcy offers two routes to confirmation of a restructuring plan: (1) "consensual" confirmation, which is a little coercive; and (2) "cramdown" confirmation, which is more so. Under consensual confirmation, the various creditor constituencies vote, hopefully approving the plan by the statutorily required majorities.[27] Under cramdown, an objecting class of creditors may still be bound if: (a) the debtor pays objecting secured creditors the value of their collateral; or,

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25. The Bankruptcy Code expressly contemplates that such negotiations may happen and seeks to preserve any gains made through such negotiations. 11 U.S.C. §§ 1125-1126; *see also* Century Glove, Inc. v. First Am. Bank of N.Y., 860 F.2d 94, 101-03 (3d Cir. 1988) (rejecting an interpretation of the statute that would "inhibit free creditor negotiations").

26. In some cases, the debtor may file for bankruptcy because the restructuring is conditioned on some form of relief available only in bankruptcy, such as renegotiation of union contracts, 11 U.S.C. § 1113, or assumption of an executory contract, 11 U.S.C. § 365 (2018).

27. 11 U.S.C. § 1126(c). A consensual confirmation merely requires the consent of all impaired classes, with consent determined by a majority vote of the class. Consensual confirmation does not mean that all creditors have actually consented.

(b) if the objecting class consists of unsecured creditors, the distribution complies with the absolute-priority rule under which unsecured creditors receive the residual equity of the recapitalized firm and old equity is wiped out.[28]

In sum, Chapter 11 creates a structured bargaining process, in which the debtor seeks the creditors' assent (in sufficient majorities), while the creditors negotiate in the shadow of liquidation or their cramdown entitlement. The two central features of this architecture are: (1) a fair process of disclosure, solicitation, and voting; and (2) the ability to establish an enforceable entitlement baseline.

Outside of bankruptcy, a debtor putting together a restructuring faces severe coordination problems. Since all significant creditors must agree to the deal, each has an incentive to hold out. Bankruptcy law helps close the deal by limiting the power of holdouts, but a deal still must be struck that will satisfy the statutory majorities. This is where RSAs come in. In its most benign form, an RSA is merely an indication of support for a term sheet that allows the debtor to line up support for the plan. This support may be secured before the petition is filed or after. Regardless, the consummation of the deal is conditioned on, and remains subject to, compliance with the plan confirmation process. If this were all that was at stake, we would not be concerned.

But RSAs have a dark side, reflected by their other name: "lockup agreements." Depending on how an RSA is constructed and how it is used, it can support the plan process or subvert it. Subversions come in two flavors: (1) RSAs can distort the voting process; and (2) RSAs can distort the distributional scheme. The two are not mutually exclusive, and each is troubling in its own right.[29] Further, the voting process can be distorted in three ways, each of which can be framed as benign or malign: (1) incentives/vote buying (corruption); (2) incentives/deathtraps (coercion);[30] and (3) streamlined disclosure/concealment (deceit). Again, these distortions are not mutually exclusive, and the line between what should be permitted and what should be proscribed is hard to draw.

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28. 11 U.S.C. § 1129(b)(2)(B).

29. Indeed, they are intertwined. Since consensual confirmation is not subject to the absolute priority rule, the creditors can vote to adjust the distributional scheme. A distorted vote can lead to a distorted distribution, and vice versa.

30. A "deathtrap" in an RSA subjects creditors to a coercive set of alternative treatments, in which a creditor supporting a plan will be treated better than one opposing the plan if the plan is confirmed. The effect of a deathtrap provision is to pressure a creditor to vote for a plan by making opposition costly if the plan is confirmed. This element of coercion is also present in the cramdown provisions of the Bankruptcy Code, 11 U.S.C. § 1129(b). Indeed, Skeel notes that so-called "deathtrap" provisions in RSAs can be likened to "cramdowns on the cheap." Skeel, *supra* note 3, at 386.

Skeel seeks to discern when distortion of the voting process may be necessary to overcome coordination problems. The principal conceptual contributions of Skeel's article are his rules of thumb for considering when "distortions" are acting in service of the plan process and when they are undercutting it. He offers his rules of thumb in the hope that they will thread the needle. Unfortunately, he takes a wrong turn. Again, because he ignores the link between process and entitlement, he would permit RSAs that include voting and distributional distortions, so long as they assist in the "consensual" confirmation of a plan.[31] By contrast, we would only permit RSAs that reinforce, rather than distort the plan process itself, even if this puts ultimate confirmation at risk.

B. RSAs and Distortion: The Rules of Thumb

Skeel offers a typology—four "rules of thumb"—to consider in evaluating distortive RSAs: (1) the likelihood of holdout behavior; (2) the degree of coercion; (3) the presence of independent justifications; and (4) the extent to which creditors were granted contractual veto rights prebankruptcy.[32] These four criteria represent important insights, but in our view, they do not justify the distortions that Skeel would tolerate.

1. Holdouts

As noted above, the problem of holdouts is the reason for Chapter 11. When multiple creditors must consider the problem of a debtor's general default, putting together a deal for continuation of the business is extremely difficult. This is true for a variety of reasons. Independent of legal entitlements, financial distress gives many parties practical vetoes over the debtor's future operations. Suppliers can stop shipping, landlords may evict, creditors may exercise remedies. Any one creditor has the power to trigger a death spiral. Further, even if the creditors trust the debtor and believe in the debtor's business, they have no reason to trust each other. The structure of state debtor/creditor law also rewards those who exercise their legal and transactional leverage early. Finally, in the modern environment, entities can trade claims, allowing creditors to trade their way into blocking positions that give them holdout power in plan negotiations. In short, keeping a deal together is difficult.

So, Skeel points out, procedural techniques that help overcome the possibility of holdouts can be beneficial. An RSA can do this, as a practical matter, by allowing creditors to signal to each other that they support the plan. But Skeel is

31. Skeel, *supra* note 3, at 392–95.

32. Skeel, *supra* note 3, at 396–406.

also worried about a particular type of holdout—one using its practical power strategically, either to obstruct the plan or to bargain for a greater return. He points to the *Momentive* case as one where an identifiable strategic holdout was present.[33] In such cases, he suggests, coercive techniques in the form of carrots and sticks may be more tolerable. He identifies two such provisions: a deathtrap and a sweetener.

A deathtrap is a plan provision that proposes to pay one distribution to creditors (or classes) who vote for the plan and a different (lower distribution) to those who vote against it. Alternatively, the plan might offer incentives that reward early plan supporters, or those that sign the RSA with enhanced distributions.

Skeel notes, correctly, that these techniques must be judged against the fact that the Bankruptcy Code itself is not neutral with regard to holdouts.[34] First, the Bankruptcy Code contains its own statutory "deathtrap." Indeed, it contains two. Individual creditors who vote against a proposed plan run the risk that the plan will fail, leaving them with a liquidation-based distribution.[35] Further, classes that reject the plan can be bound, so long as they receive a distribution that respects the realizable value of their prebankruptcy entitlements.[36] Second, decisions and treatment are determined by class: all class members rise or fall together.[37] Individual creditors cannot be separately coerced or incentivized. Third, the Code has rules for solicitation and voting that would seem to prohibit a formal solicitation outside the plan process. Courts have limited the definition of solicitation to the actual act of soliciting a vote.[38] But courts looking at RSAs have wrestled with the question of when such a contract becomes a solicitation.[39]

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33. *In re* MPM Silicones, LLC. (*Momentive*), 518 B.R. 740 (Bankr. S.D.N.Y. 2014).

34. Skeel characterizes the Code as having a pro-reorganization bias. We disagree with Skeel that the Code's voting rule can be either pro- or anti-reorganization. Instead, Chapter 11 is pro-governance. It provides a collective decisionmaking mechanism where none would otherwise exist, but it does not dictate a particular means by which the creditors should realize the value of their claims. Instead, we fear that the procedural shortcuts facilitated by an RSA may give the debtor too much power to advantage particular creditors and steamroll others.

35. 11 U.S.C. § 1126 (2018).

36. 11 U.S.C. § 1129(b)(2)(A).

37. 11 U.S.C. § 1123(a)(1).

38. Century Glove, Inc. v. First Am. Bank of N.Y., 860 F.2d 94, 101-03 (3d Cir. 1988).

39. *Compare In re* Indianapolis Downs, LLC, 486 B.R. 286, 293-95 (Bankr. D. Del. 2013) (holding that the designation and disregard of postpetition votes was not warranted), *with In re* NH Holdings, Inc., 288 B.R. 356, 362 (Bankr. D. Del. 2002) (designating and disqualifying votes cast under lock-up agreement executed postpetition), *and In re* Stations Holding Co., No. 02-10882(MFW), 2002 WL 31947022, at *3 (Bankr. D. Del. Sept. 30, 2002) (designating and disqualifying votes of creditors who signed a "lock-up" agreement).

Skeel would tolerate distortions that go further than the Code, but only if there is either an identified holdout, or if holdout behavior is likely, either for reasons having to do with the debtor's business or because claims trading is occurring that might facilitate the accumulation of blocking positions. This injunction to look at the structure of the business and the liquidity of the claims trading is perhaps Skeel's most useful insight. But two wrongs may not make a right. We worry about coercive techniques that go beyond what the Bankruptcy Code contemplates. Instead, we would focus on the Bankruptcy Code's powers to discipline bad behavior directly, such as the power to disqualify votes. We would not turn a blind eye to bad behavior by debtors, even where it is in response to bad behavior by creditors.[40]

2. Degree of Coercion

The second rule of thumb, degree of coercion, is obviously related to the first. If there are holdouts or other strategic players within the bankruptcy, then some coordinating device may be needed to manage them. The question then becomes what coercion ought to be permitted? Or, as Skeel frames it, how much distortion is too much? Here, he arrays the types of coercion along a useful spectrum.[41] On one end is a traditional RSA that commits a creditor to support a particular plan but that (1) allows post-disclosure vote switching if there is a material change; and (2) is subject to higher and better offers. More stringent exit terms are obviously problematic. And then there are both entitlement and procedural distortions. Entitlement coercion offers an improved recovery for cooperation. Procedural coercion adds sweeteners to early signers. Both of these types of coercion strike us as extremely problematic.

Here, we do not object to Skeel's useful spectrum. Rather our concern is that Skeel offers no principle for deciding where to draw the line. Skeel argues that because "the risk of problematic holdout behavior will be significant" in most large corporate bankruptcies, a certain amount of distortion is necessary.[42] We disagree. In an earlier article we took the position that entitlement-distorting RSAs that ought to be proscribed.[43] Similarly, RSAs that undercut the statutory processes of voting should also be prohibited. Skeel, by contrast, would tolerate a fair amount of distortion in pursuit of agreement.

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40. *See infra* text accompanying note 42. In our view, the power to designate and disqualify votes under § 1126(e) should be extended to include creditors who are "short" or who have significantly "hedged" their position.

41. Skeel, *supra* note 3, at 398-401.

42. *Id* at 397.

43. Janger & Levitin, *supra* note 21.

Skeel's argument proves too much. He looks at the coordinating effects of bankruptcy procedure, but he fails to appreciate how that process seeks to link value allocation to prebankruptcy entitlements. The Chapter 11 plan-confirmation process binds dissenters and can discharge debt without consent. Bankruptcy is itself a coordinating device, such that additional private coordinating add-ons should be viewed with some suspicion, as they lack bankruptcy's substantive-fairness requirements and the imprimatur of legislation. In our view, the price of a Chapter 11 restructuring is adherence to both the procedural *and* substantive guaranties of fairness. Bankruptcy *process* serves a purpose. It preserves the link between prebankruptcy entitlements and a negotiated restructuring. Skeel is prepared to allow creditors to contract away these procedural protections because he is willing to allow distortions not just to process but to entitlement. This is what we mean by the proceduralist inversion. By failing to adhere to the requirements of bankruptcy process, the tie between Chapter 11 distributions and prebankruptcy entitlements is lost.

3. Independent Justifications

The third rule of thumb, independent justifications, suggests that some distortions may have justificatory rationales that go beyond coercing consent. Here, Skeel points toward the success fees that are sometimes paid to early participants in the RSA process if a plan is confirmed. Skeel states that the coordinating effort that a creditor invests in an RSA is a public good: creditors who help coordinate benefit the estate as a whole and so should be compensated. He likens these fees to the breakup fees that are sometimes paid to stalking-horse bidders if they are outbid or if the deal does not close. Courts often approve such fees as part of a sale order in recognition of the effort and expense of preparing a bid. Success fees, Skeel argues, operate on the same principle in that they compensate the creditor for value given to the estate. Indeed, he points out that such fees could be approved by the court under 11 U.S.C. 503(b)(3)(D), which permits compensation for creditors who make a substantial contribution to the case.[44]

But this argument, while insightful, again, proves too much. Just as a "deathrap provision" can be characterized as "cramdown on the cheap," an inventive or success fee can be characterized as an "administrative expense claim on the cheap." But that is the point: just as the coercive aspects of the plan process all come with procedural protections associated with the vote, administrative expense priority should only be granted to a creditor upon a finding of benefit to the estate. Here, the missing piece in Skeel's logic is a judicial finding that the creditors' efforts benefitted the estate as a whole.

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44. 11 U.S.C. 503(b)(3)(D) (2018).

4. Contracted Vetoes

Skeel's fourth rule of thumb, vetoes embodied in contract, is more problematic. For the first three "rules of thumb," we agree with Skeel's underlying insight, but disagree about whether it justifies a procedural shortcut. Here, we question Skeel's underlying rationale. Skeel argues that RSAs should not be used to override vetoes that were contracted for prebankruptcy. These can include terms in intercreditor agreements, asset partitions, and so on. This particular rule of thumb confuses us. While we understand why bankruptcy law should respect prebankruptcy distributional entitlements (indeed, that is the *sine qua non* of the plan confirmation process), we fail to see why that solicitude carries over to prebankruptcy contracts about post-bankruptcy process, and especially to veto rights that affect the plan process as a whole. Indeed, that is just the sort of contract that the Bankruptcy Code routinely overrides. A debtor cannot waive the benefit of the automatic stay for the benefit of a single creditor. A debtor cannot waive the procedures of the plan process for the benefit of a single creditor either. These protections belong to all creditors — consensual, nonconsensual, those at the table and those who are not.

It is possible that some of these contracts may be between creditors, rather than with the debtor itself. In intercreditor agreements, for example, one creditor may promise not to assert its rights in bankruptcy until another creditor has been paid in full. To the extent that these agreements are merely bilateral, they can be asserted as a matter of contract between the parties. However, they can also rise to the level of frustrating the rights of other creditors. If this occurs, we see no reason to privilege them.

If holdout behavior is problematic, we fail to see why it is less problematic because holdout power was contracted for in advance. One answer might be that the holdout power was disclosed prebankruptcy, so other creditors are on notice. Not all agreements are disclosed, however, and not all creditors can adjust. We see little reason that such agreements should get special solicitude over other creditors seeking to maximize the value of the business and their claims.

In sum, we appreciate the insights Skeel's rules of thumb generate, but question whether they justify procedural shortcuts that undercut the integrity of the vote and the plan confirmation process. We would not only police RSAs more closely, we would do so differently. In our view, the coordination function of an RSA is valuable, and RSAs should be permitted when they support not just a particular plan, but the plan process. RSAs that support the process reinforce the tie between bargaining and entitlement in bankruptcy. By contrast, coercion that distorts the plan confirmation process or rearranges entitlements should not be permitted.

We would also address Skeel's concerns about holdouts differently. We would enhance existing mechanisms in the Bankruptcy Code that limit the powers of holdouts. Furthermore, we would encourage courts to enforce provisions of the Bankruptcy Code that enforce a clear entitlement baseline. We explain our alternative in the next Part.

II. ENTITLEMENT AND OPPORTUNISM IN CHAPTER 11: THE STEAMROLLER AND THE HOLDOUT

Skeel clearly appreciates the value of Chapter 11 in facilitating rescue. His tolerance for distortions springs from a desire to reach agreement on efficient, value-preserving restructurings where either the business continues or asset synergies and other synergies are preserved. We share that appreciation. We also recognize, along with Skeel, that the modern Chapter 11 environment has been fundamentally changed by (1) the desire for speedy resolution; and (2) the advent of claims trading and distressed debt investing. However, instead of tolerating further distortions to the process, we would favor addressing those changes directly. Do not eliminate creditor protections to speed the process; instead, develop a mechanism for preserving and respecting entitlements. Do not tolerate vote distortion to deal with claims trading; rather, reform the voting process to deal with claims trading.

In a recent article, *Badges of Opportunism: Principles for Policing Restructuring Support Agreements*,[45] we argue that RSAs should be prohibited if they seek to short circuit the plan process, distort statutory priorities, or both. Skeel takes issue with our prescriptive view. Here, we double down. We wish not only to defend our position, but to flesh it out. The views articulated in that article were merely the tip of an iceberg. They reflect a broader vision of bankruptcy that ties bargaining to entitlement through the plan-confirmation process. Skeel's distortions would sever that link. The broad architecture that stands behind *Badges of Opportunism* is contained in a trilogy of articles by us and Melissa Jacoby. The first addresses the entitlement baseline. The second addresses concerns about efforts by debtors and dominant creditors to resolve cases with lightning speed. The third addresses the problems of claims trading and obstruction.

As we have noted above, the legitimacy of bankruptcy bargaining lies in the existence of an entitlement baseline. In *Tracing Equity: Realizing and Allocating Value in Chapter 11*,[46] Janger and Jacoby explore the relationship between prebankruptcy entitlements and value allocation in Chapter 11. That article explains how Chapter 11 preserves the relationship between prebankruptcy entitlements

45. Janger & Levitin, *supra* note 21.

46. Jacoby & Janger, *Tracing Equity*, *supra* note 6.

and distributions pursuant to a confirmed plan, even when the values of assets and the firm itself change during the pendency of the case. Janger and Jacoby explain that Chapter 11 envisions a two-step process of realization. First, Chapter 11 envisions an *equitable realization* upon the opening of a proceeding that crystallizes the relative position of creditors vis-a-vis each other. Second, it contemplates a *realization of value*, through sale or recapitalization, that is allocated through a process of bargaining in the shadow of entitlements (based on the realizable value of those claims outside of bankruptcy).

In our view, there are only two paths that will allow alteration of prebankruptcy entitlements through Chapter 11: first, confirmation of a consensual plan of reorganization accepted by any impaired classes of creditors; or second, a traditional cramdown through satisfaction of the judicially ratified statutory entitlement. Notwithstanding its colorful name, a "cramdown" is a calibrated process that limits the leverage of holdouts, encourages dissemination of information, assigns entitlements, and then allows for bargaining in conditions of uncertainty. Indeed, without this process, there would be a far worse "liquidation deathtrap"—creditors would be coerced to come to a consensual resolution lest they be left with their nonbankruptcy remedies and the specter of a "race of diligence."[47]

Like Skeel, we recognize that modern bankruptcy practice has put a great emphasis on speeding cases through bankruptcy, running roughshod over the plan confirmation process. In *Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Cases*,[48] Jacoby and Janger address the problem of speed. Like Skeel, they note that the timeline in Chapter 11 cases has accelerated.[49] They look at hurry-up, all-asset sales in Chapter 11 and argue that they operated as an end-run around the plan process. The concern is that these hurry-up sales are being used to reallocate value to the purchaser, senior lender, and management, and away from other key creditor constituencies.[50] Unlike Skeel, Jacoby and Janger's solution is not to tolerate the distortion but, instead, to identify a mechanism that preserves the procedural protections of the plan process—the "Ice Cube Bond." Jacoby and Janger argue that a sale must either be conducted pursuant to a confirmed plan, or sale proceeds needed to be retained to preserve decisions

47. *See Race of Diligence*, BLACK'S LAW DICTIONARY (10th ed. 2014).

48. Jacoby & Janger, *Ice Cube Bonds*, *supra* note 6.

49. *Id.* at 865 ("Hurry-up all-asset sales under § 363 of the Code . . . are now a common feature in the bankruptcies of large public companies.").

50. *Id.* at 916 ("The speed demanded in an alleged melting ice cube sale can . . . . [r]eallocate[] unencumbered value from the bankruptcy estate to the secured creditor without any clear basis for the entitlement.").

about value allocation for the plan process.[51] Rather than acceding to a distortion, Janger and Jacoby offer a mechanism that recognizes the need for speed while maintaining the link between bargaining and entitlement.

Finally, claims trading and the increased liquidity of distressed debt have created the opposite problem. Professional investors now have novel opportunities to purchase claims and engage in obstructive behavior. In *One Dollar, One Vote: Mark-to-Market Governance in Bankruptcy*,[52] we look at the problem of creditors who seek to use the voting process to obstruct confirmation. Again, we join Skeel in his concern about the effects of claims trading on the bankruptcy process. But rather than tolerating voting distortions, we seek to adapt the voting process to the new reality by reducing the power of holdouts directly. We advocate three reforms to limit the ability of various types of claimants to exercise power over plan confirmation beyond that reflected by their real economic interest. To that end: (1) where a claim was purchased, the voting rights would be established by the purchase price, not the par value of the debt (mark to basis); (2) where a claim was hedged, the voting rights would be limited to the creditor's actual economic interest (mark to interest); and (3) where a secured creditor sought to credit bid, its credit bidding rights would be limited to the realizable value of the collateral (mark to value).[53] These changes would affect only voting rights — not distributional rights — and all but the first could be adopted by courts under current law. The effect would be that blocking positions would be harder to purchase and economic shorts would not be able to affect the future of the debtor. Again, rather than distorting the vote, we would defend its integrity.

III. CORRUPTION, COERCION AND HASTE

Again, we want to emphasize that Skeel's article provides an incredibly useful elaboration of the various RSAs used in important recent cases such as *Puerto Rico*, *Momentive*, *Arch Coal*, and others. It also shows how useful RSAs can be in helping a debtor craft consensus around a plan of reorganization. However, we are concerned that the distortions that Skeel would tolerate are far from benign. The Bankruptcy Code envisions a bargaining process based on prebankruptcy entitlements. The pragmatic distortions described by Skeel lead in fairly short order to a plan process that is characterized by situational leverage and expedience. The proceduralist concern with entitlement gives way to the primacy of the deal. Prebankruptcy entitlements give way to allocations of power in the vicinity

51. *Id.* at 925.

52. Janger & Levitin, *supra* note 22.

53. *Id.* at 1916–19.

of insolvency—what Jared Ellias and Robert Stark have recently characterized as "bankruptcy hardball."[54]

Skeel identifies two novel dynamics in modern Chapter 11 cases: (1) the need for speed; and (2) the liquidity of claims.[55] He further identifies three distortions that have arisen to address those developments: (1) entitlement-based coercion; (2) process-based coercion; and (3) procedural shortcuts.[56] He would tolerate all three types of distortion, if necessary, to address opportunistic creditor-holdout behavior. But in doing so, he underplays the dark side of each of the distortions. The distortions are simply "bankruptcy hardball" by another name.

Entitlement-based coercion is another way of saying that the debtor offers a special deal to creditors who support the proposed plan. This is vote buying, plain and simple, and it violates the fundamental bankruptcy principle that similarly situated claims should be treated similarly.[57] Process-based coercion is, in some ways, worse. Such coercion can take many forms. The debtor might offer distributional sweeteners to first adopters. The agreement might limit the ability of creditors to change their votes upon receiving new information, or punish them *for* doing so. If a sale is involved, large bidder protections or breakup fees might discourage both other buyers and dissemination of information. Speed, usually viewed as a virtue, may operate as a way of concealing information and also ensuring that opposition to the plan does not emerge.[58]

One reason that Skeel may be more tolerant of distortion than we are is the nature of the parties he sees as mattering to the dispute. In a key passage Skeel says the following:

> [C]reditors who negotiate the terms of an RSA—and thus[] a potential reorganization plan— provide a public good, since reorganization may be valuable for everyone, and they also forgo the opportunity to trade during the negotiations. The drafters of the Bankruptcy Code assumed the creditors' committee would play this role, rather than individual

54. Jared A. Ellias & Robert J. Stark, *Bankruptcy Hardball*, 108 CALIF. L. REV. 745, 748 n.10 (2020) (coining the term "bankruptcy hardball" to describe a "universe of aggressive tactics in debtor-creditor relations" that, though not always new, are now being deployed with greater frequency and intensity).

55. Skeel, *supra* note 3, at 373-74.

56. Skeel, *supra* note 3, at 384-88.

57. *See* 11 U.S.C. § 1122(a) (2018) (requiring classes to contain only substantially similar claims); § 1123(a)(4) (requiring all claims in a class to be treated the same).

58. *See* William W. Bratton & Adam J. Levitin, *The New Bond Workouts*, 166 U. PA. L. REV. 1597, 1601, 1639 (2018) (noting the use of coercive hurry-up techniques in out-of-court workouts to preclude the organization of opposition).

> creditors. But *in current cases, the creditors' committee often is not the principal locus of negotiations, because, among other things . . . the "fulcrum" class . . . is a class of lien creditors rather than the general creditors whom the creditors' committee represents*.[59]

The "fulcrum" security is the class of claimants that receives the equity of the reorganized business. They are the most junior claim in the distributional hierarchy to receive a distribution and hence bear the risks and receive the rewards of ownership.

For reasons that we explore more fully in *Tracing Equity, Logic and Limits of Liens,* and *Ice Cube Bonds*,[60] a proper understanding of the nature of secured credit under state law precludes the view that a secured creditor can ever be the fulcrum security in a rescue case. As Jacoby and Janger explain, outside of bankruptcy, Article 9 of the Uniform Commercial Code and the state law of real-estate mortgages grant secured creditors a lien on the property of the debtor, but they do not constitute a lien on the firm itself.[61] In England and Wales, the secured creditor may take a "floating charge."[62] In the United States, no such thing exists. Security is asset based, and attaches to the property of the firm, not the firm itself.[63] Even if it did, the two-step realization process in Chapter 11 would limit the allowed secured claim of a secured creditor to the realizable value of assets liened on the petition date, along with identifiable proceeds.[64] This means that even when a senior secured lender is underwater, there will be unencumbered value available to unsecured creditors—including to the secured lender on account of its unsecured deficiency claim. Even when the secured creditors are undersecured, value will flow through to the unsecured creditors.

Skeel, however, fails to acknowledge that an RSA locking in a deal between an undersecured senior lender and the debtor will have the effect of steamrolling the entitlements of unsecured creditors who are entitled to a share of any going concern surplus. The value of these residual unsecured claims may be hard to calculate in the heat of a Chapter 11 case. But that is precisely why preserving, not rushing, the voting process is essential.

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59. Skeel, *supra* note 3, at 401 (emphasis added).

60. Jacoby & Janger, *Ice Cube Bonds*, *supra* note 6, at 922; Jacoby & Janger, *Tracing Equity*, *supra* note 6, at 689-91; Edward J. Janger, *The Logic and Limits of Liens*, 2015 U. Ill. L. Rev. 589, 595-603.

61. Jacoby & Janger, *Tracing Equity*, *supra* note 6, at 689-91.

62. Roy Goode & Louise Gullifer, Goode and Gullifer on Legal Problems of Credit and Security 126-33 (2017).

63. U.C.C. § 9-109 (Am. L. Inst. & Unif. L. Comm'n 1977).

64. Jacoby & Janger, *Tracing Equity*, *supra* note 6, at 688-693.

IV. PROCESS-REINFORCING RSAS

As we explain in *Badges of Opportunism*, RSAs are extraordinarily useful tools for facilitating the confirmation of a plan of reorganization. They can facilitate entitlement-based bargaining by increasing transparency. They allow creditors to signal their support and gather momentum behind a deal. They can prime the pump for other bidders by establishing a valuation and the outlines of acceptable allocation. They can protect the process through various provisions, such as a fiduciary-out provision that allows the debtor to accept a higher and better offer, a no-material modification clause that allows signers to reconsider if circumstances change or important information comes to light, or a most-favored-nation clause that assures equal treatment for similarly situated creditors.[65]

But RSAs can have a dark side. They may include provisions that undermine the plan process and other bankruptcy values such as equal treatment.[66] These provisions sever the link between bankruptcy bargaining and entitlement. In our view, RSAs must be judged against a more robust view of the values served by the plan process: encouraging (1) disclosure, (2) voice and permitting, and (3) a meaningful decision at the time of the vote.[67]

More importantly, to the extent that modern bankruptcy practice places strains on the fifty-year-old disclosure and voting apparatus created in 1978, the better approach is to fix the plan-confirmation process itself—not by stripping it down but by addressing the identified problems directly. The need for speed should be addressed through devices like the "ice cube bond." Claims trading can be addressed through "mark-to-market governance," and governance-based distortions can be fixed by ensuring that the continuation decision rests with the fulcrum creditor, not a senior secured lender. The shortcomings of the Bankruptcy Code should be fixed by legislative and judicial interventions, not by private contracts.

CONCLUSION

Skeel has never been a classic "proceduralist." His scholarship is richer and more nuanced: he has been more willing to embrace the range of values and concerns expressed in the bankruptcy process. Further, the care with which Skeel identifies and catalogues the distortions in a series of recent cases involving RSAs is informative. Our agreements are likely greater than our disagreements. We share the view that a sale of a firm under a confirmed plan, facilitated through

65. Janger & Levitin, *supra* note 21, at 175-76.

66. *Id.* at 182.

67. *Id.* at 189.

an RSA, is normatively superior to a hurry-up, all-asset sale, conducted through a sale order approved a few weeks into the case. But Skeel's elevation of contract over entitlement, and the failure to appreciate the role of process in linking agreement to entitlement, is a common error made by finance-influenced scholars.

We cannot escape the irony, therefore, that Skeel, as nuanced a scholar as he is, is willing to scrap the process in favor of agreement—any agreement—regardless of its relationship to the entitlement baseline. Proceduralism has become reorganization *über alles*, precisely the sin that proceduralists have long complained about regarding traditionalists.

We, by contrast, would regulate RSAs more tightly. We are concerned about provisions in RSAs that would loosen the link between contract and entitlement by undercutting the process protections of the Bankruptcy Code. We would scrutinize provisions in RSAs that offered special deals to particular creditors (not linked to a legal entitlement), provisions that reward speedy agreement, provisions that limit exit, and provisions that limit the flow of information. While some of these provisions may turn out to be tolerable, they raise an inference of advantage taking and should be permitted only sparingly.

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