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FEE-SHIFTING IN BANKRUPTCY

BY

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by

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ABSTRACT

This Article examines attorney fee-shifting practices in bankruptcy from theoretical, historical, caselaw, statutory, empirical and comparative perspectives. Although the Supreme Court has insisted the American Rule remains the applicable background principle in insolvency cases as elsewhere, insolvency law, for sound equitable and systemic reasons, has always rejected strict application of the American Rule. Fee-shifting among the parties has been, and remains, pervasive in bankruptcy cases. Against this background, the Supreme Court's position has led to anomalous and untoward results in discrete areas where the American Rule continues to apply. This Article argues for a forthright rejection of what little remains of the American Rule in bankruptcy and proposes a modified English Rule giving bankruptcy courts discretion over the award of attorney's fees. I go on to identify a set of non-exclusive factors that properly inform the exercise of the bankruptcy court's discretion over the award of fees. Interestingly, the United Kingdom, starting from the tradition of the English Rule, has created a discretionary fee-shifting regime applicable to insolvency cases that mirrors the discretionary approach advocated here. Despite their disparate starting points, the realities of insolvency practice are impelling both the English and American systems toward a court-supervised discretionary fee-shifting regime in the bankruptcy arena.

 I have been previously involved in litigating the issues discussed in this Article. I was one of the academic *amici* in support of petitioner in *Baker & Botts*, *infra* n.1 and notes 151–187 and accompanying text. *See* Brief Amici Curiae of Bankruptcy Law Scholars, Baker & Botts LLP v. ASARCO LLC, U.S. Sup. Ct. Case No. 14-103 (filed Dec. 10, 2014). I was also counsel to the National Association of Consumer Bankruptcy Attorneys and the National Consumer Bankruptcy Rights Center in filing their brief *amicus curiae* in support of respondent Aleida Johnson in *Midland Funding LLC v. Johnson*, U.S. Sup. Ct. No. 16-348 (filed Dec. 21, 2016), *infra* notes 188–201 and accompanying text. Finally, I was counsel of record for appellee Marlene Penrod in *In re Penrod*, 802 F.3d 1084 (9th Cir. 2015), *infra* notes 225–237 and accompanying text. I am grateful for the thoughtful comments on preliminary drafts from my editor the Honorable Terrence Michael and my colleagues, Professors Kenneth N. Klee, Lynn LoPucki, David Marcus, Joanna Schwartz, Michael Simkovic and Stephen Yeazell, and Thomas E. Patterson, Esq. Nicholas Redfield, UCLA School of Law Class of 2023 and Melise Knowles, UCLA School of Law Class of 2022 provided excellent research and drafting support converting those preliminary drafts and comments into this Article. Sarah Paterson of the London School of Economics and Political Science provided invaluable comments and source materials relating to current UK fee-shifting practices in insolvency cases. I also benefited from preliminary discussions with Eric Helland, Ben Nyblade and Melanie Zaber, regarding some of the empirical work that has been done in

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the field of fee-shifting. I gratefully acknowledge financial support from the UCLA Academic Senate and UCLA School of Law Dean's Fund. Finally, this work would not have been possible without the marvelous research librarians and resources of UCLA's Hugh & Hazel Darling Law Library, in particular Rebecca Fordon, Esq.

I. Introduction

> "Our basic point of reference when considering the award of attorney's fees is the bedrock principle known as the American Rule: Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise"
>
> Baker & Botts LLP v. ASARCO LLC[1]

The general default rule in civil litigation in the United States, the so-called "American Rule" is that each party bears its own attorney's fees. The general default rule in the United Kingdom, and in most of the rest of the world, is the "English Rule," that is the prevailing party in civil litigation may recover its attorney's fees from its adversary as a cost of litigation. As we shall see in the discussion that follows, no system applies a pure version of either the American Rule or the English Rule in all circumstances. The thesis of this Article is that in the insolvency context we should expressly eschew reliance on the pure form of either the American Rule or English Rule, and that bankruptcy courts should authorize fee-shifts informed by a series of factors sensitive to the realities of insolvency generally and the particular case before it.

The modern Supreme Court is on unfamiliar ground when it decides bankruptcy cases. Reflexive application of general jurisprudential rules in bankruptcy cases can yield poor results. Bankruptcy is a special context where pervasive fee-shifting is already occurring, and judicial expertise in shifting and fixing attorney's fees is historically-rooted and well-developed. In that setting, reliance on the American Rule as the default rule is ahistorical and not otherwise appropriate. Moreover, it creates or exacerbates conflicts with underlying bankruptcy policy.

The discussion starts in Part II with a brief overview of the critiques and defenses of the English and American Rules respectively. Part III discusses the general fee shifting dynamics in bankruptcy and describes bankruptcy's rejection of the American Rule. Part IV identifies some areas where the American Rule's persistence has caused continuing problems in bankruptcy cases. Part V discusses the implications of the Ninth Circuit's *Penrod* decision and its progeny for fee-shifting in bankruptcy. Part VI proposes a generalized discretion in the bankruptcy court to shift prevailing party attorney fees as an appropriate corrective. Interestingly, the United Kingdom, starting from the tradition of the English Rule, has created a discretionary fee-shifting

[1] 576 U.S. 121, 126 (2015) (quoting Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242, 252–53 (2010)). Justice Sotomayor concurred writing: "Given the clarity of the statutory language, it would be improper to allow policy considerations to undermine the American Rule in this case." *Id.* at 135 (Sotomayor, J. concurring).

regime applicable to insolvency cases that mirrors the discretionary approach advocated here. The realities of insolvency practice are impelling both systems toward a court-supervised discretionary fee-shifting regime notwithstanding their disparate starting assumptions. A brief conclusion follows.

II. ANALYSES OF THE ENGLISH AND AMERICAN RULES IN CIVIL LITIGATION

At the simplest conceptual level, the choice between the English and American Rules comes down to a tradeoff between providing greater incentive to assert weak claims, especially ones that carry a potential for large damages, and greater incentive to assert meritorious claims, especially small-dollar ones.[2] The English Rule in theory deters the holder of a long-shot claim because in the likely event the claim fails, the losing litigant incurs an additional financial penalty: responsibility for its adversary's legal fees. The American Rule deters the holder of all relatively small-dollar claims,[3] regardless of merit, because even if the claimant prevails the net value of the claim will be diminished by the amount of the attorney's fees incurred to win the case.[4] In addition, it is generally agreed that at the margins the English Rule tends to increase legal costs in the aggregate because of the litigants' optimism bias.[5] Cases go to trial because the plaintiff's assessment of the likelihood of success exceeds the defendant's assessment of the likelihood of the plaintiff's success. The English Rule makes it harder to settle cases because each side overdiscounts the risk that by going to trial it will end up having to pay both sets

[2]*See generally* Albert A. Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society: In Sorrow and in Anger—and in Hope*, 54 CAL. L. REV. 792 (1966).

[3]"Small-dollar" in relation to the amount of expected attorney's fee. In a world where it may cost $1 million in attorney's fees or more to bring a complex claim to final judgment even meritorious seven-figure claims may not be worth prosecuting. In some jurisdictions, even relatively straightforward meritorious claims may not be worth pursuing if the damages are less than $100,000. *See* Ehrenzweig, *supra* note 2 at 795-96; Phyllis A. Monroe, *Financial Barriers to Litigation: Attorney Fees and the Problem of Legal Access*, 46 ALB. L. REV. 148, 159-61 (1981); John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1594-96 (1993).

[4]*But see* A. Mitchell Polinsky & Daniel L. Rubinfield, *Does the English Rule Discourage Low Probability of Prevailing Plaintiffs*, 27 J. LEGAL STUD. 141 (1998) (demonstrating that under conditions of informational asymmetry favoring plaintiffs, marginal low-probability-of-prevailing plaintiffs who actually file claims have an incentive to go to trial rather than settle such claims). The net effect of the English Rule's tendency to discourage both the filing of weak claims and their settlement after filing, on the number of weak claims actually tried is indeterminate under the Polinsky and Rubinfield analysis and the disincentive to settle effect of the English Rule they identify is dependent on the assumed informational asymmetry.

[5]Avery Katz, *Measuring the Demand for Litigation: Is the English Rule Really Cheaper?*, 3 J.L. ECON. & ORG. 143, 154-64 (1987); Edward A. Snyder & James W. Hughes, *The English Rule for Allocating Legal Costs: Evidence Confronts Theory*, 6 J.L. ECON. & ORG. 345, 376 (1990) [hereinafter Snyder & Hughes 1990]; James W. Hughes & Edward A. Snyder, *Litigation and Settlement Under the English and American Rules: Theory and Evidence*, 38 J.L. & ECON. 225, 227 (1995) [hereinafter Hughes & Snyder 1995].

of lawyers. Litigant optimism tends to both increase the plaintiff's settlement demand and decrease the defendant's offer. Fewer settlements of meritorious claims drives up the aggregate cost of resolving them. The English Rule may also drive up legal fees because clients have less incentive to constrain them, believing that the cost will be shifted to their adversaries.[6]

The English Rule is thus thought to decrease the burden of resolving weak claims (by deterring their prosecution) and to increase the burden of resolving meritorious claims (by encouraging their prosecution, raising their legal costs, and deterring their settlement).[7] At least that is what theory, as a first approximation, predicts. Most of the world, in considering that balance, has chosen the English Rule, opting to conserve judicial resources in respect of likely meritless claims, and concentrate them on the just resolution of likely meritorious claims.[8]

To the extent that United States jurisdictions continue to cling to the American Rule,[9] they implicitly place a premium on providing access to the judicial system for large dollar claims over smaller ones, and encouraging set-

[6]Abstract comparative analysis of the American and English Rules was a popular exercise in the law-and-economics literature of the 1970s and 1980s. *See, e.g.*, John P. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279 (1973); William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61 (1971); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973); Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982); Richard D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LITERATURE 1067 (1989); John J. Donohue III, *Opting for the British Rule, or If Posner and Shavell Can't Remember the Coase Theorem, Who Will?*, 104 HARV. L. REV. 1093 (1991); Ivan P.L. P'ng, *Strategic Behavior in Suit, Settlement, and Trial*, 14 BELL J. ECON. 539 (1983); *See also* Snyder & Hughes 1990, *supra* note 5.

[7]Shavell, *supra* note 6; Posner, *supra* note 6; Cooter & Rubinfeld, *supra* note 6; Bradley L. Smith, *Three Attorney Fee-Shifting Rules and Contingency Fees: Their Impact on Settlement Incentives*, 90 MICH. L. REV. 2154 (1992); James W. Hughes & Elizabeth Savoca, *Measuring the Effect of Legal Reforms on the Longevity of Medical Malpractice Claims*, 17 INT'L REV. L. & ECON. 261, 269 (1997); Snyder & Hughes 1990, *supra* note 5. *But see* John C. Hause, *Indemnity, Settlement, and Litigation, or I'll Be Suing You*, 18 J. LEG. STUD. 157, 167-68 (1989).

[8]WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT 329-30 (1991) (characterizing the English Rule as the "rest of the world rule" given that outside the United States almost all jurisdictions award prevailing party attorney's fees). Prior to the Supreme Court's decision in Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975), American commentators urged the federal courts to abandon the American Rule in federal litigation generally. *See, e.g.* Gerald T. McLaughlin, *The Recovery of Attorney's Fees: A New Method of Financing Legal Services*, 40 FORDHAM L. REV. 761 (1972); Ehrenzweig, *supra* note 2; William B. Stoebuck, *Counsel Fees Included in Costs: A Logical Development*, 38 U. COLO. L. REV. 202 (1965); Calvin A. Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 IOWA L. REV. 75 (1963); Charles T. McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 MINN. L. REV. 619 (1931). *Alyeska*'s reaffirmation of the American Rule silenced these voices urging a general abandonment. *Alyeska*, 421 U.S. at 263-271.

[9]1 MARY FRANCES DERFNER & ARTHUR D. WOLF, COURT AWARDED ATTORNEY FEES ¶ 1.12[1] (Lexis 2021) ("statutory exceptions to the American Rule are so frequently applicable in federal civil actions that it is not an exaggeration to say that statutory fee collection has become the rule, and the American Rule has become the exception").

tlement over trial. In addition, in many contexts, defendants are significantly less likely to be able to successfully collect shifted fees from plaintiffs than vice-versa, because plaintiffs as a class tend to be impecunious.[10] In those situations, the English Rule may do little to deter weak claims and may operate only to increase the cost of resolving meritorious ones. In such contexts, the American Rule may have a decisive advantage over the English Rule. Finally, in light of the "moral hazard" associated with fee-shifting (clients who expect their adversaries to bear their legal costs have less incentive to contain them to a reasonable amount), successful implementation of the English Rule is generally thought to require either legislative or administrative regulation of legal fees or court supervision of their reasonableness. The English Rule therefore implies that the system will have to bear the burden of these administrative costs.[11]

The net result of the theoretical examination of the policy advantages and disadvantages of the English and American Rules is, accordingly, indeterminate.[12] The practical answer to the question of when it makes sense to fee-shift is "sometimes depending on the circumstances." And just as the American Rule applies to only a small subset of cases in the United States, jurisdictions in the rest of world, while purporting to adopt the English Rule, in fact fee-shift only to a limited extent and in some circumstances.[13]

The policy implications of fee-shifting have been explored empirically in three places. These empirical studies reach conclusions broadly consistent with the summary above but also suggest the predicted effects of moving from the American Rule to the English Rule are muted in practice, only marginally affecting filing rates, settlement behavior, and litigation cost. The first place is Alaska, unique among United States jurisdictions in adopting the English Rule as a general default. Alaska's fee-shifting practices have been explored empirically in connection with reform efforts. Second, Florida undertook a much studied experiment with the English Rule in the 1980s in the context of medical malpractice litigation. Finally, Professors Eisenberg and Miller studied the incidence of prevailing party fee-shifting in significant commercial contracts filed with the Securities and Exchange Commission by reporting public companies. I summarize below what we have learned from studying the operation of the English Rule in these three settings and then

[10]*See infra* notes 36–50, and accompanying text (discussing Florida's experience with the English Rule in the medical malpractice cases).

[11]*See, e.g.*, Oelrichs v. Spain, 82 U. S. [15 Wall.] 211, 231 (1872) (stating the American Rule saves significant resources given the time, expense, and difficulties of proof inherent in fixing a reasonable attorney's fee).

[12]RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 22.12 at 806–11 (9th ed. 2014).

[13]Werner Pfennigstorf, *The European Experience with Attorney Fee Shifting*, 47 L. & CONTEMP. PROBS. 37 (1984); Thomas D. Rowe, Jr., *Shift Happens: Pressure on Foreign Law Attorney-Fee Paradigms from Class Actions*, 13 DUKE J. COMP. & INT'L L. 125 (2003).

discuss two intermediate forms of fee-shifting adopted or proposed in various contexts.

A. THE ALASKAN EXPERIENCE.

In its early territorial history Alaska adopted the English Rule and remains the only American state to generally reject the American Rule.[14] Under Alaska Rule of Civil Procedure 82, the prevailing party is entitled to recover a percentage of its attorney's fees based on the following schedule:[15]

Judgment Amount	Percentage Atty Fee Due if Contested With Trial	Percentage Atty Fee Due if Contested Without Trial	Percentage Atty Fee Due if Non-Contested
First $25,000	20%	18%	10%
Next $75,000	10%	8%	3%
Next $400,000	10%	6%	2%
Over $500,000	10%	2%	1%

Several studies have focused on Alaska to test the hypothesized effects of the American and English Rules.

In a 1995 study, Susanne DiPietro and Teresa Carns examined state and federal filings in Alaska, seeking to determine whether Alaska's Rule 82 affected civil filing rates and settlement rates.[16] They also conducted interviews with 161 attorneys and 29 trial judges on several topics related to Rule 82.[17]

The authors' major conclusion was that Rule 82 "seldom played a significant role" in Alaska's civil litigation.[18] Indeed, courts awarded attorney fees awards in only 10 percent of Alaskan state court cases and 6 percent of federal court cases sampled.[19] Of those fee awards, only 40 percent were

[14]Alaska Rent-A-Car, Inc. v. Avis Budget Group, Inc., 738 F.3d 960, 972 (9th Cir. 2013) (noting that Alaska adopted the English Rule in 1884 when Congress applied the laws of Oregon to the Alaska Territory and remains unique among American jurisdictions in this regard); Douglas C. Rennie, *Rule 82 & Tort Reform: An Empirical Study of the Impact of Alaska's English Rule on Federal Civil Filings*, 29 ALASKA L. REV. 1, 7 (2012).

[15]*See* ALASKA R. CIV. P. 82 (a)-(b). When the defendant prevails, or the prevailing plaintiff does not receive a money judgment, the prevailing party recovers a percentage of its attorney's fees. ALASKA R. CIV. P. 82 (b)(2). The court will award a prevailing party without a money judgment 30 percent of reasonable actual attorney's fees in cases that go to trial, and 20 percent in cases that do not. *Id.*

[16]Susanne DiPietro & Teresa W. Carns, *Alaska's English Rule: Attorney's Fee Shifting in Civil Cases*, 13 ALASKA L. REV. 33, 33 n.* (1996) (stating article summarizes chapters one and two and excerpts portions of chapters three, four, five, six, nine, and ten of ALASKA JUDICIAL COUNCIL, ALASKA'S ENGLISH RULE: ATTORNEY'S FEE SHIFTING IN CIVIL CASES (October 1995)).

[17]*Id.* at 49 n.77, 73.

[18]*Id.* at 77.

[19]*Id.* at 78.

actually collected.[20] Factors such as bankruptcy, judgment-proof debtors, and fee waivers in post-judgment settlements all played roles in these outcomes.[21]

The study found no significant difference in the per capita rate of civil case filings between Alaska and other US jurisdictions, challenging the hypothesis that the English Rule deters plaintiffs from pursuing weaker claims.[22] However, about half (52 percent) of plaintiffs' attorneys interviewed reported they had factored Rule 82 into a decision to assert a claim, although only 35 percent of "experienced litigators" could remember such a case.[23] Most attorneys interviewed thought the rule discouraged only plaintiffs with below-average or weak cases, but a few thought the rule also discouraged plaintiffs with strong claims but moderate means.[24] From the perspective of these attorneys, Rule 82 affected litigation strategy in 34 percent of cases, and affected the settlement strategy in 37 percent of cases.[25]

The authors also discovered that Alaska had a somewhat different caseload composition than the national average, with a smaller percentage of general civil filings (including tort, contract, and real property) than the national average, and a larger percentage of domestic relations cases.[26] Although fee-shifting may have accounted for some of the difference in case composition, other variables peculiar to Alaska are likely at work.[27]

Despite the apparently modest impact of fee-shifting on litigation in Alaska, the study concluded that Rule 82 had discernible effects. "It (1) discouraged some middle class parties from filing cases that either wealthy or poor plaintiffs would file, (2) discouraged some suits [and] defenses of questionable merit and (3) encouraged litigation in strong cases that might otherwise settle."[28]

A more recent empirical study in 2012[29] further confirmed the modest influence of Rule 82 on civil litigation in Alaska. This study found no significant difference between civil case filing rates in Alaska and comparison American states and therefore did not support the hypothesis that the English Rule would reduce the overall number of filings by deterring prosecution of low-merit cases.[30] The study also found no significant difference in the

[20] *Id.*

[21] *Id.*

[22] *Id.* at 63-66.

[23] Alaska Judicial Council, Alaska's English Rule: Attorney's Fee Shifting in Civil Cases 138-40 (October 1995).

[24] *Id.*

[25] DiPietro & Carns, *supra* note 16, at 78.

[26] *Id.* at 66-67.

[27] *Id.*

[28] *Id.* at 84.

[29] Rennie, *supra* note 14 .

[30] *Id.* at 3.

rate of civil trials or the median time from filing to disposition.[31] These findings challenge the notion that under the English Rule the quality of claims increases.[32]

The lack of definitive data from Alaska strongly supporting the predicted impacts of the English Rule could be due to Rule 82's structure.[33] Alaska does not employ a pure English Rule but rather awards only a percentage of attorney's fees, and only in certain cases. It therefore provides less of a deterrent to weak claims and less incentive to bring meritorious claims than the traditional English Rule.[34] Moreover, Alaska, with its small population and vast territory has a somewhat idiosyncratic civil justice system, and the studies that have been performed have significant technical limitations.[35]

B. The Florida Medical Malpractice Experiment

In 1980, Florida adopted the English Rule for medical malpractice lawsuits to "screen out claims lacking in merit" and promote the "prompt settlement of meritorious claims."[36] The statute lasted only five years, however, and was repealed in 1985, when the medical provider and health insurance interests that had lobbied for the rule change came to realize that attorney's fees awarded to prevailing defendants were frequently uncollectible.[37] Nevertheless, this five-year experiment has proved to be the best available case-study for the effects of the English Rule on litigation.

One study found Florida's adoption of the English Rule shortened the duration of dropped and settled claims.[38] A separate study also found plaintiffs dropped their cases more often under the English Rule.[39] These findings support the hypothesis that plaintiffs with weak claims are more willing to settle or dismiss quickly to avoid costly litigation under the English Rule.[40] However, the studies did not find any significant difference in the duration of litigated claims under the English Rule.[41]

Researchers in Florida also noted defendant litigation expenditures in-

[31] *Id.* at 35-39.

[32] *Id.*

[33] *Id.* at 39.

[34] *Id.*

[35] DiPietro & Carns, *supra* note 16, at 65-66, 79 (noting the lack of control group to compare cases governed by Rule 82, differences between how states count and classify civil cases, and differences between Alaska's rural population compared to other states could all play a role in some of the study's findings).

[36] Ch. 80-67, 1980 Fla. Laws 224.

[37] Ch. 85-175, 1985 Fla. Laws 1180.

[38] Hughes & Savoca, *supra* note 7, at 272.

[39] Snyder & Hughes 1990, *supra* note 5, at 376-77.

[40] Hughes & Savoca, *supra* note 7, at 269.

[41] *Id.*

creased significantly under the English Rule.[42] One study found defendant spending was 108 percent higher for litigated claims and 150 percent higher for settled claims under the English Rule.[43] These findings support the theory that the English Rule can promote "a legal arms race," where optimistic parties increase spending that may ultimately become catastrophic for the losing party.[44] On the other hand, the findings also support the view that the English Rule deters litigation, specifically of weaker claims.[45]

Finally, one study found several effects on judgment and settlement amounts.[46] Plaintiffs won judgments at a higher rate under the English Rule and their judgments were larger.[47] Settlement amounts were also higher.[48] These findings support an inference that Florida malpractice plaintiffs were less likely to pursue weaker claims under the English Rule, and only the stronger (and therefore more valuable) claims advanced into litigation.[49] The increase in average settlement and judgment amounts is therefore consistent with the prediction that under the English Rule plaintiffs are less likely to pursue weak claims and more likely to pursue meritorious ones.[50]

C. The Eisenberg/Miller Study.[51]

In 2013, Eisenberg and Miller published an empirical study on the presence of fee shifting clauses in public company contracts.[52] The study examined the attorney's-fee clauses in 2,347 contracts filed with the Securities and Exchange Commission in 2002 and noted the rate at which companies opted out of the American Rule.[53] It compared the opt-out rate for the American Rule in these public company contracts with the opt-out rates for other procedural default rules such as judicial dispute resolution (which parties may opt out of by providing for arbitration), and the right to a jury

[42]Snyder & Hughes 1990, *supra* note 5, at 374.

[43]*Id.*

[44]Christopher R. McLennan, *The Price of Justice: Allocating Attorneys' Fees in Civil Litigation*, 12 Fla. Coastal L. Rev. 357, 382 (2011).

[45]Snyder & Hughes 1990, *supra* note 5, at, 374.

[46]Hughes & Snyder 1995, *supra* note 5, at 227.

[47]*Id.* at 238.

[48]*Id.* at 241–43.

[49]*Id.* at 245.

[50]*Id.* at 245.

[51]Eisenberg & Miller also independently studied fee-shifting in the context of class-action lawsuits. Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. Empirical Legal Stud. 27 (2004). The study found the size of fees as a percentage of recovery were larger in fee-shifting cases compared to non-fee-shifting cases in class actions. *Id.* at 49–50. Fee size was also larger in federal cases than in state cases. *Id.* at 40–41. The study also found "a wider variance, as a percent of recovery," in fee-shifting cases compared to non-fee-shifting cases. *Id.* at 77.

[52]Theodore Eisenberg & Geoffrey P. Miller, *The English Versus the American Rule on Attorney Fees: An Empirical Study of Public Company Contracts*, 98 Cornell L. Rev. 327 (2013).

[53]*Id.* at 331.

trial.[54]

The study found that parties opted out of the American Rule at a substantial rate, roughly 60 percent of the time.[55] This figure was significantly higher than the rate at which parties opted out of judicial dispute resolution (11 percent) or jury trials (20 percent).[56] These data suggest that publicly traded corporations largely reject the American Rule in their most material commercial contracts. Since these agreements are typically the product of bespoke negotiations between well-represented and sophisticated parties, the revealed preference for the English Rule suggests the American Rule is often not an optimal regime for compensating attorneys in disputes over important contracts among sophisticated parties.[57]

Nevertheless, parties only opted for the pure English Rule 40 percent of the time, whereas the remaining 20 percent opted for "a modified form of loser-pays arrangement."[58] Thus, parties opted for the English Rule in about the same number of cases as they explicitly or implicitly adopted the American Rule—either by specifying their preference for it or by staying silent.[59]

Eisenberg and Miller's study is important in showing a market-based tendency to reject the American Rule in contract litigation.[60] While the data does not suggest a strong preference for a pure English Rule, these parties, by a substantial and statistically significant margin, did prefer some variation of a loser-pays scheme.[61]

D. Intermediate Solutions.

No advanced legal system applies either the English Rule or the American Rule in its pure form across all types of litigation.[62] In the United States, the American Rule may be, and commonly is, varied by statute and by contract.[63] In a few situations, particularly those involving positive externalities in collective proceedings, the American Rule is overridden by equitable considerations.[64] Commonly, even when US jurisdictions depart from the American Rule, the fee-shifting regime may provide the prevailing party only partial indemnification of its legal fees, or permit indemnification only in favor of certain parties on the basis of certain showings, with respect to certain kinds

[54]*Id.*

[55]*Id.*

[56]*Id.*

[57]*Id.* at 353, 377.

[58]*Id.* at 332.

[59]*Id.*

[60]*Id.* at 377.

[61]*Id.*

[62]Pfennigstorf, *supra* note 13, at 83; *see* Rowe, *supra* note 13, at 128 (stating that "nearly all the rest of the world" adheres, to varying degrees, to the English rule).

[63]*See, e.g., infra* notes 70–77, and accompanying text.

[64]Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967).

of claims, or in certain circumstances.[65] In particular, we frequently observe contractual or statutory fee-shifting (i) limited to prevailing plaintiffs[66] or (ii) limited in the discretion of the court or arbiter.[67] Moreover, even in statutes or contracts that purport to impose a pure English Rule, the court rendering judgment retains discretion to award or withhold fees based on its determination of who the prevailing party is (since it is the rare case in which either party can be said to be completely vindicated). In addition, under almost all fee-shifting regimes the court or arbiter may shift only a judicially determined "reasonable" amount of fees, an amount which may be substantially less than the amount of fees actually incurred. Finally, the practical reality that an award of attorney fees may by uncollectible from judgment-proof parties is often a decisive consideration, as both the Alaska experience and the Florida experiment with malpractice litigation demonstrate.[68]

1. *One Way Fee-Shifting*

Many statutes that provide for fee-shifting do so only as part of the remedy for a prevailing plaintiff. Unilateral fee shifting in favor of the prevailing plaintiff recognizes that there is a public interest in encouraging private enforcement and vindication of the statutory right at issue[69] in such areas as civil rights,[70] environmental law,[71] antitrust,[72] labor law,[73] and in many other

[65]*See e.g. supra* notes 14-35, and accompanying text (describing Alaska's Rule 82).

[66]*See infra* notes 69-79, and accompanying text (describing one-way fee-shifting under regulatory statutes).

[67]*See supra* notes 52-61, and accompanying text (describing contractual fee-shifting under a modified English Rule in the Eisenberg/Miller Study), and *infra* notes 80-90 and accompanying text (discussing discretionary fee shifting).

[68]*See supra* notes 36-50 and accompanying text.

[69]*See* Robert V. Percival & Geoffrey P. Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 LAW & CONTEMP. PROBS. 233, 240-41 (1984); Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 662 (1982); Note, *State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?*, 47 LAW & CONTEMP. PROBS. 321, 327-28 (1984). The motivation behind many such statutes is to enable financially disadvantaged parties with meritorious cases to obtain counsel in situations where contingent fees are not effective. *See* Issachar Rosen-Zui, *Just Fee Shifting*, 37 FLA. ST. U. L. REV. 717, 733 (2010) (noting certain fee-shifting statutes are intended to "facilitat[e] the access of low-income people to the civil justice system"). Efforts to attract counsel to represent parties with such claims via statutory fee shifting have met with mixed success, however. *See, e.g.*, Stewart Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statutes and the Government as Defendant*, 73 CORNELL L. REV. 719, 759-60 (1988) (finding no clear evidence that fee shifting leads to an increase in the number of cases filed).

[70]*See e.g.*, 42 U.S.C. § 1988; 42 U.S.C. § 3613(c) (Fair Housing Act); Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717 (5th Cir. 1974) (Title VII).

[71]42 U.S.C. § 6972(e) (Resource Conservation and Recovery Act); *see also* Fallowfield Dev. Corp. v. Strunk, Nos. CIV. A. 89-8644, CIV. A. 90-4431, 1993 WL 157723, at *17 (E.D. Pa. May 11, 1993) (denying attorney's fee award to prevailing for-profit corporate plaintiff).

[72]15 U.S.C. § 15 (Clayton Act).

[73]29 U.S.C. § 216(b) (Fair Labor Standards Act).

areas regulating social and economic life.[74] For example, *prevailing plaintiffs* in civil rights cases can recover their attorneys' fees "unless special circumstances would render such an award unjust"[75] while *prevailing defendants* generally may only recover fees by showing the plaintiff's litigation position was objectively unreasonable or brought in bad faith.[76]

One way fee-shifting is not only a product of a public policy judgment to affirmatively incentivize prosecution of certain types of claims that implicate third party or public interests. It is also seen as a remedy targeted at a particular shortcoming of the American Rule: That in some contexts it over-deters plaintiffs with meritorious small claims. A one way fee shift for prevailing plaintiffs in small claims litigation seems an appropriate remedy to this problem.[77]

A less benign, but still ubiquitous dynamic, may also result in one way fee-shifting. When there are significant disparities in wealth and bargaining power between contractual parties, the resulting agreement may impose one way fee recovery in favor of the more powerful party.[78] A few jurisdictions, in particular California, regulate this practice by imposing reciprocal fee-shift-

[74]Davis v. Bd. of Sch. Comm'rs, 526 F.2d 865, 868 (5th Cir. 1976) (Emergency School Aid Act of 1972, § 718, 20 U.S.C. § 1617); Torres v. Sachs, 69 F.R.D. 343, 348 n.5 (S.D.N.Y. 1975) (Voting Rights Act, 52 U.S.C. § 10310 (formerly cited as 42 U.S.C. § 1973/(e))); Camacho v. Bridgeport Fin., Inc., 523 F.3d 973, 981 (9th Cir. 2008) (Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(a)(3)); Ziegler Coal Co. v. Dir., Office of Workers' Comp. Programs, 326 F.3d 894, 903 (7th Cir. 2003) (Longshore and Harbor Workers' Compensation Act, § 928, 33 U.S.C. § 928); Gonter v. Hunt Valve Co., 510 F.3d 610, 620-21 (6th Cir. 2007) (False Claims Act, 31 U.S.C. § 3730); Porzig v. Dresdner, Klein-wort, Benson, N. Am., LLC, 497 F.3d 133, 143-44 (2d Cir. 2007) (Age Discrimination in Employment Act, 29 U.S.C. § 626); Public Interest Research Grp. of N.J., Inc. v. Windall, 51 F.3d 1179, 1190 (3d Cir. 1995) (Clean Water Act, 33 U.S.C. § 1365); Auto Alliance Int'l, Inc. v. U.S. Customs Serv., 155 Fed. App'x 226, 229 (6th Cir. 2005) (Freedom of Information Act, 5 U.S.C. § 552); Saldivar v. Rodela, 894 F. Supp. 2d 916, 939 (W.D. Tex. 2012) (International Child Abduction Remedies Act, 42 U.S.C. § 11607(b)); Am. Canoe Ass'n v. EPA, 138 F. Supp. 2d 722, 746 (E.D. Va. 2001) (Clean Water Act, 33 U.S.C. § 1365, and Endangered Species Act, 16 U.S.C. § 1540); Bd. of Trs. of Hotel & Rest. Emps. Local 25 v. JPR, Inc., 136 F.3d 794, 808 (D.C. Cir. 1998) (Employee Retirement Income Security Act, 29 U.S.C. § 1132(g)(2)).

[75]Newman v. Piggie Park Enter., Inc., 390 U.S. 400, 402 (1968).

[76]Christiansburg Garment Co. v. Equal Emp. Opportunity Comm'n, 434 U.S. 412, 419-421 (1978) (court may only award attorney's fees to a prevailing defendant if the plaintiff's action is "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.")

[77]*See, e.g.* NEV. REV. STAT. 18.010(2)(a) (fee shifting in favor of prevailing plaintiffs with claims less than $20,000). The Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.*, discussed *infra* notes 189-201 is another good example. Consumer contracts with arbitration clauses that place the burden of paying the costs of arbitration of meritorious claims, including the consumer's attorney fees, on the institutional defendant are also common. *See, e.g.* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 337 (2011) (describing arbitration scheme in cellular telephone consumer contracts).

[78]The argument in favor of imposing reciprocal fee-shifting in this context is made comprehensively in Jeffrey C. Bright, *Unilateral Attorney's Fees Clauses: A Proposal to Shift to the Golden Rule*, 61 DRAKE L. REV. 85 (2012). Professor Bright of course refers to the Golden Rule from Christian theology, not the one followed on Wall Street, "He who has the gold, rules."

ing by operation of law in these situations.[79] But when there is a significant disparity in wealth and power between the parties, even reciprocal fee shifting may systematically favor the wealthier party because of its ability to better bear the cost and risk of litigation.

2. *Discretionary Fee-Shifting*

Statutes and contracts often provide for fee-shifting in conditional terms thereby authorizing (but not mandating) fee-shifting in the court's discretion rather than as of right.[80] Most federal fee-shifting statutes, and many contracts, employ such conditional language, sometimes expressly defining the scope of the discretion conferred or the relevant factors to consider in exercising that discretion.

Often, whether or not the parties or the legislature have imposed express limitations or guidance on the court's discretion, courts balance multiple factors to focus and cabin the exercise of discretion in awarding attorney's fees. The factors may be derived from precedent, legislative history, policy or equitable considerations as well as from the statute or contract conferring the fee-shifting right. Many factors guiding the courts' discretion are closely tied to the particular area of law at issue.

Many federal statutes, including the Employee Retirement Income Security Act (ERISA), the Freedom of Information Act (FOIA) and the Internal Revenue Code follow a variation of the "substantially justified" standard developed under the Equal Access to Justice Act. This standard permits a prevailing party to recover attorney's fees from its adversary, usually the government, if the court finds the adversary asserted objectively weak claims or defenses even if it acted in good faith.

Still, cases under these statutes often employ context specific factors to guide the court's determination of whether it is reasonable to shift fees under this standard.

In ERISA cases courts employ a five-factor test that looks to:

> (1) the degree of the offending parties' culpability or bad faith;
> (2) the degree of the ability of the offending parties to personally satisfy an award of attorney's fees;
> (3) whether or not an award of attorney's fees against the offending parties would deter other persons acting under similar circumstances;

[79]*See infra* note 214 and accompanying text, discussing reciprocal fee-shifting under CALIFORNIA CIVIL CODE § 1717.

[80]DERFNER & WOLF, *supra* note 9, at ¶ 5.12.

> (4) the amount of benefit conferred on members of the pension plan as a whole;
> (5) the relative merits of the parties' position.[81]

These considerations must be weighed in the exercise of the court's discretion but no single one is necessarily controlling.[82]

FOIA's legislative history presents another context specific list of relevant fee-shifting factors:[83]

> (1) The benefit to the public, if any, deriving from the case;
> (2) The commercial benefit to the complainant;
> (3) The nature of the complainant's interest in the records sought; and
> (4) Whether the government's withholding of the records sought had a reasonable basis in law.

Each factor should be independently considered.[84] However, the fourth factor is deemed to be the most important; courts have denied fee awards even though the first three factors were met.[85]

The fee-shifting provision in the Internal Revenue Code allows taxpayers to recover attorney's fees in actions "relating to the determination, collection, or refund of any tax."[86] A court can deny the taxpayer a fee award if the government is deemed to be substantially justified in its position.[87] Some factors courts consider when making a determination of whether the government is substantially justified are:

> (1) The reasonability of the government's position as to the underlying tax dispute;
> (2) The novelty or uncertainty of the litigated issues;
> (3) The existence or absence of precedent or other supporting law for the government's position;

[81]Eaves v. Penn, 587 F.2d 453, 465 (10th Cir. 1978). *See* DERFNER & WOLF, *supra* note 9, at ¶ 10.22 n.5 (listing cases from each federal court of appeals adopting *Eaves* test) & *id.* at n.9 (listing cases); *see also* Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242, 245 (2010) (fee claimant need not prevail in the overall suit but must show some success on merits for a court to award attorney fees) & *id.* at 253 n.8, 255 (five factor test may be considered by court in awarding fees).

[82]*See* DERFNER & WOLF, *supra* note 9, at ¶ 10.22 n.9 (listing cases shifting fees on varying showings under the five factor test).

[83]S. REP. NO. 93-854, at 19 (1974).

[84]*Id.* at 19-20.

[85]*See* DERFNER & WOLF, *supra* note 9, at ¶ 10.23 (2020); Morley v. CIA, 894 F.3d 389, 392-97 (D.C. Cir. 2018).

[86]DERFNER & WOLF, *supra* note 9, at ¶ 10.25 (2020); 26 U.S.C. §?7430.

[87]*See* DERFNER & WOLF, *supra* note 9, at ¶ 10.25.

(4) The existence or absence of factual evidentiary support for the government's position.[88]

The list of relevant factors grows longer and more vague when the fee-shifting right is divorced from a particular statutory or contractual context. For example, Alaska's Rule 82 although providing for the English Rule and prescribing a fixed schedule for the court to use in imposing a fee-shift[89] also lists eleven open-ended factors on which judges can base an adjustment of the attorney's fee award prescribed by the Rule:

(1) the complexity of the litigation;
(2) The length of trial;
(3) The reasonableness of the attorneys' hourly rates and the number of hours expended;
(4) The reasonableness of the number of attorneys used;
(5) The attorneys' efforts to minimize fees;
(6) The reasonableness of the claims and defenses pursued by each side;
(7) Vexatious or bad faith conduct;
(8) The relationship between the amount of work performed and the significance of the matters at stake;
(9) The extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts;
(10) The extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by others against the prevailing party or its insurer;
(11) Other equitable factors deemed relevant.[90]

* * *

This brief survey of various discretionary fee-shifting regimes leads to the conclusion that a decision to move to a discretionary fee-shifting regime in a particular area of law is only the first step in a two-step process. It is not enough to decide that in a particular area fee-shifting is *sometimes* appropriate and confer an open-ended discretion upon the court. One must also consider when and under what particular circumstances and to what extent the fee shift is appropriate in order to help guide that exercise of discretion. The

[88] *Id.*
[89] ALASKA R. CIV. P. 82.
[90] ALASKA R. CIV. P. 82(b)(3).

factors that are relevant to that decision are likely to be context specific, non-exclusive, and of varying weights, and may operate differently depending upon whether the fees are sought by plaintiff rather than defendant or private party rather than a government or other institutional entity.

III. ATTORNEY'S FEES IN BANKRUPTCY

A. Fee-Shifting in Bankruptcy Today.

The assumption that the "bedrock principle known as the American Rule" is the proper default rule with respect to attorney's fees in bankruptcy is a mistake. *Baker & Botts* is only one case in point;[91] the mistake has been repeated numerous times, and not just by the Supreme Court.

It blinks reality to declare that the bedrock principle in bankruptcy is each litigant pays its own attorney's fees.

- Chapter 11 debtor's counsel is compensated by the bankruptcy estate. Since most bankruptcy debtors are insolvent, that compensation is effectively borne by the debtor's creditors. If insufficient unencumbered assets exist to pay those fees out of the estate as a matter of practice the secured creditor will bear those fees out of its collateral pursuant to a court-approved carve-out.[92]
- The secured creditor's fees are commonly shifted to the estate as well either by operation of law in the case of a secured party whose collateral value exceeds the amount of it claim under section 506(b), or pursuant to the terms of financing orders routinely entered at the beginning of the case affording the secured party "adequate protection" under sections 361and 363.[93]
- Unsecured creditors are represented by an official committee also entitled to retain counsel at estate expense. If an equity committee is appointed, public shareholders too may shift the burden of paying their counsel to the estate and if

[91] *See supra* note 1 & *infra* notes 151-187 and accompanying text.
[92] 11 U.S.C. §§ 327-31, 363-64, 503(b)(1). The economic incidence of the estate's administrative expenses falls on different constituents in different cases. *See also* Richard B. Levin, *Almost All You Ever Wanted to Know About Carve Out*, 76 AM. BANKR. L.J. 445 (2002). It is often unclear whether the burden of the financing order carve-out is intended to fall on the secured party or on the estate generally. *Id.* at 448-51. Although financing orders with carve-outs are approved under section 363 (use of estate property including cash collateral) and 364 (post-petition financing) nothing in those sections explicitly provides for either fee-shifting or carve-outs. Fee-shifting in favor of individual debtor's counsel also occurs in the Chapter 12 and Chapter 13 context. *In re* Steen, 631, B.R. 704, 2021 WL 2877515 at *4-8 (Bankr. N.D. Tex. July 7, 2021) (§ 330(a)(4)(B) authorizes payment of individual debtor's counsel from estate in discretion of court).
[93] 11 U.S.C. § 361, 363-64, 506(b).

that estate is insolvent effectively force creditors generally to bear that cost including creditors in constituencies adverse to the committee.[94]

- Bankruptcy trustees commonly are members of the law firms they retain to represent them.[95] For them legal fees are not a cost but a profit center. Indeed, the generous compensation afforded to the trustee's attorneys commonly dwarf the relatively stingy statutory commission available to compensate the trustee himself.[96]
- Non-debtor parties to unexpired leases and executory contracts may enjoy a statutory claim to post-bankruptcy attorney's fees upon assumption and reinstatement of their contracts under section 365(b) as a part of the right to cure and adequate assurance of future performance if their contracts so provide. Attorney's fee claims under assumed contracts and leases are paid as administrative claims with priority over all other unsecured and priority pre-petition claims.[97]
- Contractual creditors, even those whose contracts are not assumed and without sufficient collateral to enjoy a statutory claim to post-bankruptcy attorney's fees under section 506(b), commonly may add attorney's fees incurred in bankruptcy to their claim and receive a pro rata distribution of their claims along with other unsecured creditors. In those jurisdictions in which reciprocal fee shifting rights exist, if these creditors wind up in litigation with the debtor or trustee and do not prevail, they may wind up paying the fees of debtor's or trustee's counsel.[98]

[94]11 U.S.C. §§ 330(a)(1), 503(b), 507(a)(2) and 1102-03.

[95]There is no impropriety in a trustee employing his otherwise qualified law or accounting firm to render necessary professional services after making full disclosure of his connections to the firm to the court and the parties in accordance with the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure and obtaining the consent of the U.S. Trustee and the court. 3 COLLIER ON BANKRUPTCY ¶ 327.04[8] (16th ed. 2020) ("Section 327(d) specifically permits the court to authorize a trustee to act as attorney or accountant for the estate but requires the court to find that such authorization is in the best interest of the estate. . . . The selection of the trustee might be made largely with the view of consolidating the functions of trustee and attorney [or accountant] in one person for the purpose of reducing the cost of administering the case.")

[96]*Compare* 11 U.S.C. §§ 326 and 330(a)(7) (fixing trustee compensation), *with id.* at §§ 327, 328 and 330(a)(1)-(4) (standards for allowance of fees and expenses of professional persons).

[97]11 U.S.C. §§ 365(b), 503(b), 507(a)(2).

[98]Travelers Cas. & Sur. Co. v Pac. Gas & Elec. Co., 549 U.S. 443 (2007); *In re* Penrod, 802 F.3d 1084 (9th Cir. 2015). These cases are discussed *infra* notes 212-218, and accompanying text. Note that if the non-debtor party is solvent the "reciprocal" fee award will be payable at 100 cents on the dollar while the

- Fee-shifting is also available as damages or a sanction for violations of the automatic stay, the bankruptcy discharge, or other court orders. The bankruptcy court has inherent power to assess attorney's fees against a party on the basis of bad faith misconduct and express statutory authority to do so in the case of paid petition preparers. Rule 9011 sanctions also may include the payment of the counterparty's attorney's fees.[99]
- Parties making "substantial contributions" to a bankruptcy case may also apply to the court for an allowance of attorney's fees out of the estate or may negotiate for such payment under the terms of a negotiated plan. Indenture trustees, unofficial committees and other non-bankruptcy fiduciaries may collect their fees out of the distributions otherwise payable to their constituencies even in the absence of making a substantial contribution to a case.[100]
- Expenses incurred for the preservation of collateral (including fees of estate professionals) may sometimes be surcharged against that collateral, effectively shifting the fees to the secured party.[101]
- Disappointed stalking horse bidders may receive fee reimbursement under the terms of court-approved bidding procedures.[102]
- Debtors may recover their attorney's fees from petition-

prevailing creditor's claim for attorney's fees under the contract will only be paid *pro rata* with other unsecured claims at a level that will be determined by the depth of the debtor's insolvency. *See also In re* Hawkeye Ent., LLC, 625 B.R 745 (Bankr. C.D. Cal. 2021) (awarding prevailing debtor nearly $606,000 in attorney's fees in lease assumption litigation).

[99]11 U.S.C. §§ 105(a) (orders in aid of jurisdiction), 110(i) (recovery of debtor's counsel fees from paid petition preparers), 362(k) (damages from violation of automatic stay, 524 (discharge injunction); *see also* FED R. BANKR. P. 9011; 28 U.S.C. § 1927. Bankruptcy courts also commonly invoke their "inherent powers" to award compensatory sanctions for litigant or professional misconduct in the form of granting or denying compensation for attorney fees. *See, e.g.*, Chambers v. NASCO, Inc., 501 U.S. 32, 50 (1991); *In re* Dyer, 322 F.3d 1178,1187 (9th Cir. 2003); *In re* Caranchini, 160 F.3d 420, 423 n.3 (8th Cir. 1998); *In re* Rimsat, Ltd., 212 F.3d 1039, 1047 (7th Cir. 2000). *But see* Taggart v. Lorenzen, 139 S.Ct. 1795, 1801 (2019) (imposing civil contempt standard of "no objectively reasonable basis for concluding that the creditor's conduct might be lawful" on discharge violation sanctions). The inherent powers of bankruptcy courts, which do not exercise the full breadth of the federal judicial power under the Constitution, may be more circumscribed than those of the Article III judiciary in some instances. *See, e.g., In re* Courtesy Inns, Inc., 40 F.3d 1084, 1086 (10th Cir. 1994) (bankruptcy court not "court of the United States" under 29 U.S.C. § 1927).

[100]11 U.S.C. § 503(b)(3), (4).

[101]11 U.S.C. § 506(c). *But see* GECC v. Levin & Weintraub, 739 F.2d 73, 76-77 (2d Cir.1984); Hartford Underwriters Ins. Co. v. Union Planters Bank, 8-9 (2000).

[102]Expense reimbursement and break-up fees for stalking horse buyers are commonly approved under 11 U.S.C. § 363. DANIEL J. BUSSEL, DAVID A. SKEEL, JR. & MICHELLE M. HARNER, BANKRUPTCY

ing creditors if they succeed in dismissing an involuntary case.[103]

- Socialization of the parties' legal costs is a common feature of court-approved bankruptcy settlements both outside and under a reorganization plan.[104]

As this non-exclusive list makes clear, it turns out that in bankruptcy, at the end of the day, most of the major parties are not bearing their own attorney's fees. An extraterrestrial observing the scene from the heavens could be forgiven for viewing chapter 11 as a creative mechanism for retaining, compensating, and shifting the cost of attorneys and other professionals among the parties.

But bankruptcy is more than an engine for the creation and distribution of professional fees. It is a collective proceeding that involves a multiplicity of parties with both cooperative and competing interests rife with strategic behavior that may include pretextual or meritless assertion of claims and objections. Although strategic litigation behavior is certainly not limited to bankruptcy cases, these problems multiply in the context of complex collective proceedings. Given the number of parties, the immense range of activity regulated by the bankruptcy court, and the ease of access to the bankruptcy court, strategic litigation by bullies, hold-outs, and squeaky wheels are endemic concerns in bankruptcy.

Appellate courts are largely insulated from this behavior by the substantial barriers to appellate review they (with an assist from Congress) have erected in the form of standing,[105] mootness[106] and finality doctrines.[107] Collectively, these doctrines sharply limit the ability of parties to use appellate process to delay or obstruct bankruptcy proceedings for purposes of obtaining leverage in negotiations.[108] But control over the allowance and incidence of legal fees is one of the important levers that bankruptcy courts have to limit such destructive strategic behavior at the trial level.

Finally, sound fee-shifting regimes depend upon a mechanism for state regulation or court supervision of the amount of fees being shifted. Accordingly, the bankruptcy courts, in coordination with the Office of the United States Trustee, have evolved elaborate mechanisms for routinely assessing the reasonableness and payment of attorney's fees subject to court allowance.[109]

In this context it is fatuous to treat the American Rule as a basic point of reference for allocating attorney fees among the parties in bankruptcy. Fee-shifting is pervasive; the bankruptcy court and US Trustee are directly involved in reviewing the fees; sometimes it is almost impossible to figure out who is actually footing the bills. Neither the American Rule nor the English Rule is the baseline or background principle. This is as true in American practice as it is in the United Kingdom.[110]

B. The Historical Equitable Exceptions to the American Rule Undergirding Fee Shifting in Bankruptcy.

Perhaps, as *Baker & Botts* claimed, in 1796 "[t]he general practice of the United States [was] in opposition" to forcing one side to pay the other's attorney's fees, and "even if that practice [is] not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by

889-92 (11th ed. 2021); *see also* Bruce A. Markell, *The Case Against Break-up Fees in Bankruptcy*, 66 Am. Bankr. L. J. 349 (1992).

[103]11 U.S.C. § 303(i). Similarly, debtors may recover their attorney's fees from bankruptcy petition preparers who have committed fraudulent, unfair or deceptive acts. 11 U.S.C. § 110(i).

[104]This practice of socializing the legal costs of key constituents in reorganization proceedings predated statutory fee-shifting in bankruptcy. It was an established part of the judicially created federal equity receivership practice that formed the model for modern chapter 11 and former statutory reorganization procedures under the Chandler Act and 11 U.S.C. § 77B. United States v. Chicago, M., St. P. & P.R. Co., 282 U.S. 311, 319-20 (1931) (describing equity receivership plan compensation provisions for multiple committees of creditors, stockholders and managers).

[105]Appellate standing in bankruptcy is limited to "persons aggrieved," that is those with a pecuniary interest in the outcome of the appeal, a category that excludes many parties in interest that meet constitutional standing requirements. *In re* El San Juan Hotel, 809 F.2d 151, 154 (1st Cir.1987); *In re* Fondiller, 707 F.2d 441, 443 (9th Cir.1983).

[106]Much of the strategic behavior in bankruptcy involves disputes over interlocutory matters from which no appeal of right lies. Although interlocutory appeals may be taken to the federal district court or bankruptcy appellate panels, doing so requires leave of the appellate court. Appellate courts including the Supreme Court sometimes stretch the meaning of finality to pragmatically permit review of discrete proceedings. *See generally* Ritzen Group, Inc. v. Jackson Masonry, LLC, 140 S. Ct. 582 (2020). But in other instances such consequential rulings as the denial of confirmation of a reorganization plan may escape appellate review. Bullard v. Blue Hills, 575 U.S. 496, 503 (2015).

[107]When final orders are entered, unless a stay pending appeal issues, changes in position by the parties in reliance on the orders may effectively preclude appellate review under equitable mootness doctrines. Equitable mootness is discussed at length in *In re* Tribune Media Co., 799 F.3d 272 (3d Cir. 2015). In cases involving bankruptcy sales or financing, these equitable principles are codified and expanded by statute. 11 U.S.C. §§ 363(m); 364(e). Stays pending appeal generally require the posting of substantial bonds and are rarely obtained.

[108]*See* Adam J. Levitin, Purdue's *Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 Tex. L. Rev. (forthcoming 2022); Daniel J. Bussel, *Textualism's Failures: A Study of Overruled Bankruptcy Decisions*, 53 Vand. L. Rev. 887, 918-21 nn.108-110 (2000).

[109]*See, e.g.*, Bankr. S.D.N.Y. R. 2016-1 (Compensation of Professionals); Bankr. D. Del. R. 2016-2 (Motions for Compensation and Reimbursement of Expenses); *Appendix B: Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed Under United States Code by Attorneys in Larger Chapter 11 Cases*, 78 Fed. Reg. 36,248 (June 17, 2013); *Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed Under 11 U.S.C. § 330*, 28 C.F.R. Pt. 58 App. A (2021).

[110]The insolvency exception to the English Rule in UK reorganization practice is discussed *infra* notes 270-272 and accompanying text. *See also* Chris Howard & Bob Hedger, Restructuring Law & Practice ¶¶ 4.106-4.107 (LexisNexis 2d ed. 2014) ("The range, type and structure of fees payable on a restructuring are only really limited by the imagination of the various constituencies and their respective advisors . . . . The quantum of such fees remains negotiable, but market practice has clearly developed and fees will be paid in almost all circumstances.")

statute."[111] The general practice of the United States bankruptcy courts, however, consistent with the existing statutory scheme enacted by Congress, does not make attorney's fees strictly a matter of contract between lawyer and client.[112] Indeed, even in the 19th century when the American Rule became otherwise broadly entrenched in United States practice, courts recognized that collective proceedings (such as bankruptcy cases) involved special considerations requiring equitable exceptions to the American Rule.[113] Pervasive fee-shifting subject to court supervision is the historical practice in bankruptcy. The federal common law out of which the American Rule grew also incorporated these exceptions and grafted them onto the American Rule. This historic practice is equally entitled to the respect of the appellate courts unless Congress explicitly directs otherwise.

Three main categories of equitable exceptions to the American Rule developed in the caselaw in the 19th century: (1) common fund, (2) substantial benefit, and (3) bad faith and contempt. For present purposes, I will leave the bad faith exception to the side. There is broad agreement inside and outside of bankruptcy that discretionary fee-shifting is appropriate in situations where the prevailing party has been forced to fight off bad faith or frivolous claims and defenses.[114]

[111]Baker & Botts LLP v. ASARCO LLC, 576 U.S. 121, 135 (2015) (quoting Arcambel v. Wiseman, 3 U.S. 306, 306 (1796)). In fact, it is probably not true that the American Rule was the general practice in 1796. John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROB. 9, 10-13 (1984) explains that in the 18th century virtually all colonial legislatures in British America regulated attorney's fees by statute, and American courts routinely awarded the regulated fee to the prevailing party in accordance with British practice. Beginning towards the end of the 18th century and into the 1820s legislative regulation of attorney's fees fell into desuetude, and the state-approved fee schedules were increasingly ignored or repealed, because market prices exceeded the regulated rates by a large margin. As regulation faded, attorney's fees were set at market rates determined by contract between attorney and client. At this point, the American Rule emerged as the dominant rule since any fee-shifting regime depends on either state regulation or court supervision of the fees being shifted. By the middle of the 19th century state regulation of attorney's fees and court supervision of prices freely negotiated in the marketplace had fallen into deep disfavor. Historically, the emergence of the American Rule appears to have been tied to the desire to eliminate state regulation of legal fees, not any desire to increase access to justice. *Id.*

[112]Indeed, the pre-Code practice with respect to the allowance of attorney's fees incurred in defense of fee applications, the specific issue at stake in *Baker & Botts,* was that recovery of the fees by the prevailing applicant were allowable in the court's discretion. *See infra* notes 151-165, and accompanying text.

[113]*See* Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939). That exception had previously been applied in cases where a plaintiff traced or created a common fund for the benefit of others as well as himself. Cen. R.R. & Banking Co. v. Pettus, 113 U. S. 116 (1885); Trustees v. Greenough, 105 U. S. 527 (1881). *Sprague* itself involved a variation of the common fund situation where, although the plaintiff had not in a technical sense sued for the benefit of others or to create a common fund, the stare decisis effect of the judgment obtained by the plaintiff established as a matter of law the right of a discernible class of persons to collect upon similar claims. *Sprague*, 207 U.S. at 163. The Court held that the general equity power "to do equity in a particular situation" supported an award of attorney's fees under such circumstances for the same reasons that underlay the common fund decisions. *Id.* at 166-67.

[114]*See e.g.* FED. R. BANKR. P. 9011.

The common fund exception allows a prevailing party to collect attorney's fees from a common fund when others (who did not actively participate in the litigation) benefited from the litigation via the creation, protection, or enhancement of that fund. The award is taken out of the common fund as a way of preventing the beneficiaries from being unjustly enriched.

The substantial benefit exception overlaps with the common fund exception and applies when others have benefited as a result of the prevailing party's litigation even in the absence of a common fund. This exception typically arises when the beneficiaries are sufficiently represented by the defendant and so the court shifts the prevailing plaintiff's fees onto the defendant, who is then in position to spread the costs across the benefiting parties appropriately. There are two primary subcategories of cases under the substantial benefit exception discussed below: corporate therapeutics cases and union democracy cases.[115]

Both the common fund and substantial benefit cases drew heavily on bankruptcy precedent.[116]

The common fund exception to the American Rule permits a prevailing party or the prevailing party's attorney to recover attorney's fees from a common fund resulting from the prevailing party's successful prosecution of its claims creates a common fund benefiting itself and others.[117] The exception is based "on the perception that persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant's expense."[118] Typically, a party recovers its fees from a fund that is created as a result of litigation, but a party may recover where they "enhance, preserve, or protect" a fund.[119] Thus, it is not necessary that the fund was created as a result of litigation. The fund must be under control of the court, such that the court can compel a payment from that fund.[120] Furthermore, the award must be made before a fund has been fully distributed to its beneficiaries.[121]

The common fund exception was the first equitable exception to the American Rule recognized by the Supreme Court, in *Trustees v. Greenough.*[122] In *Greenough* the plaintiff, on behalf of himself and other bondhold-

[115]*See infra* notes 136-148 and accompanying text.

[116]*See infra* notes 122-126, and accompanying text.

[117]DERFNER &. WOLF, *supra* note 9, at ¶ 2.10.

[118]Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980).

[119]Abbott, Puller & Myers v. Peyser, 124 F.2d 524, 525 (1941).

[120]*See* DERFNER & WOLF, *supra* note 9, at ¶ 2.30; Trustees v. Greenough, 105 U.S. 527, 536 (1882).

[121]*See* DERFNER & WOLF, *supra* note 9, at ¶ 2.30; Wyser-Pratte v. Van Dorn Co., 49 F.3d 213, 218-19 (6th Cir. 1995); National Ass'n for Mental Health v. Califano, 717 F.2d 1451, 1456-57 (D.C. Cir. 1983).

[122]105 U.S. 527 (1881). *Greenough*, however, is hardly the first American authority recognizing a bankruptcy exception to the American Rule. *Greenough* relied on a long line of authorities stretching back

ers, successfully sued the trustees of a Florida railroad company for corruptly selling land to insiders at nominal prices.[123] After entering judgment for the recovery of the fraudulent transfers, the court went on to award attorney's fees to the plaintiff because it was unjust for him to solely bear the costs of litigation where the other bondholders had benefited on a pro rata basis.[124] The *Greenough* Court noted parties had historically been entitled to attorney fees where a fund was created for the benefit of creditors in bankruptcy cases:

> The rule that a party who recovers a fund for the common benefit of creditors is entitled to have his costs and expenses paid out of the fund, prevails in bankruptcy cases. In *Worrall v. Harford*, Lord Eldon said: 'The petitioning creditor is answerable till the assignment. Can there be a doubt that the assignees, if there be nothing special in the deed, would have a clear right to pay all the expenses incurred? It would be implied if not expressed.' This rule has been followed by the District Courts of the United States. See a forcible opinion of Judge Bryan, *In re Williams*, in the District Court of South Carolina; and *In the Matter of O'Hara*, in the western district of Pennsylvania. In a case in Massachusetts before Judge Lowell the same rule was adopted. The petitioning creditors charged as an act of bankruptcy the execution of a mortgage by the debtors, and having succeeded, after much opposition, in substantiating the charge, they asked that counsel fees should be allowed them out of the estate.[125]

to the English Chancery court that recognized that fee-shifting operated differently in bankruptcy and other common-fund cases. *Id.* at 533–36. Those principles operated to create non-statutory equitable exceptions to the American Rule when transported across the Atlantic and applied to bankruptcy cases. The continuing vitality of those principles was recognized in *Matter of* O'Hara, 17 [8 New Series] AM. L. REG. 113, 117 (W.D. Pa. 1869) ("The strong equities of the petitioner's case are not difficult to discover; and the practice under the [Bankruptcy A]ct of 1841 was to allow such a charge out of the assets . . .As the solution of this question does not depend upon any statutory provision, and, as a precedent, is of consequence to the profession and the public, before concurring with the Register, I have given to the subject mature consideration. I have arrived at the conclusion that his opinion is based on sound principles, and sustained by sufficient authority. The fund is within the control of the court, and it is our province so to administer it as to do exact justice to all the creditors. We have judicial knowledge of the professional services rendered by able counsel of the petitioning creditors, by whose exertions the fund has been realized; and as we consider the fee charged reasonable, it is proper that their compensation, as one of the incidental expense, should be deducted before distribution."); *see also In re* Williams, 2 BANKR. REG. 28 (D.S.C. 1868) (fees of prevailing petitioning creditor allowable against the insolvent estate as determined by court); *Ex parte* Plitt, 19 Fed. Cases 875, 2 Wall. Jr. 453 (E.D.Pa. 1853) (intestate estate).

[123]*Greenough*, 105 U.S. at 528–30.

[124]*Id.* at 532.

[125]*Id.* at 534 (citations omitted).

Similar understandings widely prevailed at the time of *Greenough* in the context of reorganizations conducted through equity receivership practice:

> In the vast amount of litigation which has arisen in this country upon railroad mortgages, where various parties have intervened for the protection of their rights, and the fund has been subjected to the control of the court and placed in the hands of receivers or trustees, it has been the common practice, as well in the courts of the United States as in those of the States, to make fair and just allowances for expenses and counsel fees to the trustees, or other parties, promoting the litigation and securing the due application of the property to the trusts and charges to which it was subject. Sometimes, no doubt, these allowances have been excessive, and perhaps illegal; and we would be very far from expressing our approval of such large allowances to trustees, receivers, and counsel as have sometimes been made, and which have justly excited severe criticism.
>
> Still, a just respect for the eminent judges under whose direction many of these cases have been administered would lead to the conclusion that allowances of this kind, if made with moderation and a jealous regard to the rights of those who are interested in the fund, are not only admissible, but agreeable to the principles of equity and justice.[126]

Just three years later in *Central Railroad & Banking Co. v. Pettus*,[127] the Supreme Court expanded the common fund exception to allow attorneys to directly recover their fees from a common fund.[128] In *Pettus*, the Court granted a lien on a common fund's assets to the prevailing party's attorneys in case other creditors who benefited from the judgment refused to pay extra legal fees.[129]

The next major precedent on the common fund exception to the American Rule came in *Sprague v. Ticonic National Bank*, where the Court allowed an attorney fee award despite the fact the suit was not brought for the benefit of other depositors.[130] Still, the Court awarded attorney fees because "in

[126]*Id.* at 536–37.

[127]113 U.S. 116 (1885).

[128]*Central Railroad & Banking Co.*, 113 U.S. at 127. *But see* John P. Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 HARV. L. REV. 1597, 1603 (1974) (criticizing the *Pettus* extension of *Greenough* and arguing that direct recovery to attorneys of compensation in excess of their contractual entitlement with their client under the common fund exception can only be explained by "guild" attitudes shared by judges and lawyers as members of a shared profession).

[129]Dawson, *supra* note 128, at 1604.

[130]Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 166 (1939).

view of the consequences of stare decisis, the petitioner by establishing her claim necessarily established the claims of fourteen other trusts pertaining to the same bonds."[131] Thus, it did not matter the plaintiff had formally brought the claim on behalf of solely herself as the claims of those similarly situated could be easily established and collected given the "stare decisis" effect of her judgment.[132]

In *Boeing Co. v. Van Gemert*, the Supreme Court expanded the awarding of attorney's fees to unclaimed portions of a common fund.[133] Even though the defendant had a claim on the remaining unclaimed money from the fund, the court concluded this "may not defeat each class member's equitable obligation to share the expenses of litigation."[134] *Boeing* allowed plaintiffs' attorney's fee awards to be collected from a total fund available to class members even if some of the fund was ultimately returned to the defendant because a number of putative beneficiaries failed to file timely claims.[135]

The substantial benefit exception is similar in principle to the common fund exception.[136] The key distinction is that under the substantial benefit exception there is no common fund for the award to be taken out of. The court in *Mills v. Electric Auto-Lite* described this doctrine as "permit[ing] reimbursement in cases where (1) the litigation has conferred a substantial benefit (2) on the members of an ascertainable class, and (3) where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them."[137] The court in *Mills* also clarified that a substantial benefit "must be something more than technical in its consequence and be one that accomplishes a result which corrects or prevents an abuse which would be prejudicial to the rights and interests of the corporation or affect the enjoyment or protection of an essential right to the stockholder's interest."[138] Indeed, the benefit conferred is not required to be monetary although of course, it usually is.[139]

[131]*Id.*

[132]Although the *Sprague* court purported to rely on "*stare decisis*" as the benefit conferred justifying attorney fee-shifting, in modern terms *Sprague* appears to turn on the benefit Sprague afforded similarly situated non-party beneficiaries of the prior ruling for offensive use of issue preclusion against the common defendant in the same forum on the basis of her prior judgment. *See* REST. OF JUDGMENTS (SECOND) § 29. It is not plausible to interpret *Sprague* as conferring a continuing lien in favor of an attorney who merely establishes a favorable controlling precedent against recoveries by nonparty plaintiffs from nonparty defendants in future litigation. No court appears to have done so. Dawson, *supra* note 128, at 1610-11.

[133]Boeing Co. v. Van Gemert, 444 U.S. 472 (1980).

[134]*Id.* at 747.

[135]DERFNER & WOLF, *supra* note 9, at ¶ 2.01.

[136]*Id.* at ¶ 3.01.

[137]Mills v. Electric Auto-Lite Co., 396 U.S. 375, 393-94 (1970).

[138]*Id.* at 396.

[139]*See* Koppel v. Wien, 743 F.2d 129, 133-34 (2d Cir.1984) (finding it "irrelevant to plaintiffs' entitlement to attorney's fees. . .that the amount of the benefit conferred may not be precisely ascertained.").

This exception does not permit a court to shift fees as "an added penalty to the defendants."[140] Thus, an attorney's fee award can only come from a defendant if the defendant represents the beneficiaries of the plaintiff's efforts. The Supreme Court has expressly recognized the substantial benefit exception in two contexts: (1) corporate therapeutics cases and (2) union democracy cases.[141] Moreover, the Bankruptcy Code itself expressly codifies and expands both the *Greenough* and *Pettus* principles of charging the estate for the attorney's fees of parties that render a "substantial contribution" to the bankruptcy case, including, but not limited to, the recovery for the benefit of the estate of property wrongfully transferred by the debtor.[142]

Corporate therapeutics cases occur when the plaintiff has "conferred non-pecuniary benefits on all the shareholders of the corporation, and the corporation, which is the alter ego of the shareholders, is obligated to pay the fee award."[143] In *Mills*, the Court awarded attorney's fees because the plaintiffs, who were shareholders of the defendant corporation, had proved a violation of the Securities and Exchange Act, which incurred a substantial benefit on the other shareholders.[144] Since the beneficiaries were shareholders of the defendant corporation, the Court imposed the attorney's fees on corporation effectively causing all shareholders to bear the legal expense of the prevailing party pro rata.[145]

Union democracy cases occur when an individual union member successfully sues his union, conferring a benefit upon other union members as well as himself.[146] In *Hall v. Cole*, plaintiff was expelled from his labor union and sued to restore his membership.[147] The Court awarded plaintiff attorney's fees from the defendant labor union because the court's holding benefited union members generally and the defendant was an adequate representative of these workers' interests.[148]

IV. THE AMERICAN RULE IN BANKRUPTCY

Although the American Rule plays a very minor role in bankruptcy generally, significant gaps and lacunae persist, and the Supreme Court's insistence that such gaps are by default governed by the American Rule has

[140]Schell v. OXY USA Inc., 814 F.3d 1107, 1126 (10th Cir. 2016).

[141]*See* DERFNER & WOLF, *supra* note 9, at ¶ 3.10-11 .

[142]11 U.S.C. §§ 503(b)(3)(A)-(E) (reimbursement of party) & 503(b)(4) (direct substantial contribution claim of attorney).

[143]*See* DERFNER & WOLF, *supra* note 9, at ¶ 3.10 (citing Mills v. Electric Auto-Lite Co., 396 U.S. 375, 39-94, listing "corporate therapeutics" cases).

[144]Mills v. Electric Auto-Lite Co., 396 U.S. 375, 391-92 (1970).

[145]*Id.*

[146]See DERFNER & WOLF, *supra* note 9, at ¶ 3.11 for a list of "union democracy" cases.

[147]Hall v. Cole, 412 U.S. 1, 3 (1973).

[148]*Id.* at 13-14.

repeatedly led to problems. *Baker & Botts*, discussed briefly above, is one example, worthy of more in-depth examination.[149] The Supreme Court's reliance on the American Rule also creates unfortunate incentives in connection with claim objection practice as is made clear by the discussion of *Midland Funding* below.[150] A third example is the poor incentive structure created by the American Rule in preference law where most cases are determined conclusively on the basis of affirmative defenses but no mechanism exists for the unfortunate preference defendant to come out whole if it must incur legal fees to assert those defenses. These examples, while not exhaustive, illustrate that reflexive reliance on the American Rule as a default rule is a poor fit for bankruptcy litigation, leading to systemic problems which may be obviated or ameliorated through fee-shifting.

A. Fee Objection Litigation.

Baker & Botts[151] was counsel to ASARCO in it chapter 11 reorganization filed in 2005. The great value of the services it rendered and the strategic nature of the bitterly contested objection lodged against its fee application, are apparent from a brief review of the facts of the case.[152] Unfortunately, overcoming that meritless objection cost Baker & Botts an additional $5 million in legal fees that the Supreme Court found unrecoverable under the American Rule.[153]

ASARCO mined and refined basic industrial commodities most importantly copper. Its crown jewel was its controlling interest in Southern Peru Copper Company (SPCC), a publicly traded Peruvian copper company. In late 1999, Grupo Mexico S.A.B. de C.V. (Grupo), a Mexican mining corporation, acquired ASARCO in a highly leveraged transaction for $2 billion.[154]

ASARCO had significant operating, liquidity, labor, asbestos, and environmental issues in addition to the acquisition-related debt it assumed in the Grupo transaction. By Fall 2001, ASARCO's financial difficulties became critical. In October 2001, ASARCO engaged Sidley Austin to provide bankruptcy and restructuring advice. In late 2001, Grupo loaned $41.75 million to ASARCO to keep it afloat. Financial problems mounted throughout 2002. Toward the end of 2002, ASARCO's banks demanded repayment of its revolving credit line and threatened foreclosure (including foreclosure of its SPCC stock) if the debt was not paid. Moreover, $100 million in public debt — the so-called "Yankee Bonds" — was coming due on February 3, 2003.[155]

The insiders at Grupo and ASARCO "believed that ASARCO had only two feasible courses of action: bankruptcy or the sale of assets."[156] ASARCO's most valuable and liquid asset was its SPCC stock. However, Grupo, being in the copper business itself, did not want to relinquish control of this valuable asset. Grupo decided ASARCO's restructuring would be premised on an intercompany sale of the SPCC stock to it rather than on an arms-length transaction.[157]

The transaction closed on March 31, 2003. Despite some relief from its debt obligations as a result of the sale of the SPCC stock to Grupo, ASARCO remained in dire financial straits from 2003-2005. Cash flow problems increased, and asbestos-related and environmental liabilities mounted. ASARCO put a number of its subsidiaries into bankruptcy in early 2005, and filed its own Chapter 11 case on August 9, 2005.[158]

On February 2, 2007, Baker & Botts filed suit on behalf of the ASARCO bankruptcy estate against Grupo alleging that the sale of ASARCO's SPCC stock to Grupo was an avoidable fraudulent transfer that had unlawfully depleted ASARCO's estate.[159] The estate ultimately obtained a judgment against Grupo worth between $7 and $10 billion, enabling a successful reorganization in which all of ASARCO's creditors were paid in full. After over four years in bankruptcy, ASARCO emerged in 2009 with $1.4 billion in cash, little debt, and with its environmental liabilities resolved.[160]

As part of this successful final resolution, however, New ASARCO remained a subsidiary of Grupo and emerged from bankruptcy under its control.[161] Following consummation of the reorganization plan, Baker & Botts filed its final fee application seeking final allowance of compensation for its services to old ASARCO.[162]

New ASARCO objected to allowance of Baker & Botts's fee application. After extensive discovery and a six-day trial on fees, the bankruptcy court

[149] *See infra* notes 151-165 and accompanying text.

[150] *Midland Funding LLC v. Johnson*, 137 S. Ct. 1407 (2017), is discussed *infra* notes 186-203 and accompanying text. In a few jurisdictions, state laws providing for statutory reciprocal fee-shifting if contractual fee-shifting might have been available to one of the parties may provide some relief. *In re* Andrade-Garcia, 627 B.R. 158, 170-71 (Bankr. D. Nev. 2021).

[151] Baker & Botts LLP and Jordan, Hyden, Womble, Culbreth & Holzer, PC were co-counsel for the debtor in ASARCO and the fee application litigation discussed here involved both firms. Baker & Botts LLP v. ASARCO LLC, 576 U.S. 121, 124 (2015). For convenience sake, I refer to the petitioners collectively as "Baker & Botts."

[152] The background facts are drawn from the bankruptcy court's opinion in connection with the underlying fraudulent transfer matter. ASARCO LLC v. Americas Mining Corp., 404 B.R. 150 (Bankr. S.D. Tex. 2009).

[153] *Baker & Botts*, 576 U.S. at 125.

[154] *ASARCO*, 404 B.R. at 155.

[155] *Id.*

[156] *Id.* at 156.

[157] *Id.* at 155-56.

[158] *Id.* at 156.

[159] 11 U.S.C. § 544(b).

[160] *Baker & Botts*, 576 U.S. at 124-25.

[161] ASARCO v. Americas Mining Corp., 404 B.R. 150, 155 (S.D. Tex. 2009).

[162] *Baker & Botts*, 576 U.S. at 125.

rejected New ASARCO's objections and awarded Baker & Botts $120 million for its work in the bankruptcy proceeding plus a $4.1 million enhancement for exceptional performance.[163] The bankruptcy court also awarded over $5 million in fees for time spent litigating in defense of the fee application.[164]

The Supreme Court, rejecting statutory and policy arguments offered by the petitioner and various *amici* (including the Solicitor General),[165] reversed the $5 million fee award relying on the American Rule.[166] It found no explicit statutory authority in the Bankruptcy Code supporting an award of attorney fees for Baker & Botts defense of its fee application even though the statute expressly authorized compensation for the cost of preparation of the fee application.[167]

The Supreme Court's *Baker & Botts* decision is problematic on many fronts. Construing the Code to authorize the allowance of costs of preparing the fee application but not the costs of successfully defending to it is logically incoherent and ahistorical. It also leads to perverse incentives.

Outside of bankruptcy, in the course of collecting their fees, attorneys do not usually give notice to the world and then face objections to the fee's reasonableness from third parties. Prior to 1934 when corporate reorganizations were conducted through equity receiverships rather than statutory proceedings,[168] fee shifting was pervasive under the terms of negotiated plans,[169] but no fee application process or opportunity for third party objection to the

[163]*Id.* at 125.

[164]*Id.*

[165]Brief Amicus Curiae of the United States, Baker & Botts LLP v. ASARCO LLC, U.S. Sup. Ct. Case No. 14-103 (filed Dec. 10, 2014). *See also supra* n.* (noting Baker & Botts *amicus curiae* brief filed by certain legal academics including the author of this Article).

[166]*Baker & Botts*, 576 U.S. at 125.

[167]*Id.* at 133-35.

[168]Bankruptcy Act of 1898, § 12, 30 Stat. 544, 563 (1898) (repealed 1978); 6 COLLIER ON BANKRUPTCY ¶ [0.03] 21-28 (14th ed. 1978) (discussing limitations on bankruptcy compositions, including lack of provisions to address secured debt); *see* SECURITIES AND EXCHANGE COMMISSION, REPORT ON THE STUDY AND INVESTIGATION OF THE WORK, ACTIVITIES, PERSONNEL AND FUNCTIONS OF PROTECTIVE AND REORGANIZATION COMMITTEES, Pt. I at 869 (1937) [hereinafter 1937 SEC REPORT] ("Prior to the enactment of Section 77 and Section 77B of the Bankruptcy Act, the favored method for effecting a corporate reorganization was through the federal consent receivership."); SECURITIES AND EXCHANGE COMMISSION, REPORT ON THE STUDY AND INVESTIGATION OF THE WORK, ACTIVITIES, PERSONNEL AND FUNCTIONS OF PROTECTIVE AND REORGANIZATION COMMITTEES, Pt. VIII 250 at 61 (1940) [hereinafter 1940 SEC REPORT] ("Prior to the enactment of sections 77 and 77B, there was seldom resort to the provisions of the Bankruptcy Act for the purpose of effecting the reorganization of corporations whose securities were held by the general public. When such enterprises became involved in financial difficulties serious enough to entail judicial proceedings, they were customarily reorganized through the medium of equity receivership despite the disadvantages and limitations of that procedure. . ..").

[169]*See* United States v. Chicago, M., St. P. & P.R. Co., 282 U.S. 311, 319-20 (1931) (describing equity receivership plan compensation provisions for multiple committees of creditors, stockholders and managers).

reasonableness of the shifted fees existed.[170] Neither fee application preparation nor defense was an issue in the usual non-bankruptcy case or in equity receivership practice.

In 1934, however, the enactment of section 77B brought reorganization law out of the world of equity receivership and into the Bankruptcy Act. Committees and interested parties could no longer set and recover their own fees by private agreements or plan provisions.[171] Rather the supervising court was given authority to allow a reasonable compensation for the services rendered and reimbursement for the actual and necessary expenses incurred in connection with the proceeding and the plan by "officers, parties in interest, depositaries, reorganization managers and committees or other representatives of creditors or stockholders, and the attorneys or agents of any of the foregoing and of the debtor."[172]

And so the fee application was born.

Under section 77B, courts applied strict standards to fee allowances which were perceived to impede the functioning of the reorganization. Even when courts found their services to be beneficial, attorneys still received below market fee allowances under the "conservation of the estate" principle.[173] The Supreme Court held that the statutes authorizing allowance of fees and expenses in bankruptcy cases under section 77B were to be strictly construed and might be limited to amounts "materially less than that which otherwise might have been considered reasonable."[174]

The Chandler Act enacted Chapter X as the successor to section 77B.[175] Legislating on the basis of the SEC Reports and with SEC advice, Congress addressed perceived problems under prior reorganization law by providing that disinterested trustees would displace management in large cases, restricting the role of multiple committees of creditors, and directing courts to rely on expert assistance from the SEC, including SEC recommendations on professional fees. The Chandler Act included a detailed and comprehensive scheme for the supervision and allowance of reorganization fees and expenses.

[170]6 COLLIER ON BANKRUPTCY ¶ 0.04[2.3] 58 (14th ed. 1978) ("[T]he receivership mechanism afforded only a perfunctory examination on the fairness of the essential phases of the proposed plan, since the theory was that the court could not control the plan. . . [and] [t]he receivership itself was costly and wasteful."); *Chicago, M., St. P. & P.R. Co.*, 282 U.S. at 324-28 (holding that the power to regulate commerce does not authorize regulation of equity receivership plan compensation provisions).

[171]6A COLLIER ON BANKRUPTCY ¶ 13.01 514 (14th ed. 1986).

[172]11 U.S.C. § 207(c)(9); *see also In re* Paramount Publix Corp., 83 F.2d 406, 407 (2d Cir. 1936) (discussing this provision).

[173]*In re* Paramount Publix Corp., 83 F.2d at 516-17; Emmett McCaffery, *Corporate Reorganization Under the Chandler Bankruptcy Act*, 26 CALIF. L. REV. 643, 657-58 (1938); Alfred B. Teton, *Reorganization Revised*, 48 YALE L.J. 573, 603-04, 606 (1939); 1940 SEC REPORT *supra* note 168; 6A COLLIER ON BANKRUPTCY ¶ 13.02 542 n.45 (14th ed. 1977).

[174]Callaghan v. Reconstr. Fin. Corp., 297 U.S. 464, 468 (1936).

[175]Bankruptcy Act of 1938, Pub. L. 75-696, 52 Stat. 840 (1938).

Fee authorization was expanded and "democratized" to encourage participation by individuals and independent committees, but judicial control was strengthened. The principle of economy remained in effect under the Chandler Act and was further codified in the Federal Rules of Bankruptcy Procedure.[176] Courts continued to systematically impose below-market fees on bankruptcy professionals under Chapter X.[177]

Preparing a fee application seemed analogous to the rendering of the invoice to the client and Chapter X courts generally refused to allow attorneys to recover that cost, noting the principle of economy.[178] But courts also saw no non-bankruptcy analog to fighting off third party objections to fee allowance. Hence, these same courts exercised discretion to allow the professional to recover the extraordinary costs associated with successfully litigating objections from parties in interest to the bankruptcy, the spirit of economy notwithstanding.[179] As one court put it, the pre-Code rationale behind denying fees for preparing fee applications did not "apply to services and expenses in connection with the successful defense, on appeal by others, of an award made to the applicant by the fee tribunals. In such case we think equitable considerations justify the awarding of compensation for the services required to defend the initial allowance."[180]

[176]FED. R. BANKR. P. 219(c) (repealed); FED. R. BANKR. P. 10-215 (repealed).

[177]6A COLLIER ON BANKRUPTCY ¶ 13.02 537, 539-40 n.37 (14th ed. 1977); Mass. Mutual Life Ins. Co. v. Brock, 405 F.2d 429, 432 (5th Cir. 1968) (remanding fee awards because the trial court failed to consider "the public interest which is inherent in bankruptcy matters," even though it had properly considered the time spent on the case by the trustee and his counsel, the complexity of the issues, and the commendable results achieved); Greensfelder v. St. Louis Public Serv. Co., 114 F.2d 53, 61 (8th Cir. 1940); Milbank, Tweed & Hope v. McCue, 111 F.2d 100, 101 (4th Cir. 1940); *In re* Mt. Forest Fur Farms of Am., 157 F.2d 640, 647 (6th Cir. 1946); Stark v. Woods Bros. Corp., 109 F.2d 969, 973-74 (8th Cir. 1940); *In re* Standard Gas & Elec. Co., 106 F.2d 215, 216-17 (3d Cir. 1939); Official Creditors' Comm. of Fox Markets, Inc. v. Ely, 337 F.2d 461, 466 (9th Cir. 1964) (benchmarking fee allowances against judicial salaries rather than market rates); *In re* York Int'l Bldg., Inc., 527 F.2d 1061, 1073 (9th Cir. 1975) (same); *In re* Beverly Crest Convalescent Hosp., Inc., 548 F.2d 817 (9th Cir. 1976) (same).

[178]United Corp., 39 S.E.C. 391, 0059, WL 59228, at *5 (Sept. 30, 1954) (citing Standard Gas & Elec. Co. v. S.E.C., 212 F. 2d 407, 413 (8th Cir. 1954)); *In re* Yale Exp. Sys., Inc., 366 F. Supp. 1376, 1386 (S.D.N.Y. 1973). In fact of course submitting a fee application for US Trustee and bankruptcy court review compliant with all the applicable statutes, rules and guidelines governing allowance of fees in bankruptcy is substantially more onerous than privately billing even the most demanding client for services rendered. *See supra* notes 173-177 and accompanying text.

[179]*See In re* Ark. Fuel Oil Corp. & Cities Serv. Co., 234 F. Supp. 31, 39-40 (D. Del. 1964) (exercising discretion to deny fee litigation fees, noting "policy of the [SEC] to allow supplemental fees wherever applicants have prevailed in the reviewing court").

[180]*United Corp.*, 39 S.E.C. 391, 0059 WL 59228, at *5 (Sept. 30, 1954). The more liberal attitudes towards "fees-on-fees" in bankruptcy stood in contrast to some jurisdictions' reluctance to interpret statutory or contractual fee-shifting to encompass "fees-on-fees" absent explicit statutory or contractual provisions permitting their recovery. *See, e.g.*, Jones v. Voskresenskaya, 125 A.D.3d 532, 534 (N.Y. 1st Dept. 2015) (finding referee's decision denying "recovery of 'fees-on-fees'" to be appropriate because "the parties' agreement [did] not explicitly provide for such fees.") (New York law); Batsidis v. Wattack Mgmt. Co., Inc., 126 A.D.3d 551, 553 (N.Y. 1st Dept. 2015) ("Because it is not 'unmistakably clear' from the parties'

In 1978, in enacting the present Bankruptcy Code, Congress rejected both the principle of economy and the historical antipathy to allowing costs of fee application preparation.[181] Nothing in this liberalization of the rules governing fee recovery suggests that the Congress, by rejecting blanket disallowance of preparation costs, implicitly intended to overrule the preexisting practice of allowing fee application defense costs in the court's discretion.

In 1978, in enacting the current Bankruptcy Code, Congress set forth five factors for courts to use in fixing "reasonable compensation for actual, necessary services" performed by bankruptcy professionals: "the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title."[182] Current law even more explicitly directs the court to fix compensation on the basis of current market rates.[183]

Neither section 330 nor any other part of the Bankruptcy Code rejects or alters pre-Code law allowing professional fees incurred in the defense of fee application objections in appropriate circumstances. Final fee rulings on such objections are plainly "necessary services" as the allowance of fees must be made before all bankruptcy estate assets can be distributed to administrative and pre-petition claimants and the case can be closed.

Both the change in pre-Code practice for fee applications and the lack of change in authorizing the award of fees in appropriate cases for defending fee challenges are informed by Congress's expressed intention that supervising courts consider the cost of comparable services in non-bankruptcy cases in allowing compensation.[184] The requirement to consider fees paid to other,

agreement that fees on fees were contemplated, such an award is not allowed.") (New York law). *But see* Northeastern Aviation Corp. v. Pasternack, 221 A.3d 100 (Table) (Del. 2019), *aff'g*, 2018 WL 5895827, at *11 (Del. Ch. Ct. 2018) ("Had Northeastern desired to avoid payment of fees-on-fees, it could have tailored its indemnification provision to exclude such payments.") (Delaware law); Stifel Fin. Corp. v. Cochran, 809 A.2d 555, 561 (Del. 2002) ("[W]ithout an award of attorneys' fees for the indemnification suit itself, indemnification [is] incomplete.") (Delaware law).

[181]In expressly authorizing allowance of fees incurred in preparing the fee applications necessary to meet the requirements of sections 330 and 331 and Federal Rule of Bankruptcy Procedure 2014, Congress was careful, however, to impose a condition on this new authority to compensate for the preparation of fee applications. 11 U.S.C. § 330(a)(6). Any fee award for such services must be based on the level and skill reasonably required for the application. *Id.* Congress recognized that paralegals and junior attorneys, not high-billing senior partners, should provide the bulk of the services associated with the administrative preparation and processing of a fee application, and appropriately limited compensation for this routine, although time-consuming, task. Fee defense, unlike preparation of a fee application, however, is not a routine task. It can, as in *Baker & Botts*, involve complex, hotly contested adversary litigation and no special rule limits reasonable compensation to lower-billing professionals in such matters.

[182]Bankruptcy Reform Act of 1978, Pub. L. 95-598, 92 Stat. 2549 (quoting § 330 as originally enacted).

[183]Section 330(a)(3)(F) as amended by the Bankruptcy Reform Act of 1994 § 224(b), Pub. L. 103-394 (Oct. 22, 1994) now provides that in fixing compensation the court shall consider "whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title." 11 U.S.C. § 330(a)(3)(F).

[184]*See* H.R. REP. NO. 595, at 329-30 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6286 (expres-

non-bankruptcy professionals was added to implement the "policy of this section . . . to compensate attorneys and other professionals serving in a case under title 11 at the same rate as the attorney or other professional would be compensated for performing comparable services other than in a case under title 11."[185]

Notwithstanding, all these factors, the *Baker & Botts* court, claiming to employ "textualism," disparaged any considerations beyond the text of section 330 as to the allowance of defense costs. It wrote:

> "Our unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is long-standing," and that is no less true in bankruptcy than it is elsewhere. Whether or not the Government's theory is desirable as a matter of policy, Congress has not granted us "roving authority . . . to allow counsel fees . . . whenever [we] might deem them warranted." Our job is to follow the text even if doing so will supposedly "undercut a basic objective of the statute." Section 330(a)(1) itself does not authorize the award of fees for defending a fee application, and that is the end of the matter.[186]

Despite this textualist rhetoric, *Baker & Botts* does not merely defer to a poor policy choice made by Congress and expressly embodied in the statutory text. The text at issue is *silent* on the question of fee application defense; there is no textual indication of an intent to override pre-Code practice allowing defense costs. Rather the Court *infers* that Congress created a sense-

sing intent to overrule cases setting arbitrary limits on fees and noting without fee parity, "[b]ankruptcy specialists, who enable the system to operate smoothly, efficiently, and expeditiously, would be driven elsewhere, and the bankruptcy field would be occupied by those who could not find other work and those who practice bankruptcy law only occasionally almost as a public service."); 124 CONG. REC. H11,091-92 (daily ed. Sept. 28, 1978) "[n]otions of economy of the estate in fixing fees are outdated and have no place in a bankruptcy code . . . bankruptcy legal services are entitled to command the same competency of counsel as other cases").

[185]124 CONG. REC. H11,091-92 (daily ed. Sept. 28, 1978); 124 CONG. REC. S17,408 (daily ed. Oct. 6, 1978).

[186]Baker & Botts LLP. v. ASARCO LLC , 576 U.S. 121, 134-35 (2015) (citations omitted). Because the American Rule is generally viewed as a default rule that may be varied by contract the door would seem open to express contractual authorization of the professional's reasonable fee application defense costs in its engagement letter. Bruce A. Markell, *Loser's Lament: Caulkett and ASARCO*, 35 BANKR. L. LETTER (No. 8), Aug. 2015, at 8; Michael L. Cook, *Update on Bankruptcy Fee Shifting*, 33 THE BANKRUPTCY STRATEGIST (No. 3), Jan. 2016, at 2.

The lower courts, however, have refused to permit this work-around. *In re* Boomerang Tube, Inc., 548 B.R. 69, 71 (Bankr. D. Del. 2016). *But see In re* Nortel Networks Inc., No. 09-10138 (KG), 2017 WL 932947, at *8-9 (Bankr. D. Del. Mar. 8, 2017) (distinguishing *Boomerang* in enforcing provisions in bond indenture providing for recovery of fee application defense costs).

less distinction between preparation and defense costs based on an atextual default rule born of federal common law, the American Rule.

The Court attempted to conjure a rationale supporting the desired distinction between fee application preparation and defense costs. It analogized bankruptcy professionals' position as fee applicant to that of a car mechanic rendering an itemized bill. It asserted that the mechanic's invoice would itself be a compensable item of service to the customer but his collection costs would not be. But the Court's analogy to a car mechanic is a garbled mess.[187] I don't know what car mechanic the Court uses, but my mechanic's cost of bill preparation does not appear on the itemized invoices I receive as a separately billed item alongside the cost of parts and service for lubrication, oil change, filters, waste disposal fees and taxes. And those same invoices invariably provide, in standardized terms on the reverse, for costs of collection including reasonable attorney's fees in the event of dispute. Historically, lower courts' attempts to analogize fee application preparation and defense to the rendering and collection of non-bankruptcy invoices for services led to precisely the opposite conclusion than the one reached by the Court: Disallowance of the cost of preparation of the application, but compensation for its successful defense.

Leaving to the side the false factual predicate of the Court's analogy, the analogy is in any event a poor one. The process of defending a fee application in a collective proceeding over the objections of an adverse party is nothing like a mechanic collecting a disputed bill from the client who received the services. The analogy relied upon by the Court is the same one rejected by Congress when it abrogated pre-Code law denying compensation for fee application preparation. The entire thrust of Congress's 1978 revision of the fee allowance provisions in bankruptcy was to liberalize the allowance of professional fees in order to attract the highest quality counsel into bankruptcy practice. In allowing preparation costs it eliminated the "spirit of economy" principles previously grafted onto the process and expressly provided for compensation at full market rates. Interpreting the resulting statute to implicitly overrule a preexisting judicial practice of permitting recovery of defense costs to provide full compensation to the professional forced to defend its fees in litigation is simply perverse.

But even more perverse is the absurdity and waste inherent in easing the path for Grupo to avenge its loss in the fraudulent transfer litigation by im-

[187]*Baker & Botts*, 576 U.S., at 132. The Court also had to distinguish its own prior statement in *Commissioner v. Jean*, 496 U.S. 154, 162 (1990) that it found "no textual or logical argument for treating so differently a party's preparation of a fee application and its ensuing efforts to support that same application." Although the language of the relevant statute in *Jean* differed from section 330 of the Bankruptcy Code, the Court's recognition that no logical argument supported the distinction in *Jean* is equally true in *Baker & Botts*.

posing a $5 million cost on opposing counsel in collecting its fee for successfully establishing liability against it. Vindictive fee objection litigation by non-client parties is hardly something that the Congress or the courts should encourage. And yet after *Baker & Botts* a well-funded adversary can exploit the fee application process in just this way, even if it is unable to establish any meritorious objection.

B. Time-Barred Claims.

A second example of the perversity of reliance on the American Rule in bankruptcy comes from the consumer debt area rather than large chapter 11 reorganization cases.

In *Midland Funding*,[188] the Supreme Court rejected a Fair Debt Collection Practices Act (FDCPA)[189] claim against a consumer debt collector whose business model involved the knowing assertion of time-barred claims purchased in bulk for pennies on the dollar.

Consumer debt collectors like Midland Funding buy debt from banks and other institutional consumer lenders in bulk at a steep discount. The Federal Trade Commission studied nine of the largest debt buyers who collectively bought 76.1 percent of the defaulted consumer debt sold in 2008, reviewing data on more than 5,000 portfolios containing nearly ninety million consumer accounts purchased during the three-year study period.[190] The average price was 4.0 cents per dollar of debt face value.[191] The price for older debts was significantly lower than average, particularly for older debts likely to be time-barred—debt buyers paid on average 3.1 cents on the dollar for debts that were three to six years old and 2.2 cents per dollar of debt for debts that were six to fifteen years old compared to 7.9 cents per dollar for debts less than three years old.[192] Debt collectors necessarily take into account the timeliness of the claims purchased not only to properly price the portfolio, but also to comply with the FDCPA's prohibition on asserting stale claims in state courts.[193]

[188]Midland Funding LLC v. Johnson, 137 S.Ct. 1407 (2017).

[189]15 U.S.C. § 1692 .

[190]Federal Trade Commission, The Structures and Practices of the Debt Buying Industry at i-ii (Jan. 2013) [hereinafter FTC Report].

[191]*Id.*

[192]*See* Id. at 23-24.

[193]Court decisions find that the knowing assertion of time-barred claims in ordinary civil litigation violates the FDCPA's prohibitions on unfair and deceptive debt collection practices. 15 U.S.C. §§ 1692d-g; Kimber v. Fed. Fin. Corp., 668 F. Supp. 1480, 1487 (M.D Ala. 1987); *see also* Phillips v. Asset Acceptance, LLC, 736 F.3d 1076, 1079 (7th Cir. 2013) (holding as much); Huertas v. Galaxy Asset Mgmt., 641 F.3d 28, 32-33 (3d Cir. 2011) (indicating as much); Castro v. Collecto, Inc., 634 F.3d 779, 783 (5th Cir. 2011) (same). The Consumer Financial Protection Bureau has reached a similar conclusion promulgating rules scheduled to go into effect November 30, 2021. *See* Debt Collection Practices (Regulation F), 85 Fed. Reg. 76,734, 76,735 (Nov. 30, 2020) (to be codified at 12 C.F.R. § 1006.26(b)). Unfortunately, in

Some debt buyers specialize in debts of consumers who have filed for bankruptcy.[194] These portfolios represent millions of individual accounts and billions of dollars of consumer debt.[195] Bankruptcy judges described the flood of stale claims filed by professional debt collectors as a "plague" and "a new development that presents a challenge for the bankruptcy system."[196]

Why knowingly buy and assert millions of time-barred bankruptcy claims? The success of these debt collectors' business model depends on the ease of filing bankruptcy claims, the cost to objectors of asserting even the clearest statute of limitations defense, and the diffuse nature of the "tax" these stale claims impose on the bankruptcy system if they are allowed. The effect of not objecting to a stale claim is to dilute recoveries across the whole class of unsecured creditors. The business model depends on transferring value away from other creditors in a broad pro rata manner that leaves no individual creditor with any financial incentive to file objections. That transfer also indirectly and adversely affects consumer debtors whenever they do not receive a discharge (as in the majority of Chapter 13 cases)[197] or, like millions of Americans, have nondischargeable debts such as educational loans,

deference to the Supreme Court's *Midland Funding* decision bankruptcy claim filing is excepted from the scope of this rule. Some courts have held that even the assertion of time-barred claims outside of litigation violates the FDCPA. Stepney v. Outsourcing Solutions, Inc., 1997 WL 722972, at *5 (N.D. Ill. 1997) (any collection on time-barred accounts violates the FDCPA); Taylor v. Unifund, 1999 WL 33541932 (N.D. Ill. 1999). Other courts find that absent litigation there is no FDCPA violation in asserting stale claims. Freyermuth v. Credit Bureau Serv., Inc., 248 F.3d 767, 771 (8th Cir. 2001) ("[I]n the absence of a threat of litigation or actual litigation, no violation of the FDCPA has occurred when a debt collector attempts to collect on a potentially time-barred debt that is otherwise valid."); Shorty v. Capital One Bank, 90 F. Supp.2d 1330, 1332 (D. N.M. 2000) (same); Walker v. Cash Flow Consultants, Inc., 200 F.R.D. 613, 616 (N.D. Ill. 2001) (same).

[194]The FTC Report, *supra* note 190, describes several buyers for which "some or all of the portfolios they had purchased were comprised of debts of consumers who had filed for bankruptcy." *Id.* at D-1.

[195]*See id.* at D-3; *see also* American InfoSource, AIS Insight 2015 Year in Review at 14-15 (debt buyers filed hundreds of thousands of proofs of claim asserting hundreds of millions of dollars of consumer indebtedness in 2015).

[196]*E.g.*, *In re* Jenkins, 456 B.R. 236, 239 n.2 (Bankr. E.D.N.C. 2011); *In re* Andrews, 394 B.R. 384, 387 (Bankr. E.D.N.C. 2008).

[197]Discharge is withheld in most Chapter 13 cases until the debtor's five-year plan is fully performed. 11 U.S.C. §§ 1328(a)-(b). Upwards of two-thirds of confirmed chapter 13 plans are never completed. *See, e.g.*, Till v. SCS Credit Corp., 541 U.S. 465, 493 & 493 n.1 (2004) (Scalia, J., dissenting) (discussing how "Chapter 13 plans often fail" and citing studies suggesting failure rates of nearly 60%, rates that further increased after Congress made substantial amendments to Chapter 13 in 2005); Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 Tex. L. Rev. 103, 111-12 (2011) (noting how "knowledge of outcomes of Chapter 13 can largely be reduced to one enduring fact: only one in three cases ends in a Chapter 13 discharge" and summarizing data that nearly 75% of the remaining cases result in no bankruptcy discharge under any chapter, leaving numerous debtors with no debt relief whatsoever and subject to renewed debt collection efforts). In limited circumstances, however, a hardship discharge may be granted to a Chapter 13 debtor who fails to complete his plan payments for reasons beyond his control. 11 U.S.C. § 1328(b).

domestic support obligations, or certain tax debts.[198] In these cases, all amounts paid on a time-barred debt reduce what gets paid on other debts, which in turn increases the nondischargeable obligations the consumer continues to owe after the bankruptcy case. But consumer debtors are ill-equipped to undertake the legal analysis of the applicable statute of limitations, appreciate the indirect harm they suffer through increased deficiencies on nondischargeable debts, or fund the cost of filing a legal objection. While in some cases chapter 7 bankruptcy trustees have undertaken objections to stale claims, the American Rule shifting the burden to the trustee results in little or no economic benefit to the estate when the legal cost of objection is netted against the pro rata amounts paid out on account of stale claims should they remain allowed. In short, the *Midland Funding* business model succeeds by exploiting the inertia and expense of the bankruptcy system, including the fact that under the American Rule, prevailing claim objectors must bear their own legal costs.

The FDCPA by reversing the American Rule and allowing the recovery of prevailing party legal fees provided a powerful remedy neutering this exploitive business model.[199] But in *Midland Funding* the Supreme Court found the FDCPA effectively preempted by the Bankruptcy Code's scheme for presumptively allowing claims based on the filing of a proof of claim subject to objection.[200] The Court held:

> The Bankruptcy Code, by way of contrast, creates and maintains what we have called the "delicate balance of a debtor's protections and obligations. " . . . To find the Fair Debt Collection Practices Act applicable here would upset that "delicate balance." From a substantive perspective it would authorize a new significant bankruptcy-related remedy in the absence of language in the Code providing for it. Administratively, it would permit postbankruptcy litigation in an ordinary civil court concerning a creditor's state of mind—a matter often hard to determine. See 15 U.S.C. § 1692k(c) (safe harbor for any debt collector who "shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error"). Procedurally, it would require creditors (who assert a claim) to investigate the merits of an affirmative defense (typically the debtor's job to assert and prove) lest the creditor later be found to have known the claim was untimely. The upshot could well be added complexity, changes in settlement incentives, and a shift from the debtor to the creditor the obligation to investigate the staleness of a claim.[201]

[198]11 U.S.C. § 523(a) (identifying 19 separate categories of debts excepted from discharge).

[199]The remedial provisions of the FDCPA include actual and statutory damages and recovery of prevailing plaintiffs' attorney's fees. 15 U.S.C. § 1692*l*(a)(1)-(3). Prevailing defendants may also recover their attorney's fee if the FDCPA action is brought in bad faith. 15 U.S.C. § 1692*l*(a)(3).

[200]11 U.S.C. § 502(a).

Unfortunately, as the bankruptcy courts recognized pre-*Midland Funding*, bankruptcy's "delicate balance" between debtors and creditors was demonstrably out-of-whack and exploited by the *Midland Funding* business model, creating an unjust windfall for entrepreneurs willing to buy up and assert clearly time-barred claims and dare the other interested parties to object, notwithstanding the disproportionate cost of doing so. The obvious fix post-*Midland Funding* is to locate within the "delicately balanced" bankruptcy process a discretion to assess prevailing party legal fees in claim objection litigation. Prevailing claimants under consumer contracts with attorney's fees clauses may tack bankruptcy-related attorney's fees on to their claims under Supreme Court precedent.[202] But except in a few Western jurisdictions, the prevailing objector is unlikely to have a reciprocal right.[203] Only the background assumption that the American Rule requires the objector to bear its own legal fees sustains the exploitive *Midland Funding* business model and burdens the bankruptcy system with meritless claims. There should be no need to look outside bankruptcy policy itself to the FDCPA or any other federal regulatory statute to control this practice.

C. Preferences.

Consumer debt collectors are not the only constituency that has learned to exploit the inertia and legal cost of the bankruptcy system in areas where prevailing party fee-shifting is not available. Bankruptcy trustees have also done so. Preference law in particular has come in for sharp criticism on this ground.[204]

[201]Midland Funding LLC v. Johnson, 137 S. Ct. 1407, 1415 (2017) (internal citations omitted).

[202]Travelers Cas. & Sur. Co. v Pac. Gas & Elec. Co., 549 U.S. 443 (2007). Consumer contracts generally allow prevailing party attorney's fees against the consumer debtor as costs of collection.

[203]Post-*Travelers*, courts have allowed prevailing debtors and their estates to recover reciprocal attorney's fees in accordance with Cal. Civ. Code § 1717 and similar statutes in some circumstances. *See infra* notes 215-216, and accompanying text. One court recently shifted fees incurred by an objector to stale consumer debt claims based on a Nevada fee-shifting statute authorizing discretionary prevailing party recovery of attorney's fees in small claims litigation. *In re* Andrade-Garcia, 627 B.R. 158, 170-71 (Bankr. D. Nev. 2021) (relying on Nev. Rev. Stat. 18.010(2)(b)).

[204]Brook E. Gotberg, *Conflicting Preferences in Business Bankruptcy: The Need for Different Rules in Different Chapters*, 100 Iowa L. Rev. 51, 53-56 (2014); Daniel J. Bussel, *The Problem With Preferences*, 100 Iowa L. Rev. Bull. 11 (2014); Thomas D. Goldberg, *Curbing Abusive Preference Actions: Rethinking*

Particularly with respect to trade creditors furnishing goods and services to the debtor in the immediate pre-bankruptcy period, a problem with preference law is that in too many cases it operates, often arbitrarily, to force settlements from diligent creditors based on the cost of litigation and potential liability for basically innocent conduct; settlements that, in the aggregate, do little to meaningfully help creditors generally, but simply enrich estate professionals. When preference targets are those receiving payments within ninety days of bankruptcy in respect of goods or services, redistributing those preference recoveries to unsecured creditors ratably seems like rearranging the deck chairs on the *Titanic*. Pursuing such creditors for disgorgement of pre-bankruptcy payments in respect of valid trade debts by fighting through a panoply of fact-intensive defenses may provide little benefit to anyone save the lawyers who bill the estate (or successor liquidating trust) for recovering those dollars and then redistributing what is left after payment of administrative expenses to modestly improve general creditor recoveries. This is as true in chapter 7 cases (where the deck chair rearranging is done after the ship has sunk to the bottom of the sea) as it is in chapter 11 cases (where the captain of the ship should be focused on mid-course corrections to avoid the looming iceberg, not deck chairs).

The extensive statutory safe-harbors for financial creditors only underscore the arbitrariness and unfairness of current preference law as applied to trade creditors receiving modest preferences.[205] Wall Street has obtained a free pass to demand, accept and retain preferences when it comes to securities settlements, repurchase agreements, options and futures, and indeed apparently any other financial instrument at all that it chooses to label as a "swap agreement."[206] No wonder preference law is unpopular within the general business community.[207]

Congress has recognized these problems with preference litigation in various ways—imposing and raising venue limitations and jurisdictional minimums,[208] expanding defenses,[209] requiring additional diligence prior to the

Claims on Behalf of Administratively Insolvent Estates, 23 AM. BANKR. INST. J. 14, 54 (2004) (criticizing non-insider preference litigation that does not materially benefit general creditors).

[205]*See* Stephen J. Lubben, *The Bankruptcy Code Without Safe Harbors*, 84 AM. BANKR. L.J. 123, 124 (2010); Charles W. Mooney, Jr., *The Bankruptcy Code's Safe Harbors for Settlement Payments and Securities Contracts: When is Safe Too Safe?* 49 TEX. INT'L L.J. 245 (2014); Mark J. Roe, *The Derivatives Market's Payment Priorities as Financial Crisis Accelerator*, 63 STAN. L. REV. 539, 573 (2011).

[206]11 U.S.C. §§ 101(53B) ("swap agreement"), 546(e)-(g), (j) (2013); *see In re* Nat'l Gas Distribs., LLC, 556 F.3d 247, 253, 259 (4th Cir. 2009) (noting that "[w]ith the 2005 Amendments to the Bankruptcy Code, . . . Congress substantially expanded the protections it had given to financial derivatives participants and transactions by expanding the definition of 'swap participants' and 'swap agreements' that are exempted from the automatic stay and from trustees' avoidance powers.").

[207]Gotberg, *supra* note 204, at 53-56.

[208]The Small Business Reorganization Act of 2019, Pub. L. 116-54, 133 Stat. 1079 (2019) (codified at 11 U.S.C. §§ 1184-95) increased the minimum dollar threshold for a trustee to pursue preference recovery in a district other than the one in which the defendant resides to $25,000. 28 U.S.C. § 1409(b) (as amended 2019). Subsections 547(c)(8) & (9) also preclude recovery of very small preferences ($600 in consumer cases and $6425 in commercial cases). 11 U.S.C. § 547(c)(8) & (9).

[209]In addition to continually expanding the scope of safe harbors for certain financial instruments, *see supra* note 205, Congress in enacting the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. Law 109-8, 119 Stat. 23 (2005), expanded trade creditors' reclamation defense, *see* BUSSEL, SKEEL & HARNER, *supra* note 102, at 628-29 (Note on Reclamation), created a statutory administrative priority for certain trade claims incurred within twenty days of bankruptcy, 11 U.S.C. § 503(b)(9), and significantly expanded the most important of the statutory affirmative defenses the ordinary course defense, 11 U.S.C. § 547(c)(2) to protect transfers that were made in the ordinary course of business or in accordance with ordinary business terms. Under prior law, defendants had to establish both that the transfer was made in the ordinary course of business and that was made in accordance with ordinary business terms. *See In re* Nat'l Gas Distribs., 346 B.R. 394 (Bankr. E.D.N.C. 2006); *see also* Richard Levin & Alesia Ranney-Marinelli, *The Creeping Repeal of Chapter 11*, 79 AM. BANKR. L. J. 603, 604-08 (2005).

[210]The Small Business Reorganization Act of 2019, Pub. L. 116-54, 133 Stat. 1079 (2019) imposed an obligation on the trustee to exercise reasonable due diligence in considering whether or not to file a preference action, including "tak[ing] into account a party's known or reasonably knowable affirmative defenses . . ." before proceeding with a suit. § 547(b) (as amended 2019). In the past, trustees might file preference actions based on a prima facie showing of liability without investigating defenses, imposing significant litigation costs on defendants with clear, valid defenses.

[211]In *SIPC v. Bernard L. Madoff Inv. Sec. LLC*, 631 B.R. 1, 17 (Bankr. S.D.N.Y. 2021), the court exercised discretion, perhaps as kind of proxy for an award of prevailing party attorney's fees, awarded the prevailing trustee prejudgment interest on recovery of a fraudulent transfer writing:

> Prejudgment interest is warranted in this instance. The Trustee is charged with collecting fictitious profits from net winners so that net losers in BLMIS's Ponzi scheme can be adequately compensated for their losses. He has spent approximately ten years prosecuting this case and cannot be made whole without an award of prejudgment interest. Moreover, he has spent time and energy having to defend against legal arguments that have already been decided in these SIPA cases. All of the Defendant's legal arguments in opposition to this summary judgment motion were previously decided and law of the case.

Id.

[212]951 F.2d 1149 (9th Cir. 1991).

[213]Travelers Cas. & Sur. Co. v. Pac. Gas & Elec. Co., 549 U.S. 443 (2007).

[214]802 F.3d 1084 (9th Cir. 2015).

filing of preference complaints.[210] The most direct way of making the target of a meritless preference attack whole, however, remains a prevailing party fee-shift, still unavailable based on the default assumption that the American Rule applies to avoiding power litigation.[211]

V. LESSONS FROM PENROD

No discussion of the experience of fee-shifting in bankruptcy would be complete without reference to a line of Ninth Circuit cases reconciling bankruptcy policy with fee-shifting principles under California Civil Code section 1717. The line starts with *In re Fobian*,[212] moves to *Travelers*[213] and culminates in *In re Penrod*[214] and its progeny.

California Civil Code section 1717(a) provides:

> In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs. . . . Reasonable attorney's fees shall be fixed by the court, and shall be an element of the costs of suit.

California's embrace of reciprocity as an additional basis to depart from the American Rule in contract litigation is a minority position, but it is a long-standing one[215] and it has influenced the law in a number of other states including Delaware, Montana, Oregon, Utah, and Washington.[216]

In *In re Fobian*, a creditor successfully defeated the debtor's plan of reorganization and then sought to recover the attorney's fees incurred in that effort under the attorney's fee clause in its contract. The Ninth Circuit, however, held that because the issues in the litigation were solely bankruptcy issues the proceeding was not a traditional "action on a contract" within the meaning of section 1717.[217]

In *Travelers*, an unsecured creditor incurred substantial post-bankruptcy fees protecting its contract claim against the debtor in bankruptcy. Citing *Fobian*, the Ninth Circuit denied the requested fees on the ground that "attorney fees are not recoverable in bankruptcy for litigating issues 'peculiar to federal bankruptcy law.'"[218] The Supreme Court, however, rejected the notion that anything in federal bankruptcy law limited the scope of fees recoverable under section 1717. If state law authorized recovery of attorney's fees, Travelers' claim for attorney's fees was allowable in bankruptcy as part of its

[215]California Civil Code § 1717 was first enacted in 1968, but California case law was skeptical of unilateral attorney fee clauses even prior to the enactment of the statute. *See* Ecco-Phoenix Elec. Corp. v. Howard J. White, Inc., 1 Cal. 3d 266, 272 (1969).

[216]*See* Mont. Code Ann. § 28-3-704; Or. Rev. Stat. Ann. § 20.096; Utah Code Ann. § 78b-5-826; Wash. Rev. Code. Ann. § 4.84.330; Del. Code Ann. Tit. 6, §§ 4344, 7613. Some states have interpreted statutes similar to Cal. Civ. Code § 1717 narrowly to limit reciprocal fee-shifting based on the nature of the cause of action. *See* Florida Hurricane Prot. & Awning v. Pastina, 43 So.3d 893, 895 (Fla. App. 4th Dist. 2010) (reciprocal fees not available to prevailing consumer in a breach of contract action under Fla. Stat. § 57.105(7) because contract limited fee shifting to "collection action."). Nevada, apparently focusing on the particular problem the American Rule poses for those who wish to prosecute small claims, authorizes prevailing party fee shifting if less than $20,000 is at issue. Nev. Rev. Stat. 18.010(2)(a). Alaska, of course, more generally adopts the English Rule. *See supra* note 14.

[217]*Fobian* asserted that "the applicability of the bankruptcy laws to particular contracts is not a question of the enforceability of a contract but rather involves a unique, separate area of federal law." *Fobian*, 951 F.2d at 1153 (quoting Collingwood Grain, Inc. v. Coast Trading Co. (*In re* Coast Trading Co.), 744 F.2d 686, 693 (9th Cir. 1984).

[218]Travelers Cas. & Sur. Co. v. Pac. Gas & Elec. Co.,167 Fed. App'x. 593, 594 (2006).

general unsecured claim, even if the fees were incurred solely in connection with litigating bankruptcy issues. Accordingly, the Court expressly overruled *Fobian*.[219]

Travelers put increased pressure on the California courts' interpretation of the proper scope of section 1717 and in particular the meaning of the phrase "an action on the contract." In *In re SNTL Corp.*.[220] the court, acknowledging the abrogation of *Fobian* by *Travelers*, found that a creditor successfully overcoming an objection to its claim by a bankruptcy trustee was entitled to assert the bankruptcy-related fees it incurred in establishing the validity of its claim in the claim objection proceeding in accordance with its contract and applicable California state law.[221]

California has liberally construed "action on a contract" to authorize an award of reciprocal fees whenever the opposing party would have been entitled to attorney fees under the contract had it prevailed.[222] Nothing in California law limited recovery of fees in an "action on a contract" to issues of contract interpretation, California contract law, or other California state law, and the California courts have repeatedly awarded reciprocal fees on the basis of a successful legal and factual defenses to contract claims whether those defenses were legal or factual or based on federal or state law.[223] So long as a dispute "involves" a contract, or "arises out of, is based upon, or relates to an

[219]Travelers Cas. & Sur. Co. v. Pac. Gas & Elec. Co., 549 U.S. 443, 452 (2007). The *Fobian* rule was not generally the law outside the Ninth Circuit. *See In re* United Merch. Mfrs., Inc., 674 F.2d 134, 137 (2d Cir. 1982) (finding that state law governed the enforceability of creditors prebankruptcy contractual right to attorney's fees and allowing fees regardless of whether they were incurred in state court litigation or in collecting the claim in bankruptcy court in Chapter XI proceedings under the 1898 Act); *see also In re* Cont'l Vending Mach. Corp., 543 F.2d 986, 993 (2d Cir.1976) (recovery of costs claimed by creditor in Chapter X proceeding cognizable as contractual right even though not within the 1898 Act's compensation provisions).

[220]*In re* SNTL Corp., 571 F.3d 826, 829 (9th Cir. 2009) (affirming bankruptcy appellate panel opinion entered below and reported at 380 B.R. 204 (9th Cir. BAP 2007) and expressly adopting that opinion as the Ninth Circuit's own).

[221]*In re SNTL Corp.*, 571 F.3d at 840-46.

[222]Santisas v. Goodin, 17 Cal. 4th 599, 611 (1998); *In re* Tobacco Cases I, 193 Cal. App. 4th 1591, 1601 (2011) ("an action is 'on a contract' when a party seeks to enforce, or avoid enforcement of, the provisions of the contract"); *see* Milman v. Shukhat, 22 Cal. App. 4th 538, 545-46 (1994); N. Assocs. v. Bell, 184 Cal. App. 3d 860, 864 (1986); Turner v. Schultz, 175 Cal. App. 4th 974, 908-09 (2009); Dell Merk, Inc. v. Franzia, 132 Cal. App. 4th 443, 455 (2005).

[223]*See, e.g.*, FDIC v. Dintino, 167 Cal. App. 4th 333, 357 (2008) (contract claim denied on basis of California's one form of action rule); ABF Capital Corp. v. Grove Props. Co., 126 Cal. App. 4th 204, 209-211 (2005) (claim time-barred); RTC Mortg. Trust v. Shlens, 62 Cal. App. 4th 304, 327-28 (1998) (defense barred by federal *D'Oench, Duhme* doctrine and 18 U.S.C. § 1823(e)); Weber v. Langholz, 39 Cal. App. 4th 1578, 1585-86 (1995) (action to rescind loan under federal Truth in Lending Act); Chinese Yellow Pages Co. v. Chinese Overseas Mktg. Serv. Corp., 170 Cal. App. 4th 868, 881-85 (2008) (fees incurred litigating federal bankruptcy issues recoverable under California state law); Circle Star Center Assoc. v. Liberate Tech., 147 Cal.App.4th 1203, 1209 (2002) (same); *see also In re* Am. Suzuki Motor Corp., 494 B.R. 466, 492-93 (Bankr. C.D. Cal. 2013) (awarding reciprocal fees based on federal bankruptcy defense to rejection damages claim); Gens v. Wachovia Mortg. Corp., No. 10-CV-01073-LHK,

agreement by seeking to define or interpret its terms or to determine or enforce a party's rights or duties under the agreement," the dispute is an action "on a contract" for purposes of section 1717.[224]

In this legal landscape *Penrod* arose.

In 2005, Marlene Penrod purchased a 2005 Ford Taurus automobile, pursuant to a Retail Installment Sale Contract governed by California law. The price of the Taurus was $25,600.[225] Penrod made a small cash down payment and at the same time traded in her 1999 Ford Explorer.[226] Although she owed over $13,000 secured by a lien on the Explorer, Penrod received a credit of only $6,000 for the trade-in.[227] As a result, there was more than $7,000 in "negative equity" with respect to the Explorer.[228] The dealership paid off the outstanding balance owed on the Explorer, credited Ms. Penrod for its $6,000 trade-in value and added approximately $7,000 to the dealer-financed indebtedness secured by the new Taurus.[229] The Sales Contract expressly obligated Penrod to pay AmeriCredit all principal (including the $7,000 in negative equity), 20 percent interest and the lender's reasonable collection costs, including attorney's fees.[230]

Eighteen months later Penrod filed for chapter 13 bankruptcy relief.[231] In order to collect the debt owed under the Sale Contract, AmeriCredit filed a proof of claim with the bankruptcy court, attaching the Sale Contract as an exhibit, and asserting a fully secured claim in the aggregate amount of $25,675.31 as of the petition date. Ms. Penrod filed and thereafter amended a chapter 13 plan providing she would retain her 2005 Taurus but pay AmeriCredit only $18,537.89 plus interest out of her future earnings – not the full $25,675.31 asserted in AmeriCredit's proof of claim, and that AmeriCredit's security interest in the Taurus would be limited to securing this portion of its total claim.[232] The plan provided that the difference, approximately $7,000, be treated as an unsecured claim.[233] Under the plan, the unsecured

2011 WL 3844083, at *1-2 (N.D. Cal. Aug. 30, 2011) (action asserting defenses to loan under federal Truth in Lending Act and other federal consumer protection statutes dismissed).

[224]Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc., 211 Cal.App.4th 230, 242 (2012); *see also In re* Relativity Fashion, LLC, 565 B.R. 50, 57 (Bankr. S.D.N.Y. 2017).

[225]*In re* Penrod (*Penrod I*), 611 F.3d 1158, 1159 (9th Cir. 2010).

[226]*Id.* at 1159-60.

[227]*Id.* at 1160.

[228]*Id.*

[229]*Id.*

[230]The Sales Contract provided: "You [Penrod] may have to pay collection costs. You [Penrod] will pay our reasonable costs to collect what you [Penrod] owe, including attorney fees, court costs, collection agency fees, and fees paid for other reasonable collection efforts." *In re* Penrod (*Penrod II*), 802 F.3d 1084, 1087 (9th Cir. 2015) (quoting contractual provision).

[231]*Penrod I*, 611 F.3d at 1160.

[232]*In re* Penrod, 392 B.R. 835, 840 (9th Cir. BAP 2008).

[233]*Penrod II*, 802 F.3d at 1087.

claim would be payable on a pro rata basis with other unsecured claims, if, and only to the extent Ms. Penrod had available post-petition earnings after satisfying all other priority and secured claims described in the plan.[234] The unpaid amount was discharged in 2012 when Penrod completed payments under her plan.

This treatment of AmeriCredit's contractual debt under the plan was based on Ms. Penrod's position that only the portion of AmeriCredit's claim attributable to the price of Ms. Penrod's 2005 Taurus constituted a purchase money security interest within the meaning of the California Commercial Code and the so-called hanging paragraph of Bankruptcy Code section 1325(a)*,[235] and that the claim for $7,000 in refinanced negative equity associated with her old Explorer was *not* purchase money. The "hanging paragraph" forbids bifurcation of a claim into secured and unsecured claims under a chapter 13 plan with respect to a car loan only to the extent that that debt is subject to a "purchase money security interest."

Four years of hotly contested appellate litigation in the bankruptcy appellate panel, Ninth Circuit and the Supreme Court ensued ultimately resulting in a judgment of the Ninth Circuit vindicating Penrod's legal position that she was entitled under bankruptcy law to strip down the contractual lien in her Ford Taurus to eliminate the refinanced negative equity associated with her trade-in vehicle.[236]

Penrod's appellate counsel then sought to recover almost $245,000 in fees and costs incurred in the multiple appeals over the hanging paragraph asserting that the unilateral fee-shifting provision in the Sale Contract in favor of AmeriCredit was made reciprocal by California Civil Code section 1717 and the fees incurred in litigating her legal defenses to AmeriCredit's claimed lien based on the California Commercial Code and the section 1325(a)*. The Ninth Circuit agreed, finding that:

> [T]he hanging-paragraph litigation was an "action on a contract" in which Penrod prevailed. The only remaining question is whether AmeriCredit would have been entitled to recover attorney's fees had it prevailed, a necessary prerequisite for Penrod to recover her own fees. We think the answer to that question is clear. The contract included—no doubt for AmeriCredit's benefit—an attorney's fees provi-

[234]*Id.* at 1086.

[235]11 U.S.C. § 1325(a)* is referred to as the "hanging paragraph" because of Congress's inadvertent failure to sequentially number the relevant paragraph of the 2005 BAPCPA amendment in the official codification of section 1325.

[236]AmeriCredit's subsequent petitions for rehearing *en banc* and *certiorari* were denied and the judgment became final. *See* 132 S. Ct. 108 (Oct. 3, 2011) (denying certiorari); 636 F.3d 1175 (9th Cir. 2011) (denying rehearing *en banc*).

> sion quite broad in scope. The provision was not limited, for example, to actions to determine whether the terms of the contract had been breached. It instead stated that, in the event of default, Penrod would be obligated to pay the reasonable attorney's fees AmeriCredit incurred in attempting "to collect what you owe." That provision encompasses AmeriCredit's efforts in the hanging-paragraph litigation to establish that it held a fully secured rather than a partially secured claim. AmeriCredit wanted to prevail on that issue to ensure that it would collect 100 [percent] of what it was owed on the loan. AmeriCredit had no reason to litigate that issue other than as part of an attempt to collect from Penrod what she owed. . . . As the "party prevailing on the contract," Penrod is entitled to recover reasonable attorney's fees under § 1717.[237]

Following *Penrod II*, courts applying California law have struggled to define the scope of the bankruptcy litigation that falls within the "action on a contract" language of section 1717. In *Bos v. Board of Trustees*,[238] the Ninth Circuit distinguished *Penrod* in a case involving the dischargeability of a claim against a bankrupt employer that had failed to honor a $500,000 debt to its employees' pension fund embodied in a promissory note. The plan fiduciaries argued that the fund's undisputed claim on the promissory note debt was nondischargeable as "defalcation" by the bankrupt employer under section 523(a)(4).[239] The bankruptcy court determined the debt could not be discharged and the district court affirmed.

On appeal to the Ninth Circuit, however, the court reversed and found the claim fell outside section 523(a)(4)'s exception to discharge, leaving the pension fund with only a dischargeable unsecured claim against the insolvent estate. The defaulting employer then sued to recover its attorney's fee relying on the attorney's fee clause in the promissory note, section 1717, and *Penrod*.

[237]*Penrod II*, 802 F.3d at 1089–90 (citation omitted). The Ninth Circuit did not address the asymmetry between the parties' financial condition that made the debtor's "reciprocal" right against the creditor much more valuable than the prevailing creditor's contractual right against her would have been. Had AmeriCredit prevailed before the Supreme Court in preventing the $7000 strip down there was no conceivable way it could have recovered hundreds of thousands of dollars in legal fees from Marlene Penrod, and its claim to do so, had it been asserted would have been discharged under her chapter 13 plan as a prepetition unsecured claim. Penrod, however, as prevailing party could expect to recover her appellate attorney's fees in full from the solvent AmeriCredit. This is similar to the practical asymmetry that resulted from Florida's adoption of the English Rule in medical malpractice litigation. *See supra* notes 36–50, and accompanying text.

[238]818 F.3d 486 (9th Cir. 2016).

[239]11 U.S.C. § 523(a)(4) (excepting from discharge debts "for fraud or defalcation while acting in a fiduciary capacity").

The Ninth Circuit, probably taken by surprise that the employer was not content with merely prevailing and obtaining its discharge but now wanted to collect hundreds of thousands of dollars in fees from its employees' already underfunded pension plan, distinguished *Penrod*. It determined that nondischargeability actions in bankruptcy were not "actions on a contract" because neither the enforceability of the debt or its amount was at issue, only the proper scope of the debtor's discharge.[240]

One can sympathize with the result in *Bos*. It seems a bit much to stick the employees' pension fund not only with an uncollectible debt against the defaulting bankrupt employer but also with a bill for the employer's legal fees. But the attempt to distinguish *Penrod* and reconcile *Bos* with the cases liberally construing section 1717 seems forced. Discharge is a federal bankruptcy defense to liability on a debt. In a traditional state law contract suit it would be an affirmative defense to a suit on the promissory note.[241] If the question of the scope and applicability of the discharge were litigated in state court and the noteholder prevailed on the basis that the discharge did not apply in this case, surely its attorney's fees in doing so would be recoverable under the attorney's fee clause as construed in light of the applicable California caselaw. *Penrod* would seem to say that changing the venue from state court to bankruptcy court and flipping the lender from state law plaintiff in a lawsuit to bankruptcy defendant in an adversary proceeding shouldn't matter. If the claimant would have been able to recover its fees litigating the issues in state court had it prevailed, then the prevailing debtor in bankruptcy court should be entitled to do so also as a matter of reciprocal right under section 1717. There was no question in *Penrod* about the enforceability or validity of the debt, only the scope of the bankruptcy right of bifurcation under section 506 and the hanging paragraph of section 1325(a)*. It's unclear how limiting the claimant's collection rights via the defense of bifurcation is categorically different from doing so via discharge.

Following *Bos* some courts have nevertheless focused on trying to categorically distinguish actions by "kind" in order to define the proper scope of the reciprocal right under *Penrod*. Nondischargeability actions are not "actions on a contract"[242] but claim objections probably are.[243] Plan confirma-

[240]*Bos*, 818 F.3d at 490.

[241]The bankruptcy discharge of course is not merely a state court affirmative defense. It also operates as a federal injunction enforceable by the bankruptcy court. *See, e.g.*, *In re* Meadows, 428 B.R. 894, 904–06 (Bankr. N.D. Ga. 2010). This fact does not, however, detract from the point in the text that in California state court contract litigation involving the issue, attorney's fees would be recoverable by the prevailing party under § 1717.

[242]*Bos*, 818 F.3d at 490; *In re* Davison, 289 B.R. 716, 723–24 (B.A.P. 9th Cir. 2003); *In re* McClain, No. 1:14-ap-01058-VK (Bankr. C.D. Cal. Oct. 5, 2016). *But see In re* Baroff, 105 F.3d 439, 443 (9th Cir. 1997) (debtor recovered attorney's fees after prevailing in non-dischargeability action properly character-

tion objections may be "actions on a contract,"[244] but avoiding power litigation probably isn't.[245] Prevailing in a breach of contract claim permits fee recovery;[246] prevailing on a fraud claim arising out of a contract does not.[247] Fees for foreclosure actions can be recovered;[248] but not for prevailing on a motion to lift the stay to foreclose.[249] Litigating the debtor-tenant's liability for a cure of default upon assumption of a real property lease will give rise to a claim for reciprocal attorney's fees for the prevailing party, but other bankruptcy litigation impacting the landlord's rights in the property occupied by the tenant will not.[250] Analytically, the resulting caselaw is a mess, as this list, and the Ninth Circuit's feeble effort to reconcile *Penrod* and *Bos* illustrates.

But interestingly, when one focuses on facts and equities rather than categories of proceedings and kinds of issues, not only can the cases be reconciled, they seem to coherently advance the just resolution of the matter before the court. Take the nondischargeability cases for example. Some nondischargeability actions are brought on flimsy bases by bullies against debtors (often unrepresented) who lack the resources to protect their legal right to a discharge. Shifting fees in favor of a prevailing debtor in such a case seems perfectly reasonable. *Bos,* however, is an entirely different kind of nondischargeability case. The pension fund in *Bos* had a credible enough claim to prevail on its nondischargeability claim at trial and on appeal and lost on a technical interpretation of the scope of the defalcation exception at the Ninth Circuit. Sticking the employee's pension fund with a bill for the defaulting employer's legal fees in that situation seems to add insult to injury.

Conversely, in *Penrod*, where the Ninth Circuit imposed reciprocal fee-shifting, the equities of the matter sharply favored the prevailing individual debtor Marlene Penrod. Penrod was a consumer, for whom $7000 in refinanced debt on her trade-in vehicle was a significant obstacle to a successful chapter 13 reorganization. She was opposed by virtually the entire automo-

ized as "on the contract" because court needed to determine enforceability of contract (a pre-petition settlement agreement) to determine dischargeability).

[243]*In re* Relativity Fashion, LLC, 565 B.R. 50, 65 (Bankr. S.D.N.Y. 2017).

[244]*In re* Penrod (*Penrod II*), 802 F.3d 1084, 1088 (9th Cir. 2015).

[245]*In re* Mac-Go Corp., No. 14-44181, 2015 WL 1372717 (Bankr. N.D. Cal. Mar. 20, 2015) (secured lender could recover fees for contract based defense of preference and fraudulent transfer claims).

[246]*In re* SNTL Corp., 571 F.3d 826 (9th Cir. 2009).

[247]High Sierra Properties, Inc. v. Mitchell, No. B280201, 2019 WL 1324398 (Cal. Ct. App. Mar. 25, 2019). *But see* Santisas v. Goodin, 17 Cal. 4th 599, 608-09 (1998) (attorney's fee clause applied in actions "arising out of the execution" of the parties' agreement and this phrasing is broad enough to support award of attorney's fees to prevailing party alleging both contract and non-contract claims).

[248]*See, e.g., In re* Hoopai, 581 F.3d 1090, 1101-03 (9th Cir. 2009).

[249]*In re* Menco Pac., Inc., No. LA CV17-07830 JAK, 2019 WL 653086 (C.D. Cal. Feb. 15, 2019).

[250]*In re* Hawkeye Entertainment, LLC, 625 B.R 745, 761 (Bankr. C.D. Cal. 2021) (awarding prevailing debtor nearly $606,000 in attorney's fees in lease assumption litigation).

bile finance industry[251] which forced her to litigate through four successive courts over four years (with Penrod prevailing at every level) to establish her right to retain her car subject only to the purchase money portion of the debt. She thereby set a precedent benefiting consumer debtors in chapter 13 proceedings binding throughout the western United States. It would be difficult to imagine a more sympathetic case for prevailing party fee-shifting.

All this suggests that on the question of whether or not the prevailing party should recover bankruptcy-related attorney's fees, we could do better trusting the intuitions and sense of the equities of the bankruptcy courts hearing the matters litigated to final judgment before them rather than relying on some *ex ante* rule or rigid set of categories of proceedings or issues in which, on average or in theory, fee-shifting is appropriate.

VI. MOVING TO A DISCRETIONARY PREVAILING PARTY REGIME FOR RECOVERY OF ATTORNEYS' FEES

A. A Modified English Rule for Bankruptcy Cases.

It's been a long-windup but it should be pretty clear where the pitch is headed by now. The thesis of this Article is that bankruptcy courts should be allowed to exercise a general discretionary authority to award prevailing party attorney's fees in bankruptcy litigation. One can argue that the long established equitable exceptions to the American Rule based on "common fund" and "substantial benefit," which are both rooted in ancient bankruptcy practice administered in English Chancery courts and 19th century federal courts sitting in equity and expanded from that source, provide an ample legal foundation for this power. No express federal statute sets out the American Rule as a general default principle—the American Rule is an artifact of pre-*Erie* federal common law .[252] Federal common law is not frozen forever in its

[251]AmeriCredit Financial Services, Inc. is the finance arm of the General Motors Company. *Amici curiae* briefs supporting AmeriCredit were filed by the (i) American Bankers Association [Dkt. No. 5] (filed June 27, 2011), (ii) Ally Financial Inc. et al. [Dkt. No. 6] (filed June 27, 2011), and (iii) the American Financial Services Association, National Automobile Dealers Association and California Bankers Association, 2011 WL 2559137 [Dkt. No. 4] (filed June 24, 2011) in support of AmeriCredit's petition for certiorari in the underlying *Penrod* litigation. The Ally Financial *amicus* brief was joined by American Suzuki Financial Services Co. LLC, Bank of America, N.A., Ford Motor Credit Co. LLC, JPMorgan Chase Bank, N.A., Nissan Motor Acceptance Corp. and Wells Fargo Bank, N.A. *See* 2011 WL 2559139. *See* AmeriCredit Financial Services, Inc. v. Penrod, Sup. Ct. No. 10-1443 (cert. petition filed May 25, 2011).

[252]At the same time it was recognizing equitable exceptions to the American Rule rooted in ancient insolvency cases, the Supreme Court construed the 1853 Fee Bill, 10 Stat. 161 (subsequently repealed) as codifying the American Rule. *See* Stewart v. Sonneborn, 98 U.S. 187, 197 (1879) (attorney's fees unavailable in malicious prosecution action); Flanders v. Tweed, 82 U.S. (15 Wall.) 450, 452-53 (1872) (fee award unavailable in action to recover cotton illegally seized by United States); Oelrichs v. Spain, 82 U.S. (15 Wall.) 211, 230-31 (1872) (no fees in action to obtain damages based on security bond); The Baltimore, 75 U.S. (8 Wall.) 377, 392 (1869) (attorney's fees not recoverable in admiralty action); Teese v. Huntingdon, 64 U.S. (23 How.) 2, 8 (1859) (attorney's fee unavailable in suit for patent infringement). The United

pre-1937 state. Courts may evolve and adapt common law to better serve the society it regulates. It is a small leap in light of the history and practice of special treatment of attorney's fees in bankruptcy to find a discretionary fee-shifting power in the bankruptcy court. There has been resistance at the Supreme Court to evolving the American Rule notwithstanding its status as federal common law.[253] The fact that long-standing equitable exceptions to the American Rule are grounded in a chain of bankruptcy precedents extending back centuries however provides a work-around: The Supreme Court's recognition that the Bankruptcy Code in general incorporates established pre-Code practices unless the text or context of the Code otherwise requires. This necessary discretion might be found in the interstices of the Bankruptcy Code by implication informed by pre-Code precedent and history rather than as an organic evolution of federal common law. Others may insist that an express amendment to the Bankruptcy Code or Federal Rule of Bankruptcy Procedure 7054(b)[254] providing discretion to award prevailing party attorney's fees in bankruptcy litigation is necessary.

Assuming the authority exists or can be found, bankruptcy courts that recognize their discretion to permit prevailing parties in litigation before them to recover their attorney's fees will in particular circumstances find equitable and practical considerations bearing on that decision. It is impossible to anticipate or to assign fixed weight in advance to all potentially relevant factors that figure into the decision to award fees in a particular case. Nevertheless, it is possible to lay out in broad terms factors that should commonly be relevant in considering fee-shifting in favor of a prevailing party in

States Code as currently in force designates a list of generally recoverable "costs," 28 U.S.C. §§ 1920, 1923, but makes no specific mention of attorney's fees among them.

[253]Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 270-71 (1975) ("[T]he [American R]ule followed in our courts with respect to attorney's fees has survived. It is deeply rooted in our history and in congressional policy; and it is not for us to invade the legislature's province by redistributing litigation costs in the manner suggested by respondents and followed by the Court of Appeals.").

[254]FED. R. BANKR. P. 7054 currently provides:

> (a) *Judgments.* Rule 54(a)-(c) F.R.Civ.P. applies in adversary proceedings.
>
> (b) *Costs; Attorney's Fees.*
>
> (1) Costs Other Than Attorney's Fees. The court may allow costs to the prevailing party except when a statute of the United States or these rules otherwise provides. Costs against the United States, its officers and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on 14 days' notice; on motion served within seven days thereafter, the action of the clerk may be reviewed by the court.
>
> (2) Attorney's Fees.
>
> (A) Rule 54(d)(2)(A)-(C) and (E) F.R.Civ.P. applies in adversary proceedings except for the reference in Rule 54(d)(2)(C) to Rule 78.
>
> (B) By local rule, the court may establish special procedures to resolve fee-related issues without extensive evidentiary hearings.

bankruptcy litigation:[255]

1. Whether the prevailing party or its adversary has a right to recover fees in non-bankruptcy litigation over the same issues.[256]

2. Whether the Bankruptcy Code expressly provides for recovery of attorney's fees.[257]

3. The amount of the fees sought to be shifted and whether the litigation is cost justified in light of the stakes.[258]

4. How close the case was on the merits as to the issues upon which the prevailing party seeks fees. As the merits case for the prevailing party becomes stronger the case for fee-shifting does as well. The English Rule is widely thought to encourage the prosecution of meritorious claims of all sizes and the moral case for augmenting the recovery of the holder of a meritorious claim by an award of attorney's fees increases in proportion to the strength of that claim.

5. Whether the circumstances of the case and the actions of the non-prevailing party suggest its litigation position was a tactic by which it played the part of bully, hold-out, or squeaky wheel, litigating to gain leverage to extract concessions or advantages they are not entitled to or that others similarly situated eschewed.[259]

6. Whether a systemic asymmetry exists between the parties allowing one party to implicitly shift fees whether it prevails or not and regardless of the court's fee award. Systemic asymmetries of this nature abound in bankruptcy.[260] As noted in the preference discussion,[261] win or lose, litigants represented by estate professionals can effectively shift fees to the extent the

[255]Fee-shifting borne by the bankruptcy estate as part of the equitable allocation of the costs of litigation may have materially different effects than contractual fee-shifting under *Travelers*, *supra* notes 213-219, and its progeny. Fee-shifting under those authorities only enhances the prevailing creditor's pre-bankruptcy claim against the estate whereas an award of costs against the estate as part of the resolution of post-petition litigation creates an administrative liability entitled to priority that must be paid in full in cash on the effective date of any plan of reorganization. 11 U.S.C. §§ 507(a)(2), 1129(a)(9)(A).

[256]Non-bankruptcy entitlements generally form a baseline for litigants' rights in bankruptcy. Travelers Cas. & Sur. Co. v. Pac. Gas & Elec. Co., 549 U.S. 443 (2007); Butner v. United States, 440 U.S. 48 (1979).

[257]11 U.S.C. §§ 105(a) (orders in aid of jurisdiction), 110(i) (recovery of debtor's counsel fees from paid petition preparers), 303(i) (damages from dismissed involuntary petition), 362(k) (damages from violation of automatic stay, 524 (discharge injunction). *But see* Taggart v. Lorenzen, 139 S.Ct. 1795 (2019) (imposing civil contempt standard of "no objectively reasonable basis for concluding that the creditor's conduct might be lawful" on discharge violation sanctions). *See also* FED. R. BANKR. P. 9011. Bankruptcy courts also commonly invoke their "inherent powers" to award compensatory sanctions for litigant or professional misconduct in the form of granting or denying compensation for attorney fees; *see, e.g. In re* Dyer, 322 F.3d 1178,1187 (9th Cir. 2003).

[258]*Cf.* ALASKA R. CIV. P. 82(b)(3).

[259]*See supra* notes 186-203 and accompanying text (discussing *Midland Funding*).

[260]*See supra* notes 92-104 and accompanying text (bullet points noting various fee shifting opportunities in bankruptcy).

[261]*See supra* notes 204-210 and accompanying text (trustees' incentives to bring preference actions at estate expense).

estate is administratively solvent. When such parties prevail, the case for further fee-shifting weakens. On the other hand, if the losing party can effectively fee-shift regardless of its loss the case for allowing the prevailing party to also force the estate to pay its reasonable legal fees strengthens. An asymmetry also exists in reciprocal fee shifting if one of the parties is execution proof or if the claim for recovery of the attorney's fees is treated as a dischargeable general unsecured claim against an insolvent bankruptcy estate.[262]

7. Whether the prevailing party's success in litigation will economically benefit others similarly situated or creditors generally or other constituents interested in the bankruptcy case either by maximizing the value of the estate or altering the distribution of value in a manner that benefits creditors generally or other constituents similarly situated to the prevailing party, especially to the extent such situations fit comfortably within the traditional common fund and substantial benefit exceptions to the American Rule.[263]

8. Whether the public interest in equitable and efficient administration of bankruptcy cases generally will be advanced or undermined by an award of fees in these circumstances.[264]

9. The extent to which a given fee award may be so onerous to the non-prevailing party that it would unreasonably deter similarly situated litigants from the voluntary use of the bankruptcy courts.[265] The threat of a fee award against an objecting party in the context of a confirmation hearing is particularly problematic on this basis. A confirmation objector will generally face an array of well-represented and well-funded parties who have closed ranks behind the plan. The expenses of the confirmation hearing are likely to be grossly disproportionate to the claim of an isolated objecting party. Moreover, the "confirmation express" dynamic may mean that even an objector with a good objection faces long-odds of prevailing at confirmation. In that context, the threat of an award of prevailing party fees may well be a bullying tactic employed by the plan proponents against the objector.

10. Vexatious and unreasonable conduct by either (or both) of the litigants in the course of the proceedings conducted before the bankruptcy.[266]

[262] *See supra* notes 36-50 and accompanying text (discussing Florida malpractice experiment with the English Rule) & *supra* note 237 (discussing Ms. Penrod's inability to satisfy any claim for attorney's fees had AmeriCredit prevailed). Interestingly, Delaware prohibits fee-shifting provisions in corporate charters or bylaws. Del. Gen. Corp. L. § 109(b). Shareholders' litigation against their own corporation may be one area where prevailing party fee-shifting would operate systematically in favor of the corporation to deter shareholder suits.

[263] 11 U.S.C. § 503(b)(3), (4) (administrative expense claims in of parties and their attorneys "substantial contribution" to the case); *see supra* notes 113-148 and accompanying text (discussing common fund and substantial benefit equitable exceptions to the American Rule).

[264] *See supra* notes 186-203 and accompanying text (discussing *Midland Funding*).

[265] *Cf.* ALASKA R. CIV. P. 82(b)(3)(I).

[266] *Cf.* ALASKA R. CIV. P. 82(b)(3)(G). *See supra* notes 151-165 and accompanying text (discussing *Baker & Botts*).

11. The extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar because of its status as a repeat player in bankruptcy. Parties that bring litigation that would not otherwise be brought to set a precedent or build a reputation should bear the cost of doing so even when they prevail. Parties facing such a litigant may have a particularly strong equitable case for fee shifting if they defeat the repeat player.[267]

12. The extent to which the party seeking recovery of fees practically prevailed in the litigation by comparing the result relative to the parties' contending litigation positions. Courts administering the English Rule often struggle with determining what it means to "prevail" when the litigated result lies somewhere between the contending positions of the parties. The closer the litigated result is to the litigation position of the prevailing party the stronger the case for fee-shifting.

13. Whether the prevailing party is a natural person, a minor private party, a major party, the bankruptcy estate, or a governmental entity. In general the odds are stacked against natural persons and minor private parties in bankruptcy litigation. When they prevail the moral case for making them whole by an award of attorney's fees is stronger than for major parties, bankruptcy estates, and governments that have lots of fee-shifting and loss spreading capacity, win or lose.

14. Whether the non-prevailing party is a natural person, a minor private party, a major party, the bankruptcy estate, or a governmental entity. For the same reasons noted immediately above, an award of attorney's fees stings less, and is less likely to deny anyone access to the court, when it is made against a major party, the bankruptcy estate, or government.

15. An assessment of whom among the various constituencies in the bankruptcy will practically bear the economic incidence of fees initially borne by the estate.

B. A Look at Fee-Shifting in Bankruptcy in England.

The United States primary global competitor for large insolvency reorganizations is the United Kingdom[268] and so it behooves us to look at how the question of attorney fee shifting is handled in the sophisticated financial reorganization practice taking place in London under the United Kingdom's Insolvency Act. The United Kingdom, of course, generally applies the English Rule on prevailing party attorney's fees. But against this background, the practice of awarding attorney's fees as costs has developed in interesting and

[267] *See supra* notes 212-239 and accompanying text (discussing *Penrod*).

[268] Anthony Casey & Joshua Macey, *Bankruptcy Shopping: Domestic Venue Races and Global Forum Wars*, 37 EMORY BANKR. DEV. J. 463, 468 (2021).

nuanced ways in the United Kingdom. The current practice in UK cases involving "schemes of arrangement" is summarized in a leading treatise:

> Important issues arise in relation to costs where a creditor does choose to mount a challenge. In Re Stronghold Insurance Company Limited Hildyard J stated that he would wish to make clear:
>
> . . . my understanding (and certainly my usual practice) that, unless the objections are wholly improper or irrelevant, obviously collaterally motivated, or sprung on the scheme company without offering a proper opportunity for their discussion, there is very little likelihood of any adverse order for costs . . .; and indeed there will usually be a real prospect of the relevant creditor recovering its reasonable costs of helpful and focused representation, fairly outlined in good time before the convening hearing to enable their proper consideration, on the class issues raised. [[2019] EWHC 2909 (Ch) at [145]]
>
> This approach was endorsed by Snowden J as applicable in the context of a sanction hearing in Ophir Energy Pl, In the matter of Ophir Energy Plc [[2019] EWHC 1278 (Ch) at [39]] and by Norris J in Inmarsat [plc [2020] EWHC 776 (Ch)]. However, in Inmarsat Norris J underlined that this should not be seen as an encouragement to objection. The position remained as stated by Warren J in Re Peninsular Orient:
>
> I decline to elevate to some great principle of public policy the idea that, save in exceptional cases, objectors must, in order to ensure proper scrutiny of the scheme, always be immune from the normal costs rules provided that their objections are genuine and not frivolous. It seems to me that, as in any other litigation, the courts are perfectly capable of deciding on a case by case basis, what the justice of the case demands in relation to costs. [Re Peninsular and Orient [2006] EWHC 3279 (Ch) at [47]].
>
> A further question arises as to whether the company can be required to pay the objecting creditors' costs. In *Inmarsat* Norris J declined to make any order as to costs. What mattered was not the identity of the objector but the nature and substance of the objection: in Inmarsat 'very thin gruel'. Thus, this was not a case in which the company ought to meet the objectors' costs. But, at the same time, it was also not a case in which an adverse costs order ought to be made, as the company could have responded earlier to concerns by market announcements.
>
> Overall, the lesson of the cases for the company appears to be to concentrate on consultation and disclosure in advance of commencing the scheme process. The more the court can be persuaded that creditors were consulted and received adequate information, the less likely it is that the court will order the company to pay an objecting creditors' costs and there may even be a prospect of an adverse costs order against the objecting creditor. Merely pleading urgency without evidence is unlikely to persuade the court: the English courts are increasingly showing a skepticism of claims for urgency which are not made out in the evidence. And, as we shall see below, there is a growing focus on whether consultation was 'even' or whether some creditors were privileged over others in consultation and disclosure.[269]

We see in the most recent UK insolvency cases under Part 26A of the Companies Act of 2006 the continuing push-pull among (i) the desire to socialize the costs of the reorganization effort that benefit third parties (ii) the concern about unduly discouraging participation by all affected constituents in that effort and (iii) the problems posed by hold-outs, bullies and excessive litigiousness. In this respect the recent opinion of Mr. Justice Snowden in the *Matter of Virgin Active Holdings Ltd*[270] is most instructive. Snowden had previously suggested that "creditors who attend a convening hearing" — the first hearing in a scheme or Part 26A restructuring plan at which the court confirms the company's choice of classes — "can expect to receive their reasonable costs irrespective of the outcome." But in *Virgin Active* he characterizes these remarks as dicta that "overstated the approach of the court." He then goes on:

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[269]RODRIGO OLIVARES-CAMINAL, JOHN DOUGLAS, RANDALL GUYNN, ALAN KORNBERG, SARAH PATERSON & DALVINDER SINGH, DEBT RESTRUCTURING §§ 3.03-3.04 (forthcoming 3d ed. 2021). Schemes of arrangement are the UK analog to our chapter 11. UK insolvency law also now provides for an informal composition procedure (a "company voluntary arrangement" or "CVA"). Some recent UK authority suggests court proceedings in relation to a CVA are generally governed by the English Rule rather than the more nuanced approach discussed in the text applicable to schemes of arrangement. *Id.* at §§ 3.01-3.02.

[270]2021 EWHC 911 (Ch) (Apr. 16, 2021).

Instead, on the basis of the authorities to which I have referred, it seems to me that the following principles can be stated in relation to scheme cases under Part 26,

i) In all cases the issue of costs is in the discretion of the court.

ii) The general rule in relation to costs under CPR 44.2 will ordinarily have no application to an application under Part 8 seeking an order convening scheme meetings or sanctioning a scheme, because the company seeks the approval of the court, not a remedy or relief against another party.

iii) That is not necessarily the case (and hence the general rule under the CPR may apply) in respect of individual applications made within scheme proceedings.

iv) In determining the appropriate order to make in relation to costs in scheme proceedings, relevant considerations may include,

a) that members or creditors should not be deterred from raising genuine issues relating to a scheme in a timely and appropriate manner by concerns over exposure to adverse costs orders;

b) that ordering the company to pay the reasonable costs of members or creditors who appear may enable matters of proper concern to be fully ventilated before the court, thereby assisting the court in its scrutiny of the proposals; and

c) that the court should not encourage members or creditors to object in the belief that the costs of objecting will be defrayed by someone else.

v) The court does not generally make adverse costs orders against objecting members or creditors when their objections (though unsuccessful) are not frivolous and have been of assistance to the court in its scrutiny of the scheme. But the court may make such an adverse costs order if the circumstances justify that order.

vi) There is no principle or presumption that the court will order the scheme company to pay the costs of an opposing member or creditor whose objections to a scheme have been unsuccessful. It may do so if the objections have not been frivolous and have assisted the court; or it may make no order as to costs. The decision in each case will depend on all the circumstances.[271]

* * *

As corporation reorganization practice in the United States and the United Kingdom continue to converge in the face of evolving realities in global finance[272] we thus see an interesting tendency of the UK authorities to allow for discretionary fee-shifting in a manner closely parallel to that suggested here. Notwithstanding the historic divergence between the US and UK in allocating the burden of attorney's fees generally, in insolvency cases both systems have, quite sensibly, groped toward a modified English Rule allowing for discretionary fee shifting sensitive to the realities of insolvency practice. It is time to join Justice Snowden in frankly acknowledging that neither the American Rule nor the English Rule in their pure forms has any application in this realm, and that the focus should be on properly guiding the court's exercise of its discretion to advance the goals of the reorganization process while ensuring both a fair allocation of costs and encouraging full but not abusive participation in the process by all affected constituents.

VII. CONCLUSION

Abandoning the American Rule and authorizing a discretionary version of the English Rule as the default rule in bankruptcy for recovery of attorney's fees is no radical step. Empirical work is limited, but in general supports the conclusion that shifts between the American Rule and various versions of the English Rule will have only a modest impact. In bankruptcy cases, there is already now, and always has been, an enormous amount of explicit and implicit fee shifting occurring. The bankruptcy courts have a well-developed set of procedures for regulating and allowing reasonable attorney's fees. Their control over fee allowances is an important constraint on those employing bullying and hold-out tactics calculated to confer leverage in bankruptcy negotiations by pressing weak claims and imposing costs on adversaries. And the bankruptcy courts in adjudicating the matters before them are well-positioned to exercise a sound discretion in the award of attorney's fees calculated to control such behavior when the claims and objections being pressed are meritless. We can identify a series of factors that will cabin the exercise of the court's discretion in an appropriate way designed to advance sound administration of bankruptcy cases and equitable considerations that have long been recognized. All the examples of fee-shifting regimes that we observe

[271] *Id.* at ¶ 29.

[272] SARAH PATERSON, CORPORATE REORGANIZATION LAW & FORCES OF CHANGE (2021).

suggest courts will exercise discretion under a modified English Rule cautiously. The damage being done by the American Rule, though real, may be at the margins only. Moving to a discretionary rule authorizing recovery of attorney's fees by a prevailing party in the bankruptcy court may be a modest improvement in the bankruptcy process, but it is low-hanging fruit we should promptly gather in.

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STATUTORY INTERPRETATION IN BANKRUPTCY CASES[1]

The Supreme Court of the United States often goes out of its way to avoid deciding constitutional issues. Therefore, before addressing a constitutional issue, the Court will look for a jurisdictional or statutory basis to resolve the case before it.[2] A good example is the Court's decision in *United States v. Security Industrial Bank,*[3] which held that the avoiding powers of the Bankruptcy Code do not apply retroactively rather than addressing whether the retroactive application of the statute would offend the Fifth Amendment of the Constitution.[4]

In order to give the appearance that it decides cases according to a rational rule of law, the Court often articulates rules of statutory construction or legal maxims that inform its decisions. Although these rules and maxims simply might be a veneer for the bald political forces that many suspect underlie case outcomes, they must be briefed and argued as part of the formalism of the Court. Admittedly, there are some Justices who are textualists[5] whose vote might be tied inextricably to these rules and maxims, unless an issue of great policy would be contravened by blindly adhering to them. A brief examination of the rules of statutory construction and legal maxims helps to understand the complexity woven into the Court's rhetorical bases for making legal decisions.

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[1] This paper is a modified version of a portion of Chapter 1 of Kenneth N. Klee & Whitman L. Holt's book, BANKRUPTCY AND THE SUPREME COURT: 1801-2014 (West Academic 2015), which is used here with the prior written consent of the publisher and the authors. The panelists encourage readers interested in more complete analysis of the issues and opinions discussed in this paper to purchase the complete book.

[2] In some instances, however, the plain language of a statute or the importance of the issue presented allows the Court little choice but to address a Constitutional question. *See, e.g.*, Stern v. Marshall, 564 U.S. 462, 478 (2011) (declining to utilize the canon of constitutional avoidance to eliminate need to consider the constitutionality of 28 U.S.C. § 157(b)(2)(C) under Article III); Milavetz, Gallop & Milavetz P.A. v. United States, 559 U.S. 229, 239 (2010) (concluding that the plain text of 11 U.S.C. § 101(12A) did not allow the Court to use the canon of constitutional avoidance to sidestep the need to examine the validity of certain Bankruptcy Code provisions under the First Amendment).

[3] 459 U.S. 70 (1982).

[4] *See id.* at 82 (holding that Bankruptcy Code § 522(f)(2) does not apply retroactively, thereby avoiding a difficult constitutional question).

[5] Justices Alito, Gorsuch, Roberts, and Thomas are textualists whose first approach to resolving a dispute over the Bankruptcy Code is to begin with the plain language of the statute. Based on her opinions in the *Hall*, *Baker Botts*, and *Merit Management* cases, Justice Sotomayor appears to have textualist tendencies, at least in bankruptcy cases. Other Justices, such as Justice Breyer, are purposivists who will look to the purpose the statute addresses as a point of first inquiry. Still other Justices, such as now-retired Justice Stevens, might take a mixed approach, first addressing what is fair as a matter of policy or equity.

STATUTORY CONSTRUCTION

> "The bankruptcy law has now been so thoroughly construed that there is not much doubt about any of its provisions. . . ."[6]

Numerous articles and books discuss statutory construction, and some analyze the Supreme Court's use of statutory construction to decide cases.[7] A few do so specifically with respect to the Court's use of statutory construction in bankruptcy cases.[8] Although this paper does not have the depth or breadth of analysis contained in articles and books dedicated solely to this topic, it might provide the reader with interesting insights about the Supreme Court's use of statutory construction in bankruptcy decisions.

The analysis begins by identifying and then examining the Court's use of maxims of statutory construction in bankruptcy cases. An illustration of their uses with specific examples, noting the use of conflicting maxims, and concluding with a discussion whether the Court uses the maxims as a basis for decision or to rationalize a decision *ex post*, follows.

During the twentieth century, the Court used several maxims of statutory construction in bankruptcy decisions generally reflective of the guiding principle that the Court is to interpret statutes, not make them.[9] Although many of the maxims are generalizable to other areas of the law, the use of such maxims may have particular relevance in the bankruptcy arena given Justice Scalia's observation about how "[t]he Bankruptcy Code standardizes an expansive *(and sometimes unruly)* area of law, and

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[6] *See* H.R. REP. NO. 1182, 63d Cong., 2d Sess. 1 (1914), reprinted in 52 CONG. REC. 435.

[7] *See, e.g.,* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws,* in A MATTER OF INTERPRETATION 3 (Amy Gutmann ed., 1997); Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critiq*ue, 36 HARV. J. LEGIS. 368–95 (1999). *See generally* H.L.A. Hart, *The Concept of Law* 121–44 (Oxford: Clarendon Press, 1961) (arguing for "open texture" position on judicial interpretation between formalism and rule-skepticism).

[8] *See, e.g.,* Daniel J. Bussel, *Textualism's Failures: A Study of Overruled Bankruptcy Decisions*, 53 VAND. L. REV. 887 (2000) (discussing legislatively overruled Supreme Court and lower court decisions); Karen M. Gebbia-Pinetti, *Interpreting the Bankruptcy Code: An Empirical Study of the Supreme Court's Bankruptcy Decisions*, 3 CHAPMAN L. REV. 173 (2000) (discussing the interpretive conflict and the Bankruptcy Code while reviewing bankruptcy cases from the Court's 1981 through 1998 terms).

[9] *See* N.Y. County Nat'l Bank v. Massey, 192 U.S. 138, 146 (1904) ("We are to interpret statutes, not to make them."). *See generally* ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 24–27 (Aspen Law & Business 1997) (explaining and criticizing the use of canons because "canons are not a coherent, shared body of law from which correct answers can be drawn, and . . . viewed individually, many canons are wrong"); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395–406 (1950) (describing 28 pairs of canons of statutory construction and their opposites and how the current temper of the Court and needs to be addressed affects their use).

it is [the Court's] obligation to interpret the Code clearly and predictably using well established principles of statutory construction."[10]

Among the more important and frequently used maxims of statutory construction are the following:

1. When the language of the statute is unambiguous, courts must interpret the language in accordance with its plain meaning[11] without regard to legislative history,[12] except in the rare case in which the literal application of the "statute will produce a result demonstrably at odds with the intentions of its drafters."[13]

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[10] RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 649 (2012) (emphasis added).

[11] *See, e.g.,* Patterson v. Shumate, 504 U.S. 753, 760 (1992) (party seeking to defeat plain meaning of the Bankruptcy Code bears an "exceptionally heavy burden" (internal quotation marks omitted)); Conn. Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992) ("When the words of a statute are unambiguous, then . . . 'judicial inquiry is complete.' " (citation omitted)); Gleason v. Thaw, 236 U.S. 558, 560 (1915) ("[T]he Bankrupt Law is a prosy thing intended for ready application to the everyday affairs of practical business, and when construing its terms we are constrained by their usual acceptation in that field of endeavor."); Citizens Banking Co. v. Ravenna Nat'l Bank, 234 U.S. 360, 368 (1914) ("The advantages and disadvantages have been balanced by Congress, and its will has been expressed in terms which are plain and therefore controlling."); Crawford v. Burke, 195 U.S. 176, 189 (1904) ("The language of this section is so clear as to require no construction."); New Lamp Chimney Co. v. Ansonia Brass & Copper Co., 91 U.S. (1 Otto) 656, 662 (1876) ("Statutes must be interpreted according to the intent and meaning of the legislature; and that intention must, if practicable, be collected from the words of the act itself[.]"); Sloan v. Lewis, 89 U.S. (22 Wall.) 150, 155 (1875) ("If the intention of Congress is manifest from what [appears in the text of the bankruptcy statute itself] we need not go further."); United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805) ("Where the intent is plain, nothing is left to construction.").

[12] *See, e.g.,* Barnhill v. Johnson, 503 U.S. 393, 401 (1992) ("[W]e note that appeals to statutory history are well taken only to resolve 'statutory ambiguity.' " (citation omitted)); Toibb v. Radloff, 501 U.S. 157, 162 (1991) ("[T]his Court has repeated with some frequency: 'Where, as here, the resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear.' "); United States v. Ron Pair Enters., Inc., 489 U.S. 235, 240–41 (1989) ("[A]s long as the statutory scheme is coherent and consistent, there is generally no need for a court to inquire beyond the plain language of the statute. The task of resolving the dispute over the meaning of [the statute] begins where all such inquiries must begin: with the language of the statute itself.") ("*Ron Pair*"); Kuehner v. Irving Trust Co., 299 U.S. 445, 449 (1937) ("The legislative history of this provision . . . cannot affect its interpretation, since the language of the act as adopted is clear.").

[13] *See Ron Pair*, 489 U.S. at 242 (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)); United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543 (1940) ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words." (citation omitted; quoted with approval in Perry v. Commerce Loan Co., 383 U.S. 392, 400 (1966))); United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805) (explaining "that where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain; in which case it must be obeyed"). *Cf.* Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 202–03 (1819) (adopting a rule of contract construction that overrides plain meaning to avoid "absurdity and injustice").

2. When the language of the statute is clear, the Court must enforce it in accordance with its terms notwithstanding prior practice.[14]

3. Even when the language of the statute is clear, courts must consider the legislative history and issues of policy and previous practice to determine congressional intent.[15]

4. The Court must not erode a past bankruptcy practice absent a clear indication in the legislative history that Congress intended such a departure.[16]

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[14] *See, e.g.,* Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 10 (2000) ("[W]hile pre-Code practice 'informs our understanding of the language of the Code,' it cannot overcome that language. It is a tool of construction, not an extratextual supplement." (citation omitted)); BFP v. Resolution Trust Corp., 511 U.S. 531, 546 (1994) ("Where the 'meaning of the Bankruptcy Code's text is itself clear,' . . . its operation is unimpeded by contrary state law or prior practice."); Pa. Dep't of Pub. Welfare v. Davenport, 495 U.S. 552, 563 (1990); *Ron Pair*, 489 U.S. at 245–46.

[15] *See, e.g.,* Ransom v. FIA Card Servs., N.A., 562 U.S. 61, 69–72 (2011) (looking to statutory context and purpose to buttress textual interpretation); Kelly v. Robinson, 479 U.S. 36, 43 (1986) ("[T]he text is only the starting point. . . . In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." (internal quotation marks and citations omitted)); Bank of Marin v. England, 385 U.S. 99, 103 (1966) ("[We] do not read these statutory words with the ease of a computer. There is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction."); Wright v. Union Cent. Life Ins. Co., 311 U.S. 273, 279 (1940) ("And so long as that right is protected the creditor certainly is in no position to insist that doubts or ambiguities in the Act be resolved in its favor and against the debtor. Rather, the Act must be liberally construed to give the debtor the full measure of the relief afforded by Congress, lest its benefits be frittered away by narrow formalistic interpretations which disregard the spirit and the letter of the Act." (internal citations omitted)); Wright v. Vinton Branch of Mountain Trust Bank, 300 U.S. 440, 459 (1937) ("The new Act does not in terms provide for 'The right to protect its [the mortgagee's] interest in the property by bidding at such sale whenever held.' But the committee reports and the explanations given in Congress make it plain that the mortgagee was intended to have this right. We accept this view of the statute." (footnote omitted; parenthetical in original)); City of Lincoln v. Ricketts, 297 U.S. 373, 376 (1936) ("In construing the words of an act of Congress, we seek the legislative intent. We give to the words their natural significance unless that leads to an unreasonable result plainly at variance with the evident purpose of the legislation." (citations omitted)); United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543–44 (1940) ("When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' " (footnotes omitted)); Williams v. U.S. Fid. & Guar. Co., 236 U.S. 549, 555 (1915) ("And nothing is better settled than that statutes should be sensibly construed, with a view to effectuating the legislative intent." (citations omitted)). *Cf.* Corn Exch. Nat'l Bank & Trust Co. v. Klauder, 318 U.S. 434, 438 (1943) ("[W]e find nothing in Congressional policy which warrants taking this case out of the letter of the Act."); United States v. Emory, 314 U.S. 423, 430 (1941) ("We are aware of no canon of statutory construction compelling us to hold that the word 'first' in a 150 year old statute means 'second' or 'third', unless Congress later has said so or implied it unmistakably.").

[16] *See, e.g.,* Lamar, Archer & Cofrin, LLP v. Appling, 584 U.S. ___, 138 S.Ct. 1752, 1762 (2018) (discussing how Congress "presumptively was aware of the longstanding judicial interpretation of [a] phrase" under the 1898 Bankruptcy Act "and intended for it to retain its established meaning" for purposes of the 1978 Bankruptcy Code); Cohen v. de la Cruz, 523 U.S. 213, 221 (1998) ("We . . . will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure." (internal quotation marks and citation omitted)); Dewsnup v. Timm, 502 U.S. 410, 419 (1992) ("[T]his Court has been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history."); Midlantic Nat'l Bank v. New

5. When Congress uses different language in a successor statute, the Court presumes that Congress has changed its intent.[17]

6. A later statute that does not apply retroactively cannot be invoked to influence construction of an earlier statute.[18]

7. Under the rule of *stare decisis*, once the Supreme Court has decided an issue of statutory construction, the decision is final and binding in future cases, even if the plain meaning of the text is to the contrary.[19]

Jersey Dep't of Envtl. Protection, 474 U.S. 494, 501 (1986) ("The normal rule of construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. . . . The Court has followed this rule with particular care in construing the scope of bankruptcy codifications." (citation omitted)) (cited with approval in United States v. Noland, 517 U.S. 535, 539 (1996)).

[17] *See* Crawford v. Burke, 195 U.S. 176, 190 (1904) ("Our own view, however, is that a change in phraseology creates a presumption of a change in intent, and that Congress would not have used such different language . . . without thereby intending a change in meaning."). *Cf.* Williams v. Austrian, 331 U.S. 642, 661–62 (1947) ("This negation of long-standing policy should be given effect . . . and should not be hedged by judge-made principles not in accord with those aims. Congress need not document its specific actions in elaborate fashion in order to direct this Court's attention to statutory policy and purpose. The failure to provide appropriate fanfare for . . . the consequent expansion of federal jurisdiction, hardly invites our opinion as to the advisability of the action which Congress has taken."). *But see* Maynard v. Elliott, 283 U.S. 273, 277 (1931) ("Only compelling language in the statute itself would warrant the rejection of a construction so long and so generally accepted, especially where overturning the established practice would have such far reaching consequences as in the present case."); Van Huffel v. Harkelrode, 284 U.S. 225, 227 (1931) (finding the right to sell free and clear of encumbrances by implication under the Bankruptcy Act of 1898 even though the Bankruptcy Act of 1867 contained an express provision allowing the power to sell free and clear).

[18] *See* Levy v. Indus. Fin. Corp., 276 U.S. 281, 284 (1928) ("But that statute did not govern this case and cannot be invoked for the construction of the earlier law."). *But cf.* United States v. Emory, 314 U.S. 423, 430 (1941) ("We are aware of no canon of statutory construction compelling us to hold that the word 'first' in a 150 year old statute means 'second' or 'third,' unless Congress later has said so or implied it unmistakably.").

[19] *See* Bank of Am., N.A. v. Caulkett, 575 U.S. ___, 135 S.Ct. 1995, 1999–2000 (2015) (noting how a "straightforward reading of the statute" supported the debtors' position about the operation of Bankruptcy Code section 506, but rejecting that position under the Court's prior holding in *Dewsnup v. Timm*, 502 U.S. 410 (1992), because "[t]he debtors do not ask us to overrule *Dewsnup*"). Technically speaking, the doctrine of *stare decisis* is not a rule of statutory construction but is a court-created doctrine that applies to preclude the Court from reconsidering its previous interpretation of statutory language. *See generally* Boyle v. Zacharie, 31 U.S. (6 Pet.) 348 (1832) (brief opinion by Justice Marshall stating that the principles established in *Ogden v. Saunders* "are to be considered no longer open for controversy, but the settled law of the court" despite Marshall's dissent in *Ogden*). As with rules of statutory construction, however, the Court appears to invoke *stare decisis* only when its application suits the outcome that a majority of the Court wants to reach. For example, in Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 446 (2004), the Court construed the Eleventh Amendment of the United States Constitution to apply to suits against a state by citizens of its own state even though the text of the Eleventh Amendment "refers only to suits against a State by citizens of another State." *But see, e.g.*, Perez v. Campbell, 402 U.S. 637 (1971) (overruling *Kesler* and *Reitz* as misinterpreting the Supremacy Clause of the Constitution). *Accord* Washington v. W. C. Dawson & Co., 264 U.S. 219, 238 (1924) (Frankfurter, J., dissenting) ("Stare decisis is ordinarily a wise rule of action. But it is not a universal, inexorable command. The instances in which the Court has disregarded its admonition are many." (footnote omitted)); Cook v. Moffat, 46 U.S. (5 How.) 295, 309 (1847) (concluding "[s]o far, *at least, as the present case is concerned,* the court do not think it necessary or prudent to depart from the safe maxim of stare decisis" (emphasis added)).

8. If possible, every word of a statute must be given meaning.[20]

9. Redundancy is not the same as surplusage.[21]

10. That a statute is awkward and ungrammatical does not make it ambiguous.[22]

11. A court must not interpret a statute to produce an absurd result.[23]

12. If literal interpretation of the statute produces an unfair result, it is up to Congress to amend the statute to remedy the problem.[24]

13. Congress "says in a statute what it means and means in a statute what it says there."[25]

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[20] *See, e.g.,* Rake v. Wade, 508 U.S. 464, 471 (1993) ("To avoid deny[ing] effect to a part of a statute we accord significance and effect . . . to every word." (citations and internal quotation marks omitted)); Hoffman v. Conn. Dep't of Income Maintenance, 492 U.S. 96, 103 (1989) ("It is our duty to give effect, if possible, to every clause and word of a statute. . . ." (citations and internal quotation marks omitted)); D. Ginsberg & Sons, Inc. v. Popkin, 285 U.S. 204, 208 (1932) ("[I]f possible, effect shall be given to every clause and part of a statute." (citations omitted)); Peck v. Jenness, 48 U.S. (7 How.) 612, 623 (1849) ("[I]t is among the elementary principles with regard to the construction of statutes, that every section, provision, and clause of a statute shall be expounded by a reference to every other; and if possible, every clause and provision shall avail, and have the effect contemplated by the legislature."); United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805) ("It is undoubtedly a well established principle in the exposition of statutes, that every part is to be considered, and the intention of the legislature is to be extracted from the whole."). *But see* Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001) (explaining that the Court's preference for avoiding surplusage "is sometimes offset by the canon that permits a court to reject words 'as surplusage' if 'inadvertently inserted or if repugnant to the rest of the statute' " (citation omitted)).

[21] *See, e.g.,* Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253 (1992) ("Redundancies across statutes are not unusual events in drafting, and so long as there is no positive repugnancy between two laws . . . a court must give effect to both." (internal citation and quotation marks omitted)). *See also* Piazza v. Nueterra Healthcare Physical Therapy, LLC (*In re* Piazza), 719 F.3d 1253, 1266 (11th Cir. 2013) (applying this principle).

[22] *See* Laime v. United States Trustee, 540 U.S. 526, 534 (2004) ("The statute is awkward, and even ungrammatical; but that does not make it ambiguous. . . .").

[23] *See, e.g.,* Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000) (It is well established that "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." (internal quotation marks omitted)); INS v. Cardoza-Fonseca, 480 U.S. 421, 452 (1987) (Scalia, J., concurring) (nonbankruptcy case); United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 & 390 (1805) (articulating principle against construing statutes to produce "great inconvenience," but emphasizing limited context in which the principle will apply since many inconveniences "ought to have been contemplated in the legislature when the act was passed" and were "probably overbalanced by the particular advantages [the statute] was calculated to produce").

[24] *See* Baker Botts L.L.P. v. ASARCO LLC, 576 U.S. ___, 135 S.Ct. 2158, 2168–69 (2015); Hall v. United States, 566 U.S. 506, 523 (2012); Cent. Trust Co. v. Official Creditors' Comm. of Geiger Enters., Inc., 454 U.S. 354, 360 (1982) (*per curiam*) ("While the Court of Appeals may have reached a practical result, it was a result inconsistent with the unambiguous language used by Congress."). *But see* Tinker v. Colwell, 193 U.S. 473, 490 (1904) ("[W]e think Congress did not intend to permit such an injury [criminal conversation] to be released by a discharge in bankruptcy. An action to redress a wrong of this character should not be taken out of the exception [to discharge] on any narrow and technical construction of the language of such exception.").

[25] *See* Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992) ("In any event, canons of construction are no more than rules of thumb that help courts determine the meaning of

14. Different parts of a statute must be interpreted together (*in pari materia*).[26]

15. A word is presumed to have the same meaning in all parts of the same statute.[27]

16. As a general proposition, the Court will construe a statute to affect only property rights created after the date of enactment.[28]

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legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."). *Accord Ron Pair*, 489 U.S. at 241–42; New Lamp Chimney Co. v. Ansonia Brass & Copper Co., 91 U.S. (1 Otto) 656, 663 (1876); United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805).

[26] *See, e.g.,* Duparquet Huot & Moneuse Co. v. Evans, 297 U.S. 216, 218 (1936) ("There is need to keep in view also the structure of the statute, and the relation, physical and logical, between its several parts."); Lockwood v. Exch. Bank, 190 U.S. 294, 300 (1903) ("The two provisions of the statute must be construed together, and both be given effect."); Pirie v. Chicago Title & Trust Co., 182 U.S. 438, 449 (1901) ("Undoubtedly all the sections of the act must be construed together. . . ."); New Lamp Chimney Co. v. Ansonia Brass & Copper Co., 91 U.S. (1 Otto) 656, 662–63 (1876) (noting how ambiguous language can be given meaning "from other acts in pari materia, in connection with the words, and sometimes from the cause or necessity of the statute" and emphasizing the need to read the text as a whole to produce a harmonious interpretation that avoids internal repugnancy, "unless it appears that the difficulty cannot be overcome without doing violence to the language of the law-maker"). The same rule does not hold for words in other statutes. Although "[h]ere and there in the Bankruptcy Code Congress has included specific directions that establish the significance for bankruptcy law of a term used elsewhere in the federal statutes," in the absence of such specific directions the Court will not look to other statutes to define bankruptcy law terms. *See* Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co., 547 U.S. 651, 662 (2006) (citing United States v. Reorganized CF&I Fabricators of Utah, Inc., 518 U.S. 213, 219–20 (1996)).

[27] *See* Bank of Am., N.A. v. Caulkett, 575 U.S. ___, 135 S.Ct. 1995, 2000 (2015) (explaining how the Court is "generally reluctant to give the same words a different meaning when construing statutes" (internal citation and quotation marks omitted)); Hall v. United States, 566 U.S. 506, 519 (2012) ("At bottom, 'identical words and phrases within the same statute should normally be given the same meaning.' " (quoting Powerex Corp. v. Reliant Energy Servs., Inc., 551 U.S. 224, 232 (2007))); Cohen v. de la Cruz, 523 U.S. 213, 220 (1998) (there is a presumption in the Bankruptcy Code that "equivalent words have equivalent meaning when repeated in the same statute. . . ." (citation omitted)); Patterson v. Shumate, 504 U.S. 753, 758 n.2 (1992) (citing Morrison-Knudsen Constr. Co. v. Director, Office of Workers' Comp. Programs, 461 U.S. 624, 633 (1983), for the principle "that a word is presumed to have the same meaning in all subsections of the same statute"). *But see* Dewsnup v. Timm, 502 U.S. 410, 417 n.3 (1992) ("[W]e express no opinion as to whether the words 'allowed secured claim' have different meaning in other provisions of the Bankruptcy Code.").

[28] *See* United States v. Sec. Indus. Bank, 459 U.S. 70, 79–81 (1982) ("The principle that statutes operate only prospectively . . . is familiar to every law student. . . . This principle has been repeatedly applied to bankruptcy statutes affecting property rights. . . . Holt v. Henley, 232 U.S. 637 (1914). . . . No bankruptcy law shall be construed to eliminate property rights which existed before the law was enacted in the absence of an explicit command from Congress."); Holt v. Henley, 232 U.S. 637, 639 (1914) ("[T]he reasonable and usual interpretation of statutes is to confine their effect, so far as may be, to property rights established after they were passed."); Auffm'ordt v. Rasin, 102 U.S. (12 Otto) 620, 622–23 (1881) ("[W]e see no reason to believe that in making a new rule on that subject Congress intended to make it retrospective, for the purpose of destroying rights of property or rights of action which had become vested before the passage of the law."). The same principle does not apply to contract rights where the bankruptcy statutes usually are construed to apply to pre-existing rights. *See, e.g.,* Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 188 (1902) (cited with approval in *Sec. Indus. Bank,* 459 U.S. at 80).

17. In a statute, "includes" is illustrative, not limiting or exclusive.[29]

18. When the Bankruptcy Code itself does not define a word or phrase, the Court will look for its "ordinary meaning" in dictionaries and similar sources to provide a plain and natural reading.[30]

19. When a particular matter is specifically dealt with in one part of the Bankruptcy Code, that specific provision will govern over more general provisions of the Bankruptcy Code.[31]

20. Words in the Bankruptcy Code may be given meaning based on their association with other words pursuant to the canon *noscitur a sociis*.[32]

21. Although the Bankruptcy Code's section headings do not limit the plain meaning of the text, the headings do supply cues regarding Congress's intent.[33]

The Court has used conflicting maxims of statutory construction in numerous bankruptcy cases and sometimes within the same case.[34] For example, in *Keppel v. Tiffin Savings Bank*[35] the Court was required to interpret the meaning of "surrender" in section 57g of the Bankruptcy Act of 1898.[36] Under that statute, "the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences." The Sixth Circuit certified to the Supreme Court three questions, the first of which was "[c]an a creditor of a bankrupt, who has received a merely voidable preference, and who has in good faith retained such preference until deprived thereof by the judgment of a court upon a

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[29] *See, e.g.,* Am. Sur. Co. v. Marotta, 287 U.S. 513, 517 (1933); Friedman v. P+P, LLC (*In re* Friedman), 466 B.R. 471, 482 & n.20 (B.A.P. 9th Cir. 2012).

[30] *See, e.g.,* Lamar, Archer & Cofrin, LLP v. Appling, 584 U.S. ___, 138 S.Ct. 1752, 1759 (2018); Baker Botts L.L.P. v. ASARCO LLC, 576 U.S. ___, 135 S.Ct. 2158, 2165 (2015); Clark v. Rameker, 573 U.S. ___, 134 S.Ct. 2242, 2246 (2014); Hall v. United States, 566 U.S. 506, 511–12 (2012); Ransom v. FIA Card Servs., N.A., 562 U.S. 61, 69 (2011); Hamilton v. Lanning, 560 U.S. 505, 513–14 (2010).

[31] *See* Law v. Siegel, 571 U.S. 415, 421 (2014); RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 645–46 (2012).

[32] *See* Bullock v. BankChampaign, N.A., 569 U.S. 267, 274–75 (2013).

[33] *See* Merit Mgmt. Grp., LP v. FTI Consulting, Inc., 583 U.S. ___, 138 S.Ct. 883, 893 (2018).

[34] One commentator has concluded that "the Court does not apply a single interpretive method in its Bankruptcy Code cases." *See* Karen M. Gebbia-Pinetti, *Interpreting the Bankruptcy Code: An Empirical Study of the Supreme Court's Bankruptcy Decisions*, 3 CHAPMAN L. REV. 173, 298 (2000).

[35] 197 U.S. 356 (1905) ("*Keppel*").

[36] 11 U.S.C. § 93g (1976) (repealed 1979). Section 57g of the Bankruptcy Act is the predecessor of Bankruptcy Code § 502(d). *See* STAFF OF SUBCOMM. ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE HOUSE COMM. ON THE JUDICIARY, 95th CONG., TABLE OF DERIVATION OF H.R. 8200, 7 (Comm. Print 1977).

suit of the trustee, thereafter prove the debt so voidably preferred?"[37] In a 5–4 opinion, the Court held that even creditors who involuntarily "surrender" their preferences may prove claims in bankruptcy.[38] Both the majority[39] and dissent[40] focused on the plain meaning of the statute and the policy it was intended to accomplish. The majority looked to the dictionary definition of "surrender" and determined that it applied to both voluntary and involuntary actions.[41] The majority buttressed its statutory construction by noting that the fundamental purpose of the provision was to secure an equality of distribution among creditors, and that denying a creditor who disgorges a preference the opportunity to prove a claim would create an inequality.[42] The dissent countered that a creditor who resists the trustee and disgorges a preference after judgment has nothing left to surrender; to hold otherwise would defeat the statute's policy of a prompt, equal, and inexpensive distribution of the estate.[43] The majority believed that to deprive the preferred creditor of a claim after disgorgement of the preference would be punitive and would "disregard the elementary rule that a penalty is not to be readily implied . . . unless the words of the statute plainly impose it."[44] Thus, each side passionately used maxims of statutory construction to support different interpretations and meanings of the same word.[45]

More recently, in *United States v. Ron Pair Enterprises, Inc.*,[46] the Court decided whether Bankruptcy Code § 506(b)[47] entitles a creditor to receive postpetition interest on an allowed, nonconsensual, oversecured claim. To resolve this issue, both the majority and dissent invoked different maxims of statutory construction. The war of the maxims resulted in a 5–4 decision in favor of granting postpetition interest to the oversecured-nonconsensual lien creditor. The majority invoked the maxim that a statute must be construed in accordance with its plain meaning.[48]

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[37] *See Keppel*, 197 U.S. at 359.

[38] *See id.* at 374.

[39] *See id.* at 361 ("Let us first consider the meaning of this provision, guided by the cardinal rule which requires that it should, if possible, be given a meaning in accord with the general purpose which the statute was intended to accomplish.").

[40] *See id.* at 380 (Day, J., with whom Harlan, Brewer, and Brown, JJ., joined, dissenting) ("Therefore the sole question here is: What is meant by the term 'surrender' as used in the act of 1898?").

[41] *See id.* at 362 ("The word 'surrender,' however, does not exclude compelled action, but, to the contrary, generally implies such action.").

[42] *See id.* at 361.

[43] *See id.* at 378, 384.

[44] *See id.* at 362.

[45] For a more recent example of a 5–4 decision that follows a similar pattern of disagreement over statutory interpretation, *see* United States v. Sotelo, 436 U.S. 268 (1978).

[46] 489 U.S. 235 (1989).

[47] 11 U.S.C. § 506(b) (2012).

[48] *See Ron Pair*, 489 U.S. at 241 ("[W]here, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.' " (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917))).

In this case, the placement of the second of four commas in section 506(b) meant that interest was available to any oversecured creditor and did not have to be provided in an agreement. "The language and punctuation Congress used cannot be read in any other way."[49] The dissent noted that based on the position of a comma in the statute, the majority had adopted a statutory construction that reversed a clear past practice and Supreme Court ruling without any clear evidence that Congress intended a different result when it adopted Bankruptcy Code § 506(b).[50] The dissent contended that the majority's approach violated the maxims that "[p]unctuation is not decisive of the construction of a statute" and "if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific."[51]

Indeed, several Supreme Court cases have held that as a matter of statutory construction, courts should "not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure."[52] Sometimes the Court will go to an extreme to find such a past practice. For example, in *Midlantic National Bank v. New Jersey Department of Environmental Protection*,[53] despite "unequivocal language"[54] in the statute authorizing a trustee to abandon "any property of the estate that is burdensome," the Court held that Bankruptcy Code § 554(a)[55] does not authorize a trustee to abandon hazardous property in contravention of a state statute or regulation reasonably designed to protect the public health or safety. Relying on only three pre-Code cases (including one that did not deal with state laws and another in which the relevant language was arguably dictum), the Court concluded that under pre-Code bankruptcy law there were restrictions on a trustee's power to abandon property.[56] On the other hand, the Court has limited the maxim of reliance on prior practice by noting that "where the meaning of the Bankruptcy Code's text is itself clear . . . its operation is unimpeded by contrary . . . prior practice."[57]

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[49] *See id.* at 242.

[50] *See id.* at 252–53 (O' Connor, J., with whom Brennan, Marshall, and Stevens, JJ., joined, dissenting).

[51] *See id.* at 250, 252 (citations omitted).

[52] Pa. Dep't of Pub. Welfare v. Davenport, 495 U.S. 552, 563 (1990). *Accord, e.g.*, Cohen v. de la Cruz, 523 U.S. 213 (1998); United States v. Reorganized CF&I Fabricators of Utah, Inc., 518 U.S. 213, 221 (1996); *Ron Pair* 489 U.S. at 244–45; United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 380 (1988); Kelly v. Robinson, 479 U.S. 36, 53 (1986).

[53] 474 U.S. 494 (1986).

[54] *See Ron Pair*, 489 U.S. at 251 (O'Connor, J., dissenting).

[55] 11 U.S.C. § 554(a) (1988).

[56] In *Midlantic*, Justice Rehnquist's dissent, in which Justice O'Connor joined, made plain that a close reading of the three cases relied on by the majority "reveals that none supports the rule" of *Midlantic*. *See Midlantic*, 474 U.S. at 510 (Rehnquist, J., dissenting).

[57] *See* Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 10 (2000) (quoting BFP v. Resolution Trust Corp., 511 U.S. 531, 546 (1994)).

The Court also has adhered to the maxim that in the absence of express language, courts will not construe statutes to affect property rights established before they were passed. For example, in *Auffm'ordt v. Rasin,*[58] the Court declined to give retroactive effect to a 1874 amendment to the Bankruptcy Act of 1867 that reduced the avoidance reachback period since there was no evidence that Congress intended for the amendment to have retroactive effect or otherwise "destroy a vested right of property or an existing right of action."[59] Likewise, in *Holt v. Henley*,[60] Justice Holmes wrote for a unanimous Court in refusing to apply the trustee's newly-enacted lien rights[61] to defeat the pre-existing rights of a vendor who installed a sprinkler system for the debtor. "[T]he reasonable and usual interpretation of such statutes is to confine their effect, so far as may be, to property rights established after they were passed."[62] The Court relied on this precedent 68 years later in *Security Industrial Bank*[63] when it refused to retroactively apply the Bankruptcy Code's newly-created section 522(f)[64] power to avoid liens in household goods and furnishings:[65] "No bankruptcy law shall be construed to eliminate property rights which existed before the law was enacted in the absence of an explicit command from Congress."

The rule of *stare decisis* plays a large role in Supreme Court decisions. Even if a statute has a plain meaning, if the Court previously has ruled against the plain meaning, a later court generally will not overturn the result.[66] The Court's recent Eleventh Amendment jurisprudence illustrates this point nicely. For example, the Eleventh Amendment, by its terms, plainly applies only to suits against a state by a citizen of another state.[67] But long ago, in *Hans v. Louisiana*[68] the

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[58] 102 U.S. (12 Otto) 620 (1881).

[59] *See id.* at 622–23.

[60] 232 U.S. 637 (1914) ("*Holt*").

[61] The Act of June 25, 1910, ch. 412, § 8, 36 Stat. 838, 840 amended section 47a(2) of the Bankruptcy Act of 1898 to give the trustee the rights of a lien creditor.

[62] *See Holt*, 232 U.S. at 639.

[63] *See* United States v. Sec. Indus. Bank, 459 U.S. 70, 80 (1982).

[64] *See* 11 U.S.C. § 522(f)(2) (Supp. 1980).

[65] *Sec. Indus. Bank*, 459 U.S. at 81.

[66] A vivid example of this rule can be observed in *Bank of America, N.A. v. Caulkett*, 575 U.S. ___, 135 S.Ct. 1995 (2015). In *Caulkett*, the Court noted how the debtors' position was consistent with a "straightforward reading of the statute." *See id.* at 1999. Nevertheless, the Court rejected the debtors' position based on its prior holding in *Dewsnup v. Timm*, 502 U.S. 410 (1992), which the debtors did *not* ask the Court to overrule. *See id.* at 1999–2001. Indeed, the precedential force of *Dewsnup* held despite the Court's observation in a footnote that the *Dewsnup* decision has been criticized since its inception. *See id.* at 2000 n.†. Of course, *stare decisis* does not preclude the Supreme Court from overturning previous holdings, but this is seldom done on the basis of textualism as opposed to policy concerns. *See* United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241–43 (1989).

[67] *See* U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

[68] 134 U.S. 1 (1890).

Court construed the amendment to cover suits against a state by its own citizens.[69] This expansive construction served the policy that it would be unseemly for a state to be sued by its own citizens even more than foreign citizens.[70] It also violated the maxim of statutory construction that every word must be given meaning or significance.[71] In *Hans* the Supreme Court effectively read "another" out of the Eleventh Amendment. Despite this plain departure from textualist principles, after *Hans*, Justices who adhere to textualism have followed *stare decisis* and refused to use textualism to overrule *Hans*.[72] Yet on other occasions, the Court has changed its position despite *stare decisis*. For example, in *Perez v. Campbell*,[73] the Court overruled its earlier decisions in *Kesler v. Department of Public Safety*[74] and *Reitz v. Mealey*[75] as misinterpreting the Supremacy Clause of the Constitution. In his April 9, 1971 letter to Justice Blackmun regarding *Perez*, Justice Harlan urges Justice Blackmun to turn his draft opinion into a dissent upholding *Kesler* with greater emphasis on *stare decisis*.[76]

Some commentators hold the view that the Supreme Court's bankruptcy jurisprudence adopts "a 'plain meaning' posture where the language of the statute meets with judicial approval, and use[s] legislative intent to contradict the language of the statute where a literal reading is not kind to the desired result."[77] This pragmatic, perhaps

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[69] *See id.* at 20 ("[T]he obligations of a State rest for their performance upon its honor and good faith, and cannot be made the subjects of judicial cognizance unless the State consents to be sued, or comes itself into court. . . .").

[70] *See* Alden v. Maine, 527 U.S. 706, 749 (1999) ("In some ways, of course, a congressional power to authorize private suits against nonconsenting States in their own courts would be even more offensive to state sovereignty than a power to authorize the suits in a federal forum.").

[71] *See, e.g.,* Rake v. Wade, 508 U.S. 464, 471 (1993) ("To avoid deny[ing] effect to a part of a statute we accord significance and effect . . . to every word." (citations and internal footnotes omitted)); Hoffman v. Conn. Dep't of Income Maintenance, 492 U.S. 96, 103 (1989) ("It is our duty to give effect, if possible, to every clause and word of a statute. . . ." (citations and internal footnotes omitted)); D. Ginsberg & Sons, Inc. v. Popkin, 285 U.S. 204, 208 (1932) ("[I]f possible, effect shall be given to every clause and part of a statute." (citations omitted)). *But see* Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001) ([T]he Court's preference for avoiding surplusage "is sometimes offset by the canon that permits a court to reject words 'as surplusage' if 'inadvertently inserted or if repugnant to the rest of the statute.' " (citation omitted)).

[72] "Regardless of what one may think of Hans, it has been assumed to be the law for nearly a century. During that time, Congress has enacted many statutes—including the Jones Act and the provisions of the Federal Employers' Liability Act (FELA) which it incorporates—on the assumption that States were immune from suits by individuals." Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 496 (1987) (Scalia, J., concurring).

[73] 402 U.S. 637 (1971).

[74] 369 U.S. 153 (1962).

[75] 314 U.S. 33 (1941).

[76] *See* April 9, 1971 letter from Justice Harlan to Justice Blackmun (contained in Blackmun papers) ("From my standpoint *Kesler* was correctly decided, and, further, I think that *stare decisis* should stand in the way of overruling.").

[77] *See* Kenneth N. Klee & Frank A. Merola, *Ignoring Congressional Intent: Eight Years of Judicial Legislation*, 62 AM. BANKR. L.J. 1, 2 (1988). *See also* Justice Powell's notes on a clerk's memorandum dated September 19, 1986 regarding congressional intent and Kelly v. Robinson, 479 U.S. 36 (1986) ("Congress could not have intended that restitution orders, analogous to criminal fines, are dischargeable.").

somewhat cynical, view of the Court is borne out by the research of the decisions by most, but not all, Justices.[78] Over the years, a significant number of Justices appear to care deeply about the legislative history[79] and view their role as interpreting statutes to achieve congressional intent even when the statutory language is inconsistent with the desired outcome. For example, Bankruptcy Act § 75(s)(3)[80] permitted the debtor to redeem an encumbered farm by paying its appraised value. But the remedy was subject to two provisos, the second of which authorized the secured creditor to demand a public sale of the property.[81] In *Wright v. Union Central Life Insurance Co.,*[82] the Court was asked to decide whether a debtor could redeem farmland at a value fixed by the court before the secured creditor could cause the farm to be sold in a public sale.[83] In deliberating about the Court's decision in *Wright*, Justice Roberts wrote Justice Douglas a letter specifically referencing

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[78] The tendency of courts to sometimes depart from "plain meaning" has caused one Supreme Court Justice to "question whether our legal culture has so far departed from attention to text, or is so lacking in agreed-upon methodology for creating and interpreting text, that it any longer makes sense to talk of 'a government of laws, not of men.' " *See* Patterson v. Shumate, 504 U.S. 753, 766 (1992) (Scalia, J., concurring).

[79] In the context of the Bankruptcy Code, the Court has recognized that "[b]ecause of the absence of a conference and the key roles played by Representative [Don] Edwards and his counterpart floor manager Senator DeConcini, we have treated their floor statements on the Bankruptcy Reform Act of 1978 as persuasive evidence of congressional intent." Begier v. I.R.S., 496 U.S. 53, 64 n.5 (1990). *See also* Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 350 (1985) (quoting statements made by members of Congress). *But see* Fid. Fin. Servs. v. Fink, 522 U.S. 211, 220 (1998) ("Whatever weight some Members of this Court might accord to floor statements about proposals actually under consideration, remarks that purport to clarify 'related' areas of the law can have little persuasive force, and in this case none at all."); Hoffman v. Connecticut, 492 U.S. 96, 103–04 (1989) (in refusing to rely on floor statements, the Court noted that " 'legislative history generally will be irrelevant to a judicial inquiry into whether Congress intended to abrogate the Eleventh Amendment' " (citation omitted)). The Court also has relied on House and Senate Reports in construing bankruptcy statutes. *See, e.g.,* Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 351 (1985) ("Both the House and the Senate Reports state that § 542(e) 'is a new provision. . . .' "). *But see Begier*, 496 U.S. at 69 (Scalia, J., concurring) ("I think it both demeaning and unproductive for us to ponder whether to adopt literal or not-so-literal readings of Committee Reports, as though they were controlling statutory text."). When congressional reports are silent, the Court has even looked at hearing testimony to determine legislative history. *See* United States v. Whiting Pools, Inc., 462 U.S. 198, 207 (1983) ("Although the legislative reports are silent on the precise issue before us, the House and Senate hearings . . . provide guidance."). In some instances, even when the congressional reports address the issue, the Court will refer to hearing testimony. *See, e.g.,* Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 205 n.5 (1988). *But see* Kelly v. Robinson, 479 U.S. 36, 51 n.13 (1986) ("We acknowledge that a few comments in the hearings . . . may suggest that the language bears the interpretation adopted [below]. . . . But none of those statements was made by a Member of Congress, nor were they included in the official Senate and House Reports. We decline to accord any significance to these statements.").

[80] The Frazier-Lemke Act, ch. 869, 48 Stat. 1289 (1934) (formerly codified at 11 U.S.C. § 203(s)) (repealed 1949) (adding subsection (s) to Bankruptcy Act § 75).

[81] *See id.* ("[U]pon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction.").

[82] 311 U.S. 273 (1940).

[83] *See id.* at 275–76 ("The narrow issue presented . . . is whether under § 75(s)(3) the debtor must be accorded an opportunity . . . to redeem the property at the reappraised value or at a value fixed by the court before the court may order a public sale.").

congressional debates to influence the Court's interpretation of the statute. Justice Roberts writes to Justice Douglas as follows:[84]

> This was the congressional view: "Under existing language of the bill, whether or not there may be foreclosure in a case where the award is less than the debt secured is left to the discretion of the judge. Now, that is not a clear explanation, but it will suffice for the present purpose. I would make it clearer if it were important. However, the amendment proposed removes the judge's discretion, if the original debt has not been fully paid, and gives the creditor the right, as a matter of right, to have a foreclosure of the property in the event his debt has not been in full." (79 Cong. Rec. 14333)

This concern is evidenced in the unanimous reported opinion stating that "the [Bankruptcy] Act must be liberally construed to give the debtor the full measure of the relief afforded by Congress, lest its benefits be frittered away by narrow formalistic interpretations which disregard the spirit and the letter of the Act."[85]

Similar themes pervade other Supreme Court bankruptcy decisions. For example, "[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."[86] Justice Douglas made this point quite clearly in *Bank of Marin v. England*[87] when he wrote, "[y]et we do not read these statutory words with the ease of a computer."[88]

Certain Justices are devoted textualists even when their politics would appear to favor a different outcome. For example, in *Dewsnup v. Timm*,[89] Justice Scalia, an avowed textualist, wrote a scathing dissent to a majority opinion that forbade lien-stripping of liens securing claims of undersecured creditors.[90] The substance of the dissent was that Congress could not have intended to use "secured claim" one way in Bankruptcy Code § 506(a) and another way in § 506(d). In *Bank of Marin*, Justice Harlan chided the Court for disregarding "both the proper principles of statutory construction and the most permanent interests of bankruptcy administration" in fashioning a pragmatic result "in its haste to alleviate an indisputable inequity to the bank."[91]

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[84] *See* December 2, 1940 letter from Justice Roberts to Justice Douglas regarding Wright v. Union Cent. Life Ins. Co., 311 U.S. 273 (1940).

[85] Wright v. Union Cent. Life Ins. Co., 311 U.S. 273, 279 (1940) (citations omitted). *Accord* Wright v. Logan, 315 U.S. 139 (1942).

[86] Kelly v. Robinson, 479 U.S. 36, 43 (1986) (quoting United States v. Heirs of Boisdoré, 49 U.S. (8 How.) 113, 122 (1850)).

[87] 385 U.S. 99 (1966) ("*Bank of Marin*").

[88] *Id.* at 103.

[89] 502 U.S. 410 (1992).

[90] *See id.* at 420–36 (1992) (Scalia, J., dissenting).

[91] *See Bank of Marin*, 385 U.S. at 103 (Harlan, J., dissenting).

Yet, if the policy at stake is overwhelmingly important, even the most ardent textualist might compromise his principles of statutory interpretation.[92] For example, in *BFP v. Resolution Trust Corp.*,[93] Justice Scalia wrote for the Court interpreting "reasonably equivalent value" in Bankruptcy Code § 548.[94] In order to protect 400 years of real estate mortgage foreclosure practices from fraudulent transfer attack, Justice Scalia wrote that the value received at a regularly conducted real property foreclosure sale is per se reasonably equivalent to the value of the property sold.[95] Outside the real property foreclosure context, however, "the 'reasonably equivalent value' criterion will continue to have independent meaning (ordinarily a meaning similar to fair market value)."[96]

The dissent made two textualist arguments, both of which had been used by Justice Scalia in other cases, to refute the soundness of the majority opinion. First, the dissent noted that engrafting a "foreclosure-sale exception" onto Bankruptcy Code § 548 was "in derogation of the straightforward language used by Congress,"[97] noting that neither congressional intent nor the plain meaning of the statute support the conclusion that the distressed prices normally fetched at foreclosure sales qualify for "reasonably equivalent value" in section 548. In fact, "rejecting such a reading of the statute is as easy as statutory interpretation is likely to get."[98] Second, the dissent noted that the Court's construction of the statute to permit avoidance of only collusive or procedurally deficient foreclosure sales rendered several congressional amendments to the Bankruptcy Code superfluous.[99] This interpretation transgresses a well-known rule of statutory construction that every part of a statute must be given some meaning.[100] Moreover, the Court eviscerates another canon of statutory construction by interpreting the same words in section 548 to have one meaning for real property foreclosures and another meaning for all other transfers.[101] As Justice Scalia wrote in his dissent in *Dewsnup v. Timm*, " 'Normal rule[s] of statutory construction' " require that "identical words [used] *in the same section of the same enactment*" must be given the same effect.[102]

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92 *See, e.g.,* Young v. United States, 535 U.S. 43 (2002) (Scalia, J., writing for a unanimous Court).

93 511 U.S. 531 (1994) ("*BFP*").

94 11 U.S.C. § 548 (2012).

95 *See BFP*, 511 U.S. at 542–43.

96 *See id.* at 545.

97 *See id.* at 549 (Souter, J., with whom Blackmun, Stevens, and Ginsburg, JJ., joined, dissenting).

98 *See id.* at 550–51.

99 *See id.* at 555.

100 *See supra* n.20 and accompanying text.

101 *See BFP*, 511 U.S. at 556–57.

102 *See Dewsnup v. Timm*, 502 U.S. at 422 (Scalia, J., dissenting) (emphasis in original).

Instead of simply resting the *BFP* decision on policy grounds, however, Justice Scalia went to great efforts to answer the dissent's textualist attack on his opinion.[103] He countered that the meaning of the statute is not plain because it creates an ambiguity by failing to define what a foreclosed property is worth.[104] He wrote that the Court's opinion does not render congressional amendments superfluous because "[p]rior to 1984, it was at least open to question whether § 548 could be used to invalidate even a *collusive* foreclosure sale. . . . It is no superfluity for Congress to clarify what had at best been unclear, which is what it did here by making the provision apply to involuntary as well as voluntary transfers and by including foreclosures within the definition of 'transfer.' "[105] Finally, Justice Scalia noted that his opinion did not give two inconsistent meanings to "reasonably equivalent value."[106] The inquiry whether the debtor received reasonably equivalent value is "the same for all transfers"; but the fact that "a piece of property is legally subject to a forced sale . . . necessarily affects its worth [and] completely redefin[es] the market in which the property is offered for sale. . . ."[107]

The exchange among the Justices in *BFP* is not an isolated example of sharp differences over statutory construction. For example, in *FCC v. NextWave Personal Communications, Inc.*,[108] Justice Scalia, writing for the Court, takes sharp issue with Justice Breyer's dissent,[109] at one point writing that "[i]n addition to distorting the text of the provision, the dissent's interpretation renders the provision superfluous."[110] Justice Breyer's dissent attacks the majority opinion in kind, largely based on issues of statutory construction,[111] at one point writing that the majority's reasoning "rests too heavily upon linguistic deduction and too little upon human purpose."[112]

In fact, Justice Breyer's observation is characteristic of some of the Court's bankruptcy decisions. On occasion, the Court will adhere to plain meaning and overturn a pragmatic result that departs from the language of the statute. For example, the Court's *per curiam* opinion in *Central Trust Co. v. Official Creditors' Committee*[113] interpreted section 403(a) of

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[103] *See BFP*, 511 U.S. at 546 ("The dissent's insistence here that no doubt exists—that our reading of the statute is 'in derogation of the *straight-forward language* used by Congress,' . . . does not withstand scrutiny." (emphasis in original)).

[104] *See id.* at 547 ("But what *is* the 'value'? The dissent has no response. . . ." (emphasis in original)).

[105] *See id.* at 543 n.7 (emphasis in original).

[106] *See id.* at 548.

[107] *Id.*

[108] 537 U.S. 293 (2003).

[109] *See id.* at 305–07.

[110] *See id.* at 307.

[111] *See id.* at 313–21.

[112] *Id.* at 321.

[113] 454 U.S. 354 (1982).

the Bankruptcy Reform Act of 1978 to prohibit dismissal of a chapter XI case filed under the Bankruptcy Act and refiling it as a chapter 11 case under the Bankruptcy Code.[114] Even if the dismissal was in the best interests of the estate and would conserve judicial resources, the bankruptcy court was not free to disregard a clear congressional directive.[115] "While the Court of Appeals may have reached a practical result, it was a result inconsistent with the unambiguous language used by Congress."[116]

In other instances, however, the Court will doggedly adhere to a plain meaning rule of statutory interpretation even when the result is harsh. For example, in *Laime v. United States Trustee*,[117] in a straightforward manner, the Court dealt with Congress' 1994 deletion of an award of compensation from the bankruptcy estate "to the debtor's attorney" under section 330 of the Bankruptcy Code.[118] Although the 1994 deletion left the statute "awkward, and even ungrammatical," the Court found it unambiguous.[119] The Court relied on its previous statement in *Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A.* and previous opinions that "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms."[120] The plain meaning of the statute did not lead to absurd results because the statute does not prevent debtors from engaging counsel before filing for chapter 7, even though those same attorneys could not be compensated out of the estate after the filing.[121] The Court recognized that deference to the supremacy of the Legislature caused its "unwillingness to soften the import of Congress' chosen words even if . . . the words lead to a harsh outcome. . . ."[122] Likewise, in *Hall v. United States*,[123] the Court concluded that although "there may be compelling policy reasons for treating postpetition income tax liabilities as dischargeable," Congress failed to "so provide in the statute," and it was up to Congress to amend the text

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[114] *See id.* at 359–60.

[115] *See id.* at 359.

[116] *Id.* at 360.

[117] 540 U.S. 526 (2004).

[118] *See* Bankruptcy Reform Act of 1994, Pub. L. No. 103–394, 108 Stat. 4106, 4130–31 (§ 224(b) of the Act amending 11 U.S.C. § 330(a) (1994)).

[119] *See Laime*, 540 U.S. at 534.

[120] *See* Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000) (internal quotation marks omitted).

[121] *See Laime*, 540 U.S. at 535–36.

[122] *See id.* at 538; Corn Exch. Nat'l Bank & Trust Co. v. Klauder, 318 U.S. 434, 437–38 (1943) ("Such a construction is capable of harsh results . . . but we find nothing in Congressional policy which warrants taking this case out of the letter of the Act."). *But see* Duparquet Huot & Moneuse Co. v. Evans, 297 U.S. 216, 223 (1936) ("Such a reading of the act will help at the same time in the avoidance of other consequences too harsh or incongruous to have been intended by the Congress.").

[123] 566 U.S. 506 (2012).

because the Court simply would not rewrite the statute to accomplish its purpose.[124]

Sometimes the Court will adopt a sensible rule of construction that Congress later codifies. For example, in *American Surety Co. v. Marotta*,[125] the Court interpreted the meaning of the word "includes" in the definition of "creditor" in section 1(9) of the Bankruptcy Act of 1898.[126] The Court rejected the interpretation of the lower court which had interpreted "the word 'include' to be one of limitation, the equivalent of 'include only,' and to exclude every person not having a demand presently provable."[127] Rather, the Court noted that "[i]n definitive provisions of statutes and other writings, 'include' is frequently, if not generally, used as a word of extension or enlargement rather than as one of limitation or enumeration."[128] In the context of the Bankruptcy Act, the Court contrasted "shall include" with "shall mean" and concluded that in the context of section 1(9), "it is plain that 'shall include' . . . cannot reasonably be read to be the equivalent of 'shall mean' or 'shall include only.' "[129] Congress later adopted this reasonable rule of construction for the entire 1978 Bankruptcy Code.[130]

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[124] *See id.* at 523.

[125] 287 U.S. 513 (1933).

[126] *See id.* at 516 ("(9) 'creditor' shall include anyone who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy.").

[127] *See id.* at 516–17.

[128] *See id.* at 517.

[129] *Id.*

[130] *See* 11 U.S.C. § 102(3) (1978) ("In this title, 'includes' and 'including' are not limiting."). *See also* H.R. REP. NO. 595, 95th Cong., 1st Sess. 315 (1977) ("Paragraph (3) is a codification of American Surety Co. v. Marotta, 287 U.S. 513 (1933)."). The Table of Derivation of the Bankruptcy Code also indicates this rule of construction was taken from American Surety Co. v. Marotta. *See* TABLE OF DERIVATION OF H.R. 8200, SUBCOMM. ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE HOUSE COMM. ON THE JUDICIARY, 95th Cong., 1st Sess. 2 (Comm. Print No. 6 1977).

Oral Advocacy and the Re-emergence of a Supreme Court Bar

JOHN G. ROBERTS, JR.*

Over the past generation, roughly the period since 1980, there has been a discernible professionalization among the advocates before the Supreme Court, to the extent that one can speak of the emergence of a real Supreme Court bar. Before defending that proposition, it is probably worth considering whether advocacy makes a difference—whether oral argument matters. My view after one year on the opposite side of the bench is the same as that expressed by no less a figure than Justice John Marshall Harlan—the second one—forty-nine years ago, after he completed his year on the Court of Appeals for the Second Circuit.[1] Justice Harlan lamented what he saw as a growing tendency among the bar "to regard the oral argument as little more than a traditionally tolerated part of the appellate process," a chore "of little importance in the decision of appeals."[2] This view, he said, was "greatly mistaken."[3] As Justice Harlan told the bar, "[Y]our oral argument on appeal is perhaps the most effective weapon you have got."[4]

By the time he made his remarks to the Fourth Circuit Judicial Conference meeting in Asheville, Judge Harlan had become Justice Harlan, and his remarks included reflections on not only his time on the Court of Appeals but also a few months on the Supreme Court as well. My experience has been limited to what Article III of the Constitution refers to as an "inferior" court—surely James Madison's fabled gift for finding just the right word failed him in that instance. Oral argument before a court of appeals and the Supreme Court differs in some significant respects. On the court of appeals, we hear arguments in panels of three and hear many more cases than the Supreme Court hears. We therefore give the parties less time for oral argument. Rather than the half-hour per side that is typical in the Supreme Court, we often budget ten or fifteen minutes a side. But at the same time, because we sit in groups of only three, we are able to be a little more flexible, keeping counsel as long as we think they are being useful—an additional ten minutes, fifteen minutes, even a half-hour.

"Your oral argument on appeal is perhaps the most effective weapon you have got," Justice John Marshall Harlan remarked in 1955 in an address to the judicial conference of the Fourth Circuit. Having served on the Court of Appeals for the Second Circuit and recently been appointed to the U.S. Supreme Court, Harlan viewed the tendency to belittle the value of oral argument as a mistake.

We also hear argument regularly from intervenors and *amici*, while in the Supreme Court the only non-party that is heard from, except in rare cases, is the United States, through the Solicitor General's Office.

There is also a substantive difference between arguments before the Supreme Court and before a court of appeals. In the court of appeals, we spend quite a bit of time at argument debating and puzzling over what Supreme Court opinions mean, because we are bound by them inexorably. That is typically not a significant part of an argument in the Supreme Court. Most advocates there have found that it is not a worthwhile expenditure of their time to debate with the authors about what their opinions mean. But these distinctions aside, the enterprise of oral argument and its role is really quite similar in a court of appeals and the Supreme Court.

My main conclusion after a year of being on the other side of the bench is that oral argument is terribly, terribly important. I feel more confident about that now than I ever did as an advocate—now, when the question "does oral argument ever matter?" does not carry the

same existential angst it did when it was what I did for a living. Oral argument matters, but not just because of what the lawyers have to say. It is the organizing point for the entire judicial process. The judges read the briefs, do the research, and talk to their law clerks to prepare for the argument. The voting conference is held right after the oral argument—immediately after it in the court of appeals, shortly after it in the Supreme Court. And without disputing in any way the dominance of the briefing in the decisional process, it is natural, with the voting coming so closely on the heels of oral argument, that the discussion at conference is going to focus on what took place at argument.

Oral argument is also a time—at least for me—when ideas that have been percolating for some time begin to crystallize. I—and I think many judges—are aggressively skeptical when they prepare to confront a case. Upon reading a brief, my reaction is not typically "Well, that's a good argument," or "That's persuasive," but instead "Says you. Let's see what the other side has to say." In researching the cases, my reaction is, "I bet there's some authority on the other side that balances it out." But however open you try to keep yourself to particular positions, those doors begin to close at oral argument. After all, the voting is going to take place very soon thereafter, and the luxury of skepticism will have to yield to the necessity of decision. Those closing doors often get a push from what happens at argument, whether it be the questions from the other judges or the responses by the attorneys. And the former can be just as important as the latter, because it is the protocol on the inferior court on which I sit—and, I believe, the general practice on the Supreme Court as well—that the judges do not discuss the cases before oral argument except in unusual situations. Thus, oral argument is the first time you begin to get a sense of what your colleagues think of the case through their questions.

Throughout the history of the Supreme Court, other Justices have shared Justice Harlan's view on the importance of oral argument. Justice Joseph Story reported that

> [Chief Justice Marshall] was solicitous to hear arguments, and not to decide causes without hearing them . . . . No matter whether the subject was new or old; familiar to his thoughts or remote from them; buried under a mass of obsolete learning, or developed for the first time yesterday—whatever was its nature, he courted argument, nay, he demanded it.[5]

Chief Justice Charles Evans Hughes said that oral argument was desirable because it allowed the Court to "more quickly . . . separate the wheat from the chaff."[6] In 1951, Justice Robert H. Jackson reported that the Justices on his Court would unanimously say that they relied heavily on oral argument.[7] And fifty years later, the current Chief Justice has written that oral argument does make a difference and that in a significant minority of the cases he has left the Bench feeling differently about a case than when he went on.[8] Thus, as the character of oral argument has evolved throughout the history of the Court, the Justices have not wavered in their commitment to its importance.

It used to be that you could have an oral argument at the Supreme Court and win your case without actually having to go through the oral argument. In his memoir, Erwin Griswold describes the practice of the Hughes Court of sometimes cutting off a respondent when the Justices had heard enough and were prepared to rule in the respondent's favor—a practice that still exists on many courts of appeals.[9] According to Griswold, Chief Justice Hughes once told a respondent's counsel that "[t]he Court does not care to hear further argument," but counsel kept talking. The Chief Justice repeated his statement. The counsel just spoke more loudly, apparently having understood the Chief Justice to say "We can't hear you," as opposed to "We don't care to hear you." At this point an exasperated Chief Justice looked

In his memoir, Erwin Griswold described how the Hughes Court would sometimes cut off a respondent when the Justices had heard enough and were prepared to rule in the respondent's favor. Griswold served as Solicitor General from 1967 to 1973.

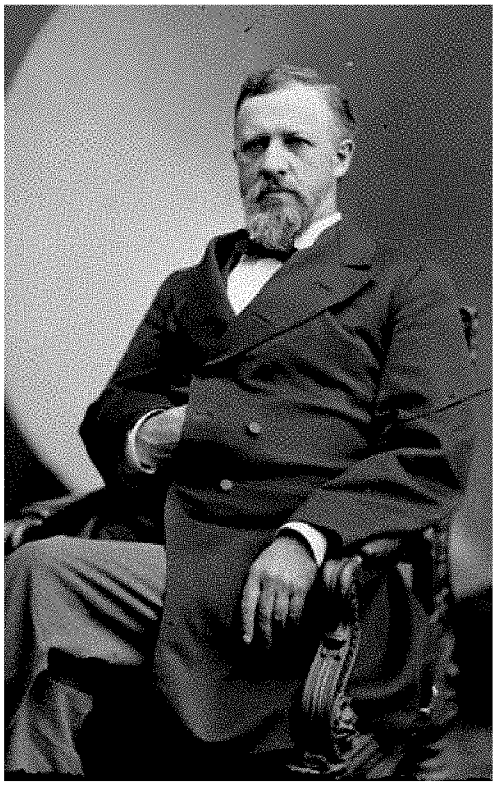
to the petitioner's counsel, who of course had just realized he was going to lose his case because they were cutting off the respondent's argument, and said "Won't you please tell counsel that the Court does not care to hear further argument." Petitioner's counsel got up, strode to the lectern, and said "They say they would rather give you the case than listen to you."[10] Which I guess was drawing some solace from his defeat.

Oral argument today—both in the Supreme Court and in most courts of appeals—consists largely of responding to questions from the bench. In his famous 1940 lecture on oral advocacy to the Association of the Bar of the City of New York, John W. Davis told advocates that they should state the nature of the case, its prior history, the facts, and the applicable rules of law.[11] In his equally famous 1951 talk to the State Bar of California, Justice Jackson said "[B]egin with a concise history of the case, state the holding of the court below and wherein it is challenged[,] . . . follow with a careful statement of important facts, and conclude with discussion of the law."[12] Well, those must have been the days. Nowadays, the most uninterrupted time that an advocate is likely to get before the Supreme Court is a couple of minutes at the outset of argument. When I was preparing for Supreme Court arguments, I always worked very hard on the first sentence, trying to put in it my main point and any key facts, because I appreciated that the first sentence might well be the only complete one I got out in the course of the argument.

Supreme Court oral argument has always been vigorous and rigorous. Some advocates have collapsed in the face of it. The story has been told oftentimes of Solicitor General Stanley F. Reed paling and being unable to

Solicitor General Stanley F. Reed was unable to continue his argument defending the Agricultural Adjustment Act in 1935 after being barraged with technical questions from the Justices.

proceed when he was faced—as the *New York Times* put it—with "a barrage of technical questions" from the nine Justices while trying to defend New Deal legislation before the Hughes Court.[13] A little less well-known is the story of the advocate in a commercial-fraud case that was argued sixty years ago. The Justices were a bit exercised about the facts,



Thomas Ewing, a Senator from Ohio who would serve in the Cabinet under two Presidents, fainted while delivering oral argument before the Supreme Court in 1869. The propensity to faint obviously ran in the family: his son, General Thomas Ewing (pictured), suffered the same misfortune when he collapsed before the Justices during oral argument in 1895.

and the questioning focused on a particular affidavit. At one point, Justice William O. Douglas demanded to know "who drafted this affidavit?," at which point the lawyer fainted dead away, hitting his head on the table on the way to the floor. Court was adjourned and a doctor was called for. When argument resumed, the lawyer—bruised but unbowed—stood up, looked at Justice Douglas, and said, "That he had."[14]

The fault in these cases, however, does not rest entirely with an overly aggressive Court. There is some interesting evidence that the problem may be hereditary. The *Washington Post* of October 23, 1895 carried an item describing how General Thomas Ewing had fainted and collapsed while arguing a case before the Supreme Court. The story went on as follows:

> An extraordinary coincidence that was brought to the mind of one of the ancient Supreme Court employees, and that was amply verified in the course of the day, was the fact that about forty years ago, Hon. Thomas Ewing, the father of Gen. Ewing, who was twice a United States Senator from Ohio, Secretary of the Treasury under President Harrison, and the first Secretary of the Interior under President Taylor, had precisely such a mishap, affecting him in a very similar way, and under exactly the same conditions. While making an argument before the Supreme Court he fell in a faint to the floor, in about three feet of the spot where his son sunk on the carpet yesterday.[15]

When the elder Ewing collapsed, he was actually not removed from the Court until after midnight.[16] The Court did not continue to hear arguments in other cases over the prone body of Senator Ewing. It adjourned; the Justices gathered around Senator Ewing; his family and friends were called for; and physicians were summoned. He eventually recovered and went on to live several more years of a very productive life. Among the family members who came to his side while he lay in the well of the Court was his son, who continued the family swooning tradition years later.[17]

Practically every advocate who has given any kind of advice about arguing before the Court has the same advice about questions: answer them. Former Solicitor General Rex Lee always used to say that oral advocates need to practice saying two words—yes and no.[18] Never put off answering a question. This is how Davis put it in his famous talk: "If you value your argumentative life do not evade or shuffle or postpone, no matter how embarrassing the question may be or how much it interrupts the thread of your argument."[19] Now,

When seasoned advocate John W. Davis (pictured) made his 138th oral argument in the *Steel Seizure Case,* he was able to defer answering a question by Justice Frankfurter about an earlier case he had argued, *Midwest Oil.* When opposing counsel Solicitor General Philip Perlman tried the same delaying tactic, however, Frankfurter persisted until Perlman answered his question.

fast-forward twelve years from that advice to the high drama of oral argument in the *Steel Seizure* case.[20] It was Davis's 138th argument before the Court, and perhaps his greatest day before it. His brilliance seemed to quiet the Justices[21]—except, of course, for Justice Felix Frankfurter, who asked about *United States v. Midwest Oil Co.*,[22] a case Davis had argued forty years earlier when he was Solicitor General that seemed to be inconsistent with his present position.

> MR. JUSTICE FRANKFURTER: What about the holding operation whereby the President took action in the Midwest Company cases, and the relationship of his action to the will of Congress?
>
> MR. DAVIS: It fell to my lot to argue that case. May I finish my brief presentation before I answer Your Honor?
>
> MR. JUSTICE FRANKFURTER: Yes.[23]

And it was in fact some time before Davis returned to Frankfurter's question, saying "Now, Your Honor mentioned the *Midwest Oil* cases. Let me dispose of that."[24]

But what was particularly revealing is what happened next, when Solicitor General Philip Perlman stood up to argue, defending President Truman's seizure of the mills. It was not to be Perlman's greatest day before the Court; he would have better. This time he was being badgered with questions.[25] Justice

Frankfurter asked him the same question he had asked Davis.

> MR. JUSTICE FRANKFURTER: . . . Do you suggest that this non-action of Congress is the equivalent to what was done in the *Midwest Oil* case?
>
> MR. PERLMAN: I want to go into that *Midwest Oil* case later on.[26]

But Frankfurter would not let him do that. He just ignored Perlman's effort to put off the question and came back with a half-dozen more questions on the same subject.[27] This surely must have seemed very unfair to Perlman. I think the lesson is: just because John W. Davis gets away with something, don't think that you're going to as well.

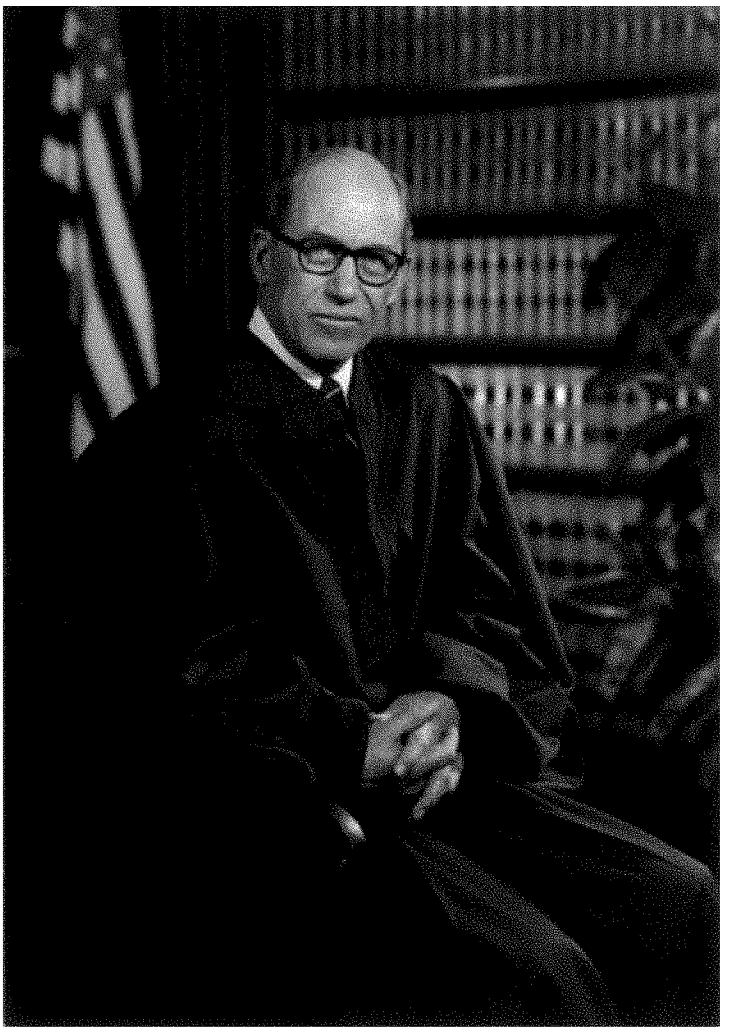
Over the last generation of advocacy before the Supreme Court, one thing that has remained fairly constant has been the level of questioning. I took the first and last cases of each of the seven argument sessions in the 1980 Term and the first and last cases in each of the seven argument sessions in the 2003 Term and added up the questions, and the statistics confirm that impression. There was an average of eighty-seven questions per argument in 1980 and ninety-one per argument in 2003. In both the 1980 and 2003 Terms, there were significantly more questions, on average, for the respondent than for the petitioner.

Davis famously said that an advocate should "[r]ejoice when the Court asks questions."[28] "[A]gain I say unto you," he wrote, "rejoice." But apparently too much rejoicing can be a bad thing. Recent studies have begun to suggest that you can tell how a case is going to come out simply by seeing which side was asked the most questions:[29] the side with the most questions is going to lose. In the twenty-eight cases I looked at, fourteen from the 1980 Term and fourteen from 2003, the most-questions-asked "rule" predicted the winner—or, more accurately, the loser—in twenty-four of those twenty-eight cases, an 86 percent prediction rate. So the secret for successful advocacy—you don't need to read Davis, you don't need to read Jackson—the secret to successful advocacy is simply to get the Court to ask your opponent more questions.

But while the level of questioning has remained constant over the last generation, there have been other changes, and significant ones. Others have commented often enough about the decline in the number of cases the Supreme Court hears on the merits.[30] The Court now hears just over half the number of cases it heard in 1980. There has been a lot of hand-wringing at the bar, of course, over this. I used to think it was a problem, but over the last year I have come to realize that it is not that serious a problem at all. I think the phenomenon is largely explained by the abolition of the Court's mandatory appellate jurisdiction in 1988, and perhaps by the departure from the Court of Justice Byron R. White. Justice White constantly advocated having the Court hear more cases, to the extent that he would write and regularly publish dissents from denials of certiorari, listing the various circuit conflicts he thought the Court was overlooking.

But whatever the reasons, the sharp decline in the number of opportunities for lawyers to argue before the Court has been accompanied, perhaps paradoxically or perhaps not, by an even more dramatic rise in the number of experienced Supreme Court advocates appearing before the Court, both in absolute terms and proportionately. That, in any event, was my impression, and I decided to test it by comparing the lawyers who argued in the 1980 Term and those who argued in the 2002 Term. In 1980, looking at oral arguments by non-federal government attorneys—that is, basically excluding the Solicitor General's Office—fewer than 20 percent of the advocates had ever appeared before the Supreme Court before. In 2002, that number had more than doubled, to over 44 percent.

The change is even more dramatic if you look at what I will call experienced advocates,



The author suggests that the retirement of Justice Byron R. White from the bench may have contributed to the reduction in the number of cases the Court agrees to hear each Term. A constant advocate for the Court to hear more cases, White would regularly write dissents from denial of certiorari, listing the various circuit conflicts he thought the Court was overlooking.

or recidivists—those with at least three previous arguments before the Court. In 1980, only 10 percent of non-Solicitor General arguments were presented by experienced counsel. In 2002, that number had more than tripled, to 33 percent. In 1980, only three lawyers outside the Solicitor General's Office argued twice before the Court, out of some 240 argument slots for non-Solicitor General lawyers, accounting for 2.5 percent of the arguments. (For two of those three, it was their first and second arguments ever.) But in 2002, there were fourteen different non-Solicitor General repeat performers who argued at least twice—many more than twice—accounting for fully 24 percent of the non-Solicitor General argument slots, a tenfold increase.

I should be quick to point out that an experienced advocate does not necessarily make for a better argument. Several of the Justices have gone out of their way to emphasize that many first-timers—many only-timers—have presented wonderful arguments.[31] I observed first arguments in the Supreme Court by Michael Dreeben, Walter Dellinger, and Seth Waxman from the very uncomfortable position of the opposing counsel's chair. On each of those occasions, I would have gladly traded for a grizzled veteran as an opponent. But it is reasonable to suppose that arguing before the

Court is, like most things (including judging), something that you hope to get better at as you go along.

This rise in the number of experienced practitioners before the Supreme Court is reflected in, and abetted by, another development over the past generation: the rise of Supreme Court and appellate practice departments in major law firms. This is largely a phenomenon of the past twenty-five years, not limited to Washington, D.C., but certainly very evident there. In establishing Supreme Court and appellate practice as a recognized specialty, these private law offices, of course, have a very successful model on which to draw. Since 1870, the federal government has had such a specialized office—the Solicitor General's Office. This type of development in the profession has had something of a snowball effect. If one side hires a Supreme Court specialist to present a case, it may cause the client on the other side to think that they ought to consider doing that as well. This is just a variant on the old adage that one lawyer in town will starve, but two will prosper.

There has been a corresponding development on the state and local government side. More and more states are copying the federal model and establishing state solicitor general's offices. These offices certainly are devoted to and focused on litigation before their state supreme court and their state courts of appeals. But they also appear far more frequently before the Supreme Court of the United States now than they did in 1980. In the 2003 Term, for example, a solicitor general or someone from that office appeared for the states of Alabama, Illinois, Michigan, Ohio, Tennessee, Texas, and Washington. I do not want to put too much weight on the label, but in fact if you do have an office of appellate specialist at the state level, I think it is natural to hope and assume that lawyers from that office will bring more experience and expertise to their cases before the Supreme Court.

Along with the rise of specialists in the private bar and the rise of specialists representing state and local government, the United States Office of the Solicitor General is appearing in proportionately more cases before the Supreme Court than it did before. That office has gone from appearing as a party or an amicus in just over 60 percent of the cases in 1980 to appearing at argument in over 80 percent of the cases the last three Terms. Interestingly, the office's absolute numbers have remained about the same as the Court's docket has contracted. In 1980 the Solicitor General appeared in some sixty-six cases; in the last three Terms, he was in sixty-five, sixty-two, and sixty-two. I do not think the Supreme Court's docket has contracted simply by eliminating cases in which there was no interest on the part of the federal government. Instead, over the past several years the Solicitor General has filed and argued in cases that that office would have let pass twenty-five years ago.

There is a certain institutional dynamic at work here: the Solicitor General must sign off on every appeal by the federal government throughout the federal judiciary, from any level to any other level. If the federal government loses in a district court and wants to appeal to the court of appeals, that has to be approved by the Solicitor General. That role is much appreciated by those of us on the inferior courts, because it helps ensure (at least in theory) that the United States is maintaining a consistent litigation position throughout the country. But it is an enormously heavy burden on the very limited resources of the Solicitor General's Office to review, in every case, whether the government should appeal and what position it should take. The lawyers who do that work end up working extremely hard, often on very mundane issues. The reward, of course, is that those same lawyers have the opportunity to appear for their country before the Supreme Court. So however much the Supreme Court's docket may contract, there is pressure to have someone from the Solicitor General's Office appear in more and more of those cases.

The net result is that the experienced lawyers of the Solicitor General's Office, on

a relative basis, are appearing far more frequently before the Supreme Court than they did a generation ago. This, too, contributes to the snowball effect. A client may not think that it needs a Supreme Court specialist until it finds out that the federal government's Supreme Court specialist is joining what, up to then, had been a purely private dispute.

Now, when you step back from all these developments and look at the net consequence, it is eye-catching. In 1980, the odds that the advocate making his way to the lectern for an oral argument before the Supreme Court had ever been there before were about one in three, including representatives of the Solicitor General's Office. By 2002, those odds were over 50 percent. It is interesting to note that a generation ago, a number of the Justices commented quite critically on the quality of oral argument before the Court.[32] Justice Lewis F. Powell said that he had high expectations of the bar when he joined the Court, but that the bar's performance "has not measured up to my expectations."[33] From Justice Powell, those are very harsh words. Chief Justice Warren Burger made the need for improved advocacy a recurring theme of his speeches, focusing on the poor quality of advocacy by those representing the states and local governments.[34] Around 1980, retired Justice Douglas said that 40 percent of the oral advocates before the Court were "incompetent."[35] And in a 1983 lecture, the current Chief Justice attributed the disrepute into which oral argument was falling to the prevailing poor quality of oral advocacy, noting that for many advocates before the Supreme Court, oral argument seemed to be an opportunity to present their brief "with gestures."[36]

My bold claim today, looking back at the last twenty-four years, is that things have changed, and for the better. First, there have been some very specific institutional changes. The establishment of an advocacy program at the Academy of State and Local Governments and similar programs at the National Association of Attorneys General were a direct response to Chief Justice Burger's critique.[37] These organizations provide not only amicus help, but also moot court training and other assistance to the representatives of state and local government. There has been a recent rise of similar programs available to all advocates before the Court. The Georgetown University Supreme Court Institute provided rigorous moot court preparation for advocates in two-thirds of the cases argued before the Supreme Court during the 2003 Term. The Institute's moot court program is highly valued by novice and experienced advocates alike because of the high quality and skill of the judges that Institute director Professor Richard Lazarus is able to attract to do the moot courts. These programs have made it easier for both first-timers and experienced advocates to do a more professional job before the Court.

There have even been changes along these same lines in the Solicitor General's Office. Everyone who has served in the Solicitor General's Office shares a belief that that office enjoyed a golden age roughly corresponding to the time that they served there. Suggesting that something has improved in the Office of the Solicitor General will to many seem like heresy, because it implies that there was at one time a need for improvement. All I will note is that a generation ago it was not the rule—certainly a practice, maybe even a common practice, but not the rule—that Solicitor General's Office lawyers went through moot courts before their arguments. That requirement was instituted by Judge Kenneth Starr, and I believe it has stuck, which I think has allowed some lawyers from the Office of the Solicitor General to become even better advocates.

I would not go so far as to say that the reemergence that I have identified of a Supreme Court bar was a response to the judicial criticism prevalent a generation ago. But perhaps to the extent that the Justices at that time identified an opportunity for improved

quality and professionalism, the bar identified the same opportunity and responded. The Supreme Court bar that I have been discussing is, of course, nothing like the Supreme Court bar of the John Marshall era. No one today is going to argue in half of the Court's cases, as William Pinkney did one year.[38] But more and more, there are familiar faces appearing at the lectern—not just the curiously attired lawyers from the Solicitor General's Office, but faces from the private bar and from the states as well. If I am right about this, I think it raises a number of interesting questions. If there has been a re-emergence of the Supreme Court bar, when did the old one die, and what killed it? What is the relationship between the Court's shrinking docket and the rise of the Supreme Court bar? More generally, is a specialized bar a good thing or a bad thing for the Court?

Obviously better advocacy—if in fact that is what comes with more experienced advocates—is a good thing. A well-argued case will not necessarily be well decided; sometimes the judges get in the way. But there is a significant risk that a poorly argued case will be poorly decided.[39] That is a risk of our adversary system. More experienced, better advocates should be a good thing.

But the developments I have noted do raise some concerns. Take the presence of someone from the Office of the Solicitor General in more than 80 percent of the Court's argued cases. If you asked me as an abstract proposition whether I would be troubled by the idea that the executive branch was going to file something in every case before the Supreme Court explaining its views, as a sort of super law clerk, my answer would be yes, I would find that very troubling. Eighty percent is pretty close to every case, and as the discernible federal interest in a matter before the Court wanes, concern about the role being played by the government increases.

On the private side, I would suppose that the Justices are pleased to see good and experienced advocates present a case. But there is no denying that something is lost as the bar becomes more specialized. The Chief Justice has referred to the "intangible value of oral argument," the point at which counsel and Court look each other in the eye and have a public "interchange" about the case.[40] If you have a case arising in Iowa that works its way through the Iowa courts, goes to the Iowa Supreme Court, and works its way to Washington, I think there is something beneficial both for the U.S. Supreme Court and certainly for the Iowa bar to have Iowa attorneys present that case. That is true, of course, only to the extent that those attorneys are able and willing to learn what practice before the Supreme Court is like and what it demands of them. That may turn out to be a very big challenge. It may be that not many lawyers with different practices to maintain can set aside the months necessary effectively to brief and to prepare for argument in a case before the Supreme Court. There is a corresponding challenge on the part of the specialist as well: to become intimately steeped in the local character and details of any particular case, so that they are able to convey that to the Justices.

Whether an advocate is a recidivist or presenting his first and only argument before the Court, he needs to have something of the medieval stonemason about him. Those masons—the ones who built the great cathedrals—would spend months meticulously carving the gargoyles high up in the cathedral, gargoyles that when the cathedral was completed could not even be seen from the ground below. The advocate here must meticulously prepare, analyze, and rehearse answers to hundreds of questions, questions that in all likelihood will actually never be asked by the Court. The medieval stonemasons did what they did because, it was said, they were carving for the eye of God. A higher purpose informed their craft. The advocate who stands before the Supreme Court, whether a veteran or novice, also needs to infuse his craft with a higher purpose. He must appreciate that what happens here, in mundane

case after mundane case, is extraordinary—the vindication of the rule of law—and that he as the advocate plays a critical role in the process. The advocate who appreciates that does infuse his work with a higher purpose, and that higher purpose will steel him for the long and lonely work of preparation, will bring the proper passion to his cause, will assuage the bitterness of defeat and moderate the elation of victory, and will, more and more, forge a special bond with his colleagues at the Supreme Court bar.

*This article is the printed version of a lecture delivered at the Supreme Court Historical Society's Annual Meeting on June 7, 2004.

ENDNOTES

[1]John M. Harlan, "Address Delivered Before the Judicial Conference of the Fourth Circuit at Asheville, North Carolina (June 24, 1955)," in John M. Harlan, "What Part Does the Oral Argument Play in the Conduct of an Appeal?" 41 *Cornell L.Q.* 6 (1955).

[2]*Id.* at 6, 10–11.

[3]*Id.* at 6.

[4]*Id.* at 11.

[5]4 Albert J. Beveridge, **The Life of John Marshall** 94 n. 1 (1916) (quoting Justice Story in 3 **John Marshall: Life, Character and Judicial Services** 377 [John F. Dillon ed., 1903]).

[6]Robert L. Stern, Eugene Gressman, and Stephen M. Shapiro, **Supreme Court Practice** 578 (6th ed. 1986) (quoting Hon. C. E. Hughes, **The Supreme Court of the United States** 62–63 [1928]).

[7]Robert H. Jackson, "Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations," 37 *A.B.A. J.* 801 (1951) ("I think the Justices would answer unanimously that now, as traditionally, they rely heavily on oral presentations.").

[8]William H. Rehnquist, **The Supreme Court** 243 (Knopf 2001) (1987) ("Speaking for myself, I think [oral argument] does make a difference: In a significant minority of the cases in which I have heard oral argument, I have left the bench feeling differently about a case than I did when I came on the bench.").

[9]*See* Erwin N. Griswold, **Ould Fields, New Corne: The Personal Memoirs of a Twentieth Century Lawyer** 92 n. 25 (1992).

[10]*Id.*

[11]John W. Davis, "The Argument of an Appeal," 26 *A.B.A. J.* 895, 896–97 (1940).

[12]Jackson, *supra* note 7, at 803.

[13]"Reed in Collapse; AAA Cases Halted," *New York Times*, December 11, 1935, at 1.

[14]William O. Douglas, **The Court Years** 181 (1980). The case being argued was *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944).

[15]"Gen. Thomas Ewing Ill; Compelled to Suspend His Argument Before the Supreme Court," *Washington Post*, October 23, 1895, at 3. General Ewing collapsed while presenting oral argument in *Farmers' Loan & Trust Co. v. Chicago, Portage & Superior Ry. Co.*, 163 U.S. 31 (1896).

[16]**Memorial of Thomas Ewing** 284–85 (Ellen E. Sherman ed., 1873). Senator Ewing collapsed while presenting oral argument in *Maguire v. Tyler*, 75 U.S. (8 Wall.) 650 (1869).

[17]*Id.* at 284.

[18]Rex E. Lee, "Oral Argument in the Supreme Court," 72 *A.B.A. J.* 60, 61 (1986).

[19]Davis, *supra* note 11, at 897.

[20]*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

[21]Rehnquist, **The Supreme Court**, *supra* note 8, at 185 ("Davis's argument I thought was masterful.... [T]he Court had appeared to be almost in awe of Davis, and asked him only one question during his ninety minutes of argument").

[22]236 U.S. 459 (1915).

[23]Transcript of oral argument, *Youngstown Sheet & Tube Co. v. Sawyer* (Nos. 744, 745) (May 12, 1952), in 48 **Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law** 893 (Philip B. Kurland and Gerhard Casper eds., 1975) (hereafter oral arg. tr.).

[24]*Id.* at 896.

[25]*See* Rehnquist, **The Supreme Court**, *supra* note 8, at 185 ("Perlman was virtually peppered with questions from the [J]ustices"); Joseph A. Loftus, "High Court Jurists Sharply Question Defense of Seizure," *New York Times*, May 13, 1952, at 1 ("For nearly all of the two hours and ten minutes that [Perlman] was on his feet... he was under the steady pressure of interrogation."); Chalmers M. Roberts, "Right to Grab Steel Mills Is Argued in High Court; Justices Question Perlman on Failure to Use Taft-Hartley Act," *Washington Post*, May 13, 1952, at 1 ("Perlman... was the target of searching questions from practically all of the nine [J]ustices").

[26]Oral arg. tr. at 907.

[27]*See id.* at 907–09.

[28]Davis, *supra* note 11, at 897.

[29]*See, e.g.*, Charles Lane, "Questions from the Bench Seen as Clues to Final Outcomes," *Washington Post*, November 3, 2003, at A17.

[30]*See, e.g.*, Arthur D. Hellman, "The Shrunken Docket of the Rehnquist Court," 1996 *Sup. Ct. Rev.* 403.

[31]*See, e.g.*, Jackson, *supra* note 7, at 802; Rehnquist, **The Supreme Court**, *supra* note 8, at 248–49.

[32]*See* Stern, Gressman, and Shapiro, *supra* note 6, at 578–79.

[33]*Id.* at 579 (quoting Remarks of Justice Powell at Fifth Circuit Judicial Conference, "The Level of Supreme Court Advocacy" 4 [May 27, 1974] [unpublished manuscript]).

[34]*See generally id.* at 579 n. 8 (citing Chief Justice Burger's remarks to District of Columbia Judicial Conference); Warren Burger, "Opening Remarks at the Conference on Supreme Court Advocacy (October 17, 1983)," in 33 *Catholic U. L. Rev. 525* (1984).

[35]Douglas, *supra* note 14, at 183.

[36]William H. Rehnquist, "Oral Advocacy: A Disappearing Art," 35 *Mercer L. Rev.* 1015, 1024 (1984).

[37]*See* Burger, *supra* note 34, at 525–26.

[38]G. Edward White, III–IV **The Oliver Wendell Holmes Devise History of the Supreme Court of the United States; The Marshall Court and Cultural Change, 1815–1835** 208 (1988) (Pinkney "argued over half the cases before the Marshall Court in the 1814 Term").

[39]*See* Rehnquist, "Oral Advocacy," *supra* note 36, at 1020 ("I am a firm believer in the proposition that a poorly argued case, whether in the briefs or in oral argument, is apt to be a poorly decided case").

[40]*Id.* at 1021 ("The intangible value of oral argument is, to my mind, considerable. It is and should be valuable to counsel, to judges, and to the public . . . . [O]ral argument offers an opportunity for a direct interchange of ideas between court and counsel.").

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Correction

On page 272 of the previous issue, George Julion should have been identified as a Representative from the State of Indiana. On page 266, Thaddeus Stevens was correctly identified as representing Pennsylvania, but he served in the House of Representatives.

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Cover: Wood engraving of oral argument before the Waite Court, June 28, 1888.