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I. INTRODUCTION

Gone are the days of bankruptcy where the insolvent debtor faced an ignominious execution or was sentenced to lifelong imprisonment to satisfy a creditor's demand for their pound of flesh. The modern U.S. Bankruptcy System has moved beyond its focus on draconian punishment,[1] instead, its focus is on fairness to the debtor and distribution of assets among creditors.[2] With recent Supreme Court cases such as *Jevic,* significant concerns have been raised about the effectiveness of negotiated agreements, related to, but outside of bankruptcy.[3] These concerns center on the reduction in the fairness of certain debtor tools—namely prepackaged and cramdown plans. These plans put creditors in a constantly inferior bargaining position to the debtor, with whom, creditors must negotiate to obtain payment of outstanding obligations. In contravention of historic fears about bankruptcy's fairness and efficiency, this article addresses a growing concern regarding the treatment of creditors in a debtor-oriented system. This article posits that *Jevic* has detrimentally altered creditor interests in insolvency and bankruptcy because creditors have been severely limited in their ability to negotiate for preferential payment.

There are two concurrent purposes to Chapter 11, which is also known as corporate bankruptcy. First, bankruptcy aims to reduce debt loads for businesses, thereby encouraging continued operation. Second, bankruptcy provides clear guidelines for the collection of debt.[4] This article focuses its attention on this

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1. *See* O. O. Vrooman, *Origin and History of the Bankruptcy Law*, 37 COM. L. J. 127, 127-28 (1932) (addressing some of the origins of bankruptcy, such as the execution and slavery systems for debtors in 4th century BCE Rome through the development of the English common law debtor slavery and the debtor prisons of the 17th and 18th centuries).

2. *See generally* Jean Braucher, *Bankruptcy Reorganization and Economic Development*, 23 CAP. U. L. REV. 499 (1994).

3. Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973 (2017) (holding that secret priority and structured dismissal of a case contrary to the Bankruptcy Code is not permitted.); *see also* Hannah L. Blumenstiel et al., *Skipping Priorities in the Post-Jevic World*, Presentation to the Commercial Law and Bankruptcy Section of the Bar Association of San Francisco (April 2018), http://content.sfbar.org/source/BASF_Pages/PDF/G181904materials.pdf [hereinafter Skipping Priorities].

4. *See* GRANT NELSON, ET. AL., REAL ESTATE TRANSFER, FINANCE AND DEVELOPMENT 772 (9th ed. 2015). It is important to note at this point that bankruptcy originated as a creditor remedy, because it provided creditors with a way to collect on their debts. However, changes over time have created a bankruptcy system which provides preferential treatment to debtors. So, most individuals file for consumer bankruptcy under chapters 7, 12, and 13 of the Bankruptcy Code, because these chapters

second purpose. Bankruptcy encourages businesses to make large scale purchases that they would otherwise be unable to afford, which in turn helps promote manufacturing and economic development all around the world.[5] As a result, bankruptcy facilitates the extension of credit by providing creditors protection for their investments.[6] This article addresses one of the quintessential aspects of bankruptcy that *Jevic* has limited, namely a creditor's ability to negotiate payment terms outside of bankruptcy, contrary to bankruptcy's purposes.

This article has six sections that focus on Chapter 11, addressing the "reorganization" of large multi-state corporate debtors who use this chapter.[7] The first section addresses the legislative history of bankruptcy and provides a brief overview of the changes in bankruptcy's objectives throughout history.[8] In the second section, this Comment addresses the basic operation of a Chapter 11 bankruptcy and provides a simple platform to understand how *Jevic* has altered a significant aspect of bankruptcy.[9] Third, this article examines how pre-bankruptcy agreements illustrate the conflict in negotiations between debtors and creditors.[10] The fourth section examines how a cramdown plan provides debtors with a stronger bargaining position as parties negotiate for both a quick and inexpensive exit from bankruptcy and a maximized payout.[11] The fifth section addresses the Supreme Court's decision in *Jevic*,[12] identifying how creditors have less incentive to bargain because they can no longer negotiate for better priority.[13] Sixth, this article proposes solutions that will restore the status quo disrupted by the Supreme Court's *Jevic* decision. In conclusion, the implementation of *Jevic* places limits on changing priorities which harms creditor interests and such a limit on negotiation is inapposite to the purpose and spirit of bankruptcy.

provide the most protections to consumers. The typical corporate bankruptcy involves large multi-state organizations, I will not address the small or midsized bankruptcies nor will I address state reorganizations or receivership protections.

5. *See* THOMAS JACKSON & DAVID SKEEL, BANKRUPTCY AND ECONOMIC RECOVERY 103 (Brookings Institute 2013).

6. CHARLES JORDAN TABB, THE LAW OF BANKRUPTCY 1039 (2nd ed. 2009).

7. A vast majority of bankruptcies do not involve large companies, however, large multistate companies that use bankruptcy to reorganize or limit their liabilities account for a large percentage of the money involved in all U.S. bankruptcy filings. Douglas G. Baird & Robert K. Rasmussen, *The End of Bankruptcy*, 55 STAN L. REV. 751, 756 (2002); *see also* Douglas G. Baird & Robert K. Rasmussen, *Antibankruptcy*, 119 YALE L. J. 748 (2010).

8. For a more exhaustive history, *see* David A. Skeel, Jr., *The Genius of the 1898 Bankruptcy Act*, 15 BANKR. DEV. J. 321 (1999); *see also* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. L. REV. 5, 10-11 (1995). Both of which address the development of bankruptcy law within the United States and focus on several of the driving economic and legal factors behind the adoption of each bankruptcy law and amendments.

9. For a comprehensive reading on the practice and nature of bankruptcy law, *see generally* TABB, *supra* note 6.

10. FRANK PERETORE, WORKOUTS AND ENFORCEMENT FOR THE SECURED CREDITOR AND EQUIPMENT LESSOR 15 (2008).

11. Blumenstiel et al., *supra* note 3.

12. Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973 (2017).

13. *Id.*

II. A VERY BRIEF HISTORY OF NEGOTIATION IN AMERICAN BANKRUPTCY LAW

In order to understand the development of bankruptcy law, it is important to have an understanding of its origin and changes in the past few centuries. Negotiation is a central part of the bankruptcy process and so it is important to understand how bankruptcy specific negotiation and the interconnected issue of distribution of bankruptcy assets have changed over time. Bankruptcy originated as a creditor friendly remedy exclusively available to the mercantile elite, over time it became more consumer-friendly.[14] Similarly, the distribution of bankruptcy proceeds has evolved from a piecemeal pro-rata distribution to the modern practice of distributing the value of the bankruptcy company based on textual and public policy reasons.[15]

A. The Early History of Bankruptcy

Insolvency laws date back to around 400 B.C.E and have existed in some form or another since then.[16] Bankruptcy's origin in the United States was derived from the common law traditions of English insolvency law and continued to evolve as colonists developed their legal traditions.[17] Because of this English influence, the drafters of the 1787 United States Constitution included a clause that granted the federal government the power to implement, control, and alter bankruptcy law.[18] The United States' view of bankruptcy was the same as England's, specifically, bankruptcy was a tool for creditors to collect money from indebted merchants.[19] Bankruptcy was not available to the layperson, their alternative was debtors' prison.[20]

Congress first exercised its bankruptcy power through the creation of the Bankruptcy Act of 1800.[21] While it only lasted until 1803, this version formed a basis for all subsequent bankruptcy laws.[22] The Bankruptcy Act of 1800 was fundamentally a creditor collection device; it allowed creditors to bring an involuntary action against debtors who had defaulted on their obligations, essentially dragging the debtor into court.[23] Scathing criticism of the system showed that debtors could repeatedly obtain credit, default, declare bankruptcy, and immediately obtain credit again much to the chagrin of their empty-handed

14. TABB, *supra* note 6.
15. *Schoenmann v. Bank of the West (In re Tenderloin Health)*, 849 F.3d 1231 (9th Cir. 2017).
16. Charles Jordan Tabb, *The History of Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 7 (1995).
17. *Id.*
18. U.S. CONST. art I, § 8, cl. 4.
19. Tabb, *supra* note 16, at 14.
20. *Id.* at 7.
21. *An Act to establish a Uniform System of Bankruptcy throughout the United States*, ch. 19, § 57, 2 Stat. 19, 20 (Apr. 1800) *repealed by Act of Dec. 19, 1803*, ch. 6, 2 Stat. 248.
22. Tabb, *supra* note 16, at 13-16.
23. *An Act to establish a Uniform System of Bankruptcy throughout the United States,* ch. 19, § 4-6, 2 Stat. 19, 22-23 (Apr. 1800). The process whereby a creditor would bring a bankruptcy proceeding against an unwilling debtor is known as an involuntary bankruptcy because the debtor was virtually dragged into bankruptcy against their will.

creditors.[24] This created a cycle where individuals would borrow without fear of repayment, and so creditors were left footing the bill.

The nation was so disgruntled with federal insolvency law that it took until 1841 for a second bankruptcy act to come into existence.[25] Unlike the Bankruptcy Act of 1800, this act provided for both voluntary and involuntary bankruptcy for real persons.[26] It allowed all consumers and many businesses, except railroads, banks, and corporations, to use bankruptcy to work with their respective creditors which provided a modicum of control over their beleaguered finances.[27] The inclusion of the voluntary bankruptcy petition set the stage for modern bankruptcy negotiation by incentivizing creditors to negotiate with their debtors so the debtor would not use bankruptcy as a weapon to eviscerate the creditor's claim.[28] The Act also provided creditors an opportunity to declare certain debts non-dischargeable to prevent bad actors from escaping their obligation unscathed.[29] However, the Act of 1841 failed to address and fix some of the reasons for its creation, so it was repealed in 1843.[30]

Following the remarkably short tenure of the 1841 Bankruptcy Act, states promoted their own insolvency laws,[31] but the differences between state law protections, in addition to, financial upheavals and a Civil War, convinced Congress to once more promulgate a system of bankruptcy.[32] The third bankruptcy act was enacted in 1867.[33] However, the Panic of 1873[34] motivated state legislatures, trade organizations, and other commercial enterprises to clamor for repeal.[35] By late 1873, Congress recognized substantial flaws in the bankruptcy law, especially among the companies and corporations that had sprung up in the aftermath of the Civil War.[36]

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24. The more unscrupulous debtors would convince a sympathetic creditor to file an action for bankruptcy when the debtors requested, creating the first voluntary bankruptcies, albeit in a roundabout way. Tabb, *supra* note 16, at 18.

25. *See An Act to establish a Uniform System of Bankruptcy throughout the United States*, ch. 9, § 57, 5 Stat. 440, 20 (Aug. 1841), *repealed by Act of Mar. 3, 1843*, ch. 82, 5 Stat. 614.

26. *Supra* note 25. The term 'real' persons is used herein because the Bankruptcy Act of 1841 did not allow corporations to declare bankruptcy. This is a significant distinction because corporations have been afforded most of the same rights as individuals under current United States law. *See generally* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (holding that corporations have the constitutional right to free speech, including political speech); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (holding that corporations and their owners have vast freedom of religion protections); Santa Clara County v. Southern Pacific R. Co., 118 U.S. 394 (1886) (holding that the 14th amendment protections extended beyond real persons).

27. Charles J. Tabb, *The Top Twenty Issues in the History of Consumer Bankruptcy*, 2007 U. ILL. L. REV. 9, 12 (2007).

28. Vrooman, *supra* note 1.

29. Tabb, *supra* note 16, at 17-18.

30. Tabb, *supra* note 27.

31. Tabb, *supra* note 16, at 1-12.

32. *Id.* at 11-12.

33. *See An Act to establish a Uniform System of Bankruptcy throughout the United States*, Ch. 176, 14 Stat. 517 (Mar. 1867*)*, [hereinafter 1867 Act], *repealed by Act of June 7, 1878*, ch. 160, 20 Stat. 99.

34. Gary Richardson & Tim Sablik, *Banking Panics of the Gilded Age*, Federal Reserve Bank of Richmond (Dec. 4, 2015), https://www.federalreservehistory.org/essays/banking_panics_of_the_gilded_age.

35. *Cong. Globe*, 42d Cong., 3d Sess. 34 (1872-73).

36. "A bill to repeal an act entitled 'An act to establish a uniform system of bankruptcy throughout the United States,' approved March 2, 1867, and all laws and parts of laws amendatory thereto." (H. R. No. 792), Congressional Record 2 (Jan. 1874), p. 210. Text from Additional Government Publications Congressional Record.

As a result, Congress passed the 1874 Amendment to the 1867 Bankruptcy Act.[37] The amendment imposed a novel idea which it described as "compositions."[38] Compositions provided new protections for businesses by providing them with an automatic discharge to business debts in exchange for creditors' votes to approve a debtor's proposed payment plan.[39] Therein creditors could meet together to determine how debtor payments would be distributed among themselves while also voicing concerns about whether a debtor's debt would be automatically discharged as was the practice under the 1841 Act.[40] Previously, creditors had to accept a pro-rata distribution, now they could negotiate for a payment based on the priority of their claim and some creditors could receive "full satisfaction" on their claims rather than sharing equally with other creditors.[41] Unfortunately, compositions came into effect too late to meaningfully affect the law because the 1867 Act was fully repealed in 1876.[42] However, the introduction of compositions firmly established negotiation among parties as a core element to modern bankruptcy.[43]

B. *The Foundation of Bankruptcy Law: The 1898 Bankruptcy Act and Subsequent Changes*

The spirit of composition was resurrected with the 1898 Bankruptcy Act and was further institutionalized with the 1938 Chandler Act.[44] Under these acts, compositions became a staple of bankruptcy law and formed the basis for creditor meetings for plans of reorganization.[45]

The Chandler Act of 1938 amended the 1898 Bankruptcy Act to allow corporations to declare bankruptcy.[46] The Chandler Act came about as a response to the Great Depression and large numbers of corporations ceasing operation due to insolvency.[47] The focus of the new and revitalized bankruptcy amendment was to avoid liquidation of struggling businesses and instead promote continued operation through restructuring.[48] This was enthusiastically encouraged by the states, who

37. C. F. Bump, *Composition in Bankruptcy*, 3 S. L. REV. n.s. 507 (1877).

38. *See An Act to establish a Uniform System of Bankruptcy throughout the United States*, ch. 176, 14v Stat. 517-541 (June 1874).

39. *An Act to establish a Uniform System of Bankruptcy throughout the United States*, ch. 176, 14v Stat. 517-541 (June 1874).

40. Vrooman, *supra* note 1.

41. Up until this point, creditors had to share whatever assets the bankruptcy referee could sell which resulted in debtors being paid in percentages of the debtors' assets. With the introduction of composition creditors could fully satisfy their claim based on their priority. As an analogy, it was as if creditors could walk up to a bucket with their measuring cup and take their full measure and once the bucket was empty then there was nothing more to be given to the remaining creditors. Vrooman, *supra* note 1; *see also* Skeel, *supra* note 8.

42. Vrooman, *supra* note 1.

43. *Id.*

44. This is the first permanent bankruptcy legislation because it did not have a sunset date provided in the legislation. Every previous act a statutory sunset date, where if the act was not repealed it would cease to be in effect. Skeel, *supra* note 8.

45. Vrooman, *supra* note 1.

46. The Chandler Act did not allow banks, railroads or brokerage firms to reorganize instead these institutions had to rely on state remedies. John E. Mulder & Charles M. Solomon, *Effect of the Chandler Act Upon General Assignments and Compositions*, 87 U. PA. L. REV. 763 (1939).

47. *Id.*

48. *Id.* at 766.

derived considerable income from incorporation and other business fees.[49] The Chandler Act provided that a debtor business could declare bankruptcy even while solvent, which allowed debtors to use bankruptcy strategically and, in some cases, use it as a threat to encourage creditors to negotiate.[50] As a result, the Chandler Act provided a permanent role for corporations as both debtor and creditor.[51] It further allowed businesses to operate as a "going concern" during their bankruptcy, which permitted stalled negotiation to carry on long after the company would have been liquidated under previous acts.[52]

C. *The Bankruptcy Act Redux: Current Bankruptcy Law–the Bankruptcy Code*

In the early 1970s, Congress realized that the current bankruptcy system was not evolving fast enough to respond to changes in the economic and financial landscape and so it began investigating the possibility of reforming bankruptcy law.[53] Congress established a Commission on the Bankruptcy Laws of the United States to create a report on issues and propose changes to the bankruptcy law.[54] The Commission's proposed changes were consolidated with proposals by the National Conference of Bankruptcy Judges to form the basis for House and Senate bills.[55]

This reform culminated in the passage of the Bankruptcy Code of 1978,[56] which is the platform for the current system of bankruptcy.[57] This new code created several different types of bankruptcies: Chapter 13, available only to consumers; Chapters 7 and 11, available to consumers and businesses; Chapter 9, available only to government entities, such as schools, utility districts, states, and cities.[58] Chapter

49. Mulder, *supra* note 46. States faced significant pressures in providing social welfare programs to unemployed persons at this time and so the idea that businesses might continue to employ people thereby reducing the economic burden on the state was one of the winning arguments by proponents of the Chandler Act. *See generally* Tabb, *supra* note 16.

50. Mulder, *supra* note 46, at 788.

51. Mulder, *supra* note 46.

52. Baird, *supra* note 7, at 756. "Going concern" is an accounting term used in bankruptcy and corporate law as a classification of a company that has the resources necessary to continue operation for the foreseeable future unless evidence arises to the contrary. This typically means the business will continue operating long enough to carry out its obligations and commitments.

53. Martin I. Klein, *The Bankruptcy Reform Act of 1978*, 53 AM. BANKR. L. J. 1, 3 (1979) ("H.R. 8200 is the result of a legislative process which began in 1970 with the congressional establishment of the Commission on the Bankruptcy Laws of the United States. The Commission issued its report, consisting of findings and a proposed new Bankruptcy Act, to Congress on July 30, 1973."). The Commission on the Bankruptcy Law of the United States was established by Public Law 91-354 on July 24, 1970. Act of July 24, 1970, Pub. L. No. 91-354, 84 Stat. 468 (1970). The Commission was formed to study, analyze, evaluate, and recommend changes both in the substance and administration of bankruptcy.

54. Klein, *supra* note 53.

55. *Report of the Commission on the Bankruptcy Laws of the United States,* H.R. Doc. No. 137 (1st Sess. 1973).

56. This is a change from the previous practice of naming each bankruptcy law as an act rather than the modern practice of classifying modern bankruptcy law as a code.

57. Klein, *supra* note 53, at 1, 3 ("H.R. 8200 is the result of a legislative process which began in 1970 with the congressional establishment of the Commission on the Bankruptcy Laws of the United States. The Commission issued its report, consisting of findings and a proposed new Bankruptcy Act, to Congress on July 30, 1973.").

58. *See* 11 U.S.C. §§ 103,109, 726, 902, 1101, 1303 & 1501 (2018). Chapters 7, 11, 12, and 13 may be used by individuals, while chapters 12 and 13 may not be used by businesses. In contrast, Chapters 7

7 involves the liquidation of the debtor's assets to pay on their debts, for businesses it involves the termination of business.[59] Chapter 11 allows a business to liquidate its assets or reorganize its business as a way of limiting debt.[60] Chapter 13 is only available to individuals, not businesses, and allows the debtor to set up an income-driven repayment plan where all of their disposable income is used to pay down their debt over a five year period.[61] This article will only provide a cursory reference to Chapters 7 and 13 insofar as they relate to Chapter 11.

The new Bankruptcy Code was quickly followed by some piecemeal reform in 1984.[62] Between 1984 and 2020, bankruptcy law has remained relatively unchanged, with the exceptions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") and Small Business Reorganization Act of 2019 ("SBRA").[63] The BAPCPA altered large portions of the 1978 Bankruptcy Code, while it was characterized as a consumer-friendly law, it has actually harmed consumers and greatly expanded the powers of creditors.[64] The SBRA sought to make it easier for small businesses to declare bankruptcy and receive a subsequent discharge, rather than forcing these businesses to comply with the same rules as large organizations.[65]

Over the years there have been some other incremental changes attached to non-bankruptcy laws, such as the Sarbanes Oxley Act which changed some aspects of how securities lawyers proceed in bankruptcy.[66] In the 40 years since the Bankruptcy Code was enacted, bankruptcy professors and practitioners have clamored for even more changes to the code to address the exponential changes in business, finance, real estate, and consumer protection that have developed during that period.[67] However, in 2017, the Supreme Court upended the bankruptcy world with its ruling in *Jevic*, in which it required that debtors and creditors follow bankruptcy priority procedures though they had negotiated a settlement outside of bankruptcy.[68] This ruling limited the ability of creditors and debtors to negotiate, where their problems were unlikely to be resolved in bankruptcy. Such a limitation is contrary to the development and history of bankruptcy law.

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and 11 have significant overlap because the liquidation of 7 and reorganization of 11 so often involve the personal assets of the owners, which results in tangled and interconnected bankruptcy cases.

59. 11 U.S.C. § 726 (2018). (Hereinafter, all citations to United States Code refer to the most recent published version, except where a change has been made since publication.).

60. 11 U.S.C. § 1123 (2018).

61. 11 U.S.C. § 1322 (2018). Most debtors do not complete their chapter 13 plan because it requires all of their disposable income to be directed toward their debts. The average person cannot go for five years without an unexpected bill and so debtors must choose to pay for an emergency hospital bill or to complete their bankruptcy plan.

62. Todd J. Zywicki, *The Past, Present, and Future of Bankruptcy Law in America*, 101 MICH. L. REV. 2016, 2021 (2003).

63. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, PUB. L. NO. 109–8, 119 Stat. 23 (2005).

64. Michelle J White, *Bankruptcy Reform and Credit Cards*, 21 J. OF ECON. PERSP. 175, 185-188 (2007); Michael D Sousa, *The Principle of Consumer Utility: A Contemporary Theory of the Bankruptcy Discharge*, 58 KAN. L. REV. 553, 558 (2010).

65. Paul W. Bonapfel, *A Guide to the Small Business Reorganization Act of 2019*, UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF GEORGIA 2 (2020), http://www.gamb.uscourts.gov/USCourts/sites/default/files/pdf/SBRA_Guide.pdf.

66. *See generally* Jack Ayer, *Bankruptcy and the Sarbanes-Oxley Act*, 3 U.C. DAVIS BUS. L. J. 4 (2002).

67. Tabb, *supra* note 8, at 37-38.

68. Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 978 (2017).

III. A BRIEF BACKGROUND OF NEGOTIATION IN BANKRUPTCY

Bankruptcy usually begins with the filing of a bankruptcy petition, similar to petitions in other courts, the petition describes the factual situation of the debtor that led them to file for bankruptcy.[69] Once the debtor files its petition in Chapter 11 it becomes a "debtor in possession"[70] as it continues operating the business while preparing to liquidate or restructure its enterprise.[71] Simultaneously, the filing institutes an automatic injunction against debt collection efforts by all creditors, whether those creditors know about the bankruptcy or not.[72] Violation of the stay can be extremely injurious to the violating creditor as insignificant actions such as sending an email regarding the balance of an old debt can be viewed as an attempt to collect, which may result in the elimination of any claim to that debt, punitive penalties, and severe sanctions.[73] This injunction, known as the "automatic stay," can also rewind the clock and allow the debtor or their trustee to sue for a return of any debt payment over $600 that was paid within the previous 90 days.[74] So, the "automatic stay" is a powerful tool for struggling businesses to control their entrance into bankruptcy by halting the claims collection process while providing options to negotiate with creditors who worry that they may not be able to collect on their debt.[75]

A. *Repayment of Claims*

Chapter 11 allows a debtor some flexibility in determining how it will pay back its creditors.[76] In order to have this freedom, a debtor must file a plan of reorganization with the bankruptcy court, which includes a repayment plan, a list of potential creditors, and written disclosure of the debtor's assets.[77] Disclosure statements are essential to a creditor's claim because they provide information about other claims, liabilities, and business affairs that indicate the health of the debtor's business.[78]

69. *See* FED. R. BANKR. P. 1007 (2018); *see also* 11 U.S.C. §§ 301, 303 (2018).

70. The Debtor in Possession (DIP) is the business debtor that continues its operations while in bankruptcy, often while it prepares to reorganize.

71. 11 U.S.C § 1101 (2018).

72. The automatic stay provides very strict limits on any effort to collect a debt. Creditors who run afoul of the automatic stay may have their claim dismissed and may be charged large punitive damages. Collection attempts can be anything that can be interpreted as an attempt to convince a debtor to relinquish their property. They may be harmless such as the "friendly" reminder notice that a debtor has a current balance of $100. 11 U.S.C. § 362 et seq.

73. A good example of the power of the automatic stay may be found in *In re Dumace Leonard LeGrand*, Case No. 19-21198-C-7 (Bankr. E.D. Cal. Feb. 6, 2020). *See generally* 11 U.S.C. § 362 (2018).

74. 11 U.S.C. § 547(b) (2018); *see also* David I. Swan & Thuc-Doan Phan, *Prepackaged Plans in 24 Hours*, 38 AM. BANKR. INST. J. 28 (Sep. 2019) (advocating for prepackaged plans because debtors can rewind debt collection of any amount over $600 which creates a strong incentive to negotiate with a debtor and prevent lapses into bankruptcy).

75. *See generally* 11 U.S.C. § 362 (2018).

76. Bryant P. Lee, *Chapter 18? Imagining Future Uses of 11 U.S.C. 363 to Accomplish Chapter 7 Liquidation Goals in Chapter 11 Reorganizations*, 2009 COLUM. BUS. L. REV. 520, 523 (2009).

77. Large companies that file for bankruptcy often have thousands of creditors; however, it is rarely worth the creditor's time to file a claim for an insignificant amount. Additionally, because of the complex nature of modern business, debtors may not know who has a claim and so they file only the claims they know about with the court. 11 U.S.C. §§ 1121, 1125 (2018).

78. 11 U.S.C. § 1125 (2018).

Generally, the debtor has two avenues available in a Chapter 11 proceeding.[79] The first provides that a debtor can liquidate its assets and use the proceeds to pay off the claims of creditors.[80] This option almost always results in a cessation of the debtor's business due to the loss of operating capital and loss of collateral which could be used to secure future credit.[81] Secured creditors will be paid the full value of their claim, while unsecured creditors will be paid in a priority schedule from whatever is left over after liquidation.[82] The priority schedule explains what level of importance each claim might have, more important social welfare issues have higher priority and less important issues have lower priority.[83] These priorities dictate that the highest priority creditor gets paid first, then the next and the next until the money runs out or, if there is any money left over after the priority creditors are paid, unsecured creditors are paid pro-rata from the remainder.[84]

Second, the debtor can create a plan of reorganization wherein it proposes ways that it can pay off its creditors using its future income or other financial assets.[85] The plan often includes very detailed information about all facets of the debtor's business, which incentivizes communication between the debtor and creditors because the plan's confirmation requires majority approval of creditors.[86] Few creditors want to vote for a plan that promises delayed returns when a quick sale is sure to get them at least some small return on their investment.[87] This risk of loss compared to possible payout has created a controversial claims trading market where parties with relatively small claims will sell or trade their interests to other parties who in turn will have a say in the reorganization planning process.[88] The risk that a proposed plan of reorganization will fail thus incentivizes creditors to resolve the bankruptcy proceeding as fast as possible.[89] As a result, all parties involved negotiate among themselves to create the most mutually beneficial plan, so they will be paid quicker from the ever-dwindling funds of the debtor's estate.[90]

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79. *See* 11 U.S.C. § 365 (2018); *see also* 11 U.S.C. §§ 1121-1129 (2018).

80. This rarely happens in a Chapter 11 proceeding because the cost of filing and remaining a "debtor in possession" is extremely high. Most debtors who meet the minimum debt qualification will convert bankruptcy into a Chapter 7. The Chapter 7, or "no asset" bankruptcy is often used by small businesses because it tends to eliminate vast swathes of debt liability. *See* Lee, *supra* note 76.

81. Dennis J. Connolly, *Current Issues Involving Prepackaged and Prenegotiated Plans*, 2004 ANN. SURV. OF BANKR. LAW PART I § B (2004).

82. 11 U.S.C. § 507 (2018).

83. *Id.*

84. TABB, *supra* note 6, at 1039.

85. 11 U.S.C. § 1123 (2018).

86. Connolly, *supra* note 81 (explaining that creditors who do not vote are assumed to consent and so they must either voice their concerns at the creditor committee meeting or else they will be considered to have voted in line with the debtor's proposal). *See* 11 U.S.C. § 1129 (2018).

87. Lee, *supra* note 76, at 552.

88. *See* Adam J. Levitin, *Bankruptcy Markets: Making Sense of Claims Trading*, 4 BROOK. J. CORP. FIN. & COM. L. 64 (2010); *but see* Baird, *supra* note 7.

89. Connolly, *supra* note 81.

90. Levitin, *supra* note 88, at 93.

B. Creating a plan to exit bankruptcy

Once a debtor proposes a plan of reorganization the court overseeing the bankruptcy proceeding will schedule a § 341 creditor meeting.[91] At this creditor meeting, the creditors voice their objections and concerns about the plan while putting forward their own proposals for how the debtor's assets should be handled.[92] If the creditors reject the plan the debtor may submit another proposed plan that addresses the concerns of the creditors.[93] A key component of the debtor's plan, arguably the most contentious aspect, is the classification of claims against the debtor.[94] The classification of claims creates groups of creditors with similar claims and proposes how those creditors' claims will be addressed.[95] Because the debtor can control how creditors are classified, the debtor can create classes that operate to their own benefit.[96]

When creating their plan of reorganization, debtors can assign their creditors into different classes to vote on the aforementioned plan.[97] Typically these classes are grouped by the similarities between the creditor claims.[98] For example, trade creditors are placed in the same category as other trade creditors so that the supplier of widgets and the supplier of fidgets share the same class of claims.[99] However, while there may be a class of trade creditors, a creditor with a unique claim may be classified separately since it makes little sense to combine 100 creditors with 100 dollar claims with a creditor with a 1.2 million dollar claim. The large creditor has such a disproportionately large claim that the 100 other creditors would lose all influence over the plan. Because the large claim is so large, its creditor could speak for the entire class which would obviate the concerns and votes that the smaller creditors might have had in their own class.[100] Classification is a powerful debtor tool because debtors can assign creditors into groups so that creditors who would normally vote against the plan of reorganization would be forced into a group of plan proponents.[101] This effectively reduces concerns about a dissenting creditor's vote preventing the confirmation of the debtor's plan.[102]

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91. A § 341 meeting is a mandatory meeting where creditors have their first opportunity to hear the debtors proposed plan and the United States Trustee's scheduling and oversight plan. 11 U.S.C. § 341 (2018).

92. 11 U.S.C. § 1126 (2018).

93. FED. R. BANKR. P. 3017; 11 U.S.C. § 1125 (2018).

94. Connolly, *supra* note 81.

95. 11 U.S.C §§ 1122, 1123 (2018). The classification of claims must be made in good faith. This creates concerns about artificial impairment and claim nullification that operates contrary to the goals of the bankruptcy system. *See In re* Quigley Co., Inc., 437 B.R. 102 (Bankr. S.D.N.Y. 2010); *contra In re* Vill. At Camp Bowie I, L.P., 710 F.3d 239 (5th Cir. 2013).

96. Connolly, *supra* note 81.

97. 11 U.S.C § 1129 (2018).

98. *In re* Bos. Post Rd. Ltd. P'ship, 21 F.3d 477, 480-81 (2d Cir. 1994); *See also* Matter of Greystone III Joint Venture, 995 F.2d 1274, 1281 (5th Cir. 1991), *on reh'g* (Feb. 27, 1992). *Greystone* is one of the most cited cases when courts consider whether a claims classification is proper or improper. The case also serves as the basis behind a circuit split about classification of claims and confirmation of plans under 11 U.S.C §§ 1121-22, 1129 (2018).

99. *See In re* Quigley Co., Inc., 437 B.R. at 102, *contra In re* Vill. At Camp Bowie I, L.P., 710 F.3d 239 (5th Cir. 2013).

100. *In re* Aegerion Pharm., Inc., 605 B.R. 22, 31-32 (Bankr. S.D.N.Y. 2019).

101. *In re* Bos. Post Rd. Ltd. P'ship, 21 F.3d 477, 480-81 (2d Cir. 1994).

102. *In re* Aegerion Pharm., Inc., 605 B.R. 22, 31-32 (Bankr. S.D.N.Y. 2019).

Another tool for the debtor is artificial impairment, which creates a *de minimus* impairment to creditors.[103] The purpose of the impairment is to create an impaired class that consents to the plan.[104] The Bankruptcy Code requires that there be at least one class of impaired creditors who vote to approve the debtor's plan.[105] Section 1129 of the Bankruptcy Code reads:

with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under . . . the plan.[106]

This section allows creditor classes to be separated into different groups and, so long as the debtor can justify their method of classification, the court will force confirmation of the plan over the objections of impaired creditors.[107] The artificial impairment of classes is important because it limits the power of the creditor to negotiate for better terms and instead allows a debtor to neutralize the concerns of some of its creditors.[108] The debtor neutralizes possible objections by creating a class where individuals might object to the plan but the majority will vote in favor of the debtor's repayment plan.

C. *What to Expect Once the Debtor Exits Bankruptcy*

Once a plan has been confirmed, the debtor is on track to exit bankruptcy.[109] The debtor is no longer bound by the debts that it incurred before its bankruptcy, although it is still liable for the repayment terms it negotiated with its creditors or for the debts incurred after the initial bankruptcy filing.[110] The debtor must now file for a final decree, in which the bankruptcy court finalizes the debtor's obligation to current and former creditors.[111] To obtain a final decree, the debtor submits an accounting of their business assets and liabilities, including any other information necessary for the closing of the case.[112] Then the court will issue a discharge order to each of the involved parties.[113] The mailing of the discharge order finalizes the bankruptcy process and allows the debtor to operate its business without some of

103. Impairment exists where a creditor does not receive full repayment or is harmed in some way that is not essential to the debtors exit from bankruptcy. Some of the most common forms of impairment are partial repayment of claims (i.e., payment of $99 on a debt of $100) or delayed repayment (i.e., payment plan that advocates for repayment over 24 months when it would be possible to pay off the debt in 20 months).

104. Matter of Greystone III Joint Venture, 995 F.2d 1274, 1277 (5th Cir. 1991).

105. 11 U.S.C § 1129(a)(10) (2018) ("If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has [to accept] the plan.").

106. 11 U.S.C § 1129 (providing a detailed list of what is required for the confirmation of a plan, the greatest focus is on the interests of the entire group of creditors rather than those creditors who might be impaired. For an explanation of impairment and classification); *see* 11 U.S.C. §§ 1123, 1124 (2018) (explaining impairment and classification).

107. Matter of Greystone III Joint Venture, 995 F.2d at 1277; *See also In re* Novinda Corp., 585 B.R. 145, 156-57 (10th Cir. BAP (Colo.) 2018).

108. Matter of Greystone III Joint Venture, 995 F.2d 1274 (5th Cir. 1991). *See also In re* Novinda Corp., 585 B.R. 145, 156-57 (10th Cir. BAP (Colo.) 2018); *Cf. In re* Ditech Holding Corp., No. 19-10412 (JLG), 2019 WL 4073378 (Bankr. S.D.N.Y. Aug. 28, 2019).

109. 11 U.S.C § 1141 (2018).

110. 11 U.S.C §§ 524, 1141 (2018).

111. 11 U.S.C § 524 (2018).

112. *Id.*

113. *Id.*

the debt and contractual obligations that had previously restricted its business operation.[114]

Before *Jevic*, debtors could use a structured dismissal[115] to avoid exorbitant bankruptcy costs, therein the debtor and creditors would agree on how each group would be paid and then file a motion to dismiss the bankruptcy case.[116] Structured dismissals have been a relatively untouched area of bankruptcy law until the Supreme Court determined that priority payments also apply to structured dismissals, which operate outside the jurisdiction of the Bankruptcy Code.[117] The structured dismissal shares common features with the prepackaged bankruptcy plans and as such should operate under the same restrictions. It is important to keep this overview of bankruptcy in mind as this article addresses some tools that debtors use to avoid bankruptcy or at least minimize its impact.

IV. THE PBNA: A DEBTOR'S ATTEMPT TO BARGAIN ITSELF AWAY FROM THE CLIFF OF BANKRUPTCY.

The prepackaged plan is a business tool frequently used where a debtor, who anticipates imminent bankruptcy, attempts to negotiate with its creditors to resolve its debts and payment terms before declaring bankruptcy.[118] This section examines the variety of plans that are developed before the debtor files for bankruptcy, these plans will be referred to as Pre-Bankruptcy Negotiated Agreements ("PBNAs") or prepackaged plans.[119] The core elements of these plans are that they are negotiated in anticipation of a bankruptcy filing, they create an agreement regarding the debts of the debtor, and are designed to shorten the time spent in bankruptcy. This can be beneficial to certain creditors involved because they may obtain preferential repayment terms, alternatively it can result in a disagreement that precludes further negotiation, effectively forcing a drawn-out bankruptcy where all parties suffer.[120]

114. *Id.*

115. A structured dismissal is a dismissal of a bankruptcy case coupled with some or all of the following additional provisions in the dismissal order: releases of certain claims, protocols for combining and paying claims, transfer of funds to unsecured creditors and retained jurisdiction by the bankruptcy court over certain post-dismissal matters. Peter M. Sweeney, *Delaware Views from the Bench–Structured Dismissals*, 4 BLAKELY & BLAKELY Q. 4, 4 (Winter 2014), http://www.bandblaw.com/newsletter/archived/2014WinterBBQuarterly.pdf; *see also* Jay Indyke, et al., *Chapter 11 Structured Dismissals: Viable Exit Strategy Or Impermissible Under Bankruptcy Code*? STRAFFORD (Oct. 28, 2014), http://media.straffordpub.com/products/chapter-11-structured-dismissals-viable-exit-strategy-or-impermissible-under-bankruptcy-code-2014-10-28/presentation.pdf.

116. *In re* Buffet Partners, L.P., No. 14-30699-HDH-11, 2014 WL 3735804, at *4 (Bankr. N.D. Tex. July 28, 2014) (holding that §§ 105(a) and 1112(b) apply to structured dismissals and the remedy "is clearly within the sphere of authority Congress intended to grant to bankruptcy courts in the context of dismissing chapter 11 cases.").

117. Blumenstiel et al., *supra* note 3, at 10-11.

118. Peretore, *supra* note 10, at 15-16, 19.

119. This is an important distinction because there are a number of different classifications including receiverships, state law compositions, etc.; I have lumped them together because of the shared attributes. So, this section addresses methods of resolving insolvency outside of bankruptcy. The vast majority of these types of plans occur prior to bankruptcy, however, the structured dismissal shares certain characteristics as it occurs outside of bankruptcy and involves significant negotiation about the nature of the parties' obligations. So, for the purpose of this section structured dismissals will be treated as PBNAs even though they are Post bankruptcy negotiated agreements.

120. WEIL, GOTSHAL & MANGES LLP., REORGANIZING FAILING BUSINESSES: A COMPREHENSIVE REVIEW AND ANALYSIS OF FINANCIAL RESTRUCTURING AND BUSINESS REORGANIZATION 1-2 (2006).

A. Financial Condition and Positioning in Anticipation of a Pending Bankruptcy

Chapter 11 and the prefiling period function along the lines of a classic economic exchange similar in a sense to the "Lets Make a Deal" approach.[121] The parties to a bankruptcy come primarily to deal and trade, not primarily to fight. The trading is not always gentle, but neither are real markets. [122] Nevertheless, in the Chapter 11 arena, all fighters should look for the opportunity to deal.[123] Ideally, these negotiations occur prior to filing.[124]

At that point, the typical debtor is already in default or is insolvent, so they cannot sustain long term operation because they cannot meet their debts and obligations.[125] Accordingly, management decisions are condensed and the debtor is in a near-constant crisis management mode.[126] This means that if a debtor wishes to continue operating, its options are limited.[127] The debtor can resolve this lack of long term control by using a pre-negotiated plan of reorganization in which they negotiate the terms of their reorganization before filing for bankruptcy under Chapter 11.[128] The business anticipating bankruptcy conducts negotiation and solicitation of their plan using non-bankruptcy law but implements the plan through a Chapter 11 filing.[129] Otherwise, they can enter bankruptcy without a firm plan and spend months or years in limbo as their assets dwindle.[130]

A prepackaged plan offers significant advantages over other options. Some courts have noted that these plans are preferable to other bankruptcy options.[131] The prepackaged plan offers greater control, lower administrative costs, and less business atrophy due to filing.[132] Prepackaged plans tend to spend significantly less time in bankruptcy between the filing date to the entry of a confirmation order.[133] During the 1990s, the time companies with prepackaged plans spent in bankruptcy ranged from 42 to 123 days,[134] compared to the average of non-prepackaged

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121. "Lets Make a Deal" is a television show that first aired in 1963. On the show contestants would be offered something of value and would be given the opportunity to keep the item or trade for another item that might be worth more or might be worth less.

122. William L. Hallam, *Let's Make A Deal: The Third Circuit Approves Structured Dismissals of Chapter 11 Bankruptcy Cases*, Rosenberg Martin Greenberg (Sept. 2016), https://www.rosenbergmartin.com/wp-content/uploads/2016/09/Lets-make-a-deal.pdf.

123. MacDonald, MacDonald & MacLeod, *Pictures Are Worth a Thousand Words: Understanding the Chapter 11 Process Through Models and Simulations*, Advanced Bankruptcy Workshop 453, 462-463 (1990).

124. Mark E. MacDonald & Daren W. Perkins, Prep*ackaged Chapter 11 Plans: The Alternative to "Free Fall" Bankruptcy*, 1 J. BANKR. L. & PRAC. 31, 31 (1991).

125. *Id.*

126. *In re* Anicom, Inc., 273 B.R. 756, 762 (Bankr. N.D. Ill. 2002).

127. *Id.*

128. MacDonald & Perkins, *supra* note 124, at 32.

129. 11 U.S.C §§ 101 et seq (2018).

130. MacDonald & Perkins, *supra* note 124, at 32.

131. *Id.*

132. *Id.* at 33.

133. *See In re* Combustion Eng'g, Inc., 391 F.3d 190, 201 (3d Cir. 2004); *In re* J T Thorpe Co., 308 B.R. 782, 791 (Bankr. S.D. Tex. 2003); *see generally* Ronald Barliant, Dimitri G. Karcazes, & Anne M. Sherry, *From Free-Fall to Free-For-All: The Rise of Pre-Packaged Asbestos Bankruptcies*, 12 AM. BANKR. L. REV. 441 (2004) (addressing the changing landscape of asbestos bankruptcies and the successes of prepackaged plans in handling mounting financial pressures from tort litigation).

134. MacDonald & Perkins, *supra* note 124, at 33.

Chapter 11 cases of 450 to 530 days.[135] Generally, the less time spent in bankruptcy the less money there is that goes to lawyers, bankers, and other professionals.

B. *Benefits of Prepackaged plans.*

As a result of the decreased time spent in bankruptcy, the popularity of prepackaged plans has exploded.[136] The prepackaged plan became the reorganization tool of choice for firms that needed to reorganize in the mid-2000s, with asbestos companies as the leading advocates of prepackaged plans as an alternative to insolvency and liquidation.[137]

Prepackaged plans in anticipation of bankruptcy have been extremely successful.[138] The extrajudicial nature of these solutions promotes greater cooperation and interaction than exists within the judicial oversight of bankruptcy.[139] The cooperative nature of a prepackaged plan increases the communication between parties, however, these plans function as last-ditch solutions.[140] The rules found in the Bankruptcy Code provide a framework for debtors and creditors who fail to negotiate, but most parties know that an unwillingness to work with others will severely harm their interests.[141] One of the most important considerations is that any sort of prepackaged plan is a settlement and is far more preferable than litigation.[142]

The Bankruptcy Committee of 1973, as part of its recommendation for a comprehensive new bankruptcy act, stated that under the new proposed law "[c]reditors . . . will be provided more effective representation and an enhanced bargaining position."[143] The committee's goal was to separate the oversight of the bankruptcy judges and referees[144] and allow debtors and creditors to meet together and prepare a plan of reorganization so that the costs and conflicts of bankruptcy would not interfere with the continued operation of the business.[145] Due in large part to the commission's efforts, reorganization and prepackaged planning were

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135. Richard M. Hynes et. al., *National Study of Individual Chapter 11 Bankruptcies*, 25 AM. BANKR. INST. L. REV. 61, 158-59 (2017).

136. David I. Swan & Thuc-Doan Phan, *Prepackaged Plans in 24 Hours*, AM. BANKR. INST. J., Sept. 2019, at 28, 28. (Showing that some of the largest reorganizations possible occurred in short amounts of time. "Arsenal Energy Holdings completed its reorganization within 11 days in February 2019; Jones Energy emerged from bankruptcy in May 2019 within 33 days of filing for Chapter 11; on Feb. 4, 2019, FullBeauty Brands Holdings Corp. had its plan confirmed within 24 hours; and on May 1, 2019, Sungard Availability Services' plan was confirmed within 19 hours.").

137. Ronald Barliant et. al., *From Free-Fall to Free-For-All: The Rise of Pre-Packaged Asbestos Bankruptcies*, 12 AM. BANKR. INST. L. REV 441, 465 (2004).

138. Swan & Phan, *supra* note 136, at 28.

139. *What Not to Put in a Chapter 11 Plan*, Am. Bankr. Inst.: Midwestern Bankr. Conf., Kansas City, Mo (Oct. 4, 2019).

140. *Id. See also* Interview with Dan Dooley, Financial Advisor, MorrisAnderson, in Kansas City, Mo. (Oct. 4. 2019).

141. *Supra* note 139.

142. PERETORE, *supra* note 10, at 15.

143. Commission on the Bankruptcy Laws of the United States, *Report of the Commission on the Bankruptcy Laws of the United States*, 29 THE BUS. LAW. 75 (1973).

144. Referees are a relic of the past, however, they acted in an administrative capacity controlling the administrative aspects of older bankruptcy cases. *See* David A. Skeel Jr., *The Genius of the 1898 Bankruptcy Act*, 15 BANKR. DEV. J. 321, 338-340 (1999).

145. Commission on the Bankruptcy Laws of the United States, *supra* note 143.

permitted and the goals of the commission were accomplished.[146] As a result, negotiation has become integral to bankruptcy as debtors and creditors utilize it to maximize their returns and minimize the costs involved with insolvency.[147]

That focus on negotiation is nowhere more apparent than with PBNAs, as the "agreement" aspect implies that negotiation between parties prior to the filing of a bankruptcy petition is of the utmost importance.[148] One of the greatest benefits of this cooperation is an acknowledgment of debt.[149] In order to induce the creditor to agree to an altered plan of repayment, the debtor must acknowledge their full debt liability, "including late charges, attorneys' fees, and expenses."[150] It is to the creditor's advantage to enter into a new contract with the debtor that substantially alters the terms of the original debt, doing so may decrease the debtor's debt in the short term but it allows the creditor to collect higher interest for longer periods of time.[151] There may be questions of fairness where a debtor is so desperate for relief that they must accept the unsatisfactory offer of the creditor, however, this unsatisfactory offer benefits both debtor and creditor as it resolves the issue of their debt.[152] Without negotiation between the debtor and its creditors, creditors would institute a "race to the courthouse" competition where the first creditor to file a foreclosure proceeding would triumph over other creditors, essentially dooming the debtor to liquidation and cessation of its business.[153]

Another benefit to the use of prepackaged plans for debtors and creditors is that individuals at any debt level can use them.[154] There are no statutory limits on the amount of debt that can be negotiated, as a result, both the small individual debtor and the multibillion-dollar corporation create workarounds that allow them to avoid the burden of being forced into bankruptcy by their debtors.[155] This is beneficial to the creditor because there is a significant risk that the debtor might liquidate rather than reorganize, which might result in a diminished return. However, a prepackaged plan almost guarantees that there will be continued business and continued payment on the debt.[156] As a result, the creditor has significantly lower upfront costs because they do not need to retain as many professionals and spend as much time and effort working on approving a plan while the parties are outside of bankruptcy.[157] Despite

146. *See In re* Jeppson, 66 B.R. 269, 283, 295-96 (Bankr. D. Utah 1986). *Jepson* provides one of the most comprehensive analysis by a bankruptcy court of the changes to priority under the 1978 Bankruptcy Code compared to the 1898 Bankruptcy Act. The court clarified that disclosure statements were a prerequisite to confirmation of a Chapter 11 plan. Additionally, creditors must solicit acceptance or rejection of a plan form claim holders before court will provide its consent.

147. *Id.* at 286.

148. *Id.* at 288.

149. *In re* Jeppson, 66 B.R. 269 (Bankr. D. Utah 1986).

150. PERETORE, *supra* note 10, at 15-16.

151. PERETORE, *supra* note 10, at 18-19. The contractual nature of the workout can create an entirely new type of debt agreement than existed originally and as a result the creditor can specify terms that the debtor would not have agreed to without the duress of their situation.

152. *See* NELSON, ET. AL., *supra* note 4.

153. *Id.*

154. Prepackaged plans occur outside of bankruptcy and while they need to be confirmed by a bankruptcy court, they do not provide a requirement on the amount of debt that can be negotiated. Whereas Chapters 7, 11, 12, 13 and 15 all provide some sort of debt limit to control who may use each chapter.

155. WEIL, GOTSHAL & MANGES LLP., *supra* note 120, at 10.

156. *Id.* at 7.

157. *Id.* at 10.

some of the hardships, both debtors and creditors benefit from the negotiation prompted by pre-negotiated bankruptcy plans.

C. *Problems with Pre-Bankruptcy Negotiated Agreements*

A large concern with the prepackaged plan is that this type of workaround is extremely inequitable.[158] PBNAs do not require the unanimous consent of creditors and many creditors will confirm the plan to ensure they receive some payment, although it may be more beneficial for smaller creditors to drag a debtor through litigation.[159] These dissenting creditors may be able to drag their feet long enough that the debtor will sweeten their offer or these creditors may want to harm the debtor by increasing the debtor's costs through a delay.[160] Prepackaged plans require far greater agreement among creditors than a traditional Chapter 11 plan.[161] A plan in bankruptcy requires a § 341 meeting where a majority of creditors participate and confirm the proposed plan, but a PBNA binds the creditors to a contractual agreement that remains valid after the filing.[162] While many creditors may approve of a proposed plan because they would rather get some money rather than risk a zero payout, creditors who are unlikely to be paid in bankruptcy have no incentive to cooperate and confirm the plan.[163] This lack of certainty presents a significant financial risk to debtors and creditors who want a plan to succeed, and can very well scuttle plans of reorganization.[164]

Few if any banks or lending institutions are willing to provide capital to a business that is in the process of failing and those that do provide credit only do so at steep interest rates.[165] The few lending institutions that are willing to provide new credit do so at terms that ensure the debtor will never pay off the debt.[166] While others, like management firms—who control the debtor's operations and provide cashflow while negotiations are ongoing—require an upfront payment and then require additional payment to the extent that most debtors cannot stay solvent for long given their newly acquired debt obligation.[167]

PBNAs lack some of the structure and consistency provided by negotiation in the confines of bankruptcy. Instead, the prepackaged plan operates like the Wild West, where almost anything goes and aggressive underhanded dealing may benefit a party far more than earnest and honest communication.[168] There are limited

158. *Id.* at 10-11.
159. *Id.*
160. *Id.*
161. Pre-packaged plans require that a court approve the final plan, however, the debtor does not face the same burden as a traditional bankruptcy proceeding where they need the approval of a majority of creditors.
162. 11 U.S.C § 341 (2018). Most contracts become part of the estate at filing and can be rejected or affirmed, however, because a PBNA can require court approval it may carry through and may not be rejected by the estate. *See* 11 U.S.C § 365 (2018).
163. MacDonald & Perkins, *supra* note 124, at 34.
164. ABI Panel: *How to get paid ethically*, 404-05, Midwestern Bankruptcy Conference, in Kansas City, Mo (Oct. 4. 2019), https://abi-org-corp.s3.amazonaws.com/materials/ProfessionalFeesGetPaidEthically.pdf.
165. MacDonald & Perkins, *supra* note 124.
166. *Id.*
167. *Id.*
168. *See generally In re* Trico Marine Servs., Inc., 337 B.R. 811, 815 (Bankr. S.D.N.Y.) (examining the effects of deceitful practices to induce acceptance of a prepackaged plan); *see also* Stephen D. Zide

options aside from business liquidation or some state law remedies to resolve business debts.[169] There is no judicial fall back for parties who cannot agree, they cannot petition the court to set the terms of their agreement, instead, their disagreement results in a freefall into bankruptcy.[170]

D. Prepackaged Example

Most debtors' rights groups and creditors recognize that the lack of judicial oversight in a prepackaged bankruptcy is a significant issue.[171] Instead of using creditor committees, trustees, bankruptcy judges, and the rest of the judicial system to resolve insolvency issues, debtors and creditors are left to resolve disputes and disagreements among themselves.[172] This is far from beneficial because such disagreements tend to resemble the petty squabbling of children rather than the composed and progressive bargaining of competent and sophisticated parties. For example, *In re Charter Communications* involved one of the largest prepackaged reorganizations ever attempted.[173] Therein the debtors attempted to restructure one of the most complex telecommunication businesses in the United States with a prepackaged plan, restructuring dozens of Charter Communication's internal entities.[174]

Charter and its bondholders were well aware of the impending crisis and engaged in "high velocity negotiation" in an attempt to prevent a long and costly bankruptcy.[175] These efforts were successful as Charter received a confirmation of its prepackaged plan after only 13 days.[176] However, its creditors fought tooth and nail to reject the plan that they had been forced into.[177] They complained that they had too little control in the confirmation process compared to what they would have traditionally had in bankruptcy.[178] Furthermore, they claimed the proposed implementation of the plan lacked oversight by government regulators such that the creditors would be treated worse than if Charter had gone through a true bankruptcy.[179] These types of complaints demonstrate some of the sticking points that make prepackaged plans so dependent on negotiation. While PBNAs reduces transactional costs and may result in a successful reorganization, this result may not be in the best interests of the parties, as such, PBNAs may create some unwanted consequences, a few of which are addressed below.

& Rachel Ringer, *A New Millennium: Bankruptcy Courts May Lack Constitutional Authority to Approve Nonconsensual Plan Releases*, JDSUPRA (Aug. 1, 2017), https://www.jdsupra.com/legalnews/debt-dialogue-july-2017-a-new-69051/.

169. PERETORE, *supra* note 10.

170. *Id.*

171. *Id.*

172. *Id.*

173. *In re* Charter Commc'ns, 419 B.R. 221, 230 (Bankr. S.D.N.Y. 2009).

174. *Id.*

175. *Id.* at 232.

176. *Id.* at 233.

177. *Id.*

178. *Id.* at 234.

179. *In re* Charter Commc'ns, 419 B.R. 221 (Bankr. S.D.N.Y. 2009).

E. Issues That Arise From Prepackaged Plans

The use of prepackaged plans faces significant condemnation by creditors.[180] These plans provide a creditor with two unsavory options: 1) accept longer-term repayment of their loans on possibly poorer terms,[181] or 2) face the expensive Chapter 11 process which will reduce the amount that the creditors can recover from their debtors.[182] This issue is compounded by the lost time value of money as the creditor wait months or years to obtain a pittance of what it lent.[183]

Creditors, especially in small to mid-sized insolvency situations, would be far better off using a PBNA or other state remedies to avoid the skyrocketing costs of the panoply of professionals involved in restructuring.[184] Because of the inherent danger of insolvency, most professionals require payment upfront, otherwise if they wait they will not be paid.[185] This upfront payment to professionals further limits creditor access to the funds they anticipated.[186] Those creditors have no say in the matter and cannot negotiate a payment structure because the services provided by the professionals are essential to the successful payments of the creditors' claims.[187] So the creditors wait and watch as the proceeds they were counting on dwindle as their lawyers, creditor committee lawyers, debtor's lawyer, and the different parties' financial advisors, accountants, investment bankers,[188] and restructuring advisors all take their cut before any resolution happens.[189]

F. Structured Dismissal as a Post-Bankruptcy Negotiated Agreement

A structured dismissal straddles the line between bankruptcy and non-bankruptcy law. It exists because a debtor is trying to avoid the administrative costs of a bankruptcy proceeding, however, unlike the prepackaged plan, it does not take place before the bankruptcy.[190] Rather, the structured dismissal takes place during

180. ABI Panel, *supra* note 164.

181. *See* NELSON, ET. AL., *supra* note 4.

182. ABI Panel, *supra* note 164, at 406-08.

183. *Id.*

184. ABI Panel, *supra* note 164, at 406-08.

185. *In re* Sillerman, No. 17-13633 (MKV), 2019 WL 5061177 (Bankr. S.D.N.Y. Oct. 8, 2019).

186. 11 U.S.C. § 362(d) (2018) allows the professional to apply for and receive payment before any other claims in the case. These professionals often exclude lawyers and include the more common accountants, debt managers, banking and investment officials, however, as lawyers tend to recognize the need for payment, they tend to demand payment upfront before service is rendered. So, they have been lumped in with other professionals.

187. 11 U.S.C §§ 328(a) (2018) (showing that where a professional has been appointed, they may use that position to require payment before performing services). *See also* 11 U.S.C § 507(a)(1) (2018) (providing the schedule of priorities. Therein administrative expenses will be paid first and the use of professionals qualify as administrative expenses). *See* Department of Justice United States Trustee Program, *United States Trustee Program Policy and Practices Manual: Volume 3 Chapter 11 Case Administration* 96-99, https://www.justice.gov/ust/file/volume_3_chapter_11_case_administration.pdf/download (last visited Dec. 29, 2020).

188. Investment bankers are essential to many insolvency cases because they provide the capital so the company can continue to operate in the interim while it negotiates with parties about restructuring and liquidation. This is often referred to a DIP financing, DIP is the acronym for debtor-in-possession, who is the party responsible for the restructuring of the insolvent company.

189. ABI Panel, *supra* note 164, at 433-34.

190. Alessandra Allegretto, *Overcoming Creditor Misfortune Creatively: Structured Dismissals in Chapter 11 Bankruptcies*, 36 J. L. & COM. 239, 248 (2018).

the bankruptcy proceeding as the debtor attempts to have its case dismissed because it lacks the assets necessary to continue with an expensive bankruptcy case.[191] Structured dismissals are attractive because they are cheaper than Chapter 11 plans, which require costly disclosure and creditor voting.[192] The structured dismissal is essentially an agreement between the debtor and creditors that assigns the rights and responsibilities of each party before the debtor seeks a voluntary dismissal.[193] These agreements generally address consolidation of claims, operations of the business after dismissal, limits of debt acquisition, and other normal corporate transactions.[194]

Structured dismissals are relatively rare, although the consensus among bankruptcy courts is that they are permitted as a non-statutory tool to resolve a debtor's insolvency.[195] Structured dismissals are governed by Bankruptcy Code § 363, which deals with "non-ordinary"-course uses of the property.[196] Generally, before a party may file a motion for a structured dismissal to conclude its bankruptcy case, a § 363 sale occurs.[197] Under § 363, the debtor or trustee may sell any asset in which the debtor has a legal or equitable ownership interest during the bankruptcy case.[198] If there are no objections the sale will typically proceed.[199] If, however, there are objections, the bankruptcy court will determine if the sale is appropriate.[200] There are two types of § 363 sales: 1) those made in the ordinary course of business[201] and 2) those made outside the ordinary course of business.[202]

191. Jonathan C. Lipson, *The Secret Life of Priority: Corporate Reorganization after Jevic*, 93 WASH. L. REV. 631, 647 (2018).
192. *Id.* at 634.
193. *Id.* at 641.
194. *Id.* at 647.
195. Allegreto, *supra* note 190.
196. To determine if a transaction falls outside the ordinary course of business, courts use both a "horizontal" and "vertical" test. The horizontal test examines whether, from an industry-wide perspective, the transaction at hand is commonly pursued by companies in the industry. The vertical test evaluates whether, from the hypothetical creditor's perspective, if "the transaction subjects a creditor to economic risk of a nature different than those he accepted when he decided to extend credit." *In re* Nellson Nutraceutical Inc., 369 B.R. 787, 797 (Bankr. D. Del. 2007). Failure to satisfy either test may render a transaction outside the ordinary course. *See In re* Roth Am., Inc., 975 F.2d 949, 953 (3d Cir. 1992).
197. John Kane, *Structured Dismissals–How They Work Part I: Court Authority for Alternative Ending*, INSOLVENCY INSIGHTS BLOG (September 22, 2014), https://insolvencyinsights.com/2014/09/22/structured-dismissals-how-they-work-part-i-court-authority-for-an-alternative-ending/.
198. Philip A. Schovanec, Comment, The Sale of Property Under § 363: The Validity of Sales Conducted Without Proper Notice, 46 OKLA. L. REV. 489, 495 (1993).
199. *Id.* at 505.
200. *Id.* at 506.
201. The ordinary course of business doctrine derives the same meaning from contract law, in that it involves the ordinary transactions that a business will enter into as part of its operations. For example, the purchase of inventory, payment of rent, payment of utilities and payment of salary all constitute ordinary course of business transactions, however, new transactions that increase the indebtedness of the debtor and do not fall under this definition. The transfer or sale of encumbered property for less than it is worth is an example of a business transaction that does not fall under the ordinary course of business doctrine. Benjamin Weintraub and Alan N. Resnick, From the Bankruptcy Courts: The Meaning of "Ordinary Course Of Business" Under the Bankruptcy Code-Vertical and Horizontal Analysis, 19 UCC L. J. 364 (1987).
202. Benjamin Weintraub and Alan N. Resnick, *From the Bankruptcy Courts: The Meaning of "Ordinary Course Of Business" Under the Bankruptcy Code-Vertical and Horizontal Analysis*, 19 UCC L. J. 364, 364 (1987).

Sales conducted in the ordinary course of business enable the debtor to continue business operations while in bankruptcy, subject to court approval of the sale.[203] Sale outside the normal course of business requires notice and hearing on the dispensation of the property, this notice and hearing is a prerequisite to a sale because it provides creditors with the opportunity to object.[204] Section 363 sales are increasingly used by debtors that wish to sell substantially all of their assets instead of attempting to restructure through the Chapter 11 process.[205]

Debtors often utilize structured dismissals in one of three scenarios. First, the debtor is unable to pay administrative costs or fund its Chapter 11 plan.[206] Second, the debtor has sufficient funds from the asset sale to fund their plan, but doing so would limit the funds available for creditor distribution.[207] Third, the debtor has unsold assets following the § 363 sale and creditors agree to negotiate an out-of-court agreement to administer these remaining assets.[208] Each scenario demonstrates that there are insufficient sale assets to make necessary payment distributions to creditors and fulfill a Chapter 11 reorganization plan.

In order to receive confirmation of a structured dismissal, the movant must show cause and the three aforementioned scenarios constitute sufficient cause.[209] Whereas the standard Chapter 11 dismissal ends all court proceedings,[210] a structured dismissal ends all court proceedings *and* contains varying "bells and whistles," such as the orders, settlements, and provisions that continue to govern the dismissal.[211]

There are several benefits and concerns associated with these pre-bankruptcy negotiated agreements. Despite concerns about the use of PBNAs, these plans encourage debtors and creditors to negotiate for better terms and lower costs than they would have had in bankruptcy.[212] The use of PBNAs as non-statutory bankruptcy tools allows creditors and debtors to negotiate for favorable terms rather than being forced into and through the bankruptcy process.

V. THE CRAMDOWN PLAN: THE DEBTORS ALTERNATIVE TO UNFAVORABLE TERMS

In contrast to the prepackaged plan, a cramdown plan is a tool for debtors to resolve payment disputes.[213] Several aspects of the two plans are similar, due in

203. *Id.*
204. *Id.*
205. Norman L. Pernick & G. David Dean, *Structured Chapter 11 Dismissals: A Viable and Growing Alternative After Asset Sales*, AM. BANKR. INST. J. 1 (June 2010) (noting that, as of 2010, "cases involving structured dismissals ha[d] not yet resulted in memorandum decisions (published or unpublished), [but] there ha[d] been a number of rulings that are useful to understanding how structured dismissals have been . . . viewed by courts.").
206. Sweeney, *supra* note 115; *see also* Jay R. Indyke, et al., *supra* note 115.
207. Indyke et al., *supra* note 115, at 7.
208. *Id.*
209. Kane, *supra* note 197.
210. *Dismissal, Conversion & Closing of a Bankruptcy Case, What are the Differences Between them?*, U.S. BANKR. CT. CENT. DIST. CAL., https://www.cacb.uscourts.gov/faq/dismissal-conversion-closing-bankruptcy-case-what-are-differences-between-them (last visited Oct. 13, 2020).
211. Sweeney, *supra* note 115, at 10.
212. *See generally* Richard F. Broude, *Cramdown and Chapter 11 of the Bankruptcy Code: The Settlement Imperative*, 39 BUS. LAW. 441, 445, 450 (1984).
213. TABB, *supra* note 6, at 1150.

large part to their shared purpose.[214] The cramdown plan functions exactly as it sounds, it allows a debtor to force down creditor objections and get its plan confirmed by the court.[215] In the early 2000s, many bankruptcy practitioners assumed that the cramdown plan was on the way out as its usage dwindled.[216] However, the mortgage crisis of 2007-09 brought cramdown plans back into focus as competing mortgagees jostled for priority and repayment of very limited funds.[217]

A. The Background and Advantage of the Cramdown Plan.

A brief overview of the operation of a cramdown may be important to understand some of the finer details surrounding debtor and creditor interactions, such as the negotiated interests that this article addresses. A cramdown is a tool used during the restructuring of a debtor's debt load, since restructuring requires confirmation of the debtor's plan by the creditors, agreement between creditors and the debtor is necessary.[218]

Regarding Chapter 11, cramdown is provided in § 1129(b) of the Bankruptcy Code.[219] It provides that for a plan to be confirmed over the valid objections of a creditor the proposed plan must not discriminate unfairly and must be fair and equitable with respect to dissenting classes of creditors.[220] The Bankruptcy Code's language provides for a cramdown of a dissenting class if:

a) All other mandatory confirmation requirements are satisfied except the impaired class requirement, which states that at least one impaired class must have accepted the plan.
b) The plan cannot discriminate unfairly against any impaired, non-consenting class.
c) The plan must be fair and equitable regarding the treatment of the non-accepting class.[221]

To summarize, a class may not receive or retain value under a plan unless all classes that enjoy higher priority are scheduled for payment in full unless they agree otherwise.[222] This has been described as a priority waterfall where the money fills the highest priority creditor's coffers with any remainder trickling down to the next creditor and so on until there is no more money.[223] Because secured creditors have first priority along with contractual protections, they often receive full payment on the portion of their claim secured by collateral with a deferred cash payment on any

214. *See generally* Broude, *supra* note 212, at 441-42; *see also* MacDonald & Perkins, *supra* note 124, at 32.
215. Tabb, *supra* note 6, at 1150.
216. Adam Levitin, *The New Cramdown*, CREDIT SLIPS (June 29, 2012), https://www.creditslips.org/creditslips/2012/06/the-new-cramdown.html.
217. Richard S. Gendler, *Home Mortgage Cramdown in Bankruptcy*, 22 AM. BANKR. INST. L. REV. 329, 331 (2014) (addressing the resurgence of chapter 13 cramdowns). While not exactly the same, chapter 13 and chapter 11 cramdown share similar attributes, as such they provide tremendous insights into the tools, motivations, and successes.
218. *Id.* at 354-55.
219. 11 U.S.C. § 1129(b)(1) (2018).
220. Weil, Gotshal and Manages LLP, *supra* note 120, at 4-5,4-6.
221. 11 U.S.C. § 1129(b)(1)(2018).
222. *Id.*
223. *See generally* Melissa B. Jacoby & Edward J. Janger, *Tracing Equity: Realizing and Allocating Value in Chapter 11*, 96 TEX. L. REV. 673 (2018); Douglas G. Baird, *Priority Matters: Absolute Priority, Relative Priority, and the Costs of Bankruptcy*, 165 UNIV. PA. L. REV. 785 (2017).

portion of their secured claim with an interest rate far lower than their original contract rate.[224]

B. Applying the Cramdown

The Bankruptcy Code provides that a plan may be crammed down on secured creditors if it provides that the holders of the secured claims retain their liens, which secure their claims.[225] If the collateral is retained by the debtor or transferred to another, and the creditor claims and each claim holder receives deferred cash payments, those payments must have a present value equal to the value of their secured collateral.[226] A creditor class[227] may separately make a § 1111(b)(2) election which provides that "[the] electing class is entitled to have the entire allowed amount of the debt related to such property secured by a lien even if the value of the collateral is less than . . . the debt."[228] This complex language has a simple meaning: whoever has a claim in bankruptcy and is subject to cramdown must be offered an amount of money at least equal to the worth of the collateral that secures the debt.[229]

The Supreme Court recently limited some uses of cramdown plans.[230] Due to the nature of their debt, a secured creditor has collateral to back up their claim and that collateral receives an in rem interest rather than in personam interest, which is not discharged with the rest of a debtor's debt.[231] In *RadLAX Gateway Hotel, LLC v. Amalgamated Bank,* the debtor's reorganization plan proposed to pay the secured creditors the value of their collateral after an auction to a stalking horse bidder.[232] However, the creditor bank, acting as trustee for the investment fund, funded the

224. Weil, Gotshal and Manages LLP, *supra* note 120, at 4-5.

225. A legal right or interest that a creditor has in another's property, lasting usually until a debt or duty that it secures is satisfied. Typically, the A legal right or interest that a creditor has in another's property, lasting usu. until a debt or duty that it secures is satisfied. Typically, the creditor does not take possession of the property on which the lien has been obtained. LIEN, Black's Law Dictionary (11th ed. 2019). RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 641 (2012); *see also* 11 U.S.C. § 1129(b)(2)(A)(i)(I) (2018).

226. BUSINESS BANKRUPTCY COMMITTEE, REORGANIZING FAILING BUSINESSES, 5.51-52 (Megan M. Adeyemo & Rafael x. Zahralddin-Aravena eds., 3rd ed. 2017) [hereinafter BUSINESS BANKRUPTCY].

227. A creditor class refers to 11 USC § 1122 (2018), which permits debtors to group creditors based on their claims. Such a grouping involves putting similar claims in the same group, while providing slightly dissimilar claims with their own groups. *See* Bankr. Rule 3013 (2018); Matter of Greystone III Joint Venture, 995 F.2d 1274, 1277 (5th Cir. 1991).

228. 124 Cong. Rec. H11, 104 (daily ed. Sept. 28, 1978).

229. It is essential to note the use of the word, worth. The value of collateral could be measured many different ways, however, cramdown evaluates value based on market value. If the collateral were to be replaced, that replacement value is what courts use to determine collateral value. Assoc.'s Com. Corp. v. Rash, 520 U.S. 953, 965 (1997); *In re* Sunnyslope Housing Ltd. P'ship, 859 F.3d 637, 640 (9th Cir. May 26, 2017) (holding that the Rash replacement value standard applies in chapter 11).

230. RadLAX Gateway Hotel, 556 U.S. at 649.

231. The debt is *in rem* because it attaches to the collateral rather than to the person who promises to pay the debt, while the debtor's personal liability may be discharged, failure to make payments may still result in the collateral's seizure and sale to satisfy the debt for the collateral. The creditor cannot satisfy any remaining debt after the sale of the seized collateral and so any resultant debt floats away into the ether.

232. Brian P. Hanley, *Preserving the Secured Creditor's Bargain in Chapter 11 Cramdown Scenarios,* 8 BROOK. J. CORP. FIN. & COM. L. 494, 499 (2014).

purchase of the secured collateral, then objected to the debtor's proposed plan to auction off the property without allowing the bank to credit bid for the collateral.[233]

The Supreme Court, in resolving a circuit split, held that a debtor could not force a creditor to accept the auction proceeds while restricting their participation because doing so would deprive them of the chance to bid which would establish the value of the collateral.[234] This ruling clarified that creditors could use all or part of their collateral to back bids on their collateral, which ensured that the creditor could push the price higher to avoid an unconscionable low price.[235] This "credit bidding" is an essential part of the real estate securitization market because it allows banks, as creditors, to apply bid with the equity they have in a property which allows them to maximize their return.[236]

The advantage of these options is that creditors with a lien securing the full amount of the claim are protected if the value of their collateral increases after the close of the case. That is because the deferred payment acts as additional security on their claim.[237] While a cramdown cannot be used on a fully secured claim, the same protection from cramdown is not available to unsecured and undersecured creditors.[238] Unsecured creditors must rely on other ways of collecting on their debt. The use of a cramdown plan is designed to ensure that the debtor can exit bankruptcy without the secured creditor voting to reject the plan.[239] In practice, this means a debtor can cramdown a secured creditor's claim to the value of their secured collateral, which means a house with a loan balance of $500,000 may be crammed down to its actual value of $375,000, so the debtor would only need to provide $375,000 to the creditor.[240]

C. Uses of the Cramdown

The use of a cramdown plan removes the advantage held by a dissenting creditor.[241] Whereas under a prepackaged plan a dissenting creditor's objection provided an additional bargaining chip, under a cramdown plan the debtor can propose to treat the dissenter fairly and the court will confirm the proposed plan over the dissenter's objection.[242] Although this is an oversimplification, it conveys the necessary point. With a cramdown, the debtor shifts onto the objecting creditor

233. RadLAX Gateway Hotel, 566 U.S. at 641.
234. Ann M. Burkhart, *Fixing Foreclosure*, 36 YALE L. & POL'Y REV. 315, 321 (2018).
235. *Id.* at 351.
236. For a well written explanation of the credit bidding process and its impact on real estate purchase *see* Ann M. Burkhart, *Fixing Foreclosure*, 36 YALE L. & POL'Y REV. 315 (2018).
237. BUSINESS BANKRUPTCY, *supra* note 226, at 5.53.
238. While unsecured creditors are an easily understood concept, undersecured is a little different. Under secured creditors have a portion of their claim secured by collateral but another part does not have any collateral that could be repossessed and sold to pay off a default. Alternatively, an undersecured creditor may have security in collateral, however, that collateral has minimal or no value. *See also* Matter of Transwest Resort Properties, Inc., 881 F.3d 724, 727 (9th Cir. 2018) (discussing the treatment of undersecured creditors, providing that their claims must be bifurcated into a secured and unsecured claim).
239. RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 641-42 (2012).
240. However, the $125,000 from the claim does not disappear, instead it becomes part of the unsecured claims and does not have to be paid in full.
241. 124 Cong. Rec. H11, 104 (daily ed. Sept. 28, 1978). *See also* BUSINESS BANKRUPTCY, *supra* note 226, at 5.53.
242. 11 U.S.C § 1129 (2018).

a requirement that the creditor shows inequitable and unfair treatment so the creditor can obtain a greater payment on their claim.[243] Because the central requirement of a cramdown is that it pays fairly and equitably, all parties receive the same disadvantage, because unsecured claims will be paid out with future cash payments in the amount of the prime rate plus one to three percent.[244] This effectively means that debtors can strip excess liens off of secured collateral where only the value of the collateral remains secured and everything else becomes an unsecured claim.[245] Then the debtor would propose a future payment under the previously mentioned rate, however, that rate does not take into account the lost time value of money or the need for immediate payment.

To illustrate the above concept please consider the following situation. Debbie Debtor purchases a lawnmower from Carl Creditor on credit. The lawnmower serves as collateral securing the loan. After making some payments and reducing the principal of the loan she defaults and subsequently files for bankruptcy. Because of the passage of time and payments on the loan, there is a substantial difference between the loan amount and the value of the lawnmower. Suppose the lawnmower has a fair market value of $10 but the loan is for $25. This difference could be stripped away. Debbie would be required to pay $10, which is the value of the item, while the remaining $15 would become an unsecured debt that unlike the $10, is not guaranteed to be repaid. Carl Creditor would be guaranteed the value of his collateral as a secured creditor, but the excess unsecured amount would be aggregated with the other unsecured claims in Debbie's bankruptcy plan.

Because of the nature of the cramdown plan, the parties who receive the greatest benefit are the debtor and secured creditors.[246] Secured creditors cannot be impaired in the same ways as unsecured creditors because secured creditors have the benefit of collateral to back up their claim.[247] Debtors can provide unsecured creditors with proposed payment terms substantially different than their original contract rate.[248]

To illustrate this point, consider another hypothetical situation where a debtor who purchases widgets from a widget supplier on credit and contracts agrees to pay the supplier over 24 months. When the debtor declares bankruptcy and proposes a cramdown plan with a new repayment schedule of 36 or more months, that extends the life of the debt and reduces the value of the money that the creditor will receive.[249] Additionally, the cramdown allows a change in the interest rate that will

243. *Id.*

244. Till v. SCS Credit Corp., 541 U.S. 465, 471 (2004).

245. *Id.* at 468.

246. Hanley, *supra* note 232, at 512.

247. *Id.*

248. *Id.* at 494. Debtors can provide unsecured creditors with proposed payment terms substantially different than their original contract rate. Bankruptcy as Federal Law allows the rewriting, reaffirmation, or rejection of contracts. This is why it is so useful to large companies, they can reject contracts, which constitutes a breach, but since breach of contract claims are unsecured debts the business can avoid paying the large termination or breach fees that would have occurred outside of bankruptcy.

249. This may not be immediately apparent, but this is an application of some basic financial principles. Money now is worth more than the same sum in the future, this present value of money is calculated using the equation: Present Value =FV/(1+r)n . In other words, present value is equal to the future value divided by one plus the rate of return to the power of the number of periods(time) between now and the future payment. *See* HOWELL JACKSON ET AL., ANALYTICAL METHODS FOR LAWYERS, 199-201 (Foundation Press 3rd ed., 2017); *see also* O'Shea v. Riverway Towing Co., 677 F.2d 1194, 1199-200,

be paid to the creditor, changing the interest rate charged from the contract rate to a prime plus rate.[250] This can result in a change from a contract rate of 12 percent to 5.75 percent, 4.75 for the prime rate with an additional one percent to account for the risk of default.[251]

While cramdowns may seem unfair at first blush they serve an important purpose.[252] The primary purpose of a cramdown is to allow a debtor to confirm their bankruptcy plan over a creditor's objection, it creates a credible threat to the objecting creditor that they may receive less than they would if they accepted the plan.[253] Further, cramdown forces the reluctant creditor to bargain with the debtor or risk being classified contrary to their interest.[254] Debtors also have statutory devices that permit them to obviate the concerns of some of their creditors.[255]

For example, if a debtor anticipates that one of their creditors will object to the terms of the proposed repayment plan, they can neatly classify that creditor's claim the same as other consenting creditors.[256] Because the cramdown plan requires class confirmation and not necessarily an individual debtor's consent, the complacent creditors would stifle the complaints of the one objecting creditor.[257] The premise is that the drowning man cannot be heard over the sounds of the sinking ship. An objecting creditor does not draw much attention when other creditors in the same position are happy about the terms of their repayment.

The use of artificial impairment is a controversial way to defeat creditor objections.[258] There is a well-defined circuit split as different courts have determined that the use of artificial impairment meets the policy objective of the code by complying with the plain language of the statute.[259] Other courts assert that the use of an artificial impairment defeats the spirit of the Bankruptcy Code because it prevents the adversarial process from taking place.[260] Some courts have held that

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(7th Cir. Ill. Apr. 27, 1982) (explaining why it is necessary to calculate present and future value in damage awards, while also showing how to do so).

250. Till, 541 U.S. at 478-79 n. 18 (explaining that the prime rate would be adequate to compensate any creditor if the court could ensure the debtor fulfills their plan). This of course reflects a fundamental misunderstanding by the Supreme Court in how bankruptcy finance works because the prime rate is the rate at which money is exchanged between banks, even the highest credit worthy institution is charged above prime. Lending institutions are not in the business of giving away money, their continued existence requires they charge interest to pay for the fundamental costs of their business, e.g., wages, leases, taxes, etc.

251. *Id.* at 476 n. 14 (questionable commentary where the Supreme Court compared the chapter 13 cramdown with the chapter 11 rate and alluded to the application of a market rate vs the contract rate that might have existed outside of a cramdown).

252. TABB, *supra* note 6, at 1150.

253. Broude, *supra* note 212, at 450-51.

254. TABB, *supra* note 6, at 1151 ("In the 1978 Code, Congress decided to let the different classes of creditors and equity security holders bargain over how to distribute the difference between liquidation and going concern."). *See also* H.R. Rep. No. 595, 95th Cong. Sess.224 (1997).

255. H.R. Rep. No 595, 95th Congr., 1st Sess. 224 (1977).

256. TABB, *supra* note 6, at 1150.

257. *Id.*

258. *Driving the Wedge Deeper: Fifth and Ninth Circuits Unite in Refusing to Condemn "Artificial Impairment" in Cramdown Chapter 11 Plans*, Jones Day (May 2013), https://www.jonesday.com/en/insights/2013/05/driving-the-wedge-deeper-fifth-and-ninth-circuits-unite-in-refusing-to-condemn-artificial-impairment-in-cramdown-chapter-11-plans.

259. *Id.*

260. Fifth Circuit in Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture (*In re* Greystone III Joint Venture), 995 F.2d 1274, 1281 (5th Cir. 1991), and the Fourth Circuit in Travellers Ins. Co. v. Bryson Props., XVIII (*In re* Bryson Props., XVIII), 961 F.2d 496, 502 (4th Cir. 1992).

claims that share similar legal characteristics must be treated alike, except in situations where equitable subordination or administrative convenience applies.[261]

Cramdowns are threatened far more than they are used,[262] the chance that they may succeed, contrary to a creditor's interests creates an incentive to negotiate. The greatest imperative of the cramdown is that it must be fair and equitable to the creditors subject to cramdown.[263] In cases where a class of secured claims will be crammed down, the dissenting secured creditors must receive the "indubitable equivalent" of their secured claims.[264] This phrase is a catchall designed to provide flexibility for the court to consider alternatives that satisfy the cramdown standard for a dissenting class of unsecured claims.[265] Congress considered "indubitable equivalent" to mean that the substitute collateral is the equivalent of the amount of the undersecured claim, as opposed to the original collateral.[266]

Abandoning the collateral to the creditor would satisfy indubitable equivalence, as would a lien on similar collateral.[267] However, present cash payments less than the secured claim would not satisfy the standard because the creditor is deprived of an opportunity to gain from a future increase in the value of the collateral. Unsecured notes as to the secured claim or equity securities of the debtor similarly would not be the indubitable equivalent.[268]

Regarding cramdowns, the risks of "failure to reach settlement are so great, and the possible negative impact of the imposition of the cramdown powers so significant, that the cramdown power is used more as a threat than as a club actually employed in confirming a plan of reorganization."[269] Because cramdowns in large bankruptcies are difficult, they are relatively rare, however, they are still successful in convincing creditors and debtors to work together or risk a drag-out slugfest of asset liquidation if the debtor remains in bankruptcy.[270]

261. *In re* Wolf, 22 B.R. 510, 512 (B.A.P. 9th Cir. 1982).

262. *See generally* Fifth Circuit in *In re* Greystone III Joint Venture, 995 F.2d 1274 (5th Cir. 1991), and the Fourth Circuit in *In re* Bryson Props., XVIII, 961 F.2d 496 (4th Cir. 1992).

263. Nelson, Whitman, Burkhart, & Freyermuth, *supra* note 152.

264. 11 USC § 1129b (2018).

265. RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 647 (2012).

266. *Id.*

267. The term originates from Judge Learned Hands opinion in *In re* Muriel where he opined that a secured creditor could not be deprived of its collateral "unless by a substitute of the most indubitable equivalence." Courts have since determined that this phraseology means that secured creditors must receive at least the value of the secured collateral. *See, e.g.*, RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 641 (2012); *In re* Murel Holding Corp., 75 F.2d 941, 942 (2d Cir. 1935).

268. 124 Cong. Rec. H11, 104 (daily ed. Sept. 28, 1978).

269. Broude, *supra* note 212.

270. *See* Richard M. Hynes, *Reorganization as Redemption*, 6 VA. L. & Bus. Rev. 183, 220 (2011) (noting the "observation of empirical researchers that cramdown is extremely rare"); Adam J. Levitin, *Bankruptcy Markets: Making Sense of Claims Trading*, 4 BROOK J. CORP. FIN. & COM. L. 67, 106 (2009) ("Cramdown plans, where a broad negotiated deal could not be reached, continue to remain relatively rare."); John D. Ayer et. al., *The Life Cycle of a Chapter 11 Debtor Through the Debtor's Eyes Part II*, AM. BANKR. INST. J., 32 (2003) ("Cramdown cases are far more often threatened than confirmed"). *See also* Bank of America v. 203 N. LaSalle St. Partnership, 526 U.S. 434, 143 L. Ed. 2d 607, 119 S Ct. 1411, 1415-24 (1999); *In re* Brotby, 303 B.R. 177, 194 (9th Cir. BAP 2003); *In re* One Times Square Assocs. Ltd. Partnership, 159 B.R. 695, 706-08 (Bankr. S.D.N.Y. 1993). *But see* Scott Alberino et al., *Corporate Bankruptcy Panel Hot Chapter 11 Plan Issues*, 28 EMORY BANKR. DEV. J. 283, 297 (2012) ("[M]ost plans have to rely upon the cramdown mechanism . . . to get . . . confirmed.").

VI. WHY WAS THE SUPREME COURT'S DECISION IN *JEVIC* SO HARMFUL?

Prior to *Jevic,* the caselaw surrounding structure dismissals could be best described as confused.[271] Until the *Jevic* decision, some courts were not convinced that structured dismissals were constitutional let alone whether they should be governed by federal bankruptcy or some other law.[272] Scholars and courts had long debated whether priority outside of formal proceedings should be absolute or relative, with most lower courts taking the position that the relative priority was better because it offered closure to a case.[273] This relative priority meant that parties could establish priority through contract rather than by following the guidance of the Bankruptcy Code.[274] The structured dismissal in *Jevic* would have both stripped the employee truck drivers of their priority claims in bankruptcy and forbidden them from pursuing any other remedies against those who allegedly harmed them outside of bankruptcy.

D. The Scenario leading up to Jevic

In 2006, Sun Capital Partners ("Sun"), a private equity firm, acquired Jevic Transportation Corporation with money borrowed from the Commercial Investment Trust ("CIT") Group in a leveraged buyout.[275] Two years after the buyout, Jevic filed for bankruptcy under Chapter 11.[276] At the time of filing, Jevic owed $53 million to its senior secured creditors and around $20 million to its general unsecured creditors.[277]

A group of former Jevic truck drivers filed an adversary suit in bankruptcy court against Jevic and Sun alleging WARN Act violations, the truck drivers asserted that they had been fired without proper notice as required by law.[278] The Bankruptcy Court granted summary judgment against Jevic in that action; $8.3 million of that judgment fell into the bucket of "priority wage claims," which were entitled to payment before general unsecured claims but behind secured claims, under the Bankruptcy Code's priority schedule.[279]

A second lawsuit was brought by the official committee of unsecured creditors against Sun and CIT. The committee alleged that the leveraged buyout hastened Jevic's bankruptcy by saddling it with debt that it was unable to pay.[280] In 2011,

271. Lipson, *supra* note 191.
272. *Id.*
273. *Id.* at 635.
274. *Id.* at 642.
275. CIT Group is a financial holding company that regularly finances corporate acquisitions. *In re* Jevic Holding Corp., 2011 WL 4345204 (Bankr. D. Del. Sept. 15, 2011).
276. *Id.*
277. *Id.*
278. *Id.* The WARN act violation involves the firing of the truck drivers without notice and contrary to the procedures set out by federal law.
279. Joe Riches, *US Supreme Court confirms priority rules apply to a structured dismissal of a chapter 11 bankruptcy case, DLA Piper: Restructuring Global Insights* (2017), https://www.dlapiper.com/en/us/insights/publications/2017/06/restructuring-global-insight-july-2017/us-supreme-court--bankruptcy-case/.
280. *In re Jevic Holding Corp.*, 2011 WL 4345204 (Bankr. D. Del. Sept. 15, 2011).

the Bankruptcy Court held that the committee had adequately pled claims of preferential and fraudulent transfer.[281]

Soon thereafter, the committee, Sun, CIT, and Jevic agreed to a settlement that, among other things, called for a structured dismissal of Jevic's Chapter 11 cases.[282] Under the proposed structured dismissal, the employee petitioners would receive no distribution, but lower priority general unsecured creditors would receive a distribution.[283] The proposed settlement called for a structured dismissal with distributions that did not follow ordinary priority rules.[284] This settlement would mean that the truck drivers who had been fired would be deprived of any compensation, while others with less compelling claims would receive a payout.

B. *The Approach used by the Bankruptcy Court, District Court, and Third Circuit Court of Appeals*

Sun, CIT, Jevic, and the creditor committee asked the Bankruptcy Court to approve the proposed settlement and dismiss the case.[285] The WARN Act employee petitioners and the United States Trustee objected, arguing that the dismissal violated the priority schedule by skipping over the petitioners, who had higher priority claims than general unsecured creditors who were scheduled to receive a distribution.[286]

The Bankruptcy Court held that because the distribution would be conducted via a structured dismissal, as opposed to through a Chapter 11 plan where the ordinary priority rules apply, the distributions were not prohibited.[287] The Bankruptcy Court approved the settlement because under the circumstances, there was "no realistic prospect" of distribution to any unsecured creditors; a plan of reorganization was nearly impossible and funds were too limited to execute a Chapter 7 liquidation.[288]

Contrary to previous rulings, the Supreme Court in *Jevic* held that creditors could not avoid traditional priority rules unless other creditors consented to a change in the distribution scheme.[289] The court explained that though the Bankruptcy Code does not expressly apply priority schemes to structured dismissals, lower courts should apply priority rules to out-of-bankruptcy workouts.[290] The Court's decision transitioned the structured dismissal from a negotiation heavy device like a prepackaged plan into a plan very much like the cramdown, where if a creditor dissents then the planning starts over.

The Bankruptcy Code does not include a provision requiring the rules of bankruptcy to apply to situations outside of bankruptcy.[291] The negotiation that

281. Riches, *supra* note 279.
282. *Id.*
283. *Id.*
284. *Id.*
285. *Id.*
286. *Id.*
287. Riches, *supra* note 279.
288. *Id.*
289. Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 978 (2017).
290. *Id.* at 979.
291. *Gouveia v. Tazbir*, 37 F.3d 295, 300 (7th Cir. 1994) ("The Supreme Court has taught that any grant of authority given to the bankruptcy courts . . . must be exercised within the confines of the Bankruptcy Code.").

goes on in a structured dismissal, takes place outside the confines of bankruptcy. It is instead an alternative to bankruptcy, very much like the use of PBNAs or prepackaged plans to prepare for the filing of bankruptcy, the structured dismissal is used to avoid bankruptcy.[292] Absent any congressional authorization, the Supreme Court in *Jevic* determined that priority schemes apply in and out of bankruptcy.[293] This is an example of overreach where the clear language of the Bankruptcy Code envisions that its provisions apply only in bankruptcy and in select, defined circumstances,[294] the structured dismissal is not included.[295]

C. *Reviewing the Interpretation of Bankruptcy Law.*

The question that must be asked is whether the Court's ruling in *Jevic* adheres to the spirit or the letter of the Bankruptcy Code. The answer is readily apparent, *Jevic* is an aberrational application of the letter of the Bankruptcy Code and such a strict interpretation does not harmonize with the well-established spirit of the Bankruptcy Code.[296] It fails to consider the all-important balance between a debtor's fresh start and a creditor's opportunity to receive just compensation.[297] A structured dismissal pertains to the dismissal of a bankruptcy case, while certain bankruptcy rules and principles apply, its purpose is to provide an escape for debtors and creditors.[298] The purpose of a structured dismissal is substantially diminished through the strict interpretation and application of *Jevic*.[299] It prevents debtors and creditors from negotiating terms during their dismissal and instead forces them to follow the provisions of § 507, even though they are not in bankruptcy.[300]

While seemingly simple, this decision has broad-reaching implications. It severely limits the ability of creditors to negotiate with their debtors or alter their position in bankruptcy such that they receive payment earlier than the priority schedule would traditionally allow.[301] The Bankruptcy Code was created to encourage and facilitate negotiations between parties-in-interest.[302] The existence of prepackaged plans, cramdown plans, and structured dismissals demonstrates that the code anticipated a need to avoid a strict and unyielding distribution schedule,

292. Lipson, *supra* note 191, at 646.
293. Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973 (2017).
294. Lamie v. U.S. Tr., 540 U.S. 526, 534 (2004) ("[W]hen 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.").
295. *In re* Biolitec, Inc., 528 B.R. 261, 269 (Bankr. D.N.J. 2014) ("[W]hile not expressly provided for in the Code, a structured dismissal may be an appropriate resolution to a case where the process includes sufficient guarantees that fundamental rules and principles governing the administration and distribution of estate assets are upheld.").
296. Blumenstiel et al., *supra* note 3.
297. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (explaining that the purpose of the bankruptcy law is "it gives to the honest but unfortunate debtor . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.").
298. Lipson, *supra* note 191, at 635.
299. Blumenstiel et al., *supra* note 3.
300. Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 985 (2017).
301. Lipson, *supra* note 191, at 633-35.
302. Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 985 (2017).

and instead allow debtors and creditors to come to some sort of agreement when possible to hasten their discharge from bankruptcy.[303]

One of the core ideas of the Bankruptcy Code is that debtors should receive a fresh start, while their creditors should receive payment on the credit they extended to the debtor.[304] As a result, circuit courts have concluded that the Bankruptcy Code should be construed liberally so that the extensive protections are provided to debtors.[305] This idea can be seen in numerous court cases dating back before the Bankruptcy Act of 1898, where judges consistently stretched beyond the strict language of the law to provide as many rights to debtors as possible.[306] Courts have, without fail, determined that where they had the chance to stretch beyond the strict statutory language that they "should rule in favor of equality for the debtor."[307] Only recently have courts begun to apply a stricter interpretation for bankruptcy law.[308]

D. *The Supreme Court's Interpretation: A Canon of Confusion*

For most of the nation's history, the Supreme Court has avoided advocating for a particular style of interpretation for bankruptcy cases, rather the court has ruled as the case demands.[309] "Not only does the Court fail to rely on bankruptcy policy expressly in any of its opinions, but it also is readily apparent that the Court's textualist approach is not a mask for a 'hidden agenda' in the bankruptcy area."[310] Bankruptcy courts as courts of equity can interpret the Bankruptcy Code as justice and wisdom demand.[311] However, the Sixth Circuit stated:

> [A court must not] ignore . . . the plain meaning of the Bankruptcy Code. The common theme in the Supreme Court's bankruptcy jurisprudence . . . is that courts must apply the plain meaning of the Code unless its literal application would produce a result demonstrably at odds with the intent of Congress.[312]

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303. Jonathon S. Byington, *The Fresh Start Canon*, 69 FLA. L. REV. 115, 133-35 (2017), http://scholarship.law.umt.edu/faculty_lawreviews/141.

304. *Id.* at 116.

305. *Id.* at 124.

306. *In re* Klein, 30 B.R. 727, 729 (Bankr. E.D.N.Y. 1983) (holding the Bankruptcy Code is to be interpreted liberally, with an eye toward giving the debtor a fresh start ... in order to invoke the beneficent spirit of the Code.); Wright v. Union Cent. Life Ins. Co., 311 U.S. 273, 279, 61 S. Ct. 196, 200, 85 L. Ed. 184 (1940) (holding 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.); *In re Ciotta,* 222 B.R. 626, 630 (Bankr.C.D.Cal.1998) ("Several bankruptcy courts have held that when Congress' intent is ambiguous, bankruptcy exemptions should be liberally interpreted in favor of the Debtor."); Baldwin v. Wilder, 2 F. Cas. 537, 539 (C.C.W.D. Mich. 1871) (holding that bankruptcy law is "a remedial and beneficient law whose spirit of equality should be extended by liberal constructions"); *In re* Delaney, 251 F. 425, 426 (E.D. Pa. 1918) (The wisdom of the policy of the law ... invites us to construe the act in a liberal spirit.").

307. *See generally*, *In re* Klein, 30 B.R. 727, 729 (Bankr. E.D.N.Y. 1983); Wright v. Union Cent. Life Ins. Co., 311 U.S. 273, 279, 61 S. Ct. 196, 200, 85 L. Ed. 184 (1940); *In re Ciotta,* 222 B.R. 626, 630 (Bankr.C.D.Cal.1998); Baldwin v. Wilder, 2 F. Cas. 537, 539 (C.C.W.D. Mich. 1871); *In re* Delaney, 251 F. 425, 426 (E.D. Pa. 1918).

308. *See generally* Carlos J. Cuevas, *The Rehnquist Court, Strict Statutory Construction and the Bankruptcy Code*, 42 CLEV. ST. L. REV. 435, 438 (1994).

309. *Id.*

310. *Id.*

311. 11 U.S.C. § 105 (2018).

312. *In re* Lee, 530 F.3d 458, 470 (6th Cir. 2008).

This new trend toward strict interpretation is perhaps best demonstrated by the Rehnquist Court.[313] The Rehnquist Court relied on the text of the statute to render its determination.[314] Then under a holistic approach, the Court analyzed the structure of the Bankruptcy Code and made a determination consistent with the text of a specific section and the structure of the entire Bankruptcy Code.[315] Both methods focused on the clear language of the Bankruptcy Code to analyze bankruptcy questions, equity played no part in the decision.[316]

Congress quickly followed on the heels of the Rehnquist Court's interpretations to ensure that this particular interpretation continued.[317] Congress's response to perceived liberal interpretations by courts was to pass the BAPCPA designed to curb the latitude of the court in making key decisions.[318] "Consumer Protection" was a misrepresentation as BAPCPA provided significant advantages to creditors, these included strict tests that removed traditional judicial discretionary decision making and instead increased the power of government organizations, like the United States Trustee office, in making critical decisions.[319] Furthermore, BAPCPA altered one of the fundamental negotiating points of large reorganizations, it allowed the court or a committee of creditors the ability to reverse modifications of retirement benefits in contravention of any negotiated agreements prior to or in anticipation of bankruptcy.[320]

While there are several concerns regarding the use of strict interpretation, there is something to be said for the reliability that such an interpretive scheme provides.[321] Debtors and creditors alike can rely on the text of a statute rather than worrying that the court will look into the murky waters of legislative history and policy to create their own radical and potentially ever-changing policy.[322] This very possibility was one of the reasons Congress passed BAPCPA, it was concerned that courts had too much latitude and were using that discretion to allow debtors a discharge where there should not have been one.[323] While there certainly are valid reasons to use strict interpretations, such interpretation should not exist where it conflicts with the well-established purpose of a law, especially where it creates a crumbling foundation from which courts will create new law. Such is the case with *Jevic*, the court used a strict interpretation to apply an unprecedented change in priority payment in structured dismissals, which in turn crippled incentives to negotiate for preferential treatment and altered claims.[324]

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313. *Id.*
314. Cuevas, *supra* note 308, at 440.
315. *Id.*
316. *Id.*.
317. Kara J. Bruce, *Rehabilitating Bankruptcy Reform*, 13 NEV. L. J. 174, 189 (2012).
318. *Id.* at 192.
319. Robert J. Landry III and Nancy Hisey Mardis, *Consumer Bankruptcy Reform: Debtors' Prison without Bars or "Just Desserts" For Deadbeats?*, 36 GOLDEN GATE U. L. REV. 91, 107 (2006).
320. BAPCPA § 437, "In large reorganizations, where debtors and committees are grappling with such complex issues as collective bargaining agreements, pension and retiree benefits, or mass tort liability, limitations on exclusivity may be detrimental to the negotiation of consensual plans." See also Elizabeth J. Futrell, *Chapter 11 Of The Bankruptcy Code After BAPCPA: It's More Than Consumer Changes*, Jones Walker, at 14, (2006).
321. Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 987 (2017).
322. *Id.*
323. 151 Cong. Rec. H2063-01, 151 Cong. Rec. H2063-01, H2066 (daily ed. Apr. 14, 2005) (statement of Rep. Sensenbrenner).
324. Lipson, *supra* note 191, at 642.

The Supreme Court acknowledged that there were significant potential side effects to its decision, however, it wanted to apply the letter of the Bankruptcy Code to an area of law outside of what the strict language of the code covered.[325] Justice Clarence Thomas, in his dissent, decried the intervention by the Supreme Court in such a complex bankruptcy case of which it had limited practical experience and lamented that this case could have been better adjudicated by experts with experience in the field before it ever made its way to the Supreme Court.[326] Scholars have noted that there were repercussions in the bankruptcy system post-*Jevic* with increased difficulties financing plans and conflicts between lenders and creditors concerning the use of money to continue the operation of the going concern debtor.[327]

The ruling by the Supreme Court in *Jevic* negated a large incentive to negotiate, and where negotiation occurs both parties benefit because it provides an opportunity for both or all parties to obtain relief on terms amenable to their position. Where a debtor will receive a discharge of $50,000 and the creditor will obtain $10,000, the creditor will always negotiate with the debtor because there is a clear benefit to the negotiation. *Jevic* is a perfect example of why negotiation is important to bankruptcy, the Supreme Court's decision, applied retroactively, would have ensured that Jevic would have been administratively dissolved without any payout to its creditors. However, if the structured dismissal had proceeded then at least some creditors would have received payment, which goes to show even tiny bankruptcy dollars are better than nothing.

VII. SOLUTIONS FOR JEVIC'S PRIORITY CLASSIFICATION CONUNDRUM

The Court's interpretation in *Jevic* has led to numerous issues for creditors as they attempt to navigate an already complicated landscape of creditor and debtor interactions. Yet Congress has not stepped up to clarify and resolve the issue, though there has been some interest in resolving the issue through legislation.[328] Senator Elizabeth Warren has proposed a new form of bankruptcy that would substantially alter how debtors are discharged from debt, presumably altering priority rules to favor the insolvent debtor.[329] This proposal makes a legislative solution a very good possibility, however, the Supreme Court might once more review priority distribution and come to a different conclusion, failing that, the bankruptcy community can ignore the Court and continue operating as if *Jevic* never happened.

A. *Introduction of Legislation Clarifying Priority Claims*

With the recent amendment to the Bankruptcy Code through the passage of the SBRA,[330] creditors could very well promote a new bill that clarifies issues that will

325. Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 987 (2017).
326. *Id.* at 988.
327. Lipson, *supra* note 191, at 708.
328. Kevin Lewis, *Making it a Priority: What Happens to Employee Claims When a Business Declares Bankruptcy?*, Congressional Research Service (2019).
329. Elizabeth Warren, *Fixing Our Bankruptcy System to Give People a Second Chance*, Warren Democrats (2020), https://elizabethwarren.com/plans/bankruptcy-reform.
330. H.R. 3311 Small Business Reorganization Act of 2019, PL 116-54 (2019).

arise with the SBRA and at the same time fix priority distribution issues created by *Jevic*. The SBRA is a response to bankruptcy's inaccessibility to small businesses.[331] The amendment provided a new subchapter to Chapter 11, titled Subchapter V.[332] The key provisions of Subchapter V seek "to increase a debtor's ability to negotiate a successful reorganization while retaining control of the business; to reduce 'unnecessary procedural burdens and costs' by eliminating the creditors' committee and disclosure statement requirements for the plan of reorganization; and to increase oversight and ensure quick reorganizations."[333]

Under a proposed amendment to the Bankruptcy Code, Congress can provide limits to where priority will apply. Instead of the current situation where bankruptcy priority rules apply in and out of bankruptcy, Congress can clarify that priority only applies while *in* bankruptcy rather than near bankruptcy. In terms of bankruptcy planning, having a clear delineation of where priority rules apply saves substantial hardship and expense for debtors and creditors.[334] Such a change is not uncommon as Congress has repeatedly edited and altered the Bankruptcy Code to reflect issues that have arisen.[335]

In addition to the minor adjustments, Congress should provide guidance on the interpretation of Chapter 11, as is found in numerous pieces of state legislation.[336] Such a provision should include language that states that the statute will be subject to a liberal construction that is consistent with the nature of bankruptcy, in that the bankruptcy exists for dual purposes. The courts must balance the interests of both creditors and debtors to create a system of bankruptcy that provides for easy access to credit while also protecting the right of creditors to collect on the credit they extend.[337] Furthermore, the first and most important canon of statutory construction asserts that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, this first canon is also the last: judicial inquiry is complete."[338] A change in legislation would provide the impetus necessary to resolve priority issues and provide courts a platform to rule according to the intent of Congress.

331. Paul W. Bonapfel, *A Guide To The Small Business Reorganization Act Of 2019*, United States Bankruptcy Court for the Northern District of Georgia (2020). https://www.ganb.uscourts.gov/sites/default/files/sbra_guide_pwb.pdf

332. *Handbook for Small Business Chapter 11 Subchapter V Trustees*, U.S. Department of Justice Executive Office for United States Trustees, at 1-1, (2020), https://www.justice.gov/ust/file/subchapterv_trustee_handbook.pdf/download.

333. *Id.*

334. Saul Levmore & Hideki Kanda, *Explaining Creditor Priorities,* 80 VA. L. REV. 2103 (1994).

335. N.L.R.B. v. Bildisco and Bildisco, 465 U.S. 513 (1984) (*abrogated by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, tit. III, § 541(a), 98 Stat. 333, 390 (codified at 11 U.S.C. § 1113)); Pa. Dept. of Pub. Welfare v. Davenport, 495 U.S. 552 (1990) (*abrogated by* Crime Control Act of 1990, Pub. L. No. 101-647, § 3103, 104 Stat. 4789, 4916); U.S. v. Nordic Village, Inc., 503 U.S. 30 (1992) (*abrogated by* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, tit. I, § 113, 108 Stat. 4106, 4117 (codified at 11 U.S.C. § 106)); Fid. Fin. Services, Inc. v. Fink, 522 U.S. 211 (1998) (*abrogated by* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, tit. XII, § 1222, 119 Stat 23, 196 (codified at 11 U.S.C. § 547(c)(3)(B))).

336. *See* RSMo § 213.010 (2017).

337. Karen Gross, *Preserving a Fresh Start for the Individual Debtor: The Case for Narrow Construction of the Consumer Credit Amendments*, 135 U. PA. L. REV. 59, 60 (1986).

338. Conn. Nat. Bank v. Germain, 503 U.S. 249, 253-54 (1992); *see also* Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A, 530 U.S. 1, 6 (2000), U.S. v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989).

Otherwise, significant policy issues exist where creditors lose the incentive to lend freely or at low rates, while debtors are crippled by high-interest rates and limited access to credit.[339] Such a stricture on credit will have a simultaneously large impact on the economy as consumers are forced to spend within their means, limiting the flow of commerce.[340] Additionally, stricter construction of such a vital aspect of daily life reduces the incentive to negotiate.[341] As creditors are no longer incentivized to negotiate with debtors for reduced or reaffirmed debts, the debtors are forced to fight their way out of debt in bankruptcy which creates substantial financial burdens on already insolvent businesses and consumers.

B. *The Jacksonian Alternative: Treat Jevic as if it Never Happened*

There is a substantial pattern of disobedience within the bankruptcy community, as they ignore the directions and rulings of the Supreme Court and instead carry on business as if the court had made a mere recommendation rather than a ruling.[342] The lines of demarcation are clear among other federal courts, there is a well-defined hierarchy proceeding from the district court up to the circuit court and ending with the Supreme Court as the ultimate arbiter.[343] However, the line is blurred with respect to bankruptcy courts, they are not Article III courts and do not fit within the traditional hierarchy.[344] Bankruptcy courts tend to observe stare decisis, however, they usually view decisions by courts outside of their circuit as merely persuasive without any binding authority.[345] Requiring bankruptcy courts to blindly follow the precedent set by district courts is a terrible policy.[346] Bankruptcy courts exist because they are the experts in the field, they have

339. Samuel Bentolila, Marcel Jansen & Gabriel Jimenez, *When Credit Dries Up: Job Losses In The Great Recession*, 16 J. OF THE EUROPEAN ECON. ASS'N. 650, 653 (2017); *see also* Peter J. Leo, *The Case for "Cramdown": Eliminating the Practical and Ideological Barriers to Pure Mortgage Modification*, 18 U. MIAMI BUS. L. REV. 257, 265 (2010) (explaining that bankruptcy encourages modification by lenders).

340. Samuel Bentolila, Marcel Jansen & Gabriel Jimenez, *When Credit Dries Up: Job Losses In The Great Recession*, 16 J. OF THE EUROPEAN ECON. ASS'N 650, 653 (2017).

341. Gross, *supra* note 337.

342. *In re* Romano, 350 B.R. 276 (Bankr. E.D. La. 2005), *See also* Singerman, Paul and Avron, Paul, *Of Precedents and Bankruptcy Court Independence: Is a Bankruptcy Court Bound by a Decision of a Single District Court Judge in a Multi-Judge District?*, 22 ABI Journal 1 (2003). CF. *First of America Bank v. Gaylor (In re Gaylor)*, 123 B.R. 236 (Bankr.E.D.Mich. 1991); *In re Villarreal*, 413 B.R. 633, 641 (Bankr.S.D.Tex. 2009). *See also, In re* Silverman, 616 F.3d 1001, 1005 n. 2 (9th Cir. 2010). (Even the courts who have determined that a bankruptcy court is bound by district court decisions within the same district have made such a determination only with respect to published decisions within the district.).

343. Paul Singerman & Paul Avron, *Of Precedents and Bankruptcy Court Independence: Is a Bankruptcy Court Bound by a Decision of a Single District Court Judge in a Multi-Judge District?*, 22 ABI Journal 1 (2003).

344. Jeffrey J. Brookner, *Bankruptcy Courts and Stare Decisis: The Need for Restructuring*, 27 U. MICH. J. L. REFORM 313, 326 (1993). "The Supreme Court has taught that any grant of authority given to the bankruptcy courts . . . must be exercised within the confines of the Bankruptcy Code." *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 77 n.29 (1982) (quoting *Crowell v. Benson*, 285 U.S. 22, 51 (1932)).

345. *Id.*

346. Singerman, *supra* note 343.

experience with the strengths and weaknesses of the system and have experience applying the nuanced bankruptcy rules.[347]

Bankruptcy courts are not alone in their disregard for Supreme Court decisions, contrary to common belief there is no correlation between the unanimity of the court and lower court treatment of the Supreme Court decision.[348] Rather, evidence indicates that lower courts are more likely to agree with and uphold Supreme Court decisions on policy grounds rather than on factual or legal grounds.[349] As an example of the bankruptcy court's reluctance to adopt the directions of the Supreme Court, the Bankruptcy Court and Second Circuit in *In re Anderson* decided contrary to the Supreme Court's decision that the arbitration of the debtor's automatic stay claim would not necessarily jeopardize or inherently conflict with the Bankruptcy Code.[350] Bankruptcy courts regularly ignore Supreme Court decisions and instead determine what rate they will use in a cramdown contrary to the Supreme Court's direction on the matter.[351]

Bankruptcy courts are reluctant to ignore Supreme Court and other higher court decisions because they dislike being overturned and fear some of the social stigma and repercussions that may occur.[352] Considerable time and effort go into their decisions and since they are the experts in their field, overturning a decision without any change in statutory authority or circumstance is an arrogant disregard for the role and practice of bankruptcy. Bankruptcy courts are often deeply involved in the negotiation and planning involved in restructuring and have first-hand knowledge of the available facts which puts them in the best position to promote an ongoing dialog between creditors and the debtor.[353] As a result, the decision by a court without that experience to overturn or remand a decision creates a conservative attitude toward interpretation and application of the law.

Instead, according to the Supreme Court in *Stern v. Marshall*, bankruptcy courts, while in possession of statutory authority to adjudicate the claims and issues that come before them, do not have the constitutional authority because that authority is reserved under Article III.[354] The Supreme Court explained that bankruptcy courts could only hear cases that include core proceedings which are those that arise in a bankruptcy case or under Title 11, i.e. the Bankruptcy Code.[355] There is no such thing as a "core" proceeding that does not arise under Title 11 or

347. Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973 (2017) (Thomas, J., Dissenting) (stating that the court would greatly benefit from the views of additional courts on this question in addition to a full adversary hearing before a bankruptcy court before addressing the issue.).

348. Charles A. Johnson, *Lower Court Reactions to Supreme Court Decisions: A Quantitative Examination*, American Journal of Political Science, Vol. 23, No. 4, 792, 802-03 (1979). This study is particularly relevant because it took place prior to the Supreme Court Case Selection Act. The act changed significantly increased the number of cases published and relied on by lower courts, so it made it more difficult to ascertain effects of Supreme Court decisions on lower courts.

349. *Id.* at 803.

350. *In re* Anderson, 884 F.3d 382, 392 (2nd Cir. 2018).

351. *In re* Texas Grand Prairie Hotel Realty, 710 F.3d 324 (5th Cir. 2013).

352. Cynthia Norton (taking the place of Chief Judge Brian Fenimore), Case Law Update and Current Developments, 2020 Annual Bankruptcy Practice Institute, Columbia, Missouri (Mar 2020).

353. Government Accountability Office, *Bankruptcy Complex Financial Institutions and International Coordination Pose Challenges,* GAO-11-707, at 106, (2011), https://www.gao.gov/new.items/d11707.pdf.

354. Stern v. Marshall, 564 U.S. 462, 503 (2011).

355. *Id.* at 473.

in a Title 11 case.[356] Further, the list of core proceedings in § 157(b)(2) of Title 28 of the United States Code serves as an example to illustrate what constitutes a core proceeding.[357] Section 157, among other examples, identifies "counterclaims by the estate against persons filing claims against the estate" as being within the bankruptcy court's core jurisdiction.[358] Accordingly, it seems that since the bankruptcy court is the expert in bankruptcy and the Supreme Court has directed them to practice only what they know, the Supreme Court would be wise to rely on the experience of the bankruptcy court that it views as an expert in the matter of bankruptcy.

Following the above reasoning, a structured dismissal as a bankruptcy specific tool, should be adjudicated according to the bankruptcy court's established practice and rules.[359] Bankruptcy courts should continue to act as experts in the field of bankruptcy while rendering decisions on their cases. Only after there is substantial disagreement between the circuits and Congress has not resolved an issue should the Supreme Court step in. As such, bankruptcy practitioners should ignore the Supreme Court since the Court has limited experience with bankruptcy law, so bankruptcy courts would be better suited to ignore the ill-informed rulings of the Supreme Court. In the words of Andrew Jackson, the Court has made its decision now let it enforce it.[360] And so bankruptcy courts could follow the example of President Jackson and ignore the ruling in *Jevic* where the circumstances of the case and equity demand it.[361]

C. *Return of Supreme Court Harmonization.*

The Supreme Court should overturn *Jevic* and provide clear guidance about the relationship between extrajudicial solutions, specifically that as a freely negotiated contract a structured dismissal falls outside the scope of the Bankruptcy Code.[362] The majority opinion recognized that it might cause substantial harm through its decision.[363] They recognized that changes in the bargaining power of different classes of creditors existed outside of bankruptcy and would not end with structured dismissals.[364] The concerns in *Jevic* also included the risk that they would upset the balance of settlements in bankruptcies, potentially reducing the amount and creating

356. *Id.* at 476.
357. *Id.* at 474.
358. Ben Rosenblum, *Stern v. Marshall* - Shaking Bankruptcy Jurisdiction to Its Core?, Jones Day Publications (2011), https://www.jonesday.com/en/insights/2011/08/istern-v-marshall-i-shaking-bankruptcy-jurisdiction-to-its-core. This is another example of the Supreme Court involving itself in a matter that it does not understand. And because of its uninformed opinion it upends the practice and policy of an area of law where over $52,000,000,000 in debt is discharged yearly. This doesn't include the billions involved in corporate restructuring and reaffirmed consumer debts. *See* Table BAPCPA 2X—Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) (December 31, 2018), https://www.uscourts.gov/sites/default/files/data_tables/bapcpa_2x_1231.2018.pdf.
359. Allegretto, *supra* note 190, at 248.
360. *See generally* Jacob A. Esher, *Alternative Dispute Resolution in U.S. Bankruptcy Practice*, 4 MASS. L. REV. 76 (2009).
361. This is merely an academic possibility; I do not propose that the courts do such a thing in real life.
362. This would be a return to a policy of the Supreme Court where they would take up cases that caused splits among circuits or resulted in contentious or discordant rulings by lower courts on a single issue.
363. Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 986-87 (2017).
364. *Id.* at 987.

more expensive litigation.[365] The court freely acknowledged that a priority-skipping dismissal might be in the best interest of the parties, however, it would not permit such a tool to exist even if it were rarely used.[366] As Justice Thomas said in his dissent, the Supreme Court could benefit from the experience of bankruptcy courts and should not have taken up this appeal without letting some of the more complicated and troublesome issues work themselves out.[367] Under his reasoning, it appears he would be willing to readdress *Jevic,* or at least the issue posed within, once a clear circuit disagreement existed regarding priority skipping.[368]

In the past, the Supreme Court often resolved issues of interpretation and application of the law to provide a predictable legal landscape.[369] However, in recent years the court has taken a more political approach to the cases it takes up, rather than removing the shadows and ambiguities of the law, it selects cases that reflect political issues of the day.[370] Given the limited number of cases that the Court can hear in a given year, its decision to avoid circuit splits demonstrates a departure from a longstanding, albeit unstated, policy of the court.[371] The Court has taken up some recent bankruptcy-related circuit splits, focusing on student loan discharge and good faith as a defense to the discharge injunction.[372] As such it is well within the Court's power to take up the *Jevic* issue once again, as it does not make any particular habit of avoiding bankruptcy-related cases.

The Court may also reverse its previous decision, as it has done on several occasions.[373] The court explains that it does so hesitantly, for good reason, it is the highest court in the land and so what it says is binding on lower courts.[374] However, when the court creates bad law or circumstances change, the court freely reverses itself.[375] When it does change its mind on an issue, such a change has a tremendous impact.[376] Regarding *Jevic* the Court should grant certiorari to restore negotiation to its pre-*Jevic* status as the catalyst to shorter bankruptcies.

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365. *Id.*
366. *Id.*
367. *Id.* at 988 (Thomas, J., Dissenting).
368. *Id.* at 987-88 (Thomas, J., Dissenting).
369. *See generally* Deborah Beim & Kelly Rader, *Legal Uniformity in American Courts*, 16 J. OF EMPIRICAL LEGAL STUD. 448 (2019) (Finding that most circuit splits are not resolved by the Supreme Court).
370. *See* Christopher W. Schmidt & Carolyn Shapiro, *The Supreme Court and American Politics: Symposium Introduction*, 93 CHI. KENT L. REV. 315 (2018).
371. Elizabeth A. Lane & Ryan C. Black, *Agenda Setting and Case Selection on the U.S. Supreme Court*, OXFORD RESEARCH ENCYCLOPEDIA (Dec. 2017) https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-91 (demonstrating that the court has reviewed fewer cases as time progresses).
372. *See generally* Rodriguez v. Fed. Deposit Ins. Corp., 140 S. Ct. 713 (2020); Taggart v. Lorenzen, 139 S. Ct. 1795 (2019). The discharge injunction prevents creditors from attempting to collect on debt that had been discharged by bankruptcy.
373. *See generally, Brown v. Board of Education,* 347 U.S. 483 *(1954) (overturning Plessy v. Ferguson,* 163 U.S. 537 *(1896) (addressing school segregation)); Lawrence v. Texas,* 539 U.S. 558 (2003) *(overturning Bowers v. Hardwick,* 478 U.S. 186 (1986) *(addressing same sex activity)); South Dakota v. Wayfair, Inc.,* 138 S. Ct. 2080 (2018) *(overturning Quill Corp. v. North Dakota,* 504 U.S. 298 (1992) *(addressing changes to state taxing powers)). These cases demonstrate that the court is not a stranger to reversing itself in different areas of life and law.*
374. Brandon J. Murrill, *The Supreme Court's Overruling of Constitutional Precedent*, CONGRESSIONAL RESEARCH SERVICE (Sep. 14, 2018) https://crsreports.congress.gov/product/pdf/R/R45319.
375. *Id.*
376. *Id.*

VIII. CONCLUSION: NEGOTIATION IN THE PAST AND FUTURE.

The change in priority from the conventional rules that bankruptcy courts had observed for years prior to *Jevic* substantially decreased the effectiveness and bargaining imperative that existed in bankruptcy.[377] Once the Court established that unsecured creditors could not negotiate for better positioning in a structured dismissal, one of the key tools in bankruptcy disappeared.[378] If creditors are to face the same treatment in and out of bankruptcy, then there is much less incentive to work with the debtor and other creditors to end the bankruptcy quickly. They will receive virtually pennies on the dollar in either circumstance.[379] *Jevic* applied the Bankruptcy Code and applied a priority scheme where one did not exist, which in turn prevented one of the essential parts of a structured dismissal. It ensured that creditors could not negotiate to release their claim against the debtor if the debtor's case was dismissed from its bankruptcy filing, instead, the same rules that applied in bankruptcy applied outside of bankruptcy which defeats the purpose of a structured dismissal and creditor release of claims. As such the courts or Congress should take action to fix the priority issues created by *Jevic,* doing so would ensure that negotiation remains a valid and integral part of the bankruptcy process.

377. Lipson, *supra* note 191.
378. Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 986-87 (2017).
379. TABB, *supra* note 6.

