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# Crystals, Mud, BAPCPA, and the Structure of Bankruptcy Decisionmaking

*R. Wilson Freyermuth\**

A critical feature of any legal system is its formal dispute resolution mechanism. From the perspective of a transactions lawyer, the dispute resolution process should be structured to accomplish (or at least contribute positively toward) doctrinal clarity. In the language made familiar by the work of Professor Carol Rose, this reflects a preference for “crystal” rules rather than “mud” rules:

Property law . . . has always been heavily laden with hard-edged doctrines that tell everyone exactly where they stand. Default on paying your loan installments? Too bad, you lose the thing you bought and your past payments as well. Forget to record your deed? Sorry, the next buyer can purchase free of your claim, and you are out on the street. . . .

In a sense, hard-edged rules like these — rules I call “crystals” — are what property is all about. If, as Jeremy Bentham said long ago, property is “nothing but a basis of expectation,” then crystal rules are the very stuff of property: their great advantage, or so it is commonly thought, is that they signal to all of us, in a clear and distinct language, precisely what our obligations are and how we may take care of our interests. . . .

Economic thinkers have been telling us for at least two centuries that the more important a given kind of thing becomes for us, the more likely we are to have these hard-edged rules to manage it. We draw these ever-sharper lines around our entitlements so that we know who has what, and so that we can trade instead of getting

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\* John D. Lawson Professor of Law, University of Missouri-Columbia. I am grateful to my colleague Michelle Cecil for her invitation to participate in the symposium and to Judge Wedoff and professors Culhane and White for their thoughtful debate on the meaning of the “means test.” Special thanks to my colleagues Michelle Cecil and Ray Phillips for conversations that helped to shape my thoughts — and to my own Bankruptcy professor, the late Mel Shimm, whose wisdom I grow to appreciate increasingly. Thanks also to Ted Janger, whose previous work has more broadly (and thoughtfully) explored the role of crystals and mud in the bankruptcy reform process. See Ted Janger, *Crystals and Mud in Bankruptcy Law: Judicial Competence and Statutory Design*, 43 ARIZ. L. REV. 559 (2001).

into the confusions and disputes that would only escalate as the goods in question become scarcer and more highly valued.<sup>1</sup>

This need for doctrinal clarity is perhaps even more important in the bankruptcy context. A lack of doctrinal clarity produces a greater volume of disputes for the system to resolve, as parties already stuck in a largely zero-sum collection game posture to maximize their respective positions. As the volume of disputes increases, the system's dispute resolution process consumes an increasing proportion of debtor assets— assets that are almost inevitably insufficient to satisfy creditors in any individual case.

As a real estate professor, I tend to focus on bankruptcy only as it intersects with mortgage law and Article 9 of the Uniform Commercial Code. Thus, I feel somewhat out of my element as a commenter in this symposium, and my observations may be suspect coming from a bankruptcy “outsider.” But as an outside observer, it seems troublesome that bankruptcy's dispute resolution system — and particularly its multiple layers of appellate review — has always been so poorly designed to produce doctrinal clarity. And even if BAPCPA does resolve a number of specific legal issues that have bedeviled the system, it does not sufficiently address this broader structural problem.

Judge Wedoff's fine article on the “means test” provides a frame for my comments. Many (if not most) would agree that if the system permits the discharge of otherwise enforceable debt, the system ought not be available to a debtor who is abusing it. In some respects, the Bankruptcy Code (the “Code”) has served this gatekeeping function through “crystal” rules. For example, § 727(a)(8) prohibits a court from awarding a discharge to a Chapter 7 debtor who has received a discharge in a prior Chapter 7 case commenced within the previous eight years.<sup>2</sup> No discretion here; a judge need do nothing more than check the calendar and the prior court records. However, the Code has also served this gatekeeping function through fuzzier and more ambiguous standards. Prior to BAPCPA, § 707(b) required the court to dismiss a Chapter 7 case if the granting of relief would be a “substantial abuse” of Chapter 7.<sup>3</sup> Because it is not obvious what conduct constitutes “abuse” and when that abuse becomes “substantial,” Congress entrusted bankruptcy judges in § 707(b) with the discretion to make a fact-specific “substantial abuse” determination in each case.

1. Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 577-78 (1988).

2. 11 U.S.C. § 727(a)(8) (Supp. V 2005) (“The court shall grant the debtor a discharge, unless . . . the debtor has been granted a discharge under this section . . . in a case commenced within 8 years before the date of the filing of the petition. . .”).

3. Section 707(b) formerly provided: “After notice and a hearing, the court . . . may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter.” 11 U.S.C. § 707(b) (2000), *amended by* 11 U.S.C. § 707(b) (Supp. V 2005).

In Rose's terminology, Congress's adoption of the "substantial abuse" standard was a choice for "mud."<sup>4</sup> As Rose explained, one may defend the virtue of mud rules by arguing that they permit the legal system to do justice in individual cases where a crystal rule might work a substantial injustice.<sup>5</sup> In this way, the "substantial abuse" standard put the bankruptcy judge in the position to make a fact-specific judgment that a particular debtor was undeserving of the system's benefits even though the debtor triggered none of the Code's crystal screening mechanisms.<sup>6</sup> As Rose explained, however, mud rules create doctrinal unpredictability. Exactly what did Congress mean by "substantial abuse"? One might expect that different judges would possess different philosophical, political, or moral views of the parameters of the term "abuse" and when abuse was "substantial." Did such differences compromise the Code's intended screening mechanism? And if so, to what extent?

Perhaps judges entrusted with the discretion to dismiss petitions for "substantial abuse" did so too rarely by allowing too many abusive petitions. Perhaps they did so too frequently by dismissing petitions from truly deserving debtors. Regardless, it was relatively difficult for potential debtors (even counseled ones) to understand precisely the parameters of "substantial abuse," thereby complicating decisions regarding whether to pursue bankruptcy relief. Likewise, this lack of clarity increased the risk that, once inside the bankruptcy system, otherwise similarly situated debtors might receive disparate treatment.

As Rose suggests, when legal rules tend toward mud, actors within the system will tend to produce "countermoves" that push the system toward crystal through private (contract) or public (legislation) bargaining.<sup>7</sup> As Professor Ted Janger has previously explained, the ten-year debate that led to BAPCPA reflects the latter type of countermove.<sup>8</sup> The debate over the desirability and content of a "means test" for consumer debtors reflected a perception — whether accurate or not — that too many undeserving consumer debtors were obtaining Chapter 7 relief. In 2005, Congress resolved the debate —

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4. See Rose, *supra* note 1, at 578 ("The trouble with this 'scarcity story' is that things don't seem to work this way [the adoption of 'crystal' rules], or at least not all the time. Sometimes we seem to substitute fuzzy, ambiguous rules of decision for what seem to be perfectly clear, open and shut, demarcations of entitlements. I call this occurrence the substitution of 'mud' rules for 'crystal' ones.").

5. *Id.* at 585 ("Yet the courts seem at times unwilling to follow this story or to permit these crystalline definitions, most particularly when the rules hurt one party very badly.").

6. Ted Janger, *Crystals and Mud in Bankruptcy Law: Judicial Competence and Statutory Design*, 43 ARIZ. L. REV. 559, 584 (2001)("[T]he role of muddy rules is to deter [abusive] behavior.").

7. Rose, *supra* note 1, at 582 (noting this pattern in the transition from caveat emptor toward buyer-protective rules in the purchase and sale of real estate).

8. Janger, *supra* note 6, at 559-62.

or at least tried to — with the enactment of BAPCPA, which gave us modified § 707(b) and its means test.

I will not focus upon the technical details of the means test as set forth in § 707(b)(2). I could add nothing of use to Judge Wedoff's article,<sup>9</sup> or that of professors Marianne Culhane and Michaela White (to which Judge Wedoff's article responds),<sup>10</sup> or to Professor John Pottow's thoughtful paper.<sup>11</sup> Instead, my focus is the dispute resolution process by which the bankruptcy system will ultimately resolve questions about the parameters of the means test. Even if the means test is a movement *toward* crystal, the language of the test leaves a bit of mud lying around,<sup>12</sup> and the nature of bankruptcy's dispute resolution system seems structured to encourage parties to wallow in it.<sup>13</sup>

The algorithmic quality of § 707(b)(2) — or, if one sees the glass as half-empty, its mind-numbing detail — looks at first blush like a choice for crystal. Nevertheless, the threshold standard in § 707(b)(1) remains “abuse.”<sup>14</sup> In Judge Wedoff's view, the retention of this sort of mud proves that the means test merely works a presumption.<sup>15</sup> He suggests that a bankruptcy judge can conclude that a debtor passes the means test and still dismiss the

9. Eugene R. Wedoff, *Judicial Discretion to Find Abuse Under Section 707(b)(3)*, 71 MO. L. REV. 1035 (2006).

10. Marianne B. Culhane & Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only Way?*, 13 AM. BANKR. INST. L. REV. 665 (2005). This article took issue with Judge Wedoff's understanding of the means test as expressed in Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 AM. BANKR. L.J. 231 (2005).

11. John A. E. Pottow, *The Totality of the Circumstances of the Debtor's Financial Situation in a Post-Means Test World: Trying to Bridge the Wedoff/Culhane & White Divide*, 71 MO. L. REV. 1053 (2006).

12. Rose's article uses the example of the evolution of mortgage law (from forfeiture through the development of foreclosure) to demonstrate the cyclical nature of the legal process:

[W]e see a back-and-forth pattern: crisp definition of entitlements, made fuzzy by accretions of judicial decisions, crisped up again by the parties' contractual arrangements, and once again made fuzzy by the courts. Here we see private parties apparently following the “scarcity story” in their private law arrangements: when things matter, the parties define their respective entitlements with ever sharper precision. Yet the courts seem at times unwilling to follow this story or to permit these crystalline definitions, most particularly when the rules hurt one party very badly. The cycle thus alternates between crystal and mud.

Rose, *supra* note 1, at 585.

13. In his work, Ted Janger described the proposed means test as a “perilous crystal,” Janger, *supra* note 6, at 614, and suggested that it “has all of the disadvantages of mud and none of its advantages, as well as all of the disadvantages of a crystal and none of its advantages.” *Id.* at 620.

14. 11 U.S.C. § 707(b)(1) (Supp. V 2005).

15. Wedoff, *supra* note 9, at 4; Wedoff, *supra* note 10, at 278-79.

debtor's case based upon a finding of "abuse." Likewise, he suggests that a debtor can fail the means test, yet still remain eligible for Chapter 7 relief based on upon the totality of the circumstances.<sup>16</sup>

Is Judge Wedoff correct? Perhaps, or perhaps not.<sup>17</sup> Regardless, bankruptcy's dispute resolution procedure ensures that we will spend vast (and almost certainly excessive) resources answering the question. As Rose pointed out, the dark side of mud rules is that they are costly to clarify — either through increased transaction costs, litigation costs, or both.<sup>18</sup> The bankruptcy system accentuates this cost problem in two ways. First, the litigation costs of the clarification process consume estate resources that would otherwise be available for payment to unsecured creditors. Second, and equally important, when bankruptcy standards are ambiguous, clarification of those standards occurs through a dispute resolution system that features not only adversarial judicial proceedings,<sup>19</sup> but also multiple layers of appellate review. Consider a Chapter 7 debtor who fails the means test, but nevertheless argues that he should be eligible for Chapter 7 relief because the specific facts of his case demonstrate a lack of abuse. The threshold question of the debtor's eligibility will be decided by the bankruptcy court, but the bankruptcy court may not have the final say regarding the parameters of § 707(b):

- The losing party may appeal the bankruptcy court's decision of right to the district court — or, in some districts, the bankruptcy appellate panel (BAP) — which can make a *de novo* determination and need not accord deference to the bankruptcy court's interpretation.
- The decision of the district court (or the BAP) may be appealed of right to the court of appeals, which can make a *de*

16. Wedoff, *supra* note 9.

17. My gut instinct is with Judge Wedoff. One could hypothesize a bankruptcy system that functioned in purely crystalline fashion with no room for judicial discretion — *e.g.*, punch in the numbers and out spits a ticket saying "discharged" or "dismissed." In such a system, of course, we could not care too much about whether the system accomplished justice at the micro level — *i.e.*, whether the system "fairly" or "equitably" resolved individual debtor-creditor relationships. As Rose explains, however, if we do care about fairness and equity, we probably have to accept some level of mud (and expect the legal system to produce it). And the Code has always given at least lip service to the idea of "fairness" and "equity" in resolving debtor-creditor relationships. So I'm not surprised that Congress chose to retain the "abuse" standard, even if the means test goes to great (excessive?) lengths to try to quantify the basic determinants of eligibility decision.

18. Rose, *supra* note 1, at 584.

19. Janger, *supra* note 6, at 584-88 (exploring the judicial role in the bankruptcy process and whether it is preferable for bankruptcy judges to operate in an adjudicative role as compared to a mediative role).

*novus* determination and need not accord deference to the respective interpretations of the bankruptcy court or the district court.

- From the court of appeals, the losing party may then petition the Supreme Court for a writ of certiorari. If granted, the Supreme Court then makes a *de novo* determination without the need for deference to any of the lower court interpretations.

Simultaneously, this same process will proceed in ninety-four different districts, with each bankruptcy court decision having no binding impact outside its own district. The current system can achieve doctrinal clarity only after an issue works its way through the various courts of appeals, and perhaps not even then.<sup>20</sup> This system seems almost calculated to give trustees, debtors, and creditors (especially oversecured creditors)<sup>21</sup> the incentive to expend resources of the bankruptcy estate litigating the meaning of the Code, and to appeal, and to appeal again, and perhaps even again. But to what purpose?

In theory, multiple layers of review provide for the percolation of issues of statutory interpretation and thus could contribute constructively to the overall quality of bankruptcy decision making.<sup>22</sup> In the bankruptcy context, however, it seems doubtful that the benefits of percolation justify multiple

20. See Judith A. McKenna & Elizabeth C. Wiggins, *Alternative Structures for Bankruptcy Appeals*, 76 AM. BANKR. L.J. 625, 627 (2002) (“The bankruptcy appellate system is not well structured to produce binding precedent. The number of first-level reviewers greatly exceeds the number of bankruptcy judges producing the judgments reviewed, and appellate caseloads are spread thinly among district judges, giving few judges much opportunity to develop bankruptcy expertise. Moreover, the inability of most appellate reviewers to create binding precedent diminishes the value of appellate review and is asserted to hinder lawyers’ and others’ ability to structure transactions and predict litigation outcomes.”).

21. Oversecured creditors — those holding security interests in collateral the value of which exceeds the amount of the debt owed to the creditor — are entitled to collect their attorney fees out of this “equity cushion,” thereby reducing the resources otherwise available to fund the debtor’s reorganization or to make payments to unsecured creditors. See 11 U.S.C. § 506(b) (Supp. V 2005).

22. See, e.g., *Maryland v. Balt. Radio Show, Inc.*, 338 U.S. 912, 918 (1950) (“It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening.”); Charles L. Black, Jr., *The National Court of Appeals: An Unwise Proposal*, 83 YALE L.J. 883, 898 (1974) (explaining that conflicts “can be endured and sometimes perhaps ought to be endured while judges and scholars observe the respective workings out in practice of the conflicting rules”); Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court’s Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 699 (1984) (noting potential benefits of further percolation of issues likely to be addressed by Supreme Court).

automatic layers of review. One of the ostensible benefits of percolation is the idea that the availability of published district and appellate court opinions should help later appellate courts produce more thoughtful (and more accurate) decisions. Yet the relative frequency with which bankruptcy court decisions are published means that by the time an issue reaches the second and third levels of review, there are likely to be numerous published opinions discussing the issue.<sup>23</sup> Further, reversal rates in bankruptcy appeals are relatively low,<sup>24</sup> which at least raises some question of whether an additional level of judicial review improves actual decision making quality to an extent that justifies its cost.

In 1997, the report of the National Bankruptcy Review Commission, which was established under the Bankruptcy Reform Act of 1994, recognized this problem and recommended that Congress truncate the appellate process by eliminating the first layer of review (review by a district court or BAP).<sup>25</sup> At first blush, the suggestion to eliminate the *first* layer of review seems odd; intuition suggests that the district courts or BAPs would resolve appeals more quickly.<sup>26</sup> Speed of resolution is especially important in the bankruptcy context, where the automatic stay gives particular significance to the familiar adage, expressed by a kite-flying founder in another context, that time is money. Further, one might argue normatively that the overall quality of appellate bankruptcy decision making would be better if appeals were decided by a more specialized tribunal (like the BAPs) rather than the courts of appeal.<sup>27</sup> Still, without substantial empirical evidence to justify the cost of the

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23. Cf. Bryan T. Camp, *Bound by the BAP: The Stare Decisis Effects of BAP Decisions*, 34 SAN DIEGO L. REV. 1643, 1669 (1997) (“[A] trial court may be able to overcome some of the disadvantages of lack of time, lack of proper briefing, and lack of colleagues if there are a variety of easily discovered decisions on point.”).

24. McKenna & Wiggins, *supra* note 20, at 630 (discussing appeal rates and outcomes from judgments of district courts and BAPs), 663-68 (discussing appeal rates and outcomes from judgments of bankruptcy courts).

25. NATIONAL BANKRUPTCY REVIEW COMMISSION RECOMMENDATIONS TO CONGRESS § 3.1.3 (1997) (“The current system which provides two appeals, the first either to a district court or a bankruptcy appellate panel and the second to the U.S. Court of Appeals, as of right from final orders in bankruptcy cases should be changed to eliminate the first layer of review.”).

26. The available empirical evidence is consistent with this intuition. *See, e.g.*, McKenna & Wiggins, *supra* note 20, at 659-63.

27. The general literature on the virtues and vices of specialized courts is extensive and reflects significant disagreement. *See, e.g.*, RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 171(1996) (specialized courts are more likely to become ideologically charged); LeRoy L. Kondo, *Untangling the Tangled Web: Federal Court Reform Through Specialization for Internet Law and Other High Technology Cases*, 2002 UCLA J. L. & TECH. 1 (increased need for specialist judges and other forms of specialization in resolving high-technology-related disputed); Jeffrey W. Stempel, *Two Cheers for Specialization*, 61 BROOK. L. REV. 67, 111-26 (1995) (supporting specialized tribunals accompanied by generalist appellate review).



additional layer of appellate review, the Commission's recommendation was at least a step in the right direction.

Rather than adopt the Commission's recommendation, BAPCPA instead created a procedure that permits, but does not necessarily require, the circumvention of the first layer of appellate review. BAPCPA provides that the district court or BAP can certify certain appeals directly to the court of appeals.<sup>28</sup>

*See generally* Arti K. Rai, *Engaging Facts and Policy: A Multi-Institutional Approach to Patent System Reform*, 103 COLUM. L. REV. 1035 (2003); Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111 (1990).

One might defend placing a sole layer of appellate review with the court of appeals rather than the district court on the "three heads are better than one" theory — that "communication between the judges will lead to a better result since each judge can test the soundness of his or her reasoning against the others." Camp, *supra* note 23, at 1668-69. *See also* Michael Abramowicz, *En Banc Revisited*, 100 COLUM. L. REV. 1600, 1630-36 (2000) (presenting the normative argument for majoritarian review). However, as noted *supra* text accompanying note 23, the relative frequency and availability of published bankruptcy court decisions as a reference point for district court judges may somewhat weaken the force of this argument. Further, because the BAPs operate in three-judge panels, this argument provides no basis for preferring the courts of appeals over the BAPs.

Whether BAPs produce "better" decisionmaking than courts of appeals remains open to argument. Certainly, as noted *supra* text accompanying note 26, BAPs appear to make decisions more quickly. Whether those decisions are "better" or more "accurate" is a question that is so value-laden as to defy empirical evaluation (or consensus even if there was good empirical data). One might posit that bankruptcy cases are most likely to produce statutory interpretation questions of a type that would be relatively uninteresting to generalist judges. *See, e.g.*, Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 246-48 (noting that the Court's 1990 statutory interpretation cases had one common factor: "None of them was interesting. Not one. Compared to flag burning or affirmative action or separation of powers or political patronage, these cases struck me as real dogs."). If this thesis is correct, one might expect that BAP judges — who are more frequent participants within the bankruptcy system — might produce more engaged decisionmaking than generalist appellate judges.

For further discussion of the potential benefits and/or costs of specialized bankruptcy appellate tribunals, *see generally* Daniel J. Bussell, *Bankruptcy Appellate Reform: Issues and Opinions*, in NORTON ANNUAL SURVEY OF BANKRUPTCY LAW 257 (1995-96); Nathan B. Feinstein, *The Bankruptcy System: Proposal to Restructure the Bankruptcy Court and Bankruptcy Appellate Processes*, in NORTON ANNUAL SURVEY OF BANKRUPTCY LAW 517 (1995-96); Paul M. Baisier & David G. Epstein, *Resolving Still Unresolved Issues of Bankruptcy Law: A Fence or an Ambulance*, 69 AM. BANKR. L.J. 525 (1995); McKenna & Wiggins, *supra* note 20.

28. 28 U.S.C. § 158(d)(2)(A) (Supp. V 2005) provides:

The appropriate court of appeals shall have jurisdiction of appeals [from appealable orders of the bankruptcy court] if the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own

However, the court of appeals retains the discretion not to authorize the direct appeal.<sup>29</sup> Whether this procedure will in fact truncate the appeals process is an empirical question, but it seems open to doubt that courts of appeals — already facing crowded appellate dockets and vacancies exacerbated by the politicization of the Senate confirmation process — would routinely grant all certification requests.

One might have designed an entirely different system of bankruptcy dispute resolution. In its landmark study evaluating the pre-1978 bankruptcy system, the Brookings Institution report argued for a predominantly administrative bankruptcy model. Its study found that consumer bankruptcy cases, both liquidation and reorganization, were better suited for administrative resolution than judicial adjudication. The report thus proposed the establishment of a bankruptcy agency.<sup>30</sup> While the Brookings Report envisioned a bankruptcy agency that would have been primarily operational and not regulatory in nature,<sup>31</sup> an administrative model could have created a system in which disputes over interpretational questions were resolved in a much more streamlined manner. For example, Congress might have created broad statutory standards regarding certain policy issues — *e.g.*, the “substantial abuse” screen for Chapter 7 relief, as in the old § 707(b) — and an administrative mechanism for implementing those standards through rulemaking. This model might have provided for more consistent application of the Code’s standards to similarly-situated debtors throughout the system, particularly by comparison to an adversarial model that produces clarity — *when* it produces clarity — only through percolation. Further, such a system would have permitted more frequent and effective refinement of the applicable regulations over time, as warranted by empirical evaluation of the system’s operation and its external effects on the behavior of commercial actors. Last, but not least, judicial review in such a model would presumably come with appropriate

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motion or on the request of a party to the judgment, order, or decree . . . or all the appellants and appellees (if any) acting jointly, certify that—

(i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;

(ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or

(iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken;

and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.

29. *Id.*

30. DAVID T. STANLEY & MARJORIE GIRTH, *BANKRUPTCY: PROBLEM, PROCESS, REFORM* (1971) (shortcomings of the existing bankruptcy system, including inter-state and inter-court inequities).

31. *Id.* at 201.

deference for the administrator's interpretation of the statute,<sup>32</sup> a concept that implicitly discourages disappointed litigants from aggressively seeking judicial review of merely debatable questions of statutory interpretation.

Instead, we have the system we have. As Professor Melissa Jacoby warned in anticipation of BAPCPA, we can expect BAPCPA to be filtered and its actual impact shaped by the influences of day-to-day actors in the bankruptcy system.<sup>33</sup> When folks as thoughtful as Judge Wedoff and Professors Culhane, White and Pottow disagree about what § 707(b) means, we can expect that debtors and creditors will aggressively litigate the issue of what constraints the means test places on judicial discretion. They will litigate it through the bankruptcy courts; they will litigate it through the district courts (unless they all agree to go straight to the court of appeals and the court of appeals will have them); they will litigate through the courts of appeal; and (heaven help us) they might even litigate it to the Supreme Court of the United States. Throughout that process, I picture an unsecured creditor sitting in the gallery shaking her head and wondering why she underwrites a collection system that serves her so poorly.

Finally, our current judicial model of bankruptcy administration makes it less likely that bankruptcy decision making can meaningfully address many of the issues raised by the other papers in this symposium. As these papers suggest, there are substantial and important connections to be explored regarding the intersection of the bankruptcy system and issues of health care,<sup>34</sup> labor,<sup>35</sup> taxation,<sup>36</sup> race,<sup>37</sup> and how self-awareness influences use of credit.<sup>38</sup> As long as clarification of the Code's standards occurs in the judicial setting, the institutional limits of the judicial process make it unlikely that the bankruptcy system can explore or address these connections in a thoughtful way.

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32. *Chevron, U.S.A., Inc. v. National Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (reviewing court "may not substitute its own construction for a reasonable interpretation" by the agency); ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* § 13.8, at 491-504 (2d ed. 2001) (discussing parameters of judicial deference to agency interpretations of law).

33. Melissa B. Jacoby, *Ripple or Revolution? The Indeterminacy of Statutory Bankruptcy Reform*, 79 AM. BANKR. L.J. 169, 189 (2005).

34. Melissa B. Jacoby, *Bankruptcy Reform and the Costs of Sickness: Exploring the Intersections*, 71 MO. L. REV. 903 (2006).

35. Daniel Keating, *Why BAPCPA Left Labor Legacy Costs Alone*, 71 MO. L. REV. 985 (2006).

36. Michelle Arnopol Cecil, *Bankruptcy Reform: What's Tax Got to Do with It?*, 71 MO. L. REV. 879 (2006).

37. Mechele Dickerson, *Race Matters in Bankruptcy Reform*, 71 MO. L. REV. 919 (2006).

38. Richard L. Weiner, *Enhanced Disclosure, Emotion, and BAPCPA*, 71 MO. L. REV. 1003 (2006).