BESPOKE BANKRUPTCY

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Abstract

The U.S. Bankruptcy Code is the primary source of bankruptcy relief for debtors in the United States. But it is not the only source. Over the years, Congress has occasionally created bespoke bankruptcy—customized debt relief designed for a particular group of debtors. Bespoke bankruptcy may provide desperately needed bankruptcy relief to entities that are ineligible or otherwise unable to access bankruptcy through the Bankruptcy Code. But bespoke bankruptcy is also fraught with difficulties. To what extent should bespoke bankruptcy be used or developed instead of the Bankruptcy Code?

This Article takes up this question. It begins by acknowledging the limitations of the Bankruptcy Code and highlighting instances where Code-based bankruptcy relief does not work. It then introduces the concept of bespoke bankruptcy and devises a framework that policymakers can use to decide when and how to implement it. In so doing, this Article sets the stage for a new direction in bankruptcy law: one where bespoke bankruptcy performs a limited, but critical, role in providing relief to entities that the Bankruptcy Code either does not or cannot assist.

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INTRODUCTION

In the spring of 2016, Puerto Rico found itself on a financial precipice. Years of overborrowing and other poor economic decisions,[1] spurred in part by mainland U.S. policies,[2] had saddled the island with "layers of debt."[3] In April of 2016, then-Governor Alejandro García Padilla signed an emergency moratorium just before the island defaulted on a $422 million bond payment, while warning that Puerto Rico would also default on an upcoming July 1 bond payment of $800 million.[4] These defaults threatened to "trigger a cycle of hospital closures, electric-grid instability, infrastructur[e] collapse, and emergency-service breakdowns."[5] In other words, Puerto Rico's financial distress was at risk of morphing into a humanitarian disaster.

Unfortunately, Puerto Rico had no way to address its mounting problems. The government lacked the money to repay the bonds.[6] Rating agencies downgraded the island's credit ratings to junk, impeding its ability to borrow additional funds.[7] In June of 2016, the U.S. Supreme

1. *See* Jim Wyss & Michelle Kaske, *Puerto Rico's Comeback Was Nigh, but Then the Coronavirus Came*, BLOOMBERG L. (June 12, 2020, 7:30 AM), https://news.bloomberglaw.com/bankruptcy-law/puerto-ricos-comeback-was-nigh-but-then-the-coronavirus-came ("For years the commonwealth sold debt to paper over budget gaps.").

2. *See* Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1673 (2020) (Sotomayor, J., concurring) ("Congress repealed Puerto Rico's favorable tax credits, and manufacturing growth deflated, precipitating a prolonged recession.").

3. John A. E. Pottow, *What Bankruptcy Law Can and Cannot Do for Puerto Rico*, 85 REVISTA JURIDICA UNIVERSIDAD DE P.R. 689, 701 (2016).

4. Ed Morales, *Who is Responsible for Puerto Rico's Debt?*, NATION (June 7, 2016), https://www.thenation.com/article/who-is-responsible-for-puerto-ricos-debt/.

5. *Id.*

6. *See id.*

7. *Fin. Oversight & Mgmt. Bd. for P.R.*, 140 S. Ct. at 1673 (Sotomayor, J., concurring).

Court confirmed that neither Puerto Rico nor its municipalities[8] were eligible for bankruptcy relief under the U.S. Bankruptcy Code, while striking down Puerto Rico's attempt to create its own bankruptcy law.[9] Even if Puerto Rico had been eligible to file for bankruptcy, the Bankruptcy Code does not have a procedure designed to restructure or adjust the debts of a U.S. territory, meaning that, at best, Puerto Rico would have only had access to partial relief.[10]

On June 30, 2016, the day before Puerto Rico was set to default on the $800 million bond payment, Congress stepped in, passing the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA).[11] PROMESA provided a form of bankruptcy relief designed specifically for Puerto Rico and its instrumentalities.[12] When President Barack Obama signed the Act into law, he claimed it would provide "more stability, better services and greater prosperity over the long term for the people of Puerto Rico."[13] Though even its supporters acknowledged that the law was far from perfect, there was a clear sense of hope that this new law—a combination of traditional bankruptcy relief and other debt restructuring mechanisms—would provide Puerto Rico with a fresh start and a functioning economy.[14]

PROMESA is a prominent example of what this Article calls "bespoke bankruptcy"—customized debt relief designed for a particular group of debtors (in this case, Puerto Rico and its municipalities). PROMESA combines portions of the Bankruptcy Code with other debt restructuring tools, namely a financial oversight board and collective

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8. This Article also refers to Puerto Rico's municipalities as "instrumentalities," which tracks the language used in PROMESA. 48 U.S.C. § 2104(19)(A). For a discussion of the case law addressing what constitutes a municipality eligible for relief under Chapter 9 of the Bankruptcy Code, see Matthew Adam Bruckner, *Special Purpose Municipal Entities and Bankruptcy: The Case of Public Colleges*, 36 EMORY BANKR. DEV. J. 341, 353–68 (2020).

9. *See* Puerto Rico v. Franklin Cal. Tax-Free Tr., 136 S. Ct. 1938, 1942, 1947 (2016).

10. *See* Pottow, *supra* note 3, at 700 (noting that Puerto Rico's substantial, unsustainable territorial debt would have been exempt under Chapter 9 of the Bankruptcy Code).

11. Pub. L. No. 114-187, 130 Stat. 549 (2016) (codified at 48 U.S.C. §§ 2101–2241).

12. *See* Patricia Guadalupe, *Here's How PROMESA Aims to Tackle Puerto Rico's Debt*, NBC NEWS (June 30, 2016, 1:39 PM), https://www.nbcnews.com/news/latino/here-s-how-promesa-aims-tackle-puerto-rico-s-debt-n601741 [https://perma.cc/HW4T-3CZB]. Although PROMESA was designed in response to Puerto Rico's difficulties, by its terms it applies to other territories as well. *See* 48 U.S.C. § 2104(20)(A)–(E).

13. Guadalupe, *supra* note 12.

14. *See* Ben Norton, *Critics Say Bipartisan Bill Signed by Obama Imposes "Colonial" Control Board on Puerto Rico, Puts "Hedge Funds Ahead of People*," SALON (July 1, 2016, 11:45 PM), https://www.salon.com/2016/07/01/critics_say_bipartisan_bill_signed_by_obama_imposes_colonial_control_board_on_puerto_rico_puts_hedge_funds_ahead_of_people/ [https://perma.cc/Z3MQ-2K6N] ("Some Democrats have admitted that they think the bill is bad, but argued it must be passed as it is the only way for Puerto Rico to be able to restructure its debts and avoid expensive legal fees when creditors take it to court.").

action provisions for bond modification.[15] Although PROMESA effectively provides a traditional bankruptcy procedure for the territory and its instrumentalities through Title III of the Act, it also equips these entities with tools and techniques drawn from sovereign debt restructuring and out-of-court municipal finance practices to create a form of relief that Congress hoped would be better suited to Puerto Rico's needs than anything in the Bankruptcy Code itself.[16]

Although the term "bespoke bankruptcy" is new, Congress has designed bespoke relief before. Prior to PROMESA, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank),[17] which combines financial regulation with a federal, orderly liquidation mechanism for certain financial firms.[18] Today, in light of the economic fallout from the COVID-19 pandemic, lawmakers and scholars are questioning whether additional reforms are needed to make bankruptcy a better tool for the entities it is designed to serve.[19]

As PROMESA illustrates, bespoke bankruptcy creates both new challenges and new opportunities. Because PROMESA is new and different from the Bankruptcy Code, its implementation has faced setbacks that are rarely, if ever, seen in Code-based bankruptcy practice.[20] Puerto Rico's economic future is still uncertain today, four years after PROMESA's passage, and this uncertainty predated the recent economic fallout due to the COVID-19 pandemic.[21] Creditors, bondholders, the

15. Section II.A.2.b of this Article offers a fuller discussion of PROMESA.

16. *See infra* notes 180–182 and accompanying text.

17. Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 7, 12, 15, 18, 22, 31, 42 U.S.C.).

18. *See* David A. Skeel, Jr., *When Should Bankruptcy Be an Option (for People, Places, or Things)?*, 55 WM. & MARY L. REV. 2217, 2225 (2014) ("With the new Dodd-Frank framework and other administrative resolution rules, we are clearly in the realm of bankruptcy.").

19. *See, e.g.*, Jonathan S. Henes, *Viewpoint: Congress Should Codify the One-Day Bankruptcy*, WALL ST. J. (May 11, 2020, 12:37 PM), https://www.wsj.com/articles/viewpoint-congress-should-codify-the-one-day-bankruptcy-11589191200?shareToken=stb6c89d2d8391427c91621fc250b12470 [https://perma.cc/MGL8-MP3F] (proposing that Congress codify a process that would allow companies to use the Bankruptcy Code to confirm a one-day bankruptcy plan, particularly in light of the burdens the economic fallout from COVID-19 is expected to place on the bankruptcy courts); Gert-Jan Boon, *Amending Insolvency Legislation in Response to the COVID-19 Crisis*, HARV. L. SCH. BANKR. ROUNDTABLE (May 12, 2020), https://blogs.harvard.edu/bankruptcyroundtable/2020/05/12/amending-insolvency-legislation-in-response-to-the-covid-19-crisis/ [https://perma.cc/89TV-PUP9] ("Insolvency legislation which is effective under normal market conditions may prove insufficient or ineffective in the current situation.").

20. For example, the litigation surrounding the constitutionality of the oversight board's appointment, discussed in Section III.A, raises issues about the legitimacy of the board's actions that are not present in typical bankruptcy cases, which do not involve the imposition of an oversight board.

21. *See* Danica Coto, *Puerto Rico's Economy in Limbo as Governor Rejects Debt Deal*, ASSOCIATED PRESS (Feb. 10, 2020), https://apnews.com/dd85b43cad66dec9026c4dd07df9287f [https://perma.cc/28FV-UX74].

local government, and the Puerto Rican people have all challenged the oversight board and the scope of its authority to oversee the island's finances.[22] The Puerto Rican government has wavered in its cooperation with the board, at times supporting its debt restructuring efforts,[23] and at times appearing to undermine them.[24] And the district judge overseeing the court proceedings associated with the debt restructuring process has had to interpret and apply a law that is new and unprecedented in many respects.[25]

Yet, Puerto Rico's experience also shows that sometimes the Bankruptcy Code is not an appropriate mechanism to provide bankruptcy relief. Indeed, the alternative to PROMESA, amending the Bankruptcy Code to make Puerto Rico eligible for traditional bankruptcy, would have been both politically and substantively difficult.[26] Puerto Rico is thus an example of a bankruptcy misfit: it needed bankruptcy, but the relief the Bankruptcy Code provided was not appropriate for it.[27] Through PROMESA, Congress sought to achieve the same outcome for Puerto Rico as sought by debtors that use the Bankruptcy Code—a fresh start—but did so through very different means.

Puerto Rico is not alone in being a bankruptcy misfit. Other entities are either ineligible for relief under the Bankruptcy Code[28] or struggle to

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22. These challenges have continued to the present day. *See* Dánica Coto, *Board Submits Puerto Rico Budget as Some Question Its Powers*, WASH. TIMES (June 11, 2020), https://www.washingtontimes.com/news/2020/jun/11/board-submits-puerto-rico-budget-as-some-question-/ [perma.cc/7HK6-MUDS] (discussing congressional debates over the extent of the oversight board's authority).

23. *See* Robert Slavin, *Puerto Rico Governor Makes FAFAA Head Her Liaison to Oversight Board*, BOND BUYER (Mar. 10, 2020, 11:44 AM), https://www.bondbuyer.com/news/puerto-rico-governor-makes-fafaa-head-her-liaison-to-the-oversight-board [https://perma.cc/BC7R-ZW77] (describing the governor's wish that the government's relationship with the oversight board be "one of respect and openness").

24. *See* Giovanna Garofalo, *Puerto Rico Gov't and Oversight Board Debate Over Approval on Debt Deals*, WKLY. J. (Feb. 12, 2020), https://www.theweeklyjournal.com/politics/puerto-rico-gov-t-and-oversight-board-debate-over-approval-on-debt-deals/article_ff112d76-4d12-11ea-b1a7-d7c71544db03.html [https://perma.cc/N6N8-MULA] (describing the governor's rejection of the board's agreement with bondholders to reduce Puerto Rico's debt by 70%).

25. *See* Jenna Greene, *Proskauer Pair Win Watershed Decision in $125B Puerto Rico Bankruptcy*, AM. LAW. LITIG. DAILY (Jan. 10, 2020), https://s3.amazonaws.com/assets.production.proskauer/uploads/961bf19743cfc6debca1b99583eea3cb.pdf [https://perma.cc/B6W3-77S6] ("These are unprecedented cases . . . .").

26. *See* Melika Hadžiomerović, Note, *An Arbitral Solution: A Private Law Alternative to Bankruptcy for Puerto Rico, Territories, and Sovereign Nations*, 85 GEO. WASH. L. REV. 1263, 1277 (2017) (arguing that PROMESA was "one of the only plausible courses of action available at the time because the political climate did not allow for a Code amendment").

27. *Cf.* Laura N. Coordes, *Reorganizing Healthcare Bankruptcy*, 61 B.C. L. REV. 419, 432–33 (2020) (discussing the concept of bankruptcy misfits in the healthcare context).

28. *See, e.g.*, 11 U.S.C. § 109(b), (d) (excluding most banks from using the Bankruptcy Code).

use the Bankruptcy Code even if they are eligible.[29] In years to come, Congress may well find it desirable to implement bespoke bankruptcy for other debtor groups. The Bankruptcy Code is now over forty years old,[30] and the world today is markedly different from the one in which the Code was drafted. Scholars, policymakers, and practitioners have all expressed concerns that the Bankruptcy Code no longer works as intended in many ways, even for many of the debtors it was designed to serve in the first place.[31] But to what extent should bankruptcy law become more bespoke?

This Article maintains that bespoke bankruptcy should be used sparingly but argues that it does have potential beyond its limited uses to date. To make this case, Part I begins by defining and exploring the limitations of "Code-based bankruptcy": bankruptcy law that comes from the Bankruptcy Code itself. The Bankruptcy Code is designed to be broad in scope, accommodating a wide variety of entities. To accomplish this goal efficiently, the Bankruptcy Code provides standard templates that most entities can use to attain financial relief. These templates are based on processes that work for the debtors that use the Bankruptcy Code most often: businesses and consumers.

These standard templates may work well in many cases. However, as Part II illustrates, some debtors are so differently situated from the debtors the Code was designed to accommodate that Code-based bankruptcy fails to provide them with adequate debt relief. Part II catalogues the various ways that Congress has adjusted bankruptcy law for these debtors, including through the creation of bespoke bankruptcy. This Article then turns to the future of bankruptcy law, explaining that, while most major debates about bankruptcy's future focus on further amendments to the Bankruptcy Code, bespoke bankruptcy is an option worthy of consideration.

Part III then explores bespoke bankruptcy's possible contributions to bankruptcy law. The costs of bespoke bankruptcy are high in terms of

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29. *See, e.g.*, Coordes, *supra* note 27, at 432–33 (discussing healthcare businesses).

30. *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C.) (enacting Title 11 of the United States Code as the "Bankruptcy Code").

31. *See, e.g.*, William W. Bratton & David A. Skeel, Jr., Foreword, *Bankruptcy's New and Old Frontiers*, 166 U. PA. L. REV. 1571, 1572 (2018) ("Today's typical Chapter 11 case looks radically different than did the typical case in the Code's early years."); Charles J. Tabb, *What's Wrong with Chapter 11?*, at 9 (Univ. of Ill. Coll. of L. Legal Studies Research Paper, Paper No. 19-15, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3352137 [https://perma.cc/FPD4-6FWE] (critiquing modern Chapter 11 practice); COMM'N TO STUDY THE REFORM OF CHAPTER 11, AM. BANKR. INST., FINAL REPORT AND RECOMMENDATIONS 6 (2014) (offering proposals for updating the Bankruptcy Code). Senator Elizabeth Warren also recently released a proposed overhaul of the consumer bankruptcy system. *See* Tucker Higgins, *Elizabeth Warren Unveils Plan to Overhaul Bankruptcy Laws, Spotlighting Differences with Biden*, CNBC (Jan. 7, 2020, 9:37 AM), https://www.cnbc.com/2020/01/07/elizabeth-warren-unveils-bankruptcy-agenda-targeting-joe-biden.html [https://perma.cc/7FJM-YSGS].

both design and implementation, which suggests that bespoke bankruptcy should not be widespread. Yet, bespoke bankruptcy can also provide distinct benefits in the form of debt relief where none is otherwise available. Part III thus turns to the question of when it is worthwhile for Congress to engage in the process of designing specialized legislation. To answer this question, Part III provides an eligibility test and four factors to assess the need for bespoke relief. The eligibility test focuses on viability, assessing the societal need for a particular entity due to the public importance of the goods or services it provides. Entities that are deemed too important to fail—and only these entities—should be considered eligible for bespoke relief. Once entities have been identified through the eligibility test, policymakers should weigh four factors to determine whether bespoke relief is warranted: (1) how many of these entities exist (numerosity); (2) how similar they are to each other (similarity); (3) how well Code-based relief works or should work for them (mismatch); and (4) the entities' vulnerability to systemic risk and exogenous shocks (vulnerability).

After articulating these steps, Part III provides an example of how to apply them and, in doing so, illustrates that other subsovereigns—namely states and municipalities—may benefit from bespoke relief. This Article concludes by identifying further areas of research into bespoke bankruptcy's theory and application.

I. CODE-BASED BANKRUPTCY: THE STANDARD TEMPLATE

To understand bespoke bankruptcy, it is first necessary to understand the primary source of U.S. bankruptcy law: the Bankruptcy Code. This Article uses the term "Code-based bankruptcy" to distinguish relief provided by the Bankruptcy Code from bespoke bankruptcy relief. This Part first discusses core characteristics of all bankruptcy law (i.e., bespoke and Code-based) before turning to a discussion of Code-based bankruptcy and its limitations.

A. *Bankruptcy's Core Characteristics*

There is substantial debate over the purposes and procedures that characterize U.S. bankruptcy law. For purposes of this Article, however, "bankruptcy," at its most basic, can be characterized using three elements.

First, bankruptcy is a *federal* remedy that allows the debtor to impair contracts and restructure its obligations.[32] The Contract Clause of the

32. *See* Jonathan C. Lipson, *Debt and Democracy: Towards a Constitutional Theory of Bankruptcy*, 83 NOTRE DAME L. REV. 605, 612–13 (2008) (discussing Congress's power under the Bankruptcy Clause and the elements of that power); Elizabeth Warren, *Bankruptcy Policy*, 54 U.

Constitution prohibits states from impairing contracts; the Bankruptcy Clause grants this power to the federal government instead.[33] Thus, "bankruptcy law" in the United States refers to federal, not state law.

Second, bankruptcy is a collective[34] and compulsory *process* that adjusts the relationship among a debtor and its creditors by resolving competing creditors' claims to limited assets.[35] In this respect, bankruptcy plays an important procedural role in centralizing both legal conflict and asset distribution.[36] Bankruptcy is a compulsory process: once a bankruptcy case is filed, parties cannot "opt[] to sit out" in the hope of something better.[37] In order to reach an orderly resolution of creditors' claims, bankruptcy provides a defined priority scheme that allows parties to understand where they rank in relation to each other in their claims to the debtor's property.[38] These claims are sorted out in bankruptcy court.

CHI. L. REV. 775, 790 (1987) ("Bankruptcy is simply a federal scheme designed to distribute the costs among those at risk.").

33. U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ."); U.S. CONST. art. I, § 8, cl. 4 ("The Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States . . . ."); *see also* James L. Tatum III, *To Disappear a City*, 69 SYRACUSE L. REV. 105, 109 (2019) ("The Constitution's Contract Clause impedes the ability of states and municipalities to impair contracts.").

34. *See* Skeel, *supra* note 18, at 2223 (observing that bankruptcy "is collective in nature").

35. *See* Kenneth Ayotte & David A. Skeel Jr., *Bankruptcy Law as a Liquidity Provider*, 80 U. CHI. L. REV. 1557, 1560 (2013) (summarizing the creditors' bargain theory of bankruptcy, which focuses on creditor competition for limited assets); Alan Schwartz, Essay, *A Contract Theory Approach to Business Bankruptcy*, 107 YALE L.J. 1807, 1807 (1998) ("Business bankruptcy systems attempt to solve a coordination problem for the creditors of insolvent firms."); *but see* Douglas G. Baird & Anthony J. Casey, *No Exit? Withdrawal Rights and the Law of Corporate Reorganizations*, 113 COLUM. L. REV. 1, 5 (2013) (pushing back on the idea that corporate bankruptcy is a mandatory regime when investors can partition asssets into different legal entities, thus creating a regime that allows a limited number of investors to effectively opt out of the bankruptcy process).

36. *See* Warren, *supra* note 32, at 793 ("A process such as bankruptcy [is] designed to consider the rights of more than two parties and to distribute the losses occasioned by the debtor's failure . . . ."); Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. CHI. L. REV. 815, 824 (1987) ("[B]ankruptcy law is a procedure in which the actions of those with rights to the assets of a firm are stayed and the affairs of the firm are sorted out in an orderly way.").

37. Vincent S.J. Buccola, *Law and Legislation in Municipal Bankruptcy*, 38 CARDOZO L. REV. 1301, 1302 (2017) ("[T]he regime is compulsory, meaning that on a showing of the debtor's insolvency no claimant to the contested assets can unilaterally prevent the bankruptcy process from taking its course or do better by opting to sit out.").

38. *See id.* at 1306 (asserting that "defined rights to a debtor's assets" is a theme of bankruptcy law).

Third, bankruptcy provides *breathing space* to enable *value maximization*.[39] The debtor uses this breathing space to assess whether it is viable as a going concern or whether value maximization (for a debtor's stakeholders)[40] would instead occur through a liquidation.[41] Depending on the outcome of this assessment, bankruptcy serves one of two purposes. If a debtor can continue as a going concern, bankruptcy is rehabilitative in nature, providing a fresh start and a discharge of debts to the debtor.[42] In contrast, if the debtor does not continue as a going concern, bankruptcy provides an orderly process for value-maximizing liquidation.[43]

At its most basic, then, bankruptcy can be described as a coordinated federal process that provides for breathing space to enable value maximization.[44] This indicates that entities benefit from bankruptcy when they have dispersed legal conflicts, need breathing space to enable value-maximizing decisions, or need federal law's power to break contracts.

Although the Bankruptcy Code provides mechanisms through which debtors can take advantage of bankruptcy relief, the Code is not the exclusive means through which an entity can achieve bankruptcy relief.[45] Thus, the concept of "bankruptcy" is broader than the mechanisms contained within the Bankruptcy Code.[46]

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39. *See* Laura N. Coordes, *Gatekeepers Gone Wrong: Reforming the Chapter 9 Eligibility Rules*, 94 WASH. U. L. REV. 1191, 1212 (2017) (discussing how Chapter 9 bankruptcy provides breathing space and the ability to overcome holdouts and modify agreements on a nonconsensual basis).

40. *See* Jay Lawrence Westbrook, *The Control of Wealth in Bankruptcy*, 82 TEX. L. REV. 795, 821 & n.94 (2004) (citing literature that illustrates agreement among scholars on the bankruptcy goal of "the maximization of distributions to beneficiaries").

41. *See* Matthew Adam Bruckner, *Higher Ed "Do Not Resuscitate" Orders*, 106 KY. L.J. 223, 241–42 (2017) (noting that bankruptcy reorganization is appropriate when it enhances value for the parties).

42. *See* Tatum, *supra* note 33, at 114 (2019) (discussing how the rehabilitative objectives of Chapters 9 and 11 are responses to financial, rather than economic, distress); ELIZABETH WARREN ET AL., THE LAW OF DEBTORS AND CREDITORS 343 (7th ed. 2014) (discussing the importance of discharge and how it "is the exclusive province of federal bankruptcy law").

43. *See* Tatum, *supra* note 33, at 115 (noting that Chapter 7 is the Code's response to companies experiencing economic distress).

44. Professor David Skeel provides a similar description of bankruptcy's core attributes. *See* Skeel, *supra* note 18, at 2222–23 (describing bankruptcy as (1) enabling a debtor to restructure obligations; (2) imposed or facilitated by government or another third party; (3) collective; and (4) specific to a particular entity or individual).

45. *See id.* at 2223–24.

46. *Id.* at 2225; *see also* Andrew B. Dawson, *Better Than Bankruptcy?*, 69 RUTGERS U. L. REV. 137, 145 (2016) (discussing assignments for the benefit of creditors).

B. *Code-Based Bankruptcy and Its Limitations*

In the United States, the Bankruptcy Code is the primary source of bankruptcy law.[47] To better understand the purposes and aims of the Bankruptcy Code, it is helpful to examine the Code's structure and history, as well as the legal scholarship surrounding Code-based bankruptcy law.

The Bankruptcy Code primarily centers around two types of entities: businesses and consumers. The bulk of the Bankruptcy Code, and the Code's most frequently used provisions, are created for (and used by) these two entity types.[48] Indeed, the Bankruptcy Code provides multiple avenues for both businesses and consumers to file for bankruptcy. A business can liquidate under Chapter 7 or reorganize under Chapter 11.[49] An individual may liquidate assets under Chapter 7 or reorganize debts under either Chapters 11 or 13.[50] Both individuals and businesses can initiate cross-border proceedings using Chapter 15.[51]

The history of U.S. bankruptcy law also illustrates U.S. bankruptcy's business and consumer focus. Early federal bankruptcy laws in the United States focused on addressing the debts of merchants and individuals.[52] When the Bankruptcy Code was enacted in 1978, it made bankruptcy more attractive to both individuals and businesses.[53] As a result, both types of entities use the Code extensively. For businesses, corporate bankruptcy has become "a business and strategic decision rather than a last resort."[54] For individuals, estimates suggest that about 10% of the

47. *See* Comment, *Bankruptcy—Security Interests in Principal Residences: Chapter 13 Bifurcation of Undersecured Claims—a Potential Crack Down on Cramdowns*, 69 N.D. L. REV. 241, 243 (1993).

48. *See Overview of Bankruptcy Chapters*, U.S. DEP'T. JUST., https://www.justice.gov/ust/bankruptcy-fact-sheets/overview-bankruptcy-chapters [https://perma.cc/A8CJ-6CDW] (overviewing the Code's "principal chapters," and noting that Chapter 7 "is a liquidation proceeding available to consumers and businesses," Chapter 11 "provides a procedure by which an individual or a business can reorganize its debts," Chapter 12 "allows a family farmer or a fisherman to file for bankruptcy," and Chapter 13 "is used primarily by individual consumers").

49. *See What Is the US Bankruptcy Code?*, CORP. FIN. INST., https://corporatefinanceinstitute.com/resources/knowledge/other/us-bankruptcy-code/ [https://perma.cc/P6VC-EAX6].

50. *See id.*

51. *See id.*

52. *See* David Haynes, *History of Bankruptcy in the United States*, BALANCE (Feb. 13, 2020), https://www.thebalance.com/history-of-bankruptcy-in-the-united-states-316225 [https://perma.cc/U88K-V78Q].

53. *See* Todd J. Zywicki, *The Past, Present, and Future of Bankruptcy Law in America*, 101 MICH. L. REV. 2016, 2021 (2003) (reviewing DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA (2001)).

54. *Id.*

current U.S. population—some 36 million individuals—have filed for bankruptcy.[55]

Existing legal scholarship also tends to focus predominantly on business and consumer debtors. For example, much ink has been spilled over the proper purpose of corporate bankruptcy law, with scholars such as Professor Douglas Baird and Professor Thomas Jackson taking the position that it should reflect, or vindicate, the deal creditors would strike if they had the chance to bargain *ex ante*,[56] and those such as Senator Elizabeth Warren and Professor Jay Westbrook arguing that corporate bankruptcy can serve public interests and other stakeholders, such as employees, in addition to creditors.[57] Over time, other scholars have expanded, developed, and commented upon the work of these foundational theorists, creating a rich and nuanced discussion of the role and purposes of corporate bankruptcy.[58]

On the consumer bankruptcy side, there is a similarly rich literature that seeks to develop and understand the purposes and aims of consumer bankruptcy law.[59] Much of the consumer literature also focuses on

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55. Bob Lawless, *How Many People Have Filed Bankruptcy?*, CREDIT SLIPS (June 22, 2020, 8:09 PM), creditslips.org/creditslips/2020/06/how-many-people-have-filed-bankruptcy.html [https://perma.cc/HD3W-LVUB].

56. *See* Douglas G. Baird & Thomas H. Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 U. CHI. L. REV. 97, 100 (1984); Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L.J. 857, 860 (1982) ("A more profitable line of pursuit might be to view bankruptcy as a system designed to mirror the agreement one would expect the creditors to form among themselves were they able to negotiate such an agreement from an *ex ante* position.").

57. *See, e.g.*, Warren, *supra* note 32, at 777 ("I see bankruptcy as an attempt to reckon with a debtor's multiple defaults and to distribute the consequences among a number of different actors."); Elizabeth Warren & Jay Lawrence Westbrook, *Financial Characteristics of Businesses in Bankruptcy*, 73 AM. BANKR. L.J. 499, 500–01 (1999) (discussing "propositions that can be stated as a matter of conventional wisdom" and noting, *inter alia*, that "Congress embraced reorganization with an explicit concern toward saving jobs"); Jay Lawrence Westbrook, *Commercial Law and the Public Interest*, 4 PENN ST. J.L. & INT'L AFFS. 445, 451 (2015) (noting "the lack of apparent concern with a public interest" in the scholarly literature).

58. *See, e.g.*, Anthony J. Casey, *Chapter 11's Renegotiation Framework and the Purpose of Corporate Bankruptcy*, 120 COLUM. L. REV. 1709, 1721–27 (2020) (advancing a theory of corporate bankruptcy where the goal is to resolve an incomplete contracting problem that occurs due to the uncertainty that characterizes financial distress); Melissa B. Jacoby, *Corporate Bankruptcy Hybridity*, 166 U. PA. L. REV. 1715, 1717 (2018) (developing a model of corporate bankruptcy as a public-private partnership); Jonathan C. Lipson, *The Secret Life of Priority: Corporate Reorganization After* Jevic, 93 WASH. L. REV. 631, 631 (2018) (downplaying the importance of efficiency in corporate bankruptcy).

59. *See* Pamela Foohey, *New Article from the Consumer Bankruptcy Project: Attorneys' Fees and Chapter Choice*, CREDIT SLIPS (Mar. 6, 2017, 8:00 AM), https://www.creditslips.org/creditslips/2017/03/new-article-from-the-consumer-bankruptcy-project-attorneys-fees-and-chapter-choice.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+

chapter choice, asking when consumers should use Chapter 7 (liquidation) as opposed to Chapter 13 (individual debt reorganization).[60]

The Bankruptcy Code, and the commentary surrounding it, is thus primarily focused on how best to provide relief to businesses and consumers. A consequence of this focus is Congress's heavy reliance on previously established business and consumer templates when asked to modify the Bankruptcy Code to accommodate debtors that do not neatly fit the business and consumer molds. For example, as Congress developed Chapter 9 of the Bankruptcy Code to address municipal debt restructuring, it borrowed from Chapter 11—the chapter designed primarily for business reorganizations[61]—even though municipalities are substantially different from businesses in both form and function.[62] Similarly, when Congress created Chapter 12 for family farmers and family fishermen, it used portions of both Chapters 11 (business reorganizations) and 13 (individual debtors), although the way these borrowed provisions work in Chapter 12 is substantially different from the contexts of Chapters 11 and 13.[63]

At bottom, the Bankruptcy Code is a series of widely applicable, standardized processes that many entities can use to attain debt relief. There is a core set of common ideas and procedures, which is shared among most or all chapters.[64] These ideas and procedures have been battle-tested and refined through decades of jurisprudence. Although the Code does contain some flexibility to accommodate nonbusiness, nonconsumer debtors, it ultimately relies on this set of standard templates, which are designed primarily for businesses and consumers.[65] Such standard templates, with their embedded rules and norms, are a key

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creditslips%2Ffeed+%28Credit+Slips%29 [https://perma.cc/JJ2D-Q68U] (discussing the Consumer Bankruptcy Project, "a long-term research project studying people who file chapter 7 and 13 bankruptcy").

60. Pamela Foohey et al., *Attorneys' Fees and Chapter Choice*, 36 AM. BANKR. INST. J., 20, 20 (2017) ("One of the most important choices that individuals considering bankruptcy face is whether to file for chapter 7 or 13.").

61. *See* Tatum, *supra* note 33, at 110 (observing that each time that Congress has amended Chapter 9, it has become more like Chapter 11).

62. *See* Laura Napoli Coordes, *Restructuring Municipal Bankruptcy*, 2016 UTAH L. REV. 307, 315 (2016) (discussing the difficulty of using Chapter 11 rules to address a municipality's "vastly different" problems).

63. LISA P. SUMNER, COMPARISON: CHAPTER 11 VS CHAPTER 12 VS CHAPTER 13, at 1 (2018), https://www.nexsenpruet.com/uploads/1498/doc/Comparison_Chapter_11_vs_Chapter_12_vs_Chapter_13_(w-009-8719).pdf [https://perma.cc/75YZ-GS74] ("Chapter 12 incorporates many of the same provisions of the Bankruptcy Code as do Chapter 11 and Chapter 13 but with significant operative differences.").

64. *See generally* 11 U.S.C. § 547 (preferences); 11 U.S.C. § 362 (automatic stay).

65. *See What Is the US Bankruptcy Code?*, *supra* note 49 (noting that the Code "governs the procedures that *businesses and individuals* must follow when filing for bankruptcy" (emphasis added)).

benefit of a statutory scheme like the Bankruptcy Code.[66] And for most entities, the Code's standard templates work well most of the time.[67]

However, not all entities are alike. Different means may be required for different entities to achieve the same desired bankruptcy outcomes.[68] To some extent, the Bankruptcy Code takes these differences into account. For example, value maximization may play less of a role in municipal bankruptcies, where the debtor at issue—a municipality—must continue as a going concern due to the importance of the public services it provides, even if it might make financial sense for that debtor to sell off its assets and "liquidate."[69] Congress responded to this concern by creating a separate Code chapter for municipalities.[70]

With regards to municipal bankruptcies, some scholars believe that Congress did not go far enough.[71] Indeed, bankruptcy theory might be very different for debtors such as municipalities.[72] For example, Professor Vincent Buccola has proposed a new theory for municipal bankruptcy, one where the goal is to preserve "spatial economies when

66. *See* Adam J. Levitin, *Toward a Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime*, 80 AM. BANKR. L.J. 1, 2 (2006) (discussing how statutes create "clear, one-size-fits-all rules").

67. Indeed, even in a bespoke bankruptcy system like this Article discusses further below, it makes good sense to retain many of the hallmarks of the Bankruptcy Code for purposes of efficiency and reliability. For example, PROMESA retained many aspects of the Code's standard templates, while adding some features and modifying others. *See* David Skeel, *Reflections on Two Years of P.R.O.M.E.S.A.*, 87 REVISTA JURÍDICA UNIVERSIDAD DE P.R. 862, 864 (2018).

68. For an insightful account and analysis of U.S. business insolvency systems outside of the Bankruptcy Code, see generally STEPHEN J. LUBBEN, THE LAW OF FAILURE: A TOUR THROUGH THE WILDS OF AMERICAN BUSINESS INSOLVENCY LAW (2018).

69. *See* Laura N. Coordes, *Formalizing Chapter 9's Experts*, 116 MICH. L. REV. 1249, 1257 (2018) ("In chapter 9, no liquidation alternative exists.").

70. *See* Andrew B. Dawson, *Beyond the Great Divide: Federalism Concerns in Municipal Insolvency*, 11 HARV. L. & POL'Y REV. 31, 40 (2017).

71. *See, e.g.*, Coordes, *supra* note 69, at 1257 (describing the difficulty of applying plan confirmation standards in a Chapter 9 case); Dawson, *supra* note 70, at 35 (advocating for a functional approach to municipal bankruptcy that recognizes debt-governance overlap); Clayton P. Gillette & David A. Skeel, Jr., *Governance Reform and the Judicial Role in Municipal Bankruptcy*, 125 YALE L.J. 1150, 1206 (2016) (discussing a need for Chapter 9 to address governance issues); Coordes, *supra* note 62, at 310 (arguing that the Chapter 9 framework is a "poor fit" for municipalities); Clayton P. Gillette, *Dictatorships for Democracy: Takeovers of Financially Failed Cities*, 114 COLUM. L. REV. 1373, 1384 (2014) (advocating for increased authority for state-run takeover boards); Buccola, *supra* note 37, at 1301 (arguing that, due to uncertainty about priorities in Chapter 9 and to the ability of multiple actors to veto the bankruptcy process in the municipal context, traditional bankruptcy models do not adequately explain municipal debt adjustment).

72. *See, e.g.*, Adam J. Levitin, *Bankrupt Politics and the Politics of Bankruptcy*, 97 CORNELL L. REV. 1399, 1399 (2012) (proposing a theory of bankruptcy as the "'armistice line' between competing interest groups" and arguing that bankruptcy is an "expression of distributional norms and interest group politics," not an exercise in economic efficiency).

public debt otherwise threatens to dissipate them."[73] Viewed in this light, municipal bankruptcy is not about value maximization but rather survival and preservation. However, the literature on municipal bankruptcy theory remains sparse and, more generally, bankruptcy outside of the business and consumer contexts is largely undertheorized.[74]

II. THE BANKRUPTCY MISFIT PROBLEM

To some extent, Congress has already begun to recognize that the Bankruptcy Code's standard templates do not always work well for some of the entities that need bankruptcy relief. For example, as previously discussed, a key characteristic of bankruptcy is its federal nature. Municipalities, potential debtors in this federal system, are creatures of the state in which they are located.[75] When a municipality seeks to file for bankruptcy, there is always a concern that the federal bankruptcy process will interfere with the state's right to govern its municipalities.[76] To address this problem, the Bankruptcy Code allows the municipality to access the federal bankruptcy system only upon the consent of the state and only for the limited purpose of debt adjustment.[77]

However, the Bankruptcy Code does not account for all differences among debtors. Sometimes, debtors' differences can give rise to a "bankruptcy misfit" problem: some debtors require such different mechanisms that using the Bankruptcy Code becomes difficult, impractical, or even impossible, thereby leaving these debtors unable to obtain bankruptcy relief.[78] These bankruptcy misfits are a natural consequence of the Bankruptcy Code since it groups together debtors under chapters for efficiency and ease of administration.[79] Bankruptcy

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73. Vincent S.J. Buccola, *The Logic and Limits of Municipal Bankruptcy Law*, 86 U. CHI. L. REV. 817, 821 (2019).

74. A marked exception to this is an article by Professor Skeel, who seeks to develop a comprehensive theory of when bankruptcy is necessary. Skeel, *supra* note 18, at 2230–31 (proposing a five-factor framework to determine when bankruptcy should be available to a particular entity).

75. *See* Coordes, *supra* note 62, at 345–46 ("Unlike a business, a municipality is never truly a discrete entity—it is always a creature of the state and/or federal government.").

76. *See* Ashton v. Cameron Cnty. Water Improvement Dist., 298 U.S. 513, 530–31 (1936) (articulating this concern).

77. *See* 11 U.S.C. § 109(c)(2) (providing that a state must specifically authorize a municipality to file for Chapter 9); 11 U.S.C. § 903 (providing that states retain control over a municipality's "political or governmental powers").

78. Coordes, *supra* note 27, at 423.

79. Although the Bankruptcy Code does provide courts some flexibility to tailor the process to debtors' needs through § 105(a), the provision widely thought to give bankruptcy courts equity powers, it is far from clear that the equity powers of the bankruptcy courts can be used to accommodate many bankruptcy misfits. *See* 11 U.S.C. § 105(a). Indeed, the U.S. Supreme Court has recently held that a bankruptcy court's equitable powers cannot be used to contravene the Code's statutory provisions. Law v. Siegel, 571 U.S. 415, 421 (2014).

misfits are the exception to the rule that the Code's chapters mostly work for most debtors.

Before delving more deeply into the bankruptcy misfit problem, it is important to recognize at the outset that not all bankruptcy misfits need bankruptcy law. If nonbankruptcy techniques are better suited to resolving an entity's financial distress, excluding that entity from bankruptcy does not pose a problem. For example, the federal government has typically stepped in with bailout funds for struggling insurance companies, and many of these entities are prohibited from filing for bankruptcy under the Code.[80] In other cases, there are salient political, practical, and legal considerations that may outweigh a particular entity's need or desire for federal bankruptcy relief.[81] This Article's proposed framework is designed to help assess these considerations against the entity's need for bankruptcy,[82] doing for bankruptcy law what other scholars have done in the bailout context for decades.[83]

On the other hand, some bankruptcy misfits do exhibit a need for bankruptcy and are not accommodated by the Bankruptcy Code. There is a "default assumption" among scholars and policymakers that bankruptcy relief should be widely available to those that need it.[84] And although some bankruptcy misfits exhibit a demonstrated need for bankruptcy relief, use of the Bankruptcy Code creates significant problems that may outweigh any practical benefits of the bankruptcy process.[85] These misfits have no effective way to access bankruptcy's core elements, even with a demonstrated need for them.[86]

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80. *See, e.g.*, Mark Koba, *Dodd-Frank Act: CNBC Explains*, CNBC (Apr. 30, 2012, 11:17 AM), https://www.cnbc.com/id/47075854 [https://perma.cc/FQQ9-SM8Z] (noting that after AIG found itself in a liquidity crisis in 2008, the U.S. Federal Reserve Bank created an $85 billion emergency fund to assist it).

81. For example, the fact that marijuana is illegal at the federal level impedes access to federal bankruptcy relief for entities and people operating marijuana businesses that are legal at the state level. For a discussion of some of these issues, see generally Vivian Cheng, Comment, *Medical Marijuana Dispensaries in Chapter 11 Bankruptcy*, 30 EMORY BANKR. DEV. J. 105 (2013).

82. *See infra* Part III.

83. *See, e.g.*, Cheryl D. Block, *Overt and Covert Bailouts: Developing a Public Bailout Policy*, 67 IND. L.J. 951, 987–88 (1992); Ann E. Cudd, *A Contractarian Approach to Corporate Bailouts*, 11 GEO. J.L. & PUB. POL'Y 283, 284–85 (2013); Jeffrey Manns, *Building Better Bailouts: The Case for a Long-Term Investment Approach*, 63 FLA. L. REV. 1349, 1349 (2011) (proposing a framework to address future financial bailouts).

84. Bruckner, *supra* note 41, at 242.

85. *See, e.g.*, Laura N. Coordes, *Beyond the Bankruptcy Code: A New Statutory Bankruptcy Regime for Tribal Debtors*, 35 EMORY BANKR. DEVS. J. 363, 365–66 (2019) (explaining this issue in the context of Indian tribes and tribal gaming corporations).

86. For an example of this and a discussion of Puerto Rico, see *infra* Part II.

A. *Accommodating Bankruptcy Misfits*

The existence of bankruptcy misfits naturally leads to the question of what should be done for entities that the Bankruptcy Code does not accommodate. In the past, when Code-based bankruptcy did not or would not work for an entity, Congress has responded by either amending the Bankruptcy Code or creating bespoke bankruptcy. Each tactic is described in more detail below.

1. Bankruptcy Code Amendments

Congress has shown a willingness to amend the Bankruptcy Code to accommodate some bankruptcy misfits. Two early examples are the Code chapters designed to address municipal debt and the debts of family farmers and family fishermen: Chapters 9 and 12, respectively.[87] In addition, Congress has sometimes provided special subchapters within existing Bankruptcy Code chapters for specific types of debtors. The most recent and salient example of this is the Small Business Reorganization Act of 2019,[88] which created a new Subchapter V within Chapter 11.[89]

a. Chapter 9

Chapter 9 is the chapter of the Bankruptcy Code that Congress created to address municipal debt adjustment. During the Great Depression, U.S. municipalities began defaulting on their debts in record numbers.[90] At that time, they had no access to bankruptcy relief; however, in 1933, Congress amended what was then the Bankruptcy Act to provide for municipal debt adjustment.[91] After making some changes in response to concerns about the constitutionality of a federal system of municipal debt adjustment, Congress made the amendments a permanent part of the Bankruptcy Code.[92]

Congress had to enact a new Code chapter rather than simply make municipalities eligible for Code-based bankruptcy relief because municipalities could not have used the bankruptcy laws as they existed at

87. 11 U.S.C. §§ 901–46, 1201–32.

88. Pub. L. No. 116-54, 133 Stat. 1079 (codified at 11 U.S.C. §§ 1181–95).

89. *See id.* For a discussion of how Subchapter V is specifically crafted to help small businesses in Chapter 11, see Christopher G. Bradley, *The New Small Business Bankruptcy Game: Strategies for Creditors Under the Small Business Reorganization Act*, 28 AM. BANKR. INST. L. REV. 251, 257 (2020).

90. *See* Daniel J. Freyberg, Comment, *Municipal Bankruptcy and Express State Authorization to be a Chapter 9 Debtor: Current State Approaches to Municipal Insolvency and What Will States Do Now?*, 23 OHIO N. U. L. REV. 1001, 1002 (1997).

91. Vincent S.J. Buccola, *Who Does Bankruptcy? Mapping Pension Impairment in Chapter 9*, 33 REV. BANKING & FIN. L. 585, 592 (2014).

92. *See* Coordes, *supra* note 62, at 313.

the time. This is because municipalities were so functionally different from the individual and business debtors that the existing bankruptcy law was designed to serve.[93] Unlike a business, a municipality could not liquidate or sell many of its primary assets.[94] Unlike consumers, municipalities could—in theory at least—generate revenue for debt payments through taxation.[95]

In many ways, Chapter 9 functions as a modified version of Chapter 11.[96] Although Chapter 9 is supposed to address the unique needs and goals of municipalities in bankruptcy, Congress has, over the years, modeled Chapter 9 to look like Chapter 11.[97] This is so even though the existing bankruptcy literature suggests that Chapter 9 should have distinctly different features.[98] In practice, however, Chapter 9 cases have been described as "vastly different than any other type of bankruptcy case, with many surprising and unique qualities."[99]

Although Chapter 9 applies a version of Chapter 11's toolkit to municipalities, it does account for the differences between a municipality and a commercial or consumer entity in several ways.[100] Chief among these are Chapter 9's eligibility requirements: unlike most business debtors, municipalities face significant hurdles before they can access bankruptcy relief, including the need for the state in which they are located to specifically authorize them to file.[101] If a municipal debtor is deemed eligible for bankruptcy, the municipality's relationship with its creditors and the court is also different from that of a typical commercial or consumer debtor. For example, only the municipality can submit a plan of debt adjustment, and the bankruptcy court's powers are more limited with respect to the municipality's property and political affairs.[102]

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93. Skeel, *supra* note 18, at 2220.

94. Coordes, *supra* note 62, at 328.

95. *See* Skeel, *supra* note 18, at 2232.

96. *See* Coordes, *supra* note 62, at 315 (observing that "Chapter 9 borrows most of its provisions from other chapters of the Bankruptcy Code" and that "[i]ts most prominent contributor is Chapter 11").

97. *See* Tatum, *supra* note 33, at 110 (noting that Congress has amended Chapter 9 to become more like Chapter 11).

98. *See* Coordes, *supra* note 62, at 315 (discussing the difficulty of using Chapter 11 rules to address a municipality's "vastly different" problems).

99. Bill Pepper, *Is the Gate Open for West Virginia Counties and Cities to File for Chapter 9 Bankruptcy Relief?*, 121 W. VA. L. REV. 883, 884 (2019).

100. Bruckner, *supra* note 8, at 349–53 (noting salient differences between Chapters 9 and 11).

101. *See* 11 U.S.C. § 109(c) (listing the requirements for Chapter 9 eligibility).

102. *See* 11 U.S.C. §§ 903–04 (affirming the state's powers over the municipality and limiting the bankruptcy court's ability to interfere); Omer Kimhi, *Chapter 9 of the Bankruptcy Code: A Solution in Search of a Problem*, 27 YALE J. ON REG. 351, 356–57 (2010).

b. Chapter 12

After it became evident that family farmers and family fishermen could not effectively use existing Bankruptcy Code provisions, Congress created Chapter 12 to provide a specialized debt restructuring process for these bankruptcy misfits.[103] To understand why a specialized process is necessary, it is helpful to examine the unique nature of a family farmer debtor. Unlike most businesses or individuals with predictable income streams, a farmer's income is often volatile and can fluctuate wildly.[104] Farmers typically take out a line of credit from a single lender, which they repay in full on a yearly basis rather than making monthly payments.[105]

After the collapse of the farm economy in the 1980s, family farmers found Chapter 11 of the Bankruptcy Code to be functionally useless to them.[106] The volatility of the farmers' income meant that they frequently lacked the means to provide adequate protection to their creditors.[107] If a secured creditor did not receive adequate protection from the farmer, the creditor could lift the automatic stay, effectively ending the breathing space for the farmer, and foreclose on the farmer's land.[108] Furthermore, Chapter 11's absolute priority rule, which requires full repayment of debts to creditors before equity holders can receive anything, prohibited most farmers from proposing a reorganization plan in which they retained ownership of the farm, because most farmers did not have the funds to repay creditors in full.[109]

Family farmers were similarly unable to use Chapter 13, which is designed for the adjustment of individual debt. In addition to the problems discussed below with respect to Chapter 13 for small businesses, Chapter 13's debt limits were too low for most farmers, and its requirement that plans must be completed in five years or less did not give most farmers sufficient time.[110] In response to a wave of defaults "reminiscent of the Great Depression" hitting the family farm industry, Congress created Chapter 12 of the Bankruptcy Code in 1986.[111]

Like Chapter 9, Chapter 12 draws heavily from existing chapters of the Bankruptcy Code—in this case, from Chapters 11 and 13, the two

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103. *See* Jamey Mavis Lowdermilk, *A Fighting Chance? Small Family Farmers and How Little We Know*, 86 TENN. L. REV. 177, 181 (2018).

104. *Id.* at 184.

105. *See id.* at 183.

106. *See id.* at 188.

107. *Id.* at 189.

108. *See id.*

109. *Id.*

110. *See id.*

111. *Id.* (quoting Mike Lowry, *A New Paint Job on an '85 Yugo: BAPCPA Improves Chapter 12 but Will It Really Make a Difference?*, 12 DRAKE J. AGRIC. L. 231, 239 (2007)).

provisions farmers found themselves unable to use.[112] For example, under Chapter 12, like in Chapter 13, there is no creditor vote on a plan.[113] Instead, unsecured creditors must receive all of the debtor's disposable income during the plan term and must also receive at least what they would have received in a liquidation under Chapter 7.[114] The practical effect of these provisions is that family farmers can keep their farms even if they do not pay their creditors in full, thus overcoming the limitations of Chapter 11's absolute priority rule.[115] However, Chapter 12 also contains some provisions that are unique to that chapter.[116] For example, it allows debtors to write down debt secured by a principal residence.[117]

Chapter 12 provides many benefits for family farmers and fishermen, enabling preservation of farm values and providing "increased leverage" for debtors.[118] Though far from perfect, it offers relief to a particular class of debtors not otherwise addressed in the Bankruptcy Code.[119]

c. Subchapter V

At first glance, it may seem exceedingly odd to have a separate bankruptcy process for small businesses. After all, small businesses are businesses—one of the groups the Bankruptcy Code was primarily designed to assist. Over the years, however, it became increasingly clear to Congress that Chapter 11 of the Bankruptcy Code primarily worked well for larger businesses, even though "most chapter 11 business cases are filed by small business debtors."[120]

Small business debtors were bankruptcy misfits because the available Bankruptcy Code chapters did not work well for them. Chapter 13, which some small business owners could use as individual debtors, had debt

112. *See* SUMNER, *supra* note 63, at 1 ("Chapter 12 incorporates many of the same provisions of the Bankruptcy Code as do Chapter 11 and Chapter 13 but with significant operative differences."); Lowdermilk, *supra* note 103, at 190 ("The family farmer chapter is essentially a 'hybrid of' chapters 11 and 13, but it is limited only to those engaged in farming or fishing." (footnote omitted) (quoting Katherine M. Porter, *Phantom Farmers: Chapter 12 of the Bankruptcy Code*, 79 AM. BANKR. L.J. 729, 732 (2005))).

113. Lowdermilk, *supra* note 103, at 191.

114. *Id.*

115. *Id.*

116. *See id.*

117. *See* 11 U.S.C. § 1222.

118. Lowdermilk, *supra* note 103, at 196–97.

119. *Id.* (observing that "[w]ithout chapter 12, many thousands of family farms would have been foreclosed, and depressed farm values would have sunk even lower" (quoting *Extension of the Family Farmer Bankruptcy Act: Hearing on H.R. 5322 Before the Subcomm. on Econ. & Com. L. of the H. Comm. on the Judiciary*, 102d Cong. 21 (1992) (statement of Judge A. Thomas Small, J., Bankr. E.D.N.C.))).

120. H.R. REP. NO. 116–171, at 3 (2019).

limits that were simply too low for many small business owners.[121] Other aspects of the Chapter 13 process, which is designed to address personal debt, did not work for small businesses that were not sole proprietors.[122] Additionally, small business owners were often excluded from Chapter 7 bankruptcy thanks to the means test.[123] This meant that the only option for which small business debtors were eligible was Chapter 11. And Chapter 11, designed primarily with large businesses in mind, was often too expensive and demanding for a small business debtor.[124]

To address the unique needs of small businesses, Congress enacted the Small Business Reorganization Act of 2019, which created a special Subchapter V within Chapter 11 to address the needs of small businesses.[125] Any "small business debtor," defined as "a person engaged in commercial or business activities . . . that has aggregate noncontingent liquidated secured and unsecured debts . . . in an amount not more than $2,725,625 . . . not less than 50 percent of which arose from the commercial or business activities of the debtor," may elect to reorganize under Subchapter V.[126] Once a debtor elects Subchapter V, the case is designed to proceed much more quickly than an ordinary Chapter 11.[127] In general, there is no need for the debtor to submit a disclosure statement with its plan,[128] and there is no creditors' committee.[129] In addition, the debtor is the only entity that can file a plan of reorganization.[130]

Although Chapter 11 cases typically do not involve the appointment of a trustee or examiner, if a small business debtor elects to use Subchapter V, a trustee will be appointed as a matter of course.[131] The Subchapter V trustee's primary tasks are to help the debtor work toward

121. *See* Robert C. Meyer, *Small Business Reorganization Act Arrives This Month*, AM. BANKR. INST. J., Feb. 1, 2020, at 8, 8.

122. *See* Amelia Niemi, *Chapter 13 Bankruptcy & Small Business Owners*, UPSOLVE (Sept. 3, 2020), https://upsolve.org/learn/business-bankruptcy-chapter-13/ [https://perma.cc/L66L-K4AX] (discussing how, in a Chapter 13 bankruptcy, the business is still responsible for debt repayment if it is a separate legal entity from the owner).

123. *See* Meyer, *supra* note 121, at 9.

124. *See id.* at 1 (noting that Chapter 11 requires "fees that are tenfold or more over what a chapter 13 costs" and "extensive writing in the form of disclosure statements, plans and more").

125. *See* Pub. L. No. 116-54, 133 Stat. 1079 (codified at 11 U.S.C. §§ 1181–95).

126. 11 U.S.C. § 101(51D). Recently, Congress amended Subchapter V in response to the economic crisis the COVID-19 global pandemic created by temporarily increasing the debt limit for Subchapter V eligibility to $7.5 million. *See* Robb Mandelbaum, *A New Small Business Bankruptcy Law Takes Effect, Just In Time*, BLOOMBERG BUSINESSWEEK (Apr. 17, 2020, 8:15 AM), https://www.bloomberg.com/news/articles/2020-04-17/a-new-small-business-bankruptcy-law-takes-effect-just-in-time [https://perma.cc/75D4-TZD2].

127. *See, e.g.*, 11 U.S.C. § 1188(a) (requiring a court to hold status conference within sixty days); *id.* § 1189(b) (requiring a debtor to file a plan within ninety days).

128. *See* 11 U.S.C. § 1190(1).

129. *See* 11 U.S.C. § 1181(b).

130. *Id.* § 1189(a).

131. *See* 11 U.S.C. § 1183.

a consensual reorganization plan and, once the plan is confirmed, to ensure that the debtor makes its plan payments.[132] In addition, there are different requirements for plan confirmation under Subchapter V, including a modification of Chapter 11's absolute priority rule.[133] This modification allows small business owners to retain their businesses even if they do not pay their creditors in full, provided they commit all of their disposable income to plan payments during the life of the plan.[134]

While Chapter 11 was designed for businesses, Congress eventually realized that the time, expense, and resources required to successfully complete a Chapter 11 bankruptcy case were "cumbersome for even medium-sized businesses."[135] By modifying the absolute priority rule, the new Subchapter V allows business owners to retain their ownership of the business, provided they meet certain requirements.[136] Many of the other provisions of Subchapter V "streamline[] the path to reorganization" for small business debtors by removing requirements that are both time-consuming and expensive, such as preparation of a disclosure statement.[137]

Despite being housed within Chapter 11, the new Subchapter V functions as a combination of Chapters 11, 12, and 13.[138] Congress selected provisions from each of these chapters to fashion relief that is better suited to the particular needs of small business debtors.[139]

2. Bespoke Bankruptcy

In addition to modifying the Bankruptcy Code, Congress has occasionally created bespoke bankruptcy—non-Code bankruptcy law designed for a particular group of debtors—in response to a perceived need to help bankruptcy misfits. Although bespoke bankruptcy contains

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132. *Id.* §§ 1183(b)(4), (b)(7).

133. *See id.* § 1181.

134. *See* 11 U.S.C. § 1191(c)(2).

135. Bob Lawless, *The Small Business Reorganization Act of 2019 and COVID-19*, CREDIT SLIPS (Mar. 15, 2020, 2:40 PM), https://www.creditslips.org/creditslips/2020/03/the-small-business-reorganization-act-of-2019-and-covid-19.html?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+creditslips%2Ffeed+%28Credit+Slips%29 [https://perma.cc/2Z9S-AM36].

136. *See id.*

137. *Id.*

138. *See id.* ("Congress modeled the SBRA on Chapter 12 of the Bankruptcy Code which has been used successfully, for years, to restructure the debts of family farmers with debts (now) up to $10 million.").

139. Of course, Subchapter V is not the only instance where Congress has created modified versions of a Bankruptcy Code chapter for certain debtors. Other subchapters provide for special legal regimes to handle the financial distress of entities that are not traditional businesses, including for railroads and stockbrokers. *See, e.g.*, 11 U.S.C. §§ 1161–74 (railroad reorganization); 11 U.S.C. §§ 741–54 (stockbroker liquidation).

the fundamental elements of bankruptcy described in Part I, this relief is provided outside of the Bankruptcy Code's statutory scheme.

a. Dodd-Frank

Dodd-Frank provides for an orderly liquidation process for distressed financial institutions that is overseen by the Federal Deposit Insurance Corporation (FDIC).[140] "During the darkest days of the Great Recession, Congress rushed through [Dodd-Frank] . . . in order to show it had done something before the 2010 mid-term elections."[141] Dodd-Frank recognizes that certain financial institutions that are "too big to fail" should be subject to more regulation and oversight through, for example, the submission of "living wills" to a federal regulator.[142] When *ex ante* regulation fails to prevent financial distress, however, Dodd-Frank also provides for a collective process that "discharges the debtor's obligations."[143] Specifically, it allows regulators to control the resolution process—a nod to the insolvency procedures banks and insurance companies use outside of bankruptcy.[144]

Congress enacted Dodd-Frank two years after the 2008 financial crisis as part of a broader attempt at bank reform.[145] Although bank holding companies may file for bankruptcy, banks themselves may not; instead, the FDIC acts as a receiver when a bank experiences financial distress.[146] Congress enacted Dodd-Frank to strengthen bank regulation and to minimize systemic risk in the event that a systemically important financial institution (SIFI) were to succumb to distress.[147]

Under Dodd-Frank's "orderly liquidation mechanism," the FDIC, as receiver, can seize, break up, and wind down a SIFI in distress.[148] Dodd-

140. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1377 (2010) (codified as amended in scattered sections of 7, 12, 15, 18, 22, 31, 42 U.S.C.).

141. James J. Angel, *What Dodd-Frank Left Unfinished in Financial Reform*, FORTUNE (July 22, 2015, 1:27 PM), https://fortune.com/2015/07/22/what-dodd-frank-left-unfinished-in-financial-reform-five-year-anniversary/ [https://perma.cc/3H64-Y3PU].

142. 124 Stat. at 1376; *Living Wills (or Resolution Plans)*, BD. GOVERNORS FED. RSRV. SYS., https://www.federalreserve.gov/supervisionreg/resolution-plans.htm [https://perma.cc/ANZ7-KA9T].

143. Skeel, *supra* note 18, at 2225.

144. *See id.* at 2224–25.

145. *See* MORRISON & FOERSTER, THE DODD-FRANK ACT: A CHEAT SHEET 8, 14, 16 (2010), http://media.mofo.com/files/uploads/Images/SummaryDoddFrankAct.pdf [https://perma.cc/G6VC-PAQ4].

146. *See* Richard M. Hynes & Steven D. Walt, *Why Banks Are Not Allowed in Bankruptcy*, 67 WASH. & LEE L. REV. 985, 986–87 (2010).

147. David S. Huntington, *Summary of Dodd-Frank Financial Regulation Legislation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 7, 2010), https://corpgov.law.harvard.edu/2010/07/07/summary-of-dodd-frank-financial-regulation-legislation/ [https://perma.cc/PTZ4-VUYA].

148. *Id.*

Frank also provides for government loans to the SIFI that are backed by its assets and ultimately repaid either during the resolution process or from other SIFIs.[149]

Congress enacted Dodd-Frank instead of amending the Bankruptcy Code based on the belief that "[t]he failure of a systemically important financial institution is materially different from that of most nonfinancial businesses."[150] Dodd-Frank is a federal process for value-maximizing liquidation.[151] Together, the federal government and the FDIC play a unique role in the orderly liquidation process in recognition of the fact that SIFIs are substantially different from the debtors the Bankruptcy Code was designed to accommodate.[152]

b. PROMESA

PROMESA, the debt relief legislation passed to assist Puerto Rico and its territorial instrumentalities, is the most recent—and arguably most prominent—example of bespoke bankruptcy. PROMESA is a federal remedy that provides breathing space and the opportunity for an orderly, collective process to resolve competing creditor claims.[153] But PROMESA encompasses other tools as well: the process is largely steered by an oversight board, and Puerto Rico has mechanisms for collective creditor action it may rely upon in lieu of the traditional bankruptcy-like process.[154]

Puerto Rico had been in crisis for over a decade before Congress passed PROMESA. Nearly every facet of every level of the island's

149. *See id.*

150. Adam J. Levitin, *Bankruptcy's Lorelei: The Dangerous Allure of Financial Institution Bankruptcy*, 97 N.C. L. REV. 243, 249 (2019).

151. *See* Thomas W. Joo, *A Comparison of Liquidation Regimes: Dodd-Frank's Orderly Liquidation Authority and the Securities Investor Protection Act*, 6 BROOK. J. CORP. FIN. & COM. L. 47, 65–66 (2011).

152. In addition to Dodd-Frank, Congress has created other special legal regimes to address the unique circumstances that arise when financial institutions and other industry players fail. *See, e.g.*, Securities Investor Protection Act of 1970, 15 U.S.C. §§ 78aaa–78lll (protecting investors when a registered broker or dealer fails); Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183, 187 (codified in scattered sections of 12 U.S.C.) (creating the Resolution Trust Corporation to close insolvent thrifts and creating the Office of Thrift Supervision to regulate savings banks and savings and loans associations in the wake of the savings and loan crisis).

153. *See* Lorraine S. McGowen, *The Impact of the New Restructuring Law on Puerto Rico Creditors*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 20, 2016), https://corpgov.law.harvard.edu/2016/08/20/the-impact-of-the-new-restructuring-law-on-puerto-rico-creditors/ [https://perma.cc/6JAN-CAWW].

154. *See* Guadalupe, *supra* note 12.

governing structure had some sort of fiscal problem.[155] As is typical of governmental fiscal distress, the contributing factors were numerous, varied, and at times difficult to pinpoint.[156] In Puerto Rico's case, everything from local fiscal mismanagement to Wall Street greed[157] to decades of U.S. federal policy[158] played a role in the island's fiscal turmoil. In part because of the number and variety of Puerto Rico's problems, a one-size-fits-all framework such as the Bankruptcy Code was unlikely to address many, if not most, of these problems.[159]

In April of 2016, the Puerto Rican government began coming to terms with the reality that it could not pay its bondholders what they were owed. At that time, then-Governor Padilla signed an emergency moratorium that attempted to justify Puerto Rico's default on a $422 million bond payment due May 1.[160] At the same time, the governor warned that the island would also default on a second, much larger payment due July 1.[161]

On the mainland, Congress had been observing Puerto Rico's descent into fiscal turmoil but had not yet acted to help. Legislators debated the merits of intervening in what some viewed as a local crisis that local mistakes caused.[162] The governor's April 2016 announcement, however, was a wake-up call, as Congress quickly realized that a failure to act could trigger a humanitarian crisis as well as a financial one.[163]

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155. *See* Samuel Issacharoff et al., *What is Puerto Rico?*, 94 IND. L.J. 1, 32 (2019) (noting that Puerto Rico's financial distress was both local and federal in nature); McGowen, *supra* note 153 (observing that, in addition to the debt the commonwealth itself held, many of Puerto Rico's instrumentalities held significant debt); Morales, *supra* note 4 (describing the varied forms of Puerto Rico's debt).

156. *See* Laura N. Coordes & Thom Reilly, *Predictors of Municipal Bankruptcies and State Intervention Programs: An Exploratory Study*, 105 KY. L.J. 493, 503–16 (2017) (discussing and categorizing numerous contributors to municipal fiscal distress).

157. *See* Laura Sullivan, *How Puerto Rico's Debt Created a Perfect Storm Before the Storm*, NPR (May 2, 2018, 7:10 AM), https://www.npr.org/2018/05/02/607032585/how-puerto-ricos-debt-created-a-perfect-storm-before-the-storm [https://perma.cc/V584-Q7DT] ("Wall Street kept pushing the Puerto Rican government's loans even as the island teetered on default . . . .").

158. *See id.* (describing a "special tax break" that brought business to the island but that Congress phased out beginning in 1996); Nathan Bomey, *6 Reasons Why Puerto Rico Slid into Financial Crisis*, USA TODAY (Oct. 4, 2017, 6:00 PM), https://www.usatoday.com/story/money/2017/10/04/puerto-rico-debt-crisis-bankruptcy-donald-trump/731091001/ [https://perma.cc/36KS-A2TR] (noting that because Puerto Rico does not receive as much Medicaid funding as U.S. states, the island has borrowed money to fund its healthcare system).

159. *See* Coordes & Reilly, *supra* note 156, at 547 ("[N]o one-size-fits-all solution for resolving municipal fiscal crises exists.").

160. *See* Morales, *supra* note 4.

161. *See id.*

162. *See, e.g.*, Mary Williams Walsh, *Here's Why Puerto Rico's Next Governor Will Inherit a Financial Mess*, N.Y. TIMES (July 25, 2019), https://www.nytimes.com/2019/07/25/business/puerto-rico-governor-restructuring.html [https://perma.cc/KAK5-MU99] (describing the local government's "bad fiscal habits").

163. *See* Morales, *supra* note 4.

As a result, Congress was more or less forced to act because Puerto Rico lacked access to bankruptcy relief. In 2014, the commonwealth attempted to address its financial situation by enacting the Puerto Rico Corporation Debt Enforcement and Recovery Act (Recovery Act).[164] The Recovery Act created a bankruptcy-like debt resolution process for Puerto Rico's territorial instrumentalities.[165] Investment funds, concerned about receiving cents on the dollar for their investments, immediately sued the commonwealth, claiming that the Recovery Act was unlawful.[166] Specifically, the funds argued that the Bankruptcy Code prohibited Puerto Rico from implementing its own debt relief scheme.[167]

The case, *Puerto Rico v. Franklin California Tax-Free Trust*,[168] ultimately went before the U.S. Supreme Court. In a 5–2 decision,[169] the Court agreed with the funds, holding that the Bankruptcy Code preempted the Recovery Act even as it prohibited Puerto Rico from authorizing its instrumentalities to use the Code.[170] Thus, Puerto Rico could neither use the Bankruptcy Code nor design its own debt relief. Perhaps recognizing that it was leaving Puerto Rico in a difficult position, the Court dropped a hint to Congress in dicta, observing that Puerto Rico was not "by definition" excluded from Chapter 9 of the Bankruptcy Code and indicating that Congress could amend the Code to allow Puerto Rico's instrumentalities to use it.[171]

The Court's decision in *Franklin* effectively thrust the matter back into Congress's hands. However, although Puerto Rico was in obviously dire financial straits, the island's relationship with the mainland United States was on rocky ground. The local government had repeatedly failed to respond to Congress's calls for greater transparency with respect to its finances.[172] Legislators on the mainland were frustrated by what they

164. 2014 P.R. Laws 371, 371; *see also* Puerto Rico v. Franklin Cal. Tax-Free Tr., 136 S. Ct. 1938, 1942–43 (2016) (describing the Act and the events leading to its passage).

165. *See Franklin*, 136 S. Ct. at 1943.

166. *See id.*

167. *Id.*; *see* 11 U.S.C. § 903.

168. 136 S. Ct. 1938 (2016).

169. Justice Scalia had died and not yet been replaced. *See* Greg Stohr & Michelle Kaske, *Scalia, Alito Court Absences Shape Puerto Rico Debt-Relief Bid*, BLOOMBERG L. (Mar. 21, 2016, 12:20 PM), https://news.bloomberglaw.com/business-and-practice/scalia-alito-court-absences-shape-puerto-rico-debt-relief-bid [https://perma.cc/Y4N8-RQ5U]. Justice Alito recused himself from the case. Adam Liptak & Mary Williams Walsh, *Supreme Court Rejects Puerto Rico Law in Debt Restructuring Case*, N.Y. TIMES (June 13, 2016), https://www.nytimes.com/2016/06/14/us/politics/supreme-court-rules-against-puerto-rico-in-debt-restructuring-case.html [https://perma.cc/5M9C-58Y8].

170. *See Franklin*, 136 S. Ct. at 1942.

171. *Id.* at 1948 (quoting Brief for Petitioner Commonwealth of Puerto Rico et al. at 25, *Franklin*, 136 S. Ct. 1938 (No. 15-233)).

172. *See* Morales, *supra* note 4. Recent events, namely a corruption scandal, have done

considered the island's lack of cooperation and good faith.[173] In addition, some members of Congress were wary of any law that could be perceived as a bailout of the island and its irresponsible local government.[174]

Thus, when Congress ultimately drafted PROMESA, it took care to differentiate the law from a bailout or bankruptcy. In this way, Congress was able to get more support for the bill to quickly enact it into law.[175] Although the need for PROMESA—or some response to Puerto Rico's fiscal distress—had been evident for years, PROMESA was still a "last-minute compromise"[176] that arose out of a desperate need to act.[177] By avoiding the terms "bankruptcy" and "bailout," Congress assuaged fears that PROMESA was a step toward bankruptcy (or bailout) for U.S. states.[178] PROMESA's wording enabled Congress to provide a path for fiscal relief for Puerto Rico while avoiding potentially drawn-out fights over politically charged terminology.[179]

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nothing to boost Congress's confidence in Puerto Rico. *See* Karen Pierog, *Puerto Rico Faces Tougher Scrutiny over Federal Medicaid Funding*, REUTERS (July 17, 2019, 5:49 PM), https://www.reuters.com/article/us-usa-puertorico-congress/puerto-rico-faces-tougher-scrutiny-over-federal-medicaid-funding-idUSKCN1UC2PI [https://perma.cc/9XU5-GSH7] (noting that, in the wake of the corruption scandal, federal lawmakers called for heightened scrutiny of Puerto Rico's Medicaid program).

173. *See* Michael Moran, *The Plot Against Puerto Rico*, FOREIGN POL'Y (Apr. 29, 2016, 6:18 PM), https://foreignpolicy.com/2016/04/29/puerto-rico-debt-default-lew-ryan-obama/ [https://perma.cc/KW8Z-N3TZ] (observing how many members of Congress treated Puerto Rico's distress as "a mere annoyance" and positing that "all sides condemn Puerto Rico's poor record of financial governance").

174. Veronique de Rugy, *Is Congress Going To Bailout Puerto Rico?*, NAT'L REV. (Apr. 28, 2017, 6:54 PM), https://www.nationalreview.com/corner/puerto-rico-bailout-congress-us-territory/ [https://perma.cc/8DCD-5VC9] ("Republicans in Congress have been pretty consistently and rightfully opposed to bailing out the island.").

175. *See* Hadžiomerović , *supra* note 26, at 1277 (arguing that PROMESA was "one of the only plausible courses of action available at the time because the political climate did not allow for a Code amendment").

176. Cheryl D. Block, *Federal Policy for Financially-Distressed Subnational Governments: The U.S. States and Puerto Rico*, 53 WASH. U. J.L. & POL'Y 215, 227 (2017) (discussing Congress's reasons and objectives for passing PROMESA).

177. *See* Tina Meng, Note, *The Perfect Storm: Puerto Rico's Evolving Debt Crises Under PROMESA*, 2019 COLUM. BUS. L. REV. 367, 382 ("After the Supreme Court's ruling in *Franklin* . . ., Puerto Rico was back where it had started—the territory was still buried under billions of dollars in unpayable debt but had no viable path towards solvency."). In this respect, at least, PROMESA is typical: last-minute responses are common in bankruptcy law, particularly in municipal bankruptcy, which PROMESA closely resembles. *See, e.g.*, Coordes, *supra* note 39, at 1228.

178. Skeel, *supra* note 67, at 873 (discussing the context and provisions of Title III of PROMESA); *see* 162 CONG. REC. S2,000–01 (daily ed. Apr. 13, 2016) (statement of Sen. John Cornyn) (discussing how "taking advantage of bankruptcy law" is not equivalent to receiving a "bailout").

179. David Skeel, Essay, *Notes from the Puerto Rico Oversight (Not Control) Board 34th Pileggi Lecture*, 43 DEL. J. CORP. L. 529, 535 (2019) ("Congress went to great lengths to avoid calling [Title III of PROMESA] bankruptcy.").

Congress passed PROMESA on June 30, 2016, one day before the Puerto Rican government's threatened July 1 default.[180] With PROMESA's passage, Congress enacted relief for Puerto Rico that came not from the Bankruptcy Code itself but from independent, bespoke legislation designed uniquely for Puerto Rico and its instrumentalities. Indeed, although PROMESA contains many of the hallmarks of bankruptcy law, it is more than bankruptcy. The law blends the traditional bankruptcy process with oversight mechanisms used for major U.S. cities, as well as sovereign debt restructuring techniques.[181] This combination provided Puerto Rico with access to more restructuring options than a debtor would receive under the Bankruptcy Code. Indeed, the Code was not designed to comprehensively address territory-level debts.[182] At the same time, however, the island faced significantly more challenges and restrictions than a typical Bankruptcy Code debtor.

PROMESA consists of three primary components. The first, Title III, is based on Chapter 9 of the Bankruptcy Code.[183] Title III allows for a court-supervised debt restructuring, similar to the process under the Bankruptcy Code.[184] Both Title III and Chapter 9 bankruptcy impose an automatic stay during the restructuring, which prevents creditors from taking actions to collect money owed by debtors and gives the debtor much-needed breathing space to negotiate with its creditors and devise a debt adjustment plan.[185]

Although Chapter 9 and Title III are largely similar, several differences stand out. First, PROMESA's oversight board, rather than the debtor, has the exclusive authority to file and submit a plan of debt adjustment.[186] In addition, a district judge rather than a bankruptcy judge

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180. *See* Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), Pub. L. No. 114-187, 130 Stat. 549, 549 (2016) (codified at 48 U.S.C. §§ 2101–2241).

181. *See* Skeel, *supra* note 67, at 864.

182. *See* Pottow, *supra* note 3, at 700 (noting that Puerto Rico's territorial debt "would be exempt even if Chapter 9 applied"); *see also* Nathan A. Mooney, Note, *Dealing With an Inevitable Case of "I Told-You-So": Crafting a Framework for Resolving State Fiscal Distress Post-Puerto Rico*, 15 N.Y.U. J.L. & BUS. 653, 670 (2019) (noting that Chapter 9 was "at best an imperfect solution" for Puerto Rico and its instrumentalities because (1) there was no process to adjust the debt the island's central government issued; and (2) there was a dispute over whether special revenue bonds the island's public utilities issued were protected from adjustment in bankruptcy).

183. *See* Bruce A. Wilson, *PROMESA: A Summary of the Puerto Rico Oversight Legislation*, KUTAK ROCK LLP (Sept. 7, 2016), http://www.kutakrock.com/PROMESA-Puerto-Rico-Oversight-Economic-Stability-Act/ [https://perma.cc/GP7R-JL2B].

184. *See id.*

185. *See id.*

186. *Id.* Despite these limitations, some view PROMESA as more debtor-friendly than Chapter 9. *See* Issacharoff et al., *supra* note 155, at 32 ("Overall, PROMESA has more protections for Puerto Rico during a bankruptcy than Puerto Rico would have obtained if its subordinate jurisdictions were allowed to file for bankruptcy protection under Chapter 9 of the Bankruptcy Code.").

oversees Puerto Rico's restructuring.[187] Despite the differences between Title III and Code-based bankruptcy, Title III does contain the traditional bankruptcy toolkit: it gives the debtor the ability to bind holdouts, for example, and imposes an automatic stay.[188]

At least on paper, PROMESA's oversight board—its second key component—has broad authority: it can approve fiscal plans and budgets, oversee operations, implement any changes necessary to comply with approved fiscal plans and budgets, approve debt issuances, hold hearings, issue subpoenas, enter into contracts, analyze pensions, approve voluntary settlements, and become a direct party in litigation against Puerto Rico or its instrumentalities.[189] In addition, any budget the island's local government passes must be consistent with a board-approved fiscal plan.[190] Since the board's creation, scholars have debated whether it possesses too much power or not enough.[191] Others have described the board's existence—as well as PROMESA as a whole—as paternalistic.[192] Like Title III, the oversight board is based on other debt relief mechanisms. Specifically, the board is primarily modeled on the financial control board that took over Washington, D.C.'s finances in the 1990s.[193]

PROMESA's third main component is Title VI, which provides for collective creditor action to modify bond terms.[194] Specifically, Title VI allows bond terms to be modified without 100% bondholder consent.[195] This component of PROMESA draws from sovereign debt restructuring practices.[196] The oversight board administers all Title VI proceedings.[197]

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187. *See* Melissa B. Jacoby, *Presiding Over Municipal Bankruptcies: Then, Now, and Puerto Rico*, 91 AM. BANKR. L.J. 375, 375–76 (2017).

188. *See* Mooney, *supra* note 182, at 673.

189. Wilson, *supra* note 183.

190. *Id.*

191. *See, e.g.*, Victoria Zorovich, Note, *The Perfect Storm: Weathering Puerto Rico's Fiscal Crisis in the Wake of Hurricane Maria*, 46 HOFSTRA L. REV. 1067, 1088 (2018) (arguing that Congress should give the oversight board more authority over the island's fiscal management and humanitarian relief efforts); Skeel, *supra* note 67, at 873–74 (cataloguing the board's powers and noting that they must be consistent with debt restructuring purposes); Walsh, *supra* note 162 ("A series of recent corruption scandals has prompted at least some members of Congress to ask whether the board's powers should be expanded.").

192. *See, e.g.*, Issacharoff et al., *supra* note 155, at 33 ("However beneficial PROMESA may turn out to be, it is still a paternalistic intervention imposed from without.").

193. *See* Skeel, *supra* note 67, at 865 ("The Washington D.C. oversight board is especially relevant to Puerto Rico, because both boards were created by Congress and because the Washington D.C. legislation served as the template for Puerto Rico's oversight board."). The New York Emergency Financial Control Board was another important influence. *See id.* at 864–65 (calling New York City's financial crisis the "watershed moment for oversight boards").

194. *See* Wilson, *supra* note 183.

195. *See id.*

196. *See* Skeel, *supra* note 67, at 872 ("Title VI . . . is similar to the collective action provisions that are used to restructure sovereign debt.").

197. *Id.* at 873.

Title VI has been used only sparingly in Puerto Rico's fiscal recovery process.[198] In contrast, the board has filed five Title III proceedings, several of which contain numerous adversary proceedings.[199]

Apart from its three primary components, PROMESA contains several provisions specific to Puerto Rico. These include provisions for infrastructure revitalization and provisions lowering the minimum wage of certain workers.[200] While each primary component of PROMESA has precedent in other areas of restructuring law and practice, PROMESA uniquely combines these components, creating bespoke bankruptcy relief for Puerto Rico and its instrumentalities.[201]

Puerto Rico easily qualifies as a bankruptcy misfit. It was in dire financial straits yet had no legal mechanism to adjust its debts. As a governmental unit, it could not shut down or liquidate assets,[202] but it needed to break away from some of its contractual obligations and receive a discharge in order to continue functioning. At the same time, the Bankruptcy Code could not provide the island with the debt relief it so desperately needed without significant revisions. Not only was the Code not designed to address territorial debt, but scholars and policymakers were also deeply divided over which of the island's many other debts bankruptcy could restructure.[203] The political overlay—years of fiscal irresponsibility, a tumultuous relationship with the mainland United States, and decades of mutual mistrust—only made a Bankruptcy Code amendment less likely.[204] All of these factors led Congress to choose bespoke bankruptcy for Puerto Rico.[205]

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198. *See id.* at 876 (noting that, although the board considered using Title VI for the Puerto Rico Electric Power Authority (PREPA), it ultimately chose to address PREPA's issues using Title III); Skeel, *supra* note 179, at 540 (describing the Government Development Bank's voluntary restructuring under Title VI).

199. *See* Eva Lloréns Vélez, *Fee Examiner in Puerto Rico Debt Restructuring Warns of Rising Litigation Costs*, CARIBBEAN BUS. (June 7, 2019), https://caribbeanbusiness.com/fee-examiner-in-puerto-rico-debt-restructuring-warns-of-rising-litigation-costs/ [https://perma.cc/VZV6-SBK6].

200. *See* Wilson, *supra* note 183.

201. *See id.*

202. *See* Frank Shafroth, *Seeking Shelter from a Quake*, GMU MUN. SUSTAINABILITY PROJECT (Jan. 7, 2020), https://fiscalbankruptcy.wordpress.com/2020/01/07/seeking-shelter-from-a-quake/ [https://perma.cc/7Z59-4UN7] (observing that "shut down" is not an option for local or state governments).

203. *See* Mooney, *supra* note 182, at 670.

204. *See* Tom C.W. Lin, *Americans, Almost and Forgotten*, 107 CALIF. L. REV. 1249, 1253–56 (2019) (observing that territories are differently situated from other U.S. political entities and that Americans living in the territories are treated differently from those living on the mainland).

205. Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1655 (2020) ("PROMESA allows Puerto Rico and its entities to file for federal bankruptcy protection.").

B. *Future Reforms*

Many, if not most, of the major debates over the future of bankruptcy law are about whether or how to amend the Bankruptcy Code. Should Congress amend the Code to better address the needs of some debtors that already use it, as it recently did for small businesses? Should Congress add chapters or subchapters to better accommodate some entities—or simply to include other entities that have been previously excluded?

Among proposals for additional chapters of the Bankruptcy Code, the one that has seemingly gained the most traction is a proposal for a new Chapter 14, which would provide debt relief to some financial institutions, including bank holding companies.[206] Although bank holding companies are currently eligible for Chapter 11 relief, in practice, bank holding company bankruptcy presents complications concerning how closely the holding company is related to the bank itself.[207] A bill proposed in the Senate in 2018 aimed to complement and assist the process outlined in Dodd-Frank by providing for the "rapid . . . recapitalization of a failed financial institution."[208]

One of the primary justifications for a new Chapter 14 is that it could help SIFIs from collapsing without the need to resort to a bailout.[209] Although Dodd-Frank encourages bank holding companies to use the Bankruptcy Code, "critical resolution tools . . . currently are unavailable or not obviously available under the Bankruptcy Code."[210] The latest bill, the Taxpayer Protection and Responsible Resolution Act, would create "a process akin to Chapter 11 . . . but specifically for failing major banks."[211] In brief, it would provide a "single point of entry" approach, allowing the failing financial firm to quickly separate its "good" and "bad" assets while retaining key Chapter 11 protections, including the absolute priority rule and continuity of management of the bank.[212] Such amalgamation of bankruptcy and nonbankruptcy (i.e., single point of

206. *See Senate Judiciary Committee Hearing on Bankruptcy for Banks and Proposed Chapter 14*, HARV. L. SCH. BANKR. ROUNDTABLE (Dec. 4, 2018), https://blogs.harvard.edu/bankruptcyroundtable/tag/chapter-14/ [https://perma.cc/KR4Y-2NRP].

207. *See* WARREN ET AL., *supra* note 42, at 832 (discussing the "cat-and-mouse game" Congress plays with the financial industry and gaps in the FDIC resolution system).

208. *Big Bank Bankruptcy: 10 Years After Lehman Brothers*: *Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 1 (2018) (statement of Mark J. Roe, Professor of Law, Harvard Law School) (emphasis omitted).

209. *See id.* (statement of Donald S. Bernstein, Partner, Davis Polk & Wardwell LLP).

210. *Id.* at 8 (statement of Stephen E. Hessler, Partner, Kirkland & Ellis LLP).

211. *Id.*

212. *Id.* at 4–7.

entry) techniques may work better than either bankruptcy or a single point of entry strategy standing alone.[213]

Another attention-grabbing proposal to modify the Bankruptcy Code is for the creation of a Code chapter that U.S. states could use to file for bankruptcy. Although there is extensive debate in the academic literature over whether states could or should have access to bankruptcy relief,[214] it is clear that state bankruptcy relief is not available under an existing chapter of the Bankruptcy Code and could not be made available without substantial modifications.[215] As states face increasing amounts of debt, discussions of bankruptcy tools for them may become more practical and less theoretical.[216]

Just as there have been proposals to create new chapters of the Bankruptcy Code, scholars have also proposed the creation of new subchapters. For example, Professor Bruce Markell has proposed creating a subchapter for individual Chapter 11 debtors.[217] In previous work, I have advocated for the creation of subchapters to address the needs of healthcare debtors.[218] Both of these proposals tout the use of subchapters as structural mechanisms that both emphasize and consolidate the different treatment the Bankruptcy Code already provides for these debtors.[219]

Finally, there have been some infrequent proposals for bespoke bankruptcy laws. For instance, I have previously advocated for Congress to adopt a bespoke bankruptcy law for tribal corporations, arguing that they are fundamentally different from other business debtors, due to unique concerns about tribal sovereignty, among other things.[220]

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213. *See* David A. Skeel Jr., *Single Point of Entry and the Bankruptcy Alternative*, *in* ACROSS THE GREAT DIVIDE: NEW PERSPECTIVES ON THE FINANCIAL CRISIS 311, 314 (Martin Neil Baily & John B. Taylor eds., 2014).

214. *See, e.g.*, Steven L. Schwarcz, *A Minimalist Approach to State "Bankruptcy*,*"* 59 UCLA L. REV. 322, 331–32 (2011) (proposing a "minimalist legal framework" that incorporates some bankruptcy protections for fiscally distressed states). For an excellent analysis of the pros and cons of state bankruptcy, see generally David A. Skeel Jr., *States of Bankruptcy*, 79 U. CHI. L. REV. 677, 680, 683–84 (2012).

215. *See* Mooney, *supra* note 182, at 707 (proposing a PROMESA-like process for states).

216. *Cf., e.g.*, Brian Chappatta, *Ripples from Puerto Rico's Debt Crisis Reach the Mainland*, BNN BLOOMBERG (July 2, 2019), https://www.bnnbloomberg.ca/ripples-from-puerto-rico-s-debt-crisis-reach-the-mainland-1.1281398 [https://perma.cc/RB67-PB94] (discussing a lawsuit seeking to invalidate $14 billion in Illinois bonds that was inspired by Puerto Rico's restructuring under PROMESA).

217. Bruce A. Markell, *The Sub Rosa Subchapter: Individual Debtors in Chapter 11 After BAPCPA*, 2007 U. ILL. L. REV. 67, 73 (2007).

218. Coordes, *supra* note 27, at 465–66.

219. *See* Markell, *supra* note 217, at 70 (arguing that Congress could better achieve its desired changes for individual Chapter 11 debtors by creating "a separate subchapter"); Coordes, *supra* note 27, at 466 (discussing the benefits of subchapters for healthcare debtors).

220. *See* Coordes, *supra* note 85, at 365–67.

Furthermore, despite Congress's efforts to the contrary, it is possible that PROMESA may function as a template for a bespoke state bankruptcy law in the future.[221]

Most notably, perhaps, legislators in Congress continue to advocate for even more specialized debt relief for Puerto Rico. In July of 2018, Senator Warren introduced the U.S. Territorial Relief Act.[222] Under Title I of the proposed Act, U.S. territories would have the option to terminate their unsecured debts upon meeting specified conditions.[223] While Title I would apply to all territories, Title II would apply uniquely to Puerto Rico, creating the Puerto Rico Debt Restructuring Compensation Fund to provide federal funds to compensate some creditors whose debt was terminated under Title I.[224] Finally, Title III of the Act would create an audit committee to specifically study Puerto Rico's debt.[225] In support of the Act, Senator Warren described how the hurricanes that have struck Puerto Rico make special debt relief for the territory necessary.[226] Although the Act has not become law, it is further recognition of the need for expanded bespoke bankruptcy relief, in this case for an entity that already uses a bespoke framework.[227]

Over the years, Congress has adjusted bankruptcy law to accommodate bankruptcy misfits by either amending the Bankruptcy Code or creating bespoke bankruptcy relief. In the current debates over access to bankruptcy law, a discussion about using bespoke bankruptcy has largely taken a back seat to proposals for Code amendments. Of course, there are many times when amending the Bankruptcy Code may be preferable to creating a new bankruptcy law from whole cloth. But sometimes, particularly when substantial deviation from the Code's templates is required, it may be better for Congress to experiment with

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221. *See* Mooney, *supra* note 182, at 707. *But see* MICHAEL CEMBALEST, EYE ON THE MARKET 3 (2020), https://am.jpmorgan.com/content/dam/jpm-am-aem/global/en/insights/eye-on-the-market/EOTM_05-04-2020.pdf [https://perma.cc/3B8R-WPFH] (arguing for states to have access to Chapter 9 provisions in emergencies).

222. U.S. Territorial Relief Act of 2018, S. 3262, 115th Cong. (2018).

223. *See id.* § 101.

224. *See id.* §§ 201, 205.

225. *See id.* § 304. The Act was reintroduced the following year as the U.S. Territorial Relief Act of 2019. S. 1312, 116th Cong. (2019).

226. *U.S. Territorial Relief Act of 2018*, ELIZABETH WARREN (May 2, 2019), https://www.warren.senate.gov/imo/media/doc/U.S.%20Territorial%20Relief%20Act%20Summary%20Final%207.24.18.pdf [https://perma.cc/X9PD-JHMD].

227. *See* Jim Wyss, *House Democrats Seek to Overhaul Puerto Rico Financial Oversight*, BLOOMBERG (May 22, 2020, 7:45 PM), https://www.bloomberg.com/news/articles/2020-05-22/house-democrats-seek-to-overhaul-puerto-rico-financial-oversight [https://perma.cc/W5KX-D9HA] (discussing proposal for additional bespoke relief for Puerto Rico by House Democrats to amend PROMESA to define some spending as essential public services, guarantee funding for the University of Puerto Rico, and require the federal government to finance the operations of the oversight board).

new legislation rather than force a square peg into a round hole. In these cases, bespoke bankruptcy may be the better answer. The next Part takes up the question of when and how legislators might best use bespoke bankruptcy to assist with resolving the bankruptcy misfit problem.

III. BESPOKE BANKRUPTCY

Bespoke bankruptcy can be invaluable to bankruptcy misfits like Puerto Rico. However, it must be used sparingly and cautiously. This Part describes potential problems with overuse of bespoke bankruptcy and unveils a method to identify debtors in need of—and well-suited to—bespoke relief.

A. *Overuse Concerns*

Bespoke bankruptcy can perform a gap-filling function, providing debt relief options to entities that might genuinely need bankruptcy tools but that either cannot or should not use the Bankruptcy Code. As PROMESA illustrates, bespoke bankruptcy can also provide relief when amending the Bankruptcy Code is either impractical or politically infeasible. Yet, bespoke bankruptcy also comes with distinct drawbacks: it can create uncertainty, it may be difficult to implement, and it can be costly.[228] Creditors may resist implementation of a bespoke framework, particularly one that alters expected priorities.[229] This could lead to increased borrowing costs for debtors *ex ante*, in addition to substantial litigation costs once a debtor is in bankruptcy.

By its very nature, bespoke bankruptcy is experimental. It can involve the creation of new elements or processes, or a combination of tools that has never been tried before. This experimentation can undermine parties' expectations and risks favoring one party over another. It also naturally creates uncertainty. Notably, uncertainty has characterized much of the process with PROMESA. In February of 2019, the U.S. Court of Appeals for the First Circuit determined that the appointment of the oversight board's members violated the Constitution's Appointments Clause because the board's members were never confirmed by the Senate.[230]

228. *See* Vélez, *supra* note 199 ("The professional fee burden on the Commonwealth increases dramatically as litigation proliferates.").

229. A salient example of creditor resistance to bespoke bankruptcy is Aurelius Capital Management, which has led a substantial litigation effort against PROMESA. For a detailed account of this saga, see Jesse Barron, *The Curious Case of* Aurelius Capital v. Puerto Rico, N.Y. TIMES MAG. (Nov. 26, 2019), https://www.nytimes.com/2019/11/26/magazine/aurelius-capital-v-puerto-rico.html [https://perma.cc/LJ3D-6L77].

230. *See* Melissa Jacoby, *PROMESA Heads to the U.S. Supreme Court?*, CREDIT SLIPS (June 24, 2019, 12:12 PM), https://www.creditslips.org/creditslips/2019/06/promesa-heads-to-the-supreme-court.html?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A +creditslips%2Ffeed+%28Credit+Slips%29 [https://perma.cc/7GGX-ZGKJ].

Although the Supreme Court ultimately determined that the board's appointment was valid,[231] the possibility that the board could be deemed unconstitutional and dismantled at any moment threatened to disrupt the board's entire restructuring process and years of work.[232]

Although the Supreme Court upheld the oversight board's appointment, bondholders have found other ways to challenge other aspects of PROMESA. In June 2019, the First Circuit told a group of bondholders that they could not challenge PROMESA's constitutionality in the PROMESA proceedings themselves.[233] The court found that two provisions in PROMESA stripped the district court of its jurisdiction to grant the relief sought (a declaration and injunction to restore the flow of revenue to the bondholders) by the bondholders' guarantor.[234] In numerous other decisions, the district court and the First Circuit have rebuffed attempts by other bondholders to short-circuit the PROMESA process.[235] Still, these lawsuits and others have crippled Puerto Rico's efforts to move forward with a debt restructuring.[236]

Even putting aside the legal challenges, the scope of the oversight board's authority is regularly questioned, debated, and threatened. As a

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231. *See* Fin. Oversight and Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1655 (2020).

232. *See* Lawrence Hurley, *U.S. Top Court Takes on Puerto Rico Financial Oversight Board Dispute*, REUTERS (June 20, 2019, 1:50 PM), https://www.reuters.com/article/us-usa-court-puerto rico/u-s-top-court-takes-on-puerto-rico-financial-oversight-board-dispute-idUSKCN1TL2DJ [https://perma.cc/7F8B-KHXJ].

233. *See In re* Fin. Oversight and Mgmt. Bd. for P.R., 927 F.3d 597, 601–03, 605 (1st Cir. 2019), *cert. denied*, 140 S. Ct. 856 (2020).

234. *See id.* at 601–03.

235. *See, e.g.*, Bill Rochelle, *First Circuit Nixes Another Attempt at Unraveling Puerto Rico's Debt Arrangement*, ROCHELLE'S DAILY WIRE (June 26, 2019), https://www.abi.org/ newsroom/daily-wire/first-circuit-nixes-another-attempt-at-unraveling-puerto-rico%E2%80%99 s-debt-arrangement [https://perma.cc/L92S-NRZB] [hereinafter Rochelle, *First Circuit*]. In January of 2020, the Supreme Court denied certiorari from a First Circuit decision "holding that bondholders cannot compel payment during the course of restructuring proceedings and before confirmation of a plan." Bill Rochelle, *Supreme Court Won't Hear a Case to Compel Paying Puerto Rico Bondholders Currently*, ROCHELLE'S DAILY WIRE (Jan. 13, 2020), https://www.abi.org/newsroom/daily-wire/supreme-court-won%E2%80%99t-hear-a-case-to-compel-paying-puerto-rico-bondholders [https://perma.cc/X249-BMVU].

236. *See* Steven Church, *Puerto Rico Judge Imposes 120-Day Pause on Bankruptcy Suits*, BLOOMBERG (July 24, 2019, 11:55 AM), https://www.bloomberg.com/news/articles/2019-07-24/ puerto-rico-judge-imposes-120-day-pause-on-bankruptcy-suits#:~:text=As%20political%20cha os%20swirled%20outside,to%20the%20island's%20financial%20turmoil.&text=Under%20Swa in's%20order%2C%20the%20court,be%20suspended%20for%20120%20days [https://perma.cc /JLM3-GG3G]; Maria Chutchian, *Puerto Rico Oversight Board Gears Up for Latest Challenge to Debt Restructuring*, REUTERS (Jan. 6, 2021. 6:16 PM), https://www.reuters.com/article/ bankruptcy-puerto-rico/puerto-rico-oversight-board-gears-up-for-latest-challenge-to-debt-restru cturing-idUSL1N2JH34Q [https://perma.cc/RUL6-9MME] (discussing a challenge from Ambac Assurance Corporation that claims that PROMESA violates the uniformity requirement in the Constitution).

result, there is often little certainty about who is in charge of what on the island. For example, Puerto Rico's former governor, Ricardo Rosselló, frequently challenged the oversight board and sought to curb its authority. In July of 2018, Governor Rosselló sued the board, claiming that it had "usurped his power and authority."[237] The following year, the oversight board rejected Governor Rosselló's spending plan and sought to impose its own budget on the territory.[238] Governor Rosselló and the board were in near-constant dispute over who had the right to enact spending plans and the extent to which each party could veto the other's decisions.[239]

The Governor's challenges were echoed by the Puerto Rican public. Protesters filled the streets outside the board's meeting places, claiming that the board represented a lack of democratic self-governance.[240] Governor Rosselló's departure in the summer of 2019 created more uncertainty for Puerto Rico; indeed, the protesters who demanded Rosselló's resignation also fought the board's continued presence on the island.[241] Many Puerto Rican legislators vehemently opposed Rosselló's designated successor, Pedro Pierluisi, because of his connections to and work with the oversight board.[242]

From a legal standpoint, the board's authority over certain aspects of Puerto Rican governance remains unclear. District Judge Laura Taylor Swain, who is overseeing Puerto Rico's Title III proceedings, has indicated that the board's actions should have some basis in the fiscal plan—but her opinion has left the board with some leeway to interpret the meaning of "some basis."[243] Furthermore, as Judge Swain herself

237. Frank Shafroth, *The Fiscal Challenges of Federalism*, GMU MUN. SUSTAINABILITY PROJECT (July 13, 2018), https://fiscalbankruptcy.wordpress.com/2018/07/13/the-fiscal-challenges-of-federalism/ [https://perma.cc/A79N-JAF2].

238. *See* Michelle Kaske, *Puerto Rico Board to Impose Cuts in Fight with Governor (1)*, BLOOMBERG L. (May 28, 2019, 5:55 PM), https://news.bloomberglaw.com/bankruptcy-law/puerto-rico-board-to-impose-cuts-in-fight-with-governor-1 [https://perma.cc/P5NX-ZSL4]; Michael Deibert, *Puerto Rico Fiscal Board Seeks Deeper Budget Cuts than Governor*, BLOOMBERG L. (July 1, 2019, 3:25 PM), https://news.bloomberglaw.com/bankruptcy-law/puerto-rico-fiscal-board-seeks-deeper-budget-cuts-than-governor [https://perma.cc/3DHC-UF9P].

239. *See* Walsh, *supra* note 162 ("Mr. Rosselló and the board have long been at odds.").

240. *See* Edwin Melendez, *Is Congress' Plan to Save Puerto Rico Working?*, CONVERSATION (July 31, 2017, 5:30 PM), https://theconversation.com/is-congress-plan-to-save-puerto-rico-working-80785 [https://perma.cc/3GLC-W2QV].

241. *See* Michael Deibert et al., *Puerto Rico Governor's Resignation Shakes Bankrupt Commonwealth*, BLOOMBERG L. (July 25, 2019, 6:09 AM), https://news.bloomberglaw.com/bankruptcy-law/puerto-rico-governors-resignation-shakes-bankrupt-commonwealth [https://perma.cc/4LV9-4M62].

242. Michelle Kaske & Michael Diebert, *Puerto Rico's Governor Is Going. Who Comes Next Is Less Certain*, BNN BLOOMBERG (Aug. 2, 2019), https://www.bnnbloomberg.ca/puerto-rico-s-governor-is-going-who-comes-next-is-less-certain-1.1296288 [https://perma.cc/R9AZ-GE3X].

243. *See* Skeel, *supra* note 67, at 878 (discussing Judge Swain's decision, which "emphasized that the Board's powers are not unlimited" and "admonished the Board and the government to work together").

acknowledged, PROMESA created a "power-sharing structure that allows for mutual sabotage."[244] "The unsettled question of the board's power has been a defining theme of the island's attempts to end its fiscal crisis."[245] Without a clear understanding of the extent and scope of the oversight board's power, everything the board does is subject to legal challenge and possible reversal. Notably, even as the Supreme Court recognized that the board had been properly appointed, Justice Sonia Sotomayor surmised in her concurrence that the board and its actions may still be illegitimate.[246]

Puerto Rico's future is still uncertain, and its experience with PROMESA illustrates that Congress's choice to provide bespoke relief can create significant problems. Because bespoke bankruptcy is, by its very nature, novel and experimental, norms and rules that typically apply in Code-based bankruptcy settings may not transfer to bespoke bankruptcy. The resulting uncertainty surrounding bespoke bankruptcy's application can encourage legal challenges, political posturing, and even protests.

More broadly, widespread use of bespoke bankruptcy could turn bankruptcy into a law of exceptions, possibly threatening the coherence of U.S. bankruptcy law. If bankruptcy law becomes more fragmented, there will be fewer opportunities for parties to establish norms and practices with respect to particular bankruptcy processes, with the result that parties could simply revert to the familiarity of Code-based bankruptcy even if a bespoke option is present.

A related concern is surfacing with respect to the treatment of the University of Puerto Rico's debt under PROMESA. It is unclear whether a debt restructuring or the austerity measures taken by the oversight board would constitute a "bankruptcy" for purposes of Title IV of the Higher Education Act of 1965.[247] If it does, the University of Puerto Rico would

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244. Steven Church, *Puerto Rico Asks Judge to Force Federal Board to Share Its Power*, BLOOMBERG L. (July 25, 2018, 5:46 PM), https://news.bloomberglaw.com/bankruptcy-law/puerto-rico-asks-judge-to-force-federal-board-to-share-its-power [https://perma.cc/K2NN-3WLD].

245. *Id.*

246. *See* Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1683 (2020) (Sotomayor, J., concurring) ("These cases raise serious questions about when, if ever, the Federal Government may constitutionally exercise authority to establish territorial officers in a Territory like Puerto Rico, where Congress seemingly ceded that authority long ago to Puerto Rico itself.").

247. Pub. L. No. 89-329, 79 Stat. 1219 (codified as amended at 20 U.S.C. §§ 1001 to 1161aa–1); *The Status of the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA): Lessons Learned Three Years Later: Hearing Before the H. Comm. on Nat. Res.*, 116th Cong. 82, 85–86 (2019) (statement of Dr. Ana Cristina Gómez-Pérez, Associate Professor, Univ. of P.R.) (quoting Scott F. Norberg, *Bankruptcy and Higher Education Institutions*, 23 AM. BANKR. INST. L. REV. 385, 385 (2015)) [hereinafter *The Status of PROMESA*].

be ineligible for federal funding.[248] Put differently, bespoke bankruptcy runs the risk of making the concept of "bankruptcy" itself unstable, which in turn affects nonbankruptcy law. For this reason, this Article has taken care to separate the concept of "bankruptcy" from the Bankruptcy Code; however, in practice, there may be good reason to view the Bankruptcy Code as synonymous with "bankruptcy" law more generally.[249]

In addition, because bankruptcy is federal in nature; widespread use of bespoke bankruptcy, particularly in those situations where bankruptcy relief has previously been unavailable, may be seen as federal government overreach. In Puerto Rico's case, this concern has surfaced as part of the local population's distrust and resentment of the oversight board and the policies it is enacting, which have directly affected Puerto Ricans' daily lives.[250]

In other cases, bespoke bankruptcy may be useful but not worth the effort. For example, designing bespoke relief may not be worthwhile if the entities in question are not vulnerable to significant financial distress, or if nonbankruptcy mechanisms, such as receiverships, prove to be adequate in addressing financial distress.

For all of these reasons, the use of bespoke bankruptcy should be limited. However, there are still times when bespoke bankruptcy is the only option that will provide relief for a debtor that desperately needs it. The next Section addresses how to determine eligibility for bespoke bankruptcy, as well as when a bespoke solution should be preferred over Code-based relief.

B. *Further Use of Bespoke Bankruptcy*

Bespoke bankruptcy may have significant potential to assist some bankruptcy misfits; however, the concerns articulated above caution against its widespread adoption. To date, Congress has developed bespoke bankruptcy only in response to crises: Dodd-Frank came about

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248. *See The Status of PROMESA*, *supra* note 247, at 85 ("[T]he University depends on Title IV funds for its survival and yet the Fiscal Plan violates the eligibility requirements of Title IV.").

249. A related issue arises with respect to eligibility for Paycheck Protection Program (PPP) loans, which the Small Business Administration (SBA) is administering to help businesses address the economic fallout from COVID-19. *See* Alex Wolf, *Virus Aid Continues to Elude Bankrupt Companies as Deadline Hits*, BLOOMBERG L. (June 30, 2020, 5:16 AM), https://news.bloomberglaw.com/bankruptcy-law/virus-aid-continues-to-elude-bankrupt-companies-as-deadline-hits [https://perma.cc/J3AA-JA6Q]. Companies in bankruptcy are prohibited from applying for the loans under the SBA's rules, and some must "navigat[e] the waters between the PPP and reorganizing their businesses to survive." *Id.* Although hypothetical, it is worth questioning whether, if a bespoke regime were available, companies would take advantage of a bespoke process that does not call itself "bankruptcy" in order to maintain eligibility for PPP loans, as well as whether such a strategy would or should succeed.

250. *See* Barron, *supra* note 229 (discussing the oversight board's decision to reduce public pensions as "a denial of basic democratic principles").

because of the Great Recession, while Puerto Rico's looming defaults spurred Congress to enact PROMESA. Hastily enacted legislation may work well as a stopgap measure, but legislation that has been passed after consideration and debate may prove more robust in the long term.[251] Thus, it is worth considering whether and how Congress might identify entities that are good candidates for bespoke bankruptcy, as well as how Congress could assess if bespoke bankruptcy's benefits outweigh its costs for these candidates. This Section proposes a mechanism to achieve these results, consisting of an initial eligibility test followed by a four-factor assessment of any entities that pass the eligibility test. Each component of this mechanism is described more fully below.

1. The Eligibility Test

To determine whether an entity is minimally eligible for bespoke bankruptcy, this Article proposes a viability test. Specifically, policymakers should seek to identify entities that have no choice but to survive due to the public importance of the goods or services they provide. Put differently, this test asks whether an entity must remain viable to avert significant, systemic public harm—whether the entity, by virtue of what it provides, is "too important to fail."[252] Use of the viability test means that bespoke bankruptcy does not replace the Bankruptcy Code for the majority of debtors that currently use it.

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251. *See* Wyss & Kaske, *supra* note 1 ("The implementation of Promesa without a comprehensive development plan has proved to be difficult, if not unsuccessful."). The numerous challenges PROMESA has faced since its enactment illustrate how speedy legislation can become an easy target for its critics. *See, e.g.*, Michelle Kaske, *Ambac Seeks to Dismiss Puerto Rico's Record Bankruptcy*, BLOOMBERG L. (May 26, 2020, 9:20 PM), https://news.bloomberglaw.com/bankruptcy-law/ambac-seeks-to-dismiss-puerto-ricos-record-bankruptcy [https://perma.cc/QSR6-CX2B] (discussing allegations that PROMESA is unconstitutional); *see* Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1671–83 (2020) (Sotomayor, J., concurring) (questioning whether Congress had the power to create the PROMESA oversight board).

252. Shlomit Azgad-Tromer, *Too Important to Fail: Bankruptcy Versus Bailout of Socially Important Non-Financial Institutions*, 7 HARV. BUS. L. REV. 159, 164 (2017). For a discussion of "socially important non-financial institutions" that might pass this test because they are "too important to fail," see *id.* at 161–62, 173, 175. In addition to these entities, others may pass the viability test if they, as a group, will overwhelm the economy in the absence of a bailout. These entities may include companies that are critically important to the economy, such as the auto industry, or even insurance companies. *See, e.g.*, TOO BIG TO FAIL: POLICIES AND PRACTICES IN GOVERNMENT BAILOUTS 222 (Benton E. Gup ed., 2004) (quoting an auto industry analyst describing Chrysler as "too big, too important, [having] too many employees, and [paying] taxes in too many states for the government not to consider seriously the possibility of the company going out of business"). A full exploration of these entities is outside this Article's scope; however, if these entities pass the viability test as a group, the current, ad hoc bailout processes that have been used for their rescue in the past should be weighed against the benefits of a bespoke bankruptcy regime.

A viability test makes sense as an eligibility floor in part because the Bankruptcy Code often implicitly assumes that debtors will have the choice to either liquidate assets or reorganize.[253] The Bankruptcy Code's own structure reinforces the idea of choice for the vast majority of debtors it accommodates.[254] For example, a business debtor may proceed under Chapter 11 or under Chapter 7.[255] Individuals may choose to either liquidate their debts under Chapter 7 or keep their assets and propose a repayment plan under Chapter 13.[256] Debtors that must remain viable, however, lack a meaningful choice among options: they must continue in their role as providers of important public goods and services despite their financial distress.

The viability test also makes sense given the high potential costs of bespoke bankruptcy. If an entity is important enough that it must survive despite financial difficulties, it is arguably worth going through the trouble of creating a bespoke process to save it, if one is needed.[257] Put differently, a viability test for bespoke bankruptcy makes sense because the entities that can pass this test have a need for survival that justifies the increased uncertainty and cost associated with the process of creating bespoke legislation.

Some scholars have already begun to recognize that Code-based bankruptcy does not work well for these "too-important-to-fail" entities.[258] Many of them are, in essence, too big for bankruptcy—their problems go beyond those that the procedures in the Bakruptcy Code are designed to address. As a result, the federal government must often get involved when these entities face financial distress.[259] To this extent, the viability test can mitigate concerns about federal government overreach, as the federal government may have to be involved in the resolution of these entities' financial distress, regardless of the mechanism they use. In

253. *See supra* Section I.B.

254. *See* 11 U.S.C. § 109.

255. *See id.*

256. *See id.*

257. The question of whether a bespoke process is actually needed is dealt with through the four-factor assessment, discussed in Section III.B.2.

258. Azgad-Tromer, *supra* note 252, at 162–63 (arguing that the bankruptcy process suboptimally values new investment opportunities for many of these entities).

259. *See id.* at 173. For example, the Dodd-Frank Act recognizes that certain financial institutions that are "too big to fail" should be subject to more regulation and oversight by, for example, the submission of "living will[s]" to a federal regulator. *See Living Wills (or Resolution Plans)*, *supra* note 142; *see also* Brian Chappatta, *OPINION: MTA Can't Go Bankrupt. So How Does It Survive?*, BLOOMBERG L. (June 29, 2020, 6:00 AM), https://news.bloomberglaw.com/bankruptcy-law/opinion-mta-cant-go-bankrupt-so-how-does-it-survive [https://perma.cc/E37A-86GQ] (discussing how Congress has provided money to the Metropolitan Transit Authority in New York to cover decreases in ridership during the COVID-19 pandemic and noting that "[t]o some extent, 'every mass transit system needs to be subsidized'" in part because they are "too big to fail").

other words, the viability test can be used to identify entities that require federal government involvement because of their importance to society at large.

Puerto Rico and its territorial instrumentalities are obvious examples of the type of entities that would pass the viability test. The government of Puerto Rico provides innumerable essential services to the Puerto Rican people, including education, social services, and utilities.[260] Although some government assets may be liquidated,[261] an entire liquidation of the territory's assets would be unthinkable. And, as previously discussed, Code-based bankruptcy was not an option for Puerto Rico and its territorial instrumentalities and would not have been an option without substantial modifications.[262] As a result, the federal government had to get involved to assist the island with resolving its fiscal distress.

2. The Four-Factor Assessment

Although the viability test substantially limits access to bespoke bankruptcy, the question remains whether bespoke bankruptcy is worth the effort, even for eligible entities. Thus, once an entity has passed the initial viability test, policymakers should further assess the entity's need for bespoke bankruptcy using the four factors articulated below.

Numerosity. The numerosity factor assesses how many of these entities exist. A critical question that must be addressed with respect to bespoke bankruptcy is how tailored the bespoke law can be without running afoul of the Constitution's requirement that Congress create *uniform* bankruptcy laws.[263] Notably, at least one scholar has expressed concern that PROMESA violates this uniformity requirement because Title III of the Act effectively applies only to Puerto Rico, and not to other U.S. territories.[264] Thus, the number of entities a proposed bespoke bankruptcy law would cover is important, not just because it may not be worth the effort to create bespoke relief for only one entity, but also

260. *See Puerto Rico*, USA.GOV, usa.gov/state-government/Puerto-rico [https://perma.cc/H5CG-7REQ] (listing the territory's major agencies); *About the Puerto Rico Energy Bureau*, P.R. ENERGY BUREAU, https://energia.pr.gov/en/about-the-commission/ [https://perma.cc/FP8D-YENH].

261. *See* Nick Brown, *Puerto Rico Board Approves Liquidation of Government Development Bank*, REUTERS (July 14, 2017, 9:34 PM), https://www.reuters.com/article/us-puertorico-debt-gdb-restructuring/puerto-rico-board-approves-liquidation-of-government-development-bank-id USKBN1A0012 [https://perma.cc/J5QH-SCG8] (discussing the oversight board's decision to wind down Puerto Rico's Government Development Bank).

262. *See supra* Section II.A.2.b.

263. *See* U.S. CONST. art. I, § 8, cl. 4 ("The Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States . . . .").

264. *See* Stephen J. Lubben, *PROMESA and the Bankruptcy Clause: A Reminder About Uniformity*, 12 BROOK. J. CORP. FIN. & COM. L. 53, 54 (2017).

because of the need to avoid the creation of "private" bankruptcy laws.[265] Practically speaking, "bespoke bankruptcy" means development of bespoke relief for a category of entities as a group rather than development of a bespoke framework for individual entities. Consideration of the numerosity requirement is also important because the cost of developing and implementing bespoke bankruptcy would skyrocket if a bespoke framework were tailored to each individual debtor in a group.

Similarity. The similarity factor asks how similar entities are to each other. Development of a bespoke bankruptcy framework for individual entities should be discouraged for reasons related to the Constitution's uniformity requirement described above, as well as for efficiency concerns. Instead, policymakers should assess whether an entity—for example, the territory of Puerto Rico—may be placed in a broader category of entities (e.g., all U.S. territories). To the extent that territories can be expected to face similar financial problems, it may make sense to adopt one bespoke framework for all territories as a group rather than bespoke bankruptcy for each individual territory.

Mismatch. This factor examines how well Code-based bankruptcy does or should work for the entities in question. In evaluating this factor, policymakers should take a hard look at the obstacles (or lack thereof) to simply amending the Bankruptcy Code to accommodate these debtors. If the entities in question are not eligible for Code-based bankruptcy, or if there is a significant conflict prohibiting the entities' access to Code-based relief, this factor weighs in favor of bespoke bankruptcy. On the other hand, if an entity's access to or use of bankruptcy can be easily accommodated through amending the Bankruptcy Code, this factor weighs in favor of Code-based bankruptcy.[266] Even if there is substantial

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265. *Id.* at 58 (observing that the Supreme Court has "provided Congress with the ability to enact laws dealing with geographically isolated problems, as long as the law operates uniformly upon a given class of creditors and debtors"); *see also* Kurt H. Nadelmann, *On the Origin of the Bankruptcy Clause*, 1 AM. J. LEGAL HIST. 215, 227 (1957) ("[I]t is no accident, we think, that the Bankruptcy Clause speaks of 'uniform laws,' rather than one 'uniform law,' which Congress may pass on the subject of bankruptcies, thus leaving Congress a free hand in adopting, if it so desired, different laws for different types of debtors."); Todd Zywicki, *Bankruptcy Clause*, HERITAGE FOUND., https://www.heritage.org/constitution/articles/1/essays/41/bankruptcy-clause [https://perma.cc/SP92-55RU] ("The 'uniformity' requirement does, how-ever, forbid 'private' bankruptcy laws that affect only particular debtors.").

266. Part II extensively describes instances where Congress has amended the Bankruptcy Code to provide easier access to or use of bankruptcy procedures. Other examples of access to bankruptcy that a Bankruptcy Code amendment would accommodate include the Family Farmer Relief Act of 2019, Pub. L. No. 116-51, 133 Stat. 1075, which expanded the debt limit for Chapter 12 bankruptcy eligibility, and the Honoring American Veterans in Extreme Need Act of 2019 (HAVEN Act), Pub. L. No. 116-52, 133 Stat. 1076, which excluded Veterans Affairs and Defense Department disability payments from the means test that determines bankruptcy eligibility for individual debtors.

mismatch between use of the Bankruptcy Code and the entities' needs, policymakers should still evaluate the existing alternatives to bankruptcy, if any, for the entities in question.

Tribal gaming corporations that are subject to the Indian Gaming Regulatory Act (IGRA)[267] provide a good example of mismatch. Although these entities are technically eligible for bankruptcy, there are significant conflicts between Chapter 11's absolute priority rule and the Code requirement that the estate preserve assets for the benefit of creditors, on the one hand, and the IGRA's requirement that a tribe hold the sole proprietary interest in a gaming operation, on the other.[268] These conflicts, along with other concerns about how tribal sovereignty might be reconciled with a federal bankruptcy regime, suggest a high degree of mismatch between a distressed tribal gaming operation's needs and the Bankruptcy Code's responsiveness to those needs.

Vulnerability. Finally, the vulnerability factor seeks to ascertain the risks to the financial stability of the entities in question. Another way of looking at this test is to assess an entity's need for the basic elements of bankruptcy relief. Do these entities need a compulsory, collective debt adjustment process due to the presence of competing creditor claims? Do they need breathing space in the form of an automatic stay or other moratorium to ensure their survival? Are there any concerns about financial mismanagement or systemic vulnerabilities in the way these entities are operated? Puerto Rico, for example, had multiple competing claims and a desperate need for breathing space to relieve it from its payment obligations. Further, the island was particularly vulnerable to economic shocks after years of fiscal mismanagement.

3. Some Thoughts on Process

The mechanism just described to determine the need for and usefulness of bespoke bankruptcy—a viability test combined with a four-factor assessment—is information-intensive and requires rigorous analysis. Thus, it is important to consider who would use this mechanism in practice. This Article has referred to "Congress" and "policymakers" more generally as those who would undertake the decision of whether and when to pass bespoke bankruptcy; ultimately, Congress would have the final say in the matter.[269] However, much of the heavy lifting would likely be done through the use of other experts, such as legal scholars,

267. Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 18 U.S.C. §§ 1166–68 and 25 U.S.C. §§ 2701–21).

268. *See* Coordes, *supra* note 85, at 382 (discussing extensive concerns about tribal sovereignty, the Indian Gaming Regulatory Act, and conflicts with the Bankruptcy Code's priority rules).

269. Per the Constitution, Congress has the power to enact "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4.

think tanks, and industry groups. This raises the additional concern that the process surrounding the creation of bespoke bankruptcy may be subject to lobbying, partisan debate, and other forms of undue influence. Unfortunately, this is a concern with the legislative process more generally, and it is a concern to which the Bankruptcy Code itself is not immune.[270] Although the extent to which special interests have dominated the legislative process is debatable,[271] this concern does highlight the need for information sharing and nonpartisan research to play a role in the development of bespoke bankruptcy.

C. *The Proposal in Action*

This Section provides a high-level, illustrative example of how this Article's proposed mechanism would work. It concludes that subsovereign entities, particularly U.S. states and some municipalities, would likely benefit from bespoke bankruptcy. Although subsovereigns are certainly not the only entities that may require bespoke bankruptcy, an examination of subsovereign debtors makes particular sense in light of PROMESA's relatively recent passage and questions that have arisen among government leaders about the possibility of state bankruptcy.[272] The remainder of this Section illustrates how policymakers might approach the factors and questions this Article's proposal articulates. Although this Article makes a case for subsovereigns to receive bespoke bankruptcy, a full and detailed inquiry—beyond what this Article highlights—into the considerations the proposal outlines would need to be undertaken before proceeding with the development of bespoke relief.

Subsovereigns clearly pass the viability test, making them minimally eligible for bespoke bankruptcy relief. These entities are the backbone of public life: they provide necessary services to the citizens that live within their borders. As Professor Clay Gillette wrote with respect to general-purpose municipalities:

> [L]ocal government provision addresses a market failure that would otherwise leave a void in service provision,

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270. *See* A. Mechele Dickerson, *Regulating Bankruptcy: Public Choice, Ideology, & Beyond*, 84 WASH. U. L. REV. 1861, 1903 (2006) (addressing the common concern that the 2005 amendments to the Bankruptcy Code were the product of industry capture and arguing instead that the legislative process balanced multiple, competing interests).

271. *See id.* at 1876.

272. *See, e.g.*, Carl Hulse, *McConnell Says States Should Consider Bankruptcy, Rebuffing Calls for Aid*, N.Y. TIMES (Apr. 22, 2020), https://www.nytimes.com/2020/04/22/us/coronavirus-mcconnell-states-bankruptcy.html [https://perma.cc/G4VA-H7RQ]. In addition, other territories, such as the U.S. Virgin Islands, may also require bespoke bankruptcy relief. *See* Amanda Albright, *There's a New Muni-Debt Crisis Brewing in Another U.S. Territory*, BLOOMBERG QUINT (Oct. 1, 2019, 10:58 PM), https://www.bloombergquint.com/business/there-s-a-new-muni-debt-crisis-brewing-in-another-u-s-territory [https://perma.cc/8J3Y-QV94].

> notwithstanding significant demand. Local government intervention becomes all the more important given that many of the services that have the characteristics of public goods are crucial to a high quality of life. These include security (police and fire), transportation (street maintenance), and health (sewer and water). . . . [I]f localities fail to provide these services in an adequate manner, residents with insufficient mobility will be unable to obtain them from any alternative source, given their undersupply in the private market. Local government incapacity to provide these services, therefore, constitutes an abrogation of the very functions for which the locality was created. . . . [M]unicipalities are created in large part to provide public goods and services not available in the market . . . .[273]

State governments similarly provide crucial services, including "police protection, education, highway building and maintenance, welfare programs, and hospital and health care."[274] Liquidation of state and municipal assets would create significant public harm. These subsovereigns are clearly "too important to fail."[275]

Moving on to the four-factor test, both states and municipalities are numerous. A proposed bespoke bankruptcy law for states would cover all fifty states, and a proposed bespoke bankruptcy law for municipalities could cover nearly 90,000 municipal governments.[276] Adopting bespoke bankruptcy for either states or municipalities would not cause concern about "private" bankruptcy laws.

Assessing the similarity factor requires a bit more nuance. Every state and municipality is managed differently. Yet, the basic structure of the services states provide and the ways in which they fund them (e.g.,

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273. Clayton P. Gillette, *How Cities Fail: Service Delivery Insolvency and Municipal Bankruptcy*, 2019 MICH. ST. L. REV. 1211, 1221–22 (2019).

274. *Financing State and Local Government*, USHISTORY.ORG, https://www.ushistory.org/gov/12b.asp [https://perma.cc/B8AL-KGC2].

275. Further evidence of the "too important to fail status" of states and municipalities comes from the Federal Reserve's municipal lending facility, which was created during the COVID-19 pandemic to allow states, counties, and cities to borrow from the federal government. *See An Illinois Default Is Unlikely, Citigroup Says*, CRAIN'S CHI. BUS. (June 8, 2020, 1:28 PM), https://www.chicagobusiness.com/government/illinois-default-unlikely-citigroup-says (describing how Illinois has used the municipal lending facility).

276. The most recent data available indicate a total of 89,476 municipal governments, made up of 39,044 general-purpose local governments and 50,432 special-purpose local governments. For a detailed breakdown, see *Number of Municipal Governments & Population Distribution*, NAT'L LEAGUE CITIES, https://www.nlc.org/number-of-municipal-governments-population-distribution#:~:text=MyNLC-Number%20of%20Municipal%20Governments%20%26%20Population%20Distribution,governments%20and%203.033%20county%20governments [https://perma.cc/5MUW-TNMQ].

through taxation) seem to indicate that states could be grouped together for purposes of bespoke bankruptcy.[277] Indeed, this is exactly what some proposals for Code-based state bankruptcy contemplate: one chapter of the Bankruptcy Code that would be devoted to the needs of all states.[278]

Municipalities are slightly more complicated. Generally speaking, municipalities can be broken down into "general-purpose," such as cities, towns, and counties, and "special-purpose," such as school districts, sewage districts, and water districts.[279] Special-purpose municipalities are functionally and structurally distinct from general-purpose municipalities.[280] This has led some scholars to suggest that separate bankruptcy procedures be used for special-purpose municipalities and general-purpose municipalities.[281] An analysis of the similarity factor suggests that a proposal could be made for bespoke legislation to separately address states, general-purpose municipalities, and special-purpose municipalities.

The mismatch factor also does not break down evenly between states and municipalities. Substantial adjustment to the Code would be necessary before it could accommodate U.S. states as debtors.[282] Although states are ineligible for Code-based bankruptcy, municipalities have an entire chapter of the Bankruptcy Code devoted to them. However, Chapter 9 bankruptcy often fails municipalities in critically important ways. Arguably, most general-purpose municipalities have succeeded in spite of Chapter 9, rather than through strict adherence to its framework.[283] The Detroit bankruptcy, which was hailed as a success,[284] ended as quickly and consensually as it did only because negotiators

277. *See Financing State and Local Government*, *supra* note 274 (discussing trends in state and local revenues and expenses).

278. *See, e.g.*, *Role of Public Employee Pensions in Contributing to State Insolvency and the Possibility of a State Bankruptcy Chapter: Hearing Before the Subcomm. on Cts., Com. & Admin. L. of the H. Comm. on the Judiciary*, 112th Cong. 32 (2011).

279. *Number of Municipal Governments & Population Distribution*, *supra* note 276.

280. *See* Coordes, *supra* note 62, at 348–49.

281. *See, e.g.*, *id.*; Buccola, *supra* note 73, at 854 n.136 (noting that special-purpose municipalities "present different considerations" than general-purpose entities because they "frequently resemble the commercial firms that file under Chapter 11 more than they do general purpose municipalities" and concluding that "Chapter 9 may work reasonably well for most special purpose debtors").

282. Mooney, *supra* note 182, at 702.

283. For a detailed discussion of how Chapter 9 often fails municipalities, see generally Coordes, *supra* note 62.

284. *See, e.g.*, Pete Saunders, *Detroit, Five Years After Bankruptcy*, FORBES (July 19, 2018, 1:36 PM), https://www.forbes.com/sites/petesaunders1/2018/07/19/detroit-five-years-after-bankruptcy/#e5a2d87cfebb [https://perma.cc/82P4-ZFSM] ("Five years on, however, it's incredible how far Detroit has come."); Corey Williams, *5 Years After Declaring Bankruptcy, Detroit Reborn at a Cost*, CHI. TRIB. (July 16, 2018, 1:09 PM), https://www.chicagotribune.com/business/ct-biz-detroit-reborn-20180716-story.html [https://perma.cc/4H4P-X23L] ("The turnaround since [the bankruptcy] has been remarkable . . . .").

working outside of the Chapter 9 process struck the Grand Bargain, a deal that arguably altered the priority rules typically seen in bankruptcy.[285] In contrast, Vallejo, California, which completed a more traditional Chapter 9 bankruptcy, has been beset by the same financial difficulties that caused it to enter bankruptcy in the first place.[286]

Chapter 9's mismatch with the needs of general-purpose municipalities, in particular, is evident from both legal scholarship and practice. Most scholars that study Chapter 9 in depth have proposed substantial changes to the process,[287] observing that "[t]he current tools available to municipal . . . governments are insufficient to address the size, scale, and complexity of the fiscal situation" they are facing.[288] Questions of priority, and particularly a municipality's ability to prioritize pensioners over bondholders in light of state constitutional law and other constraints, suggest that Code-imposed priorities are at best undefined and at worst at odds with the practical realities of municipal debt restructuring.[289] Other scholars have pointed out that municipal distress can affect multiple jurisdictions at once; however, Chapter 9 only addresses one municipality at a time.[290]

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285. *See* Coordes, *supra* note 69, at 1265–66 (describing the extraordinary role of mediators in the Detroit bankruptcy); Nathan Bomey et al., *Judge OKs Bankruptcy Plan; a 'Miraculous' Outcome*, DET. FREE PRESS (Nov. 7, 2014, 9:34 PM), https://www.freep.com/story/news/local/detroit-bankruptcy/2014/11/07/rhodes-bankruptcy-decision/18648093/ [https://perma.cc/UXA6-L2MT] ("Several major financial creditors . . . argued repeatedly during the case that the grand bargain was illegal because it favored pensioners over other creditors.").

286. *See* Coordes, *supra* note 62, at 308, 324 (discussing Vallejo and other examples of how Chapter 9 "undermines the very objectives it is designed to help municipalities accomplish").

287. *See* Coordes, *supra* note 62, at 342 (arguing that Chapter 9, as currently used, contravenes many bankruptcy principles); Coordes & Reilly, *supra* note 156, at 496, 498 (describing the numerous and varied factors contributing to municipal fiscal distress and the inadequacy of Chapter 9 alone to resolve that distress); Omer Kimhi, *Reviving Cities: Legal Remedies to Municipal Financial Crises*, 88 B.U. L. REV. 633, 654 (2008) (discussing Chapter 9 in conjunction with oversight mechanisms); Juliet M. Moringiello, *Goals and Governance in Municipal Bankruptcy*, 71 WASH. & LEE L. REV. 403, 415–16 (2014) (arguing for a combination of state and federal tools to aid distressed municipalities); Aurelia Chaudhury et al., *Junk Cities: Resolving Insolvency Crises in Overlapping Municipalities*, 107 CALIF. L. REV. 459, 466 (2019) (advocating for coordination among distressed municipalities).

288. Mooney, *supra* note 182, at 697.

289. For a fuller discussion of state and municipal pension issues, see generally James E. Spiotto, *What Illinois Can Learn from the Supreme Court of Rhode Island and Even Puerto Rico About Public Pension Reform*, MUNINET GUIDE (Aug. 1, 2019), https://muninetguide.com/what-illinois-can-learn-from-the-supreme-court-of-rhode-island-and-even-puerto-rico-about-public-pension-reform/ [https://perma.cc/NF52-LVZX]. The City of Detroit arguably altered the Bankruptcy Code's priority scheme when it did not treat pensioners and bondholders equally. *See* Coordes, *supra* note 62, at 321 n.102 (observing that the city chose to pay its retirees more than its financial creditors, over objections from bond insurers).

290. *See, e.g.*, Chaudhury et al., *supra* note 287, at 482.

To be successful, municipal bankruptcy in practice looks very different from the process Congress envisioned through Chapter 9.[291] In practice, Chapter 9 seems to work best when combined with other tools, such as an emergency manager, increased state (or other external) funding, or a team of experienced mediators.[292] This suggests that debt relief for general-purpose municipalities, such as cities, towns, and counties, requires more than what Code-based bankruptcy can provide.

Notably, a different analysis may apply to special-purpose municipalities. These municipalities and their capital structures often look more like businesses than their general-purpose counterparts.[293] Because of this, Chapter 9 may not pose as much of a mismatch for special-purpose municipalities.[294]

Alternatives to bankruptcy for these subsovereigns often pose their own problems. Although the federal or state government may provide additional funding for state or local governments in distress,[295] bailouts raise concerns about moral hazard.[296] It is technically possible for general-purpose local governments to dissolve or merge with other localities; however, dissolutions or consolidations occur only rarely and are often subject to stringent conditions.[297] It is perhaps more likely that some special-purpose municipalities, such as school districts or hospitals, could be dissolved, with a new legal entity created to replace them;

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291. *See* Melissa B. Jacoby, *Federalism Form and Function in the Detroit Bankruptcy*, 33 YALE J. ON REG. 55, 57 (2016) (noting that Detroit's success in Chapter 9 might be credited to the bankruptcy court and that this "defies the conventional wisdom about municipal bankruptcies in the legal world").

292. *See id.* at 59 (noting the strategy used in Detroit, which was "structured . . . around levers of control: active case management, deal-making and settlement promotion, team building, and a 'court of the people'" (footnotes omitted)).

293. *See* Buccola, *supra* note 73, at 858, 861.

294. *See id.* at 858 (noting that the "primary target" of early municipal bankruptcy legislation was the debt of special-purpose municipalities).

295. For example, the Federal Reserve has established a municipal liquidity facility, which will purchase short-term notes from state and local governments in order to help them manage their cash flow during the economic fallout from the COVID-19 pandemic. *See Municipal Liquidity Facility*, BD. GOVERNORS FED. RSRV. SYS., https://www.federalreserve.gov/monetarypolicy/muni.htm [https://perma.cc/CL5C-6X2X]. Ultimately, however, the Federal Reserve is expecting to be repaid for these purchases, so the facility can hardly be deemed a bailout. *See* BD. OF GOVERNORS OF THE FED. RSRV. SYS., REPORT TO CONGRESS PURSUANT TO SECTION 13(3) OF THE FEDERAL RESERVE ACT: MUNICIPAL LIQUIDITY FACILITY 1 (2020), https://www.federalreserve.gov/publications/files/municipal-liquidity-facility-4-16-20.pdf [https://perma.cc/CDB6-X35K].

296. *See* David A. Skeel, Jr., *Is Bankruptcy the Answer for Troubled Cities and States?*, 50 HOUS. L. REV. 1063, 1080 (2013) (observing that there is a strong case for adopting formal restructuring when bailout is the alternative).

297. *See* Michelle Wilde Anderson, *Dissolving Cities*, 121 YALE L.J. 1364, 1386 (2012) (discussing dissolutions); Laura N. Coordes, *When Borders Dissolve*, 93 CHI.-KENT L. REV. 649, 653 (2018) (discussing consolidations).

however, this process may jeopardize creditors' access to tax revenues generated by the entity. Finally, Congress has sought to limit the ability of states to adjust the debts of their municipalities on their own through measures such as compositions.[298]

The extent to which states and municipalities are truly vulnerable to financial shocks is a hotly debated issue. Some commentators point out that states, and to some degree municipalities, can address revenue shortfalls through their power to tax.[299] At the same time, there are practical limitations on a state or local government's taxing power. Notably, tax increases can spur residents to leave if they are unwilling to pay the increases.[300] Exogenous shocks, for example a global pandemic or recession, may make it difficult or impossible for residents to pay their taxes.[301] And although the federal government has occasionally been willing to assist financially troubled state and local governments, such relief is limited and difficult to come by.[302] Furthermore, states cannot print their own currency or refuse to pay their debts if the federal government requires them to do so.[303] As others have recognized, many states are facing looming pension crises, and some mechanism to deal with these crises will be necessary in the future.[304] Thus, there is a very real possibility that states may find themselves in a position similar to that of Puerto Rico: facing multiple creditors, layers of debt, and an

298. SAM HOBBS, AMENDING THE MUNICIPAL BANKRUPTCY ACT, H.R. REP. NO. 79-2246, at 4 (1946) (reporting on H.R. 6682's overruling of the Supreme Court's decision in *Faitoute Iron & Steel Co. v. City of Asbury Park*, which upheld a state law permitting municipal debt adjustment only if 85% of the city's creditors agreed, by expressly prohibiting state laws that provided for debt adjustment without full creditor consent).

299. *See, e.g.*, Josh Barro, *Why Mitch McConnell's State Bankruptcy Idea Is So Stupid*, INTELLIGENCER (Apr. 26, 2020), https://nymag.com/intelligencer/2020/04/why-mitch-mcconnells-state-bankruptcy-idea-is-so-stupid.html [https://perma.cc/B6HE-CZ6D] (observing that "states have the power to tax, and to increase taxes in times of budget shortfall"). *But see* Colin McGrath, Comment, *Municipal Bankruptcy and the Limits of Federalism*, 18 U. PA. J. CONST. L. 1265, 1267 (2016) ("The proliferation of tax revolts across the United States during [the late 1970s and 1980s] . . . further depressed local governments' access to operating funds.").

300. *See* Gillette, *supra* note 273, at 1213.

301. *Id.* at 1215–16.

302. For example, the Federal Reserve's municipal liquidity facility, launched due to the COVID-19 pandemic, was designed to be used only as a last resort and is available only to states and localities meeting a particular population threshold. *See* Bradley N. Ruwe & Marc T. Kamer, *The Federal Reserve's Municipal Liquidity Facility: Providing Financial Relief But at What Cost?*, DINSMORE (May 20, 2020), https://www.dinsmore.com/publications/the-federal-reserves-municipal-liquidity-facility-providing-financial-relief-but-at-what-cost/ [https://perma.cc/N2K7-3KY6] (describing the facility as a "last resort" and discussing eligibility for its use); *see also* Coordes & Reilly, *supra* note 156, at 500 (discussing the flaws and limitations of state intervention programs).

303. *See* Timothy Zick, *Are the States Sovereign?*, 83 WASH. U. L.Q. 229, 282 n.326 (2005) (noting constitutional limitations on state authority).

304. *See* Mooney, *supra* note 182, at 677 (discussing data about pension crises in the states).

inability to simply liquidate assets due to the important public services they provide.[305]

After weighing the above factors, it seems reasonable to assume that certain subsovereigns, such as states and general-purpose municipalities, would be good candidates for bespoke bankruptcy. If that is the case, what benefits could one expect bespoke bankruptcy to provide? The primary overarching benefit of bespoke bankruptcy would be to resolve the mismatch between these subsovereigns and Code-based relief. For example, a bespoke system could provide for deviations from Code-based priority or even an entirely different priority scheme than the Bankruptcy Code articulates.[306] As Congress did with PROMESA, a bespoke framework could also provide for coordinated debt relief across jurisdictions—for example, debt relief for multiple municipalities or a municipality and the state in which it is located, in one coordinated process.[307] Moreover, a bespoke framework would give Congress more leeway to design more appropriate relief in general—for example, by developing new plan confirmation standards for subsovereigns.

Commentators have long observed that the Code's plan confirmation standards, which are largely borrowed from Chapter 11's standard template, do not work well in Chapter 9.[308] As an example of just how difficult it is to apply these standards in practice, the judge overseeing the Detroit bankruptcy looked to his conscience and sense of morality to resolve difficult questions regarding the confirmation of Detroit's debt adjustment plan.[309] Bespoke bankruptcy could provide for alternative plan confirmation standards that are more specific to and appropriate for

305. *See id.* at 688 ("[D]ealing with restructuring social benefits is more complicated politically and constitutionally."); Alexandre Tanzi, *Nine States Face Economic Contraction, Most Since 2009 Crisis*, BLOOMBERG BUSINESSWEEK (Jan. 2, 2020, 4:43 PM), https://www.bloomberg.com/news/articles/2020-01-02/nine-states-face-economic-contraction-most-since-2009-crisis [https://perma.cc/R6UA-HX9F] (observing that the economies of nine states are expected to contract within six months and that this is the greatest number of states in this position since July of 2009).

306. *See* Mooney, *supra* note 182, at 737 (noting that priorities in state or municipal bankruptcy might need to be different).

307. *See* Chaudhury et al., *supra* note 287, at 507 ("Puerto Rico's current debt restructuring process offers a real-world test of what a system built around the concept of tax-base insolvency might look like in the context of overlapping jurisdictions.").

308. *See, e.g.*, Michael J. Deitch, Note, *Time for an Update: A New Framework for Evaluating Chapter 9 Bankruptcies*, 83 FORDHAM L. REV. 2705, 2726–27 (2015) (discussing inconsistencies in Chapter 9 plan confirmation orders); Juliet M. Moringiello, *Chapter 9 Plan Confirmation Standards and the Role of State Choices*, 37 CAMPBELL L. REV. 71, 75 (2015) (discussing the lack of clarity in Chapter 9 plan confirmation standards).

309. Coordes, *supra* note 62, at 342 n.241.

subsovereign debtors.[310] If Congress used bespoke bankruptcy in lieu of Chapter 9 for general-purpose municipalities, it could work to provide those entities with a menu of options that is both more expansive than and substantially different from the Bankruptcy Code's standard templates.

Bespoke bankruptcy may also be a better avenue than Code-based bankruptcy for those who would like to extend bankruptcy protection to states. Indeed, others have already suggested that, even though Puerto Rico differs from a state government in important ways,[311] PROMESA could serve as a template for state bankruptcy, should the need or desire arise to provide bankruptcy for states.[312]

Importantly, this Article does not advocate for expanding bankruptcy access to U.S. states. A full discussion of the merits and drawbacks of doing so is beyond this Article's scope and has been taken up by others.[313] Rather, this Article simply contends that *if* a debt relief mechanism is ultimately adopted for the states, such a mechanism should be bespoke rather than Code-based.[314]

Regardless of whether it is applied to municipalities, states, or both, bespoke bankruptcy could provide for coordination of bankruptcy and nonbankruptcy tools. For example, in the municipal context, bespoke bankruptcy could offer a combination of a judicial debt adjustment process with use of an oversight board or financial manager, as well as an explicit role for the state. Scholars have already advocated for these options as part of municipal bankruptcy reform.[315] For states and territories, bespoke bankruptcy could offer a combination of traditional bankruptcy relief and sovereign debt restructuring tools, similar to the way that PROMESA incorporates both options. Finally, bespoke bankruptcy may even have rhetorical benefits. As recent discussions about state bankruptcy have shown, "bankruptcy" is a politically charged

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310. There is already a developing literature about specific changes to Chapter 9 plan confirmation standards that may be desirable to implement. *See, e.g.*, Michael W. McConnell & Randal C. Picker, *When Cities Go Broke: A Conceptual Introduction to Municipal Bankruptcy*, 60 U. CHI. L. REV. 425, 466 (1993) (exploring the use of the confirmation standards as a means for influencing governance); C. Scott Pryor, *Who Pays the Price? The Necessity of Taxpayer Participation in Chapter 9*, 24 WIDENER L.J. 81, 85 (2015) (discussing the possibility of using the feasibility standard to account for taxpayer interests).

311. *See* Block, *supra* note 176, at 238–40 .

312. *See, e.g.*, Mooney, *supra* note 182, at 713–18 (proposing a PROMESA-like process for states). Professor Skeel has also proposed an alternative to state bankruptcy in the form of a federal oversight strategy. *See* Skeel, *supra* note 214, at 729, 731.

313. *See, e.g.*, Schwarcz, *supra* note 214, at 335–43 (discussing the merits of expanding bankruptcy access to the states). *See generally* Skeel, *supra* note 214 (exploring the benefits of state bankruptcy in addition to the reasons for resisting this framework).

314. *See generally, e.g.*, Schwarcz, *supra* note 214 (proposing a solution enabling states to work out their debt problems with creditors).

315. *See* Kimhi, *supra* note 102, at 385 (arguing for oversight boards); Moringiello, *supra* note 308, at 75 (arguing for increased state involvement).

word.[316] Indeed, although it includes a bankruptcy process, PROMESA contains no reference to "bankruptcy" at all. Because it exists outside of the Bankruptcy Code, bespoke bankruptcy can be framed as something other than bankruptcy and therefore may pass a political litmus test that Code-based bankruptcy cannot.

The fact that subsovereigns such as state and local governments pass the viability test mitigates, but likely does not completely resolve, concerns about federal government overreach. As Puerto Rico's experience with PROMESA illustrates, concerns about federal encroachment are always present when considering oversight mechanisms linked to debt restructuring. To the extent possible, Congress should work with state and local leaders if and when it develops bespoke bankruptcy for these subsovereigns, and it should emphasize the extent to which bespoke bankruptcy can represent a partnership among governments rather than an imposition by Congress.

Relatedly, a core purpose of this Article's proposal is to identify candidates for bespoke bankruptcy *ex ante*—before distress hits. Although it is arguably difficult to entice Congress—or any entity—to plan for possible fiscal distress,[317] identifying candidates and exploring options for bespoke relief before distress hits has significant advantages. Although it cannot be stated for certain, it is possible that many of the problems Puerto Rico has experienced with PROMESA's implementation could have been mitigated or avoided entirely by careful drafting or coordination with the territorial government. For example, the litigation surrounding the constitutionality of the oversight board's appointment might have been resolved in advance by simply providing for the Senate to confirm the President's board choices. And the inclusion of local leaders in the drafting of PROMESA may have mitigated some of the negative perceptions associated with PROMESA on the island.

Another reason to develop bespoke bankruptcy *ex ante* relates to creditor expectations. Experience with both PROMESA and municipal bankruptcies has shown that creditors will vehemently resist post-distress alterations in priority.[318] Indeed, as discussed, one of the key problems with municipal bankruptcy is the lack of a defined priority scheme that clearly applies in the municipal context. Creating a defined priority

316. *See* CEMBALEST, *supra* note 221 ("That's why it was disappointing to see [state bankruptcy] . . . framed in the press as a crude partisan divide after comments from Senator McConnell and various reactions to them.").

317. *See* Gillette & Skeel, *supra* note 71, at 1183 ("No mayor wants to be the one who has put his or her city in bankruptcy.").

318. *See, e.g.*, Rochelle, *First Circuit*, *supra* note 235; Joseph Lichterman, *Protecting Detroit Pensions May Violate Bankruptcy Code: Judge*, REUTERS (Oct. 21, 2013, 7:38 PM), https://www.reuters.com/article/us-usa-detroit-bankruptcy/protecting-detroit-pensions-may-violate-bankruptcy-code-judge-idUSBRE99K19W20131021 [https://perma.cc/6DHS-5ZEZ].

scheme in advance allows parties to know where they stand relative to others if and when bankruptcy occurs.

Finally, although this Article has used subsovereigns as an illustrative example of the type of entity that may benefit from bespoke relief, this does not represent the full scope of bespoke bankruptcy's potential applications. Other debtors—private as well as public—may qualify for bespoke bankruptcy. For example, utilities may be another candidate for consideration. As PG&E's recent bankruptcy shows, utilities often provide critical public services and play a significant public role, such that financial distress that provokes concerns about viability often necessitates government involvement.[319] In PG&E's bankruptcy, a creditor group even argued that the company was overly focused on value maximization to the detriment of the residents and businesses it serves as customers.[320] And observers have concluded that bankruptcy has not worked well for PG&E, suggesting that it is "exiting bankruptcy facing many of the same challenges as it did the day it filed."[321]

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319. For example, PG&E is incredibly important to the public of California, to the point where the governor has threatened a state-led takeover of the utility if it does not quickly reorganize in Chapter 11. *See* Mark Chediak, *California Governor Threatens to Step in and "Restructure" PG&E*, BLOOMBERG (Nov. 2, 2019, 9:00 AM), https://www.bloomberg.com/news/articles/2019-11-01/california-governor-threatens-to-step-in-and-restructure-pg-e [https://perma.cc/N8RV-DCHQ]; Steven Church, *PG&E May Pay $1 Billion in Financing Fees to Banks, Backers*, BLOOMBERG (Nov. 7, 2019, 2:18 PM), https://www.bloomberg.com/news/articles/2019-11-07/pg-e-fees-may-hit-1-billion-for-turnaround-bankers-and-backers [https://perma.cc/6JN8-W8C2] (observing that the PG&E bankruptcy is unusual in part due to the impact on millions of people and the state governor's involvement). PG&E is a private entity, but it has a significant public impact. Steven Church & Mark Chediak, *PG&E Falls After Losing Legal Fight Over California Fire Policy*, BLOOMBERG GREEN (Nov. 29, 2019, 10:09 AM), https://www.bloomberg.com/news/articles/2019-11-27/pg-e-loses-fight-over-wildfire-policy-that-led-to-its-bankruptcy [https://perma.cc/R38E-C3P5] (noting that PG&E is treated similarly to a public entity in California). Indeed, the Governor of California functionally had to approve PG&E's bankruptcy plan. *See* Mark Chediak, *PG&E Plunges as It Races to Meet Governor's Bankruptcy Demand*, S.F. CHRON. (Dec. 16, 2019), https://www.sfchronicle.com/business/article/PG-E-plunges-as-it-races-to-meet-governor-s-14909701.php [https://perma.cc/85T6-SHTC].

320. *See* Scott Deveau & Mark Chediak, *Elliott Bashes PG&E Bankruptcy Plan as Failing State Guidelines*, BLOOMBERG L. (Dec. 12, 2019, 9:34 AM), https://news.bloomberglaw.com/bankruptcy-law/pimco-elliott-group-presses-newsom-to-reject-pg-e-restructuring [https://perma.cc/58XT-AXT8].

321. Mark Chediak, *PG&E Is Set to Exit Bankruptcy, Ending Saga Sparked by Fires*, BLOOMBERG L. (June 17, 2020, 7:00 AM), https://news.bloomberglaw.com/environment-and-energy/pg-e-bankruptcy-judge-says-he-will-approve-companys-plan-1 [https://perma.cc/Q3GA-SCXY] (noting that PG&E "will emerge from Chapter 11 having nearly doubled its debt to more than $38 billion"); *see also* Mark Chediak, *PG&E Bankruptcy Judge to Confirm Restructuring Plan*, BLOOMBERG L. (June 17, 2020, 8:44 PM), https://news.bloomberglaw.com/environment-and-energy/pg-e-bankruptcy-judge-to-confirm-restructuring-plan [https://perma.cc/W5BV-F7JD] (quoting the bankruptcy judge who confirmed PG&E's plan as saying that rejecting the plan "'is not an acceptable alternative' because there are no other options on the table").

In addition to utilities, there are many other possibilities to explore. A review of the existing bankruptcy literature suggests that mass tort cases,[322] churches,[323] nonprofits,[324] and public universities[325] are all potential candidates for a bespoke regime. In short, other bankruptcy misfits exist and should be considered as possible contenders for bespoke relief. As scholars continue to uncover the difficulties that these and other entities experience, the framework proposed above will help them reach a determination about whether a bespoke regime is indeed necessary or appropriate in any given instance.

CONCLUSION

The Bankruptcy Code provides debt relief for a vast number of entities every day. But it does not, and cannot, accommodate every entity that might seek to use it. This Article explored whether and when Congress might consider adapting bankruptcy law to accommodate certain bankruptcy misfits. In particular, it advocated for the expanded use of a concept that has already been introduced into U.S. bankruptcy law: bespoke bankruptcy. To date, bespoke bankruptcy has been used too little and too late—it has been developed for only a handful of bankruptcy misfits and only on an *ex post*, ad hoc basis. It is thus an undertheorized and underutilized concept.

Over the years since the enactment of the Bankruptcy Code, the legal community has come to recognize that traditional, Code-based bankruptcy mechanisms do not serve all debtors well and that concepts such as bankruptcy priority, feasibility, and value maximization do not apply evenly across the board.[326] At the same time, the lack of any alternative framework in most cases has meant that many bankruptcy misfits end up using Code-based bankruptcy simply because that is the only option available. This Article encourages the robust exploration of

322. *See, e.g.*, Yair Listokin & Kenneth Ayotte, *Protecting Future Claimants in Mass Tort Bankruptcies*, 98 NW. U. L. REV. 1435, 1435 (2004) ("The problem of 'future claimants' plagues the resolution of mass tort bankruptcies.").

323. *See, e.g.*, David A. Skeel Jr., *"Sovereignty" Issues and the Church Bankruptcy Cases*, 29 SETON HALL LEGIS. J. 345, 346 (2005) ("Of particular concern was the danger that the bankruptcy laws, which provide for extensive oversight of the debtor's finances, might interfere with the religious affairs of the church, thus running afoul of the First Amendment guarantee of free exercise of religion.").

324. *See, e.g.*, Pamela Foohey, *Chapter 11 Reorganization and the Fair and Equitable Standard: How the Absolute Priority Rule Applies to All Nonprofit Entities*, 86 ST. JOHN'S L. REV. 31, 32–33 (2012) (discussing the challenges nonprofit institutions face in bankruptcy).

325. *See, e.g.*, Bruckner, *supra* note 41, at 241 (observing that higher education institutions "are effectively precluded from reorganizing in bankruptcy because of financial disincentives created by Congress").

326. *See, e.g.*, Azgad-Tromer, *supra* note 252, at 162–63; Christopher K. Odinet, *Of Progressive Property and Public Debt*, 51 WAKE FOREST L. REV. 1101, 1102 (2016).

bespoke bankruptcy alternatives to Code-based bankruptcy relief and offers a proposal to identify candidates for bespoke bankruptcy.

To be clear, proposing further consideration and development of bespoke bankruptcy does not mean that bespoke bankruptcy is problem-free, or even less prone to problems than its Code-based cousin. As this Article has repeatedly emphasized, there are many legal, political, and practical considerations that must be accounted for in the development of any bespoke framework. For this and other reasons, this Article has proposed that bespoke bankruptcy be available only to a small subset of debtors—those who can, at a minimum, pass this Article's viability test. Although this subset of debtors is small in number compared to those eligible for Code-based bankruptcy, it includes entities that perform critical roles in society, such that the increased costs and uncertainty of a bespoke framework may be justified.

Much work needs to be done to implement bespoke bankruptcy as a robust complement to Code-based relief. Future work should explore processes that policymakers could use to coordinate actors and develop bespoke relief, when appropriate. Relatedly, an in-depth discussion of the extent to which Code-based practices should continue to dominate bankruptcy law in the future is likely necessary. And more research into bespoke bankruptcy's possible effects on other parts of U.S. law is certainly needed. Although substantial work lies ahead, this Article, by defining bespoke bankruptcy and articulating the steps needed to assess whether it is worth the effort, has set the stage for a new direction in bankruptcy law.