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BANKRUPTCY STEP ZERO

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Bankruptcy Step Zero

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In *RadLAX Gateway Hotel, LLC v Amalgamated Bank*,[1] the Supreme Court returned once again to interpreting the absolute priority rule, the foundational principle of the law of corporate reorganizations. The opinion itself, however, gives no hint that the Court was revisiting an issue that it has confronted many times over the last century. Rather than unpacking the contours of absolute priority, the Court focused on what has emerged as a central theme of the Court's recent bankruptcy jurisprudence: the proper domain of the bankruptcy judge.

One might expect the Court to approach that question of domain as it has for administrative agencies.[2] After all, both bankruptcy courts and administrative agencies are non-Article III tribunals.[3] But the Court sees them in an altogether different light. Administrative agencies are entrusted in the first instance with carrying out federal policies. They are parts of the executive, and a politically

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[1] 132 S Ct 2065 (2012).

[2] The Court's approach to administrative agencies of course finds it foundation in *Chevron USA v Natural Resource Defense Council, Inc*, 467 US 837 (1984).

[3] Indeed, it has been noted that bankruptcy courts could just as well have been organized as administrative agencies had history played out differently. See Douglas G. Baird, *Blue Collar Constitutional Law*, 86 Am Bankr L J 3, 15 (2012). Others have gone further and suggested that bankruptcy administration *should* be transformed today into an executive-agency model where law making is done by the agencies charged with administering the bankruptcy law. See, for example, Rafael Pardo and Kathryn Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L Rev 384 (2012).

accountable legislature can delegate matters to them. And the scope of that delegation is often viewed quite broadly. They enjoy considerable leeway. In contrast, the Court has confined the space within which the bankruptcy judge may operate.

Some of the explanation for this contrast lies in the different relationship that agencies and bankruptcy courts have with Article III courts. Bankruptcy courts are entirely within the Judiciary. Article III judges themselves appoint bankruptcy judges. Article III judges can withdraw cases from the bankruptcy courts, or refuse to refer them to bankruptcy courts in the first instance. Moreover, every bankruptcy judge's interpretations of law are reviewed de novo on appeal in the same fashion as those of any other inferior court. But in addition to and quite apart from the different structural relationship, the Court's own understanding of bankruptcy law itself shapes its view about the powers entrusted to the bankruptcy judge.

There are three principal strands to the Court's bankruptcy jurisprudence. The first, embodied in *Butner v United States*[4] and its progeny, centers on the idea that the bankruptcy forum must vindicate nonbankruptcy rights. In contrast to administrative agencies that give shape to federal policies, bankruptcy judges should not unsettle nonbankruptcy rights—rights that are largely creatures of state rather than federal law. In the absence of a clear directive from Congress, those nonbankruptcy rights trump a judge's impulse to advance federal policy. The second strand, beginning with *Northern Pipeline Construction Co v Marathon Pipeline Co*[5] and continuing last Term in *Stern v Marshall*,[6] focuses on the limits of bankruptcy in a different way. Unlike the public rights at the center of the administrative state, the traditional state rights at stake in bankruptcy lie at the heart of the judicial power and cannot be entrusted to non-Article III courts. Bankruptcy judges must therefore limit themselves to deciding issues central to the administration of the bankruptcy process. They cannot issue a final judgment

[4] 440 US 48 (1979).

[5] 485 US 50 (1982).

[6] 131 S CT 2594 (2011).

with respect to those controversies in bankruptcy that are "the stuff of the traditional actions at common law tried by the courts at Westminster."[7]

RadLAX is the latest manifestation of a third strand, one driven in large measure by the frequent inability of Article III courts to review the decisions of bankruptcy judges before it is too late to give the losing party an effective remedy. Even with respect to matters properly entrusted to bankruptcy judges, *RadLAX* makes it plain that the Court reads ambiguous provisions of the Bankruptcy Code in a fashion that narrows the range of decisions over which the bankruptcy judge may exercise her discretion—at least when the exercise of that discretion might impact nonbankruptcy rights. Where the statute is ambiguous and nonbankruptcy rights might be compromised, the preferred reading in those cases is the one that is more rule-like. As the Court put it, "The Bankruptcy Code standardizes an expansive (and sometimes unruly) area of law, and it is our obligation to interpret the Code clearly and predictably using well established principles of statutory construction."[8] The Bankruptcy Code should be read narrowly to ensure that bankruptcy judges stay on a clearly demarcated path.

That view is in stark contrast to the Court's approach in administrative law. There the Court observed long ago that Congress has established non-Article III tribunals "to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by [those] specially assigned to that task."[9] But in bankruptcy the Court sees flexibility in the Bankruptcy Code as a potential source of mischief. The need to accommodate practical difficulties works as a thumb on the scale in assessing the operation of administrative tribunals, yet such pragmatism is not part of how the Court approaches bankruptcy courts.[10] Bankruptcy courts, it seems, need a disciplining hand that ordinary agencies do

[7] *Id* at 2609.

[8] *RadLAX*, 132 S Ct at 2073.

[9] *Crowell v Benson*, 285 US 22, 46 (1932).

[10] See Troy A. McKenzie, *Getting to the Core of* Stern v. Marshall: *History, Expertise, and the Separation of Powers*, 86 Am Bankr L J 23, 42 (2012).

not. This paper attempts to make sense of this state of affairs and proceeds in three parts.

RadLAX is, in the first instance, a straightforward question of statutory interpretation, and Part I sets out the statutory provision that *RadLAX* confronts and identifies the interpretative challenge it poses. Part II links *RadLAX* to the foundational question of the domain of bankruptcy judges, and Part III explores the consequences that follow from having federal bankruptcy policy vindicated in a forum so different from those of the administrative state. The conclusion returns to the puzzle of why the Court perceives the need for oversight so differently.

I. The "Fair and Equitable" Benchmark

The law of corporate reorganizations has as its central requirement that plans of reorganization be "fair and equitable."[11] The core substantive meaning of that phrase has long been settled. The "fair and equitable" requirement imposes a regime of absolute priority.[12] A plan must provide for full payment to the senior creditors whenever it provides anything to anyone junior.[13] The Bankruptcy Code, however, does not set out clearly the discretion that the bankruptcy court enjoys in deciding how the senior creditor is protected.

The *RadLAX* case itself grew out of the financial failure of the Radisson Hotel at Los Angeles International Airport. The debtor borrowed to renovate the hotel and build a parking lot next to it. The economic downturn of 2008 unsettled these plans. The debtor filed a Chapter 11 petition in August 2009, with the parking lot incomplete and owing its senior lender $120 million. No one believed the property was worth that much. After extensive marketing, the debtor found a

[11] 11 USC § 1129(b).

[12] See Douglas G. Baird and Thomas H. Jackson, *Bargaining after the Fall and the Contours of the Absolute Priority Rule*, 55 U Chi L Rev 738, 744 n 20 (1988).

[13] See Walter J. Blum and Stanley A. Kaplan, *The Absolute Priority Doctrine in Corporate Reorganization*, 41 U Chi L Rev 651, 654 (1974).

buyer willing to acquire substantially all of the assets for a much lower amount. The debtor used this bid as the basis for its plan of reorganization.[14]

The debtor proposed an open auction. Even though it seemed unlikely another buyer would appear, others would have a chance to make higher bids. The senior lender would receive all the proceeds. The junior creditors received no immediate payment under the plan, but the buyer the debtor found was willing to fund some distributions to unsecured creditors from the future profits of the hotel.[15] The senior lender could make its own bid, but it would have to bid in cash just like anyone else.

The debtor argued that this plan was "fair and equitable" and fully respected the rights of the senior creditor.[16] The senior creditor was receiving all the proceeds of the sale, and the value of an asset is what it yields in a regularly conducted sale.[17] The "fair and equitable" requirement demanded only that the senior creditor be given the value of its claim. Someone who both receives the proceeds of an open auction and who participates in the auction on the same terms as everyone else is necessarily receiving the entire value of her collateral. A secured creditor does not have the right to dictate the entire course of the reorganization, even when it is owed more than the firm is worth.

[14] *RadLAX,* 132 at 2068-69.

[15] Debtors' Joint Chapter 11 Plan, *In re: RadLAX Gateway Hotel, LLC*, No 09-B-30047, Docket No 205, * §3.09 (Bankr ND Ill June 4, 2010). This profit sharing provision may have been problematic independent of the credit bidding dispute. The debtor, however, argued that the buyer's willingness to share some future profits with junior creditors was not of concern to the senior creditor as long as no such obligation was imposed on other bidders. Though not raised on appeal, this backdoor distribution to the junior creditors might violate the "fair and equitable" requirement. While such "gifting" has become common practice in the wake of sales, it has been questioned regularly by appellate courts. See, for example, *In re DBSD North America, Inc*, 634 F3d 79 (2d Cir 2011).

[16] See, for example, Brief of Petitioner, *RadLAX v Amalgamated Bank*, No 11-166, *9-10 (S Ct, Jan 28, 2012) ("Petitioner's Brief").

[17] BFP v Resolution Trust Corp, 511 US 531 (1994).

The senior creditor argued that this understanding of the "fair and equitable" principle offered it too little protection.[18] It was entitled to the entire hotel unless someone else was willing to put up more than $120 million to buy it. Hence, it should also have the right to "credit bid," the right to participate in the auction without putting up any cash. As the senior creditor, it was entitled to all the cash that the sale produced. Any cash it gave to the auctioneer would necessarily be immediately returned to it. Hence, unlike other bidders, it should be released from having to put up cash.

Forcing the senior creditor to turn over cash that would be immediately returned serves no purpose other than to place an obstacle in its way. Borrowing cash, even for a short time, is not costless. Among other things, the senior lender is often not a single entity, but rather a consortium of investors, some based overseas. Coordinating actions among them is hard.[19] Regulations may limit the ability of some to contribute new cash, even for a few minutes. The frictions such coordination difficulties present should not keep the senior creditor from taking its collateral when it prefers the collateral to the highest cash offer. So ran the secured creditor's argument.[20]

To resolve these competing arguments about whether a plan could provide for a sale without giving the secured creditor a right to credit bid, the Court in *RadLAX* turned to the part of the Bankruptcy Code that spells out what it means for a plan to be "fair and equitable" with respect to secured creditors.[21] This

[18] See, for example, Brief for Respondent, *RadLAX v Amalgamated Bank*, No 11-166, *19-20 (S Ct, March 2, 2012) ("Respondent's Brief").

[19] See, for example, *In re Metaldyne Corp*, 09-13412 (Bankr SDNY 2009) (approving credit bid at the motion of 97% of the creditors in the consortium to overcome objections of 3% hold out group).

[20] Respondent's Brief at 20-21.

[21] Section 1129(b)(2)(A) provides:

(i) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and (II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, provision requires that the plan must provide the secured creditor with (1) a lien on its collateral and a note equal to the value of its secured claim; (2) a sale subject to credit bidding; or (3) "for the realization by such holders of the indubitable equivalent of such claims."[22]

This language contains an ambiguity. On the one hand, the provision is written in the disjunctive. As long as a sale without credit bidding provides the secured creditor with the "indubitable equivalent" of its claim, a plan is fair and equitable. Each of the avenues is an alternative to the other.[23] The provision that explicitly provides that a sale with credit bidding is fair and equitable is not dispositive. It does not exclude the possibility that giving the secured creditor the proceeds of a sale without credit bidding might also provide the indubitable equivalent of the secured claim and therefore also be fair and equitable.

Of course, one can take a different view. While each section stands as an alternative to the others, each sheds light on the other. Because the provision explicitly provides that a sale with credit bidding is "fair and equitable," one can infer that a sale without credit bidding is not "fair and equitable." It cannot provide the secured creditor with the "indubitable equivalent" of its claim.

> as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;
>
> (ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or
>
> (iii) for the realization by such holders of the indubitable equivalent of such claims.

Section 363(k) gives secured creditors a right to credit bid in the absence of cause in those cases in which assets are sold outside of a reorganization plan.

[22] *Id*.

[23] *In re Phila Newspapers, LLC*, 599 F 3d 298 (3d Cir 2010). The Third Circuit invoked the familiar cannon of textual interpretation that focuses on the meaning of disjunctive lists containing the word "or." *Id* at 304-10; see also Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 116-25 (West 2012) (explaining the "Conjunctive/Disjunctive Canon"). The Third Circuit based its adoption of this statutory canon in part on 11 USC §102(5), which provides that "'or' is not exclusive."

Inferring exclusions of some things because of the inclusion of others is a well-recognized part of how ordinary people understand language.[24] Called "scalar implicatures," linguists have studied them closely for the last fifty years.[25]

Consider the following two statements.

> An apartment building limits the pets tenants may have. It permits "cats, small dogs, or pets that are apartment friendly."
>
> Your nephew has asked you for a video game that has "big scary monsters, robots, or cool stuff."

Both these examples have the same structure as the provision of the Bankruptcy Code the Court confronted in *RadLAX*. There is a mandate and three avenues to satisfying it. In the first case, the rule identifies the sort of pet that a tenant may have; the second example identifies the types of video game that your nephew will like; the Bankruptcy Code identifies the plans that are "fair and equitable." In all three cases, there are specifically blessed types ("cats" and "small dogs"; "big scary monsters" and "robots"; notes secured by liens on the collateral and sales subject to credit bidding). There is also a general category ("apartment friendly" pets; "cool stuff"; plans that provide the "indubitable equivalent"). Each list puts forward two discrete options, and leaves a large category that lacks a hard definition. What exactly is an apartment friendly pet? What exactly is cool stuff? What provides the indubitable equivalent?

The linguistic question we face in each case is the extent to which the meaning of the larger and more general category is informed by the inclusion of the other more specific ones. Does the reference to small dogs implicitly exclude large ones and tell us, by implication, that large dogs are not apartment friendly? Does the reference to big scary monsters exclude small ones, and, by implication, exclude the possibility that small scary monsters might be cool? Does the

[24] The basic ideas are based on the work of Paul Grice. See Paul Grice, *Studies in the Way of Words* 22-40 (Harvard 1989).

[25] See generally Ryan Doran, et al, *A Novel Experimental Paradigm for Distinguishing Between What is Said and What is Implicated*, 88 Language 1, 124 (2012) (reviewing theoretical and experimental literature on scalar implicatures).

reference to sales subject to credit bidding exclude sales that are not, and, again by implication, exclude the possibility that sales without credit bidding can provide the indubitable equivalent?

Items on such a list can serve different roles. A specific item on a list might be understood as a specific illustration or a safe harbor, and not as serving to exclude others of the same type. The owner of a cat or a small dog is spared the effort of arguing that a particular cat or a particular small dog is apartment friendly. Specific items can provide context that enables the rule provider to understand the more general mandate. The nephew might list a specific type of video game that is acceptable without any intent that you exclude other games or draw inferences about what is not cool. Instead, he may have pointed to big scary monsters to make vivid what sorts of games are cool.[26]

It is axiomatic among modern linguists that one cannot determine how an ordinary speaker understands any of these statements merely by resorting to abstract principle. Instead, one must engage in empirical inquiry. As it happens, most ordinary native speakers of English think that the apartment building does not permit large dogs.[27] By listing small dogs as among the pets that are

[26] In the case of the nephew, another force may be at work. The ability to infer the exclusion of one thing from the inclusion of another is underdeveloped in young children. See Ira Noveck, *When Children Are More Logical Than Adults: Experimental Investigations of Scalar Implicature*, 78 Cognition 165 (2001); Anna Papafragoua and Julien Musolino, *Scalar Implicatures: Experiments at the Semantics–Pragmatics Interface*, 86 Cognition 253, 267 (2003). A speaker of English may infer a young age for the nephew from the way the preferences are spelled out and take this into account in trying to understand what is being said.

[27] We surveyed two thousand individuals using Mechanical Turk and seventy-four percent of the native English speakers opted for this interpretation. We ran an alternative survey of two thousand different individuals using the word "and" in place of "or." The results were not meaningfully different: seventy-seven percent of the native English speakers opted for the interpretation excluding large dogs. Web-based surveys, of course, rely on samples that, while diverse, are not randomly drawn. There are other potential sources of bias as well. Alternative methodologies, however, are not likely to produce qualitatively different results for questions such as this. See Adam J. Berinsky, Gregory A. Huber, and Gabriel S. Lenz, *Evaluating Online Labor Markets for Experimental Research: Amazon.com's Mechanical Turk*, 20 Political Analysis 351

permitted, the speaker is understood to exclude large dogs. The speaker is telling us both that she judges small dogs to be apartment friendly, and that she has reached the opposite conclusion for large dogs. The purpose of an open-ended category is to allow for certain apartment friendly pets that are neither cats nor dogs. It is still open whether canaries are apartment friendly, but the issue is resolved as far as dogs are concerned. Small ones are; large ones are not. In this example, the use of the adjective small is functioning as a scalar implicature for the typical native speaker.

Implicatures can be expected to be used in accordance with certain linguistic maxims.[28] For example, the two Gricean maxims of quantity suggest that a speaker will make his statement 1) as informative as necessary; but 2) no more so.[29] A speaker who includes the word "small" would, under the first maxim, be expected to include the word "large" if both small and large dogs were allowed.[30] The word's absence violates the first maxim of quantity if large dogs were allowed. The statement thus implies the exclusion of large dogs. As with other linguistic maxims, this one was anticipated by one of the standard Latin maxims of statutory interpretation. In this case, it is *expressio unius est exclusio alterius*.[31]

The same analysis could apply to the nephew's request. But ordinary native speakers of English believe that the nephew is perfectly open to the possibility that small scary monsters, like robots and big scary monsters, might be cool.[32] The nephew refers to large scary monsters to illustrate what might constitute

(2012); Laura Germine et al., *Is the Web as Good as the Lab? Comparable Performance from Web and Lab in Cognitive/Perceptual Experiments*, 19 Psychonomic Bulletin & Review 847 (2012).

[28] See generally Grice, *Studies the Way of Words* (cited in note 24).

[29] *Id* at 26.

[30] Of course, just "dogs" would have sufficed as well.

[31] The close connection between maxims of statutory interpretation and Gricean maxims has, of course, been long recognized. See, for example, Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 Wis L Rev 1179 (1990).

[32] Again we surveyed two thousand individuals using Mechanical Turk and seventy-six percent of the native English speakers opted for this interpretation. An an alternative survey of two thousand different individuals using the phrase "or any other cool stuff" in place of "or cool stuff" did not produce meaningfully different results (seventy-four percent).

cool stuff, not to create an excluded category of scary monster. This is consistent with an application of Grice's second maxim of quantity. The parallel maxim of statutory interpretation at work here is *eiusdem generis*. The specific examples (big scary monsters and robots) illuminate the large category ("cool stuff"). "Cool stuff" has to be like big scary monsters or robots in some way, but it does not have to *be* big scary monsters or robots.

Linguistic theory alone is still too primitive to explain when ordinary speakers will draw different inferences from statements that have the same grammatical structure. Much ink continues to be spilled over words such as "some" and "or." Linguists are not yet able to explain the difference between using the word "big" in asking for a video game with "big scary monsters" and using the word "small" in permitting tenants to have "small dogs" as pets. The best one can do is to observe that ordinary listeners understand these statements differently.

The understanding of ordinary speakers can change with only small changes in context. Even when we limit ourselves to an apartment's pet policy, different items on the same list can serve different functions. If goldfish is added to the list of permitted pets, ordinary speakers are not inclined to think that all other types of fish are excluded. They might think that goldfish are on the list not to exclude other types of fish, but rather to provide an example with which others might be compared.[33] There is more room to argue that tropical fish are permitted than there is room to argue that large dogs are apartment friendly.

This is simply to say that linguistic maxims, like their counterparts in statutory interpretation, can be helpful in identifying the dynamics at work, but they are less useful in pinning down the meaning of a specific statement. In understanding whether a particular adjective (small, gold, or big) implicitly excludes the others (large, tropical, or small) that are within the larger category (of dogs, fish, or scary monsters), context matters. Ordinary speakers may be familiar with apartments that have weight limits on dogs. They may also have

[33] In our surveys a majority of the native English speakers opted for this interpretation (sixty percent in one survey and sixty-nine percent in the other).

listened enough to young children to know that they are not as attuned to the way that the use of adjectives may implicitly exclude what is not described. They may also think that young children make their illustrations vivid ("big scary monster"), to convey what constitutes "cool stuff."

All that being said, even context leaves matters unclear. The inference that the majority of native speakers of English draws will not be universal. One in four native English speakers thinks that the apartment permits large dogs if apartment friendly. For this minority, if someone wants to prohibit large dogs, their rules should not have open-ended categories. Exclusions should be explicit. Similarly, one in four speakers of English understands the nephew to exclude small scary monsters. He wants a video game with big scary monsters because these are the only sorts of monsters that are cool.

Even if linguistics were more advanced, one can progress only so far in interpreting a statute by relying on the understanding of native speakers. Legislation is not understood in the same fashion as ordinary language. The way statutes are drafted is so radically different from the way language is typically used that one has to be careful about focusing on the common understanding. The balance between clarity and redundancy is likely to be struck differently. Less may be left to implication, and ambiguity may arise for altogether different reasons.

Statutes are written in a special language and often with special care. Sometimes this makes the task of statutory interpretation easier. The drafters of the Bankruptcy Code, for example, created a concordance and ensured that when the same words and phrases were used in different places in the text, they had the same meaning. But precisely because they are trying to be clear, drafters may leave less to implication. Inferences that might be reasonable with respect to regular speech might not make sense with respect to legislation.[34]

[34] Grice's maxims, for example, emphasize concision. An ordinary speaker avoids redundancy. As a result, listeners draw inferences in order to give each word meaning. Grice, *Studies the Way of Words* (cited in note 24). The drafter of a statute does not value and does not expect her listeners to value concision, at least not in the same way. Hence, inferences one would ordinarily draw make less sense.

At the same time, statutes contain language that is ambiguous in ways that ordinary speech is not. Drafting of legislation reflects the product of competing interests. Accommodating these may itself result in ambiguities that arise not by virtue of carelessness, but because each competing interest finds itself better off living with the ambiguity (and with its belief about how such ambiguity will be resolved) than continuing to struggle over text.[35]

As it happens, the difficulties we face in interpreting the section of the Bankruptcy Code at the center of *RadLAX* arise for just this reason. The provision itself reflects a compromise between those who favored credit bidding in all cases and those who did not. The provision was drafted in the mid-1970s in the shadow of a recent real estate bankruptcy case. A group of investors put up a modest amount of capital, formed a limited partnership, and had it borrow $1.45 million from an insurance company to build Pine Gate, an apartment complex outside of Atlanta. The lender agreed to look only to this real property in the event of default.[36]

After a short time the investors filed a bankruptcy petition.[37] The bankruptcy judge estimated the value of the property and confirmed a plan of reorganization in which the insurance company was given a note that the bankruptcy judge found was worth the value of the property.

[35] On the sources of legislative ambiguity, see Saul Levmore, *Ambiguous Statutes*, 77 U Chi L Rev 1073 (2009).

[36] See *In re Pine Gate Assocs, Ltd*, No B75-4345A, 1976 US Dist LEXIS 17366 (ND Ga Oct 14, 1976); *In re Pine Gate Assocs, Ltd*, 12 Collier Bankr Cas (MB) 607 (Bankr ND Ga Mar 4, 1977); see also Douglas G. Baird, *Remembering Pine Gate*, 38 John Marshall L Rev 5 (2004).

[37] Pine Gate turned out to be too far from Atlanta to attract the tenants willing to pay the rent the investors expected. Indeed, it attracted few renters of any kind. The property was not going to do well until there was more development in the area, and it became clear this would not happen for a long time. The property was no longer worth what the insurance company was owed. Moreover, if the insurance company foreclosed, the investors would be saddled with enormous tax liabilities. They took advantage of accelerated depreciation rules so that their basis in the property was much lower than its foreclosure value. Baird, 38 John Marshall L Rev at 7 (cited in note 36).

The plan, in his view, was "fair and equitable." The empirical evidence suggests that bankruptcy judges provide unbiased valuations of assets, but these valuations are subject to wide variance and this variance alone may give the debtor an ability to capture value.[38] The debtor does not have to go forward with any particular plan before it learns the judge's valuation. If the judge provides a value that is too high, the debtor could walk away from the property. By contrast, if the judge announces a value that is too low, the investors could put in place a plan of reorganization and then flip the property, paying the senior creditor the artificially low amount set by the bankruptcy judge and pocketing the difference.

Guarding against this sort of strategic behavior on the part of the debtor is one of the things that a bankruptcy judge must do in trying to craft rules that vindicate the "fair and equitable" requirement. Bankruptcy lawyers and judges are aware of the *Pine Gate* problem and indeed know it by that name. One can argue that such cases provide a reason to entrust these issues to the bankruptcy court in the first place. Like much else in bankruptcy practice, the *Pine Gate* problem is not especially visible to outsiders. The case itself cannot be found in any of the standard reporters, nor is it in Westlaw; but bankruptcy judges and lawyers know it, worry about it, and talk about it.

The drafters of the Bankruptcy Code trusted the ability of bankruptcy judges to implement the fair and equitable rule through case-by-case development. The drafters, however, had to contend with representatives of real estate lenders who had the ear of some of the legislators and who took a different lesson from *Pine Gate*. For them, *Pine Gate* showed a downside to giving bankruptcy judges discretion over too broad a domain. In the course of vindicating other goals, bankruptcy judges will slight the fair and equitable requirement, even while giving lip service to it. These representatives wanted to corral the scope of bankruptcy judges' discretion and limit their ability to develop the "fair and equitable" rule.[39]

[38] See Douglas G. Baird, and Donald S. Bernstein, *Absolute Priority, Valuation Uncertainty, and the Reorganization Bargain*, 115 Yale L J 1930 (2006).

[39] See generally Baird, 38 John Marshall L Rev 5 (cited in note 36).

The compromise that emerged is the Bankruptcy Code's elaboration of fair and equitable with its two specific provisions—notes supported by liens and sales subject to credit bidding—and one general one—providing the indubitable equivalent. The drafters consciously left tension between them unresolved.[40] In other words, the legislative compromise itself introduced the ambiguity. We face a difficulty that does not arise when one person attempts to convey meaning to another.

The kind of ambiguity that emerges in these environments depends on what background rule of interpretation the contending interests think the courts will ultimately adopt. To put the point somewhat more formally, a compromise such as the one here is a Bayesian equilibrium in which neither party to the negotiations thinks it can improve its position given the position of the other and given its beliefs about how a court will interpret the ambiguity. The method that resolves the ambiguity, or at least beliefs about this method, is part of the background against which the statute is drafted in the first place.[41]

That the drafters themselves understood they were leaving matters ambiguous should caution against thinking that the text itself provides a clear

[40] Complex statutes passed many decades ago are usually the work of many forgotten hands. Hence, most discussions of what the drafters believed they were doing are abstract and somewhat artificial. Whether an ambiguity was deliberate is a matter for speculation. Not so with bankruptcy. Its world is small, and everyone in it knows the two individuals who drafted the Bankruptcy Code. It is easy enough to ask one of them about such things, and we have. This is not to say, of course, that the drafters' awareness of the ambiguity should itself have any affect on how the language is interpreted.

[41] Others, of course, have made this point. See, for example, McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 Geo LJ 715 (1992). The compromises that force courts to confront statutory ambiguity arise in many environments. See, for example, *United States v Taylor*, 487 US 326 (1988) (Speedy Trial Act); *Board of Educ v Mergens*, 496 US 226 (1990) (interpreting provisions of Equal Access Act, statute forbidding discrimination against religion-based student groups). For a general discussion of the problem, see Courtney Simmons, *Unmasking The Rhetoric of Purpose: The Supreme Court and Legislative Compromise*, 44 Emory LJ 117 (1995).

answer.[42] Instead of adopting an interpretative rule that tries to resolve the meaning of the text, it may make more sense to adopt an interpretative rule that vindicates other objectives and assume that, over time, those who bargain over legislative language will negotiate with this rule in mind. *RadLAX* and the sequence of cases leading up to it may be understood as an effort to articulate such a background rule. We explore the rule that seems to be emerging and trace its origins in the next part.

II. Bankruptcy's Domain

In confronting the ambiguity in *RadLAX*, the Court could have leaned towards expanding the scope of the bankruptcy judge's discretion. One can argue that, in the absence of an unambiguous statute, much is sensibly left to case-by-case adjudication. Reviewing courts have little expertise with respect to reorganizing large corporations. Congress may have intended for bankruptcy judges to enjoy considerable discretion when it provided a general directive that plans be "fair and equitable" and allowed them to confirm plans of reorganization without staying them pending review by an Article III court.

Credit bidding is, from this perspective, one of the many issues facing bankruptcy judges who supervise corporate reorganizations. It is their job to assess the value of credit bidding and weigh it against the competing objectives of the Bankruptcy Code. Although there may not be many situations in which

[42] See Levmore, 77 U Chi L Rev at 1083 (cited in note 35). The question of intentional ambiguity provides interpretative challenges in other contexts as well. Contract cases are full of examples where the parties have intentionally left it to a later court to determine the precise meaning of a provision. The interpretative role of courts in those cases is quite different from interpreting intentional ambiguity in a statute. See, for example, Omri Ben-Shahar, *Agreeing to Disagree: Filling Gaps in Deliberately Incomplete Contracts*, 2004 Wis L Rev 389 (2004) (discussing how courts deal with intentional ambiguity); see also UCC § 2-204(4) (providing that contracts with open terms are valid if there is a basis for an appropriate remedy); *United Rentals Inc v RAM Holdings Inc*, 937 A 2d 810 (Del Ch 2007) (adopting a "forthright negotiator" rule where only one party intended the provision to be ambiguous).

restrictions on credit bidding make sense,[43] it is possible to imagine a narrow set of cases where obstacles to a secured creditor's bid are valuable because that creditor's participation in an auction might scare away other less informed bidders—even those who might place a higher value on the property.[44] Judges sensibly developing jurisprudence around the idea of "fair and equitable" should be attuned to such issues.[45] The Supreme Court, however, hardly looked at the

[43] Indeed, Vince Buccola and Ashley Keller and Adam Mortara argued in an amicus brief in *RadLAX* that these situations were indeed so rare that a plan that prohibits credit bidding cannot be "fair and equitable." In making this argument, however, they focused on how credit bidding vindicated the absolute priority rule, not on general principles of statutory interpretation. Amicus Brief, *RadLAX Gateway Hotel, LLC v Amalgamated Bank*, No 11-166 (S Ct March 8, 2012).

[44] The presence of the senior creditor and its ability to credit bid might chill the bidding and junior creditors would suffer part of the cost. This effect matters only when the asset's true value hovers close above the face value of the senior lien. The ability of the senior creditor to credit bid costlessly may aggravate the problem of the "winner's curse," the idea that a bidder who wins an auction has overpaid for the asset because she was willing to pay more than the market for the asset. This effect is magnified when one of the bidders has asymmetric information—all the worse to pay more than the amount that the party who knows the true value is willing to pay. The equilibrium is often that the other bidders anticipate this and therefore make no bid. This in turn pushes down the price the informed bidder pays. Paul Klemperer, The Wallet Game and its Applications, 42 Eur Econ Rev 757 (1998) (noting that a very small information advantage can greatly increase a bidder's chance of winning and "greatly reduce the price he pays"); Paul Klemperer, *What Really Matters in Auction Design*, 16 J Econ Persp 169, 173 (describing how asymmetric information can depress auction bids as bidders attempt to avoid the "winner's curse").

[45] As our interest is in locating where the decision making about credit bidding resides, we are not focused on the merits of this argument. We do not want to overstate the argument for limitations on credit bidding. Among other things, limiting credit bidding is a particularly ineffective and crude way of eliminating the potential winner's curse (assuming the problem is real to begin with). Auction theorists have suggested more direct ways of designing non-ascending auctions to deal with this situation. But very little work has been done to apply those design theories to bankruptcy. One notable exception is Paul Povel and Rajdeep Singh, *Sale-Backs in Bankruptcy*, 23 J L Econ & Org 710 (2007) (discussing ways to bias auctions against informationally advantaged bidders to increase the expected final bid). Povel and Singh note that while it may be optimal to exclude the informationally advantaged bidders in ascending auctions, it is "optimal to *always* let [them] participate" when the sale procedures can be freely

merits of credit bidding at all. To understand the course it took, it is necessary to step back from the narrow question of statutory interpretation and connect it to the Court's other bankruptcy opinions.

RadLAX is part of a family of cases in which the Court has limited the domain over which the bankruptcy judge may exercise her discretion. The most prominent of these is the sequence of cases beginning with *Northern Pipeline Construction Co v Marathon Pipeline Co*[46] and *Granfinanciera SA v Nordberg*[47] that continued with *Stern v Marshall* in 2011.[48] Those cases dealt directly with the fact that bankruptcy judges are not Article III judges and do not possess judicial power. As a result, they can issue final judgments only with respect to matters that are central to the administration of the bankruptcy process. *RadLAX*—and other cases not usually included in the *Marathon*-to-*Stern* list—embrace an analogous principle.

RadLAX provides a gloss on how the Court understands Congress to have exercised its bankruptcy power. Principles like "indubitable equivalent" allow for "unruly"[49] exercises of discretion. Hence, Congress intended that the boundaries within which such discretion is available should be narrow—particularly when the results of that discretion are unreviewable as a practical matter. The confirmation of a plan puts in place a sequence of events that is hard to reverse. Assets have been sold and new securities have been issued. The senior creditor no longer has a right to protest because the dispute is "equitably moot." The amount of free rein the bankruptcy judge enjoys must be seen in this light. Between two interpretations of the Bankruptcy Code that are otherwise plausible, the one to be preferred, at least when nonbankruptcy rights are in

designed. *Id* at 712. Nothing in the Bankruptcy Code requires ascending auctions or prohibits free auction design. See, for example, *In re Texas Rangers Baseball Ptnrs*, 431 BR 707, 710 (Bankr ND Tx 2010) (noting the court's clear power to "author and adopt bidding procedures").

[46] 458 US 50 (1982).

[47] 492 US 33 (1989).

[48] 131 S Ct 2594 (2011).

[49] *RadLAX*, 132 S Ct at 2073 ("The Bankruptcy Code standardizes an expansive (and sometimes unruly) area of law.").

issue, is the one that limits the power of the bankruptcy judge to depart from objective benchmarks such as those that the market provides. This idea has long been an undercurrent in the Court's bankruptcy jurisprudence. Indeed, it is fundamental to the evolution of the "fair and equitable" doctrine itself.

The Supreme Court's first clean take on the meaning of "fair and equitable" came in *Case v Los Angeles Lumber Products*.[50] The Court treated these words as terms of art that meant absolute priority. The relevant precedent did not compel this understanding of the language. The Court could have picked instead an interpretation that gave bankruptcy judges greater freedom to decide whether a particular plan of reorganization could be confirmed. By choosing the absolute-priority meaning, the Court significantly limited the scope of discretion available to the lower courts in reorganization cases.

The Court's answers to other questions about the meaning of "fair and equitable" follow in the same spirit. In spelling out the "fair and equitable" test as it applies to unsecured creditors, the Bankruptcy Code prohibits junior interest holders from receiving any property on account of their existing claim or interest when those senior to them are not paid in full.[51] On its face, this provision adds little. If the firm owes the senior lender $200, and the firm is worth $100, there is no way to give anything to the junior stakeholders and comply with the absolute priority rule. When they are not being paid in full, the seniors are entitled to everything.

The old junior stakeholders, however, sometimes offer to make a new contribution to the firm. They insist that they are not receiving anything on account of their old interest. They are receiving a share of the reorganized firm on account of the new value they are putting in. In principle, acquiring an interest in the firm in return for such contributions does not violate absolute priority. The question, however, is whether the bankruptcy judge can even entertain such an argument. In *Los Angeles Lumber*, the Court suggested in dictum that, when senior stakeholders were not paid in full, participation by the

[50] 308 US 106 (1936).

[51] 11 USC §1129(b)(2)(B).

junior stakeholders required new value from them in "money or money's worth."[52] Sweat equity was not good enough—regardless of the value a bankruptcy court might place it.

When the Court confronted this question again in *203 N LaSalle*,[53] it found that giving the old stakeholders any kind of exclusive right to a share of the reorganized business, even in return for cash, was suspect. It was not permissible for the bankruptcy judge to rely on experts to determine that the old stakeholders were paying enough. The junior stakeholders could participate, but only if their contribution was market tested. It was not enough that the bankruptcy judge found it sufficient. The key issue was not the substantive right of the junior stakeholders, but whether the bankruptcy judge had been delegated the power to decide whether the junior stakeholders were entitled to exercise it and what it is worth.[54]

RadLAX follows in the same spirit. The substantive right of the senior creditors was not open to doubt. Because the assets were worth less than they were owed, they were entitled to whatever value the assets had. No one argued otherwise. The question rather was whether the bankruptcy judges had been delegated the power to choose the form in which senior creditors were given that value. Like her determination that a junior stakeholder is providing new value, the bankruptcy judge's determination that the senior creditor is receiving the "indubitable equivalent" is essentially unreviewable. The Court limited the impact of this unreviewable discretion to confirm a plan of reorganization by holding that it did not include plans that provided for sales without credit

[52] 308 US at 122.

[53] *Bank of Am Nat'l Trust & Sav Ass'n v 203 N LaSalle St P'Ship* 526 US 434, 437 (1999).

[54] *Id* at 457-58. There was nothing novel about the idea that discretionary valuation can interfere with substantive rights or about using the market as a solution. Peter Leeson notes that even eighteenth century pirates recognized this problem and applied a similar solution. Peter Leeson, *An-arrgh-chy: The Law and Economics of Pirate Organization*, 115 J Pol 1049, 1073 (2007). (Noting that the elected quartermaster would auction off items with uncertain value to prevent conflict and "constrain[] the discretion of the quartermaster, who might otherwise be in a position to circumvent the terms of compensation").

bidding. In the face of an ambiguous statute, the court opted for the reading that narrowed the options of the bankruptcy judge to reshape nonbankruptcy rights.

Limiting the domain of the bankruptcy judge's decision protects nonbankruptcy rights from dilution. We can see this at work in *In re River East*,[55] a case decided while *RadLAX* was before the Court. The issue in that case can be put simply. Debtor owes Bank $100 and owns Blackacre, which the bankruptcy court finds is worth $50. Bank demands it be given a lien on Blackacre for $100 and a note that has a discounted present value of $50. Debtor proposes a plan that it claims provides Bank with the "indubitable equivalent" of its claim. It offers to give Bank a stream of payments backed by a treasury bill that is worth $50. There is no doubt that the stream of payments that Bank is being offered is in fact worth the value of its secured claim as measured by the bankruptcy judge. Unlike the note secured by the building, the note secured by the treasury bills has a readily ascertainable market value and this value is $50. Hence, the debtor argues, the secured creditor is getting the indubitable equivalent of a $50 claim.[56]

Confirming such a plan, however, runs contrary to the spirit of *RadLAX* and the cases leading up to it. A plan that gives Bank a lien on Blackacre for the amount of its claim gives it a chance to capture upside in the event that the property proves to be worth more than the bankruptcy judge decides it is worth. The ability to enjoy liens provides a cushion against undervaluation—as does the ability to credit bid. We cannot be confident that a bankruptcy judge will guard against the problem of valuation variance in assessing "indubitable equivalence." Hence, we want to limit the range of circumstances in which the debtor can satisfy the "fair and equitable" requirement using this test.

Nothing in the provision setting out what it means for a plan to be "fair and equitable" explicitly bars the debtor from proposing a plan in which the secured lender receives only equity in the reorganized business, but those who do not trust the judge's discretion will resist readings of the Bankruptcy Code that allow

[55] *In re River East*, 669 F 3d 826 (7th Cir 2012).

[56] 668 F 3d at 832-33.

such license.[57] When the secured creditor is provided with senior secured debt under a plan, it is more likely to be paid the true value of what it is owed even when the bankruptcy judge misvalues the underlying assets.

Together these cases start to form a pattern. On certain questions, the market and Congress are the only competent arbiters. To the extent Congress is unclear in addressing those questions, the Court will view it as providing as narrow a rule as is reasonably consistent with the Code's language.

This presumption arises not from ordinary understanding or some general interpretative canon, but rather from an interpretative principle indigenous to bankruptcy. From this view, bankruptcy policy is best vindicated when, even with respect to the business properly entrusted to them, bankruptcy judges are limited in their freedom to make factual decisions that may impact nonbankruptcy entitlements. It is for this reason, and not the understanding of the ordinary speaker, that a sale subject to credit bidding is more like a small dog than a big scary monster.

III. Bankruptcy through a *Chevron* Lens

In bankruptcy, the threshold question is similar but covers a different type of power than the one at issue in administrative law. In the case of an administrative agency, there is a threshold inquiry about the extent to which Congress has effectively delegated lawmaking power to the agency in the first place.[58] That is to say, the "step-zero" questions of administrative law is about which legal decisions fall under the agency power.[59] The answer determines

[57] See *203 N LaSalle,* 26 US at 457 ("[I]t was, after all, one of the Code's innovations to narrow the occasions for courts to make valuation judgments.").

[58] Cass R. Sunstein, Chevron *Step Zero*, 92 Va L Rev 187 (2006); Thomas W. Merrill and Kristin E. Hickman, Chevron's *Domain*, 89 Geo L J 833 (2001).

[59] One should not confuse the decision at step zero with a decision about the *level of deference* being granted to the agencies once an issue is delegated. At step zero the decision it is about the *scope of delegation*. See Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 Okla L Rev 1, 4-5 (2004) (lamenting the tendency of the Court and scholars to conflate the scope of delegation with the level of deference). The same is true in the bankruptcy context. There, the

when courts will defer to an agency. [60] In the case of bankruptcy, on the other hand, the threshold question concerns not the delegation of law making but the delegation of discretion to the bankruptcy judge to apply legal principles to the facts before her. Here the Court has consistently found that, when the underlying statutory language is unclear, there should be a presumption in favor of interpretations that limit the extent to which the bankruptcy judge can exercise her discretion where it may impact nonbankruptcy rights.[61]

The different issues at stake caution against pressing the analogy between bankruptcy and administrative law too far. Nevertheless, many of the factors that incline the Court to think an agency should be entrusted with an interpretation of a statute seem to suggest a posture towards interpreting the Bankruptcy Code that is different. Instead, bankruptcy judges, when the statute is ambiguous, should be able to apply a general standard to a given set of facts. A bankruptcy court makes its decision by formal adjudications[62] with the force of

level of deference is set in large part by the unreviewable nature of the decisions. But the question of the scope of delegation is the one that was before the court in *RadLAX*, and the question of interest to us.

[60] The answer is a source of deep division among the justices. Sunstein, 92 Va L Rev at 199 (cited in note 58). Justice Breyer has advocated a case-by-case inquiry looking at what "a sensible legislator would have expected given the statutory circumstances." *Id*. Justice Scalia has advocated an across-the-board presumption of delegation. Under this view Congress is presumed to have delegated authority any time it creates ambiguities. Put another way, for Justice Scalia all the action occurs at step one. The Court has accepted neither view outright and has vacillated from points between them. Sunstein suggests that Breyer's view gained considerable (though not absolute) traction in the trilogy of step-zero cases of *Christensen, Mead* and *Barnhart. Id.* In these cases the standard for step zero has blurred a little (at least rhetorically) into the inquiry for subsequent steps. See *Christiansen v Harris County*, 529 US 576 (2000) (considering the procedural exercise of discretion as a factor relevant to the inquiry of whether the discretion was delegated in the first place).

[61] As we have suggested there is no deference to the bankruptcy court in its interpretation of the ambiguous statute itself. Such interpretations are reviewed *de novo*.

[62] *Christensen*, 529 US 576, 587 (distinguishing "a formal adjudication or notice-and-comment rulemaking" from opinion letters in holding that the latter did not have the markings of legislative delegation of the former); *United States v Mead*, 533 US 218, 230 (2001) (noting the

law.[63] Moreover, the arguments about flexibility, expertise, and institutional competence that have been put forward to support the delegation of authority to administrative agencies apply similarly to bankruptcy courts.[64] The bankruptcy court possesses an expertise in administering the Bankruptcy Code, and that administration—especially when it turns on the facts of a particular case—is highly complex and not particularly amenable to inflexible rules. Case-by-case adjudication allows for the natural evolution of sound practices, practices that may not be particularly amenable to top-down directives.[65]

It is in part the accountability of agencies—because they are appointed by an elected branch—that justifies giving them room to maneuver,[66] and bankruptcy

"overwhelming number" of cases applying *Chevron* deference dealt with "the fruits of notice-and-comment rulemaking or formal adjudication").

[63] *Mead*, 533 US at 226-27 ("We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.") Of course, some rulings of the bankruptcy court no longer have the force of law after *Stern* and *Marathon.* But matters not excluded by those cases are still understood to be decided with the force of law.

[64] But see *Stern,* 131 S Ct at 2615 ("This is not a situation in which Congress devised an 'expert and inexpensive method for dealing with a class of questions of fact which are particularly suited to examination and determination by an administrative agency specially assigned to that task.' *Crowell*, 285 U. S., at 46; see *Schor*, supra, at 855–856."). Of course others have argued that any reference to the expertise of administrative agencies is a fiction itself. See Easterbrook, 57 Okla L Rev at 3 n 6 (cited in note 59).

[65] *Barnhart v Walton*, 535 US 212, 222 (2002) ("[T]he interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue."). For an interesting game theoretic analysis of the delegation choice in a context that involves only agencies and Article III courts, see Dennis W. Carlton and Randal C. Picker, *Antitrust and Regulation*, (forthcoming 2013) online at http://www.nber.org/chapters/c12565.pdf (visited on Jan 30, 2013).

[66] The degree to which accountability actually exists for administrative agencies is open to debate.

courts are among the least politically accountable entities. They are neither elected, nor appointed by an elected branch. But accountability is a much less weighty factor when the discretion is being exercised over factual findings than over legal interpretations. Legal interpretations are a form of law making.[67] That is traditionally a function of elected government. Factual determinations are not.

The explanation for the Court's reluctance to find that Congress entrusted bankruptcy courts to apply broad standards to the facts before her may lie in the way that *RadLAX* is connected to other parts of the Court's bankruptcy jurisprudence. *Butner* stands for the idea that nonbankruptcy rights create a baseline. The law of corporate reorganizations is designed to help investors solve the collective-action problem they face when their firm encounters financial distress. Bankruptcy provides a forum in which they can sort out conflicting claims when the assets are insufficient to pay everyone off in full. Nothing in this policy requires altering the priority that one creditor enjoys over another outside of bankruptcy.[68]

Once one accepts this principle, it is only a short step to assume that Congress is similarly reluctant to expand the discretion that bankruptcy courts enjoy. Discretion with respect to questions such as the value of a nonbankruptcy entitlement can result in this entitlement being slighted. As *203 N. LaSalle* suggests, when markets are available to assess the value of nonbankruptcy entitlements, there is no need for a bankruptcy judge to do so.

The need to guard the nonbankruptcy rights closely might seem to lead to limiting the power of bankruptcy judges to reshape them. But it is not a necessary response. Adherence to *Butner* might not require limiting the power of bankruptcy judges. Taking *Butner* seriously only means that whoever is entrusted with the power to affect the nonbankruptcy rights of parties should be well aware of and respect that principle. Indeed, there is no reason to think bankruptcy judges will systematically slight nonbankruptcy rights or that rules

[67] See Margaret Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine,* 81 S Cal L Rev 405 (2008).

[68] Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law,* 10 (Harvard 1986).

are needed to rein them in. Not only are bankruptcy courts likely to be aware of the importance of the *Butner* principle, they are likely to have a comparative advantage (over Congress and Article III courts) in identifying which factual issues and decisions are prone to raise *Butner* concerns and go astray of nonbankruptcy rights. For what its worth, the bankruptcy courts in *RadLAX* and *Philadelphia Newspapers* found that plans that denied senior creditors the ability to credit bid were not fair and equitable. It was the circuit judges who were divided.[69] Similarly, the bankruptcy judge in *River East* limited the breadth of plans allowed as indubitably equivalent to protect the value of nonbankruptcy rights.[70] Moreover, limiting the power of the bankruptcy court in these cases will not protect the nonbankruptcy rights in all cases. In particular factual scenarios, the bankruptcy court's discretion might be exercised precisely to protect the nonbankruptcy rights where the narrow rule-like reading is sometimes underprotective.[71]

Of perhaps even greater importance is the posture that the Court has taken to the constitutional problems inherent in delegating so much power to non-Article III judges. While one can trace some of the limits on judicial discretion in bankruptcy to an era in which judges in reorganization cases were Article III judges, today a large part of the rationale derives from the fact that bankruptcy judges are not Article III judges and that their decisions are hard to review. Indeed, in *Stern* the majority squarely rejected the dissent's argument that the implicit control that the judiciary has over bankruptcy courts by means of

[69] *In re River Rd Hotel Partners LLC*, 2010 Bankr Lexis 5933, * 1 (Bankr ND Ill 2010) (denying motion to approve bidding procedures); *In re Phila Newspapers, LLC*, 418 BR 548, 552 (ED Pa 2009) (reversing bankruptcy court's rejection of bidding procedures).

[70] See *In re River East*, 669 F3d at 829 ("The bankruptcy judge rejected the plan, lifted the automatic stay, and dismissed the bankruptcy proceeding.").

[71] For an example of a case in which a rule-like interpretation slights nonbankruptcy rights, see *United Savings Ass'n of Texas v Timbers of Inwood Forest Ass'n*, 484 US 365 (1988) (rejecting the bankruptcy court's power to include the value of post-petition use of collateral in a secured creditor's adequate protection, even where it arguably was entitled to as much outside of bankruptcy).

appointment, oversight, and appellate review somehow alleviates balance-of-power structural concerns.

Congress has the power to create substantive bankruptcy provisions that may alter state law rights, but any grant of discretion that allows the bankruptcy court to apply a general directive to achieve that same outcome begins to look like a traditional adjudication of private rights at common law. And those adjudications are the special province of Article III judges. Precisely because bankruptcy law is, by its nature, both vindicating and altering nonbankruptcy (often state law) rights, the Court worries more about those nonbankruptcy rights. The more Congress entrusts discretion of any kind to bankruptcy judges or anyone else who lacks the attributes that Article III requires, the more constitutionally questionable the system becomes.

Put simply, Congress can alter nonbankruptcy rights but the bankruptcy judge cannot. The less rule-like the bankruptcy law, the greater the danger that the bankruptcy judge will be shaping bankruptcy policy rather than applying the one Congress has created. Moreover, the more one relies on the discretion of the bankruptcy judge, the more likely the bankruptcy judge will be adjudicating nonbankruptcy rights, a function exclusive to Article III judges. *RadLAX* puts in place an avoidance presumption that reads ambiguities in the Bankruptcy Code in a way that limits the ability of the bankruptcy judge either to alter nonbankruptcy rights or adjudicate them.

Unlike most areas of federal law, bankruptcy law has as its guiding principle the vindication of rights that exist independent of itself. It is one thing to allow a non-Article III tribunal to alter state law rights to achieve a uniform federal environmental policy; but quite another to allow it to alter those rights in the name of a statute that has the vindication of those very rights as one of its foundational principles. If Congress intends to change that nonbankruptcy law, it does so explicitly; if it intends to point to that law as a guide for application, interpretation or gap filling, an Article III court may be required to adjudicate the matter.

This understanding of bankruptcy law embedded in *Butner* and *Marathon* naturally leads to *RadLAX*. If Congress wants a bankruptcy judge to vindicate some bankruptcy policy (and thus risk undermining *Butner* or running afoul of

Marathon), it should speak clearly. If Congress wants debtors to be able to pay creditors in exotic coin that is hard to value, it must say so. If it wants to allow sales without credit bidding, it must be clear. Congress must be explicit if it wants to give bankruptcy judges the power to make subjective judgments (valuations, approval of sale procedures, approval of the form of payment) about what is "fair and equitable."

RadLAX is unlikely to have much direct impact on the way that bankruptcy judges apply the absolute priority rule. There are few cases where limits on credit bidding make sense.[72] In the vast majority of cases, the effect of limits on credit bidding is to deny the secured creditor some of the value of its claim. Hence, a plan without credit bidding will rarely offer secured creditors the indubitable equivalent of their claim, and today's bankruptcy judges would be most unlikely to approve such plans. To limit the bankruptcy judge's discretion in these cases is to mandate the result they almost always reach anyway. But *RadLAX* matters because the presumption it brings to interpreting the Bankruptcy Code is at work whenever deferring to the bankruptcy court's discretion might compromise the principles at work in *Butner* and *Marathon*.

In this way, the arc from *Los Angeles Lumber* to *203 N. LaSalle* to *RadLAX* and its relationship to *Butner* and *Stern* give some meaning and direction to the Supreme Court's repeated admonition to adhere strictly to the text of the Bankruptcy Code. The opinion should not be understood as a general mandate to apply strong maxims of statutory interpretation to the Bankruptcy Code. Nor should it be read as an instruction to be narrow across all ambiguities, but rather only where those ambiguities intersect with the application of nonbankruptcy rights.

The importance of understanding that *RadLAX* is not a general mandate for mechanical application of the canons of interpretation can be seen in two examples. Courts have struggled with the appropriate treatment of executory contracts for intellectual property rights in bankruptcy. A provision of the Bankruptcy Code provides for special protections for holders of copyrights and

[72] See above at notes 44 & 45.

patents, but not for trademarks. Contested is whether the treatment of trademarks is different when the more general provisions of the Code are applied.

If *RadLAX* were read simply as giving a thumb on the scale in favor of the interpretative canon of *expressio unius*, then it would suggest that, by giving special protection to patent and copyright, Congress has determined that patent and copyright deserved this sort of protection and trademarks did not. If Congress had wanted this protection for trademarks, they could have easily provided it. Hence, one should incline away from an interpretation of general principles to reach the same result. This approach seems wrong across several dimensions. The question about the consequences that flow from the rejection of an executory contract in bankruptcy has nothing to do with the domain of the bankruptcy judge's discretion over nonbankruptcy rights. Indeed, inferring that the debtor enjoys a greater power to reject trademark licenses than patent licenses expands the domain of bankruptcy and runs counter to the *Butner* principle.[73]

Another example can be found in a question that has divided a number of courts.[74] In drafting a series of amendments to the Bankruptcy Code in 2005, Congress enacted a number of provisions that had the effect of ensuring that individuals received comparable treatment regardless of which chapter of the Bankruptcy Code they filed under. Under the most literal reading, however, the various sections in combination appear to abolish the absolute priority rule in individual Chapter 11 cases. Apart from unmoored literalism, however, this reading of the Bankruptcy Code has little to recommend it. Nothing about *RadLAX*, however, pushes in favor of such a reading. The amount of discretion delegated to bankruptcy judges is not implicated. None of the concerns about

[73] Judge Easterbrook looks beyond mechanical rules of statutory interpretation to reach this result in *Sunbeam Products, Inc v Chicago American Mfg, LLC*, 686 F 3d 372 (7th Cir 2012).

[74] Compare *In re Shat*, 424 Bankr 854 (Bankr D Nev 2010 (Markell, J)), with *In re Stephens*, 2013 WL 151193 (10th Cir 2013) (in face of ambiguity, court will not read the Bankruptcy Code to erode absolute priority rule "absent a clear indication that Congress intended such a departure").

bringing order to the unruly world of bankruptcy push towards excluding ordinary prepetition assets from the bankruptcy estate.

More importantly, the substantive presumption of *RadLAX* is not a blanket presumption of narrowness. When viewed in connection with *Butner* and *Marathon*, the *RadLAX* presumption is about limiting discretion where its exercise may alter nonbankruptcy rights. If the ambiguity in the statute does not involve altering nonbankruptcy rights or exercising anything akin to the judicial power with respect to nonbankruptcy rights, there is no reason to gravitate towards the narrow interpretation. Neither *Butner* nor *Marathon* is implicated.

As noted above much of the Bankruptcy Code does involve the adjudication of nonbankruptcy rights, but that is not uniformly true. Some provisions are pure bankruptcy law. When Congress has left ambiguity over these provisions and where the bankruptcy court's discretion impacts only the federal rights created by the Bankruptcy Code, courts must look elsewhere for interpretative guidance. For example, when courts are interpreting the boundaries of voidable preferences and good-faith filing requirements, they should recall that each is a statutory matter that exists only as a function of bankruptcy law and independently of nonbankruptcy rights. Voidable preferences exist only in bankruptcy and protect the integrity of the collective proceeding.[75] Similarly, the application of discretionary principles such as good faith filing can only be answered by resort to bankruptcy law principles.[76]

Ambiguities in these provisions do not implicate the *RadLAX* presumption. A question of how broadly a court can define a voidable preference should be viewed with the policy of bankruptcy in mind rather than some imported state law directive.[77] The same is true for ambiguities that may exist as to the breadth of anti-ipso-facto-clause provisions of the Bankruptcy Code. These are not

[75] HR REP NO 595, 95th Cong, 1st Sess 177-78 (1977).

[76] See, for example, *In re Integrated Telecom Express, Inc*, 384 F 3d 108, 120 (3d Cir 2004) (noting the focus for good faith filing is on whether the petition serves a valid bankruptcy purpose of either preserving going concern or maximizing the value of the estate).

[77] But see *In re PA Bergner & Co,* 140 F 3d 1111, 1118-19 (7th Cir 1998) (focusing preference inquiry on state law of letters of credit).

provisions intended to vindicate nonbankruptcy rights but rather to further specific bankruptcy principles and bring coherence to the Code.[78] In none of these cases is there a question of the interpretation, adjudication or discretionary application of nonbankruptcy rights.[79]

Conclusion

While *Stern* makes it clear that bankruptcy courts are not Article III courts, *RadLAX* adds the message that they are also not administrative agencies or anything like them.[80] The former narrows the range of legal issues that they may decide; the latter limits the domain of factual discretion they may exercise in deciding those issues.

RadLAX crystalizes a substantive interpretive principle that has been in the background of the Court's bankruptcy jurisprudence for decades: in interpreting the Bankruptcy Code, courts should start with the presumption that the range of

[78] For an example of where the interpretation of pure bankruptcy law can become unnecessarily mixed up with state law adjudication, see *In re Haire Ford, Inc* 403 BR 740 (MD Fla Bankr 2009). There the bankruptcy court was faced with the question of whether a third party could terminate an at-will contract with the debtor at the time of filing. The court found the termination to violate the clear policy but not the language of the Bankruptcy Code. Rather than resolving this ambiguity, the court created a state-law implied covenant to bar the exercise of the otherwise valid contract right in violation of bankruptcy policy.

[79] An example of this distinction can be found in the personal bankruptcy context in *Marrama v Citizens Bank of Mass,* 549 US 365 (2006). There the Court allowed the bankruptcy court to exercise discretion over decisions about who is eligible to convert a Chapter 7 bankruptcy to Chapter 13. The discretion there was over a decision about pure bankruptcy rights. *Id*; but see *Marrama*, 549 at 376 (Alito dissenting) (arguing that the relevant statute unambiguously restricted the scope of discretion).

[80] An alternate approach in a world outside the constraints of *Butner*, *Stern*, and *RadLAX* would be to organize the bankruptcy system entirely in the administrative law model. It has been noted that it may be a historical accident that this did not happen. Baird, 86 Am Bankr L J at 15 (cited in note 3). And several scholars have toyed with the idea. See, for example, Pardo and Watts, 60 UCLA L Rev 384 (cited in note 3). The centrality of nonbankruptcy rights discussed above may make this more complicated than has been recognized – or at least may require a great deal more China to be broken. In any event, *RadLAX* is a significant move in the opposite direction.

discretion a bankruptcy judge enjoys over issues that affect the application of substantive nonbankruptcy rights is narrow. Between two interpretations of the Bankruptcy Code that are otherwise plausible, the Court will incline towards the one that limits the power of the bankruptcy judge to unsettle those rights.

From the perspective of those deeply immersed in bankruptcy, the Court's opinion in *RadLAX* is unsettling. It embraces an approach to bankruptcy that, quite apart from its logical coherence, is divorced from reality. Someone reading the Court's bankruptcy opinions over the last three decades would have no idea of the extent to which the world it is trying to regulate has changed.

The bankruptcy world the Court confronted in *Marathon* was dysfunctional. The judges were former bankruptcy referees, sometimes corrupt and often of limited competence. Debtors ran roughshod over the rights of creditors, and firms often entered Chapter 11 only to bleed to death slowly. The bankruptcy world today is altogether different. Its judges are among the best in the federal judiciary. Bankruptcy judges as a general matter quickly dispose of cases that do not belong in Chapter 11. In large business cases, the judges are typically the equal of any Delaware Chancellor. They oversee the restructuring of multi-billion dollar corporations with consummate skill. As a matter of sound judicial administration, it would make sense to give them more discretion rather than less.

Those who work on the ground view the bankruptcy court as creating an umbrella that protects a space within which interested parties can plot a future course for a distressed business. The process is necessarily a fluid one and works best with a decent measure of flexibility and pragmatism. There is no recognition of this state of affairs in *RadLAX* or indeed in any of the Court's bankruptcy opinions. The pragmatic imperatives at work when the court assesses tribunals for everything from workers' compensation to securities trading are altogether absent when it comes to bankruptcy. One can, of course, take the view that, when it comes to interpreting the Constitution or a bankruptcy law passed in 1978, today's realities are irrelevant. Nevertheless, the failure to recognize these realities is in the end the most striking difference when viewing bankruptcy through an administrative law lens.