mandates that "[w]hen it is impossible to promote one aim without frustrating the other . . . [those] persons in the worst-off positions in the context of financial distress should be protected over those occupying the better-off positions."[100] Korobkin determines those who occupy the "worst-off" positions by comparing the parties' relative influence (i.e., their ability to promote their aims) and their material stake in the context of financial distress.[101] The persons who are relatively powerless and who have the most to lose inhabit what Korobkin calls the "most vulnerable position."[102]

As Korobkin notes, the principle of rational planning is readily distinguishable from an alternative principle that might emanate from the original creditors' bargain: "creditor wealth maximization."[103] Under the principle of creditor wealth maximization, "the proper response to financial distress is to maximize the economic value of the pool of assets available for distribution to creditors."[104] This principle dictates that asset maximization for creditors should take priority over all other aims. Should a firm reorganize or liquidate? Should a court convert a reorganization case to liquidation? The answer depends on which course of action yields the greatest return on assets for creditors.

Unlike the principle of creditor wealth maximization, the principle of rational planning does not filter all decisions through a prism of creditor prosperity. Instead, the principle is committed to what Korobkin calls the "maximization of aims."[105] The principle should promote "most fully and effectively the greatest part of the most important aims."[106]

The notion of fully satisfying aims plays a role in both the substance and the process of the principle. From a substance perspective, maximization of aims means that diverse aims may not be reduced to a single value.[107] Instead, the most rational solution is pluralistic in nature, furthering many different interests in many different ways. From a process perspective, the principle is fluid, involving assessing the parties' positions of vulnerability and recognizing that their positions may change continuously.[108] Moreover,

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100 *Id.* at 584.
101 *Id.* at 584-86.
102 *Id.* at 584.
103 *Id.* at 577.
104 *Id.*
105 *Id.* at 581.
106 *Id.*
107 *Id.* at 581 n.179.
108 *Id.* at 581.

the process of maximizing aims is not linear. The principle might require that the decisionmaker pursue and postpone certain aims concurrently, or even pursue competing aims.[109]

The principle's substantive and procedural distinctiveness arises logically from Korobkin's construction of the choice situation, particularly as it relates to motivation and knowledge. Persons in the bankruptcy choice model seek to maximize their own aims in financial distress.[110] However, they are divorced from any knowledge of what their personal aims will be once the veil is lifted. Additionally, they are risk-averse.[111] Their motivation and ignorance might result in their choosing a rule that aspires to powerfully promote all aims, regardless of origin. Procedural flexibility might also be attractive to these risk-averse persons who are ignorant of their fates. To the extent that procedural flexibility makes the simultaneous fulfillment of competing aims possible, these persons decrease the probability that their aim (whatever it turns out to be) will be ignored. Additionally, procedural flexibility allows the decisionmaker to account for changes in a person's circumstances, and, therefore, their aims over time.

The principle of rational planning contains useful descriptive elements for enhancing our understanding of bankruptcy law. The principle corresponds more closely with certain features of bankruptcy law than does the original creditors' bargain. Every bankruptcy scholar—including creditors' bargain theorists—agrees that bankruptcy law actually pursues a variety of goals which sometimes conflict.[112] Moreover, most bankruptcy scholars would agree that the bankruptcy process favors flexibility over a "one-size-fits-all" approach.[113]

Additionally, the principle of rational planning offers a tentative procedure for reducing complex allocational and distributional

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109 *Id.* at 583.

110 *Id.* at 571.

111 *Id.* at 578 n.170.

112 The more contentious issue is whether bankruptcy law should pursue conflicting goals. *See* Warren, *Bankruptcy Policymaking*, *supra* note 46, at 344 (identifying four competing goals: (i) enhancing value of the estate; (ii) distributing value according to multiple normative principles; (iii) internalizing the costs of business failure; and (iv) creating reliance on private monitoring); *see also* JACKSON, LOGIC AND LIMITS, *supra* note 4, at 2 ("Just as too many spices can spoil the soup, so, too, including too much in bankruptcy law can undermine what everyone agrees it should be doing in the first place.").

113 For example, our bankruptcy system, unlike some others, does not force all defaulting debtors to liquidate. Outside of involuntary proceedings, debtors can choose for themselves whether they want to liquidate or reorganize. They (or their creditors or the court) can convert a reorganization case to a liquidation case when, among other things, the prospects for reorganization look grim. *See* 11 U.S.C. § 1112 (1988).

questions to a paradigm of rational choice. Consider a typical problem in Chapter 11 reorganizations: classification of claims in "single asset reorganizations."[114] A single asset reorganization typically involves a corporate debtor whose sole asset consists of commercial real estate. Assume that a corporate debtor in Chapter 11 owns an industrial and commercial park. The debtor has been in Chapter 11 for nine months now and its prospects for a successful reorganization appear bleak. Imagine further that a commercial lender has a mortgage on the property and seeks foreclosure. The outstanding balance on the mortgage is $5.9 million and the value of the real property is $2.2 million. Assume that the bankruptcy court bifurcates the mortgagee's undersecured claim[115] into two parts: a secured claim for $2.2 million (the value of the property), and an unsecured claim for $3.7 million (the difference between the outstanding debt on the property and the value of the property).[116]

The debtor then presents a reorganization plan that classifies the claimants according to certain standards[117] as follows: Class 2-secured claim ($2.2 million); Class 3-unsecured claims of trade creditors ($1 million); and Class 4-unsecured claim of mortgagee ($3.7 million). The claimants are classified as such because the debtor must have at least one class of impaired claimants[118] accept

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114 For cases prohibiting Chapter 11 plans from classifying mortgage lenders' unsecured deficiency claims separately from the claims of other unsecured creditors, see John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs., 987 F.2d 154 (3d. Cir. 1993); Travelers Ins. Co. v. Bryson Properties, XVIII (*In re* Bryson Properties XVIII), 961 F.2d 496 (4th Cir.), *cert. denied*, 113 S. Ct. 191 (1992); Lumber Exch. Bldg. Ltd. Partnership v. Mutual Life Ins. Co. of N.Y. (*In re* Lumber Exch. Partnership), 968 F.2d 647 (8th Cir. 1992). For cases allowing separate classification, see Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enters., Ltd., II (*In re* Briscoe Enters., Ltd., II), 994 F.2d. 1160 (5th Cir. 1993); *In re* D & W Realty Corp., 156 B.R. 140 (Bankr. S.D.N.Y. 1993); *In re* ZRM-Oklahoma Partnership, 156 B.R. 67 (Bankr. W.D. Okla. 1993). *See generally* David G. Carlson, *The Classification Veto in Single-Asset Cases Under Bankruptcy Code Section 1129 (a)(10)*, 44 S.C. L. REV. 565 (1993); Linda J. Rusch, *Gerrymandering the Classification Issue in Chapter Eleven Reorganizations*, 63 U. COLO. L. REV. 163 (1992).

115 The claim is "undersecured" because the debt ($5.9 million) exceeds the value of the property ($2.2 million).

116 Under 11 U.S.C. § 1111(b) (1988), the undersecured mortgagee can choose whether it wants its entire claim to be treated as a secured claim. *See* 11 U.S.C. § 1111(b)(2) (1988). If the undersecured mortgagee elects to have its entire claim treated as secured, the reorganization plan would provide the creditor with a secured claim for $5.9 million and no unsecured claim. If the undersecured mortgagee does not elect to have its entire claim treated as secured, the secured claim will be $2.2 million (the value of the property) and the unsecured claim will be $3.7 million.

117 *See* 11 U.S.C. § 1122 (1988).

118 The bankruptcy court may not confirm a Chapter 11 plan that provides for an impaired class of claims unless, among other things, at least one impaired class of claims has accepted the plan. *See* 11 U.S.C. § 1129(a)(10) (1988). A class is impaired if the plan pro-

the reorganization plan. The trade creditors support the plan, thereby becoming the one class of impaired claimants whose acceptance the debtor needs to obtain its desired aim—a confirmed plan.[119]

Meanwhile, the mortgagee's aim is to block confirmation of the debtor's reorganization plan. Accordingly, the mortgagee demands that its claim and the claims of the trade creditors be placed in the same class as follows: Class 2-secured claim of mortgagee; and Class 3-unsecured claim of mortgagee and claims of trade creditors. No class will accept the plan if the mortgagee's classification scheme prevails because the mortgagee effectively controls both classes and the mortgagee will vote to reject the plan.[120]

How might the claimants be classified? From the point of view of creditor wealth maximization, the mortgagee's position constitutes the normatively correct approach, for the mortgagee is the only creditor with a legal claim to the sole asset in this bankruptcy. A foreclosure proceeding might bring the mortgagee a superior economic return, at least as compared to the economic return from this hopeless reorganization. The mortgagee, therefore, should have the leverage to block confirmation of the plan, and effectively force foreclosure.

The principle of rational planning might offer an alternative explanation for the same result. First, the principle asks if it is possible to realize all of the parties' diverse aims—a goal that might not be possible at this stage of the reorganization. Continuing the reorganization might have a harsh impact on the mortgagee who has already waited almost a year to foreclose on the property. While the debtor languishes in its ineffective reorganization, the value of the real estate might decline, thus materially damaging the mortgagee's security interest. Neutral coordination of aims might no longer be possible.[121] The time has come to promote one aim over the other.

The principle then locates the most vulnerable position. Compared to the other parties, the mortgagee might occupy the most vulnerable position, as the principle of rational planning interprets

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poses to alter the legal, contractual, or equitable obligations on the claim. *See* 11 U.S.C. § 1124(1) (1988).

119 Several courts have held that debtors may perform separate classifications over the objection of undersecured mortgagees. *See* cases cited *supra* note 114.

120 Several courts have held that debtors may not perform separate classification over the objection of undersecured mortgagees. *Id.*

121 Some might question whether the bankruptcy choice model is ever capable of neutrally coordinating aims. *See infra* text accompanying notes 147-60.

that condition. Let us consider the parties' respective positions. The debtor's reorganization appears doubtful, so employees have very little material stake left in the debtor. Losing their jobs could be devastating, but that loss is not materially linked to the enterprise because the enterprise has no viable financial future. The debtor is also virtually worthless to the trade creditors. The trade creditors would receive virtually nothing in a liquidation proceeding because there are no significant assets other than the building. Moreover, it is unlikely that the trade creditors will receive anything from the reorganization proceeding either. After considering the other positions, the mortgagee is the only party remaining with anything of material value at stake—its $2.2 million interest in the real estate. The principle of rational planning might, therefore, promote the mortgagee's claim over others. Thus, the mortgagee's classification scheme constitutes the rational means of satisfying the aim of the person who inhabits the most vulnerable position—the mortgagee.[122]

The weakness with this principle lies not in its structure, for it possesses an impressive procedure for making difficult comparisons, but in its substantive content, which is seriously indeterminate as to outcome. Korobkin has stated its normative aims so broadly that any number of outcomes might be considered consistent with it.[123] Under these circumstances, it remains difficult to discern (with any helpful degree of precision) what underlying values the principle should protect.[124] Thus, we must approach with skepticism Korobkin's claim that legislators might successfully use the principle to frame deliberation on bankruptcy issues.[125] How

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122 Korobkin suggests that other factors (empirical, practical, and evaluative) would be important in resolving the issue. Nevertheless, the principle of rational planning would provide what Korobkin calls "an authoritative standpoint." Korobkin, *Contractarianism*, supra note 11, at 627-30.

123 *Id.* at 581 ("First, it must be broadly effective, promoting as many aims as possible. Second, when it is not possible to achieve all the aims, it must work to achieve the aims that are most important. It thus must mitigate, to some degree, the consequences of financial distress for those who have the most to lose in that context."). The preceding analysis, in which the principle of creditor wealth maximization and the principle of rational planning—ostensibly opposing principles—led to the same result, demonstrates that the principle could generate a variety of outcomes. *See supra* text accompanying notes 114-22.

124 *See* Ronald Dworkin, *The Original Position*, *in* READING RAWLS: CRITICAL STUDIES ON RAWLS' A THEORY OF JUSTICE 16, 37 (Norman Daniel ed., 1989).

> The two principles comprise a theory of justice that is built up from the hypothesis of a contract. But the contract cannot sensibly be taken as the fundamental premise or postulate of that theory .... It must be seen as a kind of halfway point in a larger argument, as itself the product of a deeper political theory that argues for the principle *through* rather than *from* the contract.

125 Korobkin, *Contractarianism*, *supra* note 11, at 627-31.

can such legislators be persuaded to use the principle in this manner if they have little or no sense of what outcomes the principle should generate? More importantly, how can such a principle so substantively vague offer them real normative guidance?[126]

In sum, the principles of bankruptcy under the bankruptcy choice model differ from previous attempts to locate the essence of bankruptcy law because they proceed from different conceptions of representation, knowledge, and motivation. The principles of inclusion and rational planning arise from a choice situation that includes persons representing those potentially affected by financial distress. Moreover, these persons are ignorant of what positions they will occupy in financial distress. While both the bankruptcy choice model and the original creditors' bargain assume self-interested persons, the bankruptcy choice model portrays persons in the self-interested pursuit of maximizing diverse aims. The creditors in the original creditors' bargain, on the other hand, seek to maximize a more singular aim—wealth. The unique conditions of the bankruptcy choice situation produce a perspective on bankruptcy law more committed to substantive pluralism and procedural flexibility (and thus is more complete) than earlier accounts. Moreover, the application of these principles to specific doctrinal issues reveals that both principles provide useful insights pertinent to our bankruptcy system. Accordingly, the principle represents an innovative baseline from which to analyze bankruptcy law.

However, we have also seen that these principles suffer from vagueness and indeterminacy that weakens their normative force. Tracing these weaknesses to underlying problems with the bankruptcy choice model, we now examine in greater detail the conditions of choice under the bankruptcy choice model.

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126 This is a complaint against moral philosophy in general—that it is of limited value for micro-ethical advice. Instead, it is useful only with regard to very abstract questions. *See generally* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 348 (1990) (stating that "[a]s should be clear by now, I am skeptical that moral philosophy has much to offer law in the way of answers to specific legal questions"); Mark Tushnet, *Legal Scholarship: Its Causes and Cures*, 90 YALE L.J. 1205, 1213 (1980) (noting that moral philosophy presently cannot provide normative guidance in real cases because it can only rely on objective values that are too abstract).

## IV. THE BANKRUPTCY CHOICE MODEL

### A. *Persons Have No Knowledge of Their Particular Aims in Financial Distress or How Important Those Aims Will Be to Them*

Korobkin constructs his bankruptcy choice model so that persons have no knowledge of their particular aims in financial distress or how important those aims will be to them.[127] We might read this construction as meaning that these persons have no conception that some plans in financial distress are more fulfilling than others. But how can persons so thoroughly disconnected from their life plans select principles that are useful in the historically situated universe of bankruptcy?[128] Given his emphasis on procedural fairness, Korobkin would surely suggest that it is precisely because they are ignorant of their life plans that they can select justifiable principles. If people know their life plans and have an understanding of how important those plans are to them, they will only use that knowledge to their advantage in the bankruptcy choice situation.[129] However, this response is unsatisfactory to anyone who cannot conceive of normative principles of bankruptcy that are divorced from the personal understandings of individuals.[130] Stated differently, is it appropriate to demand that persons who seek to enter the bankruptcy choice situation check their individual perspectives at the door? The choice situation that produces the principles of bankruptcy contains no appreciation for particular differences among individuals and to that extent, the choice might not be conducted under terms that are widely perceived as realistic.

This point can be clarified with Korobkin's example of the notorious A.H. Robins bankruptcy.[131] Among other things, Korobkin aspires to have his principles address the perception among Dalkon Shield plaintiffs (and others) that the bankruptcy system is unfair.[132] He sometimes defeats the Dalkon Shield plaintiffs' com-

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127 Korobkin, *Contractarianism*, *supra* note 11, at 570.

128 A similar challenge has been made to Rawls's theory of justice. *See* Thomas Nagel, *Rawls on Justice*, *in* READING RAWLS: CRITICAL STUDIES OF A THEORY OF JUSTICE (Norman Daniel, ed., 1975) [hereinafter Nagel, *Rawls on Justice*] (noting that Rawls's original position blocks out persons' conceptions of the good).

129 Korobkin, *Contractarianism*, *supra* note 11, at 560.

130 This might include some utilitarians and libertarians. *See infra* note 134.

131 For an account of A.H. Robins Company's decision to manufacture the Dalkon Shield and the litigation leading up to its bankruptcy filing, see generally SHELDON D. ENGLEMEYER & ROBERT J. WAGMAN, LORD'S JUSTICE: ONE JUDGE'S BATTLE TO EXPOSE THE DEADLY DALKON SHIELD I.U.D. (1985).

132 Korobkin, *Contractarianism*, *supra* note 11, at 550-51.

plaints by testing their complaints against his principles.[133] However, what might happen if these plaintiffs challenged the conditions under which these principles were produced? Imagine this conversation between a Dalkon Shield plaintiff and Korobkin:

> *Dalkon Shield plaintiff*: Why can A.H. Robins file a bankruptcy petition? I have debilitating injuries and have suffered for years. The lawsuit I brought against A.H. Robins was mid-trial. I thought to myself, "Soon the whole terrible ordeal will be over one way or another. The jury will decide either for me or for A.H. Robins, but at least I will have had my day in court." But A.H. Robins filed for bankruptcy and I had to stop my lawsuit. It might pick up again, but who knows when? And the worst of it is that the people who put this awful product on the market get to keep their jobs and run the company! This is unfair!
>
> *Korobkin*: The way to test your complaint is to run it through the principles of bankruptcy. These principles of bankruptcy should address your concerns because they are principles that fair relations between persons would produce.
>
> *Dalkon Shield plaintiff*: Who chooses these principles?
>
> *Korobkin*: An assembly of what we call "representative persons." These persons know nothing about themselves as individuals. However, they know something about the circumstances of bankruptcy and they seek to place themselves in the best possible position to promote their aims, whatever those aims turn out to be.
>
> *Dalkon Shield plaintiff*: But these persons don't look anything like me or anyone else I know. Why should whatever these people decide mean anything to me?
>
> *Korobkin*: What these people decide should mean something to you precisely because they do not look like you. This method yields results that are more fair because no one will try to pursue purely personal interests and thus stack the deck in their favor.
>
> *Dalkon Shield plaintiff*: You keep using that word "fair." Are you the only one who decides what is and what is not "fair?" To tell you the truth, I don't think your assembly is fair in the first place. You speak of "purely personal interests" in such a disparaging way. I believe that I was injured by the Dalkon Shield. I believe that A.H. Robins knew the product was dangerous. I also think that A.H. Robins has a legal obligation to me and that they are using this bankruptcy filing to get out of that obligation, or at least to frustrate it. These are not "purely personal inter-

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133 *Id.* at 609-20.

ests"; they are deeply held convictions. But your assembly doesn't have room for my personal convictions, does it?

*Korobkin*: No, and I am telling you that it should not if we want to keep the conditions in my assembly fair and develop a model that has independent normative force. Look—you are not at a disadvantage relative to others. All others will be ignorant of their convictions as well.

*Dalkon Shield plaintiff*: There you go again. Aren't you listening to me? Your assembly is neither fair nor persuasive to me because it denies me the simple opportunity to bring my individual perspective to the table.

*Korobkin*: I am listening to you. You have asked me some hard questions and I have answered them. Haven't I satisfied you?

*Dalkon Shield plaintiff*: Not at all.

Korobkin diligently gathers representatives of everyone affected by financial distress into the assembly. However, because all persons must drop their deepest convictions to join the assembly, his herculean efforts will hardly seem worth the trouble to some. Perhaps it is necessary to nullify all individual differences to reach agreement on the principles of bankruptcy. However, what the bankruptcy choice model gains in analytic elegance, it might lose in normative influence.[134]

Restricting knowledge of individual aims is particularly controversial in light of Korobkin's broad concept of financial distress because, according to Korobkin, financial distress necessarily implicates political, social, moral, and economic values.[135] Furthermore, Korobkin holds that bankruptcy exists, at least in part, to acknowledge these diverse values that exist in financial distress.[136] One source of these diverse values is the multitude of perspectives that

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[134] Some (but not all) utilitarians and libertarians would object to Korobkin's design. Utilitarians need to know each individual's preference to determine society's net aggregate preferences. In this way, utilitarians accord at least some role for individual identity. *See* JOHN S. MILL, UTILITARIANISM, ON LIBERTY, AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 38-60 (H.B. Acton ed., 1972) (suggesting that utilitarianism protects deep human interests by justifying coercion in support of those interests). For a different view, see Carlson, *Bankruptcy Theory*, *supra* note 6, at 458-59. Consistent with their preference for individual autonomy, some libertarians believe that the actual desires of people matter a great deal, and that hypothetical contracts must be approached with caution. *See* ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 189-97 (1974) (attacking the egalitarian thrust of Rawls's difference principle).

[135] Korobkin, *Rehabilitating Values*, *supra* note 10, at 766.

[136] *Id.*

individuals bring to the bankruptcy proceeding.[137] Yet, these individual perspectives do not exist in the bankruptcy choice situation. Persons have no personal identity apart from the aim they represent. To this extent, the choice among these persons might be significantly impoverished. Whether such restricted conditions for choice can produce principles consistent with Korobkin's rich picture of financial distress remains doubtful.

Knowledge of individual aims might prove essential to us even under a more traditional conception of bankruptcy's role. For example, the standard view holds that bankruptcy exists, in part, to provide a fresh start to individuals burdened with oppressive debt.[138] The notion here is that the fresh start releases the individual to make and pursue her own aims (i.e., starting a business, changing jobs, returning to school, etc.). Behind the fresh start policy lurks several assumptions, including the claim that following one's particular life aim is valuable, either intrinsically[139] or instrumentally.[140] If we take the position that an individual's pursuit of his life plan is intrinsically worthwhile and that the fresh start policy exists for its facilitation, the bankruptcy choice situation seems inadequate. We might ask whether those persons who are ignorant of their own aims can appreciate the inherent value in following one's particular life plan. More importantly, we might question

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137 *Id.* "What undermines a corporation is not merely a crisis of dollars, but a crisis of values experienced in *individual* ways by those who have contributed to and are affected by the enterprise." *Id.* (emphasis added).

138 *See* Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (Bankruptcy law "gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns *at the time of bankruptcy*, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."); *see also* Perez v. Campbell, 402 U.S. 627 (1971) (striking down state statute that conflicted with the fresh start policy); Segal v. Rochelle, 382 U.S. 375, 380 (1966) (suggesting right of the debtor to "start[ ] out on a clean slate").

139 *See* Richard E. Flint, *Bankruptcy Policy: Toward a Model Justification for Financial Rehabilitation of the Consumer Debtor*, 48 WASH. & LEE L. REV. 515, 529 (1991) (viewing the fresh start in terms of its focus on the debtor's future as a living, breathing human being).

140 *See, e.g.*, JACKSON, LOGIC AND LIMITS, *supra* note 4, at 225-52 (discussing various rationale for fresh start, including risk allocation, limited liability, and social safety net); Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 785 (1983) ("One reason for giving the debtor a fresh start is to counteract the self-hatred he may feel, having mortgaged his entire future in a series of past decisions he now regrets."); Elizabeth Warren, *Reducing Bankruptcy Protection for Consumers: A Response*, 72 GEO. L.J. 1333, 1356 (1984) ("With adequate exemptions in place, the bankruptcy statutes permit the working poor who have become hopelessly mired with consumer debt to begin again the climb into the middle class with some assets intact.").

whether persons insensitive to this concern can choose principles capable of fully vindicating the fresh start policy.[141]

More broadly, any apparent dissonance between the conditions of bankruptcy and the bankruptcy choice model means that Korobkin might have difficulty arguing that his exclusion of individual aims is justified because it is the most reasonable conception for the particular bankruptcy system that we have.[142] To the degree that the conditions of bankruptcy—under Korobkin's own view or even a more traditional one—seem to place some degree of importance on individual aims, Korobkin might have difficulty defending the bankruptcy choice model by appealing to contextual arguments.[143]

Korobkin might at this point reject contextual claims of any sort, arguing instead that the problem to which bankruptcy responds be kept distinct from his normative theory. However, an attempt to neatly bifurcate his theory from an account of bankruptcy problems faces certain practical objections. For example, his theory cannot be applied without reference to empirical facts and evaluative judgments.[144] It must confront the conditions of

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141 This is not to suggest that the fresh start policy should always trump competing policies, only that the bankruptcy choice model may not produce principles that are sufficiently responsive to the personal concerns of individuals who need to avail themselves of the fresh start. Interestingly, Korobkin's article has very little to say about the relationship between the bankruptcy choice model and bankruptcy discharge policy. Rather, he discusses discharge primarily in the context of his principle of inclusion and then only in a frustratingly general way. *See supra* text accompanying notes 96-98. This analysis is in contrast to the detail Korobkin provides when discussing the relationship of his principles to other bankruptcy topics (i.e., corporate reorganization, automatic stay, equality of distribution, trustee's avoiding powers, distributional priorities, etc.). To be fair to the bankruptcy choice model, however, only time will tell whether the principles have much to tell us about the proper contours of discharge policy.

142 *See generally* John Rawls, *Justice as Fairness: Political not Metaphysical*, 14 PHIL. & PUB. AFF. 223, 225-26 (1985). For a critical analysis of Rawls's contextual arguments, see MARGARET MOORE, FOUNDATIONS OF LIBERALISM 115-40 (1993) (arguing that Rawls's appeal to shared values and a shared way of life conflicts with liberal conceptions of choice and liberalism's strong public-private distinction).

143 Of course, Korobkin might also defend the exclusion of individual aims by invoking the position common among some liberals—that the model should remain in practice neutral with respect to what is a good aim. JOHN RAWLS, A THEORY OF JUSTICE 396 (1971); *see also* CHARLES E. LARMORE, PATTERNS OF MORAL COMPLEXITY 43-45, 69 (1987). However, it might be too late in the day for Korobkin to seriously argue that his model can in practice remain neutral with respect to this question. Nagel, *Rawls on Justice*, *supra* note 128, at 9 ("Any hypothetical choice situation which requires agreement among the parties will have to impose strong restrictions on the grounds of choice, and these restrictions can be justified only in terms of a conception of good."); *see also* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY xiv (1977). *See generally* Stephen A. Gardbaum, *Why the Liberal State Can Promote Moral Ideals After All*, 104 HARV. L. REV. 1350 (1990).

144 *See* Korobkin, *Contractarianism*, *supra* note 11, at 627-31.

bankruptcy before it can become fully operational. In this moment of application, the distinction between theory and context becomes necessarily blurred. Moreover, divorcing normative theory from the conditions of bankruptcy carries with it the risk that Korobkin will fail to persuade his declared audience, Dalkon Shield plaintiffs, and other participants in the bankruptcy system who charge that the bankruptcy system is unfair.[145] Can Korobkin speak effectively to those persons using a normative theory devoid of an account of the problem itself? An abstract analysis of this sort certainly appeals to academics, but its appeal to those outside of the academic community seems more dubious.[146]

Finally, Korobkin might insist that his choice situation respects individual aims because each person in it must imagine the possibility that they may occupy each and every position. In imagining that possibility, they will take each individual aim into account. This projection may soothe the hypothetical Dalkon Shield plaintiff somewhat, but nagging doubts remain. Most importantly, such a plaintiff might be concerned about problems of dilution. To the extent that each person imagines a variety of aims, the intensity of the plaintiff's aim may suffer. Ultimately, the plaintiff's aim may not register with sufficiently satisfying strength. Even the possibility, then, of representation through shifting identities may not be able to ease the inherent tension that Korobkin's theory presents to us—a tension between hypothetical choice procedures that provide independent normative authority and substantive outcomes in the form of bankruptcy principles that convincingly address personal aims.

### B. *Downplaying the Absence of Neutral Effects*

Korobkin's first assumption leaves the bankruptcy choice model vulnerable to another charge. Even if we concede that the bankruptcy choice situation approximates conditions of neutrality, it might not be neutral in affecting persons with different aims.[147] Korobkin assumes that persons, desiring influence over actions of the financially distressed corporation, come together and choose prospective principles, ignorant of how they will affect their indi-

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145 *Id.* at 550.

146 *See generally* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992) (noting that judges and practicing lawyers rarely find "wholly theoretical" scholarship useful, in part because it is not grounded in the problems that arise in their work).

147 Not surprisingly, Rawls's theory of justice suffers from the same difficulty. *See* Nagel, *Rawls on Justice*, *supra* note 128, at 9.

vidual aims.[148] Korobkin confers legitimacy on those principles merely because they arose out of seemingly neutral conditions.[149]

However, for some persons that genesis may not be satisfactory. Returning to the A.H. Robins example, imagine, as Korobkin does, that shortly before bankruptcy, a Dalkon Shield plaintiff obtains a judgment lien[150] on the assets of A.H. Robins.[151] Assume that the plaintiff's aim in financial distress is to maintain her lien. Assume that other Dalkon Shield plaintiffs in the A.H. Robins bankruptcy case have not obtained judgment liens and therefore seek payment on unsecured claims. Korobkin suggests that because the judgment lien plaintiff occupies a less vulnerable position than the other plaintiffs,[152] the principle of rational planning mandates that she lose her lien and share pro rata with the unsecured claimants.[153] This result is, in one sense, neutral from the standpoint of the unsecured creditors. They sought and might achieve payment on unsecured claims. However, the principle of rational planning completely frustrates the judgment lien plaintiff's aim. While the veil of ignorance might remove the formal limitations of individual identity, its effects might not be perceived as fair to the judgment lien plaintiff who has a different aim.[154]

Importantly, the bankruptcy choice model might simply perpetuate existing inequalities among those with similar aims. Let us compare the treatment of the judgment lien plaintiff with that of a bank that obtains a consensual lien[155] on A.H. Robins's assets in the form of an Article Nine security interest.[156] Assume that the bank took its lien on A.H. Robins's assets three years prior to the bankruptcy. The bank, like the judgment lien plaintiff, desires to

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148 Korobkin, *Contractarianism*, *supra* note 11, at 570 ("They can and do anticipate that they will be affected in various contexts and in varying degrees. But they have no idea of the probability of their occupying a particular position in the context of financial distress on any specific occasion or in the course of their lifetimes.").

149 *Id.* at 571.

150 A judgment lien arises when the creditor takes judicial action against the debtor.

151 Korobkin, *Contractarianism*, *supra* note 11, at 609-10.

152 *Id.* at 611.

153 *Id.* Korobkin argues that the principle of rational planning manifests in preference law and that it is preference law that would void the judgment lien plaintiff's security interest. *Id.* at 605 n.285, 611; *see also* 11 U.S.C. § 547(b) (1988).

154 Rawls acknowledged this problem, but ultimately dismissed it. *See* JOHN RAWLS, A THEORY OF JUSTICE (1971) (suggesting that liberal political philosophy should not be concerned with the equality of effects upon those with different conceptions of the good). Korobkin, on the other hand, does not acknowledge this difficulty.

155 A consensual lien arises as a result of a voluntary grant by the debtor. ROBERT L. JORDAN & WILLIAM D. WARREN, BANKRUPTCY 1 (3d ed. 1993).

156 U.C.C. § 9-203 (1987).

maintain its lien. Under the principle of rational planning, the bank might be able to keep its lien, in part, because it maximally satisfies the bank's aim (i.e., keeping its lien) and the debtor's aim (i.e., the debtor's interest in readily available credit at reasonable rates of interest).[157] However, as we have seen, the principle of rational planning dictates that the judgment plaintiff lose her lien, in part, because it gives her a special advantage without benefiting the unsecured creditors, who are in the most vulnerable position.[158]

From the perspective of the judgment lien plaintiff, the seemingly neutral conditions of the bankruptcy choice situation simply reinforce the bank's special advantages under nonbankruptcy law. The bank's status as a large, sophisticated, institutional lender enabled it to obtain a consensual security interest years before the bankruptcy.[159] Moreover, the bank probably has thousands of debtors to whom it can look for payment. The judgment lien plaintiff, on the other hand, has none of the bank's advantages. Its security interest was probably obtained only after a lengthy trial. Additionally, A.H. Robins is its only debtor. The judgment lien plaintiff would ask what is so "fair" about voiding her lien and not the bank's? Of course, the bank may consider this eminently "fair," because, in negotiating for its security interest, it had taken advantage of an opportunity provided under nonbankruptcy law. But, the bank's response only underscores how much the bankruptcy choice model rests on a conception of fairness that might not be universally shared.[160]

Of course, any set of normative bankruptcy principles will probably benefit some more than others. Korobkin might, on this basis, argue that the mere fact that some creditors do better than others is no reason to reject the bankruptcy choice model or its

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157 Korobkin, *Contractarianism*, *supra* note 11, at 605 n.282.

158 *See supra* note 154 and accompanying text.

159 Korobkin asserts that the person occupying the most vulnerable position will change depending on the unique circumstances of each case. Korobkin, *Contractarianism*, *supra* note 11, at 587. This assertion is dubious, given the way in which Korobkin defines the most vulnerable position: those who lack influence and have a lot of material value to lose. Secured creditors will often have a lot of material value at stake in the enterprise precisely because they have a consensual security interest. Additionally, noninsider secured creditors have no more influence than any other person.

160 Among those who might not share Korobkin's conception of fairness are those who believe that bankruptcy principles should equalize bargaining power among the parties in a bankruptcy proceeding, whether due to unequal bargaining power outside of, or inside of, bankruptcy proceedings. Although controversial, this notion is manifested in at least one proposal recently placed before Congress. *See* S. REP. NO. 540, 103d Cong., 1st Sess. (1993) (requiring a Chapter 11 debtor to use its cash collateral and debtor in possession financing to pay retiree benefits).

principles. In his view, the procedural fairness of the bankruptcy choice model represents the more important question.[161] The difficulty with Korobkin's view is that the procedural fairness of the choice situation rests on assumptions that are either unbelievable or subject to serious challenge. Moreover, it is far from clear, as a normative matter, that procedural fairness should be a more important concern than substantive fairness.

We have already recognized that a Dalkon Shield plaintiff with a judicial lien may not agree to a regime in which she loses her lien.[162] How, then, can Korobkin explain her consent as the product of a procedure that is free and fair? He does so by imagining that the hypothetical choice situation happens before the plaintiff's judicial lien attaches.[163] To put the matter differently, all persons are deemed to have mere equal rights under nonbankruptcy law at the time of the choice procedure.[164] This condition is required if the bankruptcy choice model is to vindicate a policy of bankruptcy equality. But this assumption is, of course, unreal, and it should not take an empirical study to convince us otherwise. Persons are simply not equal under nonbankruptcy law because of disparities in wealth, influence, and legal rights. Korobkin assumes an equality among persons that is useful only in its ability to give his model the appearance of procedural neutrality.

Korobkin also implicitly assumes a static view of human preferences.[165] This assumption is also problematic in that principles

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161 Korobkin, *Contractarianism*, *supra* note 11, at 552-53. Korobkin follows Rawls in this regard. Rawls explicitly endorses what he calls "procedural neutrality." *See* John Rawls, *The Priority of Right and Ideas of the Good*, 17 PHIL. & PUB. AFF. 251, 263 (1988); *see also* CHARLES E. LARMORE, PATTERNS OF MORAL COMPLEXITY 42-47 (1987) (distinguishing between neutrality of procedure and neutrality of outcome).

162 *See supra* text accompanying notes 148-55.

163 Jackson employs similar reasoning in the original creditors' bargain model. *See* Carlson, *Philosophy*, *supra* note 9, at 1348-50. For criticism of this form of *ex ante* reasoning in contractarianism, see Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697, 708 (1990) (criticizing an "event" model of consent as serving "constrained views on human nature and proper public policy").

164 Korobkin, *Contractarianism*, *supra* note 11, at 571. *See generally* Michel Rosenfeld, *Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory*, 70 IOWA L. REV. 769, 797 (1985) (noting that the contractarian paradigm requires that parties to a contract enjoy relatively equal bargaining power). Korobkin makes another highly controversial, albeit weak, assumption: that the people in the bankruptcy choice model are rational. Korobkin, *Contractarianism*, *supra* note 11, at 570.

165 *Id.* at 610. In evaluating the complaints of a plaintiff with a judicial lien, Korobkin writes: "For our purposes, however, her actual perspective—or that of any other actual person—is not authoritative. The question instead is whether, as a free and equal person under conditions that are fair, she would have agreed to these legal arrangements to govern relationships in financial distress." *Id.*

that seem fair to those persons in the bankruptcy choice situation (because they appear to emanate from procedurally fair conditions) may not be acceptable to those same persons over time, because of changes in their circumstances. In other words, even if the choice procedure seems fair to those imagined persons at the time of the choice, should it bind them forever?[166] More to the point, should it bind us if it would no longer appear fair to them?[167]

On the normative front, Korobkin's approach assumes that we should judge the fairness of the bankruptcy choice model apart from its substantive effects. However, bankruptcy (like other areas of law) contains both procedural and substantive elements.[168] It

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166 Professor Karen Gross makes this point well:

> I believe that people do change and that the passage of time and life's exigencies do call for us to rethink personal decisions we have made. Part of life is that unexpected things happen and how we respond to these events cannot always be predetermined. This is because our predeterminations could have been based on facts, circumstances or feelings that are altered. Moreover, different people respond to different situations differently and hence rules with no room for heterogeneity fail to respond to real world situations .... [B]asing a legal theory on *ex ante* decision-making (default rules) is problematic at its core. Creating a legal system based on how we believe people will act, based on hypothetical conjecturing, is bound to create problems for those individuals who change their preference over time.

Karen Gross, *The Need To Take Community Interests Into Account In Bankruptcy: An Essay*, WASH. U. L.Q. (forthcoming 1994) (manuscript on file with author).

167 In selling the normative force of the bankruptcy choice model, Korobkin, like other contract theorists, must convince us that the choice of a set of principles constitutes a justification of them. *See* READING RAWLS: CRITICAL STUDIES OF A THEORY OF JUSTICE xxxix (Norman Daniels ed., 1975) (noting the distinction between Rawls's original position as an analytic device and a justification device).

168 For an excellent (and very recent) example of the tension between procedural and substantive fairness in bankruptcy jurisprudence, see BFP v. Resolution Trust Corp., 114 S. Ct. 1757 (1994). In this case, a partnership took title to a home, subject to a deed of trust in favor of a mortgagee. After the mortgagee entered the notice of default, the home was purchased by a third party who paid $433,000 for it at a properly noticed foreclosure sale. The partnership filed for bankruptcy and filed a complaint to set aside the transfer under § 548(a)(2) of the Bankruptcy Code. Section 548(a)(2) of the Bankruptcy Code allows a bankruptcy trustee to avoid certain transfers if, among other requirements, the debtor "receives less than reasonably equivalent value" for the transfer. The partnership argued that the home was worth over $725,000 when sold and thus was not exchanged for a "reasonably equivalent value."

The Supreme Court, in a 5-4 decision, held that a "fair and proper price, or a 'reasonably equivalent value,' for foreclosed property, is the price in fact received at a foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with." *Id.* at 4363. Writing for the majority, Justice Scalia rejected the "fair market value approach" that had been adopted by two Circuit Courts of Appeals, noting that such a standard was incompatible with the forced sale context of mortgage foreclosures. Moreover, Justice Scalia noted that the concept of a fair forced sale price lies beyond the appropriate confines of federal bankruptcy power because "[h]ow closely the price received in a forced sale is likely to approximate fair market value depends on the terms of the forced sale—how quickly it may be made, what sort of public notice must be given, etc." *Id.* at

would seem impossible for Korobkin (or anyone else) to develop comprehensive and useful normative bankruptcy principles without some attention to both concerns. These criticisms should not be taken to mean that substantive fairness should be the sole concern of the bankruptcy choice model. Neither can we make the claim that substantive fairness is anymore easy to define than procedural fairness. The point is that difficult value choices about the conditions necessary for fairness seem inevitable regardless of which conception one emphasizes. It is precisely these value choices that the bankruptcy choice model seems reluctant to engage, seeming as it does to rely on controversial and untested empirical premises.

### C. *Mutually Disinterested Individuals*

The persons in the bankruptcy choice situation have no interest in anyone else's results in financial distress. They seek to maximize their own aims, whatever those aims turn out to be. This goal suggests two characteristics about persons in the bankruptcy choice situation: (i) they are not altruistic; and (ii) they are atomistically isolated. These presumptions render the model incomplete to those whose conception of fairness is dependent on ethics of mutual interest and interrelatedness.[169]

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4362. Justice Scalia correctly observed that the price is thus entirely dependent on whatever state's law applies to the transaction, and that state procedures vary. Justice Scalia noted that states have created procedures designed to strike a balance between the rights of lenders and borrowers and that "[w]hen these procedures [are] followed . . . it is 'black letter' law that mere inadequacy of the foreclosure sale price is no basis for setting the sale aside . . . ." *Id.* at 4362-63.

The dissenters (Justices Souter, Blackmun, Stevens, and Ginsburg) saw the matter differently. Writing for the dissent Justice Souter noted wryly that "[t]he Court today holds that by the terms of the Bankruptcy Code Congress intended a peppercorn paid at a noncollusive and procedurally regular foreclosure sale to be treated as the 'reasonabl[e] equivalent' of the value of a California beachfront estate." *Id.* at 4364-65 (Souter, J. dissenting). Justice Souter would have required courts to determine the value of the property and then ascertain whether the purchase price was less than reasonable under the circumstances. *Id.* at 4367-68. Justice Souter criticized the majority for viewing the term "reasonably equivalent value" in procedural terms only. *Id.* at 4367 ("Unless whimsy is attributed to Congress, the term in question cannot be exclusively procedural in one class of cases and entirely substantive in all others."). Justice Souter then accused the majority of "[mischievously] dress[ing] its narrowly procedural gloss in respectable, substantive garb." *Id.* at 4367 n.10.

169 Professor Karen Gross has begun to think about bankruptcy in these terms. *See Why Should We Have A Bankruptcy Law?*, 23 Bankr. Ct. Dec. (CRR), Dec. 10, 1992, at A1, A10 (" '[B]ankruptcy is all about balancing competing interests—and . . . amongst the competing interests that have to be balanced are the interests of the community. That doesn't mean the community will always prevail. But it does mean it should be one of the factors that gets balanced.' " (quoting Professor Karen Gross)).

In rejecting Jackson's assertion that secured creditors would agree to a collective procedure because it would benefit unsecured creditors, Korobkin writes:

> But the existence of a net benefit is irrelevant to the secured party's calculation. The contractarian model derives its force from showing that certain outcomes would be freely chosen by parties in pursuit of their own interests, not as an expression of any altruistic impulse of promoting the welfare of others.[170]

This statement might represent nothing less than an anathema to those who would demand that the bankruptcy choice model account for the benevolent instincts in persons.[171] To factor out altruism, they would argue, leaves the model unable to account for an inherent impulse. Perhaps the Dalkon Shield plaintiff is to some extent unselfish and would be willing to surrender her lien if it would benefit others, even if it would mean less influence for her. The selfish pursuit of her own aims—which the bankruptcy choice model embraces—may not motivate her.

Korobkin might defend this exclusion of altruistic impulses by pointing out that it is the only method for maintaining conditions of neutrality in the choice situation. Altruism might lead a person to assert another person's aim.[172] This might advantage one person at the expense of another, and thus undermine the fairness of the deliberations.[173] However, many would approach Korobkin's assertion with skepticism that his choice situation is a neutral one. In fact, they would claim that it has a strong individualistic bias, and argue that this bias undermines the fairness of the deliberations to the extent that it forces participants to shed an important moral ethic to participate.

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170 Korobkin, *Contractarianism*, *supra* note 11, at 562.

171 Arguments of this sort are sometimes associated with communitarianism. *See, e.g.*, MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 11 (1982); LAW AND THE COMMUNITY: THE END OF INDIVIDUALISM? (Allen C. Hutchinson & Leslie J.M. Green eds., 1989); Drucilla Cornell, *Beyond Tragedy and Complacency*, 81 Nw. U. L. REV. 693, 700-03 (1987). Of course, the label "communitarian" masks the diversity of viewpoints held by many who call themselves (or who have been labeled) "communitarians." For a useful classification of "communitarian" legal scholars, see Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685, 690-71 (1992). For the view that we should discard the labels "communitarian" and "liberal," see Charles Taylor, *Cross-Purposes: The Liberal-Communitarian Debate*, *in* LIBERALISM AND THE MORAL LIFE 159, 163 (Nancy L. Rosenblum ed., 1989). *But see* RICHARD POSNER, THE PROBLEMS OF JURISPRUDENCE 414 (1990) (suggesting that "liberalism" and "communitarianism" are mutually exclusive legal theories).

172 Korobkin, *Contractarianism*, *supra* note 11, at 560.

173 *Id.*

Some communitarians would challenge as sterile and unrealistic Korobkin's conception of the persons in the bankruptcy choice situation as persons without personal relationships to communities. Persons in the bankruptcy choice situation seem to know that diverse communities exist in financial distress; however, they do not have a personal commitment to any of those communities. Most communitarians assert that communities, they would argue, give rise to core values and commitments among persons.[174] It is, they would argue, impossible for persons in the bankruptcy choice model to be so divorced from these values and simultaneously produce principles that are convincing. For example, employees might constitute a community. An individual employee might have a commitment to his employee group that is central to his identity and thus central to his aims. Secured creditors might be a community. Dalkon Shield plaintiffs might be a community. The list could go on. Yet, personal commitments to these communities do not weigh heavily in Korobkin's analysis. A person who derives nourishment and growth from a community might not embrace the bankruptcy choice model without serious reservations.

At this juncture, Korobkin might deny the charge that the bankruptcy choice model rests on selfishness and atomism, advancing the claim that such criticisms of specific assumptions in the bankruptcy choice model miss an important point about the model's operation. While it is true that parties in the bankruptcy choice situation seek to advance their own aims, those aims might include altruistic aims as well as the aims of persons as members of communities. When persons choose principles, they must take seriously the possibility that they may have aims of this kind.[175]

While this response might solve one problem for Korobkin, it also presents a new and potentially even more serious objection. If participants in the bankruptcy choice situation must imagine that

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[174] *See* ALASDAIR MACINTYRE, AFTER VIRTUE 172, 220 (1984); Michael Walzer, *The Communitarian Critique of Liberalism*, 8 POL. THEORY 6, 15-22 (1990); Michael J. Sandel, *Morality and the Liberal Ideal*, THE NEW REPUBLIC, May 7, 1984, at 15-17 (suggesting that the individual is not totally autonomous, but is situated and defined by the community).

[175] Attempts have been made to rehabilitate Rawls's original position through this line of argument. *See* Will Kymlica, *Liberal Individualism and Liberal Neutrality*, 99 ETHICS 883, 886-93 (1989). Korobkin might also argue that his principles of bankruptcy are sensitive to communitarian norms. For example, the principle of inclusion provides that the absence of a legal claim does not disqualify a person from having her aims recognized. As a result, community interests have a potential place in bankruptcy policy. *See supra* text accompanying notes 68-83. Moreover, the community could occupy the most vulnerable position, thereby meriting special protection under the principle of rational planning. *See supra* text accompanying notes 99-122.

they have altruistic aims as well as aims as members of communities, they also have to take seriously the possibility that they may have all other conceivable aims that persons might have in the context of financial distress. Indeed, they must take seriously the chance that they will have *any* aim imaginable in that context. Participants must consider the possibility that they might have aims driven by every conceivable ethical norm in the context of financial distress. The problem simply is that in trying to be sensitive to all ethical norms, the model may not be sufficiently sensitive to any. The model seems, at its core, shallow and prone to drift.[176]

The principles of bankruptcy have the characteristic simplicity and elegance of first principles. They provide, to some degree, a richer theoretical edifice than did the original creditors' bargain and even have some explanatory power. However, these principles' normative force remains uncertain. They will not be persuasive to anyone who does not accept the tenets of the model that produced them and strong evidence exists to support their skepticism. Some will argue that persons in the choice situation are too divorced from their individual perspectives to produce principles that are sufficiently responsive to the aims of individuals in financial distress. Some will fault the model for adopting unrealistic assumptions that are useful only in distancing the model from its substantive effects. Still others will argue that the choice situation stands for too much and thus stands for too little.

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176 Korobkin might defend this aspect of the bankruptcy choice model by taking the position that the aims of persons in financial distress are fundamentally incommensurable. By that he means that "values are not reducible to a single value." Korobkin, *Rehabilitating Values*, *supra* note 10, at 765 n.222. Under this view, the need for all participants to consider diverse, plural, and often irreconcilable aims does not represent a weakness, but instead a strength of the model. One must buy into this view before one will find the bankruptcy choice model—or its principles—of any practical use. However, the view that we should use a notion of incommensurability to understand and improve our legal systems hardly seems dominant. Even those who believe that the notion of incommensurability has much to offer law concede that unitary theories of value have a well-established place in law and legal theory. *See* Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 781 (1994) (noting that there is a "distinguished tradition of thought, found in such diverse thinkers as Plato and Bentham that insists that values should be seen as unitary" and that "more modest versions of [monastic theories of value] play a large role in the legal context"). For a useful discussion of incommensurability in law, see Richard H. Pildes, *Conceptions of Value in Legal Thought*, 90 MICH. L. REV. 1520 (1990) (reviewing MARTHA C. NUSSBAUM, LOVE'S KNOWLEDGE (1990)) (distinguishing various types of incommensurability and their relationship to legal thought and practice).

## V. CONCLUSION

Where do we go from here? This Article should not be construed as suggesting that bankruptcy theory is useless or futile. Indeed, as this Article makes clear, Korobkin's work shows us that theoretical approaches can produce useful insights that help explain certain features of our bankruptcy system. At the same time, our objections to the bankruptcy choice model help clarify what should be part of theoretical bankruptcy scholarship. We need to rethink seriously the idea that we can establish and state fundamental norms in bankruptcy by using mechanistic choice procedures, whether from efficiency contractarians or deontological contractarians. The bankruptcy choice model, in particular, seems too stripped-down, its assumptions too contrived and unrealistic to be justificatory for such a historically situated and detailed institution as federal bankruptcy. The principles of bankruptcy under the bankruptcy choice model seem substantively vague and indeterminate. The bankruptcy choice model gives us an elegant procedure, but it lacks normative content sufficient to give us concrete guidance on specific legal questions in bankruptcy.

The bankruptcy choice model is seductive because it permits us to avoid arguing directly for the merits of a substantive vision of bankruptcy. We can instead take refuge in what might appear to be a neutral choice paradigm. However, such refuge carries with it too high a price. If theoretical bankruptcy scholarship is to provide practical guidance for concrete allocational and distributive choices in bankruptcy, it must attend not only to questions of process, but also to substantive outcomes. Moreover, the problems to which bankruptcy responds should help guide the formulation, not just the application of theory. Attention to these matters seems vital if theoretical bankruptcy scholarship is to squarely address the complex questions that surround current debates over the proper contours of bankruptcy policy.