

University of Florida Levin College of Law

UF Law Scholarship Repository

UF Law Faculty Publications

Faculty Scholarship

2023

Bespoke, Tailored, and Off-the-Rack Bankruptcy: A Response to Professor Coordes's "Bespoke Bankruptcy"

Christopher D. Hampson

Follow this and additional works at: <https://scholarship.law.ufl.edu/facultypub>



Part of the [Bankruptcy Law Commons](#)

BESPOKE, TAILORED, AND OFF-THE-RACK BANKRUPTCY: A
RESPONSE TO PROFESSOR COORDES'S 'BESPOKE
BANKRUPTCY'

*Christopher D. Hampson**

Toward the end of every semester that I teach bankruptcy,¹ I let my students vote on which “non-traditional” insolvency regimes they would like to study, including municipal bankruptcy, sovereign bankruptcy, and financial institutions. What I am really trying to do is convey to the students that the default procedures and substantive rules in Chapters 7 and 11 of the U.S. Bankruptcy Code do not apply to all types of enterprises.

In *Bespoke Bankruptcy*,² Professor Laura N. Coordes has given me a gift: the gift of the right words to describe my tradition, and a theoretical framework to undergird it. As Professor Coordes puts it, the world is full of “bankruptcy misfits,”³ entities whose social purpose, governance structure, or financial profile makes the template model of reorganization under the Bankruptcy Code unwieldy or even counterproductive.⁴ For such entities, Congress sometimes enacts what Professor Coordes calls “bespoke bankruptcy,” a non-Code set of procedures and substantive rules designed to fit a small group of debtors.⁵

By studying at least one type of bankruptcy misfit, my bankruptcy course takes a sharp left turn, veering away from the Code (familiar territory by that point) and towards a complicated new landscape. Professor Coordes’s core insight serves to remind scholars and practitioners that the terrain covered by lowercase-b “bankruptcy” extends far beyond the Code.⁶ From a theoretical perspective, scholars attempting to provide descriptive or normative theories of bankruptcy (or defend preexisting theories) should ensure that those theories account for

* Assistant Professor of Law, University of Florida Levin College of Law. For comments and conversations that enriched and improved this Response, I am grateful to Lynn LoPucki, David Skeel, and Pamela Foohey. Zachary Torres and Feibai Ma provided helpful comments and suggestions. Many thanks to Amanda Siciliano, Joseph Burkart, and the excellent editors at the *Florida Law Review*.

1. So far, I have taught bankruptcy once, but all traditions must start somewhere.

2. Laura N. Coordes, *Bespoke Bankruptcy*, 73 FLA. L. REV. 359 (2021).

3. *Id.* at 363.

4. *Id.* at 363–64.

5. *Id.* at 361.

6. As Professor Coordes defines it, “bankruptcy” has three foundational characteristics: (1) bankruptcy allows debtors to impair contracts and restructure their debt, which under the U.S. Constitution is a power given to the federal government and not the states; (2) bankruptcy is a collective and binding process; and (3) bankruptcy provides an orderly forum for value-maximizing decision making, or as Professor Coordes puts it, “breathing space.” *See id.* at 365–67.

bankruptcy misfits and the bespoke bankruptcy regimes designed to accommodate them.⁷

Of course, Professor Coordes provides more than just a helpful set of terms. She provides a thoughtful and rigorous analytical framework, proposing that entities receive bespoke treatment only when they are “too important to fail”⁸ and only after policymakers have assessed whether a bespoke bankruptcy law could appropriately govern a group of similarly situated, vulnerable entities whose financial needs fit poorly with the current Code.⁹

Professor Coordes’s typology is at its strongest when it relies on substantive differences between bespoke bankruptcy and what she calls “Code-based bankruptcy,”¹⁰ and not the mere fact that the standard template resides in Title 11 of the U.S. Code. After all, municipal bankruptcy under Chapter 9 of the Code, at least for general-purpose municipal entities like Detroit or Chester City,¹¹ is actually an example of bespoke bankruptcy even though it lives in Title 11. So too is territorial bankruptcy under the Puerto Rico Oversight, Management, and

7. In this vein, Professor Vincent Buccola has advanced a theory of municipal bankruptcy centered on preserving “spatial economies,” noting that a theory accounting for municipal bankruptcy “must necessarily look very different” than the creditors’ bargain theory developed by Professors Thomas Jackson and Douglas Baird in the 1980s. See Vincent S.J. Buccola, *The Logic and Limits of Municipal Bankruptcy Law*, 86 U. CHI. L. REV. 817, 819–21 (2019). Michael A. Francus makes a structurally similar argument by arguing that data from public hospital bankruptcies complicates the creditors’ bargain theory. See Michael A. Francus, *Death, Bankruptcy and the Public Hospital* (unpublished manuscript) (on file with author). This development represents a new frontier in bankruptcy theory, as some of the classic debates in the literature focus exclusively on business bankruptcy. See, e.g., Elizabeth Warren, *Bankruptcy Policymaking in an Imperfect World*, 92 MICH. L. REV. 336, 341 (1993) (noting that Professors Elizabeth Warren and Douglas Baird agreed to debate the policy behind business bankruptcy); Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 776–77 (1987). Douglas Baird’s approach, drawing from Professor Jackson’s work, can be found in numerous works, including Douglas G. Baird, *The Uneasy Case for Corporate Reorganizations*, 15 J. LEGAL STUD. 127 (1986), as well as a new monograph that aims to set forth a unifying theory but is similarly restricted to corporate reorganizations. See DOUGLAS G. BAIRD, *THE UNWRITTEN LAW OF CORPORATE REORGANIZATIONS* (2022).

8. Coordes, *supra* note 2, at 396.

9. *Id.* at 398–400. Professor Skeel has also offered a framework for determining when bankruptcy should be an option, analyzing municipalities and sovereign states alongside individuals and businesses. See David A. Skeel, Jr., *When Should Bankruptcy Be an Option (for People, Places, or Things)*, 55 WM. & MARY L. REV. 2217, 2230–31 (2014). Notably, Skeel grapples with both efficiency and dignitarian concerns, the latter of which is underdeveloped in the bankruptcy literature. See *id.* at 2236–39.

10. See, e.g., Coordes, *supra* note 2, at 365, 368.

11. See Rob Kozlowski, *City of Chester, Pa., Files for Bankruptcy Mainly Over 3 Underfunded Pension Plans*, PENSIONS & INVS. (Nov. 14, 2022), <https://www.pionline.com/pension-funds/city-chester-pa-files-bankruptcy-mainly-over-3-underfunded-pension-plans> [https://perma.cc/C7FF-CVGY] (last visited March 2, 2023).

Economic Stability Act (“PROMESA”),¹² even though Subchapter III of PROMESA incorporates vast swaths of the Code,¹³ including most of the defined terms in the Code¹⁴ and the Federal Rules of Bankruptcy Procedure.¹⁵ What matters is the substantive deviation from the standard approach.

For that reason, I prefer to think of the standard approach as “off-the-rack bankruptcy,” rather than “Code-based.”¹⁶ Off-the-rack bankruptcy for enterprises, to my mind, consists of the court-supervised process under Chapter 11 and Chapter 7 of the Code—and the interplay between them. Typically, financially distressed businesses will initially invoke Chapter 11 of the Code and continue to manage the business as the debtor-in-possession, all while aiming for a sale or a plan of reorganization.¹⁷ Any plan, however, must improve upon the outcomes that would arise in a Chapter 7 liquidation,¹⁸ and so negotiations take place against the backdrop of converting the case to Chapter 7.¹⁹ The threat of Chapter 7 liquidation, constantly humming in the background, is an ineluctable part of “standard” bankruptcy practice for enterprises.

This fits very neatly with Professor Coordes’s theory that bankruptcy misfits are “too important to fail.”²⁰ Because liquidation is not an (easy) option for the Detroit or Puerto Ricans of the world, off-the-rack bankruptcy does not work for them.²¹

12. 48 U.S.C. § 2101(b).

13. See David Skeel, *Reflections on Two Years of P.R.O.M.E.S.A.*, 87 REV. JUR. U.P.R. 862, 873 (2018) (noting that Title III proceedings under PROMESA mirror chapter 9 bankruptcy); see also 48 U.S.C. § 2161(a) (incorporating Sections 101, 102, 104, 105, 106, 107, 108, 112, 333, 344, 347(b), 349, 350(b), 351, 361, 362, 364(c), 364(d), 364(e), 364(f), 365, 366, 501, 502, 503, 504, 506, 507(a)(2), 509, 510, 524(a)(1), 524(a)(2), 544, 545, 546, 547, 548, 549(a), 549(c), 549(d), 550, 551, 552, 553, 555, 556, 557, 559, 560, 561, 562, 902, 922, 923, 924, 925, 926, 927, 928, 930, 942, 944, 945, 946, 1102, 1103, 1109, 1111(b), 1122, 1123(a)(1), 1123(a)(2), 1123(a)(3), 1123(a)(4), 1123(a)(5), 1123(b), 1123(d), 1124, 1125, 1126(a), 1126(b), 1126(c), 1126(e), 1126(f), 1126(g), 1127(d), 1128, 1129(a)(2), 1129(a)(3), 1129(a)(6), 1129(a)(8), 1129(a)(10), 1129(b)(1), 1129(b)(2)(A), 1129(b)(2)(B), 1142(b), 1143, 1144, 1145, and 1146(a) of the Code, with certain exceptions enumerated elsewhere).

14. 48 U.S.C. § 2161(b).

15. *Id.* § 2170.

16. Coordes, *supra* note 2, at 365.

17. See, e.g., *Chapter 11 – Bankruptcy Basics*, U.S. CTS., <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics> [<https://perma.cc/R388-G856>] (last visited January 19, 2023).

18. See 11 U.S.C. § 1129(a)(7)(A)(ii) (requiring that nonconsenting holders of claims receive property valued at “not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title”).

19. See *id.* § 1112(b)(1) (providing that parties in interest may seek conversion of a Chapter 11 case to a Chapter 7 liquidation for cause); *id.* § 1104 (providing that parties in interest may seek the appointment of a trustee or examiner for cause).

20. See Coordes, *supra* note 2, at 396.

21. But see Anna Gelpern, *Bankruptcy, Backwards: The Problem of Quasi-Sovereign Debt*,

The second key trait of bankruptcy misfits concerns governance. In the typical model, the debtor-in-possession steers bankruptcy negotiations against the threat that the creditors will be able to force it out of the driver's seat. For bankruptcy misfits, by contrast, management cannot run the insolvency process as a debtor-in-possession, nor could a trustee manage or operate the estate with the kind of legitimacy expected by the public. Municipal or territorial governments are a good example of this: displacing elected officials with unelected bankruptcy trustees might well be politically untenable.²² Similarly, financial institutions on the verge of collapse need some kind of authority to assuage public concerns. Put differently, public-facing entities need some form of public-facing leadership.²³ Accordingly, special rules must be created to put leadership in place for a court-supervised process; otherwise, the off-the-rack options in Chapter 11 will prove insufficient.²⁴ While solutions like the Emergency Manager of Detroit²⁵ or the Oversight Board of

121 YALE L.J. 888, 906 (2012) (noting that “cities dissolve all the time outside bankruptcy” and pointing to scholarly proposals for municipal dissolution); Michelle Wilde Anderson, *Dissolving Cities*, 121 YALE L.J. 1364, 1384 (2012) (describing dissolution and bankruptcy as “independent, alternative, or sequential routes” for a municipality in financial distress). As Skeel points out, the dignity inherent in governmental bodies like cities, territories, or states may at times counsel in favor of bankruptcy. While full-scale liquidation is not a formal option, creditors may harass a governmental debtor, attempting to seize any assets outside its jurisdiction. Perhaps the most famous example of this, as Skeel notes, is Argentina's creditors, who in 2012 seized a ship called *Libertad* (freedom). See Skeel, *supra* note 9, at 2229–30.

22. By saying this, I do not mean to minimize the intense controversy that swirls around control boards and emergency managers, see Skeel, *supra* note 13, at 865–66, but rather seek to point out that those firestorms would completely engulf leaders whose claim to legitimate governance in a time of financial crisis was not carefully justified.

23. Of course, this begs the question of which entities are public-facing and which are not. A full analysis of that issue is beyond the scope of this response, which attempts to grapple with Professor Coordes's typology on its own terms. But scholars have questioned whether we can understand even corporate bankruptcy solely in terms of private values. That strain of scholarship traces back at least to then-Professor Elizabeth Warren, see Warren, *supra* note 7, and has been thoughtfully advanced by Professor Melissa Jacoby. See Melissa B. Jacoby, *Corporate Bankruptcy Hybridity*, 166 U. PA. L. REV. 1715, 1719–21 (2018) (arguing a model of corporate bankruptcy as a public-private partnership).

24. This explains in part why Professor Coordes, in a subsequent piece, argues that the standard templates fit poorly with the U.S. Postal Service: the U.S. Postal Service has a tenuous relationship with the federal government but is not a fully private company either. See Laura N. Coordes, *A Path Forward for the Postal Service*, 37 EMORY BANKR. DEVS. J. 581, 594 (2021). Law Professor David Skeel advanced similar arguments in 2012 concerning bankruptcy for states. See David A. Skeel, Jr., *States of Bankruptcy*, 79 U. CHI. L. REV. 677, 726–30 (2012).

25. See 11 U.S.C. § 109(c)(2) (requiring that a municipality be authorized to file for bankruptcy under state law); MICH. COMP. LAWS § 141.1549 (2023) (providing for the appointment of an emergency manager and details surrounding the role); *id.* § 141.1558 (authorizing the emergency manager, with the governor's consent, to file a bankruptcy petition on behalf of the municipality under Chapter 9 of the Code).

Puerto Rico²⁶ may not be perfect, they are undeniably *bespoke*.

Professor Coordes hints at this feature of bespoke bankruptcy.²⁷ It is an undeniable feature of her two biggest examples of bespoke bankruptcy: Dodd-Frank²⁸ and PROMESA.²⁹ In each instance, some kind of publicly accountable entity needs to handle the insolvency proceedings. For banks, the regulatory agency overseeing the insolvency process appoints the FDIC as receiver.³⁰ Under PROMESA, the President appoints members of the Oversight Board from lists provided by Congressional leaders.³¹

Lastly, between off-the-rack bankruptcy and bespoke bankruptcy is a third kind, which we might call “tailored bankruptcy” (if I won’t be accused of pushing the metaphor too far). This concept flows naturally from Professor Coordes’s typology. With bespoke bankruptcy, Congress drafts on a clean slate. And even where the drafters of such bespoke regimes borrow from off-the-rack bankruptcy, as Congress did in PROMESA, they must do so explicitly. With tailored bankruptcy, by contrast, Congress begins with the standard provisions of the Code and makes adjustments. Chapter 12 counts as tailored bankruptcy.³² So does Subchapter V.³³ Some of the other entities that Professor Coordes

26. See 48 U.S.C. §§ 2121–2152 (establishing an Oversight Board for Puerto Rico and setting forth its duties and responsibilities).

27. See Coordes, *supra* note 2, at 385 (noting that PROMESA “blends the traditional bankruptcy process with oversight mechanisms used for major U.S. cities, as well as sovereign debt restructuring techniques”). Professor Coordes has previously advanced the argument for bespoke bankruptcy for tribal corporations by proposing customized debt relief designed for Native American tribes. See Laura N. Coordes, *Beyond the Bankruptcy Code: A New Statutory Bankruptcy Regime for Tribal Debtors*, 35 EMORY BANKR. DEVS. J. 363, 367 (2019) (citing Professor Coordes’s past research on bespoke bankruptcy for tribal corporations); see also Coordes, *supra* note 2, at 389.

28. See, e.g., Coordes, *supra* note 2, at 362, 380–81.

29. See, e.g., *id.* at 361–63, 381–87, 390–96.

30. Banks are not authorized to file for bankruptcy under the Code. See 11 U.S.C. § 109(b)(2), (d). Instead, the state or federal regulator may appoint the FDIC as receiver. See 12 U.S.C. § 1821(c).

31. See 48 U.S.C. § 2121(e).

32. Chapter 12 of the Code “draws heavily” from Chapters 11 and 13 and was passed in 1986 as an emergency measure to deal with the farm crisis. Coordes, *supra* note 2, at 370, 376. Crucially for this analysis, the debtor in Chapter 12 cases is generally authorized to operate the farm or fishing operation, see 11 U.S.C. § 1203, even though a Chapter 12 trustee is also appointed. See *id.* § 1202. Structurally, a Chapter 12 debtor has an absolute right to convert the case to a chapter 7 liquidation, *id.* § 1208(a), and while creditors cannot force a conversion, see *id.* § 1112(c), they can move the court to dismiss the case for cause, including “unreasonable delay,” “gross mismanagement,” and “failure to file a plan,” *id.* § 1208(c). Creditors also cannot force a farmer into bankruptcy involuntarily. See *id.* § 303(a).

33. Like Chapter 12, Subchapter V cases have a Subchapter V trustee, see 11 U.S.C. § 1183, but generally allow the debtor to operate the business as a debtor-in-possession, *id.* § 1184. Subchapter V cases follow the standard chapter 11 rules for conversion or dismissal: the debtor

mentions, like nonprofits, experience a (lightly) tailored form of bankruptcy when they file for bankruptcy.³⁴

This tripartite structure may give us a little more purchase on Professor Coordes's thought-provoking question about what other entities may need bespoke bankruptcy. Professor Coordes puts several options on the table: utilities, churches, nonprofits, public universities, perpetrators of mass torts, and tribal corporations.³⁵

The underlying question for each such entity is whether off-the-rack bankruptcy will suffice, and if not, whether the entity needs tailored bankruptcy or bespoke bankruptcy. For example, I've argued that benefit corporations can chart a socially conscious path through bankruptcy under existing law,³⁶ but if I am wrong about that, benefit corporations may deserve a form of tailored bankruptcy. I do not think that benefit corporations would require bespoke bankruptcy. After all, failure is an option for profit-seeking companies, no matter how socially conscious they may be. Additionally, the governance issues of benefit corporations are not intractable—at least not so intractable that they require some kind of special leadership structure in bankruptcy. By contrast, the “significant public role” of utilities, as Professor Coordes argues, may well merit a bespoke bankruptcy regime.³⁷

In the end, Professor Coordes's framework is a beginning. Scholars are constantly uncovering ways that the standard bankruptcy process is maladapted to certain kinds of regimes,³⁸ and she offers a generative framework for analyzing when a completely different regime may be needed.

has an absolute right to convert the case to a chapter 7 liquidation, *see id.* § 1112(a), and creditors can seek conversion or dismissal for cause, *see id.* § (b).

34. Creditors of nonprofit companies cannot force them into bankruptcy involuntarily, *see* 11 U.S.C. § 303(a), nor can creditors seek to convert the chapter 11 cases of nonprofit companies to chapter 7 for cause, *see id.* § 1112(c). Indeed, as Professor Foohey has noted, even the absolute priority rule may fit poorly with nonprofit entities under some circumstances. *See* Pamela Foohey, *Chapter 11 Reorganization and the Fair and Equitable Standard: How the Absolute Priority Rule Applies to All Nonprofit Entities*, 86 ST. JOHN'S L. REV. 31, 67 (2012).

35. Coordes, *supra* note 2, at 389, 411.

36. Christopher D. Hampson, *Bankruptcy & the Benefit Corporation*, 96 AM. BANKR. L.J. 93, 134 (2022); *see also* Christopher D. Hampson, *When Benefit Corporations File for Bankruptcy, Will Anything Be Different?*, HARV. L. SCH. BANKR. ROUNDTABLE (Oct. 4, 2022), <https://blogs.harvard.edu/bankruptcyroundtable/2022/10/04/when-benefit-corporations-file-for-bankruptcy-will-anything-be-different/> [https://perma.cc/6MJV-JRT2] (last visited March 2, 2023).

37. Coordes, *supra* note 2, at 410.

38. *See id.* at 411.