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The Bankruptcy Judge and the Generalist Tradition

Alexander Gouzoules

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The prevailing academic consensus is that bankruptcy judges are specialists presiding over specialized courts. This Article contends that this description is incomplete and, in some respects, inaccurate. Drawing on scholarly models of judicial specialization and historical surveys of the field, this Article contends that bankruptcy judges reflect a hybrid design choice: procedural specialization combined with substantive generalism. This model delivers many of the observed benefits of judicial specialization (including efficiency and technical competence) while preserving the cross-pollination of ideas and other benefits associated with the generalist tradition of American judging.

This Article also reflects on contemporary developments—most notably the rise of the "complex case panel" that attracts a disproportionate number of large public company reorganizations. This trend has resulted in a handful of bankruptcy judges serving as de facto reorganization specialists. In doing so, it has disrupted the generalist design of the bankruptcy courts by increasing case concentration and attendant risks, including tunnel vision.

By recharacterizing the bankruptcy judges as generalists as well as specialists, this Article offers a fresh lens for evaluating decision makers in the field. It also contributes to the broader literature on judicial specialization. Previous accounts have emphasized that particular institutions exist along a continuum between true generalism and focused specialization. Through a focus on the bankruptcy field, this Article suggests that

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procedural and substantive expertise represent separate and potentially independent dimensions of specialization.

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INTRODUCTION

Specialization, concentration, and focused expertise are prominent dynamics in most professional fields.[1] Among

1. *See, e.g.*, Decio Coviello, Andrea Ichino & Nicola Persico, *Measuring the Gains from Labor Specialization*, 62 J.L. & ECON. 403, 403 (2019) ("A large empirical literature estimates the gains from specialization in professions as different as surgeon, schoolteacher, and clerk."); Hui Zheng & Linda K. George, *Does Medical Expansion Improve Population Health?*, 59.1 J. HEALTH & SOC. BEHAV. 113, 113 (2018) ("Since the turn of the twentieth century, physicians have energetically pursued specialization to attain greater prestige, advance clinical skills, pursue more interesting work, and increase their incomes."); Roland G. Fryer, Jr., *The "Pupil" Factory: Specialization and the Production of Human Capital in Schools*, 108 AM. ECON. REV. 616, 617–18 (2018) ("[T]eacher specialization in elementary schools was considered by many school leaders as a potential way to better prepare teachers to meet accountability standards in the era of high-stakes testing.").

practicing lawyers, specialization was long ago identified as an accelerating phenomenon.[2] But the federal judiciary is strikingly different. The generalist continues to dominate the American conception of judging,[3] and Article III judges have vigorously defended the generalist tradition on normative grounds.[4] Specialized federal courts—a category generally understood to include the bankruptcy courts[5]—are treated as exceptions to the system's core model.[6]

The theoretical advantages and drawbacks of judicial specialization have been well charted in the academic literature. Specialist judges are generally regarded as increasing the efficiency, uniformity, and technical accuracy of decision-making in complex fields.[7] The "specialized" label thus conveys focused expertise and may even encourage informal deference by disinterested generalists.[8]

2. *See, e.g.*, Edward O. Laumann & John P. Heinz, *Specialization and Prestige in the Legal Profession: The Structure of Deference*, 2 AM. BAR FOUND. RSCH. J. 155 (1977).

3. *See* LAWRENCE BAUM, SPECIALIZING THE COURTS xi (2011) ("[T]he judges who receive the most attention *are* generalists."); *see also* Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1111 (1990) ("The federal judiciary at the Article III level is predominantly generalist . . . ."); Judith Resnik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581, 600–01 (1985) (suggesting reasons why "most Article III judges currently are generalists" and "being generalists may enhance those judges' power . . . .").

4. *See infra* Section III.B.

5. *See* Robert M. Howard & Shenita Brazelton, *Specialization in Judicial Decision Making: Comparing Bankruptcy Panels and Federal District Court Judges*, 22 AM. BANKR. INST. L. REV. 407, 407 (2014) ("One of the most prominent of the Article I specialized courts is the United States Bankruptcy Court . . . ."); Lawrence Baum, *Specializing the Federal Courts: Neutral Reforms or Efforts to Shape Judicial Policy?*, 74 JUDICATURE 217, 219 (1991) ("The bankruptcy courts are increasingly independent adjuncts of the district courts that might appropriately be treated as distinct specialized courts.").

6. *See, e.g.*, Deborah A. Geier, *The Tax Court, Article III, and the Proposal Advanced by the Federal Courts Study Committee: A Study in Applied Constitutional Theory*, 76 CORNELL L. REV. 985, 993 (1991) ("Chief Justice Earl Warren opposed article III status for the Tax Court, as he believed that such status should be reserved for generalist judges.").

7. *See* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 263 (1996); Lynda J. Oswald, *Improving Federal Circuit Doctrine Through Increased Cross-Pollination*, 54 AM. BUS. L.J. 247, 251–53 (2017); William K. Ford, *Judging Expertise in Copyright Law*, 14 J. INTELL. PROP. L. 1, 49 (2006).

8. *See* Jonathan M. Seymour, *Bankruptcy Appeal Barriers*, 82 WASH. & LEE L. REV. 87, 90 (2025) ("Appellate review in the bankruptcy space is often deferential, implicitly—although usually not expressly—acknowledging the specialized nature of bankruptcy practice and the presumed expertise of the bankruptcy judge."); Jonathan M. Seymour, *Bankruptcy in Conflict*, 98 AM. BANK. L.J. 561, 589 (2024).

Advocates of the dominant generalist model, however, have warned that judicial specialists may be associated with "interest group capture, tunnel vision, or jadedness in favor of or against certain litigants."[9] In part due to such warnings, specialized federal courts preside only over fields deemed discrete and technical.[10] Their judges often lack the prestige associated with Article III, and their existence may exacerbate perceptions that particular legal fields are siloed and subordinate.[11] Oft-observed parallels between specialized federal courts and administrative agencies[12] may also burden the former at a time when administrative law is undergoing significant retrenchment.[13]

In short, the "specialized" designation has consequences for the bankruptcy system. The prevailing understanding of bankruptcy judges as specialists sitting outside the American tradition of generalist judging affects substantive outcomes and perceptions of the field.[14]

But the scholarly understanding of judicial specialization is evolving, particularly regarding certain appellate courts. For

9. Jeffrey W. Stempel, *Two Cheers for Specialization*, 61 BROOK. L. REV. 67, 127 (1995). *See also* BAUM, *supra* note 3, at 133 (noting examples of capture but arguing that the "theme of capture should not be overstated").

10. *See, e.g.*, Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Courts: Specialists Versus Generalists*, 36 FORDHAM INT'L L.J. 788 (2013) (evaluating whether antitrust, as a complex and technical field, would be appropriate for specialized courts through comparison to foreign jurisdictions).

11. *See* Linda Coco, *Stigma, Prestige and the Cultural Context of Debt: A Critical Analysis of the Bankruptcy Judge's Non-Article III Status*, 16 MICH. J. RACE & L. 181, 232 (2011) (arguing that the structure of the bankruptcy courts denotes a lack of prestige that can be traced to a pervasive cultural stigma against debtors).

12. *E.g.*, J. Jonas Anderson, *Judicial Lobbying*, 91 WASH. L. REV. 401, 439–40 (2016) ("[S]pecialized courts resemble executive administrative agencies, which are thought to seek increased responsibilities as a way of maximizing power and influence"); Ellen P. Aprill, *The Interpretive Voice*, 38 LOY. L.A. L. REV. 2081, 2089 (2005) ("Specialized courts, such as the Tax Court, have characteristics of both Article III courts and administrative agencies . . . .").

13. *See, e.g.*, Loper Bright Enter. v. Raimondo, 603 U.S. 369 (2024); SEC v. Jarkesy, 603 U.S. 109 (2024); Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 603 U.S. 799 (2024); *see also* John O. McGinnis & Xiaorui Yang, *The Counter-Reformation of American Administrative Law*, 58 WAKE FOREST L. REV. 387, 389 (2023) (noting that "administrative law is in flux, caught between the Court's vision of the original Constitution and the established practices of administration that may be in tension with it").

14. *Cf.* Cohn v. Bd. of Pro. Resp. of Supreme Ct. of Tenn., 151 S.W.3d 473, 476 (Tenn. 2004) ("This case . . . is set against the somewhat Byzantine backdrop of federal bankruptcy law and procedure."); *In re* Premiere Holdings of Texas, L.P., 277 B.R. 332, 334 (S.D. Tex. 2002) ("Bankruptcy courts, unlike this Court, are uniquely familiar with the . . . esoteric intricacies permeating the entirety of the federal bankruptcy laws.").

example, Edward K. Cheng has complicated the classic conception of circuit court judges as quintessential generalists.[15] Cheng empirically documented the phenomenon of opinion specialization, whereby certain judges informally specialize with respect to the type of opinions they draft on behalf of a panel.[16] Jonathan Remy Nash reinforced this conclusion, finding that circuit judges who previously served as bankruptcy judges are more likely to author opinions in bankruptcy cases than peers without substantial bankruptcy experience.[17] Thus, even generalist appellate courts can demonstrate, and benefit from, a degree of specialization.

In a similar vein, Jennifer Sturiale has argued that the Federal Circuit was carefully designed "to yield the benefits of specialized tribunals without the costs."[18] In her view, the channeling of patent cases to the Federal Circuit allows its judges to "become efficient at deciding patent law issues," but the court's broader jurisdiction over other types of appeals mitigates industry capture and ensures "cross-pollination of legal theories."[19] These contributions point to the possibility that some courts may achieve benefits of both specialization and generalism through hybrid design.

Through analysis of the bankruptcy system, this Article proposes a separate model of hybrid design by disentangling procedural and substantive specialization. In doing so, it adds complexity to existing models of judicial specialization while challenging the common categorization of bankruptcy courts as purely specialized tribunals. It observes instead that the bankruptcy courts are designed around a hybrid model of procedural specialization and substantive generalism. Like Sturiale's account of the Federal Circuit, this design benefits both from the modern trend toward increased specialization and the American tradition of generalist judging.

This Article further suggests that the academic literature on generalism and specialization is relevant to analyses of current developments in bankruptcy law. Specifically, the consolidation of

15. *See* Edward K. Cheng, *The Myth of the Generalist Judge*, 61 STAN. L. REV. 519 (2008).

16. *See id.*

17. *See* Jonathan Remy Nash, *Expertise and Opinion Assignment on the Courts of Appeals: A Preliminary Investigation*, 66 FLA. L. REV. 1599 (2014).

18. Jennifer E. Sturiale, *A Balanced Consideration of the Federal Circuit's Choice-of-Law Rule*, 2020 UTAH L. REV. 475, 481–82 (2020).

19. *Id.*

large corporate reorganizations before a handful of de facto Chapter 11 specialists (and the parallel consolidation of consumer Chapter 13 cases before specialists in some districts) marks a departure from bankruptcy generalism. Finally, this Article suggests that other models of adjudication might be analyzed through separate assessments of procedural and substantive specialization.

Before beginning, a roadmap: Part I begins by reviewing scholarly literature on specialized courts, examining why bankruptcy courts have, to date, generally been placed in this category. This Part also introduces Lawrence Baum's influential framework for identifying specialized courts, and it assesses that framework's application to the bankruptcy courts. It contends that the bankruptcy judge's focused area of expertise is in the application of bankruptcy procedure. Meanwhile, the bankruptcy judge remains a generalist with respect to substantive law, consistent with the broader tradition of American judging.

The Article then turns, in Part II, to the historical development of bankruptcy judging, drawing inspiration and insights from David Skeel's landmark history of the field, *Debt's Dominion*.[20] This Part observes that the evolution of the bankruptcy field resulted in a logical progression from siloed specialization toward the current model. As a result of that progression, the modern bankruptcy judge presides over diverse parties raising a broad range of substantive legal issues, as do classic generalists.

Finally, in Part III, this Article turns to, and assesses, modern trends—particularly the increasing concentration of Chapter 11 reorganizations before a handful of de facto specialists. It offers thoughts on whether modern trends are a rejection of a historical progression that has, until now, advanced in the direction of substantive generalism in bankruptcy judging.

20. DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA (2001).

I. THE BANKRUPTCY JUDGE AS A PROCEDURAL SPECIALIST AND SUBSTANTIVE GENERALIST

A. Identifying Judicial Specialization

Judicial specialization is a charged and contested concept.[21] Daniel Meador argued that the use of the "terms 'generalist' and 'specialist' in connection with the work of federal appellate judges is confusing and misleading."[22] Likewise, S. Jay Plager, a judge of the Federal Circuit, contended that "the term 'specialized' should be dropped from . . . discussion, since there is no agreement on what it means . . . ."[23] Indeed, judges of Plager's court—an Article III appellate court with a more focused and restricted docket than its sister circuits—have strenuously disputed characterizations of their own court as "specialized."[24] Their resistance to the term is telling, indicating that more is at stake than mere semantics.

But despite calls to avoid these terms, they are frequently deployed to categorize both judges as individuals and courts as institutions.[25] This section reviews previous efforts to define judicial specialization as a concept before disentangling procedural

21. *See* Brett Curry & Banks Miller, *Judicial Specialization and Ideological Decision Making in the US Courts of Appeals*, 40 LAW & SOC. INQUIRY 29, 32 (2015) (acknowledging that "there are a number of ways in which individuals might be characterized as 'specialists' in particular areas of law"); Stempel, *supra* note 9, at 67, 69 (identifying the need to clarify terminology regarding specialization).

22. Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. CHI. L. REV. 603, 612 (1989).

23. S. Jay Plager, *The United States Courts of Appeals, the Federal Circuit, and the Non-Regional Subject Matter Concept: Reflections on the Search for A Model*, 39 AM. U. L. REV. 853, 860 (1990).

24. *See, e.g.*, Judge Helen Wilson Nies, *The Federal Circuit: A Court for the Future*, 41 AM. U. L. REV. 571, 575–76 (1992) ("Our judges are generalists in the tradition of our judicial system . . . ."); Atari, Inc. v. JS & A Grp., Inc., 747 F.2d 1422, 1436 (Fed. Cir. 1984), overruled on other grounds by Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059 (Fed. Cir. 1998).

25. *See, e.g.*, Anderson, *supra* note 12, at 446 ("[T]here are good reasons to suspect that specialized judges gain valuable expertise in their subject matter."); Lawrence Baum, *Judicial Specialization and the Adjudication of Immigration Cases*, 59 DUKE L.J. 1501, 1533 (2010) ("[A] strong expectation has developed in the federal judicial branch that judges are, and should be, generalists."); Jeffrey J. Rachlinski, Chris Guthrie & Andrew J. Wistrich, *Inside the Bankruptcy Judge's Mind*, 86 B.U. L. REV. 1227, 1229 (2006) ("Specialist judges can be, and often are, recruited from the ranks of lawyers who have practiced in that area, so they often come to the bench with relevant expertise."); Chad M. Oldfather, *Judging, Expertise, and the Rule of Law*, 89 WASH. U. L. REV. 847, 847 (2012) ("Courts, too, have become specialized. The federal judiciary features, for example, the Federal Circuit, bankruptcy courts, and tax courts.").

and substantive specialization through the example of the bankruptcy courts.

1. Judges as Specialists

Some references to judicial specialization use the term to describe attributes of individual judges.[26] Used in this way, the term implies that judges whose dockets regularly include similar cases (by way of law, fact, or type of party) develop the ability to decide particular cases faster, with more efficiency, and perhaps with more accuracy.[27]

Put simply, repetition builds familiarity and proficiency.[28] In the words of Howard Markey, the first Chief Judge of the Federal Circuit, "[I]f I am doing brain surgery every day, day in and day out . . . I will do your brain surgery much quicker . . . than someone who does brain surgery once every couple of years."[29]

But precisely determining which judges have developed meaningful expertise is a difficult task.[30] Some have assumed as a matter of course that judges on courts of general jurisdiction are generalists, while those on specialized courts are specialists.[31] But this image is complicated by the meaningful number of judges on generalist courts who developed substantial expertise during previous service on specialized courts.[32]

For example, there have been fifty Article III judges who once served either as bankruptcy judges or as referees in bankruptcy.[33]

26. *E.g.*, Anderson, *supra* note 12, at 446; Lawrence Baum, *Probing the Effects of Judicial Specialization*, 58 DUKE L.J. 1667, 1672 (2009) ("To the extent that specialization by case type affects what courts do, it is primarily because individual judges do work that has only a limited range in its subject matter."); Rachlinski et al., *supra* note 25, at 1229.

27. *See* Coviello, Ichino & Persico, *supra* note 1, at 404 ("We find that judges indeed do get faster (more likely to close a case in any given hearing) during times when their dockets are rich with cases of the same type.").

28. *See id.*

29. *See* Sturiale, *supra* note 18, at 481.

30. *See* Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 888 n.12 (2003) (recognizing that there "are of course disputes about who counts as a specialist.").

31. *See* N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 118 (1982) (White, J., dissenting); Allen v. Ollie's Bargain Outlet, Inc., 37 F.4th 890, 896 (3d Cir. 2022).

32. Kushal R. Desai, *Lee v. Minner: The End of Non-Citizen Exclusions in State Freedom of Information Laws?*, 58 ADMIN. L. REV. 235, 242 (2006).

33. Search conducted in the *Biographical Directory of Article III Federal Judges*, Federal Judicial Center, https://www.fjc.gov/history/judges/search/advanced-search (last visited

Eight former bankruptcy judges or referees have served on the circuit courts of appeals,[34] and these judges continue specializing in bankruptcy law to some extent, taking on opinion-writing duties in bankruptcy cases more frequently than their less familiar colleagues.[35]

A similar trend exists in state courts. Historically, many judges of the generalist Delaware Supreme Court have been promoted from the Delaware Chancery Court, which to a large extent specializes in corporate law.[36] Accordingly, and notwithstanding the Delaware Supreme Court's general jurisdiction, most observers regard it as possessing focused expertise in corporate law.[37]

Relatedly, in the federal system, many specialized courts "borrow" judges from generalist courts, suggesting that some judges switch between generalist and specialist "modes" on a regular basis.[38] This is a venerable design choice: The original design of the federal judiciary placed district judges on district courts, which were to a large extent specialized admiralty courts.[39] But district judges also served on the circuit courts, which tried a broader range of cases.[40]

Dual-role judges persist in modern times as well. The Foreign Intelligence Surveillance Court (FISC) is a highly specialized tribunal staffed by Article III district judges who retain their district

Sep. 11, 2025) (on file with the BYU Law Review). The number includes Hamilton Ewart, a register in bankruptcy under the 1867 Act—the position that was the predecessor of the 1898 Act's referees. Ewart later served as a district judge for the Western District of North Carolina.

34. Judges Alice Batchelder, John Biggs, Ransey Cole, Conrad Cyr, Bernice Donald, Michael Melloy, John Porfilio, and Charles Vogel. *Id.* Additionally, though he did not serve as a bankruptcy judge, Judge Thomas Ambro of the Third Circuit is recognized as having particular bankruptcy expertise, having been a leading bankruptcy practitioner before his appointment to the bench. *See, e.g.*, Z. Arima, *Introduction: A Tribute to the Honorable Thomas L. Ambro*, 40 EMORY BANKR. DEV. J. 393, 394 (2024).

35. Nash, *supra* note 17.

36. *See* Marcel Kahan & Edward Rock, *How to Prevent Hard Cases from Making Bad Law: Bear Stearns, Delaware, and the Strategic Use of Comity*, 58 EMORY L.J. 713, 748–51 (2009).

37. *Id.*

38. BAUM, *supra* note 3, at 7.

39. *See, e.g.*, WILFRED RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE 10–11, 28–29 (Wythe Holt & L.H. LaRue, eds., 1990) (detailing jurisdiction of the original federal courts).

40. *See, e.g.*, *id.*

court positions.[41] These FISC judges no doubt develop focused expertise in national security matters—while remaining generalists with respect to their service on Article III district courts.[42] Judges may thus be asked to play both roles simultaneously.

Judicial specialization is therefore not a concept that applies only to individuals actively serving on specialized courts. This wrinkle complicates precise application of the specialist label to particular judges.

Nevertheless, as a general rule, individual judges develop specialized expertise by consistently judging particular kinds of cases.[43] After a meaningful period of time serving on a court with a sufficiently focused jurisdiction, an individual judge is likely to display that proficiency[44] (whether or not they currently serve on a specialized or generalist court). These observations about judges assume the ability to identify when a court is specialized.

2. *Courts as Specialized Institutions*

Fortunately, somewhat more precision can be applied to determinations of whether *courts*, as institutions, conform to specialized or generalist models.

Specialized courts are those with "restricted and concentrated" jurisdiction that accordingly focus on specific types of cases.[45] As discussed above, judges on such courts will tend to develop familiarity with the recurring issues presented by those types of cases (even if they later depart for other positions).[46]

Scholars have developed more precise frameworks to measure specialized courts. One influential model was formulated by Lawrence Baum, who recognized that generalism and

41. *See* Simon Chin, *Introducing Independence to the Foreign Intelligence Surveillance Court*, 131 YALE L.J. 655, 665 (2021) (noting that FISC consists of "U.S. District Court judges designated for limited terms by the Chief Justice of the United States.").

42. *Cf.* Laura K. Donohue, *The Evolution and Jurisprudence of the Foreign Intelligence Surveillance Court and Foreign Intelligence Surveillance Court of Review*, 12 HARV. NAT'L SEC. J. 198, 223 (2021) ("[S]pecial status of the FISC/FISCR as a specialized court—particularly one that deals with classified material—and its Article III status . . . .").

43. *See, e.g.*, Coviello, Ichino & Persico, *supra* note 1, at 404.

44. *See* Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 CORNELL L. REV. 1, 21 (2008) (recognizing expertise in commercial law developed by justices serving on New York's Commercial Division).

45. *See* Stempel, *supra* note 9, at 70.

46. *See,* Coviello, Ichino & Persico, *supra* note 1, at 404.

specialization lie along a continuum rather than existing as an absolute dichotomy.[47] Baum's framework evaluates judicial specialization along two dimensions: the concentration of judges and the concentration of cases.[48] Baum's analysis complemented earlier work by Richard Revesz, who proposed a distinct but related model. Revesz used different terms—limitation and exclusivity—to describe dimensions of specialization.[49]

Baum's concept of *judge concentration* aligns with Revesz's concept of *limitation*. Along the axis of judge concentration, Baum analyzes whether judges "hear very broad ranges of cases" or instead focus "on very specific types of cases."[50] Revesz similarly analyzes a court's limitation, contrasting specialized courts that "hear only a particular type of case" and generalist courts that "hear the full range of federal cases."[51] Judge concentration (or limitation) is significant because judges who repeatedly focus on specific questions develop familiarity within a defined field while simultaneously experiencing reduced exposure to other fields.[52]

Along the second dimension of *case concentration*, Baum evaluates whether "a small number of judges hear all the cases in a field at one level."[53] The FISC is a paradigmatic example, staffed by only eleven judges.[54] Case concentration is significant as an indicator that a small group of specialists monopolizes outcomes for an entire field. Baum argues that, where case concentration is high, "judges' awareness of their importance in a field" can influence their decisions while also facilitating interest group capture—a persistent concern about specialized courts.[55]

47. *See* BAUM, *supra* note 3, at 9.

48. *See id.* at 6–10.

49. *See* Revesz, *supra* note 3, at 1121.

50. BAUM, *supra* note 3, at 6–10. Less clear is how broadly or narrowly one should view a "type of case." Cases could be categorized broadly (e.g. "bankruptcy cases"), with an intermediate level of specificity (e.g. "Chapter 11 cases"), or with granularity (e.g. "Chapter 11 reorganizations of large public companies"). Alternatively, one could distinguish "types of cases" by procedural complexity rather than by subject matter.

51. *See* Revesz, *supra* note 3, at 1121.

52. Coviello, Ichino & Persico, *supra* note 1, at 404.

53. BAUM, *supra* note 3, at 6–10.

54. *See* 50 U.S.C. § 1803(a).

55. BAUM, *supra* note 3, at 6–10.

As its second dimension, Revesz's model looks to *exclusivity*, or whether courts hear "every case of a certain type."[56] Though this concept is related to case concentration, they do not overlap exactly. Baum is concerned not only with a court's exclusivity but also with the number of judges who collectively control an area of law at a given level.[57]

Though illuminating, these frameworks are necessarily somewhat imprecise. For example, the paradigmatic examples of generalist courts are the federal district courts, which have jurisdiction over an extremely broad range of matters.[58] But certain district courts may, with respect to certain kinds of litigation, demonstrate relatively high levels of case and judge concentration—for example, where single-judge divisions attract a large proportion of particular types of cases due to litigant judge-shopping choices.[59]

Despite complications at the margins, these models offer a nuanced and effective way to identify specialized courts. However, they generally conflate specialization with respect to substantive bodies of law and specialization with respect to methods of adjudication—for example, when Revesz references "every case of a certain type," he does not distinguish between substance and procedure.[60]

It is not clear, for example, whether a breach-of-contract action tried before a jury in state court is the same "type of case" as that same contract claim resolved in a bankruptcy court through the claims allowance process. Conventional wisdom would seem to suggest that subject matter, rather than procedure, is determinative. And yet convention also suggests that bankruptcy is a separate and specialized field of law. As these problems suggest, the application of these models to the bankruptcy courts

56. *See* Revesz, *supra* note 3, at 1121.

57. *See* BAUM, *supra* note 3, at 204.

58. *See* Diane P. Wood, *Generalist Judges in a Specialized World*, 50 SMU L. REV. 1755, 1756 (1997) ("Judges in most other countries are often staggered by the breadth of the American federal judge's writ . . . .").

59. I have explored this phenomenon elsewhere. *See* Alexander Gouzoules, *Choosing Your Judge*, 77 SMU L. REV. 699 (2024). Whether recent limitations on the power of district courts to issue universal injunctions will impact judge-shopping incentives remains to be seen. *See* Trump v. CASA, Inc., 606 U.S. 831 (2025).

60. *See* Revesz, *supra* note 3, at 1121.

reveals the unique design of the bankruptcy judge and complicates existing models of specialization.

B. Are the Bankruptcy Courts Specialized?

No formal constitutional requirement mandates that Article III judges be generalists, and judges with Article III status have long served on relatively specialized courts alongside their core service on generalist courts.[61] Nevertheless, Article III is strongly associated with generalism.[62] This association is in part a product of longstanding historical design choices by both Congress and the judiciary.[63] It also reflects values perceived as underlying Article III, such as neutral expertise in legal interpretation rather than subject-matter knowledge.[64] Perhaps most significantly, the most visible representatives of the federal judiciary, by far, are the generalist justices of the U.S. Supreme Court.[65]

Accordingly, within the pages of law reporters, distinctions between Article III "generalists" and bankruptcy court "specialists" are common and consequential. Justice White's dissent in *Northern Pipeline v. Marathon* contemplated the extension of Article III status to bankruptcy judges but cautioned that Article III judges "are, on the whole, a body of generalists," and the "addition of several hundred specialists may substantially change . . . the character of the federal bench."[66] Judge Posner had described modern bankruptcy law as a domain of "specialized judicial officers."[67]

61. *See, e.g.*, Chin, *supra* note 41, at 665 (discussing the FISC); RITZ, *supra* note 39, at 10–11, 28–29 (discussing the original district courts).

62. *See, e.g.*, Ellen E. Sward, *Legislative Courts, Article III, and the Seventh Amendment*, 77 N.C.L. REV. 1037, 1054 (1999).

63. *See* Adrian Vermeule, *The Judicial Power in the State (and Federal) Courts*, 2000 SUP. CT. REV. 357, 428 (2000) ("The federal judiciary has, both before and since the New Deal, acquiesced in the congressional creation of an extraordinary range of [administrative] . . . agencies . . . that exercise adjudicatory power outside the Article III system," rendering "the federal judiciary currently visible [as] an elite corps of several hundred life-tenured generalist judges.").

64. *See* Paul Diller, *Habeas and (Non-)Delegation*, 77 U. CHI. L. REV. 585, 608 (2010).

65. *See, e.g.*, Lab'y Corp. of Am. Holdings v. Metabolite Lab'ys, Inc., 548 U.S. 124, 138, (2006) (Breyer, J., dissenting) ("[A] decision from this generalist Court could contribute to the important ongoing debate, among both specialists and generalists").

66. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 118 (1982) (White, J., dissenting).

67. *In re* Grabill Corp., 967 F.2d 1152, 1160 (7th Cir. 1992) (Posner, J., dissenting).

Other examples abound in judicial writings.[68] In the eyes of judges, the bankruptcy courts are specialized.

Scholars have also typically considered the bankruptcy courts to be specialized—sometimes with qualifications[69] and sometimes without.[70] For his part, Baum has consistently classified the bankruptcy courts as at least partially specialized, while recognizing that they are not absolutely so.[71]

Specifically, while Baum treats the bankruptcy courts as specialized, he acknowledges that they exhibit a low concentration of cases, because over 300 bankruptcy judges collectively staff them.[72] There is, accordingly, no small group of judges entrusted with control over bankruptcy law at the initial level.

Revesz, for his part, did not specifically apply his framework to the bankruptcy courts. But just as the courts do not demonstrate

68. *See, e.g.*, *In re* Nix, 864 F.2d 1209, 1210 (5th Cir. 1989) ("Routine reference to magistrates of bankruptcy matters . . . might disrupt Congress' statutory plan for the appointment of specialized bankruptcy judges to handle bankruptcy cases."); *In re* Maynard, 269 B.R. 535, 542 (D. Vt. 2001) ("Bankruptcy judges, with their specialized expertise and experience, and their roles as guardians of the integrity of the bankruptcy system . . . ."); *In re* McLean Indus., Inc., 76 B.R. 328, 333 (Bankr. S.D.N.Y. 1987) ("Resolution of this dispute falls within the general competence of judges, and, because it concerns sections of the Bankruptcy Code, it falls within the specialized competence of bankruptcy judges.").

69. *See* Seymour, *Bankruptcy in Conflict*, *supra* note 8, at 573–79 (noting that "immersion in bankruptcy practice colors the way that everyone in the space sees the world," but recognizing that "bankruptcy remains—unlike many other legal specializations—a refuge for legal generalists"); Erwin Chemerinsky, *Decision-Makers: In Defense of Courts*, 71 AM. BANKR. L.J. 109, 115 (1997) ("The bankruptcy courts are specialized, but also have broad general jurisdiction to hear other civil claims."); BAUM, *supra* note 3, at 16 ("[T]he bankruptcy courts are a special case because there are so many bankruptcy judges.").

70. *See* Rachlinski, *supra* note 25, at 1228 ("The federal system includes specialized courts for . . . bankruptcy matters."); Andrew W. Jurs, *Science Court: Past Proposals, Current Considerations, and a Suggested Structure*, 15 VA. J.L. & TECH. 1, 26 (2010) ("[T]he bankruptcy courts present a new example of specialized court success."); Robert W. Stocker II & Peter J. Kulick, *Gambling With Bankruptcy: Navigating a Casino Through Chapter 11 Bankruptcy Proceedings*, 57 DRAKE L. REV. 361, 364–65 (2009) ("Congress has established specialized bankruptcy courts to hear bankruptcy cases."); Alan Resnick, *The Enforceability of Arbitration Clauses in Bankruptcy*, 15 AM. BANKR. INST. L. REV. 183, 183 (2007) ("Congress intended that the United States Bankruptcy Court would be a 'specialized' judiciary . . . ."); Jaclyn Weissgerber, *Is It Law or Something Else?: A Divided Judiciary in the Application of Fraudulent Transfer Law under § 546(e) of the Bankruptcy Code*, 34 PACE L. REV. 1268, 1290–91 (2014) ("[T]he Bankruptcy Reform Act of 1978 established the bankruptcy courts as specialized courts."); Jay Lawrence Westbrook & Jacob S. Ziegel, *The American Law Institute NAFTA Insolvency Project*, 23 BROOK. J. INT'L L. 7, 14 (1997) ("The United States has an extensive network of specialized bankruptcy courts throughout the country as part of its federal court system.").

71. *See* BAUM, *supra* note 3, at 194–204 (2011).

72. *See id.*

Baum's case concentration, they similarly fail to exhibit Revesz's exclusivity. While bankruptcy courts decide the vast majority of bankruptcy cases at the first level, original jurisdiction formally resides with the district courts.[73] The district courts can—and sometimes must—revoke the reference, and they have presided over rare but significant bankruptcy matters like the Dalkon Shield mass tort case.[74]

Without case concentration or exclusivity, the bankruptcy courts do not exhibit all aspects of specialized courts. Nevertheless, Baum does not dispute the prevailing consensus that the bankruptcy courts are specialized tribunals. Instead, he considers them to be specialized due to the fact that bankruptcy judges focus exclusively on bankruptcy cases.[75]

Indeed, it is the exclusive focus on "bankruptcy law" that leads most observers to label the bankruptcy courts as specialized. For example, a district court judge who served on bankruptcy judge selection panels remarked that "[b]ankruptcy law is so specialized that the interview becomes a more detailed discussion of law than [other] interviews I've been involved with . . . . [W]hen we had hypotheticals, I was usually lost."[76]

But as Thomas Jackson observed in his classic work on *The Logic and Limits of Bankruptcy Law*, bankruptcy "affects and requires consideration of virtually every other major substantive area in the legal arena."[77] One bankruptcy matter may require the judge to apply state property law,[78] another may turn on state tort law,[79] still another could require application of federal environmental

73. *See, e.g.*, Anthony J. Casey & Joshua C. Macey, *Bankruptcy by Another Name*, 133 YALE L.J.F. 1016, 1032–33 (2024).

74. *See* Brook E. Gotberg & Annette W. Jarvis, *Defending "Second-Party" Releases in Mass Tort Bankruptcies*, 41 EMORY BANKR. DEVS. J. 195, 222 (2025) (discussing the district court's direct involvement in the Dalkon Shield mass-tort bankruptcy).

75. *See* BAUM, *supra* note 3, at 16; Baum, *supra* note 26, at 1673 (2009) ("Bankruptcy judges hear only bankruptcy cases so long as they retain their positions.").

76. MALIA REDDICK & NATALIE KNOWLTON, A CREDIT TO THE COURTS: THE SELECTION, APPOINTMENT, AND REAPPOINTMENT PROCESS FOR BANKRUPTCY JUDGES 12–15 (2013). That said, representatives of the Seventh Circuit expressed a willingness to appoint nonbankruptcy practitioners with the "right judicial temperament and willingness to work hard."

77. THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW vii (1986).

78. *See* Butner v. United States, 440 U.S. 48, 55 (1979).

79. *See, e.g.*, Kawaauhau v. Geiger, 523 U.S. 57, 61 (1998).

statutes like RCRA or CERCLA,[80] while a fourth might involve the Religious Freedom Restoration Act,[81] and a fifth see a debtor attempting to invoke rights enshrined by the Fifth Amendment.[82]

Compare this diversity to a common account of the work of a district judge. Describing a day in the life of a generalist judge, Jed Rakoff (of the Southern District of New York) observed that he might in one day encounter "a narcotics case, a securities fraud action, a maritime dispute, [and] a labor controversy."[83] The similarities are revealing. Because the Bankruptcy Code incorporates rather than displaces nonbankruptcy substantive law,[84] the substantive issues presented by a bankruptcy docket resemble those that come before Article III generalists.[85]

That is not to say, of course, that outcomes in bankruptcy courts mirror outcomes outside them. On the contrary, the Bankruptcy Code's complex provisions are tailored to specific goals and circumstances, creating a unique procedural environment that alters outcomes when applied.[86] For example, the automatic stay, one of the most impactful features of bankruptcy law, does not alter the substantive rights of creditors, which are defined by nonbankruptcy law.[87] But the automatic stay dramatically alters their available remedies and, accordingly, their legal position.[88]

For this reason, "proceduralist" scholars, such as Charles Mooney, Jr., have long argued that bankruptcy law can be

80. *See, e.g.*, Midatlantic Nat'l Bank v. N.J. Dep't of Env't Prot., 474 U.S. 494 (1986).

81. *See, e.g.*, *In re* Roman Cath. Archbishop of Portland in Or., 335 B.R. 842, 860 (Bankr. D. Or. 2005).

82. *See, e.g.*, *In re* Tripp, 224 B.R. 95, 100 (Bankr. N.D. Iowa 1998).

83. Jed Rakoff, *Are Federal Judges Competent? Dilettantes in an Age of Economic Expertise*, 17 FORDHAM J. CORP. & FIN. L. 4, 6 (2012).

84. Butner v. United States, 440 U.S. 48, 55 (1979).

85. *See* Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747 (2010) ("Bankruptcy courts routinely decide matters covering a range of subjects as broad as the civil docket of the Article III district courts . . . .").

86. *See* Douglas G. Baird, *Bankruptcy Minimalism*, 98 AM. BANKR. L.J. 493, 496 (2024) ("The substance of a right outside of bankruptcy can turn on the process used to vindicate it.").

87. *See, e.g.*, Ellen E. Sward, *Resolving Conflicts Between Bankruptcy Law and the State Police Power*, 1987 WIS. L. REV. 403, 412 (1987).

88. *See, e.g.*, Jared I. Mayer, *For Bankruptcy Exceptionalism*, U. CHI. L. REV. ONLINE, June 27, 2023, at 5; Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L.J. 857, 871–72 (1982).

conceptualized "as a subset of the law of civil procedure."[89] Ralph Brubaker has succinctly explained that "by its very nature, bankruptcy 'law' is more procedural than substantive."[90]

To be sure, at the margins, the exact distinction between procedure and substantive law may blur; indeed, the terms themselves have been labeled "enigmatic" and "mystic."[91] But in the words of John Hart Ely, "the realization that the terms carry no monolithic meaning at once appropriate to all the contexts . . . need not imply that they can have no meaning at all."[92] At their core, substantive law defines rights and assigns responsibilities, while procedural law creates mechanisms for vindicating substantive rights and fulfilling substantive responsibilities.[93]

Important aspects of a bankruptcy case, such as valuation[94] or the discharge,[95] contain both substantive and procedural elements. But the existence of borderline cases is far from unique to bankruptcy.[96] At bottom, bankruptcy remains a mechanism

89. Charles W. Mooney, Jr., *A Normative Theory of Bankruptcy Law: Bankruptcy As (Is) Civil Procedure*, 61 WASH. & LEE L. REV. 931, 937 (2004). *See also* Brook E. Gotberg, *Restructuring the Bankruptcy System: A Strategic Response to* Stern v. Marshall, 87 AM. BANKR. L.J. 191, 194 (2013) ("Those who view bankruptcy as . . . a minimalist procedural structure intended to mirror nonbankruptcy law except as necessary to deal with collective default [are] often termed 'proceduralists' . . . ."); Douglas G. Baird, *Bankruptcy's Uncontested Axioms*, 108 YALE L.J. 573, 576–77 (1998) (distinguishing between the proceduralists and traditionalists).

90. Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 YALE L.J.F. 960, 970 (2022).

91. *See* Martin H. Redish & Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 MINN. L. REV. 1303, 1312 (2006); Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281, 284.

92. *See* John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 724 (1974).

93. *See* Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U.L. REV. 801, 810 (2010); Paul MacMahon, *Proceduralism, Civil Justice, and American Legal Thought*, 34 U. PA. J. INT'L L. 545, 555 (2013); *see also* Joseph Blocher, *Rights To and Not To*, 100 CAL. L. REV. 761, 765 n.20 (2012) (defining substantive rights "regarding individual conduct" and procedural rights "regarding the mechanisms by which the government can regulate" conduct).

94. *See* Baird, *supra* note 86, at 504–13 (observing that, when Chapter 11 captures going-concern value that would be unavailable outside of bankruptcy, the *Butner* principle does not answer the question of how to allocate that surplus value).

95. *See* Rafael I. Pardo, *Taking Bankruptcy Rights Seriously*, 91 WASH. L. REV. 1115, 1116–19 (2016) (describing the discharge as "the major substantive relief that bankruptcy law offers").

96. For example, business law scholars have long debated whether key concepts, such as the business judgment rule, should be seen as primarily substantive or procedural.

for vindicating, balancing, and resolving substantive rights through procedures adapted for the special context of financial distress.[97]

Proceduralists thus emphasize that "bankruptcy law" is an alternative system, process, and forum for enforcing existing substantive rights in the context of a debtor's insolvency, and those substantive rights are almost always created and defined by external sources.[98] And while this makes the bankruptcy system stand out, it is not necessarily unique in these respects.[99]

Key accounts of bankruptcy judging align with the proceduralist model. In questioning whether bankruptcy courts comport with traditional justifications for non-Article III tribunals, Troy McKenzie has suggested that a bankruptcy judge's true expertise is in this "specialized *process*, with its own rhythms that differ from litigation in other forums."[100] Day in and day out, the bankruptcy judge examines legal questions in a procedural environment that is often bewildering and inaccessible to non-specialists.[101]

If specialized judges gain expertise through repeated exposure to the same complex tasks (recalling Markey's evocative analogy to the experienced brain surgeon), then much of the bankruptcy judge's area of extensive expertise is fluency with the complex structure and rhythms that bankruptcy demands. Indeed,

See Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 89 n.25 (2004) ("Much confusion has been engendered by the question of whether the business judgment rule is a procedural presumption, a substantive limitation of liability, or both.").

97. *See* Anthony J. Casey, *Chapter 11's Renegotiation Framework and the Purpose of Corporate Bankruptcy*, 120 COLUM. L. REV. 1709, 1711–12 (2020); Jackson, *supra* note 88, at 860.

98. *See* Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 WM. & MARY L. REV. 743, 807 (2000).

99. Other types of adjudication that might be conceived of as alternative procedural systems for resolving substantive rights could include the multi-district litigation (MDL) system and alternative dispute resolution (ADR) mechanisms such as arbitration.

100. McKenzie, *supra* note 85, at 751.

101. *See, e.g.*, MOAC Mall Holdings LLC v. Transform Holdco LLC, 598 U.S. 288, 296, (2023) ("Here, as elsewhere, we decline to act as a court of 'first view,' plumbing the Code's complex depths in 'the first instance.'") (quoting Zivotofsky v. Clinton, 566 U.S. 189, 201 (2012)); *In re* Carolina Sales Corp., 45 B.R. 750, 754 (Bankr. E.D.N.C. 1985) ("An attorney is necessary in almost every Chapter 11 case to guide the debtor through the labyrinth of Chapter 11 proceedings, often bewildering to debtors not trained in the intricacies of bankruptcy law.").

other actors in the legal system assume and rely on this procedural specialization.

For example, in the seminal bankruptcy case of *Butner v. United States*, the Supreme Court acknowledged that the alternative procedures of the bankruptcy system can alter the economic value of parties' property interests, even when nonbankruptcy substantive law is applied.[102] But the Court expressed confidence that "a bankruptcy judge familiar with local practice should be able to avoid . . . potential loss by sequestering rents or authorizing immediate state-law foreclosures."[103] In other words, the bankruptcy judge's presumed understanding of procedural tools available mitigated concerns about results that might otherwise undermine the Code's objectives.

Of course, proceduralist scholars do not monopolize academic accounts of bankruptcy law. While the classic proceduralist argument urges that bankruptcy outcomes should deviate from nonbankruptcy outcomes only to resolve the core collective action problems presented by insolvency, "traditionalists" have seen bankruptcy also as a means of "implementing distributional policy."[104] Those who have cast bankruptcy as a policy tool may, for example, see the Code as a means to save jobs and minimize economic harm to community stakeholders by preserving troubled firms as going concerns.[105]

Though debates over the proper scope and goals of bankruptcy are longstanding and profound, neither view is inconsistent with the idea of the bankruptcy judge as a procedural specialist. For proceduralists, a bankruptcy judge's reliance on nonbankruptcy substantive law focuses the system on appropriately minimalist goals.[106] The logic of proceduralism implies that the substantive goals of *other* statutory schemes should continue to apply when the targets of regulation appear in a bankruptcy forum by the happenstance of insolvency.

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102. *See* Butner v. United States, 440 U.S. 48, 56–57 (1979).

103. *Id.* at 57.

104. Gotberg, *supra* note 89, at 194; *see* Laura N. Coordes, *Bankruptcy Overload*, 57 GA. L. REV. 1133, 1145 (2023).

105. *E.g.*, Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775 (1987). *See also* David A. Skeel, Jr., *Vern Countryman and the Path of Progressive (and Populist) Bankruptcy Scholarship*, 113 HARV. L. REV. 1075, 1126–28 (2000) (discussing progressive perspectives on Chapter 11).

106. *See* Baird, *supra* note 86, at 496.

Yet even for scholars with more expansive views of bankruptcy goals, the bankruptcy judge's intervention, through procedural expertise, furthers prosocial policy objectives like job preservation.[107] One key throughline of bankruptcy judging, particularly in the Chapter 11 context, is the facilitation of multiparty negotiations so as to achieve successful restructurings.[108] Bankruptcy judges might pressure parties to mediate toward a collectively beneficial agreement rather than standing on their rights,[109] to acquiesce to dealmaking innovations that nudge creditors toward plan confirmation,[110] or to otherwise reach a deal facilitated by the bankruptcy forum.[111]

All of these techniques could apply whether the debtor is a coal mining firm subject to state and federal environmental laws or an airline regulated by the FAA. None involve the type of

107. *See* KAREN GROSS, FAILURE AND FORGIVENESS: REBALANCING THE BANKRUPTCY SYSTEM 216–19 (1997) (arguing that bankruptcy judges should consider community interests during plan confirmation); *see also* Susan Block-Lieb, *A Humanistic Vision of Bankruptcy Law*, 6 AM. BANKR. INST. L. REV. 471, 484 (1998) (noting that "Gross' community-focused proposals emphasize the unspoken discretion that many bankruptcy judges have exercised time and again").

108. *See* Baird, *supra* note 86, at 508 ("What matters to the modern bankruptcy judge is creating a bargaining environment that will lead to a successful reorganization.").

109. *See* Laura N. Coordes, *Chapter 11 Mediation*, 41 EMORY BANKR. DEV. J. 153, 184–86 (2025) (noting reorganization cases where directions to "the parties to mediat[e] in the face of the parties' stated desire to litigate suggests that mediation may not be as 'voluntary' is it is supposed to be."). Distinctive features of bankruptcy law strengthen settlement pressure relative to ordinary civil litigation. For one, bankruptcy appeal barriers make it more difficult for parties to stand on their rights when a bankruptcy judge encourages collective agreement. *See* Seymour, *Bankruptcy Appeal Barriers*, *supra* note 8, at 90 ("A disappointed party confident that the bankruptcy judge has entered an order inconsistent with her rights under the Bankruptcy Code or applicable nonbankruptcy law may nonetheless be turned away from the appellate courts for prudential reasons."). For another, an Article III judge's life tenure limits the professional stakes of a docket backlogged by cases proceeding to trial.

110. *See* David A. Skeel, Jr., *Distorted Choice in Corporate Bankruptcy*, 130 YALE L.J. 366, 374–75 (2020) (discussing potential justifications for allowing vote-distorting RSAs and deathtraps).

111. Gotberg, *supra* note 89, at 195 ("Particularly in the case of business reorganization, traditionalists promote the influence of a bankruptcy judge, a third-party arbiter with a specialized knowledge of bankruptcy procedure, who can assist a struggling debtor in its efforts to regroup and emerge from bankruptcy a profitable venture, thereby saving the jobs of employees and preventing the death of factory towns."). *But see* Anthony J. Casey & Joshua C. Macey, *Purdue Pharma and the New Bankruptcy Exceptionalism*, 2024 SUP. CT. REV. 365, 373 (2024) (arguing that "bankruptcy courts use the same methods and procedures as other courts" and that "whatever differences exist are a matter of degree rather than kind").

subject-matter expertise in a substantive field that, say, a specialist judge on a foreign antitrust court develops in antitrust law.[112]

This analysis adds context to one of the most vigorous ongoing debates in the literature: whether the bankruptcy system or an alternative procedural mechanism—multi-district litigation (MDL)—is best suited to resolve mass torts.[113] Abbe Gluck has described MDL as representing "unorthodox procedure," noting, for example, that MDL judges utilize "creative case management" that goes far beyond the confines of Rule 16 of the FRCP.[114] MDL judges are handpicked by the Judicial Panel on Multidistrict Litigation based in part on experience with the MDL process, implying that they, too, combine substantive generalism with expertise in a unique procedure.[115]

While the literature on mass torts has focused on differences between bankruptcy and MDL,[116] both systems' suitability for mass-tort cases suggests a degree of similarity. In mass tort cases, both MDL judges and bankruptcy judges combine a generalist approach to the substantive tort causes of action with an expertise in a specialized mechanism for resolving unusually complex multi-party disputes.[117]

To date, the considerable literature on judicial specialization has not distinguished between procedural specialization and substantive generalism. But some scholars have pointed in that direction. Hybrid models of specialization have been introduced to account for opinion specialization and certain administrative law judges housed within administrative agencies, both examples of judges who demonstrate attributes of both specialization and generalism, but neither example involves a distinction between

112. *See* Ginsburg & Wright, *supra* note 10.

113. *See, e.g.*, Anthony J. Casey & Joshua C. Macey, *In Defense of Chapter 11 for Mass Torts*, 90 U. CHI. L. REV. 973, 974 (2023).

114. *See* Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1688 (2017).

115. *See id*. at 1693; D. Theodore Rave, *Management and Judging in Multidistrict Litigation*, 42 REV. LITIG. 291–93 (2023) (discussing the special managerial role of MDL judges).

116. *See, e.g.*, Casey & Macey, *supra* note 113.

117. *Cf.* Jaime Dodge, *Reconceptualizing Non-Article III Tribunals*, 99 MINN. L. REV. 905, 919–21 (2015) (discussing bankruptcy courts and MDL as methods to "customize[]" traditional "Article III structures" and achieve benefits otherwise associated with "non-judicial adjudication").

procedure and substance.[118] Judge Posner has suggested that some judges may be "specialists in appellate adjudication," which would seem to suggest procedural rather than substantive expertise.[119] As for literature on the bankruptcy courts, the procedural nature of bankruptcy judging has been observed in articles addressing Article III.[120] This Part has connected these observations to literature on judicial specialization.

These conclusions have implications for the wider literature on judicial specialization. For example, Jeffrey Rachlinski, Chris Guthrie, and Andrew Wistrich have drawn important conclusions about the decision-making patterns of bankruptcy judges.[121] Given the hybrid nature of the bankruptcy judge, however, it is not clear that insights drawn from the bankruptcy context would apply to true specialists—judges who lack the generalist attributes of the bankruptcy judge.

118. *See* Vanessa Casado Perez, *Specialization Trend: Water Courts*, 49 ENV'T L. 587, 602 (2019) ("This hybrid system where general judges de facto specialize while remaining generalists would ensure that court procedure is homogeneous with other areas of the law and that judges are still permeable to lessons from other legal subjects."); Malcolm C. Rich, J.D. Goldstein, Alison C. Goldstein & Goldberg Kohn, *The Need for A Central Panel Approach to Administrative Adjudication: Pros, Cons, and Selected Practices*, 39 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1, 16 (2019) (noting that some agencies "have developed hybrid systems through which some ALJs maintain specialized expertise in a very limited number of cases while other ALJs within the central panel are more generalist in nature"). The term "procedural specialist" has been used to describe judicial conference members, but not judges of specialized courts. *See* Oscar G. Chase & David Schiff, *Civil Practice*, 47 SYRACUSE L. REV. 353, 354 (1997). Finally, Penny Venetis has used the term "hybrid" to describe Article I courts located outside of administrative agencies, including the bankruptcy courts, the Court of Federal Claims, and the Tax Court. The type of hybrid specialization discussed here reflects a different use of the term and does not necessarily apply to other specialized Article I courts. *See* Penny M. Venetis, *Enforcing Human Rights in the United States: Which Tribunals Are Best Suited to Adjudicate Treaty-Based Human Rights Claims?*, 23 S. CAL. REV. L. & SOC. JUST. 121, 154 (2014).

119. *See* POSNER, *supra* note 7, at 270.

120. *See* Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 751 (2010).

121. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1485–86 (2009) ("[W]e found that federal bankruptcy judges appear as susceptible to common errors in judgment as their generalist counterparts, suggesting that specialization does not lead inexorably to improved decision making."); Jeffrey J. Rachlinski, Chris Guthrie & Andrew J. Wistrich, *Inside the Bankruptcy Judge's Mind*, 86 B.U. L. REV. 1227, 1230–31 (2006) ("The evidence we report below suggests that bankruptcy judges perform at least as well as generalist judges" along several metrics); *see also* Theodore Eisenberg, *Differing Perceptions of Attorney Fees in Bankruptcy Cases*, 72 WASH. U. L.Q. 979, 990 (1994).

The following Part examines how this unusual model came into place. It argues that historical developments gradually transformed the bankruptcy field from a siloed one into one governed by a bankruptcy judge influenced by the American tradition of judicial generalism.

II. THE BANKRUPTCY JUDGE AND THE GENERALIST TRADITION

The federal judiciary is an institution that has, to a remarkable degree, resisted broader social trends toward increased specialization.[122] Nevertheless, there have been gradual shifts in overall adjudication toward specialized tribunals, and bankruptcy courts have sometimes been positioned as part of that trend.[123] But as noted, the bankruptcy judge is a product of historical design choices that embraced substantive generalism as well as specialization.

This Part details four ways that the current bankruptcy system embodies generalist values. First, it documents the consolidation of previously separate and specialized proceedings: corporate restructuring through equity receivership and traditional bankruptcy. It then documents trends toward generalism by charting the expansion of the docket of bankruptcy referees. The following section examines the expansion of bankruptcy law by the inclusion of municipal cases. Finally, this Part examines the failure of proposals to increase bankruptcy specialization by creating a bankruptcy agency. Each of these decisions was a choice in favor of courts over agencies and in favor of generalists over specialists.[124]

A. Specialization in the Era of the Equitable Receivership

The short-lived bankruptcy laws of the early and middle nineteenth century typically ignored (and were ignored by) large corporations.[125] As a consequence, the most significant firms of the era—the railroad behemoths that connected the American

122. *See* Paul R. Gugliuzza, *Rethinking Federal Circuit Jurisdiction*, 100 GEO. L.J. 1437, 1446 (2012) ("The paradigmatic American judge, especially a federal judge, is a generalist."); Paul Horwitz, *Clerking for Grown-Ups: A Tribute to Judge Ed Carnes*, 69 ALA. L. REV. 663, 668–69 (2018) (speculating that "traditions, including a preference for generalists over specialists . . . lead American law" to resist trends in other professions).

123. POSNER, *supra* note 7, at 7; *id.* at n.9.

124. *See* SKEEL, *supra* note 20, at 87–95.

125. *Id.* at 48.

economy during the nation's westward expansion—were a poor fit for laws tailored to the insolvencies of small firms and individual debtors.[126]

When railroads failed, virtually all stakeholders understood the need to preserve critical infrastructure. As one circuit court noted in 1886, without some type of intervention, the rail lines that bound the growing country together would become "nothing but a streak of iron-rust on the prairie."[127] But despite broad consensus that distressed railroads should be rescued, neither the federal nor state governments had the political capacity or legal freedom of action to achieve that result during the nineteenth century.[128]

Accordingly, spurred by necessity and practical realities, railroad reorganizations developed as a specialized field of law separated from general insolvency work.[129] Railroad managers and prominent investment banks turned to elite New York law firms during economic downturns, and these firms developed early techniques of corporate reorganization.[130]

David Skeel has recounted the resulting process succinctly, explaining that the insolvent railroad would

> arrange for a friendly creditor (generally an out-of-state creditor, to create federal diversity jurisdiction) to file a creditor's bill asking for the appointment of a receiver . . . . [T]he receivers, who generally included members of the railroad's management, worked out the terms of a reorganization. At the same time, the railroad's investment bankers formed bondholder 'protective committees' and attempted to persuade the bondholders to deposit their securities with the committee, which would commit the bondholders to the terms of the eventual reorganization. Once everything was in place, the bonds and other security interests were foreclosed and the railroad's assets were 'sold' in a foreclosure sale.[131]

126. Stephen J. Lubben, *Fairness and Flexibility: Understanding Corporate Bankruptcy's Arc*, 23 U. PA. J. BUS. L. 132, 134 (2020).

127. Cent. Tr. Co. v. Wabash, St. L. & P. Ry. Co., 29 F. 618, 626 (C.C.E.D. Mo. 1886).

128. SKEEL, *supra* note 20, at 52–55.

129. *Id.* at 48–70.

130. *Id.* at 56–69.

131. David A. Skeel, Jr., *An Evolutionary Theory of Corporate Law and Corporate Bankruptcy*, 51 VAND. L. REV. 1325, 1356–57 (1998).

The railroad's debtholders would purchase the firm by bidding their own debt, and for various reasons outside competitors rarely (if ever) appeared to bid against them.[132] The result was a management-led corporate reorganization.[133]

The firms that developed the equitable-receivership technique brought these cases before a select set of federal judges, who proved willing to tolerate substantial deviations from the common-law foreclosure process given the importance of railroad preservation.[134] Skeel observes that these "federal judges are best seen as reflecting the views of a remarkably broad consensus in favor of reorganizing the railroad."[135]

This was an area of true specialization. Significantly, there was little to no overlap—in terms of legal doctrine, forum selection, personnel, and participants—with general insolvency practice that existed in state courts and began to develop in the federal system after the enactment of the Bankruptcy Act of 1898.[136] And while Article III judges wanted little to do with Bankruptcy Act cases, they were willing to invent new doctrines and stretch old ones to embrace railroad receiverships.[137] Indeed, district judges gained personal prestige from supervising the rehabilitation of nationally important firms.[138]

The first tentative steps toward a generalist bankruptcy practice that would include these different types of cases came in the early 1930s. Congress added Section 77 (in 1933) and 77B (in 1934) to the Bankruptcy Act, codifying the old equity receivership practice

132. *See* Jeffrey Stern, *Failed Markets and Failed Solutions: The Unwitting Formulation of the Corporate Reorganization Technique*, 90 COLUM. L. REV. 783, 798 (1990).

133. *See* Michelle M. Harner, *The Search for an Unbiased Fiduciary in Corporate Reorganizations*, 86 NOTRE DAME L. REV. 469, 480 (2011).

134. Skeel, *supra* note 131; Edward A. Purcell, Jr., *Ex Parte Young and the Transformation of the Federal Courts, 1890–1917*, 40 U. TOL. L. REV. 931, 946 (2009) (noting that turn of the century federal judges "adopted increasingly expansive views of federal equity power in administering corporate reorganizations").

135. SKEEL, *supra* note 20, at 61.

136. *Id.* at 69.

137. *See* Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 151 (1998) (listing "the revolutionary expansion of federal equity jurisprudence in the context of railroad receiverships" as evidence that "federal judges possess strong incentives to augment their powers").

138. *See* Barry E. Adler, *Financial and Political Theories of American Corporate Bankruptcy*, 45 STAN. L. REV. 311, 345 n.145 (1993).

and transplanting it into bankruptcy law.[139] The elite firms that dominated the reorganization practice initially supported codification, seeing it as a means to resolve an old headache—the fact that a single federal receiver could be appointed to manage only the fixed property within a federal circuit, complicating cases involving railroads that stretched across circuits.[140]

But more change was coming. The railroad receivership practice as a whole came under withering political fire during the New Deal.[141] Concerns about too much flexibility and deference to management, which had once inspired sporadic Supreme Court intervention,[142] now led to more restrictive legislation.

New Dealers—along with theorists of the Legal Realist movement—criticized equitable receiverships. Their critiques were rooted both in the receiverships' perceived ineffectiveness (many railroads experienced continued distress following reorganization) and in a belief that insider participants prioritized self-interest (by increasing fees and acting on behalf of management) over the interests of other stakeholders.[143] Interestingly, this critique of the highly specialized equitable receivership field echoes modern literature on the potential perils of specialization. As will be discussed in Part III, prominent critiques of judicial specialization include vulnerability to capture by special interest groups and the potential for tunnel vision. New Dealers saw both problems in the highly specialized receivership practice.

A long legislative reform process ultimately led to Chapter X of the Chandler Act, which (for a time) snuffed out some of the unique features of reorganization practice. Notably, under Chapter X, management would no longer direct insolvent firms during

139. *See* Daniel J. Bussel, *Coalition-Building Through Bankruptcy Creditors' Committees*, 43 UCLA L. REV. 1547, 1555–56 (1996). Section 77 governed railroads specifically, while 77B authorized similar practices for other business corporations. *See* Ashton v. Cameron Cnty. Water Imp. Dist. No. 1, 298 U.S. 513, 536 (1936) (Cardozo, J., dissenting).

140. Initially, receivers could be appointed for an entire circuit by the circuit court. Later, after the abolition of the circuit courts in 1911, district courts were empowered to appoint a single receiver for the circuit. They could not, however, empower a receiver to manage fixed property beyond circuit lines. *See* Lubben, *supra* note 126, at 148.

141. SKEEL, *supra* note 20, at 56–69.

142. *E.g.*, N. Pac. Ry. v. Boyd, 228 U.S. 482 (1913).

143. *See* Troy A. McKenzie, *Bankruptcy and the Future of Aggregate Litigation: The Past As Prologue?*, 90 WASH. U. L. REV. 839, 858 (2013); Stephen J. Lubben, *Railroad Receiverships and Modern Bankruptcy Theory*, 89 CORNELL L. REV. 1420, 1474 n.14 (2004); Skeel, *supra* note 131, at 1369.

the receivership process. Instead, company property would be managed—like the estates of ordinary debtors—by a bankruptcy trustee.[144] This pushed debtors into Chapter XI, designed primarily for small firms, which was an imperfect fit for large business reorganizations.[145]

Codification of the receivership practice, and, later, Chapter X, effected the merger of previously separate legal fields into an overarching bankruptcy process. The end result was a temporary decline in the equity receivership practice.[146] The elite firms that had pioneered corporate reorganizations in the railroad cases retreated from the practice area.[147]

But the codification of corporate reorganizations within bankruptcy statutes was here to stay. Article III judges would no longer enjoy primary responsibility for managing nationally significant corporate reorganizations, while leaving insolvent individuals to specialized bankruptcy referees. Instead, even while bankruptcy practitioners generally specialize in one type of case or the other, each type of matter and debtor would come before a bankruptcy judge.

B. The Restricted Docket of the Bankruptcy Referee

America's early bankruptcy laws, including the Bankruptcy Act of 1898, formally vested jurisdiction in the Article III district courts.[148] The Article III district judges, however, played a small role in most bankruptcy cases under the 1898 Act. Instead, they referred bankruptcy matters to referees—bankruptcy specialists who were in some ways the predecessors of the modern bankruptcy judge.[149] The work of the referees was far narrower and more specialized than the work of their modern equivalents.

Relying on a traditional conception of *in rem* bankruptcy jurisdiction, the 1898 Act bestowed "summary jurisdiction" on the referee's adjudication of disputes arising from the court's

144. SKEEL, *supra* note 20, at 56–69.

145. *See* Ralph Brubaker, *Taking Exception to the New Corporate Discharge Exceptions*, 13 AM. BANKR. INST. L. REV. 757, 764–66 (2005).

146. SKEEL, *supra* note 20, at 56–69.

147. *Id.*

148. *See, e.g.*, *id.* at 23–48.

149. *See id.*

possession of estate property.[150] Exercise of summary jurisdiction to resolve disputes over estate property did not require a judge. Instead, the referees were empowered to make decisions for property over which the court possessed jurisdiction.

Claims that were *not* summary—for example, a cause of action owned by the bankruptcy estate that would enable the estate to recover property from an uninvolved third party—were "plenary." These were not streamlined for final decision by the referee, unless all parties consented to the referee's adjudication.[151] Plenary suits were generally brought by a bankruptcy trustee as ordinary actions in a state or federal court with jurisdiction over the underlying claim.[152] Thus, plenary claims that were brought in a federal court would be heard by an Article III judge, and those brought in a state court by a state judge.[153] Either way, the referee was not empowered to decide them.

Plenary disputes included claims owned by the debtor that, if successful, would augment the bankruptcy estate. Because such claims could turn on a vast range of legal questions, these matters were substantively diverse. But by diverting these disputes to generalist judges, the Bankruptcy Act maintained the referees as true specialists, focusing their work on a narrow band of recurring issues involving administration of the bankruptcy estate.

This division of labor came with an efficiency cost. Bankruptcy cases were often put on hold, waiting for the resolution of plenary matters by separate generalist courts.[154] Pressure to resolve bankruptcy cases quickly so as to preserve value did not necessarily translate into other fora.

Later reformers of the 1970s sought to address these problems and increase efficiency in the new Code.[155] One way to accomplish

150. *See* Ralph Brubaker, *A "Summary" Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction After* Stern v. Marshall, 86 AM. BANKR. L.J. 121, 128 (2012).

151. *See* Thompson v. Magnolia Petroleum Co., 309 U.S. 478, 482–83 (1940).

152. *See* England v. Louisiana State Bd. of Med. Examiners, 375 U.S. 411, 423 (1964) ("A bankruptcy court commonly sends its trustee into state courts to have complex questions of local law adjudicated.").

153. *See* Brubaker, *supra* note 150, at 128–30.

154. *See* SKEEL, *supra* note 20, at 150 ("Proponents of expanding the bankruptcy court's jurisdiction argued, for instance, that trying a preference action in state court was a waste of time and money; letting bankruptcy courts decide these issues would resolve them more quickly and cheaply and with less disruption.").

155. *See id.* at 136–41.

that would be the creation of a one-stop bankruptcy process that would minimize wasteful delays.[156] That would require a bankruptcy decision maker empowered to decide a much broader range of legal issues, and it would ultimately lead to a less specialized bankruptcy judge.

C. The Evolution of Municipal Bankruptcy

Municipal bankruptcy is of more recent vintage than either corporate restructuring or consumer insolvency work. Congress's first attempt to authorize municipal bankruptcy proceedings, a response to the Great Depression, was struck down by the Supreme Court in 1936.[157] In *Ashton v. Cameron County*, over a vigorous dissent by Justice Cardozo, the Court held that municipal bankruptcies impermissibly interfered with powers reserved to the states.[158]

Congress enacted a lightly revised municipal bankruptcy act in 1937, which was then upheld by the Supreme Court in 1938.[159] Following the switch-in-time, Chief Justice Hughes embraced the law in a decision that largely tracked Cardozo's *Ashton* dissent, with Justice McReynolds, the author of *Ashton*, now left in the minority.[160]

Given federalism concerns, it is unsurprising that these early acts did not empower narrow bankruptcy referees to decide municipal cases.[161] Instead, the district courts held exclusive jurisdiction over these potentially significant and constitutionally controversial cases.[162] As Melissa Jacoby has noted, a bankruptcy referee theoretically "might have seen a municipal case if appointed as a special master for a discrete query, but research reveals no concrete examples."[163]

156. *See id.*

157. Ashton v. Cameron Cnty. Water Imp. Dist. No. 1, 298 U.S. 513, 524 (1936).

158. *Id.*

159. United States v. Bekins, 304 U.S. 27, 54 (1938).

160. *Id.*; *see generally* Daniel J. Goldberg, *Municipal Bankruptcy: The Need for an Expanded Chapter IX*, 10 U. MICH. J. LAW REFORM 91, 92–95 (1976).

161. *See* Melissa B. Jacoby, *Presiding over Municipal Bankruptcies: Then, Now, and Puerto Rico*, 91 AM. BANKR. L.J. 375, 377 (2017); Lawrence P. King, *Municipal Insolvency: The New Chapter IX of the Bankruptcy Act*, 1976 DUKE L.J. 1157, 1164 (1976).

162. Jacoby, *supra* note 161, at 380.

163. *Id.* at 377.

That Article III judges initially retained municipal cases echoes their exclusive control over the early railroad reorganizations. Like railroad corporations, municipal restructurings would be high profile and regionally, if not nationally, significant. Prestige would accrue to the judges presiding over them, and specialist referees were not initially entrusted with matters of such importance.

This dynamic persisted long after the Great Depression. Early municipal reform efforts predated the enactment of the modern Bankruptcy Code. During municipal financial crises of the 1970s (the era of "Ford to City: Drop Dead"),[164] Congress enacted a short-lived standalone municipal bankruptcy reform.[165] One point of contention was whether the former referees, newly retitled as "bankruptcy judges" but still operating under the summary-plenary divide, should preside over municipal cases.[166]

The Ford Administration, represented by then-Assistant Attorney General Antonin Scalia, argued that potential bankruptcies of major cities such as New York should be handled by Article III district judges, while smaller municipalities should be left to the bankruptcy judges.[167] This plan would have expanded the referees' substantive purview by giving them cases involving minor cities, but it also reflected a continued belief that nationally important cases required Article III judges.

Congress rejected this proposed bifurcation, opting to keep all municipal bankruptcies with the district courts. But in its own way, the 1976 municipal bankruptcy reform deviated from the American generalist tradition. In an unusual departure from the norm of random assignment,[168] the 1976 law directed the chief judge of the applicable circuit to choose the district judge who would preside over municipal cases, presumably allowing selection based on expertise and ability.[169] Thus, while the 1976 legislative scheme retained the older Act's choice to place municipal cases with Article III judges, it departed from the normal background

164. *See* Richard C. Schragger, *Democracy and Debt*, 121 YALE L.J. 860, 878–79 (2012).

165. *See* Jacoby, *supra* note 161; King, *supra* note 161.

166. *See* Jacoby, *supra* note 161.

167. *See id.*

168. *See, e.g.*, Adam M. Samaha, *Randomization in Adjudication*, 51 WM. & MARY L. REV. 1, 46 (2009).

169. Jacoby, *supra* note 161, at 382.

assumption that all generalist judges are equivalently competent to decide all cases on their dockets.[170]

The 1976 reform, however, would not be on the books for long. Comprehensive bankruptcy reform was already underway. And like corporate reorganizations, municipal cases would ultimately be placed on the docket of a bankruptcy generalist by reformers seeking to design a comprehensive bankruptcy system.

D. Rejected Proposals for Further Specialization

Even as local government distress of the 1970s led to municipal bankruptcy reforms, an explosion in consumer credit and debt, among other factors, spurred an effort to comprehensively overhaul the 1898 Act. That reform process ultimately led to the modern Bankruptcy Code and the creation of the bankruptcy courts. Those courts would be staffed by judges who assumed control of a vastly more diverse range of matters than the referees had presided over.

Initially, however, some argued for more specialization rather than more generalism. Specifically, a commission formed to study potential bankruptcy reforms advocated for an administrative solution that would divert certain bankruptcy cases away from the courts.[171]

Under this model, less complicated cases and debtors (such as those with few or no non-exempt assets) would be handled by a proposed bankruptcy agency. Bankruptcy judges and courts would decide only complex matters. Angela Littwin has labeled diversion to administrative law as the "most prominent alternative vision of American consumer bankruptcy," and David Skeel has called its absence the "dog that didn't bark" of American bankruptcy law, invoking Sherlock Holmes's famous reference to a fact whose nonappearance is significant.[172]

170. *See, e.g.*, Samaha, *supra* note 168, at 46.

171. *See* Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. REV. 384, 448 (2012); R. Wilson Freyermuth, *Crystals, Mud, BAPCPA, and the Structure of Bankruptcy Decisionmaking*, 71 MO. L. REV. 1069, 1077 (2006).

172. Angela Littwin, *The Affordability Paradox: How Consumer Bankruptcy's Greatest Weakness May Account for Its Surprising Success*, 52 WM. & MARY L. REV. 1933, 1981 (2011); SKEEL, *supra* note 20, at 89–90.

Administrative bankruptcy would have reflected Congress's normal approach to complex civil statutory structures[173]—and represented a decisive embrace of bankruptcy specialization. It would have entrusted simple consumer cases to an expert agency akin to the Social Security Administration, with administrative law judges resolving disputes that arose in those matters.[174] High profile cases—corporate insolvencies and perhaps the occasional municipal bankruptcy—would have been separated off, siloed like the old railroad cases had been.

Ultimately, the administrative path was taken by many other countries, including England.[175] America, however, remains committed to judge-centered bankruptcy to an extent that other countries have not.[176] The rejection of administrative bankruptcy was a necessary prerequisite for generalist bankruptcy judging.[177]

E. Toward a Generalist Bankruptcy Judge

In drafting the modern Bankruptcy Code, Congress sought to design a bankruptcy judge that would handle as many substantive issues as possible, thereby relieving the district courts of virtually all aspects of bankruptcy cases. The bankruptcy judges would specialize in a unique procedural environment, but their design reflected the American tradition of generalist judging in multiple ways.

First, even as the Code re-embraced aspects of the old equitable receivership practice that had been undone by the New Deal, Congress placed these cases with the new bankruptcy judges. In stark contrast to the railroad era, the modern bankruptcy judge was to handle everything from no-asset consumer cases to the reorganization of firms like General Motors and Delta Air Lines.

173. *See* Pardo & Watts, *supra* note 171, at 386.

174. *See id.*

175. *See* Iain Ramsay, *U.S. Exceptionalism, Historical Institutionalism, and the Comparative Study of Consumer Bankruptcy Law*, 87 TEMP. L. REV. 947, 947 (2015) ("The U.S. [bankruptcy] system is also organized around courts and lawyers rather than a public administrator, with the consequent U.S. 'primacy of lawyers rather than an administrator.'"); Nathalie Martin, *Common-Law Bankruptcy Systems: Similarities and Differences*, 11 AM. BANKR. INST. L. REV. 367, 367 (2003) ("The United States never adopted the English's unforgiving and highly administrative bankruptcy process, although both Australia and Canada did.").

176. *See* John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 852 (1985); Ginsburg & Wright, *supra* note 10.

177. *See* SKEEL, *supra* note 20, at 89–90.

To be sure, some provisions of the modern Code recognize that certain types of reorganizations might call for specialized subject-matter expertise. Modern railroad reorganizations, for example, are governed by Sub-Chapter IV, which provides for the Secretary of Transportation's involvement in the selection of a qualified trustee.[178] But consistent with a generalist judicial design, the Code incorporates subject matter expertise in these cases at the level of the trustee—not the judge.

The choice to consolidate corporate reorganizations and individual bankruptcy cases before the same judges seems unsurprising only because we have lived under such a regime for decades. Practitioners tend to specialize in one area or the other. And the very goals of individual bankruptcy (the fresh start for the honest but unfortunate debtor)[179] and business bankruptcies (the elimination of collective-action problems and the preservation of going-concern value)[180] differ significantly. That contrast led Douglas Baird to reflect that it is "an unhappy accident that individual bankruptcy and corporate reorganization law are fused together."[181]

But this fusion is consistent with the American tradition of judicial generalism. And as will be discussed in more detail in Part III.B, defenders of that tradition posit that rulings in diverse areas benefit from the cross-fertilization of ideas from the other.[182] The generally recognized success of bankruptcy judging may in part be due to the benefits of generalism and its compatibility with the wider American tradition.[183] The final merger of corporate and individual bankruptcy was thus a fateful and potentially beneficial one.

A similar consolidation took place with respect to municipal bankruptcy. The Bankruptcy Code's new Chapter 9 retreated from the short-lived 1976 decision to bestow all municipal bankruptcies

178. *See, e.g.*, *In re* Merco Joint Venture LLC, No. 02-80588-288, 2002 WL 32063450, at *2 (Bankr. E.D.N.Y. July 19, 2002).

179. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

180. *See, e.g.*, Donald R. Korobkin, *The Role of Normative Theory in Bankruptcy Debates*, 82 IOWA L. REV. 75, 121 (1996).

181. Baird, *supra* note 86, at 494 n.4.

182. *E.g.*, Wood, *supra* note 58, at 1766.

183. Even critics of some aspects of the bankruptcy system generally acknowledge the professional excellence of the bankruptcy bench. *See* MELISSA B. JACOBY, UNJUST DEBTS: HOW OUR BANKRUPTCY SYSTEM MAKES AMERICA MORE UNEQUAL 4–12 (2024).

upon Article III courts. Notwithstanding concerns that had been expressed by Scalia and others, the judges of the new bankruptcy courts would handle all municipal restructuring cases from the smallest localities to the largest cities—just as they would handle cases involving individual debtors and large businesses. Unlike truly narrow specialists, extremely different entity types and individual parties would appear before them.

But the most sweeping step toward expansive bankruptcy judging was the attempted elimination of the old distinction between summary and plenary matters. The new bankruptcy courts were designed to exercise jurisdiction not only in proceedings "arising under" the bankruptcy title but additionally over proceedings "arising in or related to" bankruptcy cases brought under that title.[184] In other words, bankruptcy courts would exercise both *in rem* and *in personam* jurisdiction, rendering final decisions in disputes that had previously been plenary as well as those that had been summary.[185]

This was an enormously broad grant of jurisdiction, potentially reaching nonbankruptcy disputes that merely "related to" a bankruptcy.[186] It would include even disputes that would not be heard in other federal courts, such as a purely state-law claim belonging to the debtor's estate where the parties lacked diversity of citizenship.[187]

In this regard and in others, the new bankruptcy courts would be quite unlike the narrow and carefully delineated Article I courts. Reformers recognized that this scheme would empower bankruptcy judges to decide claims that had traditionally been heard in the district courts, but proposals in the House would address these concerns by giving bankruptcy judges Article III status.[188] Here we see another hint that the bankruptcy judge was designed as a substantive generalist, as Article III status has

184. Brubaker, *supra* note 98, at 755.

185. *Id.*

186. *See id.*

187. *See id.*

188. *See* SKEEL, *supra* note 20, at 157–59 ("Along with nearly all the principal interest groups—from bankruptcy lawyers to creditors—bankruptcy judges favored Article III status. Their chief opposition came from other federal judges, who quite candidly worried that elevating bankruptcy judges would diminish their prestige."); Coco, *supra* note 11, at 182–83.

almost never been bestowed on true specialists who do not at least serve a dual role on a generalist court.[189]

But the prestige of Article III has been jealously guarded by the federal judiciary, and many existing judges were displeased by the idea of being joined by hundreds of Article III bankruptcy judges. Breaking rather dramatically with separation-of-powers norms, Chief Justice Warren Burger intervened in the legislative process.[190] Burger canvassed senators (demanding a rejection of the House's approach) and President Carter's White House (demanding a veto).[191]

In response to pressure, Congress ultimately dropped the idea of Article III status for bankruptcy judges.[192] Fatefully, though, the Bankruptcy Code retained the original scheme's approach to expansive bankruptcy court jurisdiction. This would lead to the Supreme Court's most persistent and consequential interventions into the bankruptcy space.

Taken together, the Court's jurisprudence on the bankruptcy courts reflects concerns about Congress's choice to grant a non-Article III generalist the power to render final decisions. In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, a majority of the Court agreed that Congress overstepped by allowing a bankruptcy judge without Article III status to decide a breach-of-contract claim filed by a debtor-in-possession against a third party.[193]

Congress responded by dividing bankruptcy matters between "core" proceedings subject to final decision by a non-Article III bankruptcy judge and "non-core" proceedings, for which a bankruptcy judge's report and recommendations must be reviewed *de novo* by a life-tenured district court judge.[194] The post-*Marathon*

189. To be sure, some specialized courts like FISC borrow Article III judges from generalist courts, but these judges never stop being generalists in their capacity as district court judges. The Federal Circuit has also been labeled a "specialized court" in some contexts, but its own judges have resisted that characterization. Perhaps the closest examples to Article III specialists are the judges of the Court of International Trade, though it too possesses jurisdiction over a range of cases. Craig A. Lewis, Jonathan T. Stoel & Brian S. Janovitz, *The United States Court of International Trade in 2010: Is Commerce Suffering from Adverse Decisions It Wasn't Double-Counting On?*, 43 GEO. J. INT'L L. 47, 48–49 (2011).

190. *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982); Casey & Macey, *supra* note 111, at 378–79.

191. *See* Casey & Macey, *supra* note 111, at 378–79.

192. *Id.*

193. *Id.*

194. 28 U.S.C. § 157.

scheme also required district courts to withdraw proceedings from the bankruptcy courts if they required consideration of both bankruptcy law "and other laws of the United States regulating organizations or activities affecting interstate commerce."[195] On its face, this would seem to meaningfully restrict and narrow the docket of the bankruptcy judge.

But the mandatory withdrawal provision was quickly given a narrow and limiting construction, and the allocation of cases between bankruptcy and district courts was not fundamentally reordered.[196] Many believed *Marathon* to be a temporary foray into a strict and formalistic interpretation of Article III, from which the Court would likely retreat.[197] Later history proved otherwise.

In *Stern v. Marshall*, the Court decided that some claims that Congress had designated as "core" (specifically, a non-compulsory state-law counterclaim against a third party) had been unconstitutionally assigned to a non-Article III judge.[198] Ralph Brubaker has read *Stern* as partially constitutionalizing the summary-plenary divide, blocking Congressional efforts to bestow old plenary claims on bankruptcy judges for final disposition.[199]

To some extent, then, *Marathon* and *Stern* brushed back on Congress's choice to maximally expand the bankruptcy judge's jurisdiction without extending Article III status. And while many have since argued that the simplest solution would be

195. *Id.* § 157(d).

196. *See* Laura B. Bartell, *Motions to Withdraw the Reference – an Empirical Study*, 89 AM. BANKR. L.J. 397, 408–09 (2015).

197. *See* Erwin Chemerinsky, *Formalism Without a Foundation:* Stern v. Marshall, 2011 SUP. CT. REV. 183, 198 (2011) (arguing that *Marathon*'s liberal plurality was responding to "a number of bills [that] were introduced into the new Congress to strip the Supreme Court and the lower federal courts of the ability to decide particular issues, such as challenges to state laws restricting abortion or allowing prayer in public schools"); James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 646–47 (2004) ("After an ill-fated and relatively short-lived attempt to establish categorical limits to non-Article III adjudication in the Northern Pipeline case, the Court has seemingly retreated to a multifactored balancing test that includes judicial independence as one factor and often results in the validation of Article I tribunals.").

198. Ralph Brubaker, *Article III's Bleak House (Part I): The Statutory Limits of Bankruptcy Judge's Core Jurisdiction*, 31:8 BANKR. L. LETTER, at 1, 1–5 (Aug. 2011); *see also* Stern v. Marshal, 564 U.S. 462 (2011).

199. *See* Ralph Brubaker, *Non-Article III Adjudication: Bankruptcy and Nonbankruptcy, With and Without Litigant Consent*, 33 EMORY BANKR. DEVS. J. 11, 59 (2016).

life tenure and salary protections for bankruptcy judges, Congress has not acted.[200]

Even after *Stern*, however, it remains appropriate to treat the bankruptcy judge as a substantive generalist. Following *Stern*, the bankruptcy judge still considers the diversity of legal questions presented by both core and non-core claims, even if she decides non-core matters only as a report and recommendation to be reviewed de novo by the district court. In analyzing a judge's development of specialized expertise, it is the matters they consider—rather than the finality of their consideration—that count the most. Indeed, magistrate judges, who act as adjuncts to the district courts in significant matters,[201] are considered generalists in the academic literature.[202]

Moreover, a narrow majority of the Supreme Court subsequently held, in *Wellness International Network v. Sharif*, that a bankruptcy judge may indeed render a final decision in a non-core claim where all parties consent to that adjudication.[203] Thus, bankruptcy judges continue to decide the full range of non-core claims, albeit with finality only upon party consent.

At the same time, the bankruptcy judge's non-Article III status might encourage *procedural* specialization by incentivizing judges to prioritize speed and efficiency. For district court counterparts with Article III's life tenure and salary protections, the career consequences of slow decision making are strikingly low. Congress has attempted to nudge district judges toward faster decision making by publicly identifying judges with backlogged motions on the "six-month list,"[204] and research suggests that they generally strive to avoid appearing on it.[205] Nevertheless, district judges who have appeared on the six-month list have subsequently

200. *See* Gotberg, *supra* note 89, at 194.

201. Magistrate judges remain empowered to issue final decisions in misdemeanor cases. *See* Adrienne Arnold, *Magistrates and Misdemeanors: Examining Magistrate Judges' Petty-Offense Jurisdiction*, 54 HOU. L. REV. 209, 237 (2016).

202. *See, e.g.*, Guthrie, Rachlinski & Wistrich, *supra* note 121, at 1479.

203. Wellness Int'l Network v. Sharif, 575 U.S. 665, 688 (2015) (Roberts, C.J., dissenting).

204. *See* Tejas N. Narechania, Tian Kisch & Delia Scoville, *Forum Crowding*, 112 CAL. L. REV. 327, 332 (2024).

205. *See* Miguel F.P. de Figueiredo, Alexandra D. Lahav & Peter Siegelman, *The Six-Month List and the Unintended Consequences of Judicial Accountability*, 105 CORNELL L. REV. 363, 366 (2020).

been elevated to the circuit courts and even the U.S. Supreme Court, indicating that minimal consequences attach to it.[206]

In contrast, for a bankruptcy judge without life tenure, a positive reputation for speed and efficiency is likely to increase chances of reappointment.[207] The efficiency gains from procedural innovation and fluency in the unique and complex mechanics of bankruptcy cases becomes all the more important.

Thus, in various important ways, the bankruptcy judge was designed to incorporate features of generalist judging, even while exercising specialized expertise in the unique procedural environment of bankruptcy. Previously separate fields of law were consolidated before the bankruptcy courts. Significantly different types of parties, generally represented by different types of counsel, were placed before them. And Congress dramatically expanded the diversity of legal issues they would consider. Indeed, the bankruptcy courts would be charged with adjudicating state-law questions to a greater extent than any other federal courts, implicating sensitive federalism concerns.[208]

These choices—each of which assumed a level of generalism on the part of the bankruptcy judge while increasing her status and importance—were consistent with the plans of those who sought Article III status for bankruptcy judges. Fatefully, none were revisited after Article III status was rejected. The result was a hybrid design that, as the next section explains, produced various advantages for the bankruptcy system.

III. ADVANTAGES OF THE HYBRID MODEL

As discussed in the preceding parts, over the course of bankruptcy history, the bankruptcy courts developed as a unique

206. *See, e.g.*, CJRA TABLE 8: U.S. DISTRICT COURTS—REPORT OF MOTIONS PENDING OVER SIX MONTHS, 23–24 (2021), https://www.uscourts.gov/sites/default/files/data_tables/cjra_8_0331.2021.pdf (on file with BYU Law Review) (listing motions for Ketanji Brown Jackson, prior to her elevation to the D.C. Circuit and then the Supreme Court by President Biden); *id.* at 290 (listing motions for Richard Sullivan, prior to his elevation to the Second Circuit by President Trump).

207. *Cf.* David A. Skeel, Jr., *Lockups and Delaware Venue in Corporate Law and Bankruptcy*, 68 U. CIN. L. REV. 1243, 1278 (2000) (noting Delaware bankruptcy judges' "reputation for speed and administrative efficiency" and the corresponding benefits for Delaware as a preferred forum).

208. Thomas E. Plank, *The Erie Doctrine and Bankruptcy*, 79 NOTRE DAME L. REV. 633, 636 (2004).

institution that combines procedural specialization and substantive generalism. This Part analyzes the advantages of that hybrid model for the bankruptcy system.

A. The Advantages of Specialization

Whether or not specialized courts produce *better* outcomes than generalist ones is almost certainly an unanswerable question, with answers depending in part on competing views of the fundamental nature of law.[209] But scholars have identified a set of more concrete benefits that specialized courts are expected to produce relative to generalist ones. These core identified advantages include efficiency, uniformity, and "technical competence."[210]

In other words, a group of specialists in a field will reach consistent results expected by other experts in the field, and they will do so faster than non-specialists. Proponents of judicial specialization see corresponding disadvantages in the prevailing model of judicial generalism. For example, while praising the more specialized German judicial system, Professor John Langbein dismissed the American tradition as one of "calculated amateurism."[211]

Consistency within a specialized field may also be produced by outside perceptions of expertise. While many specialized courts do not produce precedential opinions, the persuasive impact of their decisions is bolstered by their perceived proficiency. More often, such deference by generalist judges may be implied and informal,[212] but Article III judges on occasion have explicitly invoked a degree of deference to a bankruptcy judge's expertise in

209. The suggestion that a specialist's rulings are "better" implies that there are formally correct answers to particular legal questions, which itself is contested. *Compare* Peter de Marneffe, *But Does Theory Lead to Better Legal Decisions?: Response to Ronald Dworkin's "In Praise of Theory*," 29 ARIZ. ST. L.J. 427, 430 (1997) ("Dworkin is quite right to maintain that there are objectively correct decisions in legal cases.") *with* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statues Are to be Construed*, 3 VAND. L. REV. 395, 396 (1950) (disputing "the idea that the cases themselves and in themselves, plus the correct rules on how to handle cases, provide one single correct answer to a disputed issue of law").

210. *See, e.g.*, Wood, *supra* note 58, at 1766 (1997); Ford, *supra* note 7, at 49; POSNER, *supra note* 7, at 263; Oswald, *supra* note 7, at 251–53.

211. Langbein, *supra* note 176, at 852.

212. *See* Seymour, *Bankruptcy Appeal Barriers*, *supra* note 8, at 90; Seymour, *Bankruptcy in Conflict*, *supra* note 8, at 583–88.

applying the Code.[213] Relatedly, when bankruptcy court decisions are appealed and litigants may opt to appeal either to a bankruptcy appellate panel (BAP) or a generalist district court, BAP opinions on further appeal are more likely to be cited by circuit courts of appeals than comparable district court decisions.[214]

Thus, specialization not only increases efficiency and may result in more uniform decisions; it also bolsters consistency and confidence in the decisions that specialists ultimately reach.

B. The Advantages of Generalism

Defenders of the generalist model have pointed to a separate set of benefits. In asserting that "judges should be generalists," Judge John Walker, Jr. (of the Second Circuit) argued that the generalist will be best able to "discern when good arguments are being made."[215] Likewise, Judge Rakoff charged that judicial specialization obscures "what judges are really supposed to do, which is to apply reason, legal principles, and basic moral values to the resolution of controversies."[216] Rakoff further warned that "even the best of judges in specialized courts tend to develop a tunnel vision, oblivious to developments in other parts of the law that should impact their decisions."[217]

Judge Dianne Wood (of the Seventh Circuit) has made similar points, arguing that "we need generalist judges more than ever."[218] She notes that generalist courts force advocates to explain technical concepts to non-insiders, thus forcing the bar "to demystify legal

213. *See* Traylor v. First Fam. Fin. Servs., Inc., 183 B.R. 286, 287–88 (M.D. Ala. 1995) ("The court finds that the [bankruptcy judge], who is exceedingly learned in the laws of bankruptcy, is in the best position to make this determination . . . . Accordingly, the court will defer to the expertise and specialized knowledge of the bankruptcy judge."); *In re* Premiere Holdings of Texas, L.P., 277 B.R. 332, 334 (S.D. Tex. 2002) ("Bankruptcy courts, unlike this Court, are uniquely familiar with the . . . esoteric intricacies permeating the entirety of the federal bankruptcy laws.").

214. Jonathan Remy Nash & Rafael I. Pardo, *An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review*, 61 VAND. L. REV. 1745, 1747 (2008).

215. John M. Walker, Jr., *Comments on Professionalism*, 2 J. INST. FOR STUDY LEGAL ETHICS 111, 113–14 (1999); *see also* Neal Katyal & Morgan Goodspeed, *The Future of Appellate Advocacy? More Generalists, Fewer Appeals*, 54 DUQ. L. REV. 367, 371 (2016).

216. Rakoff, *supra* note 83, at 7.

217. *Id.* at 10.

218. Wood, *supra* note 58, at 1756. Though Wood discusses generalist and specialist models across the federal Article I and Article III courts as well as state courts, she does not specifically address the bankruptcy courts.

doctrine and to make the law comprehensible."[219] Finally, Wood argues that a general docket provides for the "cross-fertilization of ideas" from one field to another, thus improving decision quality across the board.[220]

The central defense of judicial generalism—that generalist judges build expertise in evaluating legal arguments that transcends subject area boundaries—has a long pedigree. Long before Walker, Wood, and Rakoff, Oliver Wendell Holmes Jr. observed that:

> Having to listen to arguments, now about railroad business, now about a patent, now about an admiralty case, now about mining law and so on . . . all the cases[,] when you have walked up and seized the lion's skin[,] come uncovered and show the old donkey of a question of law, like all the rest.[221]

In addition to the long-observed benefits of generalism, academic literature has also identified potential downsides of specialization that may be mitigated by the generalist model. These accounts warn that extreme specialization increases the "risks of interest group capture, tunnel vision[,] or jadedness in favor of or against certain litigants."[222] Judge Guido Calabresi (of the Second Circuit) has pointed to examples where specialized experts were wrong; these examples appear to support the charge of tunnel vision.[223] Wood likewise argues that generalists are less likely to become "technocrats" or "victim[s] of regulatory capture."[224]

In addition to these gains from generalism and losses from the specialist model, another consequence for specialized courts within

219. *Id.* at 1767 ("Economic mumbo-jumbo is already prevalent . . . but lawyers talk of the trade-off between the deadweight loss 'triangle' and the income transfer 'rectangle' at their peril in front of a judge who does not live and breathe the field" of antitrust law.)*; see also* Deanell Reece Tacha, *Refocusing the Twenty-First-Century Law School*, 57 SMU L. Rev. 1543, 1545 (2004) ("[L]egal writing is about conveying complex legal and factual issues . . . . [S]o that your garden-variety judge, who in the American tradition is still a generalist, can grasp the intricacies.").

220. *See* Wood, *supra* note 58, at 1767.

221. Oliver Wendell Holmes, Jr. to John C. H. Wu (May 14, 1923), in HARRY SHRIVER, ED. JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 163–64 (1936).

222. Stempel, *supra* note 9, at 127; BAUM, *supra* note 3, at 133 (noting examples of capture but arguing that the "theme of capture should not be overstated").

223. Guido Calabresi, *The Current, Subtle-and Not So Subtle-Rejection of an Independent Judiciary*, 4 U. PA. J. CONST. L. 637, 639 (2002).

224. Wood, *supra* note 58, at 1767.

the federal system is diminished prestige. The longstanding interest of Article III judges in defenses of judicial generalism is itself an indicator of the importance of the generalist model within the American system. (Interestingly, this makes the judiciary stand out against many other high-status professions, where specialization is often a prestige enhancer.[225])

This theme has been documented by several writers; for example, Linda Coco has argued that the narrow, specialized, and non-Article III structure of the bankruptcy courts denotes a lack of prestige that can be traced to pervasive cultural stigma against debtors.[226] By the same token, Merritt McAlister (developing an analogy first advanced by Douglas Baird) has labeled the generalist Article III courts as "white-collar courts" that "receive a vastly disproportionate amount of scholarly (and popular) attention."[227] The extent to which prestige truly matters is debatable, but at a minimum, prestigious courts likely attract talent to the bench and to the bar that practices before them.

In sum, generalists benefit from cross-exposure to ideas that arise in different areas, they are insulated from myopia and from pressures that arise when their work involves only a small set of recurring parties or industries, and they benefit from enhanced status associated with longstanding traditions of American judging.

C. The Bankruptcy Judge and the Hybrid Model

Given the widely recognized tradeoffs of both specialist courts and generalist judging, a hybrid model may be an advantageous design choice in certain fields.

Several scholars' observations align with this contention. Jennifer Sturiale reached this conclusion with respect to the Federal Circuit, observing that its control over patent law cultivates its judges' expertise and efficiency, even while its broader docket allows for the cross-pollination of insights from different legal fields.[228] Likewise, in arguing for greater judicial expertise in water

225. *See, e.g.*, Zheng & George, *supra* note 1, at 113 (noting that "physicians have energetically pursued specialization to attain greater prestige").

226. Coco, *supra* note 11, at 225; *see also* Geier, *supra* note 6, at 993.

227. Merritt E. McAlister, *White-Collar Courts*, 76 VAND. L. REV. 1155, 1157 (2023); *see also* Douglas G. Baird, *Blue Collar Constitutional Law*, 86 AM. BANKR. L.J. 3, 21 (2012).

228. *See* Sturiale, *supra* note 18, at 481–82.

law, Vanessa Casado Perez has observed that partial specialization by generalist judges allows for expertise while ensuring "that judges are still permeable to lessons from other legal subjects."[229] And Adrian Vermeule has argued that the Supreme Court's traditional composition of nine lawyer-justices could be improved by the addition of at least one lay or dual-competent justice with specialized knowledge in a relevant discipline.[230]

The bankruptcy courts can be understood as benefiting from a hybrid design. Non-specialists have often reflected on the complexity and inaccessibility of the Bankruptcy Code, while bankruptcy judges gain fluency in its unique procedures every day they sit on the bench. This leads to efficiency and consistency.[231] Faster decision making is particularly consequential in the bankruptcy context, as the Code's focus on preserving value is threatened by the asset-depleting delays.[232]

But the bankruptcy system benefits from substantive generalism as well. For one, the consolidation of high-profile matters—like corporate and municipal reorganizations—with proceedings to provide relief to indigent debtors benefits the latter group. In demonstrating this point, Angela Littwin has compared bankruptcy to other administrative systems that serve "financially distressed, stigmatized population[s]."[233] Though far from perfect,[234] bankruptcy has generally remained relatively accessible and avoided a culture of bureaucratic hostility.[235] One reason why is that modern consumer

229. *See* Perez, *supra* note 118, at 602.

230. *See* Adrian Vermeule, *Should We Have Lay Justices?*, 59 STAN. L. REV. 1569, 1610–11 (2007).

231. *See* Seymour, *supra* note 8, at 584–85 ("We might assume, for example, that expert bankruptcy judges are more likely to get tricky and contestable questions of bankruptcy law right than generalist judges who must routinely be brought up to speed both on the substance of the complex and interconnected provisions of the Code itself and on the way in which bankruptcy practice puts the Code to use.").

232. *Cf.* Robert K. Rasmussen & Randall S. Thomas, *Timing Matters: Promoting Forum Shopping by Insolvent Corporations*, 94 NW. U. L. REV. 1357, 1368 (2000) (noting advantages when "judges and clerks' offices that have previously handled a large corporate bankruptcy . . . handle new, major Chapter 11 cases more efficiently than inexperienced ones").

233. Littwin, *supra* note 172, at 1988.

234. *See, e.g.*, Nicole Langston, *Discharging Government Debt*, 78 VAND. L. REV. 73, 75 (2025) (noting certain Code provisions that "run counter to bankruptcy's own internal principles, are inconsistent, and harm economically marginalized consumers").

235. Littwin, *supra* note 172, at 1988.

bankruptcy benefited from "the prestige-enhancing association with corporate bankruptcy."[236]

In a similar vein, bankruptcy judge Craig Gargotta has seen a connection between the breadth of a bankruptcy court's docket and the prestige of being a bankruptcy judge.[237] The bankruptcy judge's responsibility over matters great and small, and her focus on a diverse and intellectually stimulating docket, may draw enhanced talent to the bench and in turn be responsible for the strong reputation of the modern bankruptcy judge.[238]

It is also likely that the bankruptcy system has benefited from its historical development into a broad, court-based system rather than a siloed and specialized administrative one. Over the years, many scholars have persuasively argued for the benefits that would have been gained by an administrative approach to bankruptcy.[239] As bankruptcy's "dog that didn't bark,"[240] and as a path taken by several other countries,[241] administrative bankruptcy has retained a hold on the imagination of scholars and reformers.

Most of these arguments, however, were advanced before the current Supreme Court's dramatic revisions to administrative law.[242] In part because the bankruptcy system never embraced administrative specialization, informal deference to bankruptcy judges may survive the demise of *Chevron* deference.[243]

236. *Id.*

237. Craig A. Gargotta, *Who Are Bankruptcy Judges and How Did They Become Federal Judges?*, 2018 FED. LAW. 11, 12.

238. *Cf.* Charles J. Tabb, *Courting Controversy*, 54 BUFF. L. REV. 467, 488 (2006) ("[T]he big cases are just a lot more fun, interesting, and exciting."); Rich, *supra* note 118, at 16 ("What seems to be consistent among ALJs we have surveyed and interviewed is that they tend to be satisfied with their jobs in no small part because of the opportunity to judge different areas of the law.").

239. *See* Pardo, *supra* note 171, at 448; Freyermuth, *supra* note 171, at 1077.

240. SKEEL, *supra* note 20, at 89–90.

241. *See* Martin, *supra* note 175, at 367.

242. *See, e.g.*, Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024); SEC v. Jarkesy, 603 U.S. 109 (2024); Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 603 U.S. 799 (2024); *see also* McGinnis & Yang, *supra* note 13, at 389 (noting the flux in administrative law as "caught between the Court's vision of the original Constitution and the established practices of administration that may be in tension with it").

243. *See* Sapna Kumar, *Scientific and Technical Expertise After* Loper Bright, 74 DUKE L.J. 1749, 1754 (2025) ("[A]gencies are now under significant control by generalist judges who neither possess scientific backgrounds nor have access to relevant experts. . . . [and] judges [may thus] make major errors regarding science and technology . . . ."). *See* Loper Bright, 603 U.S. 369.

Likewise, while the major questions doctrine, which reflects a restrictive and skeptical approach to administrative agencies,[244] has been raised at oral argument in bankruptcy cases, the Supreme Court has yet to invoke the doctrine in a bankruptcy opinion.[245] Modern administrative law has also been marked by "policy whiplash" between alternating administrations in an era of unusually contentious partisanship[246]—another fate that the judicial bankruptcy system has avoided despite the frequent involvement of political and regulatory actors in high profile bankruptcy cases.[247]

Perhaps most significantly, the diversity of substantive legal issues presented on a bankruptcy judge's docket likely increases the quality of their decision making. Many defenses of judicial generalism stress the importance of the cross-fertilization of ideas.[248] And on the other side of the same coin, skeptics of specialized courts have worried about myopia and tunnel vision.[249] In other words, intensive subject-matter familiarity in a discrete field may come at the cost of interdisciplinary insights and a wider vision.

The substantive generalism of the bankruptcy judge theoretically addresses these concerns. And indeed, bankruptcy judges' analysis of the thorniest questions presented by the Code often demonstrates cross-disciplinary reasoning that is reminiscent of generalist judges.

Consider, for example, the Supreme Court's analysis of non-consensual, non-debtor releases in *Harrington v. Purdue Pharma*.[250] To the dissent, the Sacklers' release was "in essence a

244. *See* Cass R. Sunstein, *Two Justifications for the Major Questions Doctrine*, 76 FLA. L. REV. 251, 253 (2024).

245. *See* Fred B. Jacob, *Black Hole of Administrative Law: The Threat of an Ever-Expanding Major Questions Doctrine to the Judiciary*, 98 ST. JOHN'S L. REV. 567, 568 n.9 (2024). *Compare* Transcript of Oral Argument, Harrington v. Purdue Pharma L.P., No. 23-124 (2024), *with* Harrington v. Purdue Pharma L.P., 603 U.S. 204 (2024).

246. *See* Haiyun Damon-Feng, *Administrative Reliance*, 73 DUKE L.J. 1743, 1752 (2024).

247. *See* Adam Feibelman, *Bankruptcy and the State*, 38 EMORY BANKR. DEVS. J. 1, 7 (2022).

248. *See, e.g.*, Wood, *supra* note 58, at 1767; Rakoff, *supra* note 83, at 13.

249. *See, e.g.*, Rakoff, *supra* note 83, at 10; Richard A. Posner, *Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761, 785 (1983) ("Judicial monopoly . . . reduces diversity of ideas and approaches.").

250. *Harrington*, 603 U.S. at 209.

traditional litigation settlement . . . not a blanket discharge."[251] The majority saw the issue differently. What the Sacklers sought "essentially amount[ed] to a discharge," which was inappropriate because the Sacklers had not filed for bankruptcy.[252] Doing so would have required them to "place[] virtually all their assets on the table for distribution to creditors," a fate that they sought to avoid.[253]

Though the disputed issue—the permissibility of non-debtor releases—arose in the context of Chapter 11, both sides analyzed it by reference to other fields. To the dissent, arguments for permissibility were bolstered through comparison to traditional settlement practice. For the majority, the impermissibility of the practice was confirmed by contrast against bankruptcy's treatment of individual debtors. Of course, it is likely no surprise that the generalist justices of the Supreme Court approached a difficult corporate bankruptcy case by referencing other areas of law.

But now consider how bankruptcy judges have analyzed a related question: how to evaluate whether a non-debtor release was consensual when a claimant failed to opt out. Like the generalists of the Supreme Court, some of the most nuanced considerations of this question have been developed by bankruptcy judges analogizing to other areas of law.

In the FTX bankruptcy, Judge Dorsey held that parties who had received notice and been given the opportunity to opt out had consented when they failed to do so, reasoning that those methods would be "acceptable in the context of class action litigation."[254] In reaching a different conclusion to the same question, Judge Goldblatt analogized to contract law, reasoning that failure to respond to an offer within the offeror's specified time frame cannot constitute acceptance.[255] Both judges' reasoning was fundamentally cross-disciplinary.

The generalist tendency to draw insights from other fields is an important part of the bankruptcy judge's toolkit. This conclusion either undercuts part of the scholarly consensus on specialized

251. *Id.* at 271 (Kavanaugh, J., dissenting).

252. *Id.* at 215.

253. *Id.*

254. *In re* FTX, No. 22-11068, Transcript of Hearing (D. Del. Oct. 8, 2024) at 116.

255. *In re* Smallhold, Inc., 665 B.R. 704, 709–10 (Bankr. D. Del. 2024).

courts or reinforces this Article's position that the bankruptcy judge draws from much of the generalist tradition.

IV. MODERN TRENDS AND THE RISK OF OVER-SPECIALIZATION

Through a combination of deliberate design choices and happenstance, the bankruptcy judge evolved to range widely across substantive fields while regularly deploying distinctive procedural tools. Yet hybridity in design does not guarantee hybridity in reality.

One lesson of the railroad receivership era is that formal legal barriers will bend when the perceived need is great enough. Nominally, the receivership courts were applying foreclosure law; in reality, the need to save systemically important railroad firms drove the creation of a new reorganization practice.[256] In today's world, pressure to successfully reorganize distressed firms, combined with competition for prestigious mega-cases, has led to innovations that undermine the bankruptcy judge's generalist design.

Most prominently, the Southern District of Texas has implemented a "complex case panel," through which all large Chapter 11 cases are assigned to one of two designated bankruptcy judges.[257] These judges thus serve as de facto Chapter 11 specialists. The complex case panel is the most extreme and formalized iteration of a longstanding trend whereby certain bankruptcy courts attract a disproportionate number of large business reorganizations due to judge-shopping choices by litigants.[258] And while other districts have not gone quite so far, some have taken steps in the same direction, facilitating judge shopping by case placers through local rules and standing orders.[259]

256. *See supra* Section II.A.

257. *See* Adam J. Levitin, *Judge Shopping in Chapter 11 Bankruptcy*, 2023 U. ILL. L. REV. 351, 354 (2023); Adam J. Levitin, Purdue*'s Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 TEX. L. REV. 1079, 1130 (2022); Daniel B. Kamensky, *The Rise of the Sponsor-in-Possession and Implications for Sponsor (Mis)behavior*, 171 U. PA. L. REV. ONLINE 19, 37–38 (2024); Jonathan M. Seymour, *Against Bankruptcy Exceptionalism*, 89 U. CHI. L. REV. 1925, 1971 (2022).

258. *See* LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS, 70–74 (2005) (discussing the role of judge shopping in drawing large firms to Delaware during the 1990s).

259. *See* Nancy B. Rapoport, *Failing to See What's in Front of Our Eyes: The Effect of Cognitive Errors on Corporate Scandals*, 16 WM. & MARY BUS. L. REV. 45, 87 n.168 (2024).

The Southern District of Texas may be an outlier in departing from the norm of random assignment, but doing so has made it into a dominant forum. Adam Levitin has shown that in 2020, "55% of large, public company bankruptcy filings were heard before just *three* of the nation's 375 bankruptcy judges," two of whom served on the complex case panel.[260] Prior to his resignation, Chief Judge David Jones of that panel presided over 17% of *all* bankruptcy cases involving more than $1 billion in liabilities between 2020 and 2023.[261] During that period, there were 345 authorized bankruptcy judgeships, and never more than 38 vacancies in any one year.[262]

The complex case panel's dominance over large Chapter 11 cases alters the balance of bankruptcy court specialization. According to Baum's model, case concentration—where "a small number of judges hear all the cases in a field at one level"—is a relevant feature of truly specialized courts because "judges' awareness of their importance in a field can shape their . . . choices," while also facilitating interest-group capture.[263] With nearly 350 authorized bankruptcy judges, along with occasional involvement by district judges, the bankruptcy courts were fashioned in a way that avoided case concentration. That design has been disrupted.

Other districts have resisted pressure to deviate from the generalist design choices of the bankruptcy system. Bankruptcy Judge Michael Kaplan of the District of New Jersey has stated that his district "will never change our rules to create 'complex case panels,'" arguing that "[a]ll of our judges are more than capable and experienced to handle complex cases."[264] But given bankruptcy law's extremely permissive venue statute,[265] even one such panel in an attractive district will be enough to create de facto

260. Adam Levitin, *Judge Shopping in Chapter 11 Bankruptcy*, 2023 U. ILL. L. REV. 351, 354 (2023).

261. *See* Dietrich Knauth & Nate Raymond, *Bankruptcy Judge's Sudden Resignation Causes 3,500 Cases to Be Reassigned*, REUTERS (Oct. 19, 2023, at 5:13 MT) (on file with the BYU Law Review).

262. U.S. COURTS, JUDICIAL BUSINESS (2022).

263. BAUM, *supra* note 3, at 6–10.

264. Dietrich Knauth, *NJ Bankruptcy Court Will Not Limit Large Cases to Just a Few Judges*, REUTERS (Feb. 8, 2024, at 14:38 MST), https://www.reuters.com/legal/government/nj-bankruptcy-court-will-not-limit-large-cases-just-few-judges-2024-02-08 (on file with the BYU Law Review).

265. 28 U.S.C. § 1408.

reorganization specialists, eroding the substantive generalism of the larger bankruptcy court system.

Interestingly, and less prominently, a similar phenomenon of de facto specialization has taken place with Chapter 13 cases. Some bankruptcy districts have adopted a practice of assigning all such matters to a single judge.[266] This phenomenon is somewhat more difficult to explain than the complex case panel—Chapter 13 consumer cases, generally regarded as frustrating for professionals and disadvantageous for consumers,[267] are not the type of high-status matters that inspire court competition.[268]

But de facto Chapter 13 specialists may indeed be a product of the same dynamics. Where a small group of specialists accumulate all expertise in the procedures of Chapter 13 consumer cases, others may focus exclusively on building expertise in the efficient resolution of business reorganizations, further increasing the attractiveness of a given forum to case placers at major firms.

With a significant proportion of all large bankruptcies flowing to a handful of judges, and a parallel phenomenon playing out with Chapter 13 cases in some districts, de facto specialization has refashioned the bankruptcy system toward a more concentrated design. Many scholars have criticized forum shopping in Chapter 11 cases,[269] but the consequences of overspecialization may stretch beyond these critiques.

Writing about opinion specialization within the Federal Circuit, Melissa Wasserman and Jonathan Slack have argued that, where a court is already partially specialized, further specialization

266. *See, e.g.*, U.S. COURTS, JUDGE BRENDAN LINEHAN SHANNON, https://promesa.prd.uscourts.gov/sites/default/files/Bio-Judge-Brendan-Linehan-Shannon.pdf (on file with the BYU Law Review) (noting that "Judge Shannon has managed a full Chapter 11 docket, and also handles all Chapter 13 consumer bankruptcy cases filed in the State of Delaware"); *see also Legislative Update: Is the Proposed Guidance for Random Assignment in Civil Cases a Harbinger for Bankruptcy? Experts Weigh In,* AM. BANKR. INST. J. (May 2024) (statement of Melissa B. Jacoby) (noting "some districts' practice of assigning all Chapter 13 cases to one judge").

267. *See* Dov Cohen, Robert M. Lawless & Faith Shin, *Opposite of Correct: Inverted Insider Perceptions of Race and Bankruptcy*, 91 AM. BANKR. L.J. 623, 624 (2017); Jean Braucher, Dov Cohen & Robert M. Lawless, *Reflections on the Responses to "Race, Attorney Influence, and Bankruptcy Chapter Choice,"* 20 AM. BANKR. INST. L. REV. 725, 731 n.23 (2012); David Gray Carlson, *Means Testing: The Failed Bankruptcy Revolution of 2005*, 15 AM. BANKR. INST. L. REV. 223, 228 (2007).

268. *See, e.g.*, LOPUCKI, *supra* note 258, at 70–74.

269. *See, e.g.*, Adam Levitin, *Judge Shopping in Chapter 11 Bankruptcy*, 2023 U. ILL. L. REV. 351, 354 (2023); LOPUCKI, *supra* note 258, at 70–74. *But see* Rasmussen, *supra* note 232, at 1368.

"significantly amplifies the pathologies of specialized tribunals while providing minimal expertise and efficiency benefits."[270] Overspecialization leads to "even more isolation from the broader legal system and even less cross-pollination of ideas," as well as increasing "the chances that doctrine may reflect the idiosyncratic preferences of a few judges."[271]

Multiple bankruptcy scholars have noted that extreme case concentration in large corporate Chapter 11 cases may lead to a lack of intellectual diversity and robust debate between the judges who decide such matters.[272] This problem is compounded by equitable mootness and other doctrines that serve to block appeals in Chapter 11 cases.[273] In other words, a small group of judges may monopolize the law not only at one level but indeed at all levels. The chance that outcomes will reflect idiosyncrasies of a few judges is exponentially increased.

There are also potential costs for other types of debtors. As mentioned, consumer debtors—a long stigmatized group[274]—arguably benefit from bankruptcy generalism through the system's association with high-profile and consequential reorganizations.[275] Indeed, Congress explicitly sought to reduce stigma through the enactment of the Bankruptcy Code,[276] replacing, for example, the pejorative term "Bankrupt" with the more neutral "Debtor." A generalist bankruptcy docket dignifies marginalized consumer debtors; the diversion of major cases to de facto specialists a step closer to a tiered system.

Perhaps counterintuitively, the converse may be true as well. Recent and horrific mass tort cases—including opioid manufacturers and sexual abuse scandals arising from the Boy Scouts and multiple Catholic dioceses—have brought new levels

270. Melissa F. Wasserman & Jonathan D. Slack, *Can There Be Too Much Specialization? Specialization in Specialized Courts*, 115 NW. U. L. REV. 1405, 1409 (2021).

271. *Id.* at 1418–19.

272. *See* Brook E. Gotberg, *The Market for Bankruptcy Courts: A Case for Regulation, Not Obliteration*, 49 BYU L. REV. 647, 662–63 (2024); Laura Napoli Coordes, *The Geography of Bankruptcy*, 68 VAND. L. REV. 381, 400 (2015).

273. *See* Seymour, *supra* note 8, at 90.

274. *See, e.g.*, Coco, *supra* note 11, at 204.

275. *See* Littwin, *supra* note 172, at 1988.

276. *See* Rafael Efrat, *The Evolution of Bankruptcy Stigma*, 7 THEORETICAL INQUIRIES L. 365, 378 (2006).

of scrutiny upon the bankruptcy system.[277] More broadly, there may be costs—in terms of legitimacy, public opinion, and political capital—should the bankruptcy system come to be generally regarded as catering to business interests while imposing bureaucratic austerity on individuals.[278] The turn toward reorganization specialists for high value cases may exacerbate these impressions, with attendant costs to the long-term health of the bankruptcy system.

Of course, there may also be practical advantages that flow from the embrace of de facto specialists. A fast and effectively managed corporate reorganization will preserve more value for all stakeholders than a slow and inefficient proceeding.[279] Marginal Chapter 13 cases might enjoy more frequent success in the hands of a particularly adept and experienced judge. But because hyperspecialization comes with tradeoffs, these are choices that should be made by Congress, if at all.

CONCLUSION

This Article has contended that bankruptcy judges are procedural specialists and substantive generalists, departing from and adding nuance to existing literature on specialized courts. Bankruptcy judges wield deep expertise in the Code's complex provisions, but they also decide a remarkably wide array of disputes over state and federal law in cases involving diverse parties.

That hybridity is a product of the field's evolution. Historical choices to fold corporate receiverships and municipal workouts into a bankruptcy forum, and, later, Congressional attempts to abolish the summary-plenary divide each reflect an embrace of generalist values. The result was a judge in the American generalist tradition that was compatible with Article III status, even if such

277. *See* Lindsey D. Simon, *Bankruptcy Grifters*, 131 YALE L.J. 1154, 1157–58 (2022).

278. *See* JACOBY, *supra* note 183, at 4–8 ("The American legal system tends to be more deferential to artificial persons like big corporations than to humans of modest means. . . . [B]ankruptcy law treats fake people, such as corporations, differently than it treats . . . individuals."); *cf.* Diamond Alternative Energy LLC v. EPA, 145 S. Ct 2121, 2143 (2025) (Jackson, J., dissenting) ("This case gives fodder to the unfortunate perception that moneyed interests enjoy an easier road to relief in this Court than ordinary citizens.").

279. *See* Robert K. Rasmussen & Roye Zur, *The Beauty of* Belk, 97 AM. BANKR. L.J. 438, 439 (2023).

status never came to fruition. At the same time, continuity in procedural focus has preserved the efficiency and expertise that make the bankruptcy courts effective forums.

The contemporary landscape tests that hybridity. Increased case concentration, driven by court competition and judge shopping, threaten to overspecialize the system and remake it into a tiered and siloed one. This trend, should it continue, will amplify the risks of tunnel vision, idiosyncratic decision making, and diminished confidence that have been observed with respect to highly specialized tribunals.

Perhaps the efficiency gains from increased specialization make these trends worth the tradeoffs. But the bankruptcy judge's dual status as a procedural specialist with a generalist outlook has produced an effective system. Significant alterations to that model should be taken with care and enacted on a system-wide basis rather than by individual courts.

This Article's conclusions about bankruptcy judging suggest that existing models of judicial specialization may be incomplete. Discussions of judicial specialization may be improved by disentangling conceptions of procedural and substantive generalism. Analysis of the MDL mechanism, alternative dispute resolution, or proposals for new specialized courts[280] may also benefit from this conception of hybrid expertise. Scholars focused on these institutional designs may benefit from insights derived from the history of bankruptcy law in America.

280. There have been, for example, recurring calls for the creation of a specialized administrative law court—which would presumably combine specialization in APA procedure with substantive generalism. *See, e.g.*, William Ortman, *Rulemaking's Missing Tier*, 68 ALA. L. REV. 225, 277 n.307 (2016); Joseph W. Mead & Nicholas A. Fromherz, *Choosing A Court to Review the Executive*, 67 ADMIN. L. REV. 1, 33 (2015).