

Spring 5-24-2024

## The Erosion of Judicial Discretion: Why Congress and the Court Should Curb Restrictions for Bankruptcy Judges

Mason Spedding

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [Law Commons](#)

---

### Recommended Citation

Mason Spedding, *The Erosion of Judicial Discretion: Why Congress and the Court Should Curb Restrictions for Bankruptcy Judges*, 49 BYU L. Rev. 1219 (2024).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol49/iss4/11>

This Comment is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

# The Erosion of Judicial Discretion: Why Congress and the Court Should Curb Restrictions for Bankruptcy Judges

*Mason Spedding\**

*This Note argues that reducing bankruptcy courts' discretionary powers is a policy mistake because broad-sweeping legislation cannot adequately account for every circumstance presented by debtors. Bankruptcy is a unique field of law that requires unique rules; unlike a purely uniform bankruptcy system that is inherently over- and under-inclusive, a system of judiciously broad discretionary powers enables bankruptcy courts to find the optimal solutions to new issues on a case-by-case basis. Rather than restricting the discretionary powers of bankruptcy judges, Congress should enact a set of standards for judges to consider when evaluating individual cases. Under this system, judges would be rightfully circumscribed by the Bankruptcy Code, but they would no longer have to hide behind the mysterious cloak of equity to implement equitable solutions. Establishing a set of standards is the best way to effectively balance the important goals of uniformity—including predictability in the law, transparency, and judicial restraint—with a bankruptcy judge's unique ability to provide equitable solutions through the exercise of discretionary powers.*

---

\*J. Reuben Clark Law School, J.D. 2024. Brigham Young University, B.S. Economics 2021. Special thanks to Professor Brook Gotberg for her tireless mentorship, support, and encouragement. Thanks also to Brooklyn Bird, Paige Skousen, Madeleine Sharp, and the other skilled editors at the Brigham Young University Law Review for their careful revisions.

## CONTENTS

INTRODUCTION .....	1220
I. BACKGROUND .....	1221
A. History, Purposes, and Goals of the Bankruptcy System.....	1221
B. Discretionary Powers Granted to Bankruptcy Courts .....	1223
C. Recent Efforts to Restrict Bankruptcy Courts’ Discretionary Powers .....	1225
1. <i>Congress’s Restrictive Efforts</i> .....	1225
2. <i>Courts’ Narrow Interpretations of the Bankruptcy Code</i> ....	1228
II. BROAD JUDICIAL DISCRETION IN BANKRUPTCY COURTS: VIRTUE, NOT VICE .....	1230
A. Reasoning Through Restrictive Efforts .....	1231
1. <i>Uniformity in Bankruptcy Jurisprudence</i> .....	1231
2. <i>Preventing System Abuse</i> .....	1235
B. Honoring Bankruptcy’s Founding Principles: The Case for Maintaining Discretion in Bankruptcy Courts.....	1236
1. <i>Bankruptcy Courts Are Unique</i> .....	1236
2. <i>Restrictions on Judicial Discretion Have Not Slowed             System Abuse and Are Not Otherwise Having Their             Intended Effect</i> .....	1239
3. <i>System Abuse is Less Prevalent than Congress Has             Suggested</i> .....	1241
4. <i>Weighing Competing Interests</i> .....	1243
5. <i>Discretionary Powers Were Rightfully Prescribed by             Congress When It Enacted the Bankruptcy Code in 1978</i> ..	1245
III. POLICY RECOMMENDATIONS.....	1247
CONCLUSION.....	1248

## INTRODUCTION

Bankruptcy law is deeply rooted in principles of equity and fairness.<sup>1</sup> To pursue these virtues, Congress granted bankruptcy courts significant discretion in determining the outcomes of both consumer and business bankruptcy cases when it enacted the Bankruptcy Code in 1978.<sup>2</sup> While broad discretion allows

---

1. See *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007) (“The principal purpose of the Bankruptcy Code is to grant a fresh start to [debtors].”).

2. 11 U.S.C. § 105(a) (“The court may issue *any* order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” (emphasis added)).

bankruptcy judges to remove the burden of debt from an honest debtor—even under seemingly unfavorable facts—it also requires significant societal trust in those judges who, like the rest of us, are prone to error.

In recent years, Congress and the Supreme Court have responded to this concern by tightening bankruptcy courts' discretionary powers.<sup>3</sup> Many members of the bankruptcy community view this change positively, favoring a system of uniform rules over "vaguely restrained judicial discretion."<sup>4</sup> But at what point do limitations on judicial discretion make bankruptcy jurisprudence so "rigid and unworkable"<sup>5</sup> that they undermine the primary purposes of bankruptcy law?

This Note analyzes how Congress's proposed and enacted efforts to rein in bankruptcy courts' discretionary powers affect the reliability, efficiency, and sustainability of the bankruptcy system. Part I gives a brief historical background of bankruptcy law's goals, describes the discretionary powers Congress has granted the courts, outlines the approach the Supreme Court has taken in interpreting those powers, and discusses recent efforts to restrict bankruptcy courts' discretionary powers. Part II analyzes arguments for and against these restrictive efforts and concludes that, to ensure that the primary purposes of bankruptcy jurisprudence are adequately fulfilled, Congress should reject proposals that would reduce discretionary powers. Finally, Part III offers alternatives that would allow Congress to advance its goal of uniformity without infringing on important aspects of judicial discretion.

## I. BACKGROUND

### *A. History, Purposes, and Goals of the Bankruptcy System*

Bankruptcy can be a "gloomy and depressing subject."<sup>6</sup> Society has historically viewed indebted individuals harshly; religious

3. See Ferve E. Ozturk, *Law v. Siegel: U.S. Supreme Court Limits Reach of § 105(a)*, 33 AM. BANKR. INST. J. 102, 102-03 (May 2014).

4. Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. CHI. L. REV. 815, 834 (1987).

5. Brian Shaw & Mark Radtke, *Bankruptcy Courts' Equitable Discretion May Be in Danger*, LAW360 (Sept. 20, 2021, 2:44 PM), <https://www.law360.com/articles/1423268/bankruptcy-courts-equitable-discretion-may-be-in-danger>.

6. CHARLES WARREN, *BANKRUPTCY IN UNITED STATES HISTORY* 3 (1935).

excommunication, slavery, and death were not uncommon punishments for those unable or unwilling to pay back their debts.<sup>7</sup> Though these punishments are no longer accepted as reasonable means for debt collection, social stigma “is an enduring byproduct of bankruptcy.”<sup>8</sup> Nonetheless, society has also recognized the many benefits that a bankruptcy system can provide. As a result, the bankruptcy system aims to effectively balance countless competing goals and interests by preserving economic value and providing equitable solutions for debtors and creditors alike.<sup>9</sup>

A well-functioning bankruptcy system preserves economic value—both for the individual debtor and society at large—even in liquidation.<sup>10</sup> Without an organized system, creditors would undergo a chaotic process of seizure—a far less efficient resolution than the collective approach to orderly liquidation of assets.<sup>11</sup> But under an organized system, businesses that take advantage of the bankruptcy process to restructure can continue functioning rather than shutting their doors, “reflecting the simple economic fact that businesses, like people, are often worth more alive than dead.”<sup>12</sup>

Bankruptcy law also aims to give debtors a fresh start.<sup>13</sup> The Supreme Court has recognized the magnitude of relief that bankruptcy can grant individuals: “[I]t gives to the honest but unfortunate debtor . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.”<sup>14</sup> One way it does this is by requiring all individuals filing for bankruptcy to complete pre-bankruptcy

---

7. Lewis E. Levinthal, *The Early History of Bankruptcy Law*, 66 U. PA. L. REV. 223, 230, 238–39 (1918).

8. Yvana L. Mols, *Bankruptcy Stigma and Vulnerability: Questioning Autonomy and Structuring Resilience*, 29 EMORY BANKR. DEVS. J. 289, 289 (2012).

9. ELIZABETH WARREN, JAY LAWRENCE WESTBROOK, KATHERINE PORTER & JOHN A.E. POTTOW, *THE LAW OF DEBTORS AND CREDITORS: TEXT, CASES, AND PROBLEMS* 5 (8th ed. 2020) (recognizing bankruptcy’s “policy pendulum swinging between enforcing an individual’s promises to repay . . . on the one hand and providing cancellation of debts as a ‘fresh start’ for the debtor on the other”).

10. *Id.* at 7–8.

11. *Id.* at 7.

12. *Id.*

13. Laura N. Coordes, *Narrowing Equity in Bankruptcy*, 94 AM. BANKR. L.J. 303, 323 (2020).

14. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934); *see also* 151 CONG. REC. S1836 (daily ed. Mar. 1, 2005) (statement of Sen. Kennedy) (“Supreme Court Justice Joseph Storey . . . [explained] that bankruptcy legislation should relieve the debtor from a slavery of mind and body which robs his family of the fruits of his labor.”).

credit counseling prior to filing and pre-discharge debtor education once bankruptcy proceedings have begun, further encouraging debtors to take full advantage of their fresh start and move on with their lives.<sup>15</sup>

The fresh start afforded debtors does not leave creditors without redress. Individuals filing for bankruptcy must earn their new beginnings by liquidating their assets to satisfy their debts or by creating reasonable repayment plans.<sup>16</sup> Creditors thus also benefit from a well-functioning bankruptcy system because it saves them the significant time, effort, and expenses often required to repossess assets or personally collect debts from defaulting parties.<sup>17</sup>

Recognizing these benefits is important to any discussion about criticism of the bankruptcy system or suggestions for system reform. This includes debates about the optimal level of judicial discretion in bankruptcy courts. In determining that “optimal level”—if such a level exists—Congress should consider whether the benefits of judicial discretion outweigh its downfalls and whether there is a more efficient way to promote a productive bankruptcy system. And it should ensure that any reform does not displace the current system’s benefits that are central to bankruptcy law.

#### *B. Discretionary Powers Granted to Bankruptcy Courts*

Understanding the current level of bankruptcy courts’ discretionary powers similarly provides an important foundation to this discussion. Section 105(a) of the Bankruptcy Code allows courts to “issue any order, process, or judgement that is necessary or appropriate to carry out the provisions of [the Code].”<sup>18</sup> It also instructs courts that “[n]o provision of [the Code] . . . shall be construed to preclude the court from . . . taking any action or making any determination necessary or appropriate to enforce or

---

15. *Credit Counseling and Debtor Education Courses*, U.S. CTS., <https://www.uscourts.gov/services-forms/bankruptcy/credit-counseling-and-debtor-education-courses> (last visited Mar. 7, 2024).

16. *Creditors’ Legal Rights in Bankruptcy*, JUSTIA, <https://www.justia.com/bankruptcy/collections-credit/creditors-rights> (last visited Mar. 7, 2024).

17. See WARREN ET AL., *supra* note 9, at 23–44 (outlining a creditor’s remedies for a debtor’s nonpayment of debt).

18. 11 U.S.C. § 105(a).

implement court orders or rules, or to prevent an abuse of process.”<sup>19</sup> Bankruptcy judges have cited section 105(a) to support a wide variety of judicial actions in thousands of reported cases.<sup>20</sup> That provision is thus at the heart of any discussion of authority for judicial discretion in bankruptcy courts.<sup>21</sup>

Despite the extensive nature of the Code, however, there is no singular understanding of the scope of bankruptcy courts’ equitable powers.<sup>22</sup> Some scholars argue that the very existence of section 105(a) demonstrates “the congressional intent that bankruptcy equity be broad.”<sup>23</sup> But others posit that bankruptcy courts do not have “freewheeling equitable jurisdiction” and should remain within the confines of the Code’s express provisions, notwithstanding the seemingly broad discretionary powers authorized by section 105(a).<sup>24</sup>

This variation in understanding is especially clear in bankruptcy judges’ responses to questions regarding their discretionary powers. One survey found that bankruptcy judges’ views on exercising discretion range from beliefs that bankruptcy courts have some inherent but limited equitable powers that may be exercised as directed by the Code, to beliefs that courts have broad, inherent equitable powers to which the Code should yield whenever it authorizes judicial discretion.<sup>25</sup> Both views have wide support in the legal community.<sup>26</sup>

---

19. *Id.*

20. Common uses of § 105(a) include extending deadlines, issuing sanctions, subordinating claims, allowing debtors more time to make adequate protection payments, confirming and enforcing chapter 13 plans, dismissing abusive cases, and finding equitable mootness, to name a few. See Diane Lourdes Dick, *Equitable Powers and Judicial Discretion: A Survey of U.S. Bankruptcy Judges*, 94 AM. BANKR. L.J. 265, 298 (2020).

21. See Steve H. Nickles & David G. Epstein, *Another Way of Thinking About Section 105(a) and Other Sources of Supplemental Law Under the Bankruptcy Code*, 3 CHAP. L. REV. 7 (2000).

22. Dick, *supra* note 20, at 269 (“Judges’ views on judicial discretion and equitable powers are exceptionally nuanced, multidimensional, and interconnected.”); Hon. Michelle M. Harner & Emily A. Bryant-Álvarez, *The Equitable Powers of the Bankruptcy Court*, 94 AM. BANKR. L.J. 189, 190 (2020) (noting the ongoing debate over the extent of bankruptcy courts’ inherent and statutory powers).

23. Brian Leepson, *A Case for the Use of a Broad Court Equity Power to Facilitate Chapter 11 Reorganization*, 12 BANKR. DEVS. J. 775, 778 (1996).

24. J. Maxwell Tucker, *Grupo Mexicano and the Death of Substantive Consolidation*, 8 AM. BANKR. INST. L. REV. 427, 428 (2000) (internal quotations omitted).

25. Dick, *supra* note 20, at 270–72.

26. See *id.*

Notably, the legal community seems uncertain as to whether a bankruptcy judge's understanding of equitable powers aligns with her political beliefs.<sup>27</sup> But recent evidence suggests that a bankruptcy judge's political leanings are irrelevant to how she will exercise discretion.<sup>28</sup> A bankruptcy judge's understanding of discretionary powers is thus most likely not a standard question of conservative versus liberal ideals; rather, understanding likely varies among judges because Congress is sending unclear signals about the appropriate level of discretion under the Code.<sup>29</sup>

### *C. Recent Efforts to Restrict Bankruptcy Courts' Discretionary Powers*

In recent years, Congress has expressed doubts that judicial discretion is an adequate tool for preventing abuse of the bankruptcy system.<sup>30</sup> These doubts stem in part from the significant increase in filings under all chapters since 1978, leading some members of Congress to believe that the law is failing to prevent debtors from using bankruptcy as a "first resort, rather than a last resort."<sup>31</sup> With this in mind, Congress has proposed and enacted several laws to standardize courts' applications of the Code, leaving bankruptcy judges with less discretion. The Court has also amplified the effect of these laws by narrowly interpreting the discretionary powers granted by the Code.

#### *1. Congress's Restrictive Efforts*

Congress's passing of the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act (the BAPCPA) is perhaps its most

---

27. Compare *id.* at 269 (finding that, in a survey of U.S. bankruptcy judges, different understandings of discretionary powers did not reflect political leanings), with Jeffrey J. Rachlinski, Chris Guthrie & Andrew J. Wistrich, *Inside the Bankruptcy Judge's Mind*, 86 B.U. L. REV. 1227, 1231 (2006) (noting evidence of a potential correlation between political views and the decisions reached by bankruptcy courts).

28. See, e.g., Dick, *supra* note 20, at 269, 302 ("[C]lusters of common beliefs" regarding judicial discretion in bankruptcy courts "do not necessarily fall along a spectrum of the traditional qualities used to describe judging styles, such as that of restraint versus activism . . . [or] reflect political leanings, such as conservative versus liberal.").

29. *Id.* at 269–70 (Judges of all political leanings described themselves as "restrained and cautious, and . . . signaled their deep concern with justice and fairness and their strong commitment to the rule of law.").

30. See Lauren E. Tribble, *Judicial Discretion and the Bankruptcy Prevention Act*, 57 DUKE L.J. 789, 799 (2007).

31. *Id.* (quoting H.R. REP. NO. 109-31, pt. 1, at 4 (2005), as reprinted in 2005 U.S.C.C.A.N. 88, 89).



significant restrictive effort.<sup>32</sup> Before the BAPCPA, judges had discretion to dismiss chapter 7 bankruptcy filings that were a “substantial abuse” of the Code.<sup>33</sup> While exact interpretations of substantial abuse varied, nearly all circuits looked to the ability of debtors to pay their creditors, and most measured a debtor’s ability to pay by deducting the debtor’s reasonable monthly expenses from expected monthly income.<sup>34</sup> If the debtor’s expected monthly income significantly exceeded monthly expenses, courts typically dismissed the debtor’s chapter 7 petition, though judges still exercised discretion by considering other factors.<sup>35</sup> Debtors who failed this test were still permitted to file for bankruptcy under chapter 11 or chapter 13 if they qualified.<sup>36</sup>

Creditors quickly became dissatisfied with this process, associating the increase in filings with the courts’ assessment of debtors’ ability to pay. Acting on this dissatisfaction, creditors lobbied for a more uniform standard, arguing that bankruptcy judges were “unable or unwilling to clamp down on abusive debtors.”<sup>37</sup> Congress responded with the BAPCPA, which instituted the “means test” — a uniform standard for determining a debtor’s ability to pay (and, ultimately, whether a debtor will qualify for chapter 7).<sup>38</sup> At its simplest, the test includes two steps. First, it compares the debtor’s monthly income to the median income in the debtor’s state of residence.<sup>39</sup> Second, if the debtor’s income exceeds that median income, the test subtracts the debtor’s

---

32. S. 256, 109th Cong. (2005).

33. See 11 U.S.C. § 707(b) (2000), amended by 11 U.S.C. § 703 (Supp. V 2005).

34. Though the Fourth Circuit did not view a debtor’s ability to pay as a primary factor in determining abuse, it still accounted for that factor. Tribble, *supra* note 30, at 797 n.66 (citing *In re Green*, 934 F.2d 568, 572–73 n.7 (4th Cir. 1991)).

35. Courts also considered unemployment, sudden illness, the reasonableness of the debtor’s proposed budget, and the debtor’s “good faith” when determining Chapter 7 eligibility. *Id.* at 798 (citing *In re Green*, 934 F.2d at 572).

36. 11 U.S.C. § 707(b) (2000), amended by 11 U.S.C. § 703 (Supp. V 2005). Notably, a debtor’s inability to qualify for relief under other chapters of the Code did not persuade courts to approve chapter 7 petitions. See, e.g., *In re Krohn*, 886 F.2d 123, 127 (6th Cir. 1989) (rejecting the debtor’s argument that he should be entitled to relief under some provision of the Code because “[t]here is no constitutional right to a bankruptcy discharge”).

37. Tribble, *supra* note 30, at 799 n.82 (citing Peter G. Gosselin, *Judges Say Overhaul Would Weaken Bankruptcy System*, L.A. TIMES, Mar. 29, 2005, at A1).

38. Bankruptcy Abuse Prevention and Consumer Protection Act, Pub. L. No. 109-8, § 102, 119 Stat. 23, 27–35 (2005).

39. 11 U.S.C. § 707(b)(6).

eligible expenses<sup>40</sup> from her income.<sup>41</sup> If the result shows that the debtor would be unable to pay off at least twenty-five percent of her debts over five years, she may continue bankruptcy proceedings under chapter 7 without a presumption of abuse; otherwise, she fails the means test, and must proceed with a presumption of abuse.<sup>42</sup>

Congress's institution of the means test affects bankruptcy judges' ability to exercise discretion in at least two respects. First, when a debtor fails the means test, bankruptcy judges are required to presume abuse, significantly reducing their discretion to determine a debtor's chapter 7 eligibility.<sup>43</sup> Under the BAPCPA, the debtor's reason for filing is "generally irrelevant[,]"<sup>44</sup> and "the reason for filing never affects whether a debtor passes or fails the means test."<sup>45</sup> Although the debtor may rebut this presumption of abuse by demonstrating special circumstances, such circumstances rarely exist.<sup>46</sup> Second, the BAPCPA created one-way discretion. Though judges cannot set aside the presumption of abuse when a debtor *fails* the means test, when a debtor *passes* the means test, judges may determine chapter 7 eligibility by assessing whether the debtor's petition was filed in "bad faith" and whether "the totality of the circumstances . . . of the debtor's financial situation demonstrates abuse."<sup>47</sup> Put simply, the means test allows judges to examine the totality of the debtor's circumstances to *find* abuse, but largely prohibits their consideration of any circumstances to find that a debtor is *not* abusing the system.

Besides the BAPCPA, senators have proposed several bills that, if enacted, would reduce judicial discretion in bankruptcy courts.<sup>48</sup> While none of these bills have passed, they similarly demonstrate

---

40. Eligible expenses are calculated using standards set by the IRS; the debtor's actual expenditures are not considered. *Id.* § 707(b)(2)(A)(ii)(I).

41. *Id.*

42. *Id.* § 707(b)(2)(A)(i).

43. *Id.* ("[T]he court *shall* presume abuse exists" if the debtor fails the test) (emphasis added).

44. Tribble, *supra* note 30, at 806.

45. *Id.* (citing 11 U.S.C. § 707(b)(2)).

46. The presumption of abuse is rebuttable only under "special circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces . . ." 11 U.S.C. § 707(b)(2)(B)(i).

47. 11 U.S.C. § 707(b)(3).

48. See, e.g., Bankruptcy Equity Act of 2012, H.R. 4058, 112th Cong. (proposed by Democratic Representative Earl Blumenauer); No Bonuses Ahead of Bankruptcy Filing Act of 2020, H.R. 7279, 116th Cong. (2020) (proposed by Republican Representative Greg Steube).

the desire of some senators on both sides of the political spectrum to reduce judicial discretion in bankruptcy courts.

## 2. Courts' Narrow Interpretations of the Bankruptcy Code

The Supreme Court has also reduced bankruptcy courts' discretionary powers by narrowly interpreting section 105(a). *Law v. Siegel* is perhaps the most notorious of these recent decisions grappling with the impact of that statutory provision.<sup>49</sup> In *Law*, a chapter 7 debtor tried to preserve the equity in his home by creating a fictional lien on the property.<sup>50</sup> The fictional lien brought the sum of all liens on the property over the home mortgage's value, leaving no equity for the creditors.<sup>51</sup> The bankruptcy trustee filed a motion to surcharge the debtor's \$75,000 homestead exemption to defray the attorney fees he incurred<sup>52</sup> in proving the debtor's fraudulent misrepresentations.<sup>53</sup> However, this request contradicted another section of the Code. That section, by reference to state law, allowed the debtor to exempt \$75,000 of the equity in his home,<sup>54</sup> which made the \$75,000 "not liable for payment of any administrative expense . . . ."<sup>55</sup> The bankruptcy court nonetheless granted the motion, and the Ninth Circuit affirmed. Both courts relied in part on the broad discretionary powers granted in section 105(a), ultimately concluding that the surcharge was necessary to protect the integrity of the bankruptcy process.<sup>56</sup>

The Supreme Court disagreed. In a unanimous decision authored by Justice Scalia, the Court held that neither section 105(a) nor the courts' inherent powers to sanction "abusive litigation practices" gives bankruptcy courts discretion to contradict another

---

49. *Law v. Siegel*, 571 U.S. 415 (2014).

50. *Id.* at 415.

51. *Id.*

52. The trustee incurred more than \$500,000 in attorney's fees to overcome the debtor's misrepresentations. *Id.* at 420.

53. *Id.* at 422.

54. *Id.*; 11 U.S.C. § 522(b)(3)(A).

55. 11 U.S.C. § 522(k). Attorney's fees are an "administrative expense" under 11 U.S.C. § 502(b)(4).

56. *Law v. Siegel*, 571 U.S. 415, 420 (2014) (quoting *In re Law*, 435 Fed. Appx. 697, 698 (2011) (per curiam)).

provision of the Code.<sup>57</sup> Though this decision did not necessarily articulate an unfamiliar rule,<sup>58</sup> it made clear the Court's desire to rein in the use of section 105(a).

Responses to this decision vary widely.<sup>59</sup> Some bankruptcy judges appreciated the Court's message to restrict the use of section 105(a),<sup>60</sup> while others criticized it as an overly restrictive reading of the Code.<sup>61</sup> Some judges thought that more guidance on interpreting section 105(a) would be helpful; others posited that "more guidance would probably come with more restrictions and, in any event, would likely only confuse matters more."<sup>62</sup> And though *Law* certainly reined in bankruptcy courts' discretionary powers under section 105(a), judges are still unsure where the line is.

The Supreme Court similarly narrowed bankruptcy courts' discretionary powers by condemning federal common lawmaking in *Rodriguez v. Federal Deposit Insurance Corp.*<sup>63</sup> In that case, the Court unanimously annulled the *Bob Richards* rule, a widely accepted rule created by the Ninth Circuit in 1973 and used "to determine ownership of consolidated tax refunds."<sup>64</sup> The Court's holding reduced bankruptcy courts' discretion by criticizing their creation of law—no matter how widely accepted or effective their solutions may be—and demonstrates the Court's general disapproval of federal common lawmaking in bankruptcy courts.<sup>65</sup>

---

57. *Id.* at 421 ("[W]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." (internal quotations omitted)).

58. See, e.g., *In re Smart World Techs, LLC*, 423 F.3d 166, 183–84 (2d Cir. 2005) (holding that section 105(a)'s powers are "plainly limited by the provisions of the Code"); *In re Fesco Plastics Corp.*, 996 F.2d 152, 154 (7th Cir. 1993) (holding that courts may not disregard other sections of the Code using § 105(a)).

59. Dick, *supra* note 20, at 294–96.

60. *Id.* at 295 ("[Section] 105(a) could eat the Code if you let it. We need the judicial humility to remember who we are in the scope of the system. We do not have magical superpowers.") (*Law* was a "long overdue limitation in the too frequent use of § 105(a) by some judges.").

61. *Id.* ("The debtor made a mockery of the system, and was able to profit from it.") (The Court's analysis was "flawed and myopic.").

62. *Id.* at 296.

63. *Rodriguez v. FDIC*, 140 S. Ct. 713, 715 (2020).

64. Mitchell P. Reich, *A Swan Song for Federal Common Lawmaking in Bankruptcy Courts*, 39 AM. BANKR. INST. J. 20, 20 (2020).

65. *Id.* (citing *In re Bob Richards Chrysler-Plymouth Corp.*, 473 F.2d 262, 263 (9th Cir. 1973)).

Circuit courts have also restricted the use of certain discretionary tools such as equitable mootness.<sup>66</sup> Courts often use equitable mootness to dismiss chapter 11 plan confirmation appeals when, even though relief could be granted, implementation of that relief would be inequitable because the plan is already in action.<sup>67</sup> The Eighth Circuit recently scaled back the application of equitable mootness, holding that judges should invoke equitable mootness “only in extremely rare circumstances”<sup>68</sup> because equitable mootness “has lured [courts] into abdicating [their] jurisdiction when [they] should be exercising it, and [into] stunting the development of . . . bankruptcy jurisprudence when it’s [their] duty to promote it.”<sup>69</sup> This has effectively reduced the tool of equitable mootness “from a sledgehammer to a tack hammer”<sup>70</sup> within the Eighth Circuit. The Eighth Circuit has also predicted that the Court may abolish the application of equitable mootness entirely,<sup>71</sup> furthering the trend toward reduced discretion in bankruptcy courts.<sup>72</sup>

## II. BROAD JUDICIAL DISCRETION IN BANKRUPTCY COURTS: VIRTUE, NOT VICE

Questions surrounding the efficacy and permissibility of judicial discretion have fueled a decades-old debate among bankruptcy scholars. With recent restrictive efforts in mind, this Part evaluates arguments for and against broad judicial discretion and concludes that, to ensure that the primary purposes of bankruptcy jurisprudence are adequately fulfilled, Congress

---

66. Equitable mootness is a “judicially created doctrine under which the court renders an appeal moot when, even if effective relief may conceivably be granted, implementing of the relief is inequitable.” *Equitable Mootness*, PRACTICAL LAW: GLOSSARY, [https://1.next.westlaw.com/Glossary/PracticalLaw/Ie8f8878ad84611e698dc8b09b4f043e0?transitionType=Default&contextData=\(sc.Default\)&isplcus=true&firstPage=true&bhcp=1](https://1.next.westlaw.com/Glossary/PracticalLaw/Ie8f8878ad84611e698dc8b09b4f043e0?transitionType=Default&contextData=(sc.Default)&isplcus=true&firstPage=true&bhcp=1) (last visited Mar. 8, 2024).

67. See, e.g., *In re VeroBlue Farms USA, Inc.*, 6 F.4th 880 (8th Cir. 2021).

68. *Id.* at 891.

69. Shaw & Radtke, *supra* note 5.

70. *Id.*

71. *In re VeroBlue Farms USA*, 6 F.4th at 891.

72. Shaw & Radtke, *supra* note 5 (“[The Eighth Circuit’s] Supreme Court prediction serves as a reminder—or, more aptly, a warning—for all who practice and adjudicate in the bankruptcy arena that the misuse of discretion may lead to the loss of it.”).

should reject proposals that would reduce those courts' discretionary powers.

### *A. Reasoning Through Restrictive Efforts*

While the analysis in section II.B will show that the advantages of judicial discretion in bankruptcy courts outweigh its disadvantages, it is important to recognize the thought process behind Congress's restrictive efforts. Indeed, Congress's restrictive efforts are not without foundation. The Constitution authorizes Congress to enact "uniform laws on the subject of Bankruptcies . . ."<sup>73</sup> And as illustrated in Part I of this Note, there is no uniform understanding of the scope of bankruptcy courts' discretionary powers. This variation in understanding, along with Congress's constitutionally granted right to establish uniform bankruptcy laws, has led Congress to justify recent restrictive efforts—which, at the very least, would clarify bankruptcy courts' discretionary powers. Further, Congress has identified several potential benefits to reduced judicial discretion in bankruptcy courts, including increased uniformity and prevention of system abuse.

#### *1. Uniformity in Bankruptcy Jurisprudence*

Ensuring the uniform interpretation of federal law has long been a goal of the federal court system.<sup>74</sup> Many members of the legal community believe that bankruptcy courts are no exception.<sup>75</sup> In fact, securing uniformity is so important to the bankruptcy community that the National Conference of Bankruptcy Judges lists it among its primary purposes.<sup>76</sup> So what exactly leads

---

73. U.S. CONST. art. I, § 8.

74. See, e.g., Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 237 (1988) ("[T]he Supreme Court's role in assuring the uniformity . . . of federal law has not been the subject of substantial debate."); Sandra Day O'Connor, *Our Judicial Federalism*, 35 CASE W. RES. L. REV. 1, 4 (1984) ("[A] single sovereign's laws should be applied equally to all . . .").

75. See, e.g., Dick, *supra* note 20, at 280 ("The rule of law depends on judicial outcomes being predictable, which can be inconsistent with judicial discretion.").

76. The fundamental purposes of the NCBJ are to provide continuing legal education to judges, lawyers and other involved professionals, to promote cooperation among the Bankruptcy Judges, to secure a greater degree of quality and uniformity in the administration of the Bankruptcy

some judges, lawyers, and legal scholars to value uniformity over the individualized approach available through broad discretionary powers?

First, uniformity in courts' interpretation of the law may "eliminate the personal element in the administration of justice."<sup>77</sup> Congress has found uniformity important to many other fields of law, particularly when the public voices concerns of judicial leniency or inconsistency in applying the law.<sup>78</sup> When courts exercise discretion to obtain a result that society believes is incorrect, the public's faith in the judiciary decreases. Conversely, when courts follow the law as it is set forth by Congress, the public is less likely to blame the judiciary for the result.<sup>79</sup>

This tension is similarly observed in the bankruptcy community, where legal scholars have expressed concerns about judges' inconsistent applications of the Code.<sup>80</sup> For example, consumer cases are often very personal and sympathetic because, as one judge noted, "Consumer cases are about more than money. Business cases are usually just about money."<sup>81</sup> When broad discretion is permitted, some bankruptcy judges are more lenient in consumer cases because they understand that their decisions will affect an individual debtor's livelihood, while others may simply be more lenient in all types of bankruptcy filings.<sup>82</sup> In either case, a more uniform system can remove the human factor that inevitably impacts judges' decision-making. Uniformity thus prevents judges

---

system and to improve the practice of law in the Bankruptcy Courts of the United States.

*The NCBJ Today*, NCBJ, <https://ncbj.org/the-ncbj-today> (last visited Mar. 6, 2024).

77. See Roscoe Pound, *The End of Law as Developed in Legal Rules and Doctrines*, 27 HARV. L. REV. 195, 214 (1914).

78. Federal criminal statutes, for example, sometimes require judges to impose minimum sentences on all persons convicted of the same offense. See, e.g., 18 U.S.C. § 924(c)(1)(A)(iii) (requiring a minimum sentence of ten years for any person who discharges a weapon while committing a violent crime).

79. For a more detailed discussion about this dichotomy, see Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240 (2019) (discussing the tension between sociological and legal legitimacy).

80. See Dick, *supra* note 20.

81. *Id.* at 284. While this statement demonstrates some bankruptcy judges' views, it fails to consider the impact that the outcome of business cases has on the business's employees, the employees' families, and the market.

82. *Id.* at 285 ("[I]n consumer cases, I take into account that my decision may remove a debtor from his car or house. I want to give the debtor the second chance that the Code provides.").

from approaching business and consumer cases differently, leading to a more predictable system that honors the separation of powers between the judicial and legislative branches.

Uniformity in courts' interpretations of the law can also prevent forum shopping. A system endowing bankruptcy courts with broad judicial discretion encourages forum shopping, as consumer and business debtors are incentivized to find the court that will be most sympathetic to their cases. Conversely, if bankruptcy law is truly uniform—and thus interpreted the same in every bankruptcy court—there is little reason for debtors to file in any court besides the one that is most geographically convenient. This is particularly relevant for corporate entities filing for bankruptcy, because non-business debtors are more restricted when it comes to selecting a venue.<sup>83</sup>

Some scholars argue that forum shopping presents a dangerous problem in corporate filings.<sup>84</sup> Many chapter 11 business cases are filed in courts located far away from the company's creditors, in jurisdictions where the company only has tangential contact.<sup>85</sup> This may prevent smaller, faraway creditors from gaining meaningful access to relevant bankruptcy proceedings.<sup>86</sup> Further, because most chapter 11 cases are filed in Delaware or New York,<sup>87</sup> the same small group of judges is repeatedly asked to decide novel issues,<sup>88</sup> limiting the diversity of opinions and giving these judges significant power to establish precedent.<sup>89</sup>

Two cases adequately summarize the critiques of forum shopping in bankruptcy jurisprudence. Consider first one of the

83. See 28 U.S.C. § 1408.

84. See, e.g., Lynn M. LoPucki, *Chapter 11's Descent into Lawlessness*, 96 AM. BANKR. L.J. 247, 254–59 (2022).

85. Mark Salzberg & Kyle Arendsen, *Bankruptcy Venue "Reform" – What Are The Odds This Time?*, SQUIRE PATTON BOGGS (Oct. 5, 2021), <https://www.restructuring-globalview.com/2021/10/bankruptcy-venue-reform-what-are-the-odds-this-time>.

86. *Id.*

87. Jared A. Elias, *What Drives Bankruptcy Forum Shopping? Evidence from Market Data*, 47 J. LEGAL STUD. 119, 119–20 (2018).

88. Out of 375 bankruptcy judges nationwide, 3 heard 57% of all large public company chapter 11 cases in 2020. *Oversight of the Bankruptcy Code, Part I: Confronting Abuses of the Chapter 11 System: Hearing Before the Committee on the Judiciary Subcommittee on Antitrust, Commercial, and Administrative Law*, 117th Cong. 3 (2021) (written testimony of Adam J. Levitin, Professor of Law, Georgetown University Law Center).

89. See Salzberg & Arendsen, *supra* note 85.



largest bankruptcy cases in history — *In re Purdue Pharma, L.P.*<sup>90</sup> In that case, Purdue Pharma sought a nonconsensual third-party release to shield the Sackler family — Purdue’s former owners — from opioid-related lawsuits, which would have eliminated some creditors’ legal claims.<sup>91</sup> Because the legality of third-party releases is disputed,<sup>92</sup> Connecticut-based Purdue filed for Chapter 11 bankruptcy in New York, ensuring that its case would be heard by a New York judge with a “debtor-friendly” reputation and who had previously permitted third-party releases.<sup>93</sup> This significantly increased the Sackler family’s chances of obtaining a release from any potential liability,<sup>94</sup> sparking public outrage among those who wished to see the Sacklers punished for their role in the nation’s opioid crisis.<sup>95</sup>

Forum shopping was also of concern in *LTL Management*, which addressed Johnson & Johnson’s recent asbestos-related litigation.<sup>96</sup> In *LTL*, an indirect subsidiary of Johnson & Johnson (a New Jersey company) created LTL Management (a Texas company), to which it transferred its asbestos-related tort liabilities and then placed into bankruptcy in North Carolina.<sup>97</sup> This obscure maneuver is colloquially referred to as the “Texas Two-Step.”<sup>98</sup> Though Johnson & Johnson’s actions were permissible under a divisive merger

---

90. As measured by unsecured claims against a debtor-in-possession, *In re Purdue Pharma, L.P.* is “[t]he largest chapter 11 case ever . . . .” Jeanne L. Schroeder & David Gray Carlson, *Third Party Releases Under the Bankruptcy Code After Purdue Pharma*, 31 AM. BANKR. INST. L. REV. 1 (2023); *In re Purdue Pharma, L.P.*, 635 B.R. 26 (Bankr. S.D.N.Y. 2021).

91. *In re Purdue Pharma, L.P.*, 635 B.R. at 133–34.

92. Adam J. Levitin, *Purdue’s Poison Pill: The Breakdown of Chapter 11’s Checks and Balances*, 100 TEX. L. REV. 1079, 1106–07 n.106–07 (2022) (noting the circuit split in handling third-party releases).

93. Alex Wolf, *Purdue Pharma Bankruptcy Spotlights Venue Shopping Battle*, BLOOMBERG L. (Aug. 2, 2021, 9:33 AM), <https://news.bloomberglaw.com/bankruptcy-law/purdue-pharma-bankruptcy-spotlights-court-venue-shopping-battle>.

94. Jeremy Hill, *Purdue Pharma’s Opioid Deal Hinges on Divisive Legal Maneuver*, BLOOMBERG L. (July 23, 2021), <https://www.bloomberg.com/news/articles/2021-07-23/purdue-pharma-s-opioid-deal-hinges-on-divisive-legal-maneuver#xj4y7vzkg> (“In the wrong court, Purdue would have a lot of trouble . . . . But Purdue is not in the wrong court.”).

95. Some senators were so enraged by the Sacklers’ conduct that they proposed — rather creatively — the “Stop shielding Assets from Corporate Known Liability by Eliminating non-debtor Releases Act,” or the SACKLER Act. S. 2472, 117th Cong. (2021).

96. *In re LTL Mgmt., LLC*, No. 21-30589, 2021 WL 5343945 (Bankr. W.D.N.C. 2021).

97. *Id.*

98. Michael A. Francus, *Texas Two-Stepping Out of Bankruptcy*, 120 MICH. L. REV. ONLINE 38, 38 (2022).

statute, many viewed the maneuver as “little more than a fancied-up fraudulent transfer”<sup>99</sup> and claimed that Johnson & Johnson should not have been permitted to forum shop its way around true bankruptcy. While the court eventually granted the bankruptcy administrator’s motion to transfer the case to New Jersey,<sup>100</sup> *LTL* nonetheless illustrates that a lack of uniformity in bankruptcy law can encourage forum shopping, and that adverse forum shopping can cause problems for creditors. At its best, adverse forum shopping is expensive for both parties; at its worst, forum shopping places the parties in a court that unfairly advantages one party over the other.

Cases like *Purdue* and *LTL*, along with a strong desire to remove the personal element from bankruptcy cases, lead some members of the legal community to believe that Congress’s restrictive efforts are justified. Because uniformity reduces forum shopping and leads to a more predictable system, these individuals argue that the benefits of uniformity outweigh the benefits of broad judicial discretion.

## 2. Preventing System Abuse

Preventing abuse is critical to the bankruptcy system’s survival. While the system is surely intended to provide debtors with a fresh start, it must also adequately serve the interests of creditors to maintain its efficacy.<sup>101</sup> Unfortunately, some debtors take advantage of the bankruptcy system in a variety of ways, including through serial filing, hiding assets, and understating the value of exempt property.<sup>102</sup> Some scholars believe that increased uniformity is the best way to prevent this abuse because uniformity

---

99. Jonathan C. Lipson, *Texas Two Step and the Future of Mass Tort Bankruptcy Series: Vertical Forum Shopping in Bankruptcy*, HARV. L. SCH. BANKR. ROUNDTABLE (Jun. 14, 2022), <https://bankruptcyroundtable.law.harvard.edu/2022/06/14/texas-two-step-and-the-future-of-mass-tort-bankruptcy-series-vertical-forum-shopping-in-bankruptcy>.

100. *In re LTL Mgmt., LLC*, 2021 WL 5343945 at \*15.

101. See *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (recognizing the “new opportunity” bankruptcy grants debtors); *Marrama v. Citizens Bank*, 549 U.S. 365, 367 (2007) (“The principal purpose of the Bankruptcy Code is to grant a fresh start to . . . debtor[s].” (internal quotation marks omitted)).

102. See, e.g., Kimberly L. Nelson, *Abusive Filings: Can Courts Stop the Abuse Within the Confines of the Bankruptcy Code?*, 17 BANKR. DEV. J. 331, 334 (2000) (discussing debtors’ abuse of the Code to prevent foreclosure sales).

not only removes the personal element in administering justice,<sup>103</sup> but it also closes loopholes that are available to debtors when judges are left to fill gaps in the Code.<sup>104</sup> Strict, uniform rules such as the BAPCPA's means test are in place to ensure that only the truly honest but unfortunate debtors have access to the benefits of a chapter 7 proceeding. Uniformity in the Code replaces fuzzy standards with bright-line rules. It ensures that all debtors are treated the same, regardless of their circumstances. Of course, a single piece of uniform legislation does not perfectly prevent system abuse; but when all debtors are treated the same, the most used loopholes become apparent, and Congress can address those issues with further legislation.

*B. Honoring Bankruptcy's Founding Principles: The Case for  
Maintaining Discretion in Bankruptcy Courts*

Bankruptcy jurisprudence was founded on principles of fairness and equity. Notwithstanding the considerations set forth in section II.A of this Note, these fundamental interests are best served by a system that provides for judicial discretion, particularly in consumer cases. This is true for several reasons. First, bankruptcy courts differ significantly from Article III courts, necessitating special rules. Second, evidence suggests that Congress's restrictive efforts are not having their intended effect. Third, system abuse is less prevalent than Congress and the media suggest, making broad, sweeping rules more harmful than beneficial. Fourth, the benefits of judicial discretion are understated. And finally, Congress rightfully supported discretionary powers when it enacted the Bankruptcy Code in 1978.

*1. Bankruptcy Courts Are Unique*

Many critics of judicial discretion in bankruptcy law—including Congress—focus on generalized arguments against the judicial branch's use of discretion.<sup>105</sup> This Note does not dispute the importance of judicial restraint. Rather, it suggests that, because bankruptcy courts are unique in several respects, discretionary

---

103. Pound, *supra* note 77, at 213–14.

104. Dick, *supra* note 20, at 301.

105. See *supra* Section II.A.

powers may be more appropriate in bankruptcy courts than in Article III courts.<sup>106</sup>

First, bankruptcy courts are unique because they are legislative courts created by Congress as a special forum for bankruptcy cases.<sup>107</sup> Though federal district courts have original jurisdiction over bankruptcy cases, they generally refer bankruptcy cases to bankruptcy judges.<sup>108</sup> Judges in courts of general jurisdiction, although highly qualified, cannot be experts in every subject their cases concern. Conversely, bankruptcy judges spend their entire tenure interpreting the Bankruptcy Code and dealing with creditor-debtor relations.<sup>109</sup> This makes them uniquely qualified to handle even the most complex consumer and business cases that come before them,<sup>110</sup> justifying broader discretionary powers than would normally be permitted in Article III courts.<sup>111</sup>

Second, the appointments process for bankruptcy judges differs significantly from the appointments process for other federal judges. For example, unlike judges in Article III courts, bankruptcy judges are not appointed by the President. Instead, bankruptcy

---

106. The proposition that bankruptcy is a special field that requires an exceptional approach is commonly referred to as “bankruptcy exceptionalism.” Legal scholars disagree as to what “exceptional” approach (if any) should be taken in bankruptcy. *See, e.g.,* Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. REV. 384, 384 (2012) (making the case for “moving bankruptcy toward an administrative model with a regulatory agency charged with setting bankruptcy policy[.]” as Congress has done with the securities laws administered by the SEC and the tax laws administered by the IRS); Jonathan M. Seymour, *Against Bankruptcy Exceptionalism*, 89 U. CHI. L. REV. 1925, 1925 (2022) (arguing that bankruptcy is “distinctive, but . . . not exceptional” and should not be treated differently from other fields).

107. *See* Samuel Henninger, *Bankruptcy Courts and the Constitution*, AM. BAR ASS’N (Dec. 9, 2020), [https://www.americanbar.org/groups/business\\_law/publications/blt/2020/12/bankruptcy-courts\\_](https://www.americanbar.org/groups/business_law/publications/blt/2020/12/bankruptcy-courts_)

108. *See* Craig A. Gargotta, *Who Are Bankruptcy Judges and How Did They Become Federal Judges?*, FED. LAW., Apr. 2018, at 11, 11, <https://www.fedbar.org/wp-content/uploads/2018/04/Bankruptcy-Brief-pdf-1.pdf>.

109. *See id.*

110. Dick, *supra* note 20, at 279.

111. Adam J. Levitin, *Toward a Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime*, 80 AM. BANKR. L.J. 1, 83 (2006) (“Even courts that have limited bankruptcy equity through statutory language or judge-made tests recognize that there is something unique about bankruptcy that requires more discretion than other proceedings.”); *see also* Coordes, *supra* note 13, at 320 (“Article I courts like the bankruptcy courts and the Tax Court, which are charged with interpreting statutes, have a particular need for [the flexibility equity can provide.]”).

judges are appointed by circuit court judges through a rigorous merit screening panel.<sup>112</sup> This reduces the potential political overtones in the appointments process, instead emphasizing almost exclusively the candidates' merits—especially their understanding of bankruptcy law.<sup>113</sup> Further, unlike Article III judges, who have lifetime tenure, bankruptcy judges serve a limited term of fourteen years.<sup>114</sup> They can also be removed at any time during that term “for incompetence, misconduct, neglect of duty, or physical and mental disability” by the circuit court that appointed them.<sup>115</sup> These term limits—along with bankruptcy's accessible and unique removal process—minimize concerns with granting bankruptcy judges broad discretionary powers, including concerns about judicial policymaking.

Third, bankruptcy courts see many pro se litigants, particularly in consumer cases.<sup>116</sup> This phenomenon “results in more circumstances in which [bankruptcy judges are] faced with making discretionary decisions in response to those parties' procedural errors.”<sup>117</sup> For example, pro se debtors often fill out paperwork incorrectly, misunderstand exemptions, or innocently forget to declare all debts.<sup>118</sup> With broad discretionary powers, judges can provide equitable solutions and correct these minor errors, leveling the playing field between sophisticated and unsophisticated parties and ensuring that matters are decided on the merits.<sup>119</sup> Without

---

112. 28 U.S.C. § 152(a)(1) (“Each bankruptcy judge to be appointed. . . shall be appointed by the court of appeals of the United States for the circuit in which such district is located.”).

113. Selection processes differ across circuits. The Fifth Circuit, for example, uses a panel of a Fifth Circuit judge, a bankruptcy attorney, and a district court judge to make the selection. Applicants must provide a form attesting to their “competency in bankruptcy, notable cases, bar activities, and community service.” Gargotta, *supra* note 107, at 11. Following the interview process, the top two candidates are presented to the Judicial Council of the Fifth Circuit, which consists of Fifth Circuit judges and a district court judge from each judicial district in the Circuit. The Council discusses the candidates' merits and then votes to appoint a candidate. *Id.*; see also Dick, *supra* note 20, at 279.

114. 28 U.S.C. § 152(a)(1).

115. 28 U.S.C. § 152(e).

116. See *Just the Facts: Trends in Pro Se Civil Litigation from 2000 to 2019*, U.S. CTS., fig.6 (Feb. 11, 2021), [https://www.uscourts.gov/news/2021/02/11/just-facts-trends-pro-se-civil-litigation-2000-2019#figures\\_map](https://www.uscourts.gov/news/2021/02/11/just-facts-trends-pro-se-civil-litigation-2000-2019#figures_map); Dick, *supra* note 20, at 285.

117. Dick, *supra* note 20, at 285.

118. See *Top 10 Filing Errors by Self-Represented Parties*, U.S. BANKR. CT. FOR THE DIST. OF MD., <https://www.mdb.uscourts.gov/pro-se/top-10-filing-errors-self-represented-parties> (last visited Mar. 2, 2024).

119. Dick, *supra* note 20, at 271.

such powers, bankruptcy judges would be forced to turn away the honest but unfortunate debtor based on blameless clerical errors.<sup>120</sup>

Finally, the bankruptcy system often makes up for systemic societal failures in federal assistance programs. For example, many individuals who file for bankruptcy are caught in a cycle of poverty.<sup>121</sup> These debtors have often worked through uniform systems—such as the Supplemental Nutrition Assistance Program (SNAP), Medicaid, and subsidized housing programs—to escape their circumstances without success.<sup>122</sup> Bankruptcy not only provides these individual debtors a fresh start, but can also put a permanent end to poverty in their families.<sup>123</sup> When solving cyclical, systemic problems, the individualized bankruptcy process provided through judicial discretion can thus be more effective than Congress's complex forms and rigid calculations of bankruptcy eligibility—particularly for debtors who are “too broke to file bankruptcy” with the help of an attorney.<sup>124</sup>

## 2. Restrictions on Judicial Discretion Have Not Slowed System Abuse and Are Not Otherwise Having Their Intended Effect

Congress's restrictions on judicial discretion must have more than a theoretical effect on system abuse to be worthwhile. Indeed, empirical evidence must show that Congress's efforts are truly decreasing system abuse; otherwise, the bankruptcy system is losing out on the benefits of equitable powers without gaining

---

120. For examples of how this principle has played out in practice, see Neil M. Berman, “Without Thought or Conscious Intention”: An Analysis of the Dismissal Standards of 11 U.S.C. § 521(i), 5 NORTON BANKR. L. ADVISER 10 (2006) (discussing the numerous negative practical consequences of the BAPCPA's strict filing deadlines on individual debtors).

121. Robert Gordon, *Change the Bankruptcy System to Help End Cycle of Poverty*, LAW360 (Nov. 1, 2020, 8:02 PM), <https://www.law360.com/articles/1324335/change-the-bankruptcy-system-to-help-end-cycle-of-poverty>.

122. See Deborah Thorne, Pamela Foohey, Robert M. Lawless & Katherine Porter, *Graying of U.S. Bankruptcy: Fallout from Life in a Risk Society*, 90 SOCIO. INQUIRY 681, 681–704 (2020) (discussing the collapse of the social safety net that Social Security, Medicare, and Medicaid used to provide seniors and the resulting increase in bankruptcy filings among older age groups); but see WARREN ET AL., *supra* note 9, at 7 (noting the argument that discharge should remain constrained because “easy bankruptcy discharge results in laxity that is undesirable for our collective conception of the good”).

123. Gordon, *supra* note 121 (“[B]ankruptcy relief can be the vital hedge between a citizen's complete devastation—loss of assets, loss of home and loss of dignity—and the ability to save each from ruin.”).

124. *Id.* (noting that the complexity of the filing process disproportionately affects those most in need of bankruptcy because they cannot afford a competent lawyer).

value in return. But Congress's restrictive efforts have done little to prevent system abuse.

The means test established under the BAPCPA has not reduced system abuse—at least not to the degree Congress had hoped.<sup>125</sup> This is in part because rigid tests cannot account for the unique circumstances of all debtors. As one judge noted:

The whole point of permitting discretion and equitable powers is that it's so difficult for anyone to know, in advance, all the possible future situations that can arise. So, when Congress or the Supreme Court attempt to give guidance, they often state broad principles that might sound good in theory but that end up being counterproductive, unfair, and wasteful in practice. Later on, if that is brought to the attention of Congress or the Supreme Court, they can and do fix the problem (much of the time) but that can take many years.<sup>126</sup>

This over- and under-inclusiveness has played out many times in practice. For example, before the BAPCPA's means test, judges were afforded discretion in examining post-petition developments, such as a debtor's employment, when determining income and expenses.<sup>127</sup> The BAPCPA restricted this discretion, instead requiring judges to consider only the debtor's income for the six months prior to filing.<sup>128</sup> This sometimes allows those who find new, high-paying jobs around the time of filing to qualify for chapter 7 bankruptcy, even if they should be creating a chapter 13 repayment plan based on their new income.

Consider the example of a student filing for bankruptcy near her graduation date. Her income for the past six months may be close to nothing, even if she has secured a high-paying job after graduation. Under the pre-BAPCPA system, a judge could consider the income provided by the student's new job in determining chapter 7 eligibility and order her to create a repayment plan under

---

125. Dick, *supra* note 20, at 276 (noting a judge's criticism that "[t]he means test is a poor substitute and allows all sorts of abuse that we used to have the discretion to dismiss").

126. *Id.* at 296; see also Jay Lawrence Westbrook, *Equity in Bankruptcy Courts: Public Priorities*, 94 AM. BANKR. L.J. 203, 205 (2020) ("The duty to engage in . . . balancing [interests] in turn relates to the tension between the impossibility of drafting legislation anticipating all the material elements of a future decision amid the complexities of a Chapter 11 proceeding and the need to take account of those elements that turn out to be relevant to that decision.").

127. Tribble, *supra* note 30, at 808 (citing *In re Cortez*, 437 F.3d 448, 455 (5th Cir. 2006)).

128. 11 U.S.C. § 101(10A) (Supp. V 2005).

chapter 13, thus preventing abuse of the discharge of debts permitted by chapter 7. But under the BAPCPA, a judge cannot consider post-petition developments in determining a debtor's income and is thus limited in preventing even the debtor who *does* have the ability to repay her debts from obtaining a discharge under chapter 7.<sup>129</sup> This rigid approach encourages abuse and is especially concerning in light of recent proposed legislation allowing for student loan discharge.<sup>130</sup> What's more, the loophole is not just available to graduating students; any well-informed debtor with a high income can pass the means test by reducing their income for the six months prior to filing.<sup>131</sup>

Other bright-line rules have similarly incentivized behavior that is "contrary to the goal of maximizing creditor recovery."<sup>132</sup> Efforts to restrict judicial discretion, though well-intentioned, are not reducing system abuse to the extent Congress had hoped. And in some cases—as seen with the means test—restrictive efforts are doing more harm than good.<sup>133</sup>

### 3. System Abuse is Less Prevalent than Congress Has Suggested

The steady increase in bankruptcy filings often fuels concerns that the bankruptcy system is not doing its job.<sup>134</sup> The legal community is quick to establish causation: A greater number of filings indicates widespread system abuse, especially by

---

129. The judge may require the debtor to proceed with a presumption of abuse only if there is evidence that the petition was filed "in bad faith." 11 U.S.C. § 707(b)(3)(A).

130. See, e.g., The Student Borrower Bankruptcy Relief Act, H.R. 9110, 117th Cong. (2022) (allowing for the discharge of student debt under certain circumstances).

131. Tribble, *supra* note 30, at 810–11. Any debtor can become "well-informed" on how to pass the means test through a simple internet search. See, e.g., Cara O'Neill, *Expenses that Can Help You Pass Bankruptcy's Means Test*, NOLO, <https://www.nolo.com/legal-encyclopedia/expenses-help-pass-bankruptcys-means-test.html> (last visited Mar. 2, 2024).

132. Dick, *supra* note 20, at 276 n.31 (discussing 11 U.S.C. § 707(b)'s bright-line rule for vehicle expenses and the incentive it provides for debtors to "buy a vehicle just before bankruptcy rather than be frugal and continue to use an old vehicle, even though that decreases the debtor's ability to pay existing creditors").

133. Even at the time of the BAPCPA's enactment, Congress recognized the heavy financial burden—nearly \$400 million over the first five years—the BAPCPA would impose on the country. Tribble, *supra* note 30, at 804 (citing CONG. BUDGET OFF., *COST ESTIMATE FOR BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005*, at 1 (2005), <https://www.cbo.gov/sites/default/files/109th-congress-2005-2006/costestimate/s25600.pdf>).

134. Elizabeth Warren, *The Bankruptcy Crisis*, 73 IND. L.J. 1079, 1079 (1998) (noting the sudden negative publicity bankruptcy received when the number of filings increased to one million in 1996).



consumers.<sup>135</sup> But this causation is assumed, not proven.<sup>136</sup> Cherry-picking provocative stories of significant abuse does not establish a causal link between the increase in bankruptcy filings and widespread system abuse.<sup>137</sup>

By and large, the people who file for bankruptcy “are those who need it.”<sup>138</sup> And though the bankruptcies of Kim Basinger<sup>139</sup> and Mike Tyson<sup>140</sup> may be newsworthy – and to many, upsetting – they are not representative of the standard American filing for bankruptcy.<sup>141</sup> Unlike these multi-millionaires, the typical chapter 7 debtor has an annual income of less than \$30,000.<sup>142</sup> Further, contrary to popular belief, most consumer filings are a result of overwhelming medical expenses – not reckless spending.<sup>143</sup>

Unlike a purely uniform bankruptcy system that is inherently over- and under-inclusive, a system of judiciously broad discretionary powers enables bankruptcy courts to root out abuse on a case-by-case basis. The honest but unfortunate debtor should not be punished because others have attempted to abuse the system. Nor should Congress feel the need to enact strict, broad rules such as the means test, which may be doing more harm than good, to prevent “widespread system abuse” that is not, in fact, widespread at all.

---

135. *See id.* at 1079–80.

136. *Id.* at 1080 (“The line of argument that casts families as villains—or at least as suspects—starts and ends with the sharp rise in consumer bankruptcy filings.”).

137. *Id.* at 1084 (“Outrageous anecdotes may highlight legal loopholes that should be closed, but they cannot constitute the sole basis for radical changes to the policy and structure of an entire system.”).

138. *Id.* at 1087.

139. Basinger’s bankruptcy was so unconventional and comical that it inspired the premise of a popular sitcom. *See* Lara Zarum, *The Rise of ‘Schitt’s Creek’*, N.Y. TIMES, <https://www.nytimes.com/2020/01/07/arts/television/schitts-creek-final-season.html> (last updated June 9, 2021).

140. For more details on Mike Tyson’s \$27 million bankruptcy, *see* Richard Sandomir, *Tyson’s Bankruptcy Is a Lesson in Ways to Squander a Fortune*, N.Y. TIMES (Aug. 5, 2003), <https://www.nytimes.com/2003/08/05/sports/tyson-s-bankruptcy-is-a-lesson-in-ways-to-squander-a-fortune.html>.

141. Jenifer Kuadli, *9 Mind-Blowing Bankruptcy Statistics for 2023*, LEGALJOBS, <https://legaljobs.io/blog/bankruptcy-statistics> (last updated May 20, 2023) (providing a summary of typical demographics of bankruptcy filers).

142. Bill Fay, *Bankruptcy Statistics*, DEBT.ORG, <https://www.debt.org/bankruptcy/statistics> (last updated July 20, 2023).

143. *Id.*

#### 4. Weighing Competing Interests

This Note began with a discussion of competing interests in bankruptcy jurisprudence. Though the values set forth in section II.A are certainly important, they must be balanced with the benefits of broad discretion because (1) the benefits of those values can be maintained in a system of broad discretion and (2) the benefits of discretion are undervalued in bankruptcy.

First, opponents of forum shopping overstate its effects. They argue that any differences in courts' interpretations will lead to forum shopping because litigants will try to bring their cases in the courts "most favorably disposed to" their positions.<sup>144</sup> Forum shopping, however, is not inherently problematic. Indeed, if forum shopping always disadvantaged one party over another, the law would prevent rather than enable it.<sup>145</sup> Parties are limited by the venue rules enacted by Congress.<sup>146</sup> Some scholars thus argue that taking advantage of these rules can "hardly be viewed as evidence of malfunctioning in the system."<sup>147</sup>

Further, forum shopping is not as pervasive a problem in bankruptcy jurisprudence as critics suggest—at least not in consumer cases. And most bankruptcy cases are filed by consumers.<sup>148</sup> Consumers filing for bankruptcy have strict venue rules: their cases must be filed in the district where "the domicile, residence, principal place of business . . . or principal assets . . . of the person . . . have been located for the one hundred and eighty days immediately preceding such commencement."<sup>149</sup> Because individual consumers have the same domicile, residence, and principal place of business, they are required to file in the district where they've been living for the 180 days before filing.<sup>150</sup> These

144. Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1601–02 (2008).

145. *Id.* at 1602 n.111 ("The Framers themselves condoned this search for a friendly forum by establishing diversity jurisdiction.").

146. See 28 U.S.C. § 1408 (discussing venue rules for title 11).

147. Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. PITT. L. REV. 693, 755 (1995).

148. Of the 413,616 bankruptcy cases filed in 2021, 399,269 were non-business filings. U.S. CTS., U.S. BANKRUPTCY COURTS—BUSINESS AND NONBUSINESS CASES COMMENCED, BY CHAPTER OF THE BANKRUPTCY CODE 1 tbl.F-2 (2021), [https://www.uscourts.gov/sites/default/files/data\\_tables/bf\\_f2\\_1231.2021.pdf](https://www.uscourts.gov/sites/default/files/data_tables/bf_f2_1231.2021.pdf) (last visited Mar. 3, 2024).

149. 28 U.S.C. § 1408, *supra* note 146.

150. See *id.*

practical restrictions, which are already in place, significantly reduce the possibility of forum shopping for approximately ninety-seven percent of bankruptcy cases nationwide.<sup>151</sup>

The remaining three percent of cases—business filings—also stand to benefit from broad discretionary powers. The term “equity” is used frequently throughout the Code, “reflect[ing] the fact that Congress understands that the very nature of Chapter 11 bankruptcy means that many different interests converge in complex and novel ways and the courts require a proportionate flexibility.”<sup>152</sup> The need for proportionate flexibility has not lessened in recent years. Further, chapter 11 cases affect significant public and societal interests, such as layoffs in employment, making their ramifications widespread. Bankruptcy judges are in the best position to see firsthand what is necessary to carry out the objectives of the bankruptcy system in business cases—that is, to preserve value not just for the insolvent business, but for society as a whole.<sup>153</sup>

Additionally, there are more efficient ways to deal with the issue of forum shopping in chapter 11 filings. For example, instead of reducing judicial discretion to achieve uniformity and thus prevent forum shopping, Congress could attack the root of the problem by enacting stricter venue rules for corporate filings.<sup>154</sup> Congress could also prevent “judge shopping”—that is, picking the individual judge who will hear a case—by requiring random case assignment in large chapter 11 cases.<sup>155</sup> This would preserve the

---

151. See U.S. CTS., *supra* note 148.

152. Jay Lawrence Westbrook, *Equity in Bankruptcy Courts: Public Priorities*, 94 AM. BANKR. L.J. 203, 204 (2020).

153. See *supra* Part I.

154. In the last decade, Congress has considered several proposals to amend venue reform. See, e.g., *Bankruptcy Venue Reform Act of 2021*, S. 2827, 117th Cong. (2021) (requiring, among other things, a corporate debtor to file where its headquarters or principal assets are located, limiting the ability to use affiliates to establish venue, and requiring a debtor to establish “by clear and convincing evidence” that venue in the selected jurisdiction is proper). While these efforts have historically been unsuccessful, some attorneys believe that public outrage over recent high-profile cases, such as *In re Purdue Pharma, LP*, have “changed the calculus” and in turn increased the likelihood of a venue reform bill passing. Alex Wolf, *Purdue Pharma Bankruptcy Spotlights Venue Shopping Battle*, BLOOMBERG L., <https://news.bloomberglaw.com/bankruptcy-law/purdue-pharma-bankruptcy-spotlights-court-venue-shopping-battle> (last updated Aug. 2, 2021, 9:33 AM).

155. Adam J. Levitin, *Judge Shopping in Chapter 11 Bankruptcy*, 2023 U. ILL. L. REV. 351, 368 (2022).

equity provided by broad judicial discretion while resolving one of the concerns of a non-uniform system. If forum shopping is a major concern of Congress when Congress is evaluating the level of discretion that is granted to bankruptcy courts—and history suggests that it is—perhaps that concern is overstated and could be dealt with by means other than reducing judicial discretion, including venue reform.

In addition to maintaining some of the benefits of uniformity, judicial discretion also provides underemphasized, desirable benefits such as the opportunity to experiment with new solutions. Experimentation in lower bankruptcy courts “moves the law forward”<sup>156</sup> by allowing Congress to see developments in bankruptcy law that have not been addressed by the Code.<sup>157</sup> Instead of trying to anticipate what types of rules may be effective in the bankruptcy system, Congress can look to what has proven effective in the past.<sup>158</sup> This allows Congress to be more precise in its drafting, preventing over- and under-inclusiveness of laws, and ensuring that bills serve their intended purposes.

*5. Discretionary Powers Were Rightfully Prescribed by Congress When It Enacted the Bankruptcy Code in 1978*

As confirmed in *Law*, bankruptcy judges’ discretionary powers must remain within the confines of the Code’s text.<sup>159</sup> But this does not change that the Code’s text *has* authorized broad discretionary powers through section 105(a), which is meaningfully titled “Power of Court” and grants courts the power to issue “*any* order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Code].”<sup>160</sup> The title and text of section 105(a) indicate that the 1978 Congress—the same Congress that enacted the Bankruptcy Code—intended to grant bankruptcy courts

156. Coordes, *supra* note 13, at 310.

157. See William W. Bratton & David A. Skeel, Jr., *Bankruptcy’s New and Old Frontier*, 166 U. PA. L. REV. 1521, 1572 (2018) (noting that developments in bankruptcy law have mostly been driven by “innovations in reorganization practice” and cases, rather than full-fledged legislative change).

158. See *Siegel v. Fitzgerald*, 596 U.S. 464, 467–68 (2022) (While uniformity is not “toothless[,]” the “[Bankruptcy] Clause’s requirement that bankruptcy laws be ‘uniform’ is not a straitjacket: Congress retains flexibility to craft legislation that responds to different regional circumstances that arise in the bankruptcy system.”).

159. *Law v. Siegel*, 571 U.S. 415, 421 (2014).

160. 11 U.S.C. § 105(a) (emphasis added).

powers “not specifically enumerated in the statute”<sup>161</sup> because doing so was necessary to the success of the bankruptcy system. Of course, today’s Congress is not bound to retain section 105(a). But wisdom and experience since Congress enacted the Bankruptcy Code (and, in turn, section 105(a)) reinforce the conclusion that discretionary powers are necessary in bankruptcy jurisprudence.<sup>162</sup>

Determining the extent of those powers presents a more difficult question. As one bankruptcy judge noted:

By its nature ‘discretion’ is a concept that is hard to quantify or reduce to a perfect formula. As the world moves toward models that seek to create efficiencies with one-size fits all formulas, there may be an interest in eliminating discretion because discretion is inconsistent with this goal. [But] [i]mplicit in discretion is the recognition that no legislative scheme, law, or rules can be drafted to address every nuance or set of circumstances that a judge is faced with. Discretion allows a judge to render justice.<sup>163</sup>

Indeed, notwithstanding the Court’s recent decisions, Congress’s passing of the BAPCPA, and other attempts to cabin bankruptcy courts’ discretionary powers, courts are still left with some discretion. Even setting aside the powers granted by section 105(a), the 1978 Congress filled the Code with discretionary terms such as “good faith,”<sup>164</sup> “for cause,”<sup>165</sup> and “according to the equities of the case,”<sup>166</sup> among many others.<sup>167</sup> Of course, precedent provides guidance on how this statutory language should be interpreted, but such broad language still leaves ample room for discretion.<sup>168</sup> The 1978 Congress recognized that bankruptcy judges

---

161. Coordes, *supra* note 13, at 316.

162. *See supra* Section II.B.

163. Dick, *supra* note 20, at 280.

164. 11 U.S.C. § 1129(a)(3) (requiring debtors to propose a chapter 11 plan “in good faith”); § 1325(a)(3) (requiring debtors to propose a chapter 13 plan “in good faith”).

165. 11 U.S.C. § 362(d)(1), § 502(j) (permitting courts to reconsider claims that have been allowed or disallowed “for cause”).

166. 11 U.S.C. § 502(j) (granting courts discretion to allow or disallow claims “according to the equities of the case”).

167. *See, e.g.*, 11 U.S.C. § 303(h)(1) (requiring courts to determine what a “bona fide dispute” is for purposes of involuntary filings and allowing courts discretion in determining what it means for a debtor to be “generally not paying” its debts); 11 U.S.C. § 362(d)(2)(B) (preventing the automatic stay from being lifted where the property is “necessary . . . to an effective reorganization” but giving no guidance on what makes a property “necessary”).

168. Dick, *supra* note 20, at 274.

need to exercise discretion to render justice and provided a robust Code that enables them to do so.

Today's Congress should follow the reasoning, success, and instinct that the 1978 Congress had. Judges must draw their authority from the text of the Code. Accordingly, it would be counterproductive, unfair, and wasteful to follow some scholars' suggestions to eliminate Section 105(a) or to reduce the discretion provided for in other sections of the Code. Judges would be required to implement unjust solutions in nuanced circumstances not anticipated by Congress's broad-sweeping legislation. Indeed, lack of adequate discretion "is itself a threat to the integrity and efficiency of the court system" because the inevitable over- and under-inclusivity of legislation results in poor outcomes.<sup>169</sup>

### III. POLICY RECOMMENDATIONS

This Note does not dispute that clear rules and direction from Congress are important. But striking a balance between uniformity and discretion is not an either-or proposition. As some scholars have noted, "[m]ore often than not, both objectives can be served with a more thoughtful use of the available bankruptcy tools."<sup>170</sup> Congress should take two actions to further these objectives.

First, Congress should codify discretion and allow judges to balance specified public interests.<sup>171</sup> This would rightfully prevent bankruptcy courts from "tucking [those considerations] under the heading of equity,"<sup>172</sup> as they often do.<sup>173</sup> Without such provisions, the discretion of judges is left unchecked and almost certainly varies from court to court. Including public interest provisions in the Code would ensure that the *process* of exercising discretion remains the same across courts, regardless of context. Further, such provisions would keep judges within a uniform set of goalposts,

---

169. *Id.* at 280.

170. Shaw & Radtke, *supra* note 5.

171. Harner & Bryant-Álvarez, *supra* note 22, at 200 (citing Westbrook, *supra* note 151).

172. Westbrook, *supra* note 152, at 225 (internal quotations omitted).

173. Hon. Marcia S. Krieger, "The Bankruptcy Court Is a Court of Equity": What Does That Mean? 50 S.C. L. REV. 275, 275 n.1 (1999) ("[T]he frequency of reference to the bankruptcy court as a court of equity is second only to introductions, 'May it please the Court' or 'Good morning [], Your Honor.'").

effectively balancing principles of uniformity with the flexibility judicial discretion provides.<sup>174</sup>

Second, Congress should refrain from enacting laws that aim to reduce discretionary powers in bankruptcy courts. Such laws have a poor track record and often do more harm than good to both debtors and creditors.<sup>175</sup> Today's Congress should not forget that the Code was built for some flexibility to accommodate its goals: "a fresh start for the honest but unfortunate debtor and equality of distribution among creditors."<sup>176</sup> The Code already provides uniform solutions for countless issues. Allowing for judicial discretion under some circumstances furthers the principal goals of bankruptcy – fairness and equity for debtors and creditors alike.

### CONCLUSION

Reducing judicial discretion in bankruptcy jurisprudence is a policy mistake because the law cannot account for every unique circumstance presented by debtors. Unlike a purely uniform bankruptcy system that is inherently over- and under-inclusive, a system of judiciously broad discretionary powers enables bankruptcy courts to find the best solutions on a case-by-case basis.

Bankruptcy is a unique field of law that requires unique rules. The honest but unfortunate debtor should not be punished because others have attempted to abuse the system. Rather than restricting the discretionary powers of bankruptcy judges who are in the best position to stop abuse, Congress should enact a set of standards for judges to consider when evaluating individual cases. Judges would still be rightfully circumscribed by the Code but would no longer have to hide behind the mysterious cloak of equity to implement equitable solutions. Giving judges a set of goalposts is the best way to effectively balance the important goals of uniformity, including predictability and judicial restraint, with a bankruptcy judge's unique ability to provide equitable solutions through the exercise of discretionary powers.

---

174. Dick, *supra* note 20, at 282.

175. See *supra* Section II.B.

176. Coordes, *supra* note 13, at 323.