

February 1992

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Donald R. Korobkin, *Value and Rationality in Bankruptcy Decisionmaking*, 33 Wm. & Mary L. Rev. 333 (1992), <https://scholarship.law.wm.edu/wmlr/vol33/iss2/2>

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William and Mary Law Review

VOLUME 33

WINTER 1992

NUMBER 2

VALUE AND RATIONALITY IN BANKRUPTCY DECISIONMAKING

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Too many [judges and scholars] seem to think that a bankruptcy proceeding provides, in the main, an essentially unlimited opportunity to do what appears at the moment to be good, just, or fair without regard to the reasons for having a system of bankruptcy laws in the first place.¹

Since the enactment of the Bankruptcy Code in 1978,² major corporations have tested the limits of bankruptcy relief, using corporate reorganization in bold and unprecedented ways. Although courts often have developed creative solutions in these challenging situations,³ public and scholarly discussions have be-

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In the writing of this Article, I am particularly grateful to Connie Rosati, who reviewed several early drafts and engaged in countless discussions; her knowledge of ethical theory has informed many of the ideas developed here. My thanks also to Jay Mootz for useful conversations and to John Ayer, David Carlson, and Frank Kennedy for their helpful comments on an earlier version of this Article.

1. Douglas G. Baird & Thomas H. Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 U. CHI. L. REV. 97, 97 (1984).

2. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101-1330 (1988)).

3. See, e.g., *In re A.H. Robins Co., Inc.*, 89 B.R. 555, 558-63 (Bankr. E.D. Va. 1988) (disallowing punitive damage claims against Dalkon Shield manufacturer); *In re Johns-Manville Corp.*, 36 B.R. 743, 757-59 (Bankr. S.D.N.Y.) (approving appointment of representative for future victims of asbestos-related disease), *appeal denied*, 39 B.R. 234 (S.D.N.Y. 1984).

come consumed by a common worry: that bankruptcy decision-making may be without rational constraint.⁴

Motivated by this concern, Douglas Baird and Thomas Jackson developed a normative theory that specifies the limited role of bankruptcy law and requires bankruptcy decisionmaking to conform with what they take to be the dictates of economic theory.⁵ According to this "economic account,"⁶ the reason "for having a system of bankruptcy laws in the first place"⁷ is to respond to the economic problem of collecting debt.⁸ In particular, the bankruptcy system exists to address the "common pool problem,"⁹ which arises when multiple creditors assert claims against a debtor's limited pool of assets.¹⁰ This rationale for having a bankruptcy system demands that judges be constrained from

4. See, e.g., Thomas H. Jackson & Robert E. Scott, *On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain*, 75 VA. L. REV. 155, 198-202 (1989) (concluding that legislative and judicial pursuits of distributional goals threaten to impose undue costs on bankruptcy system); Lynn M. LoPucki & William C. Whitford, *Bargaining Over Equity's Share in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 139 U. PA. L. REV. 125, 154-58 (1990) (concluding that the closed culture of judges and lawyers in Chapter 11 cases leads to consensual plans of reorganization that divert assets of insolvent debtors from creditors to equity holders); Morton Mintz, *When Expediency, Not Law, Prevails*, LEGAL TIMES, Sept. 11, 1989, at 28 (describing how A.H. Robins and its insurance company used the bankruptcy system to manage their liability to Dalkon Shield claimants).

5. See generally THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* (1986); Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. CHI. L. REV. 815 (1987); Baird & Jackson, *supra* note 1.

6. By use of the term "economic account," I refer specifically to Baird and Jackson's application of economic principles to bankruptcy law. Based on the normative principle of wealth maximization, Baird and Jackson's approach conforms in important respects with that taken by proponents of law-and-economics, including Richard Posner. See, e.g., RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 60-87 (discussing wealth maximization as an ethical principle), 95-99 (applying the wealth-maximization principle to negligence law) (1991). Nonetheless, their application of welfare economics may deviate from law-and-economics in certain respects. See David G. Carlson, *Postpetition Interest Under the Bankruptcy Code*, 43 U. MIAMI L. REV. 577, 624-31 (1989) (distinguishing Baird and Jackson's economic approach from the welfare efficiency tradition of law-and-economics and labeling their approach as "pseudo-law-and-economics"). In any event, by the term "economic account," I do not mean to encompass economic theory in general or any other effort other than that of Baird and Jackson to apply economic theory to bankruptcy law.

7. Baird & Jackson, *supra* note 1, at 97.

8. See, e.g., JACKSON, *supra* note 5, at 3 ("Bankruptcy law, at its core, is debt-collection law.").

9. See, e.g., JACKSON, *supra* note 5, at 21-27 (stating that the proper role of bankruptcy law is to address the common pool problem).

10. See, e.g., *id.*; Baird & Jackson, *supra* note 1, at 97-109 (arguing that bankruptcy law has the exclusive normative role of requiring persons with property rights against the debtor's assets to act collectively to promote their group welfare).

doing "what appears at the moment to be good, just, or fair"¹¹ and instead make decisions that maximize economic returns.¹² By offering a universal standard that determines the correctness of particular decisions, the economic account promises to constrain bankruptcy decisionmaking in rational ways.

The economic account, however, is based on a false foundation. As I have argued elsewhere, bankruptcy law is not a response to the purely economic problem of collecting debt; it is a response to the larger problem of financial distress, understood as a crisis of diverse values.¹³ I have offered, in place of the economic account, a "value-based account"¹⁴ of bankruptcy law. According to the value-based account, bankruptcy law exists to create a context in which the economic and noneconomic values of all those affected by financial distress may be expressed and sometimes recognized.¹⁵ The bankruptcy system, then, is not merely a mechanism for reaching an optimal economic outcome for creditors as a group; it is a process for rendering richer, more informed decisions to govern the relationships of all persons affected by financial distress.

Conceiving of bankruptcy law in these terms, however, does not resolve the more practical concern that inspires the economic account. We worry about arbitrariness in resolving all complex disputes and thus seek guidance for judicial decisionmaking. We may want courts to "do equity," but not if doing so results in unwise or inconsistent decisions. Although we may differ widely on what we consider to be a good decision in bankruptcy, we agree on the undesirability of creating a situation in which "just anything goes." Conceiving of bankruptcy law as a response to the problem of financial distress rather than the problem of collecting debt may provide important insight into the reasons why we have a bankruptcy system in the first place; yet it does nothing, by itself, to relieve our worry about arbitrariness of decision.

In fact, this conception may only aggravate the concern. If bankruptcy law existed merely as a response to the problem of maximizing the economic welfare of creditors as a group, bankruptcy decisionmaking would be simple. The ideal decisionmaker

11. Baird & Jackson, *supra* note 1, at 97.

12. See sources cited *supra* note 10.

13. Donald R. Korobkin, *Rehabilitating Values: A Jurisprudence of Bankruptcy*, 91 COLUM. L. REV. 717, 762-66 (1991).

14. *Id.* at 721.

15. See *id.* at 766.

would be available for hire—a person skilled in economics. Economic theory offers general rules that may, in principle, be applied to render consistent and predictable decisions. The economic account of bankruptcy law thus carries with it a method for resolving conflicts in a way that seemingly offers an escape from the arbitrariness we fear.

In contrast, once we view bankruptcy law as a response to a crisis of diverse human values, we seem to be cut loose from objectivity and certainty. We have no scientific principles for arbitrating such disputes and must legislate ways to constrain decisionmaking. Especially in reorganization cases, courts must face conflicts of complex dimensions and oversee an intense process of negotiation, administration, and litigation that may continue for years. Although it may not be disturbing to contemplate that we require a decisionmaker who is more than a Samuelson,¹⁶ it is less assuring to note that we may need a Solomon. A decisionmaker in bankruptcy must apparently be capable of unattainable wisdom—of resolving seemingly intractable conflicts between and among fundamentally incommensurable values. Under these difficult conditions, even a Solomon may be capable of doing nothing more than “what appears at the moment to be good, just, or fair,” leaving us with the worry about the consistency of decisionmaking.

The introduction of the value-based account of bankruptcy law thus seems to lead to an unhappy dilemma. Either we limit bankruptcy courts to the method of the economic account, in which case we must accept decisions that are insensitive to the diverse human values that find expression in financial distress, or we allow such courts to recognize a plurality of values, in which case we license a situation in which “just anything goes.” It seems that we are forced to choose between the economic account’s method of decisionmaking that is “rational” but not always “good,” and value-based methods of decisionmaking that may be “good” but are not “rational.”

This Article demonstrates that the above dilemma is a false one and that conceiving of bankruptcy law under the value-based account does not require a view of bankruptcy decisionmaking as without rational constraint. Part I shows that the economic account’s reductive method for bankruptcy decisionmaking is not as rational as it appears. As an example, Part I focuses on a

16. I refer to the Nobel Prize winning economist Paul Samuelson.

critical decision in many reorganizations—whether to permit the reorganizing debtor¹⁷ to reject its continuing obligations under a collective-bargaining agreement. Rational constraints on such a decision must be capable of resolving conflicts between diverse and incommensurable human values arising in specific contexts in a bankruptcy case. Part I shows that, because the economic account fails even to recognize these diverse values, it lacks the capacity to resolve conflicts among them. Thus, it is unsuited for reaching decisions addressed to conflicts of this kind.

Part II elaborates on the value-based account and presents an alternative model for bankruptcy decisionmaking. Under this model, bankruptcy decisionmaking is constrained in ways that allow a full response to financial distress as a human crisis. This Part argues that bankruptcy decisionmaking is rationally constrained in the same ways that individual decisionmaking about a person's life is rationally constrained. Just as a person is rationally able to resolve conflicts regarding her future aims in life, so the bankruptcy court can rationally resolve conflicts about the aims of the corporate enterprise in financial distress. Drawing upon recent philosophical literature on the nature of persons, autonomy, and rational planning, Part II describes the kinds of constraints that are capable of providing rational guidance in bankruptcy decisionmaking. It then displays the operation and interaction of the constraints upon a court's decision whether to allow a reorganizing debtor to reject a collective-bargaining agreement.

This Article reveals bankruptcy decisionmaking to be both creative and rationally constrained, thus contributing to a normative explanation of bankruptcy law that vindicates its basic structure and fundamental practices. At the same time, the Article sketches a systematic but nonreductive basis for evaluating bankruptcy law and decisionmaking—the beginnings of a theoretical framework for bankruptcy criticism.

I. THE ECONOMIC ACCOUNT AND RATIONAL CONSTRAINTS ON BANKRUPTCY DECISIONMAKING

What constitutes rational decisionmaking depends on the problem to which the decisionmaking must respond. Our common

17. Under the Bankruptcy Code, the debtor-in-possession or the trustee, as representative for the estate, has the authority to reject or assume executory contracts of the historical debtor. 11 U.S.C. § 365(a) (1988); *see also id.* § 1107(a) (debtor-in-possession has rights of trustee). For convenience, however, I will refer to the debtor-in-possession or the trustee generically as the "reorganizing debtor" or the "debtor."

experience testifies to this fact. To count the pages of Milton's *Paradise Lost*, for instance, may be a rational way of deciding whether the poem is too long to finish on a forty-minute train ride; however, it is not a rational way of deciding whether it is the greatest work in English literature. A model of rational decisionmaking must rest on a diagnosis of an underlying problem and be appropriate to the nature of the problem to be addressed.

In developing its model of bankruptcy decisionmaking, the economic account offers a diagnosis of the underlying problem to which bankruptcy law responds. It views bankruptcy law as a response to the economic problem of collecting debt and, in particular, as existing to solve the common pool problem that arises when diverse co-owners assert conflicting claims against a common pool of assets.¹⁸ According to the economic account, bankruptcy law forces diverse creditors, which it considers to be co-owners of the insolvent debtor's assets, to work together toward a collective solution.¹⁹ It forces these diverse co-owners to behave as if they were a sole owner of assets who, consistent with economic assumptions, would use the assets in a way that secures the best economic return.²⁰

Based on this diagnosis, the economic account first defines a standard by which to evaluate any bankruptcy decision: the "correct" outcome maximizes economic returns for creditors as a group.²¹ It then provides guidelines for constraining judicial deliberation so as to increase the likelihood of a decision that will be consistent with this wealth-maximizing standard.²²

18. See sources cited *supra* note 10.

19. See, e.g., JACKSON, *supra* note 5, at 17 (stating that "[b]ankruptcy provides a way to override the creditors' pursuit of their own remedies and make them work together").

20. See, e.g., *id.* at 10-14; Baird & Jackson, *supra* note 1, at 105-09.

21. See JACKSON, *supra* note 5, at 210-13; Thomas H. Jackson, *Avoiding Powers in Bankruptcy*, 36 STAN. L. REV. 725, 728-29 (1984) [hereinafter Jackson, *Avoiding Powers in Bankruptcy*]. Proponents of the economic account have acknowledged that, as a descriptive matter, the wealth-maximization standard fails to account for "persistent and systematic redistributive impulses" in bankruptcy law. Jackson & Scott, *supra* note 4, at 156. Although Jackson and Scott have developed a "common disaster" component to account for these impulses, *id.* at 157, they maintain, as a normative matter, that maximizing assets for the benefit of creditors remains the "central goal" in bankruptcy law, *id.* at 156 n.2.

22. Jackson summarizes the economic account's normative strategy in the following terms:

In analyzing bankruptcy law, as with any other body of law, it helps to start by identifying first principles. Those principles can then be developed by defining their potential operation in the existing social, economic, and legal world to identify precisely what bankruptcy law should encompass, how it can accomplish its goals, and the constraints on its ability to do so.

JACKSON, *supra* note 5, at 2-3 (footnote omitted).

Suppose, for example, that a corporation files for reorganization and soon thereafter refuses to comply with a provision of an unexpired collective-bargaining agreement requiring wage increases for its employees. Instead, the reorganizing debtor asks the court to allow it to reject the agreement, arguing that to grant these pay increases would detrimentally affect its chances for reorganization. In opposition, the employees' union maintains that the agreement expressly provides that it will remain binding on the debtor in the event of the debtor's filing for reorganization. The union further contends that the debtor's unilateral rejection of the agreement is prohibited by the policies and provisions of the National Labor Relations Act.²³ What should the court decide?

The economic account offers a determinate answer to this question. Because bankruptcy law has the unique function of solving the common pool problem and thereby maximizing the economic welfare of diverse co-owners of the debtor's assets, the court should make whichever decision will have this wealth-maximizing effect.²⁴ But which decision will have this result? The economic account maintains that if a party has rights in a bankruptcy context that it does not enjoy outside of bankruptcy, such a party may have particular incentive for acting in a way that is contrary to the economic welfare of the creditors as a group.²⁵ The court thus must deliberate as to which decision will best preserve the rights of the parties under nonbankruptcy law²⁶ or, at least, the "relative value" of those nonbankruptcy rights.²⁷

If the court observes these guidelines, it will reach what the economic account views as the correct decision—to deny the debtor's request for rejection of the collective-bargaining agreement.²⁸ The debtor has no unilateral right to disaffirm this kind

23. 29 U.S.C. §§ 151-159 (1988).

24. See, e.g., JACKSON, *supra* note 5, at 23-27 (arguing that bankruptcy law is justified in overriding nonbankruptcy rights only if it maximizes the welfare of creditors as a group).

25. See, e.g., Baird & Jackson, *supra* note 1, at 106-09 (contending that altering nonbankruptcy entitlements creates incentives for persons to act in ways that are contrary to the interests of creditors as a group); Jackson, *Avoiding Powers in Bankruptcy*, *supra* note 21, at 730-31 (stating that the risk of creating perverse incentives is the "problem that makes such rule changes normatively undesirable").

26. See, e.g., Baird & Jackson, *supra* note 1, at 100 ("Bankruptcy law should change a substantive nonbankruptcy rule only when doing so preserves the value of assets for the group of investors holding rights in them.").

27. See, e.g., JACKSON, *supra* note 5, at 28-29 (indicating that, although it may be impossible to preserve nonbankruptcy rights, the bankruptcy system should at least protect the relative value of those rights).

28. See, e.g., *id.* at 111-13; Douglas G. Baird, *A World Without Bankruptcy*, 50 LAW & CONTEMP. PROBS., Spring 1987, at 173, 185-86.

of agreement under nonbankruptcy law, and therefore, according to the economic account, the debtor should not be allowed to do so simply because it has filed a petition for reorganization.²⁹ A debtor that is able to repudiate a collective-bargaining agreement only in bankruptcy may well choose bankruptcy for that reason alone, at the expense of the economic welfare of creditors as a group.³⁰

This method for bankruptcy decisionmaking constrains the court's deliberation toward a determinate resolution of the dispute. The question remains, however, whether the economic account constrains the court's decision in a rational way. In some sense, of course, the constraint is rational, because the economic account's method of decisionmaking allows consistent decisions, and it promotes one value that is obviously important in bankruptcy cases. Nonetheless, the rationality of the economic account ultimately depends upon whether it has correctly diagnosed the problem to which bankruptcy law responds.

This consideration is critical. As I have argued elsewhere, because the economic account ignores those aspects of bankruptcy law that promote noneconomic outcomes as independent values, it misconstrues bankruptcy law as a response to a thoroughly economic problem.³¹ This misdiagnosis leads proponents of the economic account to repudiate aspects of bankruptcy law that are most expressive of its unique character and history—in particular, its provisions for corporate reorganization.³² Because the economic account misidentifies the problem to which bankruptcy law responds, it also lacks the resources to explain important bankruptcy rules, including the rule of equality of distribution among similarly situated creditors.³³

29. See sources cited *supra* note 28. The economic account reaches this conclusion based on the assumption that the employees covered by a collective-bargaining agreement "may be much closer to an entity holding a full-fledged property (and priority) right." JACKSON, *supra* note 5, at 111. If proponents of the economic account were instead to conclude that rights under a collective-bargaining agreement are closer to the rights of an ordinary contract party under nonbankruptcy law, they would presumably reach a different conclusion on the question of whether rejection should be allowed. See, e.g., *id.* at 112 (basing opposition to rejection of a collective-bargaining agreement on the assumption that nonbankruptcy law affords special rights to employees under collective-bargaining agreements).

30. As Baird notes, "[o]ne cannot think that a firm should be able to repudiate a collective bargaining agreement in bankruptcy, but not elsewhere, and then be surprised if a firm chooses to use bankruptcy to repudiate a collective bargaining agreement and for no other reason." Baird, *supra* note 28, at 185 (footnote omitted).

31. See Korobkin, *supra* note 13, at 732-35.

32. See *id.* at 739-40.

33. See *id.* at 735-39.

As an alternative, I have developed the value-based account of bankruptcy law, which rests on a larger understanding of the problem to which that law responds. According to the value-based account, bankruptcy law is a response to the problem of financial distress, understood as a crisis of diverse human values, only some of which are economic.³⁴ Financial distress encompasses not only the debtor and its creditors but extends to the whole network of persons who suffer the effects of the debtor's financial troubles. In contrast to the economic problem of collecting debt, financial distress implicates a plurality of human values—moral, political, personal, and social, as well as economic.³⁵

In answering bankruptcy questions, then, the court must resolve conflicts among such diverse values. The court's decision to allow a debtor to reject a collective-bargaining agreement will have important economic implications, extending not only to the debtor's management and union, but to shareholders, nonunionized employees, and creditors. It will determine which employees will keep and which will lose their jobs, which creditors will be paid, and how much the payment will be. The court's decision will also have moral, political, social, and personal meaning to these various individuals and may affect the lives of their families and the life of their community.

In view of the plurality of values at stake, the court may be pulled in different directions. A party to a collective-bargaining agreement has special rights and remedies under the National Labor Relations Act,³⁶ which reflect values associated with protecting employee welfare. Still, the court may be justifiably concerned that recognizing these values would be disastrous. To bar the reorganizing debtor from rejecting an agreement as important as a collective-bargaining agreement may so restrict its financial and operational options as to sabotage the efforts of the business to survive. The collapse of the business would sacrifice the economic and noneconomic values of all the other participants in the debtor's financial distress—including creditors, nonunionized employees, shareholders, and interested members of the larger community. Business collapse would even undercut the interests of those unionized workers that collective-bargaining agreements are designed to protect.

34. *See id.* at 766.

35. *See id.* at 764-65.

36. 29 U.S.C. §§ 151-169 (1988).

On the other hand, authorizing the rejection of collective-bargaining agreements may frustrate important values which the collective-bargaining process promotes. This process offers labor and management a means of self-regulation in the workplace and prevents the "economic warfare" that may otherwise result from unilateral modifications and terminations.³⁷ In fact, allowing the reorganizing debtor to reject a collective-bargaining agreement may, in any particular case, so destabilize the relationship between management and its unionized employees as to threaten the ultimate realization of a successful reorganization. Allowing such rejections also might inspire future debtors to use the bankruptcy system strategically to avoid such agreements and thereby rid themselves of troublesome unions.

The participants in financial distress may express their diverse values and concerns in these larger terms, or speak more personally. The management's desire to reject the agreement derives partly from its calculation of economic utility, but also from obligations that individual members of that management owe to each other, their dependents, and their creditors. Similarly, the union leaders owe their membership specific obligations that may be expressed in their personal concern for its well-being, moral outrage at what they perceive as management's betrayal, or political self-defense. The resolution of this dispute will have important personal meaning for these various participants.

In reaching a decision that will have such a critical impact on the lives of these participants and on the bankruptcy case as a whole, a court faces the unavoidably difficult task of resolving a conflict between dramatically divergent values. This kind of conflict constitutes what philosopher Thomas Nagel referred to as a "practical conflict"³⁸—a clash between values that cannot be reduced to a single value.³⁹ The decisionmaker seeking to resolve a conflict of this kind lacks a single scale on which values may be rationally measured and balanced.⁴⁰

The economic account is not attuned to this problem. The economic account's method of resolving disputes is reductive: it is premised on the existence of a single scale on which competing values may be compared. It adopts a standard of economic utility

37. See, e.g., *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 674 (1981) (indicating the importance of the National Labor Relations Act in promoting corporate self-governance in the workplace).

38. THOMAS NAGEL, *MORTAL QUESTIONS* 128-29 (1979).

39. See generally *id.* at 128-41 (examining the nature of "practical conflicts").

40. *Id.* at 128-32.

and directs the court to use this standard as the sole basis for its deliberation. The court ultimately must evaluate its options by determining which option would maximize the economic welfare of creditors as a group. Thus, in deciding whether to allow the debtor to reject a collective-bargaining agreement, the court must either reduce noneconomic values to economic terms, or ignore these values altogether.

This reductive method guides judicial deliberation in a way that has little relationship to the diverse values that so urgently seek recognition in this context. It neglects not only the non-economic values associated with upholding collective-bargaining agreements, but also the diverse values that may be frustrated if the reorganization ultimately fails. This method is entirely unsuited to guide decisionmaking that must resolve practical conflicts among incommensurable values. As a method for deciding bankruptcy questions, it may not be as irrational as counting pages to decide the greatness of *Paradise Lost*, but it displays a similar brand of irrationality. It is insensitive to the full range of values at issue in the problem to be addressed.

What then is the alternative? Leaving judges to make decisions based entirely on "what appears at the moment to be good, just, or fair" is no solution. Lacking a method for resolving disputes, a court may gravitate toward whichever voice seems most compelling at the time, with too little regard for the legal merits of its decision. In an important sense, to make a decision in this way only perpetuates the problem that bankruptcy law seeks to redress. In financial distress, various parties assert conflicting and unorchestrated demands that undercut their ability to obtain a larger perspective on the crisis and its consequences.⁴¹ Allowing judges to make bankruptcy decisions based on whichever demand happens to grip them at the moment^f would be replacing one kind of unorchestrated decisionmaking for another. Although decisionmaking of this kind may lead to justice in a particular case, as a general practice, it is more likely to lead to inconsistent and often unwise outcomes.

This kind of decisionmaking returns us to our central worry. There may be good reasons for rejecting the view that bankruptcy law is merely a response to the economic problem of collecting debt, but does viewing bankruptcy law as a response to the problem of financial distress commit us to licensing a

41. See Korobkin, *supra* note 13, at 763-66.

situation in which "just anything goes"? Is it possible to constrain bankruptcy decisionmaking in rational ways that are suited to the particular characteristics of financial distress?

II. A VALUE-BASED MODEL OF BANKRUPTCY DECISIONMAKING

A. *The Formulation of a Rational Plan of Life*

The economic account defines what it views as rationality in bankruptcy decisionmaking by a simple analogy to the case of the individual economic actor: bankruptcy decisionmaking should have the effect of forcing diverse co-owners of a common pool of assets to behave as if they were a sole owner of that pool.⁴² Consistent with economic assumptions, such a sole owner would act in rational and self-interested ways, making business decisions that maximize the economic return from the sale of the pool.⁴³ Because the economic account has misdiagnosed the problem to which bankruptcy law responds,⁴⁴ this analogy has limited force. Bankruptcy decisionmaking is addressed not to the common pool problem, but to the problem of financial distress;⁴⁵ and those parties affected by financial distress are not dehistoricized economic actors, but actual persons moved by diverse human values and concerns.

Nonetheless, in developing a value-based model of bankruptcy decisionmaking, we might follow the economic account's lead in analogizing to individual decisionmaking. Rather than studying economic theories of rational choice, however, we might consider the workings of an actual person's decisionmaking; we might thereby reconstruct the analogy to incorporate our understanding of bankruptcy law as a response to a problem involving diverse human values. After all, a person often faces critical decisions in her own life, sometimes involving larger issues about personal identity and goals. Faced with the task of deciding among diverse aims and values, a person is capable of reaching decisions through a process that seems constrained in rational ways. As a means of defining rationality in decisionmaking under the value-based

42. See, e.g., JACKSON, *supra* note 5, at 22-24; Baird & Jackson, *supra* note 1, at 105-09.

43. See, e.g., Baird & Jackson, *supra* note 1, at 104-05.

44. See *supra* notes 31-33 and accompanying text.

45. See *supra* notes 34-35 and accompanying text.

account, we might first consider what kinds of constraints operate in personal decisionmaking.

Imagine a person who faces a choice between possible careers. She may confront, for example, a choice between becoming either a professional musician or a lawyer. Her decisionmaking does not merely involve a choice between occupations, but also between ways of living her life.⁴⁶ She may view her choice as between an unconventional life as a musician, which may allow her to retain greater control over how she spends her time but offers no financial security, or a relatively conventional life as a lawyer, which may provide financial security but at the cost of the freedom to pursue her own projects at her own pace. Her choice will permit her to pursue and develop certain kinds of activities and interests while excluding others. In an important way, she is presented with the task of formulating a plan for her life. By what process does this person choose among these diverse aims and decide upon a rational life plan that allows her to move forward in a constructive way?

As a start, she may have certain strongly held values that are not put into question by the decisionmaking. She may know, for example, that she does not want to become anything other than a musician or a lawyer; and, whatever she becomes, she wants at some point to have children and serve as a good role model for their development. These strongly held values express and rank specific and more general aims, acting as constraints on her decisionmaking process. Let us call these "normative constraints." Guided by normative constraints, she comes to her decisionmaking with certain aims already settled and with some sense of their relative importance. She thus chooses not among limitless and unordered aims, but only among those aims that are the most likely and compelling candidates for recognition.

In some cases, these normative constraints may determine most, if not all, of a person's important aims. A person's strongly held values may be such that she already knows what she wants to do with her life. For example, although having the option to become a lawyer, she may know that she prefers to become a professional musician. She also may have settled on various other aims related to this career goal. Although her aims are relatively

46. In examining the question of why persons become lawyers, Anthony Kronman has described this aspect of making such a career choice as "peculiarly bifocal," involving "the compassionate survey of alternatives viewed simultaneously from a distance." See Anthony T. Kronman, *Living in the Law*, 54 U. CHI. L. REV. 835, 853 (1987).

settled, she still requires a life plan for achieving them and must deliberate to formulate such a plan.

In particular, her deliberation may serve one or more of three basic functions. First, she may deliberate to discover the practical means of achieving her aims as a musician—an “instrumental” function of deliberation.⁴⁷ In planning her career as a musician, she may consider whether it would be better for her to attend a formal music college or to continue to train herself and practice with her friends. Second, her deliberation may serve a “clarifying function” that illuminates the content of her settled aims. She may seek to determine, for example, what kind of musician to become—a studio or nightclub musician, a composer, or a teacher—or what being a musician means to her.

Third, because she will have various activities and interests even while she has generally settled aims, she may deliberate as to how to organize her activities in a way that will allow her realize those aims. For example, although she may enjoy going to movies on the weekends, she may deliberate as to whether to spend more of that time practicing or to take an evening job which would allow her to support herself while pursuing a musical education. As John Rawls noted, “[t]he aim of deliberation” is to “find that plan which best organizes our activities and influences the formation of our subsequent wants so that [our] aims and interests can be fruitfully combined into one scheme of conduct.”⁴⁷ In this instance, deliberation serves a “coordinating” function.

By performing these various functions, deliberation moves the person toward formulating a rational plan of life. But what determines the rationality of her deliberation? As one approach to answering this question, we might theorize about how a person might go about choosing a plan for a good life and, as Rawls did, specify rational guidelines in the form of “principles of rational choice.”⁴⁸

For example, according to Rawls, one principle of rational choice dictates that, if a person is faced with a choice between alternative plans with roughly the same aims, she should adopt the plan that realizes those aims with the least expenditure of means and that achieves the aims to the fullest extent.⁴⁹ Rawls referred to this as the principle of “effective means.”⁵⁰ A second

47. JOHN RAWLS, A THEORY OF JUSTICE 410-11 (1971).

48. *See id.* at 408.

49. *Id.* at 411-12.

50. *Id.* at 411.

principle—that of “inclusiveness,”⁵¹ holds that a person should select the plan that allows her to realize more of her aims.⁵² According to a third principle, of “greater likelihood,”⁵³ a person choosing between two plans with roughly the same aims should choose the plan that is more likely to achieve those aims.⁵⁴ Let us call such constraints on how a person deliberates “deliberative constraints.”

Naturally, the person formulating a life plan for becoming a musician will not research Rawls’ theories of rational planning as a means of guiding her decision. Still, she may seek advice from friends, parents, mentors, and professional counselors. Their advice may impose constraints on her deliberation, which thus represent deliberative constraints. The advice, if rational, will effectively constitute concrete instances of principles of rational choice. If the person is trying to decide whether to move to New York City to train with the best musicians in the country or to stay in her hometown and continue to practice with her friends, a rational advisor will counsel her to consider which route will allow her to accomplish her aims as a musician to the fullest extent, realize additional aims she might have, or be most likely to allow her to achieve her aims. Such advice will help her formulate a life plan that allows her to realize her aims as a musician.

The principles of rational choice discussed thus far, however, do not exhaust the principles relevant to her decisionmaking. For one thing, those principles are neutral as to possible variations in the importance of her aims. For example, although she may want to get the best musical training possible, she also may fear that the expense of such training will prevent her from taking luxurious vacations for the next few years. An additional principle of rational choice guides her decisionmaking in the presence of conflicting aims of varying degrees of importance. According to the principle of “intensity,” she should adopt the plan that is most likely to realize her most important aims, even if it frustrates less important aims that she might have.⁵⁵

Yet, in formulating a life plan, this person cannot know all her aims at the outset and, as circumstances change and she gains

51. *Id.* at 412.

52. *Id.*

53. *Id.*

54. *Id.* at 412-13.

55. Rawls described this principle but did not give it a name. *See id.* at 416-17.

more information, she may develop other aims. She may be certain that she wants to become a professional musician but be uncertain whether she would like to specialize in classical music or jazz. It is rational, therefore, that she should plan specifically for the present while not unduly restricting her options in the more distant future.⁵⁶ Guided by this principle, she may decide to engage in training that will allow her to develop her abilities in both areas. Again, following Rawls, such planning is consistent with a principle of "postponement."⁵⁷

Ideally, a person would want to continue to deliberate as to her life plan until she gained command of all relevant facts and understood what each alternative would bring. She would want to know what it would be like to live a life as a musician specializing in classical music and also know what it would be like specializing in jazz. Unfortunately, no one is capable of omniscience; at some point, she must settle on a choice. Her deliberation thus must be consistent with an additional principle of rational choice, of "relative benefit": "She should deliberate up to the point where the likely benefits from improving [her] plan are just worth the time and effort of reflection."⁵⁸

In formulating a rational life plan, then, a person is subject to two kinds of constraints: normative constraints, which express and order her aims, and deliberative constraints, which guide her deliberation and include concrete instances of the principles of rational choice. Under the guidance of these constraints, a person may make decisions without experiencing any real crisis in decisionmaking. If her strongly held values do not conflict and relevant normative constraints direct her toward relatively settled aims, she need deliberate only as to how to accomplish those aims—whether that involves arranging practical means, clarifying the content of the aims, or coordinating their fulfillment. Although her deliberation may be challenging, she suffers no crisis in personal autonomy so long as she maintains the capacity to regulate herself toward aims that she herself established.

If her strongly held values conflict, however, the person confronts a different situation. She experiences a crisis, as applicable normative constraints direct her toward seemingly incompatible sets of aims. She may admire artistic creativity and be drawn to a career as a musician; yet she also may worry about widespread

56. *Id.* at 410.

57. *Id.*

58. *Id.* at 418. The label "relative benefit" is my own.

poverty, admire selfless action, and be drawn to a life as a lawyer representing poorer clients. She faces a conflict between strongly held and incommensurable values, each of which pulls her in a different direction. This crisis may lead her sporadically to pursue divergent aims. If she is unable to resolve this crisis, she may find, years later, that she has achieved nothing of what she desires. To protect herself from suffering this eventual fate, she requires a way of moving forward, of deliberating toward a rational life plan. How does the person in such a crisis avoid a decisionmaking process in which "just anything goes"?

Recent philosophical discussions of free will and the nature of persons have explored the process of deliberation by which a person addresses a crisis in personal autonomy.⁵⁹ For example, Harry Frankfurt argued that persons have the distinctive capacity for stepping back from themselves to engage in a reflective commentary on the desirability of their conflicting desires or aims.⁶⁰ In other words, persons are capable of deciding to identify with certain aims while excluding or subordinating others.⁶¹ Through this ongoing reflective process, a person contributes toward the creation of a "self"; she exercises control over who she is and what kind of person she will be.⁶²

A person's self-reflective deliberation differs in an important way from ordinary deliberation that occurs when aims are relatively settled. Self-reflective deliberation is not directed to formulating the means for achieving settled aims but to formulating the aims themselves.⁶³ The person thus addresses her crisis in personal autonomy by seeking to restore her capacity to regulate herself toward ends that she herself has chosen.⁶⁴

Because self-reflective deliberation operates only in the absence of settled aims, it serves no instrumental function of arranging the practical means for settled aims. By serving a clarifying

59. See, e.g., HARRY G. FRANKFURT, *Identification and Wholeheartedness*, in *THE IMPORTANCE OF WHAT WE CARE ABOUT* 159, 159-76 (1988); CHARLES TAYLOR, *What is Human Agency?*, in *HUMAN AGENCY AND LANGUAGE* 15, 15-20 (1985); Connie Sue Rosati, *Self-Invention and the Good* 78-116 (1989) (unpublished Ph.D. dissertation, University of Michigan).

60. See HARRY G. FRANKFURT, *Freedom of the Will and the Concept of a Person*, in *THE IMPORTANCE OF WHAT WE CARE ABOUT*, *supra* note 59, at 11, 12.

61. See FRANKFURT, *Identification and Wholeheartedness*, *supra* note 59, at 166.

62. See *id.* at 170-72.

63. Cf. *id.* at 172-75 (comparing self-reflection with other kinds of decisionmaking).

64. Cf. *id.* at 170-72 (describing a person's self-reflection as defining "the intrapsychic constraints and boundaries with respect to which a person's autonomy may be threatened even by his own desires").

function, however, such deliberation may lead the person to understand the meaning of her competing aims. Divided between strongly held values that pull her toward incompatible sets of aims as a musician and a lawyer, the person must step back and evaluate the desirability of the respective aims. Ultimately, she must either find a way of integrating these incommensurable aims into her life plan or exclude some of the aims entirely. Through deliberation, she hopes to clarify the nature of these aims, their significance to her, and their relative priority. She thus moves toward settling her aims and ultimately formulating a rational life plan.

Her attempt to clarify her aims may not lead to a final settling of those aims. She may be leaning toward one career choice or the other, but be unsure about what she really wants; or she may remain completely divided. In either case, she wants to leave open her option to decide upon her aims at some indefinite future time and, consistent with the principle of postponement,⁶⁵ does not want to do anything today that might foreclose an important possibility later. She wishes to move forward toward a final resolution of her crisis while still deliberating on her final decision.

At the same time, she recognizes that she may incur some risk in prolonging her deliberation and not wholeheartedly identifying with aims to become either a musician or a lawyer. If she is going to realize her most important aims in either career, she must devote significant time to activities related to the achievement of these aims. If she spends too much time in activities related to one set of aims, she may undercut her efforts to succeed in the other. Consistent with the principle of relative benefit,⁶⁶ she should thus deliberate as to her aims only so long as the likely benefits from improving her life plan are worth the costs of continued reflection.

The person faces the challenge of coordinating her various activities to realize a complex set of aims. Her self-reflective deliberation serves this coordinating function, allowing her to reach a creative solution to her problem. She may decide to attend law school part-time while also continuing her training as a musician; or she may decide to work at a lawyer's office for a limited time to find out whether legal work is likely to satisfy her, while earning money to finance her continuing musical ed-

65. See *supra* notes 56-57 and accompanying text.

66. See *supra* note 58 and accompanying text.

ucation. Through continued deliberation over the course of months or years, she may regulate the mix of her activities in constructive ways, adjusting her commitments to increase the likelihood of achieving her most important aims, whatever those aims might turn out to be. In the process, she further clarifies those aims and perhaps revises their relative priority. Such revisions introduce new challenges for coordination, and the deliberation may continue.

Despite all this reflection, however, the person's decisionmaking must remain, to some degree, indeterminate. Although certain life plans may not be suited to a person, it is not the case that only one life plan will be rational. If the person decides to become a musician and has a fulfilling life, it does not mean that she would have been an unfulfilled lawyer. This kind of indeterminacy in the decisionmaking process does not render "irrational" the process or the outcome.

The person's decisionmaking process is to be considered rational not because it is constrained by some absolute standard that leads to a determinate outcome. Rather, the rationality of her decisionmaking flows from her following an ongoing procedure of reflection that, consistent with applicable normative and deliberative constraints, clarifies and coordinates her aims in meaningful ways and helps her to achieve the aims that she ultimately chooses.⁶⁷ Such a procedure is expressive of personal autonomy; if carried out, it thereby translates into a proper outcome.⁶⁸ Let us call this method "procedural rationality." Unlike the determinate rationality of the absolute standard, procedural rationality is suited to the human crisis that the person seeks to address.

B. Rationality in Bankruptcy Decisionmaking Under the Value-Based Account

In overseeing a corporate bankruptcy case, a court addresses a human crisis that is similar to the crisis that a person faces in

67. I borrowed the concept of procedural rationality from RAWLS, *supra* note 47, at 84-89. Rawls distinguished between "perfect procedural justice," *id.* at 85, which applies if "there is an independent standard for deciding which outcome is just," *id.*, and "pure procedural justice," *id.* at 86, which requires the existence of "a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is, provided that the procedure has been properly followed." *Id.*

68. *Id.*

deciding among divergent aims and desires.⁶⁹ A corporation is a collective enterprise that, in the context of financial distress, struggles for direction. The various constituents of that enterprise—secured and unsecured creditors, shareholders, management, employees, and interested members of the larger community—seek recognition of incommensurable values. They assert demands that pull the corporate enterprise toward diverse and often incompatible aims. Left unchecked, these participants will bring dire consequences to the corporation and to each other. The corporation as an enterprise thus suffers what might be viewed as a crisis in “collective autonomy.” Like a person radically divided between possible lives, the collective enterprise has lost the capacity to regulate itself toward chosen aims.

The bankruptcy system offers a means for addressing this crisis. It empowers a court in bankruptcy to exercise control over unruly demands, orchestrate their expression, and mediate their resolution. Bankruptcy decisionmaking thus performs the role of supplying the reflective and deliberative capacity that the enterprise currently lacks. The court, in conjunction with the participants in financial distress, undergoes a procedure of reflection by which the fundamental aims of the enterprise may be debated, shaped, and ultimately decided. Bankruptcy decisionmaking moves the participants toward a “long-term plan” that redefines the moral, political, social, and economic aims of the enterprise.

The bankruptcy “estate,”⁷⁰ a legal entity removed from the historical debtor, serves as the medium by which the aims of the enterprise are defined and redefined.⁷¹ The various participants, by seeking recognition of their individual demands in the context of a bankruptcy case, each present competing visions of what the values of the estate should be.⁷² They contribute to the rehabilitative process through which the enterprise establishes its aims and thus recovers its collective autonomy.

In supervising this process, the court has a complex task. It must confront practical conflicts that pervade the bankruptcy

69. In discussing the role of judgment in politics, Kronman has suggested a similar comparison: “The different possible futures that an institution faces at every critical juncture in its history resemble the different ways of life between which an individual must choose at certain decisive moments in his own career.” Kronman, *supra* note 46, at 860.

70. 11 U.S.C. § 541(a) (1988) (defining “estate” as “all legal or equitable interests of the debtor in property as of the commencement of the case”).

71. See Korobkin, *supra* note 13, at 770.

72. See *id.* at 770-71.

case and resolve those conflicts without full knowledge of the long-term consequences of its decision or even of all the aims that the enterprise eventually might seek to realize. Despite the magnitude of the court's task, however, it is not the case that "just anything goes." Bankruptcy decisionmaking is subject to identifiable constraints that lead the court toward rational solutions to complex problems.

To begin with, legislative and judicially created rules reflect strongly held values, which exclude certain kinds of aims from consideration and, in particular and varied contexts, express and order specific and more general aims. These rules thus embody normative constraints, requiring judicial recognition of aims of various kinds. Those aims include, among others, promoting fairness to and among claimants,⁷³ avoiding the adverse consequences of business failure,⁷⁴ increasing distributions to creditors,⁷⁵ generally respecting rights and expectations arising under substantive nonbankruptcy law,⁷⁶ and preventing debtor fraud.⁷⁷ Although participants in financial distress may assert demands expressive of diverse and incommensurable values, those demands are eligible for recognition only if they are consistent with some normative constraint. In identifying and ordering recognizable aims, normative constraints create working conditions for meaningful deliberation.

Bankruptcy decisionmaking is also subject to deliberative constraints that rationally guide the court's deliberation toward formulation of a long-term plan for realizing some combination of eligible aims. These deliberative constraints are provided by specific bankruptcy rules that represent concrete instances of principles of rational choice. Constraints of this kind support the deliberative process by performing instrumental, clarifying, and coordinating functions. They thereby steer deliberation toward formulating a long-term plan that, consistent with principles of

73. One of the most important aspects of this general policy of "fairness" is that of equality of distribution among similarly situated creditors. *See, e.g.,* *Nathanson v. NLRB*, 344 U.S. 25, 29 (1952) (describing "equality of distribution" as the "theme" of the Bankruptcy Act).

74. *See* H.R. REP. NO. 595, 95th Cong., 1st Sess. 220, 220 (1977) ("It is more economically efficient to reorganize than to liquidate, because it preserves jobs and assets.").

75. *See id.*

76. *See, e.g.,* *Butner v. United States*, 440 U.S. 48, 56 (1979) ("Unless some federal interest requires a different result, there is no reason why [state law property] interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding.").

77. *See* H.R. REP. NO. 595, *supra* note 74, at 232-33.

rational choice, realizes those aims that are most important.

The existence of these varied normative and deliberative constraints explains the role of corporate reorganization as an alternative to liquidation. If bankruptcy relief for corporations were restricted to liquidation of corporate assets, the bankruptcy system would be rendered incapable of realizing many of the potentially important aims that the survival of the business might bring. It would be unable to avoid massive layoffs, to preserve a business important to the community and the economy, or to prevent the economic waste resulting from the forced liquidation of assets. As a person rationally chooses the plan that realizes more of her aims,⁷⁸ so the bankruptcy system rationally creates conditions in which a business may survive as a viable concern, if its survival will allow fulfillment of aims that would otherwise be lost if the business collapsed.

Of course, in some instances, it would be irrational for bankruptcy decisionmaking to move toward a long-term plan of reorganization, because furthering the aims associated with the viability of the business would sacrifice more important aims. The corporation may be beyond rescue as a financial concern, or persons essential to its continued operation may abandon the corporation. To pursue reorganization would only raise false hopes and waste economic resources. In such a case, it would be rational to require that the court and the participants in financial distress not aim for a plan of reorganization but another kind of "long-term plan"—that includes the liquidation of assets and distribution of proceeds to claimants. Nonetheless, affording the possibility for corporate reorganization gives flexibility to the court, in conjunction with the participants, to formulate whichever kind of long-term plan is suited to the characteristics of the bankruptcy case.

The rationality of bankruptcy decisionmaking, then, does not depend on whether the outcome of the bankruptcy case satisfies some absolute standard measured in reductive terms. Whether the bankruptcy process culminates in reorganization or liquidation, the rationality of bankruptcy decisionmaking derives from having complied with a procedure of reflection that is consistent with normative and deliberative constraints. Bankruptcy decisionmaking thus displays procedural rationality.⁷⁹ If the court in its decisionmaking complies with the procedure and its con-

78. See *supra* note 52 and accompanying text.

79. See *supra* notes 67-68 and accompanying text.

straints, the outcome of the bankruptcy case is thereby rational.

From context to context, however, particular constraints may vary in both the nature and extent of guidance they provide to the court's decisionmaking. The bankruptcy case is comprised of specific contexts in which participants assert demands to which the court must answer. In certain contexts, participants may assert demands that are consistent with strongly held values under bankruptcy law and do not offend other strongly held values. In those instances, normative constraints embodied in bankruptcy law appropriately direct the court to pursue settled aims. The court need engage only in ordinary deliberation intended to arrange means of realizing these aims. Bankruptcy law may also include particular bankruptcy rules that embody concrete instances of principles of rational choice, providing the court with specific guidance in this deliberation.

Consider the court's decision whether to allow rejection of an ordinary contract, not a collective-bargaining agreement.⁸⁰ For example, the reorganizing debtor may seek to reject a prepetition executory contract to purchase inventory from a manufacturer. If this contract is unprofitable to the estate, its rejection would promote various economic and noneconomic values. It would improve the viability of the business and increase distributions to its creditors. In addition, treating the manufacturer's claim for damages arising from rejection of the contract as a general unsecured claim, rather than as a claim with any special priority, would promote the strongly held value of equality of distribution among unsecured creditors. Meanwhile, the manufacturer's demand that the estate perform the contract or give priority to its claim for damages would frustrate realization of these important values.⁸¹ In this simplified example, the reorganizing debtor's demands are fully consistent with the relevant strongly held values recognized under bankruptcy law.

80. The following discussion regarding a debtor's rejection of an ordinary executory contract is intended to display the most basic workings of the value-based model, and thus presents an extremely simplified sketch of the issues implicated in such a request. For more comprehensive discussions of the sometimes complex issues of law and policy in this context, see Jay Lawrence Westbrook, *A Functional Analysis of Executory Contracts*, 74 MINN. L. REV. 227 (1989) and Michael T. Andrew, *Executory Contracts in Bankruptcy: Understanding "Rejection,"* 59 U. COLO. L. REV. 845 (1988).

81. The rejection of an ordinary contract generally does not offend values connected with respecting nonbankruptcy rights. Ordinarily, nonbankruptcy law does not bar a party from breaching a contract, although the victim of the breach then may have a right to collect damages.

In such an instance, Congress appropriately established normative constraints that reflect these strongly held values. Section 365(a) of the Bankruptcy Code authorizes the reorganizing debtor, subject to the court's approval, to assume or reject any executory contract or unexpired lease of the debtor.⁸² This rule embodies a normative constraint that promotes the viability of the business, freeing the reorganizing debtor to reject unprofitable contracts. In addition, § 365(g) provides that rejection constitutes a breach of the contract not as of the time of the court's approval, but "immediately before the date of the filing of the [bankruptcy] petition."⁸³ Thus, the unsecured claim for damages arising from that breach is generally equal in status to all other unsecured claims that have arisen before the filing of the petition, promoting aims associated with equality of distribution.

Even in this context, however, courts have sometimes denied the debtor's request for rejection. After all, a reorganizing debtor might misjudge what is best for the estate and the reorganization effort. Hence, courts traditionally will not permit rejection unless the debtor can articulate a business reason that favors that action, the so-called "business judgment rule."⁸⁴ This judicially created deliberative constraint guides courts in deciding whether the rejection of a contract would be the most effective means of promoting business survival and increasing distributions to creditors.⁸⁵ In this context, the existence of relatively clear and settled aims simplifies the task of devising appropriate normative and deliberative constraints to guide decisionmaking.

In other contexts, the settling of aims poses a greater challenge. Let us now return to the court's decision whether to authorize rejection of a collective-bargaining agreement.⁸⁶ Participants on each side of the issue assert demands that are ex-

82. 11 U.S.C. § 365(a) (1988).

83. *Id.* § 365(g)(1).

84. *See, e.g.,* Control Data Corp. v. Zelman (*In re Minges*), 602 F.2d 38, 43 (2d Cir. 1979) (approving of the business judgment rule as a fair and flexible approach); Carey v. Mobil Oil Corp. (*In re Tilco, Inc.*), 558 F.2d 1369, 1372-73 (10th Cir. 1977) (holding that a court applying the business judgment rule must make findings as to the benefits or detriments of the proposed rejection to the estate).

85. Section 365(a) also embodies a specific deliberative constraint that supports ordinary deliberation in performing clarifying and coordinating functions: it creates an occasion on which the debtor must seek the court's approval for rejection. 11 U.S.C. § 365(a). Such an occasion provides a source of information about the current direction of the reorganization to the court and the participants. It clarifies the reorganization's more particular aims, encourages ongoing participation in their formation, and thus generally facilitates the court's coordination of present and possible future aims.

86. *See supra* notes 23-40 and accompanying text.

pressive of strongly held values recognized under bankruptcy law. The reorganizing debtor's rejection may be essential to promoting a successful reorganization. Denying such rejection, however, would realize other strongly held values of upholding the integrity of the collective-bargaining process and preserving substantive rights of unionized employees.

The mere existence of a conflict between strongly held values does not prevent the rulemaker—whether it be Congress or the rulemaking court—from settling aims once and for all. For instance, Congress might decide that the aims promoted in upholding collective-bargaining agreements are clearly more important than the aims that might be realized by allowing the reorganizing debtor to reject the agreement. It thus might adopt a rule that embodies an appropriate normative constraint. The effect of this rule would be to rank one set of aims over the other—to promote the integrity of the collective-bargaining process over achieving successful reorganizations.

Congress also may include specific deliberative constraints in the rule it enacts. Some legislators may argue that the denial of a rejection may result, in certain circumstances, in the immediate collapse of the business and the ensuing loss of union jobs, only defeating the aims that Congress seeks to protect. Congress therefore might enact a rule that, although generally barring rejection, does allow the reorganizing debtor to reject the agreement if denial of rejection would result in immediate liquidation of the business.⁸⁷ This rule embodies a specific deliberative constraint that guides the court in locating the most effective means for achieving the legislatively settled aims.

This kind of solution is not always feasible. Congress may conclude that the importance of values connected with each set of competing aims frustrates any attempt to reach a final ranking. It may be committed to protecting the special rights of unionized employees but may lack the will to enact a rule that undercuts the reorganization effort in all these cases. The clash among strongly held values may be inescapable, pointing to seemingly incompatible sets of aims.

Congress or the rulemaking court cannot ignore the conflict. It must confront a different task: to develop constraints that are

87. In Congress' silence and prior to the Supreme Court's decision in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984), certain courts in fact adopted such a rule. *See, e.g., Brotherhood of Ry., Airline & S.S. Clerks v. REA Express, Inc.*, 523 F.2d 164 (2d Cir.), *cert. denied*, 423 U.S. 1017 (1975), and *cert. denied*, 423 U.S. 1073 (1976).

capable of guiding a court's decisionmaking in the absence of settled aims. Even in the absence of settled aims, the bankruptcy court must be able to move forward in its deliberation and progress toward the formulation of a long-term plan. In this regard, the bankruptcy court stands in a position analogous to that of a person who is divided in career aims and confronts a crisis in personal autonomy.⁸⁸ The court must address the symptoms of the crisis of collective autonomy that constitutes financial distress—the inability of the enterprise to regulate itself toward chosen aims. The court must deliberate not merely to establish means but to establish the aims themselves. By engaging in “self-reflective” deliberation,⁸⁹ the court seeks to define which particular aims, among the eligible aims and sets of aims, to incorporate, and which to subordinate or exclude.

The court's evaluation of the relative desirability of such aims may vary depending on the individual circumstances of a bankruptcy case and the specific context in which the conflict arises. In any one reorganization case, the variety of conflicts is vast, and each conflict has its own salient characteristics. The meaning of a bankruptcy court's decision to allow a particular reorganizing debtor to reject a collective-bargaining agreement is, to this extent, unstable and indeterminate. How can such decisionmaking be constrained?

Of course, an omniscient, ideal Congress would be capable of fully constraining such decisions. It would identify all the combinations of particular aims among which the court might choose and then enact elaborate rules to determine the court's decision in each possible circumstance. An actual Congress, however, confronts its epistemic limits. It cannot know enough at the outset to enact rules that, once and for all, constrain all important aspects of the court's self-reflective deliberation. At least as a starting point, it must allow the bankruptcy court sufficient flexibility to reach a decision that responds to the characteristics of the individual bankruptcy case.

In *NLRB v. Bildisco & Bildisco*,⁹⁰ the Supreme Court recognized the importance of preserving the bankruptcy court's flexibility in decisionmaking of this kind.⁹¹ The Court rejected a rule that

88. See *supra* notes 59-66 and accompanying text.

89. See *supra* notes 59-64 and accompanying text.

90. 465 U.S. 513.

91. In addition to addressing the issue discussed here, the Court in *Bildisco* also addressed the question of whether the NLRB may find a debtor-in-possession guilty of

would have permitted rejection of a collective-bargaining agreement only if necessary to prevent immediate business collapse.⁹² This rule, the Court stated, "subordinates the multiple, competing considerations underlying a Chapter 11 reorganization" to the single consideration of avoiding the corporation's liquidation.⁹³ Such a definitive ranking of aims is "fundamentally at odds with the policies of flexibility and equity built into Chapter 11 of the Bankruptcy Code."⁹⁴ Although acknowledging that the ultimate aim of the process is a "successful rehabilitation," the Court recognized that "[d]etermining what would constitute a successful rehabilitation involves balancing the interests of the affected parties—the debtor, creditors, and employees."⁹⁵ It therefore concluded that the bankruptcy court must be free, in this context, to determine what constitutes a "successful rehabilitation" and thus to evaluate which particular aims, among the competing aims, most deserve recognition in any particular bankruptcy case.⁹⁶

Accordingly, the Court in *Bildisco* adopted an alternative rule designed to preserve this latitude.⁹⁷ According to this rule, the bankruptcy court may reject the collective-bargaining agreement if it finds "that the collective-bargaining agreement burdens the estate, and that after careful scrutiny, the equities balance in favor of rejecting the labor contract."⁹⁸ In balancing the equities, the bankruptcy court should not restrict itself to the question of whether rejection is needed to prevent the debtor's liquidation. It should consider the interests of the various parties to the reorganization, including creditors and both unionized and non-unionized employees, and take into account "any qualitative differences between the types of hardships each may face."⁹⁹ Through this wide-ranging deliberation, the court may achieve an informed perspective as to the likely impact of its decision on the parti-

an unfair labor practice when it unilaterally rejects or modifies a collective-bargaining agreement prior to formal approval by the bankruptcy court. *Id.* at 527. The Court held that, because filing of the bankruptcy petition renders the agreement "no longer immediately enforceable," *id.* at 532, the NLRB was barred from seeking to enforce the contract by charging the debtor-in-possession with an unfair labor practice, *id.* at 532.

92. *Id.* at 525.

93. *Id.*

94. *Id.*

95. *Id.* at 527.

96. *Id.*

97. *Id.* at 526.

98. *Id.*

99. *Id.* at 527.

cipants in this case. This perspective allows the court to evaluate the specific aims that vie for recognition in the estate's long-term plan.

Still, even in balancing equities, the court remains within the framework of rational constraint. Although no normative constraint operates to settle all the aims and thus to direct the court to a specific outcome, the court remains subject to related normative constraints that express and order aims that are associated with its ultimate decision. Under such related normative constraints, for example, the court may be required to dismiss the petition of a debtor who seeks bankruptcy relief without any legitimate intention to reorganize or liquidate, but having the sole purpose of rejecting a collective-bargaining agreement.¹⁰⁰ The court also is bound, subject to important exceptions, to respect the substantive nonbankruptcy rights of the unionized employees and other participants.¹⁰¹ In choosing among conflicting aims, the court is not in a normative vacuum but reaches its decision within the confines of strongly held values recognized under bankruptcy law.¹⁰²

The court's equitable decisionmaking is also answerable to principles of rational choice, which define the outer boundaries of rational decisionmaking.¹⁰³ Its decision in this context is only

100. See 11 U.S.C. § 1112(b) (1988) (authorizing dismissal of reorganization case "for cause"); see also Frank R. Kennedy, *Creative Bankruptcy? Use and Abuse of the Bankruptcy Law—Reflection on Some Recent Cases*, 71 IOWA L. REV. 199, 213 (1985) (indicating that courts have authority to dismiss reorganization petitions filed to achieve improper purpose of evading a collective-bargaining agreement). As a further related normative constraint, a court may be required to appoint a trustee or examiner for cause, including the fraud or dishonesty of current management. See 11 U.S.C. § 1104 (1988).

101. For example, unionized employees retain their right to strike, and the rejection of the agreement does not warrant the issuance by the bankruptcy court of an injunction against such action. See *Briggs Transp. Co. v. International Bhd. of Teamsters*, 739 F.2d 341 (8th Cir.), cert. denied, 469 U.S. 917 (1984).

102. In *Bildisco*, the Court itself imposed requirements that represent related normative constraints on the bankruptcy court's decisionmaking. For example, the Court held that the bankruptcy court, before permitting rejection, must be satisfied "that reasonable efforts to negotiate a voluntary modification have been made and are not likely to produce a prompt and satisfactory solution." *Bildisco*, 465 U.S. at 526. This constraint assures that the bankruptcy court's decision will not undercut certain aims associated with encouraging industrial self-regulation in the workplace.

103. Under the *Bildisco* approach, the bankruptcy court's decision is also subject to basic rules that represent concrete instances of these principles of rational choice. For instance, the reorganizing debtor has the burden of showing that rejection is necessary for a successful reorganization, and the court must "make a reasoned finding on the record why it has determined that rejection should be permitted." *Id.* at 527. This requirement forces the court to clarify which aims are most important and subjects those deliberations to judicial review.

part of a larger deliberative process culminating in the realization of a long-term plan. As the Court in *Bildisco* recognized, "The Bankruptcy Code does not authorize freewheeling consideration of every conceivable equity, but rather only how the equities relate to the success of the reorganization."¹⁰⁴ If possible, the court seeks to realize a long-term plan that not only orchestrates the current demands of various participants but, through the continuation of the corporate enterprise, creates a workable basis for accommodating future demands as well.

In balancing the equities, a court must thus consider how its decision in the immediate context will affect the range of aims that will be possible later on. As one consideration, the reorganizing debtor's rejection of a collective-bargaining agreement may pave the way for constructive negotiation among all the parties to the case. This negotiation may culminate in a long-term plan for accommodating the demands of other employees, creditors, shareholders, management, and the community as a whole. Like a person coordinating her activities to leave open possible lives as a musician and lawyer,¹⁰⁵ the court seeks to move toward defining the aims of the enterprise without foreclosing attainment of potentially important future aims.

Nonetheless, the flexibility that the court enjoys in coordinating aims may appear to invite abuse. Because a court may rationally favor reorganization over liquidation in many circumstances, it might exhibit an undue bias toward solutions that create added insurance against liquidation. When confronted with the cumulative demands of those constituencies favoring rejection against the sole union opposing rejection, the judge also may be influenced by the appearance of a consensus and discount the importance of upholding collective-bargaining agreements. If these particular aspects of its decision are not subject to specific constraints embodied in bankruptcy law, the court may make mistakes without violating any specific bankruptcy rule or committing reversible error.

Equitable decisionmaking, then, does introduce certain identifiable risks; but the existence of these specific and limited risks in this particular context does not mean that bankruptcy decisionmaking as a whole is somehow "irrational." Bankruptcy law supplies a rational foundation for bankruptcy decisionmaking. Precisely because bankruptcy law has a rational foundation, bank-

104. *Id.*

105. See *supra* text accompanying notes 65-66.

ruptcy critics are able to speak meaningfully of "mistakes" in bankruptcy. As a corrective to any identifiable risk of error, Congress need not impose a reductive method that forces courts to observe the dictates of economic theory. Instead, it may refine bankruptcy law as a response to financial distress by building upon the immanent rationality that bankruptcy law itself affords.

As one means of reducing the chance of error in this context, Congress might modify the relevant normative constraints, enacting additional rules that express general or specific aims. These enactments need not settle all the aims relevant to the court's decision, however. Congress may provide further normative guidance while preserving a significant measure of flexibility; it may enact rules that embody related normative constraints that do not determine the court's decision, but do exclude certain aims from recognition. Moreover, whatever the nature of the normative constraints imposed, Congress may adjust the relevant deliberative constraints, enacting rules that operate as concrete instances of principles of rational choice. Congress thus reforms bankruptcy law not by locating a reductive method of deciding all bankruptcy questions, but by adjusting the constraints by which bankruptcy decisionmaking in a particular context is guided.

Section 1113 of the Bankruptcy Code,¹⁰⁶ enacted within months after *Bildisco*¹⁰⁷ and after intense lobbying by various labor groups,¹⁰⁸ provides a good example of how meaningful bankruptcy reform is possible.¹⁰⁹ First, it embodies normative constraints to

106. 11 U.S.C. § 1113 (1988).

107. Section 1113 was enacted on July 10, 1984, as Subtitle J of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 390-91.

108. See William Serrin, *Labor Leaders Voice Concern*, N.Y. TIMES, Feb. 23, 1984, at 46.

109. Like any statute governing a controversial and difficult problem, § 1113 may well have practical flaws. Commentators have argued, for example, that the provision was inadequately drafted and that courts have misapplied the provision. See, e.g., Anne J. McClain, Note, *Bankruptcy Code Section 1113 and the Simple Rejection of Collective Bargaining Agreements: Labor Loses Again*, 80 GEO. L.J. 191, 206-10 (1991) (contending that courts have misinterpreted and manipulated what was intended as a pro-labor statute to defeat labor interests). In addition, § 1113 has complex practical origins, having been enacted in a highly politicized context and in a hurried manner. See, e.g., Rosalind Rosenberg, *Bankruptcy and the Collective Bargaining Agreement: A Brief Lesson in the Use of the Constitutional System of Checks and Balances*, 58 AM. BANKR. L.J. 293, 312-21 (1984) (describing the political process culminating in the enactment of § 1113). None of these factors, however, undercuts my basic point that bankruptcy reform reveals the workings of normative and deliberative constraints. A statute such as § 1113 may display the workings of rational constraints, even though it may represent an imperfect embodiment of those constraints or may be misapplied in practice. The question of whether, in principle, bankruptcy legislation has rational foundations is distinct from the question of whether the practical origins or practical application of the statute is itself rational.

promote certain strongly held values associated with the integrity of collective-bargaining agreements. In addition to requiring that the "balance of equities clearly favor[] rejection,"¹¹⁰ § 1113 demands that the court find that the reorganizing debtor bargained in good faith to reach a negotiated settlement with the union.¹¹¹ It regulates that bargaining process, requiring, among other things, that the debtor-in-possession present to the union a proposal for modifications, containing only "necessary modifications" that are "necessary" to the reorganization.¹¹² This rule forces the reorganizing debtor to limit the kinds of modifications that it might seek through rejection. Although this rule does not definitively settle the aims in favor of upholding collective-bargaining agreements,¹¹³ it does embody related normative constraints that encourage industrial self-regulation and discourage strategic use of the reorganization process to undercut union representation.

Furthermore, by demanding that the court determine that certain bargaining requirements have been met before allowing rejection, § 1113 includes concrete instances of principles of rational choice that guide the court in formulating a long-term plan. Whatever the substantive progress resulting from the parties' negotiation, both sides may have at least expressed their disagreement and, to some extent, explored its implications. In determining whether the bargaining requirements have been satisfied, the court gains insight into the nature of the demands

110. 11 U.S.C. § 1113(c)(3).

111. *See id.* § 1113(b), (c). However, in those cases in which modification of the agreement prior to the hearing on rejection is "essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate," *id.* § 1113(e), the court may order such interim relief without these findings, *id.*

112. *Id.* § 1113(b)(1)(A).

113. Most courts have interpreted the "necessary" requirement consistently with the basic approach in *Bildisco*, requiring only that the modifications proposed be necessary for the debtor's "long-term" survival. *See, e.g., In re Mile Hi Metal Sys., Inc.*, 899 F.2d 887 (10th Cir. 1990) (holding that a modification proposal places the burden on the debtor of proving that the proposal is made in good faith and that it contains necessary, but not absolutely minimal, changes that will enable the debtor to successfully reorganize); *Truck Drivers Local 807, Int'l Bhd. of Teamsters v. Carey Transp., Inc.*, 816 F.2d 82 (2d Cir. 1987) (holding that "necessary" does not mean essential or bare minimum, but puts on the debtor the burden of proving that its proposal was made in good faith). Such courts interpret § 1113 as leaving the competing aims largely unsettled and thus have continued to exercise considerable latitude in moving toward a long-term plan that might accommodate diverse aims. *See, e.g., Mile High Metal Sys.*, 899 F.2d at 890-93. Other courts, however, have read the requirement more strictly. *See, e.g., Wheeling-Pittsburgh Steel Corp. v. United Steelworkers*, 791 F.2d 1074, 1088-89 (3d Cir. 1986) (requiring that the proposal contain only modifications absolutely required for the debtor's short-term survival).

asserted by each side. This deliberation may clarify the potential consequences of its decision for the participants that the decision will affect. The court thus stands in a better position to evaluate the benefits and risks of its decisionmaking, and to reach an outcome that is less likely to offend principles of rational choice.

These bargaining requirements also may have the effect of easing the court's task in coordinating the realization of conflicting aims. Obligated to bargain in good faith, the reorganizing debtor and the union may in fact work out some of their differences before the time for hearing. When the time of hearing arrives, the court then will be faced with alternatives that are less dramatically divided. If the court approves rejection, the reorganizing debtor and union at least have a starting point for renegotiation that the court may enforce; and if the court denies rejection, the union may have already made concessions. With the divergence of possible aims somewhat narrowed, the court may be more likely to locate a creative solution that accommodates the competing aims as part of a long-term plan.

Section 1113 thus exemplifies the workings of bankruptcy criticism. It addresses the worries created by the court's balancing of equities, not by repudiating the court's equitable power, but by adjusting the constraints to which bankruptcy decisionmaking is subject. Although § 1113 embodies normative constraints that limit the kinds of aims that a court may recognize, it also includes deliberative constraints that support the court in exercising its remaining flexibility to the greatest advantage. The court may continue to work toward defining the aims that are most important in a particular case, progressing toward a long-term plan that is suited to the values and concerns of those it must govern.

In this context as well as others, the rule of equity has an essential role in bankruptcy decisionmaking. It allows a court to respond to an inescapable clash between strongly held values by mediating their relationship in the context of a particular bankruptcy case. This kind of flexibility creates a possibility that a normative constraint definitively ranking the aims would have foreclosed: the court may develop a creative solution that accommodates a range of divergent demands.

Even subject to these additional constraints, however, a court's decisionmaking must remain, at least to some degree, indeterminate. In a particular case, a court may abuse its flexibility and reach a decision that ignores important values or recognizes unimportant ones. The alternative, however, is much worse; it

would be to constrain courts from recognizing the values that are most important in responding to financial distress. The small pockets of indeterminacy are the price we pay for decisionmaking that is suited to the character of the problem it seeks to address.

III. CONCLUSION

This Article addresses perhaps the most important concern for a value-based account of bankruptcy law: can bankruptcy decisionmaking among diverse values be rational? The worry, as I suggested earlier, may be posed in the form of a dilemma.¹¹⁴ We are forced, it may seem, to choose between the economic account's method for bankruptcy decisionmaking that is rational but not good, and value-based methods for decisionmaking that are good but not rational.¹¹⁵

This Article proves that this dilemma is illusory, for each of its horns is in error. First, the economic account's method of decisionmaking is neither good nor fully rational. To be rational, bankruptcy decisionmaking must be appropriate to the character of the problem to be addressed. Although the economic account's method may be suited to solve a purely economic problem, it is entirely unsuited to resolve practical conflicts among diverse and incommensurable values that pervade financial distress. Thus, its reductive method is not fully rational for the same reason that it is not good: it fails to offer the kind of rational guidance that decisionmaking requires to respond to the human problem of financial distress.

A means of achieving rationality in bankruptcy decisionmaking exists. The second horn of the dilemma is also mistaken: value-based methods of bankruptcy decisionmaking are both good and rational. Bankruptcy law embodies normative and deliberative constraints that guide the court in rationally resolving conflicts among diverse human values. In some contexts, the relevant constraints may direct the court to pursue those aims that reflect our firm and unqualified commitments. When our commitments are less clearly defined, however, the court appropriately retains some measure of latitude, within a framework of constraint, to reach decisions attuned to the particular characteristics of the bankruptcy case. In either event, we need not resort to the severe logic of the economic account to determine the limits of

114. See *supra* text accompanying notes 1-16.

115. See *supra* text accompanying notes 15-16.

bankruptcy decisionmaking. Bankruptcy law itself has abundant resources for offering a kind of rationality that is suited to the human crisis of financial distress.