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# TOWARDS A JURISPRUDENCE OF PUBLIC LAW BANKRUPTCY JUDGING

*Edward J. Janger*

## ABSTRACT

*In this essay Professor Janger considers the role of bankruptcy judges in public bankruptcy cases, in light of the scholarly literature on public law judging. He explores the extent to which bankruptcy judges engage in the fiscal restructuring of a municipality use tools, and face constraints, similar to those utilized by federal district court judges in structural reform cases, where constitutional norms are at issue. In both types of cases, judges face a legitimacy gap that exists when vindicating legal norms requires detailed contextualized relief. Successful judges in both contexts are able to create, in effect, a legitimacy feedback loop consisting of five elements: (1) norm; (2) information; (3) participation; (4) consent; and (5) enforcement. These five elements work together in a loop. First, the legal norm that gives the judge jurisdiction over the dispute at the front end, an intermediate institution for developing information and facilitating consent in the middle, and finally judicial power intervenes to review the agreement and enforce it at the back end.*

## INTRODUCTION

This piece is a nested dialogue, and the start of a larger project.

Professor Melissa Jacoby, my co-panelist and frequent co-author has, in prior work, analyzed the role of the judge in the Detroit and now Puerto Rico bankruptcy cases, describing an emerging practice template that she calls, “the blueprint.”<sup>1</sup> She has taken a deep dive, and is steeped both in the cases themselves, and the literature. I, by contrast, am just beginning. I have written about the role of judges in bankruptcy cases, though not for a while, and not in the context of public bankruptcies.<sup>2</sup> This piece begins my own process of triangulation. Professor Jacoby and I do not always start in the same place, but we almost always end up agreeing. In this piece, I write alone, engaging with her work and seeking to create a dialogue between the jurisprudence surrounding judging in bankruptcy, and the civil procedure literature on “public law judging.”

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1. See Melissa B. Jacoby, *Federalism Form and Function in the Detroit Bankruptcy*, 33 YALE J. ON REG. 55, 108 (2016) [hereinafter Jacoby, *Detroit Bankruptcy*]; see also Melissa B. Jacoby, *Presiding over Municipal Bankruptcies: Then, Now and Puerto Rico*, 91 AM. BANKR. L.J. 375, 389–90 (2017).

2. See generally Edward J. Janger, *Crystals and Mud in Bankruptcy Law: Judicial Competence and Statutory Design*, 43 ARIZ. L. REV. 559 (2001) [hereinafter Janger, *Crystals and Mud*]; Edward J. Janger, *Muddy Property: Generating and Protecting Information Privacy Norms in Bankruptcy*, 44 WM. & MARY L. REV. 1801 (2003) [hereinafter Janger, *Muddy Property*].

The intellectual starting point is the classic series of articles by Abram Chayes, Owen Fiss, and Judith Resnik about “public law” judging in “structural reform” cases.<sup>3</sup> While that exchange focused on constitutional class action litigation in federal court, it is not lost on either of us that bankruptcy referees were engaging in “managerial” and often “structural judging” before the terms had been coined. Modern bankruptcy judges have been finding ways to guide multi-party, multi-dispute, multi-centric cases, albeit among private companies, for decades. Indeed, in the Bankruptcy Code of 1978, Congress felt it necessary to take steps to make the role of bankruptcy judges *less* managerial and more classically “judicial.”<sup>4</sup> While I previously considered the literature on public law judging as part of a defense the central role of bankruptcy judges in a system of negotiated dispute resolution,<sup>5</sup> Professor Jacoby has taken on a more ambitious task—evaluating the institutional structure of bankruptcy cases where entire political subdivisions are being financially reconfigured.

Hence the nested dialogues: (1) Janger with Jacoby over the “blueprint”; and (2) Janger engaging the literature on public law judging. My “modest” goal is to articulate a framework for a jurisprudence of public law bankruptcy judging. This essay is, therefore, divided into two parts: First, I will look to the Chayes morphology to situate the bankruptcy judge on the spectrum between traditional judge and “public law judge,” and contrast the role of bankruptcy judges in public bankruptcies with that in private restructurings. Next, I will evaluate the emerging blueprint for public bankruptcies in light of the subsequent literature on public law judging through the lens of the Detroit and Puerto Rico bankruptcies. In particular, I will explore the common problem of establishing the public legitimacy of judicial actions that reshape public institutions and even polities.

## I. THE MAPPING: PUBLIC LAW JUDGING V. BANKRUPTCY JUDGING V. PUBLIC BANKRUPTCY JUDGING

Most public interest lawyers familiar with class action practice would not see themselves as having much common ground with bankruptcy lawyers. They live on opposite sides of the public law/private law divide. This binary has always been descriptively inaccurate. Class action practice evolved, in part, out of “common fund” or “limited fund” cases where a court had to divide a pool of assets, be it a decedent’s estate or the proceeds of a liquidated

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3. See generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Owen M. Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

4. BRUCE G. CARRUTHERS & TERENCE C. HALLIDAY, *RESCUING BUSINESS: THE MAKING OF CORPORATE BANKRUPTCY LAW IN ENGLAND AND THE UNITED STATES* 470–505 (1998).

5. See Janger, *Crystals and Mud*, *supra* note 2 at 580–81; Janger, *Muddy Property*, *supra* note 2 at 1813–15, 1858–61, 1873.

firm, to pay everyone. A bankruptcy case is the classic “limited fund” case.<sup>6</sup> The bankruptcy judge simultaneously resolves disputes about the validity and priority of claims,<sup>7</sup> while also supervising the realization of value from the debtor’s assets or operations.<sup>8</sup> Determining how to maximize value further adds questions of governance and business judgment.<sup>9</sup> Thus, bankruptcy judges have always lived in a multiparty world, adjudicating claims of entitlement and priority against the residual estate of the debtor, but also choosing among business strategies and making projections about likely future outcomes. Indeed, the concept of group representation of classes of claimants predates the current Bankruptcy Code, dating back to § 338 of the former Bankruptcy Act.<sup>10</sup>

Business reorganizations are also structural. A financial restructuring, like school desegregation and prison reform, seeks to vindicate rights (whether financial or constitutional) by reshaping an ongoing institution. Public bankruptcies take this last area of commonality one step further. Where the restructuring entity is a municipality, territory, or sovereign state, the public/private line is obliterated. Bankruptcy judges must balance creditors’ claims against the needs of cities to provide services to their citizens. The judge’s adjudication is in the deepest sense constitutional, albeit with a small “c.” Here, I examine the bankruptcy judge as a “public law” judge, and ask, “To what extent does that descriptive model help us to understand public bankruptcy cases like Detroit, Puerto Rico, and even sovereign cases like Greece and Argentina?” In particular, I consider the blending of the practical (and political) aspects of dispute resolution with the legal legitimacy of the outcomes.

### **A. PUBLIC V. PRIVATE LAW JUDGING: THE CHAYES MORPHOLOGY**

In 1976, Abram Chayes claimed that a new model of litigation had emerged in contradistinction to the traditional account of adjudication.<sup>11</sup> Private law litigation was, as he described it:

- (1) bipolar

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6. For a classic example of a common fund case, *see, e.g.*, *Mullane v. Cent. Hanover Bank & Tr.*, 339 U.S. 306 (1950).

7. *See* 11 U.S.C. §§ 502, 506, 507 (2012).

8. *Id.* §§ 363, 1129.

9. The principle governance question in Chapter 11 is whether to reorganize or liquidate. This question implicates complex strategic questions about how to best realize value for the benefit of the estate by selling assets, selling the business, fixing the business, or recapitalizing the business.

10. Bankruptcy Act § 338 (originally codified at 11 U.S.C. § 738). § 338 was first added as § 44 of the Chandler Act of 1938, Pub. L. No. 696, 52 Stat. 840 (1938).

11. Chayes, *supra* note 3, at 1282–89.

- (2) retrospective
- (3) the remedy is tightly linked to the right
- (4) the episode/dispute is self-contained
- (5) the case is party initiated and controlled.<sup>12</sup>

Some of these traditional aspects of litigation were, as Chayes acknowledged, overdrawn. Declaratory judgments and injunctions can be prospective.<sup>13</sup> The case need not be strictly bipolar, but this does capture the image of a judge resolving a dispute about a property line, or awarding damages based on a past assault or breach of contract. Any lawyer, familiar with bankruptcy practice, at least since 1938 would, however, likely laugh and say “bankruptcy has *never* been like this.” Cases under Chapter 11, and before that—Articles X and XI, have always been multipolar, prospective, negotiated, involved the global affairs of a complex enterprise, and were often driven by events rather than adjudication of legal disputes, *per se*.<sup>14</sup>

Chayes then argues that the new model of public law litigation has a different set of characteristics:

- (1) The scope of the lawsuit is not exogenously given but is shaped primarily by the court and parties.
- (2) The party structure is not rigidly bilateral but sprawling and amorphous.
- (3) The fact inquiry is not historical and adjudicative but predictive and legislative.
- (4) Relief is not conceived as compensation for past wrong in a form logically derived from the substantive liability and confined in its impact to the immediate parties; instead, it is forward looking, fashioned ad hoc on flexible and broadly remedial lines, often having important consequences for many persons including absentees.
- (5) The remedy is not imposed but negotiated.
- (6) The decree does not terminate judicial involvement in the affair: its administration requires the continuing participation of the court.
- (7) The judge is not passive, his function limited to analysis and statement of governing legal rules; he is active, with responsibility not only for credible fact evaluation but for organizing and shaping the litigation to ensure a just and viable outcome.

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12. *Id.* at 1282–83.

13. *Id.* at 1293.

14. *See generally* DAVID A. SKEEL, JR., *DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* (2003).

(8) The subject matter of the lawsuit is not a dispute between private individuals about private rights, but a grievance about the operation of public policy.<sup>15</sup>

Again, to a bankruptcy lawyer, the reflex reaction is to exclaim, “bankruptcy cases have *always* been like that.” When these characteristics are mapped onto the various types of bankruptcy cases, it is striking how thoroughly Chapter 11, and even more so Chapter 9, appear to fit within Chayes’ morphology of public law litigation. One might argue that the modern Bankruptcy Code dates from 1978, two years after Chayes’ article. However, as noted above, the basic structure of a reorganization case dates back to the Chandler Act of 1938.<sup>16</sup>

Not all bankruptcy judging deviates from the classic model. While a Chapter 7 case is multi-party, it lacks the other aspects. The case is defined by the assets of the firm.<sup>17</sup> The relief is retrospective with regard to establishing claims to entitlement.<sup>18</sup> Once the assets have been distributed, the case is closed.<sup>19</sup> In liquidation cases, the bankruptcy judge takes cases as they come—defined by the parties. The rights adjudicated are principally private, and adjudication within an adversary proceeding within a bankruptcy case places the judge in an even more traditional judicial role.

By contrast, Chapter 11 shares many aspects of public law judging. In particular, the goals of preserving “going concern” value and/or to fix the business complicate the questions of value allocation and governance. The scope of the case is often shaped by the debtor in the first instance, but power may shift over the course of the case. Where a firm is structured as a group, the debtor may choose to have some subsidiaries file for bankruptcy, and others not. Where the debtor wishes to preserve commercial relationships, it may elect to pay critical vendors<sup>20</sup> or assume certain contracts.<sup>21</sup> As with a Chapter 7 case, the typical Chapter 11 case is multi-party and multipolar. The relief affects all of a debtors’ owners and creditors.<sup>22</sup> The disputes are often not between debtor and creditor, but among the creditors themselves. The cases are decidedly not retrospective. When the time comes to choose between confirming or rejecting a plan, or reorganizing or liquidating, the question is usually made on the basis of predictions about how the firm will

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15. Chayes, *supra* note 3, at 1302.

16. Legislative History of the Bankruptcy Act of 1938, Pub. L. No. 75-696, 52 Stat. 840.

17. 11 U.S.C. § 541 (2012).

18. *Id.* § 726.

19. FED. R. BANKR. P. 5009 (at least as a formal matter).

20. See, e.g., *In re Kmart Corp.*, 359 F.3d 866, 868–72 (7th Cir. 2004); *In re Just for Feet, Inc.*, 242 B.R. 821, 823–25 (Bankr. D. Del. 1999); *In re Lehigh and New England Ry. Co.*, 657 F.2d 570, 581 (3d Cir. 1981); *In re Penn Cent. Transp. Co.*, 467 F.2d 100, 102 (3d Cir. 1972); *In re Columbia Gas Sys., Inc.*, 171 B.R. 189, 191–92 (Bankr. D. Del. 1994).

21. 11 U.S.C. § 365.

22. *Id.* §§ 524, 1141.

perform in the future. Is the firm worth more dead than alive? Which strategy will realize the most value for the estate?<sup>23</sup>

Indeed, with regard to decisions about value maximization and allocation, the process is designed as a structured negotiation.<sup>24</sup> There are strict rules about the process of approval, including disclosure and voting rules, as well as minimum standards for confirmability. The precise details are worked out through negotiation.<sup>25</sup> Whether the court continues to be involved varies, depending on whether the case is a reorganization or sale. But even after a plan is confirmed or the business is sold, there may be avoidance actions or other litigation activities that continue, and the plan may even be modified if necessary.<sup>26</sup> Also, it is not as uncommon as one might think for firms to refile if the planned restructuring fails.<sup>27</sup> The extent to which a judge controls the structure of the case depends on the nature of the debtor and the style of the judge. It is difficult to generalize, but this is true about public law cases as well. Finally, in private Chapter 11 cases, the statute is federal, but the rights adjudicated are private.

This quick review of Chapter 11 judging in light of the Chayes' morphology suggests that the role of the judge in public law litigation may not be unique to public law litigation or litigation over public rights. This raises an important question: does the addition of a private v. public, or a citizen v. state aspect fundamentally change the nature of judicial role? Cases like Detroit and Puerto Rico provide a lens into this inquiry. And, at first glance, it might seem as if the difference is not all that great. Chapter 11 cases differ from Chapter 9 cases only in the "public" nature of the grievance, and even then, the difference might seem relatively small. After all, the dispute in a Chapter 9 case is still about adjustment of debt—how much a municipality is going to pay on its debt contracts.

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23. Much of bankruptcy scholarship is devoted to figuring out how to optimize the decision whether to continue the firm or not. *See, e.g.*, Edward R. Morrison, *Bankruptcy Decision Making: An Empirical Study of Continuation Bias in Small-Business Bankruptcies*, 50 J.L. & ECON. 381, 382–83 (2007).

24. *See* Melissa Jacoby & Edward Janger, *Ice Cube Bonds: The Price of Process in Chapter 11 Cases*, 123 YALE L. J. 862, 866 (2014).

25. 11 U.S.C. §§ 1122, 1125, 1126, 1129.

26. *Id.* §§ 544, 547, 548, 550 (avoidance); *id.* § 1127 (modification).

27. *See* Edward I. Altman, *Revisiting the Recidivism - Chapter 22 Phenomenon in the U.S. Bankruptcy System*, 8 BROOK. J. CORP. FIN. & COM. L. 254, 254 (2014); *see also* LYNN LOPUCKI, *COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURT* 97–102 (2006).

	Chapter 7	Chapter 11	Chapter 9
Scope shaped	No	Yes	Yes
Bilateral	No	No	No
Factors are projections about the future	No	Yes	Yes
Relief forward looking	No	Yes	Yes
Remedy negotiated	No	Yes	Yes
Continuing judicial involvement	No	Depends	Depends
Judge actively shapes the case	No	Yes	Yes
Public grievance/not private	No	No	Yes

## B. PUBLIC LAW JUDGING: BEYOND THE CHAYES MORPHOLOGY

The focus on the “techniques” of judging that form the basis for the Chayes morphology reduces the importance of the “public/private” distinction in public bankruptcies—the techniques are not so new after all. The public/private distinction looms much larger in “public bankruptcies” however, if we expand our understanding of public law judging v. private law judging beyond the Chayes morphology to include two more dimensions: (1) the role of law; and (2) the role of settlement. These two dimensions were added to the discussion by Owen Fiss and Judith Resnik respectively—Fiss in his classic article, *The Forms of Justice*,<sup>28</sup> and Resnik in her article *Managerial Judges*.<sup>29</sup>

In *The Forms of Justice*, Owen Fiss turns from process to substance, zeroing in on the relationship between right and remedy in public law litigation.<sup>30</sup> Fiss takes issue with Chayes, pointing towards the importance of the “law” in public law litigation—a link between the legal public law norm and the remedy.<sup>31</sup> Here, the public nature of the right has fundamental significance. Unlike a question of lien priority, or even of prospective valuation of a firm, Fiss is concerned with Constitutional litigation.<sup>32</sup> When the case is about giving meaning to the Equal Protection Clause of the Constitution, or the prohibition on cruel and unusual punishment, or the right to vote, the judge is forced to justify the remedy in a way that engages fundamental questions of justice and national values. Resnik’s work on managerial judging focuses on the strengths and weaknesses of the judicial mechanisms for forging that link, raising questions about the nature of a judge’s supervisory role.<sup>33</sup> While she is concerned with the same question, she focuses on how the judge may interact with the parties in managing both the liability and remedy phase of these public cases.<sup>34</sup>

28. See Fiss, *supra* note 3, at 1.

29. See Resnick, *supra* note 3, at 377. Cf. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) (“[T]he absence of a trial and judgment renders subsequent judicial involvement troublesome.”); Owen M. Fiss, *Justice Chicago Style*, 1987 U. CHI. LEGAL F. 1 (1987) (considering consent decrees).

30. Fiss, *supra* note 3, at 18–22.

31. *Id.* at 27.

32. *Id.* at 1–5.

33. Resnick, *supra* note 3, at 426–31.

34. *Id.*

## II. PUBLIC LAW JUDGING AND PUBLIC LAW BANKRUPTCY JUDGING: THE INSTITUTIONAL DYNAMICS OF LEGITIMACY

The most recent crop of public bankruptcy cases—Detroit and Puerto Rico—illustrate that, while the rights being adjudicated and adjusted are financial, the cases are as “structural” as they come. As a statutory (and Constitutional matter), Chapter 9 does not (and may not) displace the political governance institutions of a municipality.<sup>35</sup> The same is true of Title III of the Puerto Rico Oversight, Management, and Economic Stability Act of 2016 (PROMESA), which largely mirrors and incorporates the framework of Chapter 9.<sup>36</sup> Nonetheless, the restructuring of public debt has far-reaching implications for public institutions, and can only be implemented in partnership with political actors who will have to make hard political choices.

In her article, *Federalism Form and Function in the Detroit Bankruptcy*,<sup>37</sup> Professor Jacoby looks at how, as an institutional matter, the judge in Detroit created an institutional structure within the case that would allow for the cobbling together of the so-called “Grand Bargain”—a deal among the various stakeholders—and cleared the way for what appears to be a revitalization of the city.<sup>38</sup> While the rights at stake were not large “C” constitutional, their vindication had far-reaching small “c” constitutional implications. Cases like Detroit and Puerto Rico represent re-constitutive moments for the polity. This raises fundamental questions about how bankruptcy judges (or in the case of Puerto Rico, a district judge who used to be a bankruptcy judge) should conceive of their roles.<sup>39</sup>

On questions of law and fact, the role of the judge remains, and must remain, adjudicative and impartial—calling balls and strikes. But a considerable part of the value added by judges in cases like Detroit may be political. While it is possible to take the position that the “politics” must happen outside the courthouse, the costs and risks of doing so may be very high. Similarly, while it is possible to say that it is all politics, and the judge is just a mediator, the legitimacy costs of taking that view are also high. The “structure” of the case matters. The bankruptcy judge can serve a coordinating function, but it must be done carefully. With proper attention to preserving the judge’s adjudicative role, the bankruptcy court can be a forum for adjudication, a location for bargaining, and a facilitator of conciliation,

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35. 11 U.S.C. § 904 (2012).

36. Puerto Rico Oversight, Management, and Economic Stability Act, Pub. L. No. 114-187, §§ 301–317, 130 Stat. 549, (2016) (codified at 48 U.S.C. §§ 2161–2177 (2016)).

37. See generally Jacoby, *Detroit Bankruptcy*, *supra* note 1.

38. *Id.* at 70–71; Pete Saunders, *Detroit After Bankruptcy*, FORBES (Apr. 24, 2016, 1:17 PM), <https://www.forbes.com/sites/petesauanders1/2016/04/24/detroit-after-bankruptcy/#3229363263d7>.

39. See Nathan Bomey, *John Roberts Appoints New York Judge to Oversee Puerto Rico Bankruptcy*, USA TODAY (May 5, 2017, 1:59 PM), <https://www.usatoday.com/story/money/2017/05/05/puerto-rico-bankruptcy-laura-taylor-swain/101329204/>.

but the functions must be kept distinct. As Professor Jacoby has noted, Detroit provides a blueprint, and Puerto Rico may provide a test case.<sup>40</sup>

### A. THE PARADOX OF CHAPTER 9: DETROIT

The great puzzle of “structural” Chapter 9 cases like Detroit, is how a judge can do anything more than approve or ratify a restructuring already agreed to by the parties. When compared to Chapter 11, Chapter 9 can be described as a stripped-down bankruptcy statute or “bankruptcy lite.” The Code does not even provide the judge with the usual bankruptcy tools for supervising a case.<sup>41</sup> In a typical Chapter 11 case, the power of the bankruptcy judge derives, conceptually, from the court’s *in rem* jurisdiction over the estate. Indeed, the *in rem* nature of the court’s power has been essential to the Supreme Court’s reasoning in its cases on sovereign immunity.<sup>42</sup> A peculiarity of Chapter 9 (and PROMESA) is that no bankruptcy estate is created.<sup>43</sup> For constitutional and practical reasons, the bankruptcy court does not take jurisdiction over the municipality’s assets.<sup>44</sup> As a result, in precisely those cases where the institutions are the most complex, and the need for a judge to steer a complex case may be at its greatest, the actual formal power is weakest. To the extent the judge has power, it is not a power to command, but a power to coordinate and coax – to cobble together consent.<sup>45</sup> To do this in Detroit, the court had to construct a variety of structures and institutions within the case to engineer agreement among the key parties necessary to effectuate a legitimate solution.

#### 1. The Detroit Blueprint

To facilitate consent in Detroit, as Professor Jacoby explains, Judge Rhodes used a variety of techniques.<sup>46</sup> First, he used his power to adjudicate those issues that did come before him—such as lift stay motions or other case motions—as leverage, to push the parties toward agreement. He took an active role in questioning witnesses, and cajoling parties. For example, where the City of Detroit was not making sufficient progress toward developing a

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40. Jacoby, *Detroit Bankruptcy*, *supra* note 1, at 102.

41. *Id.* at 62–63.

42. *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 448 (2004) (“[O]ur cases indicate that the exercise of [the bankruptcy court’s] *in rem* jurisdiction to discharge a debt does not infringe state sovereignty.”); *see generally* *Alden v. Maine*, 527 U.S. 706 (1999); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

43. Section 541 of the Code is not among the Code provisions applicable in Chapter 9. 11 U.S.C. § 901 (2012). Neither is it included in section 301 of PROMESA. Puerto Rico Oversight, Management, and Economic Stability Act, Pub. L. No. 114-187, § 301, 130 Stat. 549 (2016) (codified at 48 U.S.C. § 2161 (2016)).

44. *See* *United States v. Bekins*, 304 U.S. 27, 54 (1938) (the Supreme Court imposed limits, based on the 10<sup>th</sup> Amendment, to a bankruptcy court’s power to displace a state’s sovereign powers).

45. Jacoby, *Detroit Bankruptcy*, *supra* note 1 at 62–63.

46. *Id.* at 88–90.

plan for dealing with all tort claims, in a lift stay hearing brought by a single tort claimant, the court suggested a willingness to lift the stay if progress was not made on an overall plan. Second, while Judge Rhodes made use of a court appointed mediator, Judge Rosen, to encourage settlement, the Court still played an active role in evaluating and reviewing the settlements that emerged from the mediations. Third, the Court created teams to help with various aspects of the case: (1) a fee examiner; (2) a tort mediation team; and (3) a feasibility team.<sup>47</sup> These teams had different compositions, but each one developed information for Judge Rhodes, allowed for outreach to affected parties, and created information for the politically accountable parties to negotiate settlements.<sup>48</sup>

## 2. The Legitimacy Feedback Loop

Through use of all of these ad hoc institutional devices, the judge in Detroit was able to stitch together a Grand Bargain among politicians, bondholders, and other affected constituencies. While each ad hoc grouping was constructed differently, they each engaged five distinct elements to achieve a legitimate and enforceable result: (1) legal norm; (2) information; (3) participation; (4) consent; (5) enforcement. These five elements work together in a loop. First, there is the legal norm that must be addressed by the court. That legal broad norm can be large—what is the sustainable debt load of Detroit? The legal norm element can also be narrow—is a particular creditor entitled to go forward with their tort suit? If one looks at the three teams—fees, torts, and feasibility—each had a legal norm that gave the judge jurisdiction over the dispute at the front end, an intermediate institution for developing information and facilitating consent, with judicial power intervening again to review the agreement and enforce it at the back end.

A judge's power, at both the front end, and the back of the case is binary—grant or deny approval or relief. In a case with structural elements like Detroit, however, the devil is in the details. The puzzle is how to work out those details in a multi-party political environment that is anything but binary. Here, the fee, tort, and feasibility teams worked with the mediator to obtain participation and consent from the appropriate actors, in the shadow of judicial approval. But legal leverage alone, without intermediate ad hoc institutions to broker consent, would likely not achieve a coordinated outcome. The dynamic, for better or for worse, was to use the leverage of a legal dispute over a single norm to foster an environment where a legitimate political solution could be arranged to vindicate the norm, without relying on an exercise of judicial power.

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47. *Id.* at 104–08.

48. *Id.*

## B. PUBLIC LAW JUDGING & PUBLIC BANKRUPTCIES: THE NORM-POWER PARADOX

This legitimacy loop suggests an unexpected overlap between “public law” constitutional adjudication and ostensibly private adjudication in public bankruptcies; this common feature might be called the Norm/Power Paradox. Where a relatively “inarticulate” legal norm regulates a public institution, the need for a detailed judicial remedy may be greatest precisely where the link to a specific legal command is at its most tenuous. On the public side, for example, a federal judge trying to deal with issues of school desegregation, cruel and unusual punishment in prisons, or substantive due process in public mental health institutions, may find it difficult to map a broad constitutional norm onto granular institutional practices. The Eighth Amendment does not say how many prisoners can be held in a cell or how much access to the library is required. As a result, a judicial order on busing or prison crowding may appear to be a naked exercise of judicial power unless tempered by techniques of public law judging, with attention to the legitimacy loop: information gathering, participatory consultation, facilitation and ultimately consent. To accomplish such a goal, the case must be organized in a manner that reflect the dynamics of the case itself, but with attention to the institution being reformed. This requires a measure of judicial statesmanship.<sup>49</sup> As others have commented, this may explain the heavy reliance on consent decrees in institutional and other structural cases<sup>50</sup>

In public bankruptcies the link between debt repayment and sustainable debt load can generate a disconnect between the underlying obligation and a granular remedy. While claimants may only be concerned with debt repayment, determining the sources of debt repayment and of a sustainable debt load requires social choices. While a water supply district or other instrumentality may be concerned only with its own ability to generate revenue, cities, counties, territories, and sovereigns cannot make financial promises without considering political institutions and political consequences. Public bankruptcies exist on a spectrum from project finance (small) to country (large). The higher the level of government involved, the weaker the enforcement institutions. This is true both in absolute terms—there is no such thing, at the moment, as a court seized with power to adjust national debts, and in relative terms—a bankruptcy judge has less power than a sovereign. For example, restructuring a public project like a power district or a stadium can be handled with the classic mechanisms of bankruptcy judging. Detroit requires more creativity, but the tools of public law judging come into play through the blueprint. When sovereign debt is involved, there is no national court system that can intervene to coordinate a solution.

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49. See *infra* text accompanying note 55.

50. Judith Resnik, *Judging Consent*, 1987 U. CHI. LEGAL F. 43, 44 (1987) (offering an “analysis of whether judicial involvement with consent decrees can be the source of their legitimacy”).

Multilateral attempts have been made, for example, through the IMF's proposed sovereign debt restructuring mechanism, and through similar efforts within the Eurozone.<sup>51</sup> Nonetheless, today, national debts are dealt with through negotiation among central bankers, rather than through the courts.

In both constitutional and public bankruptcy adjudication, the link between the norm being enforced and the consequences of enforcement may be tenuous, while the consequences of the necessary exercise of judicial power can be quite far-reaching. As a result, necessary exercises of judicial power may appear arbitrary.

### C. THE LEGITIMACY GAP AND THE LEGITIMACY LOOP

This may result in a legitimacy gap. Critical claims of judicial activism or overreach may rest on an obscure link between a highly specific remedy and a fairly generic legal norm: in public bankruptcy, higher taxes or reduced social services derive from the need to pay bonds; in constitutional litigation, detailed rules for operating a prison derive from a broad prohibition of cruel and unusual punishment. The "blueprint" used in Detroit and now Puerto Rico may offer a template for filling the legitimacy gap.

Bankruptcy judges and Article III judges adjudicating constitutional rights are, therefore, placed in a similarly difficult position by the need to give meaning to the Constitution in one case, and by the need to reconcile payment obligations, the Bankruptcy Code and the Constitution in the other.<sup>52</sup> In both cases the exercise is complicated by the lumbering realities of self-government. A court presented with a case like Detroit or Puerto Rico, or a school or a prison in freefall, must make a fundamental decision whether to rely on the parties work it out for themselves or try to help.

One is reminded of Justice Jackson's concurrence in the *Steel Seizure* case. There, in measuring the legitimacy of an exercise of presidential power, he identified three types of executive acts: (1) those expressly authorized by statute or in an area of delegated discretion; (2) those neither prescribed nor proscribed; and (3) those where the act is incompatible with statute.<sup>53</sup> Bankruptcy judges in public bankruptcies join public law judges on the judicial equivalent of the borderline between the first two categories. They act in a delegated area of discretion, or where the need to resolve a dispute requires the judge to act based on its power as a judge. Attention to the legitimacy loop described above may, however, allow the judge to expand the outer boundaries of category one, where legitimacy is greatest. The process of participatory negotiation around a legal norm, coupled with

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51. See François Gianviti et al., *A European Mechanism for Sovereign Debt Crisis Resolution: A Proposal* (Nov. 9, 2010), available at <https://core.ac.uk/download/pdf/5087087.pdf>.

52. 11 U.S.C. § 109 (2012); see generally *United States v. Bekins*, 304 U.S. 27 (1938) (discussing the scope of the bankruptcy power and limits imposed by the 10<sup>th</sup> Amendment).

53. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–55 (1952).

evaluation of the negotiated solution in light of the legal norm, may permit a bankruptcy judge to avoid less legitimate, more intrusive, exercises of power.

Robert Post has, in a different context, called this form of judging “judicial statesmanship.” In his article, *Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics*,<sup>54</sup> Post considers judicial use of the “avoidance canon”—construing statutes to avoid constitutional infirmity, as a way of realizing the ideal of “politically responsive law.”<sup>55</sup> I would like to suggest that public law bankruptcy judging, along the lines carried out in Detroit, carries the idea a step further. In cases like Detroit, it is not that the judge should be political, but that the case needs to accommodate the fact that to resolve a financial dispute, politics needs to happen.

Detroit needed to be reconstituted as a political and economic entity. Municipal cases require that peace be negotiated among bondholders, public workers, taxpayers, and the state, to name a few. At the end of the day, the burden sharing must be accepted, and acceptable, by everyone. The same is true of public law judging, where public institutions are being reorganized around a public norm. The norm must be identified and vindicated in the context of the particular institution. As in Detroit, the presiding judge needs to structure the case to enhance the legitimacy of the remedy. In this regard, the judge’s power is structural—to enlist the authority (and accountability) of political actors in service of the legal norm. The legitimacy of the remedy, then rests on the authority of the participants, rather than a standing exercise of power by the judge. In Chapter 9, under PROMESA, and in public law judging, the judiciary remains the least dangerous branch, but for that reason, it may also be the best situated to adjudicate these complex public disputes.

## CONCLUSION

In sum, the literature on public law judging offers a framework for evaluating the judicial interventions in Detroit and now in Puerto Rico. Public law judging, managerial judging, and judicial statesmanship are all on display in these cases. But the legitimacy loop illustrated in Detroit may also offer lessons to the public law judge about how to vindicate constitutive public norms through a judicial process that makes room for politics.

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54. See Robert Post, *Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics*, 98 CAL. L. REV. 1319, 1319–24 (2010).

55. *Id.* at 1319–20.