Coerced Releases: Are Non-Consensual Third Party Releases in Bankruptcy Code Chapter 11 Cases Allowed by The Constitution and the Bankruptcy Code?

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1. **Synopsis**

Chapter 11 reorganization plans allocate the reorganized debtor's value among its creditors and shareholders. When the reorganized debtor needs more capital to survive, the main shareholders sometimes provide it on the condition the court compel all the debtor's creditors and other shareholders to release them from claims related to the debtor ("coerced releases"). For instance, some creditors may contend the main shareholders injured them by defrauding them into extending credit to the debtor. This article examines the critical issues litigants have not raised and courts have not considered regarding whether federal courts can deprive the debtor's dissenting creditors and minority shareholders of their individual claims against the debtor's main shareholders without violating the Bankruptcy Code and the Constitution.

Determining the legality of coerced releases is facilitated by identifying each right they cause the creditors and shareholders to lose. Exposing the lost rights (the "Lost Rights") highlights the constitutional and statutory rights the coerced releases implicate. After determining which rights are violated, this article considers whether the Constitution's grant to Congress of power to enact uniform bankruptcy laws legalizes such violations, and shows it does not.

Coerced releases violate the following constitutional rights:

1. Violation of Fifth Amendment Substantive Due Process. The Fifth Amendment provides entities suffering takings of their property for public purposes are entitled to just compensation. As compared to eminent domain proceedings, the coerced releases have been ordered without allowing the parties whose claims are taken to prove the value of their individual claims without determining the value they receive, let alone proof it amounts to just compensation.

2. Deprivation of Fundamental Rights. One of the unenumerated, fundamental rights protected from denial and disparagement by its exclusion from the Bill of Rights and repeatedly recognized by the Supreme Court is the right to sue, because liberty and property rights are meaningless if their violations cannot be remedied in court. Coerced releases eliminate the creditors' and shareholders' rights to sue the shareholders receiving the coerced releases. The Supreme Court has rejected deployment of the bankruptcy power to deprive litigants of fundamental rights even when compelling business reasons exist.

3. Violation of Fifth Amendment Procedural Due Process. The constitutionality of bankruptcy law depends on a fair distribution of the

debtor’s assets to the stakeholders suffering discharge of their claims. Shareholders receiving coerced releases, however, do not make their full assets available for distribution to their creditors. Therefore, shareholders are left with assets for themselves, and could pay their personal creditors in full, while they pay an undetermined fraction of the discharged claims. That distribution scheme has no attributes of fairness compared to the distribution schemes in the Bankruptcy Code, especially in the two cases discussed here where it is possible the shareholders owed the debtors more than they paid them and thereby paid nothing extra to satisfy creditors’ individual claims against them.

4. Violation of Article III Judicial Power. Coerced releases are issued without allowing the creditors and shareholders suffering them to sue, quantify, and enforce their claims against the released shareholders. Withdrawal from Article III judicial cognizance of the creditors’ and shareholders’ tort and contract claims for money damages violates the Article III judicial power.

5. Violation of Separation of Powers Principle. If the Bankruptcy Code authorizes courts to deprive creditors and shareholders of their rights to sue the released shareholders in exchange for what the released shareholders contribute to the reorganization, Congress violated the separation of powers principle by authorizing the judicial branch to discard the common law and impose a remedy without a jury trial determining the released claims. And it did so without providing guardrails, thereby either unconstitutionally inviting the creation of federal common law, delegating its legislative power, or violating the constitutional avoidance, major question, and vagueness doctrines.

The Bankruptcy Power neither authorizes nor condones any of the foregoing violations. There are no Supreme Court opinions allowing deprivation of fundamental rights in bankruptcy cases.

The Bankruptcy Code, by limiting chapter 11 plans to provisions consistent with title 11, does not authorize coerced releases, except in asbestos cases. The releases of non-debtors have been inconsistent with the Bankruptcy Code’s disclosure requirements, best interest test, criteria for discharge, and distribution scheme. Thus, as a statutory matter, coerced releases are not authorized by the Bankruptcy Code, except in asbestos cases where they are statutorily authorized, but unconstitutional for all the foregoing reasons.

2. Two Recent Opinions[2] Discussing Coerced Releases

The issue of coerced releases has been spotlighted by two recent high profile circuit level decisions.

In *Millennium,* the bankruptcy court had confirmed a chapter 11 plan providing for extinguishment of the Title 11[3] debtor's[4] lenders' claims against the debtor's primary shareholders (who are also non-Title 11 debtors) over the objection of one of the lenders.[5] The other co-lenders holding 93% of the lenders' claims had negotiated and accepted the plan to avoid "corporate destruction" of the debtor.[6] Specifically, the debtor's primary equity holders would contribute $325 million to the reorganized debtor and transfer their equity interests to the debtor's lenders. The contribution would enable the reorganized debtor to continue the debtor's business by satisfying a settlement obligation to the United States Department of Justice and avoiding the loss of its Medicare billing privileges without which it could not survive. In exchange, the primary equity holders would be released from (i) the debtor's lenders' RICO and fraud action,[7] and (ii) the debtor's estate's claim to recover a $1.3 billion special dividend made to

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[2] In re Millennium Lab Holdings II, LLC, 945 F.3d 126 (3d Cir. 2019) (*"Millennium"*), and Purdue Pharma, L.P. v. City of Grande Prairie (In re Pharma L.P.), 69 F.4th 45 (2d Cir. 2023) (reverses District Court and holds bankruptcy court properly approved plan and made findings supporting nonconsensual releases), *rev'g*, *In re Purdue Pharma, L.P.,* 635 B.R. 26 (S.D.N.Y. 2021), vacating, "Modified Bench Ruling on Request for Confirmation of Eleventh Amended Joint Chapter 11 Plan," in *In re Purdue Pharma L.P.*, 633 B.R. 53 (Bankr. S.D.N.Y. 2021) (RDD, B.J.)). By order dated August 10, 2023, the Supreme Court recalled and stayed the Second Circuit's mandate and granted certiorari on the question whether coerced releases are authorized by the Bankruptcy Code. Harrington v. Purdue Pharma, L.P., 600 U.S. ___, Case No. 23-124 (2023). In this article, the Second Circuit's opinion is referred to as *Purdue Pharma* and the district court's opinion is referred to as *Purdue Pharma DC*.

[3] 11 U.S.C. §§ 101 et seq. is the Bankruptcy Code.

[4] For the balance of this article, "debtor" and "chapter 11 debtor" refers to a debtor subject to a bankruptcy case under Title 11 of the United States Code. A non-Title 11 debtor refers to a person or entity who owes money, but who is not subject to a case under Title 11.

[5] *Millennium*, 945 F.3d at 130-32.

[6] *Id.* at 132.

[7] *Id.* at 130, 132 n. 4.

non-debtor equity holders by the debtor while it was being investigated by the U.S. Department of Justice.[8]

In the objecting lender's view, "at the time of the credit agreement, Millennium knew of the legal scrutiny it was under by the government but made 'affirmative representations . . . which specifically indicated that there was no investigation pending that could result in a material adverse situation[,]' and Millennium further represented that it was not doing anything potentially illegal. (App. at 1309.) [The objecting lender] thus asserted that it had significant legal claims against Millennium and Millennium's equity holders . . . ."[9]

Millennium concluded the non-Article III bankruptcy court could order the coerced release because it was "integral to the restructuring,"[10] which was *Millennium's* mode of communicating it was within the bankruptcy power.[11] *Millennium* did not consider any of the foregoing constitutional issues, most likely because the litigants did not raise them.

In *Purdue Pharma*, the bankruptcy court confirmed the chapter 11 plan which granted the debtor's shareholders and family contributing $4.325 billion to fund the plan[12] (a) a coerced release from non-consenting creditors' claims against the owners and their family to the extent Purdue Pharma's conduct, omission, or liability is the legal cause or an otherwise legally relevant factor of the liability of the shareholders and their family,[13] and (b) a consensual release of the estate's potential claims arising out of

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[8] The district court's opinion affirmed by *Millennium* provides:

> "In exchange for the $325 million contribution, the proposed Plan provided the Non-Debtor Equity Holders with full releases and discharges of any and all claims against them and related parties - including any claims brought directly by non-Debtor lenders such as Appellants - and including claims relating to the $1.3 billion special dividend that had been paid to the Non-Debtor Equity Holders while the Debtors were in the midst of the DOJ Investigation…."

Opt-Out Lenders v. Millennium Lab Holdings II, LLC (In re Millennium Lab Holdings II, LLC), 591 B.R. 559, 564 n.10 (D. Del. 2018), *aff'd*, 945 F.3d 126 (3d Cir. 2019).

[9] *Millennium*, 945 F.3d at 132.

[10] *Id.* at 140.

[11] Article I, Section 8, Clause 4 of the United States Constitution authorizes Congress to establish "uniform laws on the subject of Bankruptcies throughout the United States," and is referred to in this article as the Bankruptcy Power.

[12] During pendency of the appeal to the Second Circuit, the Sacklers agreed to pay up to an additional $1.675 billion to settle with the objecting States, leaving the United States Trustee, some Canadian provinces, and some pro se claimants as the only parties pressing the appeal. *Purdue Pharma,* 69 F. 4th at 67-68.

[13] *Id.* at 57, 86.

transfers from Purdue Pharma to the owners' family of approximately $11 billion cash and other non-cash transfers, which reduced Purdue Pharma's assets by 75% and solvency cushion by 82%.[14] While Purdue Pharma successfully sold oxycontin to generate billions, at the end of the day, states, cities, individuals, and others contended the company was responsible for creating addictions at their expense.[15] Eight states, many Canadian municipalities and tribes, and individuals appealed the confirmation order because it eliminated their claims against the Sackler family and their affiliates who owned Purdue Pharma, which claims were particularized or direct claims — including claims predicated on fraud, misrepresentation, and willful misconduct under various state consumer protection statutes.[16] The United States District Court reversed, ruling "the Bankruptcy Code does not authorize such non-consensual non-debtor releases: not in its express text (which is conceded); not in its silence (which is disputed); and not in any section or sections of the Bankruptcy Code that, read singly or together, purport to confer generalized or 'residual' powers on a court sitting in bankruptcy."[17] The court thus vacated the confirmation order on statutory grounds and observed it was therefore not reaching the constitutional issues,[18] although it did rule the non-Article III bankruptcy judge could not constitutionally impose the nonconsensual releases.[19] The Second Circuit agreed with that ruling,[20] but overturned the district court's ruling that the Bankruptcy Code does not authorize nonconsensual releases. The Second Circuit ruled Bankruptcy Code section 1123(b)(6), in tandem with Bankruptcy Code section 105(a), authorizes nonconsensual releases,[21] without explaining how they are not inconsistent with other sections of the Bankruptcy Code (discussed below). Both the majority and concurring opinions in the Second Circuit

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[14] *Id.* at 59; Disclosure Statement for Fifth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and Its Affiliated Debtors, at 144-46, https://restructuring.primeclerk.com/purduepharma/Home-DocketInfo?DocAttribute=4218&DocAttrName=PlanDisclosureStatement&MenuID=9013#.

[15] *Purdue Pharma DC,* 635 B.R.at 34.

[16] *Purdue Pharma,* 69 F. 4th at 70.

[17] In re Purdue Pharma, L.P*.,* 635 B.R. 26 37-38 (S.D.N.Y. 2021). Another district court rejected coerced releases after determining the bankruptcy court lacked subject matter jurisdiction over many of the released claims because they did not relate to the bankruptcy, and lacked constitutional authority to determine them. Patterson v. Mahwah Bergen Retail Grp., Inc., 636 B.R. 641, 669-70 (E.D. Va. 2022).

[18] *Purdue Pharma DC*, 635 B.R at 38.

[19] *Id.* at 82.

[20] *Purdue Pharma,* 69 F.4th at 68.

[21] *Id.* at 72-73.

point to its precedent,[22] and the concurring opinion explains a contrary ruling requires an *en banc* hearing.[23]

The bankruptcy courts presiding over the Millennium and Purdue Pharma chapter 11 cases each implicitly assumed the Bankruptcy Code authorized them to order coerced releases and reasoned they could constitutionally do so as non-Article III judges. The district court in *Purdue Pharma* reasoned the issue of whether a non-Article III court could order constitutionally a coerced release meant little in the scheme of things and the real issue was whether the Bankruptcy Code authorizes any court to do so.[24] The Second Circuit agreed.[25]

Notably, neither *Millennium* nor *Purdue Pharma* discuss the constitutional issues implicated by coerced releases except for whether non-Article III judges can order them or an Article III district judge is required to do so. The decisions neither identify nor consider the Lost Rights the coerced releases take away. The legality of depriving creditors of the Lost Rights, however, must be ascertained to determine the legality of gestalt concept of coerced releases. The Lost Rights include:

1. Loss of the right to sue the shareholder for money damages.
2. Loss of the right to a jury trial.
3. Loss of the right to a judgment.
4. Loss of the right to enforce the judgment against the shareholder.
5. Loss of the right to discover the shareholder's assets in the enforcement proceedings.
6. Loss of the judicial branch' right and power to determine a creditor's common law claims against the released shareholder and to determine the appropriate common law remedy.
7. Loss of the legislative branch' right to legislate the rules for ordering coerced releases.[26]

3. **Coerced Releases Violate the Fifth Amendment Just Compensation Requirement**

[22] *Id.* at 75-76 and 85 (referring to In re Drexel Burnham Lambert Group, Inc. ("*Drexel*"), 960 F.2d 285, 293 (2d Cir. 1992), and In re Metromedia Fiber Network, Inc. *("Metromedia*"), 416 F.3d 136 (2d Cir. 2005)).
[23] *Purdue Pharma,* 69 F. 4th at 85.
[24] *Purdue Pharma DC*, 635 B.R at 37.
[25] *Purdue Pharma*, 69 F. 4th at 69.
[26] I attribute this article's identification of the Lost Rights and issues to my chemistry lab teacher in tenth grade at Horace Mann School. In the first class, Dr. Albert J. Kroner handed a short candle to each student and instructed us to write lists of all possible observations. Most of us wrote ten to twenty observations. Dr. Kroner showed us thirty six.

The Supreme Court consistently rules the Bankruptcy Power is subject to the Fifth Amendment's takings clause[27] in cases in which the bankruptcy statute authorizes takings of property interests after[28] the bankruptcy case commences.[29] Justice Brandeis ruled: "The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment."[30] While takings in bankruptcy cases frequently take the form of allowing the debtor to use or consume a creditor's collateral as opposed to allowing the government to outright acquire for itself property such as a railroad, the Fifth Amendment's taking clause can still apply.[31] The rationale is that the government has enacted a bankruptcy statute authorizing takings of property in one way or another to serve the public purposes of bankruptcy.[32] Those purposes are to equalize distributions among creditors holding claims of equal rank, and to foster employment, fresh start, and recovery by stakeholders.[33]

Although there are exceptions to the rule that the Bankruptcy Power is subject to the takings clause, there is no historical exception applicable to the claims taken in the context of coerced releases. The exceptions relate to traditional exercises of the Bankruptcy Power where payment of just compensation would thwart bankruptcy's dominant purposes of equalizing distributions among creditors holding claims of equal rank and providing debtors fresh starts.

The first exception is that "under the bankruptcy power Congress may discharge the debtor's personal legal obligation, because, unlike the States, it is not prohibited

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[27] U.S. Const. amend. V ("nor shall private property be taken for public use, without just compensation").
[28] There is a split of authority as to whether the Fifth Amendment compels full payment to creditors holding prepetition takings claims. Compare Cobb v. City of Stockton (In re City of Stockton), 909 F.3d 1256, 1268 (9th Cir. 2018) (rejects argument that takings claim "has protected status because it was originally founded as a constitutional claim") and Poinsett Lumber Mfg. v. Drainage Dist. No. 7, 119 F.2d 270, 272–73 (8th Cir. 1941) (just-compensation claim not "invested with a constitutional sanctity beyond other forms of liability" that limits its adjustment) with Fin. Oversight & Mgmt. Bd. v. Cooperativa de Ahorro (In re Fin. Oversight & Mgmt. Bd.), 41 F.4th 29, 41 ([st] 1st Cir. 2022) ("we move on to assessing whether the Fifth Amendment precludes the impairment or discharge of prepetition claims for just compensation in Title III bankruptcy [under PROMESA]. For the following reasons, we conclude that it does."), *cert. denied*, 143 S. Ct. 774 (2023).
[29] *See, e.g.,* United States v. Sec. Indus. Bank, 459 U.S. 70, 75 (1982); Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 589 (1935). Blanchette v. Conn. Gen. Ins. Corporations, , 419 U.S. 102, 162 (1974) (Douglas, J., dissenting).
[30] *Louisville Joint Stock Land Bank*, 295 U.S. at589..
[31] *Sec. Indus. Bank*, 459 U.S. at 78.
[32] *See, e.g.*, *Louisville Joint Stock Land Bank*, 295 U.S.at 602 (public interest required taking mortgagee's collateral to relieve mortgagors during the Great Depression).
[33] H.R. Rep. No. 95-595, at 16, 177-78, 200 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 5977-78, 6137-39, 6179; *Young v. Higbee Co*., 324 U.S. 204, 210 n.8 (1945).

from impairing the obligation of contracts."[34] Eliminating the debtor's personal obligation takes from the creditor its legal entitlement to the debtor's future earnings after bankruptcy. That is the crux of the Bankruptcy Power.[35] If the debtor had to pay creditors just compensation for being freed from the obligation to pay old debts from future earnings, bankruptcy would not provide debtors fresh starts.

The second exception is for voidable preferences.[36] When a debtor claws back money validly paid to a creditor within ninety days before bankruptcy, the Fifth Amendment does not require payment to the creditor of just compensation. If it did, the equality policy underlying bankruptcy law could not be carried out.

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[34] *Louisville Joint Stock Land Bank*, 295 U.S.at 589; *Blanchette*, 419 U.S.at 162 (Douglas, J., dissenting).

[35] Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 188 (1902).

[36] Normally, taking from a creditor money it received validly in payment of a lawful debt, would be a clear taking of the creditor's property for the public purpose of an equitable distribution, entitling it to just compensation under the Fifth Amendment. But, the debtor's estate's payment of just compensation for the disgorgement of a voidable preference to the estate would undo the creditor's disgorgement and block its redistribution to all creditors to carry out the equity policy to prevent some lucky creditors from being paid in full while others absorb all the losses. Before the Constitution was ratified the bankruptcy power was known to compel creditors to disgorge moneys the debtor had paid them shortly before bankruptcy, without any requirement that creditors be paid just compensation for the disgorged property. *See* Schoenthal v. Irving Tr. Co., 287 U.S. 92, 94 (1932). Thus, it is unsurprising the Supreme Court has signaled the bankruptcy power's claw back of voidable preferences is not subject to the Fifth Amendment's just compensation requirement: "If the argument is that Congress has no power to alter property rights, because the regulation of rights in property is a matter reserved to the States, it is futile. Bankruptcy proceedings constantly modify and affect the property rights established by state law. A familiar instance is the invalidation of transfers working a preference, though valid under state law when made." Wright v. Union Cent. Life Ins. Co., 304 U.S. 502, 517 (1938). Similarly, in Sexton v. Dreyfus, 219 U.S. 339, 344 (1911), Justice Holmes, writing for the unanimous court, observed: "We take our bankruptcy system from England, and we naturally assume that the fundamental principles upon which it was administered were adopted by us when we copied the system . . . ." *But see Sloan v. Lewis, 89 U.S. 150, 157 (1874)* ("The English cases referred to in the argument, in our opinion, have no application here. They are founded upon the English statutes and the established practice under them. Our statute is different in its provisions and requires, as we think, a different practice."). In *Sloan*, the issue was whether accrued interest at the time of an involuntary bankruptcy petition counted toward the minimum debt required to file an involuntary petition, and the court reasoned the United States statute governing the petition that accrued interest counted, thereby overriding any different English law.

The third exception is for the debtor's and bankruptcy trustee's hypothetical status as a judicial lien creditor.[37] Under nonbankruptcy law, unperfected security interests are enforceable.[38] But, in bankruptcy, the debtor is granted the hypothetical status of a judicial lien creditor which has the effect of taking from creditors the value of their unperfected security interests,[39] to serve the public purpose of depriving creditors of security interests undisclosed to other creditors.

Subject to the exceptions explained above, inside and outside bankruptcy, the taking of private property for public use invokes the Fifth Amendment's last command: "nor shall private property be taken for public use, without just compensation."[40] As the Supreme Court has observed, "nearly all state governments provide just compensation remedies to property owners who have suffered a taking . . . ."[41] Those remedies allow each property owner to prove the value of its taken property, and require the government to pay just compensation. But, in the instance of coerced releases, the creditors and shareholders whose claims against the main shareholders are involuntarily released, are not allowed to prove the validity and size of their claims, or how much they could collect directly from the released shareholders. Moreover, neither the chapter 11 debtor nor the released shareholders have been required to prove the value the released shareholders transferred into the reorganized debtor would provide other creditors and shareholders just compensation for the claims against the released shareholders they were forced to release. In the context of coerced releases, creditors' claims against shareholders are taken under color of the government's bankruptcy law and used to carry out the law's public purposes of fresh start, rehabilitation, and reorganization by releasing them in exchange for the shareholders' transfers of assets into the restructuring. The creditors receive no just compensation directly from the released parties. Instead, they theoretically receive incremental value indirectly through the released parties' transfers to the reorganized debtor that distributes its stock and debt or other consideration to its stakeholders.

No effort was made in *Millennium* or *Purdue Pharma* to determine the value of the released claims or whether the incremental value received by each entity suffering a taking of its claims equaled just compensation. While the courts approving coerced releases generally reason the coerced releases produce a result in the aggregate for creditors and shareholders superior to allowing each creditor and shareholder to sue the released shareholders, the evidentiary records have included neither evidence approximating the amounts of the valid released claims nor evidence of the shareholders' financial condition and ability to pay. Indeed, the courts' reasoning is more hope than fact given the courts do not know what the creditors could have

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[37] *See* 11 U.S.C. § 544(a)(1).
[38] *See* Uniform Commercial Code § 9- (a).
[39] *See* Uniform Commercial Code § 9-322(a).
[40] U.S. Const. amend. V.
[41] Knick v. Twp. of Scott, 139 S. Ct. 2162, 2176 (2019).

collected from the shareholders. Thus, the takings are clear, but there is only hope of indirect benefit and no showing the compensation paid to creditors matches the value taken from them.

In *Millennium* and *Purdue Pharma*, there is no evidence the released shareholders paid anything to benefit the creditors losing their claims, because in each case, the debtor's estate's claims against the released shareholders exceeded the amount the released shareholders paid to fund the reorganization plan. Therefore, if the debtors' estates' claims against the released shareholders were valid, the shareholders' funding of the reorganization plans did not even satisfy the shareholders' liabilities to the estates, let alone produce additional value in exchange for the released creditors' claims. Professor Adam J. Levitin explains that in the Purdue Pharma case, the coerced releases of the Sackler family were imposed by including them in a chapter 11 plan which included a settlement with the United States Department of Justice under which the department's civil and criminal forfeiture powers would consume all Purdue Pharma's value unless it emerged from chapter 11 as an ongoing public benefit company.[42]

Lack of disclosure of the shareholder's assets and how all its creditors are being treated also runs afoul of Supreme Court rulings in limited fund, non-optout class action settlements under Rule 23 of the Federal Rules of Civil Procedure. Some companies confronted with thousands of tort claims have attempted to resolve them with class action settlements in which they receive the equivalent of a bankruptcy discharge. In exchange for the distributions a company makes, all its tort claimants are barred from attempting to sue for more. The Supreme Court overturned such a settlement due to lack of proof the fund was limited and lack of "assurance that claimants are receiving the maximum fund, not a potentially significant fraction less."[43] In the cases of *Millennium and Purdue Pharma*, there were no assurances about the shareholders' assets, whether they constituted a limited fund, and whether they would be equitably distributed.

4. **Coerced Releases Violate Fifth Amendment Procedural Due Process**

No legal training is needed to discern unfairness if a billionaire runs up a credit card tab of $100,000 and is allowed to discharge the debt without paying it while keeping his or her fortune and paying in full other creditors. Our bankruptcy laws have never allowed discharges unless creditors receive the value of the debtor-estate's assets and they share the value on a fair basis. Unsurprisingly, this common sense has constitutional underpinning. The Constitution requires every debtor's assets to be distributed fairly which generally means all creditors' similar claims must be treated

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[42] Adam J. Levitin, *Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances* (March 23, 2022), Tex. L. Rev., Vol. 100 at 136-139, https://ssrn.com/abstract=3851339 or http://dx.doi.org/10.2139/ssrn.3851339.

[43] Ortiz v. Fibreboard Corp., 527 U.S. 815, 863 (1999).

relatively the same and, absent creditor consent, the debtor cannot retain assets while its creditors suffer losses.

Coerced releases provide the major shareholders a release of claims without any disclosure of the asset value the shareholders retain for themselves and the value they pay to their personal creditors who are not creditors of the debtor. Presumably, the shareholders retain sufficient assets to pay their personal creditors in full because the purpose of the coerced release is to enable them to avoid their own bankruptcies. In *Millennium* and *Purdue Pharma*, the economics of the coerced releases were further clouded by two facts. First, there was no determination of which claims against the shareholders were valid. Therefore, some invalid claims received value and the creditors and shareholders holding valid claims indirectly received value from the released shareholders in undetermined fractions of the valid claims. Second, in exchange for the shareholders' lump sum contributions to the reorganized debtors, the shareholders not only received coerced releases from the creditors and other shareholders, but also voluntary releases from the debtor's estate. In *Millennium* the shareholders were potentially liable to return a $1.3 billion fraudulent transfer claim for a special dividend, and in *Purdue Pharma* they were potentially liable to return over $10.43 billion they took from Purdue Pharma in prior years.[44] Thus, when the courts ordered coerced releases in *Millennium* and Purdue Pharma, the courts did not know how much was really being paid for them as compared to the estate claims.[45] The shareholders paid the estates much less than the estates' claims against them. The distribution of the shareholders' assets to the reorganized debtors, to the shareholders' personal creditors, and to themselves implicate the due process and just compensation clauses of the Fifth Amendment.[46]

The Fifth Amendment's due process clause (no person shall "be deprived of life, liberty, or property, without due process of law") requires that when the debtor receives a discharge, the debtor's assets must be distributed in a manner "consonant with a fair, reasonable, and equitable distribution of those assets."[47] The Bankruptcy Power allows courts to confirm chapter 11 plans distributing value in a manner rejected by classes of creditors and shareholders. But, the Bankruptcy Power also requires that "the creditor

[44] *See supra* notes 8 and 12 and associated text.
[45] In respect of *Purdue Pharma*, *see* Levitin, *supra* note 42, at 139. .
[46] U.S. Const. amend. V.
[47] Kuehner v. Irving Tr. Co., 299 U.S. 445, 452 (1937). *accord* ACC Bondholder Grp. v. Adelphia Communications Corp. (In re Adelphia Communications Corp.), 361 B.R. 337, 358 n.98 (S.D.N.Y. 2007) (citing *Kuehner*). Fair distribution has also been a hallmark of bankruptcy legislation. Stellwagen v. Clum, 245 U.S. 605, 617 (1918) ("The federal system of bankruptcy is designed not only to distribute the property of the debtor, not by law exempted, fairly and equally among his creditors, but as a main purpose of the act, intends to aid the unfortunate debtor by giving him a fresh start in life, free from debts, except of a certain character, after the property which he owned at the time of bankruptcy has been administered for the benefit of creditors.").

gets all the value of his lien and his share of any free assets."[48] To satisfy the fair, reasonable, and equitable distribution requirement, the debtors' assets and liabilities must be known. When they are unknown and creditors cannot prove the claims they make, due process is violated.[49]

In *Millennium* and *Purdue Pharma*, the shareholders' contributions to the reorganized debtors indirectly repaid an unknown fraction of the creditors' claims against them eliminated by the coerced releases, while the shareholders were left with assets for themselves and their personal creditors. Paying fractionally the shareholders' creditors who were also the debtor's creditors while retaining assets to pay the shareholders' personal creditors in full and retaining value for themselves violates the distribution schemes in both chapters 7 and 11 of the Bankruptcy Code which generally provide for equal treatment of similar claims and payment of creditors before owners. Subject to one exception, it is patent the shareholders' assets were not distributed in a fair, reasonable, and equitable manner allowed by United States bankruptcy statutes since 1800.[50] The exception is that chapter 11 debtors are allowed to distribute less than all their asset value when all impaired classes accept the plan and each creditor receives at least what it would receive in a chapter 7 liquidation.[51] In *Millennium* and *Purdue Pharma,* however, there was no determination of what each creditor would receive from the released shareholders in a chapter 7 liquidation. Those determinations

[48] Reconstruction Fin. Corp. v. Denver & R. G. W. R. Co., 328 U.S. 495, 533 (1946).

[49] The Third-Party Releases at issue in this case represent the worst of this all-too-common practice, as they have no bounds. The sheer breadth of the releases can only be described as shocking. They release the claims of *at least* hundreds of thousands of potential plaintiffs not involved in the bankruptcy, shielding an incalculable number of individuals associated with Debtors in some form, from every conceivable claim — both federal and state claims — for an unspecified time period stretching back to time immemorial. In doing so, the releases close the courthouse doors to an immeasurable number of potential plaintiffs, while protecting corporate insiders who had no role in the reorganization of the company. Yet, the Bankruptcy Court — acting with its limited Article I powers — extinguished these claims with little or no analysis. In doing so, the Bankruptcy Court exceeded the constitutional limits of its authority as delineated by the Supreme Court in *Stern v. Marshall*, 564 U.S. 462 (2011), ignored the mandates of the Fourth Circuit in *Behrmann*, and offended the most fundamental precepts of due process. *Patterson v. Mahwah Bergen Retail Grp*., *Inc.*, 636 B.R. 641, 655 (E.D. Va. 2022).

[50] Bankruptcy Act of 1800, 2 Stat. 19, c. 19; Bankruptcy Act of 1841, 5 Stat. 440, c. 9; Bankruptcy Act of 1867, 14 Stat. 517, c. 176; Bankruptcy Act of 1898, 11 U.S.C. §§ 1 et seq.; Bankruptcy Code, 11 U.S.C. §§ 101 et seq.

[51] *See* 11 U.S.C. §§ 1129(a)(7)(A)(ii), 1129(b)(1), and 1129(b)(2)(B).

were impossible because there were no determinations of the creditors' claims against the released shareholders.[52]

5. **Coerced Releases Violate Constitutionally Protected Unenumerated, Fundamental Right to Sue**

Coerced releases deprive creditors and shareholders losing their claims against the major shareholders of their day in court. Is Congress empowered to deprive persons and entities of their rights to sue shareholders and to enforce any judgments against the shareholders' assets? Congress is largely empowered by Article I, Section 8 of the Constitution. Nothing there grants Congress such a power, unless it is tucked inside the Bankruptcy Power, which it cannot be for reasons explained below. Conversely, do the creditors and shareholders have rights not to be divested of their day in court?

The Ninth Amendment to the U.S. Constitution provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Thus, the question becomes whether the creditors' and shareholders' right to sue is an unenumerated right the people did not in the Constitution render subject to the federal government's power. Here, the Bankruptcy Power plays a role. It is uncontested that federal bankruptcy courts can temporarily stay legal actions between non-debtor third parties when the litigation would impair the reorganization effort.[53] But the question here inquires one step further to permanence. Is the federal government empowered to deprive non-Title 11 debtors of their day in court permanently, or is the right to sue an unenumerated right reserved to the people. It is the latter.

The right to use the federal courts to protect a litigant's interest is an unenumerated right reserved to the people who are citizens of the United States.[54] Intuitively, this makes sense because no right, whether a property right or liberty right, has meaning if it cannot be judicially enforced.[55] Likewise, the Constitution's Privileges

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[52] *Purdue Pharma,* 69 F.4th at 87 (Wesley, J., concurring) ("Here, the Plan expressly disallows value being paid based on claims against nondebtors, that is, the Sacklers.").
[53] *See infra* note 71.
[54] WALTER F. MURPHY, JAMES E. FLEMING, & WILIAM F. HARRIS, AMERICAN CONSTITUTIONAL INTERPRETATION, 1083-1084 (1986) (cited in RANDY E. BARNETT, THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 38 (Randy E. Barnett, ed., George Mason University Press 1989).
[55] When Chief Justice Marshall, in *Marbury v. Madison*, 5 U.S. 137, 163 (1803), was confronted with the issue whether a person commissioned by the president of the United States as a justice of peace had a remedy if the signed commission was not delivered to him, Marshall declared the power of the judiciary branch over the legislative

and Immunity clause[56] expressly grants citizens of every state the privileges and immunities of citizens of the other states, which includes the right to sue in each state's courts.

The Supreme Court made clear in *Crandall v. Nevada*[57] and the *Slaughter-House Cases*[58] that "every citizen of the United States . . . is entitled to free access…to its judicial tribunals . . . in every State in the Union."[59] Similarly, the Supreme Court has made clear United States citizens have fundamental rights to sue in each state's courts.

In 1823, in response to a claim made under the Privileges and Immunity clause, the circuit court in *Corfield v. Coryell* ruled the privileges and immunities of citizens in all states were "fundamental; which belong, of right, to the citizens of all free governments."[60] Alongside the right of *habeas corpus*, the circuit court identified as a fundamental right protected by the Privileges and Immunity clause, the right "to institute and maintain actions of any kind in the courts of the state . . . ."[61] The right to sue and

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and executive branches. He started by quoting Blackstone's statement of the law in England, saying "it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress."

[56] U.S. Const., art. IV, § 2, cl. 1 ("The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.").

[57] Crandall v. Nevada, 73 U.S. 35 (1868) (affirmed overturning of state statute taxing all citizens using vehicles for hire to leave the state on ground it interfered with federal constitutional right of citizens to pass through each state).

[58] Slaughter-House Cases, 83 U.S. 36, 79 (1873) (upheld state statute limiting slaughtering to one area and granting slaughtering rights to one company on ground state's police power and nothing more was at issue).

[59] *Crandall*, 73 U.S. at 48 (quoting unopposed *dicta* from Chief Justice Taney's dissent in the *Passenger Cases*, 48 U.S. 283, 492 (1849) (state tax on passengers from foreign ports overturned as unconstitutional state tax on foreign commerce).

[60] *See* Corfield v. Coryell, 6 F. Cas. 546, 551-552 (Cir. Ct., E.D. Pa. 1823) (issue was whether right of state's residents to oysters from state's waters was a privilege and immunity of citizens of all states, and court ruled it was not because it was not a fundamental right to share in the property collectively owned by citizens of another state); Ward v. Maryland, 79 U.S. 418, 430 n.12 (1870), cites with approval Professor Thomas Cooley's treatise,THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (2d ed. Boston: Little, Brown & Co. 1871), which cites *Corfield* for the proposition in the text. Professor Cooley explains the Privileges and Immunities clause prevents "discriminations by the several States against the citizens and public authority and proceedings of other States." *Id.* at 36.

[61] *Corfield*, 6 F. Cas. at 551-52. The Supreme Court cites these pages of *Corfield* as "describing unenumerated rights under the Privileges and Immunities Clause, Art. IV, §2, as those 'fundamental' rights 'which have, at all times, been enjoyed by the citizens of the several states.'" Dobbs v. Jackson Women's Health Organization, 142 S. Ct.

defend is fundamental because it is the alternative to force and lies at the foundation of orderly government.[62] The Supreme Court has cited *Corfield* with approval and articulated and reaffirmed this fundamental principle several times,[63] and confirmed these fundamental rights are protected by the Constitution.[64] Fundamental rights and liberties are "deeply rooted in this Nation's history and tradition."[65] The United States has a "'deep-rooted historic tradition that everyone should have his own day in court.'"[66] The Supreme Court has ruled the right to enjoy property without unlawful deprivation is a personal right no less than liberty rights such as the rights to speak and travel.[67] As a practical matter, no property or other legal right has substance if its owner cannot enforce it in court or with legal self-help. The Supreme Court concludes personal rights to liberty and personal rights in property have no meaning without each other.[68]

This article would end here if Congress has no power to intrude on the people's fundamental rights, including the right to sue, protected by the Constitution. But, it does. Chief Justice John Marshall, the fourth chief justice of the United States Supreme Court, ruled Congress can impact fundamental rights when acting pursuant to a power expressly given for national purposes, or a power clearly incidental[69] to some power expressly given.[70] Indeed, it is virtually unchallenged that bankruptcy courts can *temporarily* enjoin creditors and shareholders from suing third parties needed to

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2228, 2248 n.22 2022).; *see Slaughter-House Cases*, 83 U.S. at 75-76 (refers to *Corfield* as leading case on Privileges and Immunities issue).

[62] Chambers v. Baltimore & O.R. Co., 207 U.S. 142, 148 (1907).

[63] *See, e.g.*, Howlett v. Rose, 496 U.S. 356, 382 n. 26 (1990) (quoting McKnett v. St. Louis & San Francisco R. Co., 292 U.S. 230, 232 (1934)); Canadian N.R. Co. v. Eggen, 252 U.S. 553, 560 (1920).

[64] Jones v. Helms, 452 U.S. 412, 418-19 (1981).

[65] Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977)).

[66] Martin v. Wilks, 490 U.S. 755, 762 (1989) (quoting 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4449, p. 417 (1981)).

[67] Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972).

[68] *Id.*

[69] U.S. Const. art. I, § 8, cl.. 18 (Congress has the power "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.").

[70] Gibbons v. Ogden, 22 U.S. 1, 203-04 (1824); Sturges v. Crowninshield, 17 U.S. 122, 193 (1819) ("When the American people created a national legislature, with certain enumerated powers, it was neither necessary nor proper to define the powers retained by the States. These powers proceed, not from the people of America, but from the people of the several States; and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument.").

effectuate a reorganization.[71] Thus, the question becomes whether the Bankruptcy Power or a power incidental to it includes the power to deprive persons *permanently* of their fundamental right to their day in court.

6. **The Bankruptcy Power Does Not Include the Power to Impose Coerced Releases Because They Deprive Litigants of Fundamental Rights**

Consistent with Article III, Section 2 of the Constitution providing the judicial power of the United States only extends to actual cases and controversies and not to advisory opinions,[72] the Supreme Court has articulated neither every component of the Bankruptcy Power granted to Congress nor every limitation on the Bankruptcy Power.[73]

But, the Supreme Court has consistently ruled fundamental rights are protected in bankruptcy. It has ruled "Congress may prescribe any regulations concerning discharge in bankruptcy that are not so grossly unreasonable as to be incompatible with fundamental law . . . ."[74] The Supreme Court has explained that while English law does not generally constrain the Constitution, English law's protections of fundamental rights continue to protect the fundamental right to trial:

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[71] *See, e.g.*, Caesars Entm't Operating Co. v. BOKF, N.A. (In re Caesars Entm't Operating Co.), 808 F.3d 1186 (7th Cir. 2015); Solidus Networks, Inc. v. Excel Innovations, Inc. (In re Excel Innovations, Inc.), 502 F.3d 1086, 1094-95 (9th Cir. 2007); Feld v. Zale Corp. (In re Zale Corp.), 62 F.3d 746, 761 (5th Cir. 1995); In re Western Real Estate Fund, Inc., 922 F.2d 592, 601-02 (10th Cir. 1990);

[72] *See, e.g.,* Valley Forge Christian College v. Americans United for Separation, 454 U.S. 464, 475-76 (1982); Camreta v. Greene, 131 S. Ct. 2020, 2028 (2011)("Article III of the Constitution grants this Court authority to adjudicate legal disputes only in the context of "Cases" or "Controversies."). Conversely, non-Article III courts can issue advisory opinions. Ex Parte Bakelite Corp., 279 U.S. 438, 450 (1929) ("These courts, this Court has held, are created in virtue of the power of Congress 'to exercise exclusive legislation' over the district made the seat of the government of the United States, are legislative rather than constitutional courts, and may be clothed with the authority and charged with the duty of giving advisory decisions in proceedings which are not cases or controversies within the meaning of article 3, but are merely in aid of legislative or executive action, and therefore outside the admissible jurisdiction of courts established under that Article.").

[73] *See, e.g.*, Wright v. Union Cent. Life Ins, 304 U.S. 502, 513-516 (1938) (footnotes omitted) ("'The subject of bankruptcies is incapable of final definition. The concept changes. It has been recognized that it is not limited to the connotation of the phrase in England or the States, at the time of the formulation of the Constitution. An adjudication in bankruptcy is not essential to the jurisdiction. The subject of bankruptcies is nothing less than 'the subject of the relations between an insolvent or nonpaying or fraudulent debtor and his creditors, extending to his and their relief.' This definition of Judge Blatchford, afterwards a member of this Court, has been cited with approval here."); Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 186 (1902).

[74] *Hanover Nat'l Bank*, 186 U.S. at 192..

> Certainly, these rules [English law] have no such restrictive effect in respect of any constitutional grant of governmental power (*Waring* v. *Clarke, supra*), though they do, at least in some instances, operate restrictively in respect of clauses of the Constitution which guarantee and safeguard the fundamental rights and liberties of the individual, the best examples of which, perhaps, are the *Sixth* and *Seventh Amendments*, which guarantee the right of trial by jury. That guaranty has always been construed to mean a trial in the mode and according to the settled rules of the common law, including all the essential elements recognized in this country and England when the Constitution was adopted.[75]

Consistent with protecting the fundamental right to trial, the Supreme Court has shown the Bankruptcy Power is subject to the constitutional right to jury trial in instances where it applied in England in 1789.[76] The Bankruptcy Power has never been held to allow violation of fundamental rights. To the contrary, the Supreme Court has consistently ruled the application of the Bankruptcy Power is subject to the Constitution, which protects fundamental and certain nonfundamental rights.

In 1949, the Supreme Court confronted the issue as to whether the United States district court sitting in bankruptcy could determine whether the owner of the tracks formerly leased to the debtor-railroad had validly authorized the sale of the tracks to the debtor which the debtor had negotiated to purchase so it could stay in business post-reorganization.[77] The Supreme Court ruled the Bankruptcy Power unquestionably gives the bankruptcy court power over the debtor, its property, and all rights asserted against it, but the debtor's purchase of formerly leased property from a non-Title 11 debtor does not involve rights asserted against the debtor and therefore the relief requested was outside the Bankruptcy Power, and the district court lacked jurisdiction to order the sale.[78] The Supreme Court went on to observe the jurisdiction over the debtor's dispute with the solvent lessor asserted by the district court presiding over the debtor's railroad

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[75] Continental Illinois Nat'l Bank & Trust Co. v. Chicago, R. I. & P. R. Co., 294 U.S. 648, 669 (1935). Trial by jury requires trial by jury as understood in 1789 under English law when the Judiciary Act was enacted. Patton v. United States, 281 U.S. 276, 288, 301 (1930) "(1) that the jury should consist of twelve men, neither more nor less; (2) that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect of the facts; and (3) that the verdict should be unanimous.").

[76] Granfinanciera , S.A. v. Nordberg, 492 U.S. 33, 53 (1989) ("*Granfinanciera*"). WIth consent of the litigant, government, and court, the jury trial right can be waived because it is not jurisdictional. Patton,281 U.S. at, 301.

[77] Callaway v. Benton, 336 U.S. 132 (1949) ("*Callaway*").

[78] *Id*. at 147.

reorganization was "an extension of these traditional powers not justified by any provisions of the Bankruptcy Act."[79]

Accordingly, the bankruptcy court in *Purdue Pharma* distinguished *Callaway* on the ground the bankruptcy court's jurisdiction was then narrower than it is today under 28 U.S.C. § 1334(b).[80] While it may have been narrower, the jurisdiction included jurisdiction to "[B]ring in and substitute additional persons or parties in proceedings under this Act when necessary for the complete determination of a matter in controversy."[81] Therefore, had the Supreme Court believed the Bankruptcy Power was broad enough to encompass claims of non-debtor creditors against non-debtor shareholders, the grant of statutory subject matter jurisdiction was not an impediment. Put differently, even if Congress were to draft bankruptcy subject matter jurisdiction to incorporate expressly creditors' actions against shareholders, there is no basis in the jurisprudence to believe the Bankruptcy Power in the Constitution authorizes that jurisdictional grant absent a direct impact of each of the actions on the debtor's estate. Additionally, the U.S. Court of Appeals for the Third Circuit ruled in *Combustion Engineering* that parties cannot create subject matter jurisdiction over a third party's actions by rendering a reorganization plan dependent on the third party's contributions.[82] Curiously, *Millennium* does not cite *Combustion Engineering*.

Significantly, the Supreme Court's rulings defining aspects of the Bankruptcy Power have not encompassed anything remotely akin to coerced releases or related disputes with third parties not involving the debtor's property. Rather, the rulings have focused on the relation between the debtor and creditor. Early on, the Supreme Court approved a lower court's attempt to describe the Bankruptcy Power: "it extends to all cases where the law causes to be distributed, the property of the debtor among his creditors; this is its least limit. Its greatest, is the discharge of a debtor from his contracts. And all intermediate legislation, affecting substance and form, but tending to further the great end of the subject -- distribution and discharge -- are in the competency and discretion of Congress."[83] Thus, when discharge entails impairing contractual obligations, the Bankruptcy Power authorizes impairment.[84] The Bankruptcy Power

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[79] *Id.* at 148.
[80] In re Purdue Pharma LP, 633 B.R. 53, 98 (Bankr. S.D.N.Y. 2021).
[81] Former Bankruptcy Act, 1898 Act § 2a(6) (1938).
[82] In re Combustion Eng'g, Inc., 391 F.3d 190, 228-229 (3d Cir. 2004) ("a debtor could create subject matter jurisdiction over any non-debtor third-party by structuring a plan in such a way that it depended upon third-party contributions. . . . by consent of the parties. Where a court lacks subject matter jurisdiction over a dispute, the parties cannot create it by agreement even in a plan of reorganization." (quoting *In re Resorts Int'l, Inc.,* 372 F.3d 154, 161 (3d Cir. 2004))).
[83] Hanover Na'l Bank, 186 U.S. at 186 (quoting Justice Catron in *In re Klein*, decided in the Circuit Court for the District of Missouri, and reported in a note to Nelson v. Carland, 1 How. 265, 277 (1843)).
[84] Ry Labor Executives' Ass'n v. Gibbons, 455 U.S. 457, 466 (1982).

"would clearly encompass a federal statute defining the mortgagee's interest in the rents and profits earned by property in a bankrupt estate."[85] The Supreme Court has concluded the framers of the constitution understood the Bankruptcy Power included more than simple adjudication of rights in the *res* of the debtor's estate, as shown by the first bankruptcy statute authorizing the bankruptcy commissioner appointed by the district court to imprison a person in possession of estate property.[86] Indeed, the Bankruptcy Power encompasses the power to punish bankruptcy by death, and the framers of the Constitution did not carve out that aspect of the Bankruptcy Power because they trusted Congress not to abuse it.[87]

Notably, the Bankruptcy Power "is not limited to the connotation of the phrase in England or the States, at the time of the formulation of the Constitution," and "[a]n adjudication in bankruptcy is not essential to the jurisdiction."[88] Thus, the fact the shareholders obtaining coerced releases were not debtors in bankruptcy cases is not what renders unconstitutional their releases provided by the coerced releases. That Congress can render any class of unfortunate and meritorious debtors eligible for bankruptcy, even though English law restricted bankruptcy eligibility to traders, "is really not open to discussion."[89] Similarly, the Bankruptcy Power authorizes Congress to allow debtors to invoke bankruptcy law voluntarily, and not only at the instance of creditors.[90] As shown above, it is their destruction of fundamental rights that shows coerced releases are not countenanced by the Bankruptcy Power and insulated from constitutional challenges. Unlike disgorgement of voidable preferences, discharges, and avoidances of otherwise valid property transfers, all of which take property without just compensation but are grandfathered as components of the Bankruptcy Power, coerced releases have no history of having been part of bankruptcy practice in England or in the United States until being invented in the twentieth century. We have found no reported decisions suggesting the Bankruptcy Power incorporates coerced releases. *Millennium* and *Purdue Pharma* do not mention the Bankruptcy Power.

In 1935, Charles Warren, a historian of United States legal history, authored his book, *Bankruptcy in United States History,* which describes the Bankruptcy Power deployed to that time and nowhere mentions any power to determine disputes between two entities not in bankruptcy.[91] The Supreme Court considered Charles Warren a "competent scholar" and attributed its landmark decision in *Erie R. Co.* v. *Tompkins*,[92]

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[85] Butner v. United States, 440 U.S. 48, 54 (1979).
[86] Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 370-71 (2006).
[87] Hanover Nat'l Bank,186 U.S. at 187.
[88] Wright., 304 U.S. at 513.
[89] Hanover Nat'l Bank,, 186 U.S. at 187.
[90] *Id.* at 185.
[91] CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 95-159 (Harvard University Press 1935).
[92] Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

overturning *Swift* v. *Tyson*,[93] to Warren's new research[94] of the Federal Judiciary Act of 1789[95] which *Erie* and *Swift* interpreted.[96] Warren concluded his book quoting Senator Henry Clay, in 1840, proclaiming a very broad picture of the Bankruptcy Power, but confining it to the debtor and his creditors: "I maintain that the public right of the State (Nation) in all the faculties of its members, moral and physical, is paramount to any supposed rights which appertain to a private creditor. This the great principle which lies at the bottom of all bankruptcy laws."[97]

Coerced releases violate multiple sections of the Constitution. The lack of federal Bankruptcy Power to deprive persons of their trial rights is confirmed by the procedural due process clause of the Fifth Amendment and the Supreme Court's decisions showing the bankruptcy law is subject to the Constitution. Indeed, if the shareholders receiving coerced releases had commenced their own bankruptcy cases, the creditors would have had their day in court. They would be allowed to file and prove their claims against the shareholders' estates and obtain fair distributions from it. The bankruptcy court trials would be nonjury trials because in England in 1789 bankruptcy was handled in the equity courts,[98] not the law courts. There is nothing in the Bankruptcy Code remotely suggesting creditors' can constitutionally be deprived of their fundamental trial right and liberty interest to sue the debtors' shareholders in state or federal court and enforce whatever judgments they procure either under state law or federal law.

While the Bankruptcy Power is generally subject to the Fifth Amendment, the Bankruptcy Power does transcend the Fifth Amendment's just compensation requirement in instances where enforcement of the just compensation requirement would undermine the essence of the Bankruptcy Power. As explained above, bankruptcy discharges the debtor from its obligation to pay creditors from future earnings.[99] If the debtor were required to compensate creditors for being discharged (in addition to providing creditors a fair allocation of their value at the time of bankruptcy), there could be no fresh start, which is one of the two dominant public policies underlying all bankruptcy law. Likewise, when the debtor takes back from a creditor money it validly paid to the creditor within ninety days of bankruptcy, there is no requirement that the debtor pay just compensation to the creditor.[100]

[93] Swift v. Tyson, 16 Pet. 1 (1842).
[94] Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49 (1923).
[95] 28 U.S.C. § 725 (1789).
[96] *Erie R. Co.,* 304 U.S. at 72-73.
[97] WARREN, BANKRUPTCY IN UNITED STATES HISTORY, *supra* note 93, at 159.
[98] Katchen v. Landy, 382 U.S. 323, 336-37 (1966); Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 689-90 (2015) (Roberts, CJ and Thomas, J., dissenting).
[99] *Hanover Nat'l Bank,* 186 U.S. at 188.
[100] *See supra* note 36.

7. **Coerced Releases Violate the Separation of Powers Principle by the Executive and Legislative Branches Allowing the Judicial Branch to Deprive Itself and Creditors of Judicial Cognizance over Common Law Claims**

The separation of powers principle permeates the Federalist Papers which explain why the Constitution adopts it to preserve liberty. In short, the early Americans did not want a government in which the same actor would have the executive, legislative, and judicial powers. The Federalist No. 47 explains: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny."[101] The Federalist Papers recognized the three governmental branches cannot be totally separate because each one needs security "against the invasion of the others."[102] Thus, for example, federal judges are appointed by the executive branch with the advice and consent of the Senate,[103] but the judges are protected from the executive and legislative branches with their lifetime tenure and irreducible compensation.[104] Likewise, the judiciary is dependent on the executive branch for the enforcement of its judgments.[105] Conversely, when the legislature enacts a law beyond its legislative authority, the judiciary has the duty and power "to declare all acts contrary to the manifest tenor of the Constitution void."[106]

The Supreme Court's decisions the last forty-one years discussing Article III's application in bankruptcy cases identify the key issue—separation of powers—but it has been overlooked in most lower courts' jurisprudence discussing coerced releases, including *Millennium* and *Purdue Pharma*. Starting with *Northern Pipeline* in 1982, the

[101] The Federalist No. 47 (James Madison).
[102] The Federalist No. 48 (James Madison).
[103] U.S. Const. art. II, § 2.
[104] U.S. Const, art. III, § 1; *see* The Federalist No. 51 (James Madison); The Federalist Nos. 78, 79 (Alexander Hamilton).
[105] The Federalist No. 78 ((Alexander Hamilton).
[106] *Id.* ("There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid."); Marbury v. Madison, 5 U.S. 137, 177, 180 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. *** Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.").

Supreme Court has determined on four occasions[107] whether a non-Article III bankruptcy judge can constitutionally determine contract and tort claims for money damages of debtors or trustees under Title 11 of the United States Code (the "Bankruptcy Code") against other persons or entities who are non-Title 11 debtors. The Supreme Court repeatedly explained its overall purpose was to carry out the separation of powers principle. Namely, no branch of the federal government should have its powers exercised by either of the other two branches. Therefore, as an example of one application of the separation of powers principle, if resolution of any claim requires exercise of the Article III judicial power, the claim cannot be determined by bankruptcy judges whose compensation and tenure are controlled by the legislative branch because then the legislature would have economic influence over the judges' decisions. Disputes requiring determination by the Article III judicial power can only be constitutionally determined by an Article III judge insulated from influence by the other branches by their lifetime tenure during good behavior and their irreducible compensation.

To carry out the separation of powers principle in each of the four cases arising in bankruptcy cases the Supreme Court resolved, most of the Lost Rights were not at stake. A chapter 11 debtor or bankruptcy trustee was suing a third party for money damages. There was no dispute the court would apply the common law, and the debtor could procure and enforce a judgment. The Supreme Court only had to determine whether Article III judicial power was required. If so, an Article III judge and jury were required to avoid the legislative branch from controlling the judges determining the actions.[108] If not, a non-Article III bankruptcy judge could resolve the claim without a

[107] Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) ("Northern Pipeline"); Granfinanciera , S.A. v. Nordberg*,* 492 U.S. 33 (1989); Langenkamp v. Culp, 498 U.S. 42 (1990) ("Langencamp"); and Stern v. Marshall, 564 U.S. 462 (2011)..

[108] *See* Commodity Futures Trading Commission v. Schor, 478 U.S. 833, 850-851 (1986) ("Article III, § 1, safeguards the role of the Judicial Branch in our tripartite system by barring congressional attempts 'to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating' constitutional courts, National Insurance Co. v. Tidewater Co., 337 U.S. 582, 644 (1949) (Vinson, C. J., dissenting), and thereby preventing 'the encroachment or aggrandizement of one branch at the expense of the other.' Buckley v. Valeo, 424 U.S. 1, 122 (1976) *(per curiam)*. *See Thomas,* 473 U.S., at 582-583; *Northern Pipeline*, 458 U.S. at 57-58, 73-74, 83, 86; *id.,* at 98, 115-116 (White, J., dissenting)." To the extent that this structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III, § 2. *See, e. g.,* United States v. Griffin, 303 U.S. 226, 229 (1938). When these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect..

jury because if the judiciary branch's Article III judicial power was not required, then there was no danger of the legislative branch controlling use of the Article III judicial power. Thus, the Article III judge and jury were the only variables affecting the carrying out of the separation of powers principle.

Seemingly in line with the Supreme Court's four decisions, *Millennium* and other courts addressing coerced releases have focused on whether an Article III judge and jury is required to order the coerced releases, without recognizing the overarching issue and objective was to carry out the separation of powers principle. Thus, they failed to identify the Lost Rights and determine whether a coerced release violates the separation of powers principle for reasons other than the lack of an Article III judge. And, they never considered fundamental rights and the Ninth and Tenth Amendments. When that is done, the separations of powers principle is violated in several ways because coerced releases allow the judicial branch to legislate requirements for coerced releases and allow the legislative branch to authorize the withdrawal from the judicial branch of the power to determine tort and contract claims in accordance with the common law. Therefore, unlike the four Supreme Court decisions in which an Article III judge could assure adherence to the separations of powers principle, when it comes to coerced releases, requiring an Article III judge and jury does not by itself carry out the separation of powers principle.

In *Plaut*,[109] the Supreme Court overturned a federal statute requiring federal courts to reopen certain final judgments on the ground it violated the separation of powers principle by vacating final judgments. En route to its decision, the Supreme Court explained it had previously identified two types of statutes in which the legislature had required the judicial branch to exercise judicial power in violation of Article III of the Constitution. In one type, Congress had required federal courts to apply new rules of decision to cases already pending.[110] In the other type, Congress had vested in the executive branch the power to review federal court judgments.[111]

The principle that the power to legislate does not include the power to legislate judicial decisions of preexisting disputes has also been firmly entrenched in the states' constitutions. Thomas Cooley's treatise on constitutional limitations under state law quotes from an 1851 decision of the Pennsylvania Supreme Court: " That is not legislation which adjudicates in a particular case, prescribes the rule contrary to the

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[109] Plaut v. Spendthrift Farm, 514 U.S. 211, 218 (1995).
[110] *Id.* (citing United States v. Klein, 80 U.S. 128 (1872)). *Plaut* added that since *Klein*, the Supreme Court ruled in *Robertson v. Seattle Audubon Soc'y.*, 503 U.S. 429, 441 (1992), that *Klein* does not take effect when Congress amends applicable law. *Plaut,* 514 U.S. at 218.
[111] *Plaut*, 514 U.S. at 218 (citing Hayburn's Case, 2 U.S. 409 (1792)).

general law, and orders it to be enforced. Such power assimilates itself more closely to despotic rule than to any other attribute of government."[112]

Coerced releases transgress the separation of powers principle in at least two ways already charted by the Supreme Court in *In re Murray's Lessee*[113] and in *United States v. Klein.*[114] In each instance, the violation is more extreme and egregious than the violations already stricken by the Supreme Court. On the assumption *Purdue Pharma* is correct (as shown below it is not) that Congress authorizes coerced releases in the Bankruptcy Code, Congress thereby authorizes courts to deprive entities of trials and judgments against released shareholders determined in accordance with the common law. Instead of rendering money judgments against the shareholders for torts and statutory violations to be proven by the creditors, the courts are authorized to release the creditors' claims and jury trial rights in exchange for the interests distributed to them in a debtor's chapter 11 plan to which the shareholders have contributed, with no determinations of how a creditor's benefit from the shareholders' contributions compares to what the creditor can collect from enforcing a judgment on its claims based on settled law.

In *Murray's Lessee*, in 1839 an auditor and comptroller of the United States Treasury Department had found a federal customs collector owed the United States over $1.37 million of customs he had collected but not turned over to the department. Without judicial involvement, a solicitor of the department had issued a distress warrant against the collector's property, and a United States marshal had conducted a sale of the property.[115] All this was done in accordance with a federal statute enacted pursuant to the legislative power in the Constitution to impose taxes and the executive power the statute granted to collect them.[116] The sale was challenged on the ground the sale remedy was implemented without judicial power required by the Fifth Amendment's bar against taking property without due process of law.[117] The Supreme Court determined that in England and the United States up through enactment of the Constitution, English sovereigns and state officials exercised the same remedies against their tax collectors without judicial involvement in accordance with the "law of the land" which were the words in the Magna Carta meaning due process of law.[118]

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[112] THOMAS M. COOLEYA TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 132 (2d ed. Boston: Little, Brown & Co. 1871) (quoting from Ervine's Appeal, 16 Pa. 256, 266 (1851)), https://repository.law.umich.edu/books/10.
[113] Murray v. Hoboken Land & Improvement Co., 59 U.S. 272, 284 (1856).
[114] United States v. Klein, 80 U.S. 128 (1871).
[115] *Murray,* 59 U.S. at 274.
[116] *Id.* at 281.
[117] *Id*. at 274-75.
[118] *Id.* at 276-79.

The Supreme Court concluded the exercise by the Treasury Department of the foregoing acts and remedy pursuant to the federal statute was a valid and conclusive exercise of executive power which cannot be made subject to the judicial power unless Congress creates and consents to judicial review.[119] Thus, the Supreme Court reasoned that when a remedy was determined and implemented without judicial involvement by the sovereign in England and by state officials in the United States, the matter subject to the remedy was controlled by executive power and was not subject to judicial power.[120] The Supreme Court thereby carried out the separation of powers principle and established precedent showing when a matter is within the executive power and determined as a "public right," without judicial power.[121]

Consistent with the separation of powers principle, the Supreme Court also established the inverse. It established the rule religiously followed today that if the claim would have been resolved in the law courts in England, as opposed to being determined unilaterally by the sovereign, the claimholder is entitled in federal court to have its claim determined by the Article III judicial power. The Supreme Court ruled: "To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination."[122]

When applied to coerced releases, there is no dispute the creditors' common law tort actions against the shareholders were quintessentially subject to judicial cognizance at common law. Therefore, without violating the separation of powers principle, Congress as the legislative branch cannot constitutionally withdraw them from judicial cognizance or authorize any Article III or non-Article III judge to do so. That would be a violation of the judiciary's Article III judicial power and the separation of powers principle whereby a bankruptcy statute enacted by Congress and the President of the United States would prevent a creditor from proving its claim against a shareholder in a jury trial and usurp the judiciary's power to determine the claim. Even though the Bankruptcy Code, if it authorizes nonconsensual releases at all, allows the judge to

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[119] *Id.* at 285.

[120] *Id.*at 284-85. The Supreme Court went further and pointed out that history also established powers private parties can exercise without judicial involvement such as the recapture of goods by the lawful owner. *Id.* at, 283 . Indeed, the Uniform Commercial Code grants secured parties the power to exercise self-help possession of their collateral without judicial process if the creditor proceeds without breaching the peace. Uniform Commercial Code § 9-609(b)(2). As the Supreme Court points out, however, a private party exercising a remedy without judicial process can be sued, while the government exercising executive power can only be sued with its consent and actions pursuant to lawful governmental directions cannot be challenged. *Id.*

[121] *Murray,,* 59 U.S. at 284.

[122] *Id.*

determine whether to impose them, the legislature cannot deprive the judicial branch of the power to determine common law claims even if the judicial branch consents.[123]

In *United States v. Klein*,[124] following the Civil War, Congress had enacted a law overturning the impact of presidential pardons to persons who had aided the rebellion, but who pledged allegiance to the Constitution and the union of the states as a condition of receiving the pardons and the return of their confiscated property. The law required federal appellate courts reviewing lower court determinations granting pardoned litigants the returns of their property taken because they supported the rebellion, to dismiss the cases for lack of jurisdiction thereby undoing the judgments requiring their property to be returned. The Supreme Court overturned the law because it could not enforce it "without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it."[125] The Supreme Court ruled the law separately violated the separation of powers principle because it impaired the effect of a pardon and thereby infringed the constitutional power of the President.[126]

Coerced releases authorize the court to discard settled law applicable to the creditors' claims against the released shareholders, and to impose a different remedy, namely an interest in the reorganized debtor which interest is enhanced by the shareholders' contribution. Thus, if the Bankruptcy Code authorizes coerced releases, Congress authorizes the judiciary to impose rules of decision applicable to the released claims, which rules are at odds with settled law. In *Klein*, Congress required appellate courts to apply different decisional law as opposed to simply authorizing them to do so. Therefore, the question for coerced releases becomes whether the courts' voluntary decision to discard settled law applicable to the creditors' released claims, eliminates the separation of powers violation. It does not.

It is both hornbook law and logical that neither any one judge nor all Article III judges in the United States are empowered to authorize a violation of the separation of powers principle built into the Constitution. "The Constitution's division of *power* among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment."[127] Therefore, it does not cure the coerced release's violation of the separation of powers principle if one or all Article III judges order the coerced release. Because bankruptcy judges lack

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[123] *See infra* note 127.
[124] United States v. Klein, 80 U.S. 128 (1872).
[125] *Id.* at 146..
[126] *Id.* at 147..
[127] New York v. United States, 505 U.S. 144, 182 (1992) (even if State officials consent, Congress may not exercise power reserved to the States); Buckley v. Valeo, 424 U.S. 1, 118-37(1976) (Congress cannot infringe on President's appointment power even if President consents); INS v. Chadha, 462 U.S. 919, 944-59 (1983) (legislative veto violates the separation of powers even if President consents).

lifetime tenure during good behavior[128] and an irreducible compensation,[129] they are not Article III judges. As non-Article III judges, their elimination of the creditors' entitlement to a trial based on settled law would be an act of the executive branch snatching power from the judicial branch while depriving creditors of their fundamental rights, and most certainly a separation of powers violation.

As explained above in Section 4, under the Ninth Amendment, regarded as a truism, powers are reserved to the States and the people if the Constitution does not grant them to the federal government. The Constitution nowhere grants any branch of the federal government the power to deprive a person or entity of its due process right to a day in court, Seventh Amendment jury trial, judgment, and enforcement of its common law contract and tort claims against another person or entity when the latter is not a debtor under a bankruptcy statute.

8. **Coerced Releases May Also Violate the Ninth and Tenth Amendments and the Separation of Powers Principle by Delegating to the Judicial Branch the Power to Legislate the Requirements for Coerced Releases, But Certainly Violate the Major Questions and Vagueness Doctrines**

As shown above, if the Bankruptcy Code authorizes coerced releases, it violates the separation of powers principle for the legislative or executive branch to authorize the withdrawal from the Article III judicial power of tort claims for money damages against shareholders and to authorize their transformation into some type of participation in a chapter 11 plan. The authorization of coerced releases could also violate the separation of powers principle by a delegation of legislative power to the judicial or executive branch depending on whether the coerced releases are imposed by Article III or non-Article III judges. But, the Supreme Court has largely refrained from dealing with the delegation of legislative power directly, as opposed to dealing with it by means of the major question, vagueness, and constitutional avoidance doctrines.

The Supreme Court holds legislative action has "the purpose and effect of altering the legal rights, duties, and relations of persons . . . ."[130] Manifestly, coerced releases alter legal rights, duties, and relations of persons. The courts imposing

[128] *See* 28 U.S.C. §§ 152(a)(1), 152(e).
[129] *See* 28 U.S.C. § 153(a).
[130] *INS*, 462 U.S. at 952 (House of Representatives, without Senate and President, violated separation of powers by exercising legislative power when it overruled executive branch decision not to deport alien). Similarly, a statute allowing the SEC to determine whether to prosecute civilly a person for securities fraud within the SEC in front of an administrative law judge or in an Article III court, improperly delegated legislative power to the SEC in violation of the separation of powers principle. Jarkesy v. SEC, 34 F.4th 446, 451-464 (5th Cir. 2022), *rehearing denied*, 51 F.4th 644 (5th Cir. 2022).

coerced releases based on standards they create do all those things, making them look like legislatures.[131] But. based on the understanding Congress cannot do its job without delegating power, the Supreme Court holds constitutional Congressional delegations of authority as long as Congress provides an intelligible principle to which the power's delegee is directed to conform.[132] The Supreme Court has ruled only twice Congress unconstitutionally delegated authority and almost never second guesses the degree of policy judgment Congress can leave to those executing or applying the law.[133] Conversely, by determining delegations fail under the major question, vagueness, or constitutional avoidance doctrines the Supreme Court has achieved the same outcome as holdings that Congress unconstitutionally delegated legislative authority.[134] These doctrines, however, operate through statutory interpretation and are discussed below in that context.

If, for argument's sake, the Bankruptcy Code authorizes coerced releases, it provides no rules governing them other than they cannot be inconsistent with the Bankruptcy Code. For instance, it provides no rules identifying the circumstances under which third parties' tort claims against the debtor's shareholders can be transformed into chapter 11 plan participations without determining each creditor's claim, and how the adequacy of the shareholders' contributions should be determined. *Purdue Pharma*, in line with *In re Dow Corning Corp.*,[135] prescribes seven rules.[136] Years earlier, the same appellate court in *Drexel* opined the coerced release should be "important" to the reorganization plan.[137] Another court primarily looked to whether there were "unusual circumstances" requiring funds from the released party.[138] *Millennium* discussed only

[131] Most recently, on the ground the lower court engaged in legislative creation of constitutional causes of action better suited for Congress, the Supreme Court overturned a ruling prescribing First Amendment and Fourth Amendment constitutional damage actions against a border-patrol agent for retaliation and use of excessive force. Egbert v. Boule, 142 S. Ct. 1793, 1804 (2022).
[132] Gundy v. United States, 139 S. Ct. 2126, 2123 (2019); Mistretta v. United States, 488 U.S. 361, 372 (1989); J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).
[133] *Gundy*,s 139 S. Ct. at 2129 (citing Whitman v. Am. Trucking Assns., Inc., 531 U. S. 457, 474-75 (2001) (quoting Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).
[134] *Gundy*, 139 S. Ct. at 2141, 2142 (Gorsuch, J., dissenting).
[135] Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.), 280 F.3d 648, 658 (6th Cir. 2002).
[136] *Purdue Pharma*, 69 F.4th at 79-82.
[137] Drexel, 960 F.2d at 293..
[138] *In re Dow Corning Corp.*, 280 F.3d at 65 (seven-factor test for approval of coerced releases); SE Prop. Holdings, LLC v. Seaside Eng'g & Surveying (In re Seaside Eng'g & Surveying), 780 F.3d 1070, 1079 (11th Cir. 2015) (adopts *Dow Corning* test).

whether the non-Article III bankruptcy judge can constitutionally order coerced releases and whether the appeal was otherwise equitably moot.[139]

In the absence of standards and rules for coerced releases the courts have been crafting them on a case-by-case basis in plan confirmation opinions. It is tempting to conclude Congress violated the separations of powers principle by delegating legislative power to the judicial branch or executive branch. The question is whether the Supreme Court would rule the requirement in Bankruptcy Code section 1123(b)(6) that a chapter 11 plan be consistent with Bankruptcy Code qualifies as an intelligible principle governing coerced releases. By authorizing coerced releases, the legislative branch would also impose collateral damage on the creditor having a common law tort claim against a shareholder. They are deprived by the legislative branch of the Lost Rights. As explained above, this violates the Ninth and Tenth Amendments because powers not granted to the federal government, such as the power to deprive citizens of their common law tort claims and fundamental rights to prosecute them in accordance with common law, are reserved to the States and the people. Certainly, treating as an intelligible principle Bankruptcy Code section 1123(b)(6)'s restriction that chapter 11 plans only contain provisions consistent with the Bankruptcy Code requires a court to assume Congress would render the Constitution subject to almost certain violation by allowing courts to impose coerced releases with guidance subject to multiple interpretations.

While the Supreme Court has found intelligible principles can be general and broad such as requirements to regulate in the public interest or set fair and equitable prices,[140] Bankruptcy Code sections 1123(b)(6) and 105(a), at the least, push the limit. Therefore, for this article's purposes, those statutes' putative authorizations of coerced releases have to be determined based on something other than the bar against Congress delegating legislative power in violation of the separation of powers principle because sections 105(a) and 1123(b)(6), to be charitable, arguably provide intelligible principles.

9. **The Bankruptcy Code Does Not Authorize Coerced Releases, Except in Asbestos Cases**

If not for several appellate decisions ruling or implying the Bankruptcy Code authorizes coerced releases in various circumstances,[141] it would be easy to conclude

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[139] *Millennium*, 945 F.3d 126 at 133.
[140] *Gundy*, 139 S. Ct. at 2129.
[141] *See, e.g.*, In re Ingersoll, Inc., 562 F.3d 856, 863 (7th Cir. 2009); Menard-Sanford v. Mabey (In re A.H. Robins Co.), 880 F.2d 694, 702 (4th Cir. 1989); *In re Dow Corning Corp.*, 280 F.3d at 658; Gillman v. Continental Airlines (In re Continental Airlines), 203 F.3d 203, 212 (3d Cir. 2000); Johns-Manville Corp. v. Chubb Indem. Ins. Co. (In re

the Bankruptcy Code does not, as shown below. Although *Millennium* proclaims "[t]he Bankruptcy Court indisputably had 'core' statutory authority to confirm the plan,"[142] two circuit courts have long disagreed the statute grants power to compel nonconsensual non-debtor releases.[143]

Johns-Manville Corp.), 517 F.3d 52, 66 (2d Cir. 2008), *reversed and remanded on other grounds,* Travelers Indemnity Co. v. Bailey, 129 S. Ct. 2195 (2009); *In re Drexel Burnham Lambert Grp.*, 960 F.2d at 293.

[142] *Millennium's* proclamation is easily explained and illustrates a perilous way to determine statutory authority in bankruptcy cases. 945 F.3d at 137. Because 28 U.S.C. § 1334(b) grants federal courts subject matter jurisdiction of civil proceedings "related to cases under title 11," it is easy to conclude coerced releases in a chapter 11 plan are "related to" plan confirmation, and therefore subject matter jurisdiction exists to approve coerced releases in a chapter 11 plan. Indeed, the Supreme Court has opined the phrase 'related to' "suggests a grant of some breadth." Celotex Corp. v. Edwards, 514 U.S. 300, 307-08 (1995). Determining jurisdiction by starting with the statute, is tempting, but perilous because Congress cannot grant subject matter jurisdiction in a statute unless it is authorized to do so by the Constitution. Therefore, the first step of the analysis should be to determine whether the bankruptcy power in Article I, Section 4, clause 8 of the Constitution incorporates the power to order coerced releases. The analysis in Section 6 above, concludes it does not.

[143] *American Hardwood, Inc. v. Deutsche Credit Corp. (In re American Hardwoods Inc.),* 885 F.2d 621, 624-26 (9th Cir. 1989), ruled that while the bankruptcy court has subject matter jurisdiction to impose third party releases because they are related to the chapter 11 case, they do not have the power pursuant to Bankruptcy Code section 105(a) to grant a release of a creditor's guarantor because that would run afoul of Bankruptcy Code section 524(e). The court observed the case presented none of the unusual facts of *Menard-Sanford v. Mabey, (In re A.H. Robins Co.)*, 880 F.2d 694 (4th Cir. 1989), including that the releases were essential to the plan or that the entire reorganization hinged on them. *In re American Hardwoods Inc.*, 885 F.2d at 627. *Millennium*'s facts are that "the deal to avoid corporate destruction would not have been possible without the third-party releases." *Millennium*, 945 F.3d at 132. Subsequently, the United States Court of Appeals for the Ninth Circuit pointed out that *American Hardwood* only ruled that pursuant to Bankruptcy Code section 524(e) the bankruptcy court cannot discharge a nondebtor from debt the debtor is discharged from, but did not bar exoneration clauses releasing nondebtors from other creditors' claims for "liabilities arising from the bankruptcy proceedings and not the discharged debt." Blixseth v. Credit Suisse, 961 F.3d 1074, 1085 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1394 (2021). In *Robins*, the appellate court affirmed an injunction against creditors paid in full under the plan from suing entities (debtor's directors and attorneys, and insurer and its attorneys) who would have indemnity or contribution claims against the debtor or other impacts on the reorganization. 880 F.2d at 701-02. *Bank of New York Trust Company, NA v. Official Unsecured Creditors' Committee (In re Pacific Lumber Company),* 584 F.3d 229, 252-53 (5th Cir. 2009), held the release of entities from liability (other than for wilfullness and gross negligence) for proposing, implementing, and administering a chapter 11 plan

The only sections of the Bankruptcy Code arguably authorizing coerced releases outside asbestos cases are Bankruptcy Code sections 1123(b)(6) and 105(a). Section 1123(b)(6) provides a plan may include any appropriate provision not inconsistent with the applicable provisions of title 11 of the United States Code. Bankruptcy Code section 105(a) provides the court can issue any order necessary or appropriate to carry out the Bankruptcy Code.

A straight forward application of the words of Bankruptcy Code sections 105(a) and 1123(b)(6) shows they do not authorize coerced releases because the release of shareholders from creditors' claims is inconsistent with many Bankruptcy Code provisions. For example, Bankruptcy Code section 523(a)(2)(A) renders nondischargeable an individual debtor's debts for fraud. But, as the concurring opinion in *Purdue Pharma* explains, the Purdue Pharma chapter 11 plan releases the individual Sackler family members from "any claim 'of any kind, character[,] or nature…so long as the Debtors' 'conduct, omission, or liability' is …a legally relevant factor."[144] As a result, the concurrence concludes the Sacklers sought "a release broader than that which Congress decided was wise to make available to a debtor in bankruptcy."[145] Moreover, Bankruptcy Code section 727(a)(2)(A) deprives individual debtors of discharges if within a year of bankruptcy they transferred property with intent to hinder, delay, or defraud creditors. The Supreme Court has ruled that when a person transfers his own assets into his wholly owned corporation, the transfer is a fraudulent transfer if done to hinder and delay creditors.[146] *Purdue Pharma* acknowledges the shareholders transferred assets to spendthrift trusts and offshore accounts.[147]

If a shareholder becomes a chapter 11 debtor under the Bankruptcy Code it cannot procure a discharge of claims against it without assuring creditors they receive at least what they would receive if all the shareholder's assets were liquidated in a chapter 7 case. This requires disclosure and proof of the shareholder's assets and liabilities. A coerced release comes with no such disclosure or proof. Curiously, one of the Second Circuit decisions opining a coerced release is authorized in rare situations, concedes "it may operate as a bankruptcy discharge arranged without a filing and without the safeguards of the Code."[148] The concession shows coerced releases

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must be struck from the plan, except for the release and exculpation of the creditors' committee and its members because they have "qualified immunity for actions within the scope of their duties." The court opined that 11 U.S.C. § 524(e) provides a fresh start to debtors and is not intended to release other parties. *Id*. at 252-53. Nexpoint Advisors, L.P. v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.), 48 F.4th 419, 434-38 (5th Cir. 2022) (cert. petition pending), followed *Pacific Lumber*.

[144] *Purdue Pharma*, 69 F.4th at 82 (Wesley, CJ, concurring in judgment).

[145] *Id.* at 87..

[146] Shapiro v. Wilgus, 287 U.S. 348 (1932).

[147] *Purdue Pharma*, 69 F.4th at 63.

[148] Deutsche Bank AG, London Branch v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.), 416 F.3d 136, 142 (2d Cir. 2005).

neither carry out nor are consistent with the Bankruptcy Code. Indeed, the basics of bankruptcy administration require every debtor (other than municipality debtors) to disclose its assets and liabilities within fourteen days of voluntary filings,[149] which is well before a discharge is granted. The court may not grant a discharge to an individual debtor who fails to disclose all assets.[150] The notion that courts, on an *ad hoc* basis, can issue releases to shareholders without such disclosure fosters inconsistencies with the Bankruptcy Code in violation of sections 105(a) and 1123(b)(6) and thwarts many constitutional protections including the principle that Congress may enact only uniform bankruptcy laws.[151] After conducting the same type of statutory analysis, *Purdue Pharma DC* contended: "the Bankruptcy Code does not authorize such non-consensual non-debtor releases: not in its express text (which is conceded); not in its silence (which is disputed); and not in any section or sections of the Bankruptcy Code that, read singly or together, purport to confer generalized or 'residual' powers on a court sitting in bankruptcy."[152]

Although Bankruptcy Code section 524(e) has also been cited to show the Bankruptcy Code bars coerced releases,[153] section 524(e) does not do so. It provides the discharge of a debt of the debtor does not affect liability of any other entity for the debt. That means a guarantor of a debt is not released from its guaranty for the benefit of a creditor, when the debtor is discharged from the debt. Otherwise, guaranties would serve no purpose. But, section 524(e) contains no language barring a coerced release of independent claims of a creditor against a shareholder, as opposed to a release for the same debt that was discharged. Moreover, a coerced release is not triggered by the debtor's discharge and therefore does not bar the release of any claim including a claim for the debtor's discharged debt.

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[149] Fed. R. Bankr. P. 1007(b)(1)(A), 1007(c).

[150] 11 U.S.C. §§ 727(a)(3), 1141(d)(3)(C).

[151] In applying the uniformity requirement to United States Trustee fees each debtor's estate must pay, the Supreme Court ruled the uniformity requirement applies to substantive and administrative bankruptcy laws. Siegel v. Fitzgerald, 142 S. Ct. 1770 (2022). Thus, the uniformity requirement applies as much to the Bankruptcy Code's disclosure requirements as to its criteria to discharge the debtor from the debtor's debts. Coerced releases undermine uniform bankruptcy laws by enabling certain shareholders to procure releases without complying with the Bankruptcy Code's requirements for debtors obtaining discharges.

[152] In re Purdue Pharma, L.P., 635 B.R. 26, 37 (S.D.N.Y. 2021). Another district court rejected coerced releases after determining the bankruptcy court lacked subject matter jurisdiction over many of the released claims because they did not relate to the bankruptcy, and lacked constitutional authority to determine them. Patterson v. Mahwah Bergen Retail Grp., Inc., 636 B.R. 641, 671-72 (E.D. Va. 2022).

[153] *See In re American Hardwoods Inc.*, 885 F.2d at 624-26.

Although the foregoing statutory analysis seems dispositive, the fact that three circuit courts have approved coerced releases[154] shows the words of the statute have not always been dispositive by themselves. Accordingly, other instruments of statutory interpretation can point to the right answer if they all lead to the same outcome.

Purdue Pharma contends that while the court's power to release shareholders of certain claims derives from its discharge power, the releases are not discharges because they do not provide the umbrella protection of discharges.[155] Previously, the same appellate court had reasoned: "In form, it is a release; in effect, it may operate as a bankruptcy discharge arranged without a filing and without the safeguards of the Code."[156] When it comes to individuals, their discharges in bankruptcy cases are limited by a multitude of nondischargeable claims, which is very similar to a blanket discharge with nondischargeable claims carved out.[157] Besides, the use of the discharge power to release shareholders from the only claims they are not paying in full does not rescue coerced releases from being inconsistent with the Bankruptcy Code.

While *Purdue Pharma DC* was reversed due to Second Circuit precedent to the contrary, its contention that the Bankruptcy Code does not authorize coerced releases is consistent with the clear statement rule manifested by the Supreme Court's precedents requiring "Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property."[158] There is no exceedingly clear language in sections 105(a) and 1123(b)(6) providing the bankruptcy court can take creditors' claims against shareholders.

Given the constitutional violations described in prior sections of this article, the interpretation of Bankruptcy Code sections 105(a) and 1123(b)(6) should also be guided by the substantive[159] constitutional-doubt canon under which a "statute should be interpreted in a way that avoids placing its constitutionality in doubt."[160] Thus, under that canon the statutes would not be interpreted to allow coerced releases. As shown

[154] *Drexel*, 960 F.2d at 293; *In re Dow Corning Corp*., 280 F.3d at 658 (seven-factor test for approval of coerced releases); *In re Seaside Eng'g & Surveying*, 780F.3d at 1079 (adopts *Dow Corning* test).
[155] *Purdue Pharma*, 69 F.4th at 70-71 (cites MacArthur Co. v. Johns-Manville Corp. ("*Manville I*"), 837 F.2d 89, 91 (2d Cir. 1988)).
[156] Deutsche Bank AG, London Branch v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.), 416 F.3d 136, 142 (2d Cir. 2005).
[157] *See* 11 U.S.C. §§ 523(a)(1)-(19), 1141(d)(2).
[158] United States Forest Serv v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1849-50 (2020); *cf.* Gregory v. Ashcroft, 501 U.S. 452, 460 (1991).
[159] "Substantive canons are rules of construction that advance values external to a statute." Biden v. Nebraska, 143 S. Ct. 2355, 2376 (2023) (footnote omitted) (Barrett, J., concurring).
[160] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 247 (2012).

above, the statutes can easily be interpreted based on conventional statutory construction not to allow coerced releases. When a case can be decided based on a constitutional question and statutory construction or general law, the court will only decide the statutory construction or general law issues.[161] Together, the constitutional-doubt canon and the latter rule are sometimes referred to as the rules of constitutional avoidance.[162]

When two interpretations of a statute are equally plausible, invocation of the rules of constitutional avoidance raises no constitutional issues because the judicial power must find a way to interpret the statute. But, when one interpretation is more plausible than the other, the question becomes whether the constitutional avoidance rules violate the judicial power if they require interpretation of the statute to be at odds with the more plausible interpretation of what Congress and the President enacted. The conventional view is federal courts function as faithful agents of Congress.[163] Purposivism claims a judge should be faithful to Congress's presumed intent rather than to the statutory text when the two appear to diverge.[164] Conversely, textualism maintains the statutory text is the only reliable indication of congressional intent because it is impossible to know whether Congress would have drafted different language had it anticipated a particular fact scenario and the legislative process is path-dependent and riddled with compromise.[165] Then Professor Amy Coney Barrett (now Justice Barrett) tentatively concluded that although a federal court's use of substantive canons to choose an interpretation of a statute at odds with its most plausible interpretation[166] conflicts with the court's serving as the faithful agent of Congress, the two can be reconciled -- the judicial power authorizes use of substantive canons when invoked in pursuit of constitutional values and is based on a plausible statutory interpretation.[167] In the context of coerced releases, invocation of the constitutional doubt canon passes muster as it avoids an interpretation leading to all the constitutional violations explained above. Professor John Manning, who Professor Barrett credited as "the most prominent academic textualist,"[168] similarly concludes that while using the absurdity doctrine to override clear statutory text violates important assumptions underlying our constitutional structure such as legislative supremacy, the absurdity doctrine can be invoked to

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[161] *Id.*.
[162] *Id.*.
[163] Amy Coney Barrett, *Substantive Canons and Faithful Agency,* 90 B.U. L. Rev. 109, 117 (2010), https://ssrn.com/abstract=1553771 (hereafter, "*Substantive Canons*")
[164] *Id.* at 112.
[165] *Id.*.
[166] Justice Barrett refers to these as "strong form" substantive canons. *Biden*,143 S. Ct. at 2376-77(Barrett, J., concurring).
[167] *Substantive Canons, supra* note 162, at 164, 181.
[168] *Id.* at 114.

displace legislative supremacy when the legislative action would otherwise violate the Constitution.[169]

Thus, Congress either unconstitutionally delegated legislative power to courts in violation of the separation of powers doctrine, or the interpretation of the Bankruptcy Code to authorize coerced releases would violate the constitutional avoidance doctrine, the major question doctrine, and the vagueness doctrine while fostering the creation of federal common law rarely allowed because it constitutes judicial lawmaking rather than legislative lawmaking in the alteration of substantive state law.[170]

The major question doctrine helps carry out the separation of powers principle through statutory interpretation. When the executive branch claims Congress delegated power to it, the Supreme Court will look at the history and breadth of the authority asserted and its economic and political significance to determine whether it can decide the issue by deploying a standard exercise of statutory interpretation or by requiring the alleged delegation be supported by clear congressional authorization.[171] Justice Barrett has explained the major question doctrine emphasizes "the importance of context when a court interprets a delegation to an administrative agency. Seen in this light, the major questions doctrine is a tool for discerning—not departing from—the text's most natural interpretation."[172] Thus, Justice Barrett does not view the major question doctrine as a substantive canon leading to interpretation of a statute contrary to its most plausible meaning, which would concern textualists.[173]

In the context of coerced releases, the context is telling. In Bankruptcy Code section 524(g)(4)(A)(ii), Congress expressly authorizes coerced releases of asbestos-caused claims against non-Title 11 debtors fitting within three categories,[174] when specific requirements are satisfied such as that the release is fair and equitable to the victims losing their claims.[175] Against that backdrop, it is highly improbable that without mentioning coerced releases in sections 105(a) and 1123(b)(6), Congress intended to

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[169] John F. Manning, *The Absurdity Doctrine,* 116 Harv. L. Rev. 2387, 2485-86 (2003).
[170] *See* Rodriguez v. FDIC, 140 S. Ct. 713, 717(2020) (Gorsuch, J.)**;** Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts….");Ralph Brubaker & James H.M. Sprayregen, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 Yale L.J.F. 960, 971-81 (2022), https://ssrn.com/abstract=3960117.
[171] West Virginia v. EPA, 142 S. Ct. 2587, 2608-09 (2022) (citing FDA v. Brown & Williamson Tobacco Corp, 529 U.S. 120, 159 (2000), and Utility Air Regulatory Group v. EPA, 573 U.S. 302, 324 (2014)).
[172] *Biden*, 143 S. Ct. at 2376 (Barrett, J., concurring).
[173] *Id.*.
[174] 11 U.S.C. § 524(g)(4)(A)(ii).
[175] 11 U.S.C. § 524(g)(4)(B)(ii).

authorize releases of claims caused by anything against any non-Title 11 debtors without any specific guardrails. Taking a further step back to look at the big picture, it is more highly improbable that after enacting the entire Bankruptcy Code imposing exacting requirements on debtors requesting discharges, Congress, without mentioning releases, would authorize releases of non-Title 11 debtors without specifying a single economic requirement. Put differently, after painstakingly enacting the Bankruptcy Code to govern discharges of debtors, it is simply not credible Congress would authorize judges to make up their own rules to release debtors who are bystanders to a bankruptcy case.

10. Compelling Business Justification Does Not Trump the Legal Obstacles to Coerced Releases

In *Millennium* and *Purdue Pharma* the overwhelming creditor support for the coerced releases shows they made business sense, at least for the majority of creditors. In *Purdue Pharma* the coerced releases provide creditors $5.5 billion to $6 billion from the Sackler family and eliminate the risk of failing to prove claims against the family and failing to collect judgments from Sackler family assets positioned in spendthrift trusts and offshore accounts.[176] The business benefits for the creditor majority, however, do not justify depriving minority creditors of their constitutional and other legal rights, and the Supreme Court has signaled as much in other bankruptcy cases.

In light of the Supreme Court's decisions in *Czyzewski v. Jevic Holding Corp.*[177] and *Ortiz v. Fibreboard Corp.*,[178] the subsequent *Millennium* and *Purdue Pharma* opinions are particularly surprising. In *Jevic*, the Supreme Court reversed the Third Circuit's affirmance of a bankruptcy court order dismissing a chapter 11 case and approving the distribution of the estate's money in a manner violating the priority scheme required in chapter 11 plans and chapter 7 cases. The lower court had approved a distribution that "gave money to high-priority secured creditors and to low-priority general unsecured creditors but which skipped certain dissenting mid-priority creditors" based on the justification that the alternative was that only the secured claimholder would receive anything, so the mid-priority creditors were not worse off.[179] "The skipped creditors would have been entitled to payment ahead of the general unsecured creditors in a Chapter 11 *plan* (or in a Chapter 7 liquidation)."[180] Nevertheless, in *Millennium and Purdue Pharma*, the courts granted non-Title 11 debtors releases of claims without imposing on the released parties the requirements chapters 7 and 11 impose before a debtor can be discharged of any claims. While

[176] *See Purdue Pharma*, 69 F.4th at 56-57. 63.
[177] 580 U.S. 451 (2017) ("*Jevic*").
[178] *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 840-41 (1999).
[179] *Jevic*, 580 U.S. at 454.
[180] *Id.* at 454-55.

neither *Millennium* nor *Purdue Pharma* cite *Jevic*, if they had they might have emphasized its *dicta*.

In *Jevic,* without commenting on their propriety, the Supreme Court acknowledges decisions of lower courts approving deviations from priorities in the Bankruptcy Code, and observes that in the record in *Jevic* it could not find "any significant offsetting bankruptcy-related justification" for violating the Bankruptcy Code's priorities, such as promoting the possibility of a confirmable plan.[181] *Millennium* and *Purdue Pharma* each emphasized how the coerced releases were integral to the restructuring and settlements necessary to render confirmable plans possible.[182] While this article explains why, as statutory and constitutional matters, the Bankruptcy Code does not allow coerced releases, there can be no absolute certainty the Supreme Court would not countenance a deviation from the statute if only enforcement of the Bankruptcy Code were at issue and there were a justification for the deviation. To the extent coerced releases violate the Constitution, however, it is fair to assume the Supreme Court would bar them regardless of any offsetting justification. Additionally, that the coerced releases are integral to a chapter 11 plan is unlikely to be compelling to the Supreme Court when actually confronted with it because one can always devise a unique plan benefit if the court will approve illegal plan components.

Outside bankruptcy, the most similar and perhaps only situation allowing a coerced release occurs in limited fund, non-optout class action settlements under Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure. The United States Supreme Court does not affirm approval of such settlements unless the record proves the entity being released is actually a limited fund, meaning the claims against it exceed the fund's amount.[183] *Millennium's* plan would not be approved under that constraint. In *Ortiz v. Fibreboard Corp.*,[184] the Supreme Court explained that for a limited fund class action settlement to be approved under Fed. R. Civ. P. 23(b)(1)(B), it must satisfy certain conditions making it equitable to bind class members to a fund insufficient to pay them in full: (a) the maximum size of the fund must be less than the maximum claims, (b) the entire fund must go to the claimants, and (c) the claims must share a common theory of liability.[185] Additionally, the Supreme Court opined there must be a necessity to deprive the claimant of his day in court and his jury trial.[186] In *Millennium* and *Purdue Pharma*, there is no showing the primary shareholders' assets are less than the total claims, all their assets are not going to claimants, and not all the creditors may have the same

[181] *Jevic*, 137 S. Ct. at 986.
[182] *See Millennium*, 945 F.3d at 140; *Purdue Pharma.* 69 F.4th at 72.
[183] *See Ortiz*, 527 U.S. at 840-42. .
[184] 527 U.S. 815..
[185] *Id.* at 840-42.
[186] *Id.* at 858-60.; *see* Martin v. Wilks, 490 U.S. 755, 762 (1989).

claims. The Supreme Court also opined that the existence of a negotiated settlement does not eliminate the need for proof the fund is less than the claims.[187]

To be sure, if non-Title 11 debtors such as the shareholders in *Millennium* file chapter 11 petitions and comply with the applicable provisions of Title 11 of the United States Code, they can procure discharges from their creditors' claims under the Bankruptcy Code. Whether the Bankruptcy Code allows a non-Title 11 debtor to procure a discharge without complying with Title 11 is another story.

11. If Coerced Releases were Otherwise Constitutional, Non-Article III Judges Could Impose Them

Millennium concluded the non-Article III court could order the coerced release because it was "integral to the restructuring,"[188] which was *Millennium's* mode of communicating it was within the Bankruptcy Power and susceptible of being constitutionally ordered by a non-Article III court. *Millennium* reached that conclusion by inferring it from *Stern v. Marshall,*[189] which explained relief "integral to the restructuring of the debtor-creditor relationship" can be ordered by a non-Article III court.[190] Notably, *Stern* did not involve the restructuring of the creditor-shareholder relationship which was the issue in *Millennium*. More importantly, in *Stern* the United States Supreme Court was determining when an action for money damages by a debtor or bankruptcy trustee against a third party, needed to be resolved by an Article III judge to carry out the separation of powers principle. The coerced release in *Millennium*, however, meant discharging the shareholders from creditors' claims and depriving the creditors of their rights to prove their claims against the shareholders and to enforce them. To the extent *Millennium* relied on *dicta* in *Stern* which did not include those deprivations of rights, the Supreme Court makes clear it is "not bound to follow our dicta in a prior case in which the point now at issue was not fully debated."[191]

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[187] *Ortiz*,, 119 S. Ct. at 2302 ("We hold that applicants for contested certification on this rationale (limited fund theory under Fed. R. Civ. P. 23(b)(1)(B)) must show that the fund is limited by more than the agreement of the parties, and has been allocated to claimants belonging within the class by a process addressing any conflicting interests of class members.").

[188] *Millennium,* 945 F.3d at 140.

[189] 564 U.S. 462, 485-86 (2011)..

[190] *Id.* at 497.

[191] Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 363 (2006) (following Cohens v. Virginia, 19 U.S. 264, 399-400 (1821), providing "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision"); *accord* S. Union Co. v. United States, 567 U.S. 343, 352 n.5 (2012); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 737 (2007).

In any event, *Millennium* did not need to reason backwards from *Stern*. *Millennium* only needed to heed the Supreme Court's teachings that the question whether an Article III judge is required is answered by determining whether the relief requested would have been tried in the law courts or equity courts in England in 1789.[192] Because it is clear that bankruptcy commissioners in the equity courts granted discharges,[193] an Article III judge is not required. *Purdue Pharma* agrees the coerced releases were derived from the discharge power.[194]

Conversely, before a non-Article III judge can constitutionally grant the discharge, an Article III judge would have to determine it is constitutional (which it is not) to deprive creditors of their fundamental right to prove their claims against the shareholders. To the extent, if any, a federal judge can remove a private right from determination by the Article III judicial power in a jury trial or by a state court, only an Article III judge may do so based on Supreme Court precedent that the facts and laws necessary to deprive a litigant of constitutional rights must be determined by an Article III judge.[195]

12. Conclusion

Coerced releases deprive a litigant of its day in court and all the due process that goes with it comprising the Lost Rights. The right to sue is a fundamental right, and the Supreme Court has opined that while the Bankruptcy Power is broad and the court has not identified all its boundaries, it does not authorize violations of fundamental rights. Conversely, the Supreme Court has routinely safeguarded fundamental rights in bankruptcy cases such as federal[196] jury trial rights and property rights. When the constitutional obstacles to coerced releases are combined with the overt unfairness of depriving a creditor of its claim against a shareholder without determining the claim's value and without determining what the creditor receives in exchange, the conclusion that coerced releases are illegal follows easily. But then, what explains why several appellate courts have approved them? Two things. First, the business justifications. Coerced releases have been approved when the court is convinced that in the aggregate, creditors will be better off, even if any particular creditor may not be. Supreme Court jurisprudence shows business justifications do not overcome constitutional protections and fundamental rights. Second, the litigants have not raised most of the issues discussed in this article, especially fundamental rights and the

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[192] *Northern Pipeline*, 458 U.S. at 90 (Rehnquist, J. and O'Connor, J., concurring); *Stern*, 564 U.S. at 484.
[193] Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 689-90 (2015) (Roberts, CJ., Scalia, J., and Thomas, J.,dissenting).
[194] *Purdue Pharma*, 69 F.4th at 70.
[195] Crowell v. Benson, 285 U.S. 22, 60 (1932).
[196] States can deprive persons of jury trials in civil proceedings without abridging fundamental rights guaranteed by the due process clause of the Fourteenth Amendment. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); Walker v. Sauvinet, 92 U.S. 90, 92-93 (1876).

Bankruptcy Power. When those issues are considered, the illegality of coerced releases jumps off the page.