RESTRUCTURING RURITANIA: BANKRUPTCY, SOVEREIGN DEBT, AND THE EQUITY RECEIVERSHIP

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The traditional legal story of sovereign restructuring goes something like this: foreign governments cannot file for bankruptcy under domestic law. When faced with the need to restructure unsustainable debts, they must negotiate with each of their creditors. Since the late 1980s, private debt has been held by increasingly diverse and dispersed bondholders, making renegotiation more difficult. Defaulting debtors face two basic problems: first, they have no process analogous to the automatic stay in bankruptcy, which can pause litigation by creditors and buy time for an orderly reorganization; second, and more importantly, they have no process analogous to the cramdown provisions of Chapter 11, whereby new terms can be imposed on non-consenting creditors. As a result, sovereign reorganizations are at the mercy of holdout creditors, who can extract concessions at the expense of other creditors. This creates economic uncertainty with attendant lower growth rates and ultimately imposes additional hardship on the sovereign's taxpayers. This Article argues against the conventional wisdom, showing how it is possible for a sovereign debtor to use existing law to stay pending or future litigation, and impose new terms on holdout creditors. This can be done with the venerable equity receivership, a legal device used to reorganize corporate debtors prior to the adoption of the first modern Bankruptcy Code in the 1930s. In effect, sovereign debtors can be treated like a nineteenth-century railroad in need of reorganization. To be sure, this procedure would reach only American law-governed debt, but the ability of sovereigns to resolve the holdout problem for all their dollar-denominated debt could dramatically simplify restructurings. Even if finance ministries are hesitant to avail themselves of such a novel and untested legal theory, the possibility of being

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able to cram down new terms against holdout creditors may ease the process of negotiated restructurings.

TABLE OF CONTENTS

INTRODUCTION 110

I. THE RISE AND NOT QUITE FALL OF THE EQUITY RECEIVERSHIP 115
 A. Restructuring Railroads 116
 B. Criticisms and Refinements of the Equity Receivership 118
 C. Modern Receiverships 120

II. RESTRUCTURING RURITANIA 123

III. COMPLICATIONS 129
 A. Does the Bankruptcy Code Displace Equity Receiverships? 129
 B. Restructuring Judgments 132
 C. Obtaining a Permanent Injunction 136
 D. Treatment of Non-New York Law Creditors 139
 E. The Fundamental Difference Between Sovereign Restructuring and Corporate Reorganizations 143

CONCLUSION 147

INTRODUCTION

Traditionally, two assumptions have defined the legal status of sovereign debt.[1] First, because of sovereign immunity, legal enforcement against government debtors is impossible.[2] Second, because sovereigns are not subject to domestic bankruptcy law, there is no formal insolvency procedure for governments in financial distress.[3] Both of these claims are only partially true. It is well understood that domestic courts will avail themselves of waivers of sovereign immunity in bond contracts, and under the so-called restrictive theory of sovereign immunity codified

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1. *See generally* W. Mark C. Weidemaier & Mitu Gulati, *The Relevance of Law to Sovereign Debt*, 11 ANN. REV. L. & SOC. SCI. 395 (2015) (discussing the role of law in both the practice of sovereign debt and scholarship on the topic).

2. Indeed, the central theoretical debate in the economic and financial literature on sovereign debt is premised on the assumption that government debts are legally uncollectible. *See* Jonathan Eaton & Mark Gersovitz, *Debt with Potential Repudiation: Theoretical and Empirical Analysis*, 48 REV. ECON. STUD. 289, 289 (1981) ("Unless the governments of private creditors are willing to coerce debtor governments into repaying loans, there is no explicit mechanism deterring a government from repudiating its external debts. Any net worth criterion is essentially irrelevant. Thus the existence of private loans to foreign governments appears to be a paradox, but can be understood using a model with an endogenous default penalty."). Eaton and Gersovitz offer the seminal economic model in the field. For a summary of the debates, see Ugo Panizza et al., *The Economics and Law of Sovereign Debt and Default*, 47 J. ECON. LIT. 651, 259–64 (2009) (summarizing the theoretical literature on sovereign debt).

3. *See, e.g.*, Eric Helleiner, *The Mystery of the Missing Sovereign Debt Restructuring Mechanism*, 27 CONTRIBUTIONS POL. ECON. 91, 91 (2008) ("The absence of a formal international regulatory mechanism to facilitate sovereign debt restructuring has long been recognized as a most serious gap in the architecture of global finance.").

in the Foreign Sovereign Immunities Act ("FSIA"), it is possible to sue defaulting governments in U.S. courts.[4] To be sure, obtaining a judgment is not the same thing as enforcing a debt, and levying on a judgment against a foreign sovereign is difficult.[5] Still, the spectacular success of hedge funds such as Elliot Associates, which spent over a decade litigating against Argentina and was eventually paid billions of dollars, shows that a sufficiently determined and resourceful creditor can use the legal system to extract payment from a defaulting sovereign debtor.[6]

The availability of an insolvency proceeding for sovereign debtors under current law is less recognized and far more controversial.[7] The traditional legal story of sovereign restructuring goes something like this[8]: foreign governments cannot

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4. *Compare* 28 U.S.C. § 1605(a) (stating the main conditions under which "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States"), *with id.* § 1604 ("[A] foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter."). *See generally* W. Mark C. Weidemaier, *Sovereign Immunity and Sovereign Debt*, 2014 U. ILL. L. REV. 67 (2014) (discussing the history of the restrictive theory of sovereign immunity and its application to sovereign debt).

5. *See* 28 U.S.C. § 1609 ("Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in [the FSIA]."); *id.* § 1610 (allowing attachment of the property of a sovereign that is used for "commercial activities").

6. *See* NML Cap., Ltd. v. Republic of Argentina, 699 F.3d 246, 250 (2d Cir. 2012) (upholding an injunction prohibiting Argentina from paying bondholders under its contractual reorganization plan until NML Capital, which refused to participate, was paid); NML Cap. v. Republic of Argentina (2012) No. RPC/343/12 (HC) (Ghana) (seizing a training ship of the Argentine Navy to satisfy the judgment of a hedge fund while the ship was visiting the port of Accra). *See generally* GREGORY MAKOFF, DEFAULT: THE LANDMARK COURT BATTLE OVER ARGENTINA'S $100 BILLION DEBT RESTRUCTURING (2024) (recounting Elliot Associates's efforts to collect on defaulted debt against Argentina); Agustino Fontevecchia, *The Real Story of How a Hedge Fund Detained a Vessel in Ghana and Even Went for Argentina's "Air Force One"*, FORBES (Oct. 5, 2012, 6:50 PM), https://www.forbes.com/sites/afontevecchia/2012/10/05/the-real-story-behind-the-argentine-vessel-in-ghana-and-how-hedge-funds-tried-to-seize-the-presidential-plane/ [https://perma.cc/L69X-E32C]. NML Capital Ltd. is a subsidiary of Elliot Associates.

7. The possibility of an equity receivership for sovereign debt has been mentioned without any extensive analysis by a well-respected scholar and leading practitioner in the field. *See* Lee C. Buchheit & G. Mitu Gulati, *Sovereign Bonds and the Collective Will*, 51 EMORY L.J. 1317, 1352–57 (2002). Steven Lubben has expressed skepticism about the utility of such a procedure based on his historical research suggesting that railroad receiverships often failed to successfully rehabilitate distressed companies but provides no detailed legal analysis of the question of whether such a procedure would be viable under current law. *See generally* Stephen J. Lubben, *Out of the Past: Railroads & Sovereign Debt Restructuring Essays*, 35 GEO. J. INT'L L. 845 (2003). It has also been suggested as a mechanism for dealing with the debt restructurings by U.S. states, which are also excluded from the bankruptcy process. *See generally* ZACK A. CLEMENT, RESTRUCTURE OF STATE GOVERNMENT DEBT THROUGH A FEDERAL EQUITY RECEIVERSHIP (2020).

8. *See generally* Lee C. Buchheit et al., *The Restructuring Process*, *in* SOVEREIGN DEBT: A GUIDE FOR ECONOMISTS AND PRACTITIONERS 328 (S. Ali Abbas et al. eds., 2020); Barry Eichengreen, *Restructuring Sovereign Debt*, 17 J. ECON. PERSPS. 75 (2003).

file for bankruptcy under domestic law.[9] When faced with the need to restructure unsustainable debts, they must negotiate with each of their creditors. Prior to the Latin American debt crises of the 1980s,[10] this was a difficult but not insurmountable problem. Bilateral debts between governments could be negotiated with a certain civilized predictability under the auspices of the Paris Club, and private debts were held as syndicated loans by a fairly small and homogeneous group of banks.[11] After the Brady bond revolution of the late 1980s, however, private debt has been held by an increasingly diverse and dispersed population of bondholders, making renegotiation more difficult.[12] Defaulting debtors face two basic problems: first, they have no process analogous to the automatic stay in bankruptcy, which can pause litigation by creditors and buy time for an orderly reorganization;[13] second, and more importantly, they have no process analogous to the cramdown provisions of Chapter 11, whereby new terms can be imposed on non-consenting creditors.[14] As a result, sovereign reorganizations are at the mercy of holdout creditors, who can extract concessions at the expense of other creditors. This creates economic uncertainty with attendant lower growth rates and ultimately imposes additional hardship on the sovereign's taxpayers.[15]

These problems were on spectacular display in the Argentine debt defaults of the early 2000s.[16] In the wake of the Argentine crisis, the deputy managing director of the International Monetary Fund ("IMF") suggested the creation of a

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9. As a statutory matter, this is because only "debtors" may petition for bankruptcy, and under the Bankruptcy Code a debtor is defined as a "person or municipality concerning which a case under this title has been commenced." 11 U.S.C. § 101(13). In turn, "[t]he term 'person' includes individual, partnership, and corporation, but does not include governmental unit[s]." *Id.* § 101(41). Hence, foreign sovereigns may not file for bankruptcy because for purposes of the Bankruptcy Code they are not "persons."

10. *See* Barry Eichengreen et al., *Public Debt Through the Ages*, *in* SOVEREIGN DEBT: A GUIDE FOR ECONOMISTS AND PRACTITIONERS, *supra* note 8, at 7, 34 (discussing the Latin American debt crisis of the 1980s and the rise of so-called Brady bonds).

11. *See* Buchheit et al., *supra* note 8, at 332–34 (discussing sovereign debt restructuring before the rise of Brady bonds).

12. *See* Eichengreen et al., *supra* note 10, at 7, 34 (discussing the Latin American debt crisis of the 1980s and the rise of so-called Brady bonds).

13. *See* 28 U.S.C. § 362 (setting forth the scope of the "automatic stay" in bankruptcy that stops most proceedings outside of bankruptcy court against a debtor that has filed for bankruptcy). Interestingly, however, the Southern District of New York recently granted a six-month stay of litigation against Sri Lanka to allow the country to negotiate with its creditors. *See* Hamilton Rsrv. Bank Ltd. v. Democratic Socialist Republic of Sri Lanka, No. 22cv5199, 2023 WL 7180683, at *1 (S.D.N.Y. Nov. 1, 2023).

14. *See* 11 U.S.C. § 1129 (setting forth the requirements that a Chapter 11 plan must meet in order to be "crammed down" against objecting creditors). *See generally* Patrick Bolton & David A. Skeel, Jr., *Inside the Black Box: How Should a Sovereign Bankruptcy Framework Be Structured*, 53 EMORY L.J. 763 (2004) (discussing the absence of a cramdown procedure in sovereign debt restructurings and the desirability of such a procedure).

15. *See* Eichengreen, *supra* note 8, at 81–82 (discussing the economic consequences of default and prolonged restructuring negotiations).

16. *See generally* PAUL BLUSTEIN, AND THE MONEY KEPT ROLLING IN (AND OUT): WALL STREET, THE IMF, AND THE BANKRUPTING OF ARGENTINA (2006); MAKOFF, *supra* note 6.

supranational insolvency regime.[17] That initiative failed due to the opposition of the U.S. Treasury and debtor nations fearful of spooking credit markets.[18] Instead, governments began issuing bonds with so-called "collective action clauses" ("CACs"), which allowed for the rewriting of contractual terms if a supermajority of the bond issue or, in later iterations, of all of the debtor's outstanding bondholders voted in favor.[19] The problem with CACs is that the bonds of distressed borrowers trade at a steep discount, and strategic investors may be able to buy their way into a blocking position.[20] This is true of even second-generation CACs, which contain aggregation clauses allowing alteration of terms by a supermajority vote of bondholders across all bond issues.[21] In the case of small countries with a relatively small amount of total outstanding debt, a strategic creditor may be able to buy its way into a blocking position despite such an aggregation clause. Alternatively, creditors who obtain a judgment against the defaulting debtor before it can invoke

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17. *See* Anne Krueger, First Deputy Managing Dir., IMF, Address on a New Approach to Sovereign Debt Restructuring (Nov. 26, 2001) [hereinafter Krueger, New Approach], https://www.imf.org/en/News/Articles/2015/09/28/04/53/sp112601 [https://perma.cc/YHT5-WR82]; Anne Krueger, First Deputy Managing Dir., IMF, Speech on New Approaches to Sovereign Debt Restructuring: An Update on Our Thinking (Apr. 1, 2002) [hereinafter Kreuger, An Update], https://www.imf.org/en/News/Articles/2015/09/28/04/53/sp040102 [https://perma.cc/HK2W-7PRU].

18. The proposal was made in a series of speeches by then-IMF Director Anne Krueger. *See* Krueger, New Approach, *supra* note 17; Krueger, An Update, *supra* note 17; Anne O. Krueger, *Desperately Seeking a Mechanism for Sovereign Debt Restructuring*, PROJECT SYNDICATE (Apr. 22, 2022), https://www.project-syndicate.org/commentary/sri-lanka-debt-restructuring-needs-global-mechanism-by-anne-o-krueger-2022-04 [https://perma.cc/BZU9-JQ9A]. For criticisms of the proposal, see ANNA J. SCHWARTZ, CATO INST., THE IMF'S DUBIOUS PROPOSAL FOR A UNIVERSAL BANKRUPTCY LAW FOR SOVEREIGN DEBTORS 7 (2003), https://www.cato.org/sites/cato.org/files/pubs/pdf/fpb75.pdf [https://perma.cc/7X8R-2WR9]. For a historical account of efforts to create sovereign debt restructuring mechanisms and the reasons for their failure, see generally Helleiner, *supra* note 3.

19. *See generally* W. Mark C. Weidemaier & Mitu Gulati, *A People's History of Collective Action Clauses*, 54 VA. J. INT'L L. 51 (2013) (discussing the origin of collective action clauses); Randal Quarles, *Herding Cats: Collective-Action Clauses in Sovereign Debt—the Genesis of the Project to Change Market Practice in 2001 Through 2003*, 73 L. & CONTEMP. PROBS. 29 (2010) (same).

20. *See* INT'L MONETARY FUND, THE INTERNATIONAL ARCHITECTURE FOR RESOLVING SOVEREIGN DEBT INVOLVING PRIVATE-SECTOR CREDITORS—RECENT DEVELOPMENTS, CHALLENGES, AND REFORM OPTIONS 30 (2020) ("Holdout behavior is still possible even under the single-limb voting mechanism under enhanced CACs, particularly in countries (such as frontier and low-income economies) where the total outstanding debt stock is relatively small and a holdout could assemble a blocking position at fairly low cost." (citation omitted)). *See generally* Robert E. Scott et al., *Anticipating Venezuela's Debt Crisis: Hidden Holdouts and the Problem of Pricing Collective Action Clauses*, 100 B.U. L. REV. 253 (2020) (discussing the possibility of strategic holdout behavior by Venezuelan creditors despite the CACs in Venezuela's bonds).

21. Kay Chung & Michael G. Papoioannou, *Do Enhanced Collective Action Clauses Affect Sovereign Borrowing Costs?*, J. BANKING & FIN. ECON., Oct. 22, 2021, at 59, 62–63.

its CACs may be able to avoid restructuring.[22] In short, CACs do not appear to be the panacea that their authors hoped they would be. In the wake of the international COVID-19 pandemic and the increase in global interest rates to cope with the inflation sparked by the fiscal response to that pandemic, dozens of countries have defaulted or are at risk of default, highlighting the need for more effective mechanisms to deal with sovereign restructurings.[23]

This Article argues that despite the conventional wisdom, a mechanism already exists under U.S. law whereby at least New York law-governed private debt may be reorganized.[24] It is possible for a sovereign debtor to use existing law to stay pending or future litigation and impose new terms on holdout creditors. This can be done with the venerable equity receivership, a legal device used to reorganize corporate debtors prior to the adoption of the first modern corporate bankruptcy law in the 1930s.[25] In effect, sovereign debtors can be treated like a nineteenth-century railroad in need of reorganization. To be sure, this procedure would reach only American law-governed debt, but this is no small thing. Generally, the renegotiation of bilateral debt through the Paris Club does not present an insurmountable problem, although the rise of Chinese lending complicates matters.[26] While private English-law debt and domestic-law debt would remain outside of an equity receivership, the ability of sovereigns to resolve the holdout problem for all of their dollar-denominated debt could dramatically simplify restructurings.[27] Even if finance ministries are hesitant to avail themselves of such a novel and untested legal theory, the possibility of being able to cram down new terms against holdout creditors may ease the process of negotiated restructurings.

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22. *See* Hamilton Rsrv. Bank Ltd. v. Democratic Socialist Republic of Sri Lanka, No. 1:2022cv05199, 2023 WL 2632199 (S.D.N.Y. Mar. 24, 2023) (allowing Hamilton Bank to sue Sri Lanka for default); Mark Weidemaier & Mitu Gulati, *Raise a Glass to Freedom . . . from Debt Restructurings*, FIN. TIMES (U.K.) (Apr. 27, 2023), https://www.ft.com/content/fc34471b-48ba-4825-a0f1-3dccabb1e855 [https://perma.cc/E289-GDWL] (discussing Hamilton Bank's strategy of obtaining an early judgment in over to avoid being structured under the collective action clauses in Sri Lanka's bonds); *see also infra* Section III.B.

23. Since 2019, nine countries have defaulted on their debts (Argentina, Belize, Ghana, Ecuador, Lebanon, Russia, Sri Lanka, Suriname, and Zambia). The IMF lists an additional 28 countries that are at serious risk of default. *See* MARTIN A. WEISS, CONG. RSCH. SERV., IF11880, SOVEREIGN DEBT CONCERNS IN DEVELOPING COUNTRIES 1 (2023), https://sgp.fas.org/crs/row/IF11880.pdf [https://perma.cc/96WL-XQ9D].

24. The vast majority of dollar-denominated private credit to sovereign debtors takes the form of Wall Street-issued bonds containing New York choice-of-law clauses.

25. *See* DAVID A. SKEEL, DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 48–70 (2001) (providing a history of the use of equity receiverships as vehicles for corporate reorganization).

26. *See Who Are We?*, CLUB DE PARIS, https://clubdeparis.org/en/communications/page/who-are-we [https://perma.cc/EFW9-RMS8] (last visited Jan. 18, 2025) (describing the Paris Club). *See generally* Anna Gelpern et al., *How China Lends: A Rare Look into 100 Debt Contracts with Foreign Governments*, 38 ECON. POL'Y 345 (2023) (providing an overview of Chinese bilateral lending).

27. Dollar-denominated debt issued in the so-called Eurodollar market, however, will likely take the form of English law-governed bonds.

While the law of equity receiverships is well-established, the restructuring of a sovereign's debts would require a slightly different procedural outcome from many of the receiverships of the late-nineteenth and early-twentieth centuries. In those cases, the restructuring was formally consummated by a judicial sale.[28] Restructuring sovereign debt, however, would require the court to put in place a permanent injunction. Both procedures allow the reorganized entity to continue to conduct its affairs while limiting creditors to the new rights that they acquire in the receivership. The difference between the two procedures, however, is more than a bit of legal pedantry. Rather, it raises fundamental normative questions about the nature of sovereign debt. The basic outcome of a corporate reorganization is to wipe out a firm's old equity and exchange junior debt for new equity in the restructured entity.[29] In effect, an insolvent corporation is owned by its creditors, and reorganization law—both under equity receiverships and the modern Bankruptcy Code—recognizes this reality.[30] Countries, however, cannot be owned by their creditors. Hence, a sovereign restructuring cannot and ought not to result in a transfer of ownership, as does a corporate reorganization. Because creditors cannot and ought not be able to claim the entirety of a country's wealth or tax revenue, receiverships for sovereigns will necessarily require difficult questions of how to balance the interests of the debtor against the interests of the creditor. In this sense, they are more like personal bankruptcies than corporate reorganizations, where, strictly speaking, the debtor as an entity has no interests to be balanced against the interests of creditors. In such cases, the debtor can simply be owned by its creditors. Not so for sovereigns.

This Article proceeds as follows. Part I provides an overview of the equity receivership, showing how it was used to reorganize troubled firms and how it continues to exist as a remedy available to distressed sovereigns. Part II provides an account of how a receivership could be used to restructure the debts of the fictional nation of Ruritania, which has the characteristics of a typical less-developed country in fiscal distress. Part III discusses the complications created by the procedure discussed in Part II. The Article then concludes.

I. THE RISE AND NOT QUITE FALL OF THE EQUITY RECEIVERSHIP

This Part will provide a brief introduction to equity receiverships. As a procedure, the receivership has existed for centuries, but over the course of its long life, it has undergone several transformations. Most notably, at the end of the nineteenth century, courts and lawyers repurposed it into a mechanism for restructuring insolvent corporations. After briefly discussing its origins, this Part will explain how receiverships were used to restructure nineteenth-century railroads and other large corporations, the criticisms of that project, and the fate of the

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28. *See* Paul D. Cravath, *The Reorganization of Corporations; Bondholders' and Stockholders' Protective Committees; Reorganization Committees; and the Voluntary Recapitalization of Corporations*, *in* SOME LEGAL PHASES OF CORPORATE FINANCING, REORGANIZATION AND REGULATION 153, 200–06 (1917).

29. *See generally* THOMAS H. JACKSON, LOGIC AND THE LIMITS OF BANKRUPTCY LAW (1986) (discussing the basic policy rationale for corporate reorganization law).

30. *See generally id.* (discussing the basic policy rationale for corporate reorganization law).

procedure in a world where the Bankruptcy Code now governs corporate reorganization. My goal is to show the basic structure of the receivership as a vehicle for debt restructuring and to demonstrate the continued vitality of the procedure under current law.

The equity receivership began its life in the chancery courts of Elizabethan England as a way of preserving the value of property where the ultimate claimants did not have possession or control.[31] Originally, the procedure was used mainly in cases involving real property.[32] Suppose, for example, that the title to Blackacre was held by an infant. At the request of a concerned party, the equity court could appoint a receiver of the rents of the property, which would then be held for the benefit of the infant.[33] The idea was that the receiver could protect the rights of an owner who, for some reason, was unable to protect himself or herself against the party in possession of the property. The receivership later developed into a more general creditor's remedy that could substitute for the legal remedy of a writ of execution. For example, after obtaining a judgment, a creditor might petition for the appointment of a receiver to take possession of the debtor's property and sell it to satisfy the judgment—a proceeding referred to as a "receiver under a creditor's bill" or a "receiver by way of equitable execution."[34] The equity receivership crossed the Atlantic with much of the rest of English law during the colonial period.[35] In its new American home, it was put to a new use beginning in the mid-nineteenth century. Originally a creditor's remedy in the United States, the equity receivership would develop into a mechanism for restructuring corporate debt under American law.

A. Restructuring Railroads

As with so much in the development of the institutions of modern capitalism, the railroads were the driving force behind legal innovation.[36] Consider the stylized case of an insolvent railroad.[37] The company possessed substantial assets in the form of a rail network. It also had debts to bondholders, suppliers, and others, which were substantially greater than the value of its assets. If the creditors availed themselves of their legal remedies, then there would be a race to the courthouse, with individual creditors grabbing portions of the rail network and selling them off piecemeal using judgment liens and writs of execution. This would have pernicious results. The assets making up the railroad network were most valuable as a railroad network. Severed from that network, the property securing a loan consisted of nothing but worthless rusting rails sitting atop abandoned railroad

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31. *See* 1 RALPH EWING CLARK, A TREATISE ON THE LAW AND PRACTICE OF RECEIVERS § 4 (1918) (discussing the earliest receiverships).

32. *See id.*

33. *See id.*

34. *See id.* at § 12(i)–(j).

35. *See id.* at § 5.

36. *See* SKEEL, *supra* note 25, at 48 ("In a very real sense, the history of corporate reorganization is the history of nineteenth-century railroad failure."). *See generally* JAMES W. ELY, JR., RAILROADS AND AMERICAN LAW (2001).

37. For background on how equitable receiverships in corporate reorganizations functioned, see SKEEL, *supra* note 25, at 56–60; Cravath, *supra* note 28, at 153.

ties and unmarketable real property rights on the prairie.[38] The legal remedies would thus both break up a socially valuable rail network and reduce the recovery for creditors as a group.

The simplest solution was to sell the railroad in its entirety as a going concern and distribute the proceeds to the creditors.[39] This would both preserve the network intact and maximize the value of the assets to the creditors. Unfortunately, such a sale was financially and legally impossible. As a financial matter, capital markets simply were not deep enough to finance the purchase of all of a railroad's assets at a single sale.[40] Indeed, it was the very thinness of those markets that resulted in the extremely complicated capital structures of nineteenth-century railroads.[41] Large railroads were difficult to build, often resulting from the merger of multiple firms that had to repeatedly return to capital markets to fund their construction piecemeal. This led to many different kinds of debt instruments, often secured by conflicting mortgages on different portions of the rail network.[42] This complexity, in turn, created holdout problems that precluded a voluntary reorganization. A solution to the financial problem would be for a large group of wealthy creditors, who could often coordinate because they were represented by a single banker, to form a new corporation and then bid on the assets using a mixture of cash and credit bids based on their debt claims.[43] In effect, participating creditors could finance the purchase at minimal cost through the transformation of their debt claims against the railroad into equity in a new entity that would acquire the entire road as a going concern. The problem with this solution was that it was impossible to acquire the railroad free of the claims of non-participating creditors because such a sale of the railroad's assets would be the quintessential example of a fraudulent conveyance.[44]

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38. *See* SKEEL, *supra* note 25, at 62 ("[T]he collateral for any given bond issuance—say, one hundred miles of track in the middle of nowhere—was essentially worthless unless the railroad remained intact.").

39. In a modified form this is what was done in what was widely regarded as the first railroad reorganization case. In that proceeding, a relatively small line in Georgia fell into financial difficulties, and rather than selling the railroad off piecemeal, the judge in the case sold the entire railroad as a going concern. *See* Macon & W.R.R. Co. v. Parker, 9 Ga. 377, 394 (1851) (approving the reorganization sale).

40. *See* SKEEL, *supra* note 25, at 56–58.

41. *See id.* at 48–52, 56–60.

42. *See id.* at 48–52, 62 (discussing railroad finance).

43. *See* RON CHERNOW, THE HOUSE OF MORGAN: AN AMERICAN BANKING DYNASTY AND THE RISE OF MODERN FINANCE 66–69 (Grove Press 2010) (1990) (discussing the role of J.P. Morgan & Co. in providing railroad finance at the end of the nineteenth century).

44. The law of fraudulent conveyances goes back to an Elizabethan statute, and as early as *Twyne's Case*, published 1601, the courts invalidated transfers of title made with the intent of frustrating the efforts of creditors to collect their debts. *See* Twyne's Case (1601) 76 Eng. Rep. 809 (setting forth the so-called badges and incidence of fraud). The sale of all of the railroad's assets to a new entity would be done with the intent to shield those assets from the railroad's old creditors. There is a similar result under the doctrine of successor liability. If one sells the entirety of a corporation's assets as a going concern, then the acquirer takes the assets subject to the claims of the original corporation's creditors. This doctrine is less ancient than the law of fraudulent conveyances and was being developed in the late-nineteenth century.

The equity receivership provided a solution to these problems. A group of creditors would petition the equity court to appoint a receiver to take control of all of the railroad's assets.[45] This would stop non-participating creditors from tearing apart the railroad with their legal remedies. The receiver could obtain an injunction against creditors, prohibiting them from taking any action, legal or otherwise, that might interfere with the receiver's control of the property.[46] The receiver would then conduct a judicial sale of all of the railroad's assets.[47] At this judicial auction, there would be a single bidder: a new entity owned by the participating creditors of the old railroad.[48] This entity would offer a mix of cash and credit bids.[49] Once the bid was accepted by the court, the resulting cash would be distributed to the non-participating creditors. Because the receivership auction was a judicial sale, it could not be attacked as a fraudulent conveyance, and it cut off any successor liability.[50]

B. Criticisms and Refinements of the Equity Receivership

This radical repurposing of the equity receivership proved controversial.[51] At a superficial level, there were procedural innovations. By the end of the nineteenth century, the incumbent management of the railroad, rather than a neutral third party, could be appointed as the receiver, and the debtor itself could petition

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45. *See, e.g.*, Louisville Tr. Co. v. Louisville, New Albany & Chi. Ry. Co., 174 U.S. 674, 677 (1899) ("[T]his court will forthwith appoint a receiver for the entire railroad; . . . that the court will fully administer the trust fund, in which the complainant is interested as a judgment creditor, and will for such purpose marshal all the assets of said insolvent corporation . . . ." (citation omitted)); *see also* Cravath, *supra* note 28, at 157–61 (discussing receivers taking control of assets of an insolvent firm).

46. *See, e.g.*, Chillicothe Furniture Co. v. Revelle, 14 F.2d 501, 505 (8th Cir. 1926) (affirming an injunction against a mortgagor prohibiting the mortgagor from foreclosing against the debtor in receivership). However, creditors were allowed to litigate against the debtor in state court, so long as the state court proceeding did not interfere with the property of the estate. *See, e.g.*, Brown v. Duffin, 13 F.2d 708, 709–10 (6th Cir. 1926) (allowing litigation in state court against a debtor in receivership unless the state proceedings interfered with the property of the debtor).

47. *See* SKEEL, *supra* note 25, at 59; Cravath, *supra* note 28, at 161, 204.

48. *See* SKEEL, *supra* note 25, at 59; Cravath, *supra* note 28, at 204–05.

49. *See* SKEEL, *supra* note 25, at 59; Cravath, *supra* note 28, at 205.

50. *See* Joseph L. Weiner, *Conflicting Functions of the Upset Price in a Corporate Reorganization*, 27 COLUM. L. REV. 132, 137 (1927) ("The foreclosure sale, therefore, besides serving the purely formal purpose of removing a lien, serves also to define the right of the individual bondholder if he chooses to be paid in cash rather than accept the reorganization plan."); *see also* 10 GEORGE W. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 5172, at 187–88 (1957) (discussing the effect of a foreclosure sale on third-party interests in the property).

51. *See* GERALD BERK, ALTERNATIVE TRACKS: THE CONSTITUTION OF AMERICAN INDUSTRIAL ORDER, 1865–1917, at 56–60 (2d ed. 1997) (discussing criticisms of equity receiverships and corporate reorganizations); *see also* Bradley Hansen, *The People's Welfare and the Origins of Corporate Reorganization: The Wabash Receivership Reconsidered*, 74 BUS. HIST. REV. 377, 381–85 (2000) (same); Albro Martin, *Railroads and the Equity Receivership: An Essay on Institutional Change*, 34 J. ECON. HIST. 685, 685–86 (1974) (same); Peter Tufano, *Business Failure, Judicial Intervention, and Financial Innovation: Restructuring U.S. Railroads in the Nineteenth Century*, 71 BUS. HIST. REV. 1, 11–12 (1997) (same).

the equity court to open a receivership proceeding.[52] At a deeper level, the proceedings were dominated from first to last by bankers representing a preeminent group of creditors and their Wall Street lawyers—actors such as J.P. Morgan & Sons and the Cravath law firm, which perfected the legal mechanics of corporate reorganization in the closing decades of the nineteenth century.[53] Critics argued in effect that the receivership amounted to little more than a successful effort to launder a fraudulent conveyance through a shamefully cooperative federal judiciary for the benefit of Wall Street insiders and at the expense of investors and non-Wall Street creditors.[54] It's also not clear that receiverships were practically successful as a mechanism for rehabilitating troubled firms. Serial receiverships were not uncommon, and modern research suggests that many receiverships were economically ineffective.[55]

The courts responded by developing a set of doctrines designed to protect the interests of non-participating creditors. Accordingly, courts imposed conditions on the approval of the judicial sale. The court had to be persuaded that the cash distributed to the non-participating creditors represented the fair value of their claims and that they would be no worse off than if they had been left to their legal remedies.[56] This was done by establishing an "upset price." If creditors bid below this price at the judicial auction, the court would refuse to finalize the sale.[57] In practice, this price was often set very low, drawing the understandable ire of critics, who insisted that unless the upset price was set higher, dissenting creditors would be harmed for the benefit of insiders.[58] The courts also held that equity holders in the old railroad, who were frequently represented by the same bankers that dominated the receivership, were not allowed to participate in the new entity at the expense of the creditors.[59] Eventually, the procedures developed by the courts in

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52. *See* Cent. Tr. Co. v. Wabash, St. Louis & Pac. Ry. Co., 29 F. 618, 623 (C.C.E.D. Mo. 1886) (allowing the debtor to file for a receivership without a creditor); *see also* D.H. Chamberlain, *New-Fashioned Receiverships*, 10 HARV. L. REV. 139, 141–43 (1896) (an article by opposing counsel in the case violently criticizing the Wabash decision).

53. *See* SKEEL, *supra* note 25, at 63–69 (discussing the role of Wall Street bankers and lawyers).

54. *See generally* MAX LOWENTHAL, THE INVESTOR PAYS (1933) (offering an influential progressive critique of the mature equity receivership system of corporate reorganization).

55. *See* Stephen J. Lubben, *Railroad Receiverships and Modern Bankruptcy Theory*, 89 CORNELL L. REV. 1420, 1462–68 (2004) (arguing that the evidence suggests that most receivership proceedings were not economically successful).

56. *See* Inv. Registry, Ltd. v. Chi. & Milwaukee Elec. R.R. Co., 212 F. 594, 609–10 (7th Cir. 1913); *In re* Prudential Outfitting Co. of Del., 250 F. 504, 507 (S.D.N.Y. 1918); *see also* Weiner, *supra* note 50, at 138 (discussing how the upset price can be used to protect minority creditors).

57. *See* SKEEL, *supra* note 25, at 60.

58. *See id.* at 71 (discussing criticisms of the "upset price" in practice); Weiner, *supra* note 50, at 145 ("In fact the upset price has ceased to be a protection for the minority, if it ever was one, and has become one of the most useful tools of the majority for forcing recalcitrants into line.").

59. *See* N. Pac. Ry. Co. v. Boyd, 228 U.S. 482, 561–62 (1913) (disallowing old equity from participating in a reorganized firm unless they provided new capital in exchange

equity receivership were codified, with some modifications and enhancements, in the 1938 Chandler Act, the progenitor of the modern Bankruptcy Code.[60] The best interests test and the absolute priority rule, which form the heart of modern cramdown procedures, were originally articulated to protect non-consenting creditors whose claims were cut off by the receivership.[61]

C. Modern Receiverships

After the passage of the Chandler Act, corporate debtors ceased using equity receiverships to restructure their debts. Indeed, because the Chandler Act placed control over large corporate reorganizations in the hands of Securities and Exchange Commission ("SEC") trustees who excluded a debtor's pre-filing lawyers and bankers from the proceedings, the corporate reorganization bar went into eclipse, and large-scale corporate restructurings were less common in the immediate post-New Deal era.[62] Over time, the government-controlled process envisioned by the Chandler Act was eroded as corporations made use of Chapter XI of the Act, which was originally intended for small businesses.[63] This procedure retained the basic structure of the equity receivership, with the proceeding largely under the control of the debtor. In 1978, Congress enacted the modern Bankruptcy Code, which removed the SEC from the reorganization process by broadening the Chandler Act's Chapter XI into the even more expansive Chapter 11 procedure, returning to a restructuring process that was closer to the equity receivership, albeit with enhanced protections for dissenting creditors.[64]

Despite the rise of the Bankruptcy Code, the receivership continues to be available as a remedy in federal courts. It arises from the general grant of equitable jurisdiction and power to the federal courts and continues to be available under the Federal Rules of Civil Procedure.[65] The rules assume the applicability of a body of

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for new equity); Douglas G. Baird & Robert K. Rasmussen, Boyd*'s Legacy and Blackstone's Ghost*, 1999 SUP. CT. REV. 393, 397–401 (discussing the background to *Boyd*, 228 U.S. 482, which the authors call "the most important bankruptcy decision of the last century").

60. *See* Pub. L. No. 75–696, 52 Stat. 840 (1938); *see also* SKEEL, *supra* note 25, at 106–09 (discussing the legislative history of the Chandler Act).

61. *See* 11 U.S.C. § 1129(a)(7)(A)(ii) (providing the modern "best interest" test, which is the lineal descendant of the "upset price" rule); *id.* §1129(b) (providing the modern "fair and equitable" test, which is the lineal descendant of the absolute priority rule announced in *Boyd*, 228 U.S. 482).

62. *See* SKEEL, *supra* note 25, at 135–37.

63. *See id.*

64. *See* Bankruptcy Reform Act, Pub. L. No. 95-598, 92 Stat. 2549 (1978); 11 U.S.C. § 1129 (setting forth the enhanced protections provided to dissenting creditors in cramdown cases); *see also* SKEEL, *supra* note 25, at 131–59 (discussing the legislative history of the 1978 Act and its consequences for the practice of corporate reorganizations).

65. *See* FED. R. CIV. P. 66 ("[T]he practice in administering an estate by a receiver or a similar court-appointed officer must accord with the historical practice in federal courts or with a local rule."); *see also* Can. Life Assurance Co. v. LaPeter, 563 F.3d 837, 842 (9th Cir. 2009) (holding the federal law governs the appointment of a receiver in federal courts, even in diversity cases); SEC v. Safety Fin. Serv., Inc., 674 F.2d 368, 372 (5th Cir. 1982) (stating that federal courts have "broad powers inherent [in] supervising an equity receivership"); N.Y. Cmty. Bank v. Sherman Ave. Assocs., L.L.C., 786 F. Supp. 2d 171, 175

federal case law governing receiverships. Thus, Rule 66 states that "the practice in administering an estate by a receiver or a similar court-appointed officer must accord with the historical practice in federal courts or with a local rule."[66] Receiverships are regularly used, for example, in securities fraud cases.[67] In the wake of a failed Ponzi scheme, the SEC will petition a federal court for the appointment of a receiver.[68] The receiver will then be given power over all of the fraudster's assets and can use the court's equitable powers to locate and take control of those assets.[69] The goal of the receivership is to centralize and equalize recovery by victims of the fraud in a single proceeding so as to avoid a destructive race to the courthouse and the frittering away of the fraudster's assets in piecemeal litigation.[70] Accordingly, the receiver can call on the equitable powers of the federal court to stay litigation by victims in other fora and cut off individual creditors' claims against the fraudster's assets in the interests of creditors as a whole.[71]

SEC receiverships in Ponzi schemes are hardly the only place where modern federal statutes involve receivers. The most important and dramatic example is the case of receiverships by the Federal Deposit Insurance Corporation ("FDIC"), in which the assets of a troubled bank are taken over by a government receiver and sold.[72] However, there are numerous less well-known examples. For example, the Small Business Administration ("SBA") has the authority to institute receivership proceedings to wind up the affairs of businesses that have improperly obtained SBA loans.[73] Likewise, the Commodity Futures Trading Commission has the authority to deal with fraud cases involving commodity traders, which is analogous to the SEC's authority over securities fraud cases.[74] As a result of these regulatory schemes, the

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(D.D.C. 2011) (finding that absent specific statutory authority, district courts can appoint receivers using their "inherent powers as . . . court[s] of equity").

66. FED. R. CIV. P. 66.

67. *See* 15 U.S.C. § 77t(b) (authority for equity receiverships under the Securities Act of 1933), *id.* § 78u(d)(5) (authority for equity receiverships under the Exchange Act), *id.* § 78u(d) (authority for equity receiverships under the Investment Advisers Act). *See generally* David A. Gradwohl & Karin Corbett, *Equity Receiverships for Ponzi Schemes*, 34 SETON HALL J. LEGIS. & PUB. POL'Y 181 (2010) (providing a critical overview of equity receiverships by the SEC in cases of securities fraud).

68. *See* Gradwohl & Corbett, *supra* note 67, at 194–96 (describing the "elements of the equity receivership" in SEC enforcement actions).

69. *See id.* at 196.

70. *See id.*

71. *See id.* at 200.

72. *See* 12 U.S.C. § 1821(d) (setting forth powers of the FDIC as a receiver or conservator).

73. *See* 15 U.S.C. § 687(c) (authorizing the appointment of an SBA receiver); *see, e.g.*, United States v. Acorn Tech. Fund, Ltd. P'ship, 429 F.3d 438 (3d Cir. 2005) (SBA receivership case).

74. *See, e.g.*, Commodity Futures Trading Comm'n v. Am. Metals Exch. Corp., 991 F.2d 71, 72 (3d Cir. 1993) (upholding the appointment of a receiver in an CFTC enforcement action).

federal courts continue to build up a body of case law on receiverships.[75] They also continue to cite and rely on pre-Chandler Act equity receivership case precedent.[76]

Finally, equity receivers continue to be used as a remedy in cases where there is no statutory basis for a receivership, such as debt collection actions in diversity cases.[77] Because the receivership is an in rem procedure, it is not normally available in cases involving a simple breach of contract.[78] Modern creditors can avail themselves of a receivership in cases where they have some concrete interest in the debtor's property. The most common examples are where the creditor holds a mortgage or rights under a deed of trust.[79] Another situation involves a creditor who has acquired an interest in the debtor's property via a judgment.[80] However, with the consent of the debtor, a receiver can also be appointed in cases where the creditor has no concrete interest in the debtor's property but where the debtor consents to the receivership.[81] When a federal court decides cases involving receiverships that are vindicating rights under state law, the courts have held that under *Erie Railroad Co. v. Tompkins*[82] and its progeny, federal law controls the appointment and supervision of the receiver.[83] In short, while much diminished from its heyday at the turn of the twentieth century, the equity receivership remains a viable judicial remedy.

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75. Unless the court is grappling with an issue specific to the statutory scheme before it, precedents from one kind of receivership are treated as relevant and controlling for a different kind of receiver. Thus, for example, a court in an SEC receivership will cite to cases from SBA receiverships. *See, e.g.*, SEC v. Vescor Cap. Corp., 599 F.3d 1189, 1196 (10th Cir. 2010) (an SEC receivership case citing *Acorn Tech. Fund*, 429 F.3d at 443, an SBA receivership case); Ritchie Cap. Mgmt., L.L.C. v. Jeffries, 653 F.3d 755, 762 (8th Cir. 2011) (same).

76. *See, e.g.*, SEC v. Wencke, 622 F.2d 1363, 1371–72 (9th Cir. 1980) (discussing Harkin v. Brundage, 276 U.S. 36 (1928)).

77. *See, e.g.*, Digit. Media Sols., LLC v. S. Univ. of Ohio, 59 F.4th 772, 774 (6th Cir. 2023) (appointment of a receiver in a debt collection action); Nat'l P'ship Inv. Corp. v. Nat'l Hous. Dev. Corp., 153 F.3d 1289, 1291–92 (11th Cir. 1998) (same); Aviation Supply Corp. v. R.S.B.I. Aerospace, Inc., 999 F.2d 314, 316 (8th Cir. 1993) (same); N.Y. Life Ins. Co. v. Watt W. Inv. Corp., 755 F. Supp. 287, 293 (E.D. Cal. 1991) (appointing a receiver in an action to enforce a secured loan); View Crest Garden Apartments, Inc. v. United States, 281 F.2d 844, 849 (9th Cir. 1960) (affirming the appointment of a receiver in a case involving a mortgage foreclosure).

78. *See* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2985 (3d ed. 2020).

79. *See, e.g.*, Can. Life Assurance Co. v. LaPeter, 563 F.3d 837, 842 (9th Cir. 2009) (affirming the appointment of a receiver under a deed of trust); *View Crest Garden Apartments, Inc.*, 281 F.2d at 849 (affirming the appointment of a receiver in a case involving a mortgage foreclosure).

80. *See, e.g.*, Morgan Stanley Smith Barney LLC v. Johnson, 952 F.3d 978, 980 (8th Cir. 2020) (appointing a receiver at the request of a judgment creditor).

81. *See, e.g.*, *Digit. Media Sols.*, 59 F.4th 772 (a case involving breach of contract and the voluntary appointment of a receiver).

82. 304 U.S. 64 (1938).

83. *See Can. Life Assurance Co.*, 563 F.3d at 842 (noting that federal law governs appointment of a federal receiver even when diversity is the basis of jurisdiction); Nat'l P'ship Inv. Corp. v. Nat'l Hous. Dev. Corp., 153 F.3d 1289, 1291–92 (11th Cir. 1998) (same); Aviation Supply Corp. v. R.S.B.I. Aerospace, Inc., 999 F.2d 314, 316 (8th Cir. 1993) (same).

II. RESTRUCTURING RURITANIA

The modern Bankruptcy Code is a complicated statutory scheme spanning hundreds of pages.[84] It deals with a vast variety of issues and seeks to govern debtors ranging from distressed individuals to billion-dollar multinational corporations or huge municipalities.[85] The legal needs of distressed sovereigns, however, are more modest.[86] A country with unsustainable obligations that is seeking to restructure its debts has two basic requirements. First, while the lion's share of its restructuring will be voluntary, it needs the ability to impose new contractual terms on non-consenting creditors. The threat of such a cramdown, if only implicitly, should make negotiations easier. That is because it gives the sovereign a more credible threat than unilateral default or repudiation, which can have harsh and difficult-to-foresee consequences for the debtor.[87] More importantly, the power to cram down new terms against non-consenting creditors solves the problem of holdouts. Second, a sovereign debtor needs a mechanism to halt litigation on the debts that it seeks to restructure, both while the restructuring is ongoing and once new terms have been put in place. An equity receivership could supply both of these needs.

Consider the hypothetical case of Ruritania. Ruritania is a less-developed country. It has domestic law debt denominated in its local currency and held by Ruritanian citizens, primarily through the local banking sector. It also has bilateral debts to wealthy countries in the Paris Club and perhaps China. Finally, Ruritania has borrowed dollars from international capital markets by issuing New York law-governed bonds. Through misfortune, mismanagement, or perhaps a combination of the two, Ruritania finds itself in financial distress, and, unable to make interest payments on its debts, it defaults. The default shuts Ruritania out of international debt markets, further imperiling the country's ability to meet its obligations as they come due.[88] At this point, Ruritania calls on the IMF, which sends a team to the country to examine the finance ministry's books, assess economic conditions, and issue a debt sustainability analysis.[89] The IMF will suggest a combination of fiscal reforms, demand that Ruritania seek negotiated debt relief from its creditors, and, if Ruritania is lucky, offer bridge financing. At the same time, Ruritania will begin negotiations with its bilateral creditors through the Paris Club. It will also begin

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84. The Bankruptcy Code consists of the entirety of Title 11 of the United States Code. *See* 11 U.S.C. §§ 101–1532 (the Bankruptcy Code). This is not to be confused with Chapter 11 of the Bankruptcy Code itself, which is merely a portion of Title 11. *See id.* §§ 1101–95 (Chapter 11).

85. *Compare id.* §§ 1101–1195 (reorganization of corporate debtors), *with id.* §§ 901–946 (reorganization of a municipality).

86. For example, much of the Bankruptcy Code deals with the precise shape of the bankruptcy estate, including the powers of bankruptcy trustees to avoid pre-petition transfers of the debtor's assets and bring that property back into the estate. The precise contours of the estate are vital in a bankruptcy proceeding because creditors look to the property of the estate to satisfy their claims or define the scope of their rights under a Chapter 11 plan. As explained in the text, none of this is true in Ruritania's equity receivership.

87. *See* Eichengreen, *supra* note 8, at 85–86.

88. *See* Buchheit et al., *supra* note 8, at 343–44.

89. *See* IRC TASK FORCE ON IMF & GLOB. FIN. GOVERNANCE ISSUES, OCCASIONAL PAPER SERIES: THE IMF'S ROLE IN SOVEREIGN DEBT RESTRUCTURINGS 13, 58 (2021).

negotiating with one or more committees representing major international bondholders.

Ruritania is able to reach an agreement with some of its external creditors, but there are holdouts despite the CACs in Ruritania's bonds. Ruritania's bonds now trade at a steep discount, and strategic creditors may buy their way into a blocking position in certain bonds.[90] Other creditors may sue immediately to change their claim against Ruritania from a bond into a judgment, hoping to avoid the reach of CACs.[91] Finally, it may simply prove difficult to persuade enough creditors to agree to Ruritania altering the terms of its contracts.[92] Chapter 11 allows a bankrupt debtor to cram down in the face of all but unanimous opposition from its creditors.[93] In contrast, even the most generous CACs require very large supermajorities to alter the important financial terms of a bond.[94]

At this point, Ruritania could go into federal court with the committees representing the cooperating creditors and ask that a receiver be appointed. The federal court would have subject-matter jurisdiction over the case under the FSIA and the waivers in the Ruritanian bonds.[95] The power to appoint a receiver is inherent in the federal court's general power to grant an equitable remedy on the underlying breach of contract claim in a case of debt default.[96] Ruritania and the friendly creditors would ask that the receiver be given control of all of Ruritania's

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90. *See* INT'L MONETARY FUND, *supra* note 20, at 30 ("Holdout behavior is still possible even under the single-limb voting mechanism under enhanced CACs, particularly in countries [such as frontier and low-income economies] where the total outstanding debt stock is relatively small and a holdout could assemble a blocking position at fairly low cost." (citation omitted)).

91. *See* Hamilton Rsrv. Bank Ltd. v. Democratic Socialist Republic of Sri Lanka, No. 22cv5199, 2023 WL 2632199, at *1 (S.D.N.Y. Mar. 24, 2023) (allowing Hamilton Bank to sue Sri Lanka for default); *see also* Weidemaier & Gulati, *supra* note 22 (discussing Hamilton Bank's strategy of obtaining an early judgment in order to avoid being structured under the collective action clauses in Sri Lanka's bonds).

92. *See* Buchheit et al., *supra* note 8, at 344–46.

93. *See* 11 U.S.C. § 1129 (setting forth the requirements that a Chapter 11 plan must meet in order to be "crammed down" against objecting creditors).

94. *See* Quarles, *supra* note 19, at 36–37; *see also* Weidemaier & Gulati, *supra* note 19, at 78–79.

95. *See* 28 U.S.C. § 1330(a) ("The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity . . . .").

96. *See* FED. R. CIV. P. 66 ("[T]he practice in administering an estate by a receiver or a similar court-appointed officer must accord with the historical practice in federal courts or with a local rule."); *see also* Can. Life Assurance Co. v. LaPeter, 563 F.3d 837, 842 (9th Cir. 2009) (holding that federal law governs the appointment of a receiver in federal courts, even in diversity cases); SEC v. Safety Fin. Serv., Inc., 674 F.2d 368, 372 (5th Cir. 1982) (stating that federal courts have "broad powers inherent in . . . supervising an equity receivership"); N.Y. Cmty. Bank v. Sherman Ave. Assocs., LLC, 786 F. Supp. 2d 171, 175 (D.D.C. 2011) (finding that absent specific statutory authority, district courts can appoint receivers using their "inherent powers as . . . court[s] of equity").

non-exempt property subject to the jurisdiction of the U.S. courts.[97] Non-exempt property in this context means all Ruritanian property subject to possible attachment by Ruritanian creditors—thus excluding property such as embassies, diplomatic residences, and military vessels where control by the receiver would raise problems under domestic and international law.[98]

The receivership is an in rem proceeding against the debtor's property.[99] By operation of law, a receiver acquires the right to possession and control of the debtor's property to the exclusion of other claimants.[100] The district court would then issue a blanket stay against efforts by creditors to enforce their claims against the debtor's assets outside of the receivership.[101] Thus, the receivership would deprive creditors of their traditional legal remedy. The receiver's control of the property standing alone, however, would not prevent creditors from merely pursuing a judgment in another court—a judgment that could be taken to a non-U.S. court for enforcement against the non-U.S. property of the debtor.[102] However, receivers have long been able to sue to obtain injunctions commanding creditors to refrain from litigating in other fora when doing so would undermine or complicate the receivership.[103] This includes injunctions against creditors pursuing litigation in

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97. *See* Commodity Futures Trading Comm'n v. Am. Metals Exch. Corp., 991 F.2d 71, 76 (3d Cir. 1993) (district courts have discretion to determine the scope of a receiver's power over a debtor's assets).

98. *See, e.g.*, Schooner Exch. v. Mc'Faddon, 11 U.S. (7 Cranch) 116, 146–47 (1812) (holding that federal courts lacked jurisdiction over the naval vessels of friendly foreign sovereigns); 28 U.S.C. § 1611(b)(2) (exempting military property of a foreign state from attachment); *id.* § 1609 ("Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.").

99. *See* WRIGHT & MILLER, *supra* note 78, § 2985 ("[A]ppointment of a receiver is in the nature of a proceeding in rem").

100. *See* 28 U.S.C. § 754 ("A receiver appointed in any civil action or proceeding involving property, real, personal or mixed, situated in different districts shall, upon giving bond as required by the court, be vested with complete jurisdiction and control of all such property with the right to take possession thereof."); *see also* 2 RALPH EWING CLARK, A TREATISE ON THE LAW AND PRACTICE OF RECEIVERS §329(a) (3d ed. 1959) ("A receiver does not take title as a bona fide purchaser, but takes the assets subject to the equities existing between the parties. A receiver takes the property by operation of law and not by voluntary act of the owner.").

101. *See* SEC v. Black, 163 F.3d 188, 192–93 (3d Cir. 1998) (discussing the power of the district court to issue a blanket order freezing the debtor's assets); SEC v. Humphries, No. 2:22-cv-00612, 2022 WL 4483143, at *2 (D. Nev. Sept. 27, 2022) ("[T]his [C]ourt hereby takes exclusive jurisdiction and possession of the personal assets, of whatever kind and wherever situated of the following [d]efendants . . . ." (third alteration in original)).

102. *Cf.* NML Cap. v. Republic of Argentina (2012) No. RPC/343/12, at 25 (HC) (Ghana) (seizing a training ship of the Argentine Navy to satisfy the judgment of a hedge fund while the ship was visiting the port of Accra).

103. In most modern receiverships, such an order is unnecessary because the receiver has control of all the debtor's property. As a result, it is impossible to enforce a judgment except through the receivership. Nevertheless, such injunctions are sometimes

non-U.S. courts.[104] All that is necessary for the U.S. court to issue such an injunction would be for the court to have personal jurisdiction over the target of the injunction.[105] The receiver would be bringing an action of the receivership, not the debtor, and would thus have standing to initiate the action.[106] In the case of Ruritania, the holders of New York law-governed bonds would likely have minimum contacts with the U.S. forum by virtue of the purchase of the bonds and the contractual relationships with New York-based brokers and underwriters needed

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given particularly when a debt could be enforced against a third party in a way that would affect the receivership proceeding. *See, e.g.*, Zacarias v. Stanford Int'l Bank, Ltd., 945 F.3d 883, 904–05 (5th Cir. 2019) (upholding an injunction barring creditors from pursuing actions against third parties and their property when doing so would interfere with the orderly and efficient administration of the receivership); Zacarias v. Stanford Int'l Bank, Ltd., 931 F.3d 382, 401 (5th Cir. 2019) (same).

104. *See, e.g.*, Seattle Totems v. Nat'l Hockey League, 652 F.2d 852, 855 (9th Cir. 1981) ("A federal district court with jurisdiction over the parties has the power to enjoin them from proceeding with an action in the courts of a foreign country, although the power should be 'used sparingly.'" (citation omitted)); SEC v. Pension Fund of Am., L.C., 613 F. Supp. 2d 1341, 1347 (S.D. Fla. 2009) (enjoining litigation in Costa Rica involving an American receivership), *aff'd in part and rev'd in part*, 396 F. Appx. 577 (11th Cir. 2010).

105. Indeed, in some receiverships, district courts have issued injunctions against parties who are not parties to the receivership proceeding when the actions of those parties potentially interfered with that proceeding. *See* SEC v. Wencke, 622 F.2d 1363, 1372–74 (9th Cir. 1980) (upholding a district court's issuance of a blanket stay that stopped state court proceedings by creditors who were not part of the receivership proceeding).

106. Traditionally, the power of the receiver to bring suits was not inherent in the receivership itself, unless authorized by statute. As explained by one treatise writer,

> In order to carry out the purposes of the receivership it may be necessary for the receiver to institute suits either in the court in which he is appointed or in other courts . . . . In large receiverships, particularly in railroad receiverships where many suits either for or against the receiver are brought, it is generally customary when the order of appointment is made to provide that the receivers may bring such suits and defend such suits as are necessary to the due administration of the res.

2 CLARK, *supra* note 100, § 578. In order to facilitate modern receiverships, however, Congress has empowered receivers to sue by statute. *See* 28 U.S.C. § 754 (stating a receiver "shall have capacity to sue in any district without ancillary appointment").

to execute such transactions.[107] If necessary, the receiver could reach all of the bondholders through a class action suit.[108]

Having stopped all litigation on the old bonds, Ruritania would still need to swap its old bonds for new bonds with restructured terms. It could do this by issuing new bonds with the desired terms to the receiver in New York. These bonds would automatically become the property of the receivership. The receiver would then distribute these bonds to the creditors like any other distribution of cash or assets from a receivership. Finally, the receiver would petition the court to render the injunction against litigating the old bonds permanent and return the rest of Ruritania's non-exempt property to Ruritania. As a practical matter, the receivership would be at an end.

This entire process would be subject to judicial supervision and a final judicial decision. The objecting creditors would no doubt argue that the permanent injunction depriving them of the ability to sue on their old bonds is inequitable. The receiver will be able to make a number of arguments in support of the restructuring. An equity receivership is a creditors' remedy, but it is a collective creditors' remedy. With the rise of railroad receiverships, it has been used for well over a century to corral creditors into a single proceeding for the collective good. It has always involved the impairment of individual legal remedies in the interest of maximizing returns for all of the creditors.[109] This continues to be the case for modern equity

107. There do not seem to be any U.S. cases discussing whether a court may exercise personal jurisdiction over a defendant based merely on the purchase of a bond in the United States. Merely selling securities in the United States, however, is sufficient to establish jurisdiction. *See* Pinker v. Roche Holdings, Ltd., 292 F.3d 361, 365 (3d Cir. 2002). In addition, bond contracts often have forum selection clauses stating that the debtor submits to exclusive jurisdiction in New York, even when the enforcement of a New York judgment in other courts is allowed. *See, e.g.*, *Prospectus Supplement: Republic of Peru €1,000,000,000 1.950% Euro-Denominated Global Bonds Due 2036*, U.S. SEC. & EXCH. COMM'N 14 (2021), https://www.sec.gov/Archives/edgar/data/77694/000119312521327174/d231510d424b2.htm#supprom231510_4 [https://perma.cc/D7QW-7QEZ] ("In connection with any legal action against Peru or its properties, assets or revenues arising out of or relating to the indenture or any debt securities or warrants, to which we refer in this prospectus as a 'related proceeding,' Peru will . . . submit to the exclusive jurisdiction of any New York State or U.S. federal court sitting in New York City, and any appellate court thereof . . . ."). One might be able to argue that in these clauses the bond purchasers have implicitly submitted to jurisdiction in the United States, at least for purposes of litigating their rights under the bonds.

108. While rare, it is possible under the Federal Rules of Civil Procedure to institute a class action lawsuit where the class consists of defendants rather than plaintiffs. *See* FED. R. CIV. P. 23(a) (emphasis added) ("One or more members of a class may sue *or be sued* as representative parties . . . ."). This action has been used in SEC receiverships. *See* Bell v. Brockett, 922 F.3d 502, 504–05 (4th Cir. 2019) (case involving a receiver who instituted a class action case against creditors who received preferential transfers from a Ponzi scheme).

109. *See* SKEEL, *supra* note 25, at 75–76 (discussing how equity receiverships were used to limit the individual creditor's remedies in the interests of creditors as a collective group).

receiverships.[110] Thus, the bare fact that a permanent injunction will impair the creditor's legal remedies cannot be a valid objection. It proves too much.

Rather, the inquiry should center on whether the impairment of the objecting creditors' legal remedies will be in the interest of all the creditors. Like the judge in a nineteenth-century railroad receivership forced to decide if the price offered for a distressed railroad's assets was fair to objecting creditors, the judge must decide if objecting creditors are being treated fairly.[111] The receiver will argue that the new bonds put into the receivership by Ruritania justify the permanent injunction. Without such an injunction, Ruritania will not offer the bonds, and without the bonds, the receivership has few assets to distribute to the creditors. True, the receiver and the court could reject Ruritania's offer, which would allow a small group of swashbuckling creditors to litigate against Ruritania to the ends of the earth and the end of time. This strategy might (or might not) pay off for the swashbucklers, but it provides no value to ordinary creditors and deprives them of the value of the new bonds.[112]

This is a difficult decision for the judge to make. However, it is not inherently more difficult than the kinds of decisions that bankruptcy judges are routinely required to make in Chapter 11 proceedings.[113] Furthermore, the judge is not without tools to assist in making this decision. She can look to the IMF's debt sustainability assessment.[114] Indeed, the IMF could even choose to opine as amicus curiae on a proposed restructuring. Likewise, as it has recently done in Sri Lanka's restructuring, the United States could opine in favor of an injunction in aid of reorganization.[115] Ruritania would be foolish to pursue a receivership in the teeth of unanimous creditor objections. The judge can thus look to the reasoning of

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110. *See* Gradwohl & Corbett, *supra* note 67, at 211 (discussing how modern SEC receiverships in Ponzi scheme cases limit the remedies of some victims on the theory that doing so benefits victims as a class); *see also* Zacarias v. Stanford Int'l Bank, Ltd., 945 F.3d 883, 899 (5th Cir. 2019) ("It is necessarily the case that where a district court appoints a receiver to coordinate interests in a troubled entity, that entity's investors will have hypothetical claims they could independently bring but for the receivership: the receivership exists precisely to gather such interests in the service of equity and aggregate recovery.").

111. *See, e.g.*, N. Pac. Ry. Co. v. Boyd, 228 U.S. 482, 510 (1913) (disallowing old equity from participating in a reorganized firm unless they provided new capital in exchange for new equity); Inv. Registry, Ltd. v. Chi. & Milwaukee Elec. R.R. Co., 212 F. 594, 609 (7th Cir. 1913); *In re* Prudential Outfitting Co. of Del., 250 F. 504, 507 (S.D.N.Y. 1918).

112. *See* MITU GULATI & ROBERT E. SCOTT, THE THREE AND A HALF MINUTE TRANSACTION: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN 14–17 (Illustrated ed. 2012) (discussing how litigation by hold-out creditors harmed other creditors and the citizens of sovereign debtors).

113. *See* WILLIAM MILLER COLLIER, COLLIER ON BANKRUPTCY ¶ 1100.09[2][e] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2009) (discussing the role of bankruptcy judges in determining whether a proposed Chapter 11 plan is fair to creditors and has some likelihood of succeeding).

114. *See generally Debt Sustainability Analysis*, INT'L MONETARY FUND, https://www.imf.org/external/pubs/ft/dsa/ [https://perma.cc/8EE5-SQGZ] (July 28, 2017) (briefly explaining the role of the IMF in producing debt sustainability analyses).

115. *See* Hamilton Rsrv. Bank Ltd. v. Democratic Socialist Republic of Sri Lanka, No. 22cv5199, 2023 WL 7180683, at *5–6 (S.D.N.Y. Nov. 1, 2023).

cooperating creditors, financially sophisticated parties with an incentive to prioritize their own interests above those of Ruritania. A judge could even resort to more exotic strategies to value the offer, such as auctioning some of the new bonds to non-creditors and refusing to approve the deal unless the bonds sell above a threshold close to their discounted present face value.[116] Finally, a skeptical judge could always call Ruritania's bluff and reject the restructured bonds but leave injunctions against collection efforts in place for a time while the debtor produces a higher bid.

III. COMPLICATIONS

It would be foolish, of course, to confidently predict the success of a proceeding as novel and complex as that outlined above. There would be serious obstacles, obstacles that would give any finance ministry pause before attempting such a risky undertaking. This Part discusses the main objections and complications to using an equity receivership to restructure sovereign debt. First, there is the question as to whether the Bankruptcy Code invalidates all of the older precedents governing equity receiverships. Does it occupy the field in this area, representing the sole mechanism available to a troubled debtor under federal law? Second, early railroad receiverships were consummated through a judicial sale of all of the debtor's assets, leaving an empty shell company with no assets or future revenues. This option is not available to a sovereign debtor. May a federal court issue the permanent injunction contemplated in Part II instead? Third, if New York law-governed debt can be restructured using a receivership in federal court, what of non-New York law-governed debt? Finally, while they have some legal similarities, the process of restructuring a sovereign raises normative questions that are not present in corporate restructurings. These normative concerns would play out in concrete terms in a Ruritanian restructuring.

A. Does the Bankruptcy Code Displace Equity Receiverships?

The most fundamental legal objection to using a receivership to restructure Ruritania's debt is that the procedure is too old. Perhaps the Bankruptcy Code has displaced the judge-created law of equity receiverships. It has established the sole insolvency regime in federal courts, an insolvency regime from which sovereign nations are excluded. As discussed above, the basic structure of a receivership proceeding consists of a court-appointed receiver taking control of a debtor's property, using injunctions to stop competing collection efforts, and distributing property to creditors.[117] This basic procedure continues to be part of the remedial repertoire of federal courts, both under federal statutes and as an inherent part of federal courts' equitable powers.[118] The U.S. Supreme Court has never passed on

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116. *Cf.* Paul B. Lewis, 203 N. LaSalle *Five Years Later: Answers to the Open Questions*, 38 J. MARSHALL L. REV. 61, 68–96 (2004) (discussing the complexities of the so-called "market test" in the context of Chapter 11 reorganizations).

117. *See supra* Part II.

118. *See* Can. Life Assurance Co. v. LaPeter, 563 F.3d 837, 842 (9th Cir. 2009) (holding the federal law governs the appointment of a receiver in federal courts, even in diversity cases); SEC v. Safety Fin. Serv., Inc., 674 F.2d 368, 372 (5th Cir. 1982) (stating that federal courts have "broad powers inherent in . . . supervising an equity receivership"); N.Y. Cmty. Bank v. Sherman Ave. Assocs., LLC, 786 F. Supp. 2d 171, 175 (D.D.C. 2011) (finding

the question of whether the Bankruptcy Code displaces the law of equity receiverships, but lower federal courts assume the continuing vitality of this law. As the Sixth Circuit Court of Appeals put it in 2023: "Before the modern bankruptcy laws, federal courts had long reorganized distressed corporate debtors using an equitable remedy: the appointment of a receiver in an 'equity receivership' to gather and safeguard the debtor's assets for a fair division among its creditors. These receiverships, although rare, continue to exist today."[119] There are several more specific reasons for concluding that the Bankruptcy Code is not intended to be the sole mechanism for dealing with insolvencies under American law.

First, the restructuring of a sovereign's debts is explicitly exempted from the reach of the Bankruptcy Code. Under the Code, only a "person" or a municipality may be a "debtor," and the term "person" is defined in the Code to exclude all government entities and municipalities, which includes only political subdivisions of American states.[120] It is thus impossible for there to be a direct conflict between a sovereign equity receivership and a federal bankruptcy proceeding. There is also no evidence that Congress intended to "occupy the field" of sovereign debt restructuring with the passage of the Bankruptcy Code. To the contrary, the Code explicitly chose to avoid legislating in this area. In the 1930s, of course, there would have been serious doubts as to whether widely accepted principles of sovereign immunity would have allowed Congress to legislate with regard to sovereign debts.[121] The same was not true, however, of the 1978 Bankruptcy Code. By the time of its passage, the U.S. State Department had endorsed the restrictive theory of sovereign immunity for decades, and Congress itself had codified that theory in 1976 with the passage of FSIA.[122]

Second, despite the passage of the Bankruptcy Code, federal courts continue to appoint receivers over insolvent entities. This is generally done pursuant to a statutory grant of authority, such as an SEC receivership used to wind up the affairs of a bankrupt fraudster or an FDIC receivership to deal with an insolvent bank.[123] However, federal courts will also appoint receivers based on their inherent equitable authority in cases where there is no statutory basis for the receivership.[124] None of these practices have been questioned in light of the passage of the Bankruptcy Code. In these proceedings, case law from the era of restructuring

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that absent specific statutory authority, district courts can appoint receivers using their "inherent powers as . . . court[s] of equity").

119. Digit. Media Sols., L.L.C. v. S. Univ. of Ohio, 59 F.4th 772, 774 (6th Cir. 2023).

120. *See* 11 U.S.C. § 101(41); *see also* Weidemaier, *supra* note 4, at 89–90 (discussing the theory of absolute sovereign immunity).

121. *See* Weidemaier, *supra* note 4, at 73–74.

122. *See* 28 U.S.C. §§ 1330, 1391(f), 1441(d), 1602–1611 (the Foreign Sovereign Immunities Act); Weidemaier, *supra* note 4, at 77–81 (discussing the development of the restrictive theory of sovereign immunity after World War II).

123. *See supra* Section I.C.

124. *See* SEC v. Safety Fin. Serv., Inc., 674 F.2d 368, 372 (5th Cir. 1982) (stating that federal courts have "broad powers inherent in . . . supervising an equity receivership"); N.Y. Cmty. Bank v. Sherman Ave. Assocs., LLC, 786 F. Supp. 2d 171, 175 (D.D.C. 2011) (finding that absent specific statutory authority, district courts can appoint receivers using their "inherent powers as . . . court[s] of equity").

receiverships is regularly cited. Furthermore, in construing the Bankruptcy Code, the U.S. Supreme Court has repeatedly cited landmark equity receivership cases, such as *Northern Pacific Railway Co. v. Boyd*,[125] in discussing the policies behind the Bankruptcy Code, which suggests that the Code's purpose was not to create a fundamentally different approach to debt restructurings.[126] Accordingly, allowing an equity receivership for a sovereign debtor would not involve recourse to basic principles repudiated by Congress.

Third, one can look by analogy to the preemptive force of the Bankruptcy Code on state law insolvency rules. In the much-discussed case of *Sherwood Partners v. Lycos, Inc.*, the Ninth Circuit Court of Appeals held that the Code preempted state insolvency remedies even if they did not directly conflict with federal law.[127] However, the holding in that case has been widely criticized and rejected by other courts.[128] For example, state court equity receiverships have been used to successfully restructure cannabis-related businesses that are legal under state law but cannot avail themselves of the Bankruptcy Code because such businesses remain illegal—but unprosecuted as a matter of Department of Justice policy—

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125. 228 U.S. 482 (1913).

126. *See, e.g.*, Bank of Am. Nat. Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434, 444 (1999) ("The terms 'absolute priority rule' and 'new value corollary' (or 'exception') are creatures of law antedating the current Bankruptcy Code, and to understand both those terms and the related but inexact language of the Code some history is helpful. . . . Hence the pre-Code judicial response known as the absolute priority rule, that fairness and equity required that 'the creditors . . . be paid before the stockholders could retain [equity interests] for any purpose whatever.'" (quoting *Boyd*, 228 U.S. at 508)) (citation omitted) (alteration in original)); Nw. Bank Worthington v. Ahlers, 485 U.S. 197, 202 (1988) ("The [absolute priority rule] had its genesis in judicial construction of the undefined requirement of the early bankruptcy statute that reorganization plans be 'fair and equitable.' The rule has since gained express statutory force and was incorporated into Chapter 11 of the Bankruptcy Code adopted in 1978." (citing *Boyd*, 228 U.S. at 504–05; Louisville Tr. Co. v. Louisville, New Albany & Chi. Ry. Co., 174 U.S. 674, 684 (1899)) (citation omitted)).

127. 394 F.3d 1198, 1205–06 (9th Cir. 2005).

128. *See, e.g.*, *In re* Fowler, 493 B.R. 148, 154 (Bankr. E.D. Cal. 2021) (declining to follow *Sherwood Partners*); Genius Fund I ABC, LLC v. Shinder, No. 2:21-cv-03765, 2021 WL 2136414, at *4–6 (C.D. Cal. May 26, 2021) (same); Insolvency Servs. Grp., Inc. v. Comcast Cable Commc'ns, L.L.C., No. 20-1499, 2021 WL 4477000, at *3 (D. Del. Sept. 30, 2021) (same); Windmill Health Prods., L.L.C. v. Sensa Prods., No. C-15-05714, 2015 WL 6471180, at *2 (N.D. Cal. Oct. 27, 2015) (same); *In re* Murray, 586 Fed. App'x 477, 480 (10th Cir. 2014) (same); Christian v. Mason, 219 P.3d 473, 477 (Idaho 2009) (same); Spector v. Melee Ent. LLC, No. 07C-03-191, 2008 WL 362125, at *4 (Del. Super. Ct. Feb. 6, 2008) (same); Ready Fixtures Co. v. Stevens Cabinets, 488 F. Supp. 2d 787, 790–91 (W.D. Wis. 2007) (same); Credit Managers Ass'n of Cal. v. Countrywide Home Loans, Inc., 50 Cal. Rptr. 3d 259, 260 (Ct. App. 2006) (same); Haberbush v. Charles & Dorothy Cummins Fam. Ltd. P'ship, 43 Cal. Rptr. 3d 814, 815 (Ct. App. 2006) (same). *See generally* Geoffrey L. Berman & Catherine E. Vance, *State Law Preference Actions: Still Alive After* Sherwood Partners v. Lycos, 26 AM. BANKRUPTCY INST. J. 24 (2008) (discussing the limited reach of *Sherwood Partners*).

under federal law.[129] Indeed, such proceedings have proceeded without objection in California state court despite the Ninth Circuit's decision in *Sherwood Partners*. In short, the Bankruptcy Code does not "occupy the field" with regard to state law insolvency regimes. One could claim by analogy that it also does not occupy the field when it comes to federal insolvency law.

B. Restructuring Judgments

To the extent that one can speak of such a thing, the current sovereign debt insolvency regime is geared toward the restructuring of contractual obligations. This can be seen most clearly in the reach of CACs, the one sovereign debt restructuring mechanism that does not rely on the unanimous consent of creditors. CACs allow debtors to impose new terms on non-consenting creditors provided that a supermajority of the other creditors consent. Crucially, however, CACs reach only the obligations that arise under the contract itself. Given the nature of sovereign liabilities, this focus on contractual obligations is unsurprising. For example, sovereigns seldom face massive tort liability that requires restructuring, although increasingly, sovereigns have involuntary creditors such as victims of state expropriation who obtain arbitral awards under bilateral investment treaties or other international regimes.[130] Still, historically, it has been the contractual liability of

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129. *See generally* Ryan C. Griffith, *Cannabis Receiverships: The Alternative for State Legal Cannabis Businesses Seeking Financial Rehabilitation Locked Out of Bankruptcy Court by the Controlled Substances Act*, 45 SEATTLE U. L. REV. 1107 (2022) (discussing the use of state receiverships in cannabis cases); Oren Bitan, *Cannabis Receiverships: A Viable Alternative to Bankruptcy*, CANNABIS INDUS. J. (July 20, 2022), https://cannabisindustryjournal.com/feature_article/cannabis-receiverships-a-viable-alternative-to-bankruptcy/ [https://perma.cc/4RET-KNL6] (same).

130. One important counter example would be large awards against sovereigns in cases involving the expropriation of foreign investors under either bilateral investment treaties, arbitration, or lawsuits before foreign courts in some cases. *See, e.g.*, Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela, 932 F.3d. 126 (3d Cir. 2019); OI Eur. Grp. BV v. Bolivarian Republic of Venezuela, 73 F.4th 157 (3d Cir. 2023). These cases present complexities in a receivership. Under the so-called New York Convention, the decision of an international arbitral tribunal is treated as a judgment under U.S. law and can be enforced under the Federal Arbitration Act. *See* 9 U.S.C. § 201; United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38. This statutorily created judgment could be dealt with in a U.S. receivership proceeding. However, it might not be possible to obtain an international injunction against enforcement of the arbitral award itself. Unlike a bond contract, such awards are creatures of international rather than domestic law. Concerns of international comity could exist were a U.S. court to seek to make international obligations unenforceable in a country that may have international obligations to see that such treaties are enforced. Less speculatively to obtain an international injunction in a receivership, the foreign cause of action must be identical to the U.S. cause of action subject to a receivership. Thus, a court should be able to prohibit a party from attempting to enforce the statutorily created U.S. judgment in a foreign court. However, if a party seeks to enforce the international decision itself in a foreign court using that country's domestic law, there may be a serious question as to whether the U.S. court could issue an injunction, especially if the foreign treaty enforcement mechanism differs in material respects from U.S. law. Finally, in many cases the creditors under international treaties will be beyond the personal jurisdiction of U.S. courts. As a practical matter, however, the inability

sovereign borrowing that has posed an existential threat to countries' fiscal health.[131] Unsurprisingly, the focus of lawyers and policymakers has been on how to restructure this contractual debt overhang.

However, the already anemic CAC restructuring regime is vulnerable to non-contractual liabilities, which it may not be able to reach. The most important way that such liabilities can arise is by a creditor obtaining a judgment against the sovereign. It's tempting to think of a judgment as little more than a step on the road to enforcement of an underlying obligation. Hence, we could think of a suit by a bondholder as an effort to enforce a contract. Obtaining a judgment is simply one procedural stage in the process of putting the coercive machinery of the state in motion to vindicate the bondholder's contractual rights. The judgment will be followed by a writ of execution or perhaps a judgment lien and, ultimately, the seizure and sale of the debtor's property in satisfaction of the debt.

As a functional matter, this view of judgments is generally correct, but it elides some important technical consequences of obtaining a judgment. Crucially, when one obtains a judgment, the original cause of action is merged into the judgment.[132] This is why a bondholder who obtains a judgment against a debtor cannot sue a second time to enforce the same breach. The cause of action based on the original contractual breach ceases to exist. After the judgment is rendered, the only cause of action is the judgment itself. An unpaid plaintiff can sue on the judgment but cannot sue on the underlying cause of action. Furthermore, as a cause of action, the judgment has different characteristics than those of the breach of contract action. Most notably, compared to ordinary civil claims, the statute of limitations on a judgment is much longer—usually 20 years—and all that one must show to obtain relief is non-payment of the judgment.[133]

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of a sovereign to use a receivership to stop litigation on an arbitral decision in the courts of another country may be of little significance if the important assets are in the United States. The protracted *Crystallex* litigation against Venezuela centered around ownership of Citgo—the American oil company wholly owned by PDVSA, the Venezuelan state oil company—provides an example. A receivership over Citgo might be sufficient as a practical matter to restructure Venezuela's debt to Crystallex even though Crystallex might technically be able to litigate against Venezuela in other countries.

131. *See generally* CARMEN REINHART, THIS TIME IS DIFFERENT: EIGHT CENTURIES OF FINANCIAL FOLLY (2009) (providing a history and analysis of sovereign debt crises entirely in terms of contractual debts).

132. 46 AM. JUR. 2D *Judgments* § 430 (2024) ("Upon rendition of a judgment, a cause of action merges into the judgment and that judgment is conclusive as to all matters which were litigated, which properly should have been litigated or might have been litigated in the original action.").

133. It is rare to sue on a judgment but not unheard of. The most common situation involves the effort to domesticate a judgment in a foreign jurisdiction. In order to use a judgment from State A to reach property in State B, the judgment must be domesticated in State B, usually by filing the judgment in a local court and then asking that court to issue a writ of execution against the property of the debtor located in State B. State B's laws, however, may prohibit the domestication of a stale foreign judgment. Accordingly, a plaintiff holding an old but unpaid judgment must sue on the judgment in State A in order to obtain a new judgment that may be domesticated in State B. *See, e.g.*, N.Y. C.P.L.R. § 211(b) (MCKINNEY 2024).

Because CACs reach only contractual obligations, it's possible that they cannot be used to alter the sovereign's obligations under a judgment. We are in the midst of the first major wave of sovereign defaults since the creation of the CAC regime, so it is difficult to know exactly how judgments will be used and how they will be deemed to affect debtors' powers under CACs. However, there are indications that strategic creditors will use them to try to avoid involuntary restructuring and improve their bargaining position vis-à-vis distressed sovereigns. This dynamic seems to be in play in the recent case of *Hamilton Bank Ltd. v. Sri Lanka*.[134] The Democratic Republic of Sri Lanka defaulted on its debt on April 18, 2021.[135] Hamilton Bank, which held dollar-denominated Sri Lankan bonds, sued in the Southern District of New York on June 21, 2022.[136] The ostensible issue in the litigation was whether Hamilton Bank, as the beneficial owner of Sri Lanka's bonds, could sue even though another entity was the holder of record.[137] The striking thing about the suit is the speed that Hamilton Bank sued Sri Lanka, particularly as the statutory rate of interest that it would get on any judgment would be lower than the contractual rate of interest on its bonds.[138] As a point of comparison, Argentina defaulted on its external debt in 2001, but Elliot Associates did not institute the lawsuit that ultimately led to its multibillion-dollar payout until 2009.[139] Knowledgeable observers have suggested that the accelerated pace of Hamilton's

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134. *See* No. 22cv5199, 2023 WL 2632199 (S.D.N.Y. Mar. 24, 2023) (allowing Hamilton Bank to sue Sri Lanka for default).

135. *See* Uditha Jayasinghe & Alasdair Pal, *Sri Lanka to Default on Debt, No Money for Fuel, Minister Says*, REUTERS (May 18, 2022, 11:52 PM), https://www.reuters.com/world/asia-pacific/sri-lanka-default-debt-no-money-fuel-minister-says-2022-05-18/ [https://perma.cc/5EEW-5JWM].

136. *See Hamilton Rsrv. Bank Ltd.*, 2023 WL 2632199, at *1.

137. *See id.*

138. On November 1, 2023, the Southern District of New York, at the request of Sri Lanka and the United States, agreed to stay Hamilton Bank's lawsuit for six months to allow voluntary restructuring negotiations to proceed. *See* Hamilton Rsrv. Bank Ltd. v. Democratic Socialist Republic of Sri Lanka, No. 22cv5199, 2023 WL 7180683, at *6 (S.D.N.Y. Nov. 1, 2023).

139. *See* NML Cap. Ltd. v. Republic of Argentina, 699 F.3d 246, 253 (2d Cir. 2012) (discussing the procedural history of the case); *see also* GULATI & SCOTT, *supra* note 112, at 12–17 (providing a timeline of the Elliot Associates litigation against the Republic of Argentina). The classic holdout strategy can be summarized thus:

> Activist creditors are able to extract a larger return from holding out if they wait until the debtor first negotiates a significant haircut with the other creditors and only then litigate against both the debtor and the holders of the restructured bonds until a settlement is achieved. Put differently, holding out works best if the population of holdouts is relatively small so that it is in the financial interest of the debtor to pay the holdouts in full in order to settle with the other creditors at the restructured rate. This means that a holdout creditor has an incentive to hide its plans, including which bonds it plans to target, until after the other creditors have settled their claims with the sovereign.

Scott et al., *supra* note 20, at 263.

lawsuit is motivated by a desire to avoid CAC restructuring.[140] The current CAC regime thus creates an incentive for aggressive creditors to rush into court.

In contrast to the CAC regime, the Bankruptcy Code allows for the restructuring of judgments as well as contracts.[141] To be sure, a creditor who obtains a judgment lien will often be able to retain their priority in bankruptcy.[142] However, a bare judgment is treated like any other claim in a Chapter 11 case and can be restructured just like a tort claim or a contract.[143] Scholars have noted the desirability of such a global restructuring power in the context of sovereign debt and have lamented its presumed absence.[144] Like Chapter 11, however, an equity receivership could be used to restructure the rights of judgment holders along with those holding only contractual rights.[145] This is because, formally, a receivership, like the corporate bankruptcy proceeding that is its descendant, limits a creditor's remedies against the debtor, rather than eliminating or altering the underlying obligations.[146] In contrast, CACs may alter only the underlying contractual liability rather than altering the creditors' remedies. This is why under an equity receivership, a creditor

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140. *See* Weidemaier & Gulati, *supra* note 22.

141. *See* 11 U.S.C. § 101(5)(A) ("The term 'claim' means . . . [a] right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured . . . ."); *see also* COLLIER, *supra* note 113, at ¶ 502.02[1][c] (discussing the scope of the concept of "claim" in bankruptcy).

142. Often, but not always. A creditor who obtains a judgment lien on the threshold of bankruptcy will find their lien stripped away as a voidable preference. *See* 11 U.S.C. § 547(d) (setting forth the trustee in bankruptcy's or debtor in possession's power to reverse preferential transfers of property made on the threshold of bankruptcy).

143. *See, e.g.*, Epstein v. Official Comm. of Unsecured Creditors of Est. of Piper Aircraft Corp., 58 F.3d 1573, 1576–77 (11th Cir. 1995) (defining the scope of the term "claim" under the Bankruptcy Code).

144. *See generally* Lee C. Buchheit & Mitu Gulati, *Avoiding a Lost Decade—An Interim Update*, 39 OXFORD REV. ECON. POL'Y 356 (2023); Robin Wigglesworth, *Treating Sovereign Defaults like a Plane Crash*, FIN. TIMES (U.K.) (Feb. 20, 2023), https://www.ft.com/content/49d6e473-98a9-4486-bcf2-d4532da93e88 [https://perma.cc/33U4-Q2R3].

145. *See, e.g.*, Duff v. Cent. Sleep Diagnostics, L.L.C., 801 F.3d 833, 841–43 (7th Cir. 2015) (disregarding a judgment creditor's lien in distributing receivership estate because the judgment creditor attempted to "perfect" the lien against settlement proceeds from a state court case in violation of the receivership stay); SEC v. Wencke, 622 F.2d 1363, 1369–70 (9th Cir. 1980) (affirming denial of creditor's motion for leave to enforce a state court judgment against the defendant outside of the receivership court); 11 U.S.C. § 101(5)(A) ("The term 'claim' means . . . [a] right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured . . . .").

146. This may seem to be an overly lawyerly distinction, but it can have very concrete practical implications. The most important situation involves the liability of a guarantor of a contract that has been restructured in Chapter 11. Even though the debtor cannot be forced to pay the full amount of the original debt, a guarantor remains fully liable under the original contract. In other words, for all purposes *other than* enforcement against the debtor the original contract remains valid and the debtor's non-payment is treated as a breach. *See* 11 U.S.C. § 727(b) ("[A] discharge under subsection (a) of this section discharges *the debtor* . . . ." (emphasis added)).

might be free to litigate against a debtor in other fora, so long as once a judgment is obtained, a creditor makes no effort to enforce the judgment.[147] This was the approach taken under the Chandler Act as well.[148] It wasn't until the passage of the Bankruptcy Code in 1978 that creditors were required not only to enforce but also to litigate their claims in the bankruptcy forum.[149] This was done not because it was necessary to the restructuring of debts, but because centralizing all proceedings in the bankruptcy forum economized on litigation expenses.[150] Occasionally, modern receiverships will enjoin litigation in other fora for the same reason.[151] Whether such an injunction against litigation in other fora should be issued in a receivership for a sovereign debtor will depend on how costly such litigation is for the estate. Strictly speaking, however, an injunction against litigation in other fora during the receivership is not necessary to affect a reorganization—this is so as long as there is an injunction against efforts to levy on any judgment, and at the conclusion of the proceeding, the court issues an injunction against all attempts to enforce the old bonds. Likewise, a court could issue an injunction against efforts to enforce a U.S. judgment.

C. Obtaining a Permanent Injunction

Procedurally, the final resolution of Ruritania's receivership differs in important ways from that of a nineteenth-century railroad reorganization. They both end by leaving non-consenting creditors with "valid" but unenforceable claims. In the case of the railroad receivership, this was done by the judicial sale of the railroad's assets to a new corporate entity owned by the participating creditors.[152] If a creditor declined to participate in the new entity, it formally retained a claim against the old company, but that company was reduced to an empty corporate shell. In the imagined Ruritanian proceeding above, the objecting creditor formally retains its previous legal claim against Ruritania, which of course continues to exist and has revenues and property. Any attempt by the creditor to enforce its old bond, however, will result in a contempt citation. Of course, in the railroad receivership, the railroad also continued to exist as a real economic entity.[153] The only thing that changed was the identity of the legal fiction that owned the assets. The question arises of whether

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147. *See id.* § 101(5)(A) (discussing the scope of the concept of "claim" in bankruptcy and instructing that "[t]he term 'claim' means . . . [a] right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured").

148. *See id.* § 105 (discussing the role and jurisdiction of bankruptcy courts); *see also* Chandler Act, Pub. L. No. 75–696, 52 Stat. 840, 888 (1938).

149. *See* § 105 (discussing the role and jurisdiction of bankruptcy courts).

150. *See id.*; *see also* CHARLES JORDAN TABB ET AL., LAW OF BANKRUPTCY 42–43 (W. Acad. 6th ed. 2025) ("A key aspect of the reform was to enlarge substantially the jurisdiction of the bankruptcy courts, so that bankruptcy judges could hear virtually any matter arising in or related to a bankruptcy case. One of the major perceived weaknesses of the 1898 Act was the splintered jurisdictional scheme . . . .").

151. *See, e.g.*, Zacarias v. Stanford Int'l Bank, Ltd., 931 F.3d 382 (5th Cir.), *withdrawn and superseded on reh'g by* 945 F.3d 883 (5th Cir. 2019) (upholding the jurisdiction of a district court to issue injunctions against litigation in other courts—including state court—in aid of a receivership proceeding).

152. *See* SKEEL, *supra* note 25, at 59–60.

153. *See id.* at 58–60.

a U.S. court can cut off creditors' rights against a restructured entity without a judicial sale, using only a permanent injunction.

The answer seems to be yes. In 1922, the Eighth Circuit Court of Appeals decided the case of *Phipps v. Chicago, Rock Island & Pacific Railway Co.*[154] The case involved a suit by several creditors against a railroad company that had gone through an equity receivership.[155] The creditors had obtained judgments against the railroad and were seeking to enforce them against the debtor corporation.[156] Unlike in earlier receiverships, however, there had been no judicial sale in *Phipps*. Rather, creditors—including the judgment creditors in the case—had been given stock in the original corporate debtor, which was left in possession of the railroad.[157] The district court had then consummated the restructuring by issuing a permanent injunction against any effort to enforce the pre-receivership debts of the corporation.[158] This was done to save the expense of the judicial sale and creation of a new corporation.[159] In upholding the permanent injunction, the *Phipps* court focused on whether the restructuring was "fair, equitable, and just."[160] This was the standard for cutting off the creditors' claims, rather than the formality of a judicial sale. The Supreme Court granted certiorari in the case, but the grant was dismissed by agreement of the parties. The importance of the *Phipps* case, however, was recognized at the time, drawing the attention of numerous legal commentators.[161]

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154. 284 F. 945 (8th Cir. 1922).

155. *Id.* at 946.

156. *See id.* at 946–47.

157. *See id.* at 947, 953.

158. *See id.* at 947.

159. *See id.* at 946–47.

160. *Id.* at 952 ("[I]t was not the judicial sale that made the decree and the title of the reorganized company in that case impervious to the attacks of the creditors of the old company. It was the offer to them in stock of the reorganized company of their fair and equitable shares in the benefits of the participation in that company."); *id.* at 954 ("[T]he decree of the United States District Court . . . was far within the jurisdiction and power of that court, and was fair, equitable, and just.").

161. *See, e.g.*, Carl B. Spaeth, *The Reorganization Amendments to the Bankruptcy Act*, 8 TEMPLE L.Q. 447, 462–63 (1934) (discussing the commentary in the aftermath of the *Phipps* decision); *Corporations—Reorganization by Decree—Power of Court to Require Dissenting Unsecured Creditors to Accept Payment in Securities of the Reorganized Corporation*, 36 HARV. L. REV. 1030 (1923) (discussing the case shortly after its issuance); *Power to Require Nonassenting Creditors or Bondholders to Accept Securities Of, or Shares In, New or Reorganized Corporation*, 28 A.L.R. 1196 (1924) (discussing the case); *Power to Require Nonassenting Creditors or Bondholders to Accept Securities Of, or Shares In, New or Reorganized Corporation*, 88 A.L.R. 1238 (1934) (updating the earlier note). Jerome Frank defended the holding in *Phipps*, writing:

> The support of the [*Phipps* decision] can rest upon the fact heretofore discussed: the utter practical uselessness and meaninglessness of a judicial sale in connection with any reorganization of a corporation with a huge debt structure. That practical uselessness and meaninglessness in such cases is a fact. And it is a fact which the courts should recognize and to which they should attach consequences even in cases where stockholders

Even though the holding was never affirmed by the Supreme Court, *Phipps* has been followed by other courts.[162] After the passage of the Chandler Act, the Second Circuit noted that far from displacing the rule in *Phipps*, it was codified in the Bankruptcy Act as to corporate restructurings.[163]

A legal realist might note that 1922 was a long time ago and that courts beyond the Eighth Circuit are not formally bound by *Phipps*. This is a fair point, and it would be of practical concern to any finance ministry considering a receivership. The realist critic could also point to the U.S. Supreme Court's apparently skeptical modern stance toward a broad reading of courts' residual power to craft injunctions in cases involving insolvency. In *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund*, the Supreme Court struck down a preliminary injunction issued by a district court.[164] The creditor obtained an order prohibiting the insolvent debtor from making preferential transfers of property to other creditors.[165] The Supreme Court held that the district court's power to craft such an injunction was limited to the powers held by an English equity court in 1789 when the original Judiciary Act was passed.[166] And in 1789, equity courts lacked the ability to join a debtor absent a judgment.[167]

Grupo Mexicano can be distinguished from *Phipps* in various ways. First, *Grupo Mexicano* involved a preliminary injunction rather than a final injunction. Since deciding *Grupo Mexicano*, the Court has considered no fewer than ten cases involving permanent injunctions. None of those cases apply the framework from *Grupo Mexicano*.[168] Second, a permanent injunction is generally ordered under Federal Rule of Civil Procedure 65. *Grupo Mexicano* was decided under Rule 65(a),

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> have not participated and quite apart from any aspect of the doctrine of fraudulent conveyances.

Jerome N. Frank, *Some Realistic Reflections on Some Aspects of Corporate Reorganization*, 19 VA. L. REV. 541, 562–63 (1933).

162. *See, e.g.*, Guar. Tr. Co. of N.Y. v. Seaboard Air Line Ry. Co., 53 F. Supp. 672, 700 (E.D. Va. 1943), *aff'd sub nom.* Badenhausen v. Guar. Tr. Co. of N.Y., 145 F.2d 40 (4th Cir. 1944) (noting that "[t]here are indeed a very few cases in which the futility of [judicial sales in reorganization proceedings] has been recognized and dispensed with" (citing *Phipps*, 284 F. 945)).

163. *See* Am. Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co., 122 F.2d 454, 459 n.4 (2d Cir. 1941) ("With one notable exception, *Phipps v. Chicago, Rock Island R.I. & P.R. Co.*, . . . the device of the judicial sale at a fair upset price was the standard means of securing majority control in reorganization through equity receivership before the Bankruptcy power in secs. 77, 77B and Chapter X enabled it to be done directly." (citations omitted)).

164. 527 U.S. 308, 308 (1999).

165. *Id.* at 312.

166. *Id.* at 318–19, 332.

167. *Id.* at 319–20.

168. *See* Nelson v. Campbell, 541 U.S. 637, 639 (2004); Tory v. Cochran, 544 U.S. 734, 736 (2005); eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 390 (2006); Sole v. Wyner, 551 U.S. 74, 78 (2007); Lefemine v. Wideman, 568 U.S. 1, 2 (2012); Zubik v. Burwell, 578 U.S. 403, 403 (2016); Abbott v. Perez, 585 U.S. 570, 580 (2018); Valentine v. Collier, 141 S. Ct. 57, 57 (2020) (mem.); Raysor v. DeSantis, 140 S. Ct. 2600, 2600 (2020) (mem.); AMG Cap. Mgmt., L.L.C. v. FTC, 593 U.S. 67, 70 (2021).

dealing specifically with preliminary injunctions.[169] In contrast, any permanent injunction under *Phipps* would implicate Rule 66, which is specific to receiverships. Rule 66 in turn provides explicitly that "the practice in administering an estate . . . must accord with the historical practice in federal courts."[170] *Phipps*, which predates the adoption of Rule 66 in 1946, would seem to be included in "the historical practice of the federal courts."[171] This cannot be read as an implicit reference to the practice of English equity courts in 1789, as no federal courts—and thus no "historical practice of the federal courts"—existed in 1789.[172] Rather, the most natural reference for the language in Rule 66 seems to be the well-established equity receivership jurisprudence that existed in 1946, a jurisprudence that had included *Phipps* and its progeny for over two decades. To be sure, there is no guarantee that the hostility toward broad equitable powers in *Grupo Mexicano* will not be extended by the Supreme Court to a permanent injunction in a sovereign equity receivership. However, to the extent that the root of the Court's concern was the apparently open-ended power claimed by the district court under Rule 65(a), that concern should be much more muted under Rule 66. In *Grupo Mexicano*, the Court created a historical test for preliminary injunctions under Rule 65(a), looking to the pre-1789 powers of English equity courts.[173] The text of Rule 66, however, already contains its own historical test as a limiting principle, but rather than looking to the practice of English courts before 1789, it looks to the historical practice in the federal courts.[174]

D. Treatment of Non-New York Law Creditors

The procedure outlined above relates only to private New York law-governed bonds. Ruritania, however, like any sovereign debtor, will have other kinds of debt. There will be bilateral loans from other governments and loans from multilateral international institutions, such as the IMF, the World Bank, and regional development banks. Domestic savers will hold domestic law bonds. Finally, Ruritania may have non-New York law-governed private debts, most likely bonds issued in London and governed by English law. Any restructuring of Ruritania's debts must consider these liabilities. Certainly, New York law-governed bondholders will strenuously object if they are forced to take a haircut and other creditors are paid in full or are allowed to retain all of their legal rights. How would this non-New York law be dealt with in a receivership?

An equity receivership would be unable to restructure bilateral debt. There could be difficult questions of a federal court obtaining jurisdiction over such creditors. This is because, generally speaking, a bilateral loan between two foreign countries consummated outside of the United States may not constitute "commercial activity" for purposes of FSIA, and it's unlikely that such loan documents would

169. 527 U.S. at 313–14.
170. FED. R. CIV. P. 66.
171. *Id.*
172. *See* Federal Judiciary Act of 1789, ch. 20, 1 Stat. 73, 73–93 (1789) (establishing the federal court system).
173. 527 U.S. at 318.
174. FED. R. CIV. P. 66.

contain waivers of sovereign immunity in U.S. courts.[175] The deeper problem, however, isn't jurisdictional. The restructuring in a receivership would be consummated by the court issuing an injunction to all of the creditors barring them from taking any action to enforce their old claims against Ruritania. Very grave questions of comity between nations would be raised if a U.S. court were to order a sovereign nation, on pain of contempt, to do or not do something. Some have suggested that even under the restricted theory of sovereign immunity, any injunctive relief against a sovereign would run afoul of comity principles.[176] Even if one does not subscribe to a total ban on equitable remedies against sovereigns, successfully obtaining a permanent injunction against a sovereign creditor seems unlikely.

When the bilateral creditor is the United States, however, the issue is more complicated. The United States enjoys sovereign immunity in U.S. courts, although government officials acting in their official capacity do not.[177] The United States, however, can waive its sovereign immunity by statute.[178] Depending on the legal form in which they are cast, it might be possible to restructure bilateral debts to the United States in a receivership. Bilateral debt owed to the United States seldom arises directly from agreements with the U.S. Treasury. Rather, foreign sovereigns borrow money through various instrumentalities of the U.S. government. Each of these entities is defined by its own statutory regime, and each entity casts its agreements in different legal forms. If a bilateral debt is structured as an ordinary contract with some instrumentality of the U.S. government and controlled by either federal common law or the law of a particular American state, then such a contract could likely be restructured in an equity receivership like any other contract.

For example, the Support for the Sovereignty, Integrity, Democracy, and Economic Stability of Ukraine Act of 2014 authorized the President to pledge up to $100 million in loan guarantees for the Republic of Ukraine through the U.S. Agency for International Development ("USAID").[179] Under this program, Ukraine could borrow money from private creditors with New York law-governed bonds, using the loan guarantee from USAID to obtain a lower interest rate.[180] If Ukraine

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175. *See* 28 U.S.C. § 1605(a) (stating the main conditions that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States"); *cf. id.* § 1604 ("[A] foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter."). It is not completely unimaginable however, that a sovereign would make a bilateral loan governed by the law of a third country. In 2013, the Russian Federation loaned $3 billion to Ukraine in the form of Eurobonds issued in Dublin and governed by English law. *See* L. Debenture Tr. Corp. v. Ukraine [2023] UKSC 11, ¶ (an appeal from Eng.); *see, e.g.*, Gelpern et al., *supra* note 26, at 353, 365 (discussing waivers of sovereign immunity in Chinese bilateral lending agreements).

176. *See* W. Mark C. Weidemaier & Anna Gelpern, *Injunctions in Sovereign Debt Litigation*, 31 YALE J. ON REGUL. 189, 200–04 (2014) (summarizing the controversy).

177. *See* United States v. Lee, 106 U.S. 196, 208–09 (1882) (holding that the United States has sovereign immunity but that government officials may be sued individually).

178. *See* 5 U.S.C. § 702; 28 U.S.C. §§ 1346(a), 1491(a)(1), 2674.

179. Pub. L. No. 113-95, 128 Stat. 1088, 1092.

180. *See* 22 C.F.R. § 234.4 (setting forth the definition of "Eligible Notes" under the program).

defaults on the notes, then USAID would be liable to make Ukraine's private creditors whole.[181] Were this to happen, under a theory of subrogation, the United States would succeed to the rights of the private creditors against Ukraine, in effect becoming a New York law-governed bondholder.[182] Similar loan guarantee programs exist for other countries.[183] In such cases, the question would hinge on whether or not the United States waived its sovereign immunity by virtue of the authorization to enter into the contracts. For example, in the case of the Ukrainian loan guarantee program, the Code of Federal Regulations states that the agreements are to be "governed by and construed in accordance with the laws of the United States of America governing contracts and commercial transactions of the United States government."[184] This language seems to suggest that at a minimum, the U.S. government waives its sovereign immunity as to its liability on the loan guarantee. By virtue of claiming subrogation rights against Ukraine, one could argue that the United States has also waived sovereign immunity in an action involving a collection proceeding on those rights such as an equity receivership.[185]

Concerns with comity between nations are not present in the case of non-New York law private creditors. In theory, there is no bar to a U.S. court adjudicating the rights under a contract entered into outside of the United States and governed by

181. *See id.* § 234.3 ("[T]he United States of America, acting through USAID, guarantees to Noteholders the Borrower's repayment of 100 percent of principal and interest due on Eligible Notes.").

182. *See id.* § 234.12 ("After payment by USAID to an Applicant hereunder, USAID shall have exclusive power to prosecute all claims related to rights to receive payments under the Eligible Notes to which it is thereby subrogated."). It is also possible that the claim of the United States against Ukraine in such a case could be governed by federal common law. *See id.* § 234.16 ("This Guarantee shall be governed by and construed in accordance with the laws of the United States of America governing contracts and commercial transactions of the United States government."); *see also* United States v. Kimbell Foods, Inc. 440 U.S. 715, 726 (1979) (holding that federal law governs the commercial activities of the United States government). In a case of subrogation, one succeeds to the legal rights of another. In this case, those would be the New York law-governed rights of the creditors under the bonds issued by Ukraine. However, the United States' right to succeed to those claims arises as a matter of federal law both because of the Code of Federal Regulations and the federal law of commercial contracts, which would give to the government a right of subrogation under a paid-upon guarantee. *See* United States v. Bellard, 674 F.2d 330, 333 n.6 (5th Cir. 1982) ("The question presented by this action, involving the rights of the United States arising under a nationwide federal program, is governed by federal law." (citations omitted)). Whether the rights of the United States against Ukraine in this case are governed by federal common law by reference to New York law or by New York law is a distinction without any practical significance for a receivership proceeding. In neither case would the claim be beyond the subject matter jurisdiction of the federal courts.

183. *See* 22 C.F.R. §§ 230.01–.16 (Israel); *id.* §§ 231.01–.16 (Egypt); *id.* §§ 232.01–.16 (Tunisia); *id.* §§ 233.01–.16 (Jordan).

184. *Id.* § 234.16.

185. *See id.* § 234.12 ("After payment by USAID to an Applicant hereunder, USAID shall have exclusive power to prosecute all claims related to rights to receive payments under the Eligible Notes to which it is thereby subrogated.").

non-American law.[186] Indeed, U.S. courts adjudicate such cases all the time.[187] There is also nothing unusual about a U.S. court issuing an injunction against a private party that is not a U.S. citizen. Finally, unlike in the case of sovereigns, as a matter of international comity, there would be nothing exceptional about a U.S. court exercising jurisdiction over such parties.

The problems with restructuring such debt are practical rather than strictly legal. In theory, a U.S. court could have jurisdiction over the holder of an English law-governed bond, but only if the bondholder had sufficient contacts with the United States to establish personal jurisdiction in U.S. courts.[188] An investor in rural Moldova who happens to hold English law-governed bonds but has no contacts with the United States cannot be subject to the jurisdiction of U.S. courts and made the object of an injunction. Unlike the purchaser of a Wall Street-issued bond, such a creditor does not subject herself to the possible jurisdiction of U.S. courts merely by purchasing the bond.[189] To be sure, a large U.K. bank holding English law-governed bonds issued by Ruritania may well have sufficient contacts with Wall Street to be subject to jurisdiction in the Southern District of New York.[190] However, those bonds will almost certainly contain not only a choice of law clause designating English law but also a forum selection clause requiring that any litigation related to the bonds be conducted in the City of London.[191] Ruritania's domestic creditors will be subject to similar jurisdictional difficulties, and those bonds will likely contain domestic forum selection clauses.

The inability of a receivership to directly reach these debts does not mean that they would be irrelevant to such a proceeding. New York law creditors would have a perfectly reasonable argument that it is unfair for them to be forced to take losses in a situation where other creditors are being paid in full. Thus, in considering

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186. *See* Philip D. Stacey, *Rule 44.1,* Bodum USA v. LaCafetiere*, and the Challenge of Determining Foreign Law*, 6 SEVENTH CIR. REV. 472, 479 (2011) ("[A]s the world has become more globalized, national boundaries are becoming less important, resulting in a rapid increase in the number of foreign law cases in domestic courts. Just as people are no longer surprised to see German cars on American roads, or Chinese household goods on Wal-Mart shelves, people should no longer be surprised to see cases that turn on interpretations of German or Chinese law being decided by American courts." (footnotes omitted)).

187. *See, e.g.*, Korean Press Agency, Inc. v. Yonhap News Agency, 421 F. Supp. 2d 775, 780 (S.D.N.Y. 2006) (enforcing a forum selection clause in a Korean-law governed contract); MBIA Ins. Corp. v. Royal Bank of Can., 958 N.Y.S.2d 62 (Sup. Ct. 2010) (deciding the rights of the parties to an English-law governed contract).

188. *See generally* Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102 (1987) (setting forth the contacts necessary for a foreign defendant to subject itself to the jurisdiction of U.S. courts).

189. *See, e.g.*, Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 619–20 (1992) (holding that the Southern District of New York properly asserted jurisdiction over Argentina in breach of contract action concerning bonds Argentina issued that were repayable in New York in U.S. dollars).

190. *See id.* (same).

191. *See* Stratos Pahis, *Bits & Bonds: The International Law and Economics of Sovereign Debt*, 115 AM. J. INT'L L. 242, 272 (2021) ("[E]xternal bonds often select New York or London as the designated forum.").

whether to approve a sovereign debtor's restructuring, a court could consider the relief that the debtor has been able to obtain from creditors not before the court. A court could even make a final order putting in place a permanent injunction contingent on obtaining such relief. Indeed, the presence of the receivership may make such negotiations easier. As a way of putting such concerns to rest, a sovereign might seek to credibly commit to not unreasonably favoring non-U.S. law-governed creditors. One way that this could be done is by placing a "most favored creditor" undertaking in the new bonds that Ruritania issues to the receiver. In its simplest form, this clause would cause Ruritania's bonds to automatically reset to the most favorable terms obtained by other creditors. The problem with such a clause is that it might expose the receivership proceeding to risks created by holdout creditors under non-U.S. law-governed bonds.[192] Likewise, it may be in the interest of all creditors to allow more favorable treatment for some creditors—such as loans by the IMF that provide distressed financing to keep the sovereign fiscally afloat in the short term, or domestic law debt where deep haircuts would destroy the domestic financial sector, leading to massive economic contractions and fewer tax revenues for U.S. law-governed creditors. Such issues, however, could be finessed by carefully drafting language limiting the reach of a "most favored creditor" clause. In the end, much will depend on the mix of debt issued by a sovereign. An equity receivership will be most valuable for a borrower dependent on New York law-governed bonds. A debtor with a heterogeneous collection of bilateral creditors and private lenders, only a minority of whom hold New York law-governed bonds, may find the procedure less useful.

E. The Fundamental Difference Between Sovereign Restructuring and Corporate Reorganizations

There are complex moral questions that arise with sovereigns that don't arise in the simpler world of firms. In a real sense, we are completely indifferent to the ultimate status of the debtor as a legal person in a corporate restructuring.[193] That

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192. It is conceivable, of course, that such a holdout problem might not exist for non-U.S. law-governed bonds, such as cases involving very large issues of CAC bonds that are immune from strategic purchases by wannabe holdout creditors. Likewise, holdout problems under domestic law-governed bonds can be dealt with by amending domestic law. *See, e.g.*, Miranda Xafa, *Lessons from the 2012 Greek Debt Restructuring*, CTR. FOR ECON. POL'Y RSCH. (June 25, 2014), https://cepr.org/voxeu/columns/lessons-2012-greek-debt-restructuring [https://perma.cc/22RA-9NKY] ("On the positive side, the terms of domestic-law bonds could be amended unilaterally through an act of Parliament. However, Greece used legislative action only to retrofit collective action clauses in bond contracts in order to facilitate the restructuring. A coercive restructuring involving a unilateral change in payment terms by the debtor was thus avoided, and so was disorderly default, defined as a unilateral decision by the borrower to suspend debt service payments due to inability or unwillingness to pay. Instead, Greece negotiated a pre-emptive debt exchange with creditors as part of a second rescue package agreed with the IMF and the EU.").

193. It is important to distinguish between the firm as an economic entity and the corporation that is the legal debtor in an insolvency proceeding. The goal of a corporate reorganization is to maintain the firm as a valuable going concern. However, maintaining the firm as a going concern does not require that one maintain the legal integrity of the corporation that embodied the firm before the restructuring. The firm—in the sense of all of

debtor is a wholly fictitious person—a corporate entity—that can be eliminated or replaced with another fictitious person. The interests of the residual claimants on an insolvent firm—the shareholders—are properly given no weight in a restructuring.[194] Countries are more normatively complex entities, and the residual claimants on Ruritania command moral concern that shareholders in a defunct corporation do not. This tension would appear in very concrete ways in Ruritania's receivership.

At the most basic level, we are unconcerned by the idea that a railroad is owned by someone and that the railroad's creditors could become its owners. This is what happened in the equity receiverships, where participating creditors were transformed into the equity holders of the reorganized railroad.[195] The same thing happens via different procedural mechanisms in a Chapter 11 restructuring.[196] However, corporations and other firms are perhaps unique among debtors in justifying this insouciant stance toward creditor ownership. The starkest counterexample is the case of a natural person as a debtor. For much of human history, debt servitude was a common creditor's remedy.[197] If you failed to pay your creditor, the creditor could enslave you or perhaps your children.[198] Notice that there is a sense that an equity receivership or a Chapter 11 reorganization involves a form of debt servitude for the firm. It will literally be owned by its creditors. This isn't problematic, but we rightly regard slavery of natural persons (for indebtedness or otherwise) with abhorrence. One of the consequences of the Thirteenth Amendment's ban on slavery and involuntary servitude, for example, is to render any efforts to create debt servitude unconstitutional.[199]

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its assets as a going concern—might be sold in its entirety to a new legal entity, as in a nineteenth-century equity receivership. Alternatively, the original corporation might be retained, but all of its old equity holders could be wiped out and replaced with entirely new equity holders. Both procedures transfer ownership of the firm.

194. *See* N. Pac. Ry. Co. v. Boyd, 228 U.S. 482, 504 (1913).

195. *See supra* Section I.A.

196. *See supra* Section I.C.

197. For example, under the earliest rules of Roman law, the so-called Twelve Tables, *manus iniectio* was the standard remedy for an unpaid debt. Under this procedure, the creditor would seize the debtor 30 days after a judgment was left unpaid. The creditor could then imprison the debtor for 60 days in hope of payment, after that the debtor could be sold into foreign slavery. This procedure was eliminated in 326 B.C. by the *Lex Poetelia*. *See* PAUL J. DU PLESSIS & ANDREW BORKOWSKI, BORKOWSKI'S TEXTBOOK ON ROMAN LAW 71 (6th ed. 2020).

198. In addition, poor debtors could voluntarily sell their children into slavery to raise funds, although under Roman law such impoverished sellers of children retained a right to redeem their offspring upon payment of the purchase price. *See id.* at 91.

199. *See* Clyatt v. United States, 197 U.S. 207, 217 (1905) (holding that involuntary labor could be prosecuted as criminal debt servitude); Bailey v. Alabama, 219 U.S. 219, 243 (1911) (striking down state laws imposing peonage); United States v. Reynolds, 235 U.S. 133, 140–41, 149–50 (1914) (upholding federal prosecutions of those acting under color of state law); Taylor v. Georgia, 315 U.S. 25, 29 (1942) (striking down a state law imposing peonage); Pollock v. Williams, 322 U.S. 4, 25 (1944) (same); *see also* Nathan B. Oman, *Specific Performance and the Thirteenth Amendment*, 93 MINN. L. REV. 2020, 2079–87 (2009) (discussing the Peonage Cases and their relationship to the Thirteenth Amendment).

There is an important sense that insolvent sovereigns are more like individuals than they are like corporations.[200] We generally do not believe that creditors should be able to claim ownership of a defaulting sovereign. The inability to resolve Ruritania's receivership with a judicial sale stems from the fact that while Ruritania's property can be sold, Ruritania itself cannot be sold, nor can it cease to exist as a legal entity and all of its affairs transferred to a new entity. Only Ruritania can own or be Ruritania. To be sure, sometimes territory and sovereignty change hands.[201] Historically, it has even changed hands to satisfy the demands of creditors in rare cases.[202] But these transactions are governed by the harsher and more rarefied realm of geopolitics and public international law.[203] They are manifestly not matters of New York contract law, and they are beyond the competence of the federal courts, even when they sit in equity.

These concerns could arise if objecting creditors in an equity receivership raise the status of domestic creditors. Bondholders might understandably object to taking haircuts and reschedulings in a world where domestic creditors are made whole. Serious questions of sovereignty and comity between nations would be raised if a U.S. court sitting in equity were to order a foreign country to pass laws raising taxes, cutting spending, or altering the scope of domestic creditors' contractual rights.[204] Indeed, one of the doctrinal attractions of the equity receivership is that it

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200. A number of scholars have made this point. As Robert K. Rasmussen has written:

> Issues of political theory generate much disagreement. At their core, however, most theories of the state turn to the well-being of citizens for their justification. Whether utility, rights, or fairness forms the bedrock of any given political theory, it is utility, rights, or fairness with respect to *citizens* that is important. This focus on the demands that individuals can make of the state points to another strand of bankruptcy law that has yet to find a role in the debate over sovereign financial distress— personal bankruptcy law. Incorporating the insights from individual bankruptcy law expands the possible choice set of regimes to confront the problem of sovereign financial distress. Most notably, a sovereign debt restructuring system that flows from a theory of the state would contain a right of discharge. States would, under certain circumstances, have the right to have a portion of their debt eliminated. Such a right would not be conditioned on the consent of their creditors.

Robert K. Rasmussen, *Integrating a Theory of the State into Sovereign Debt Restructuring*, 53 EMORY L.J. 1159, 1163–64 (2004) (footnote omitted); *see also* David A. Skeel Jr., *States of Bankruptcy*, 79 U. CHI. L. REV. 677, 687–89 (2012) (arguing that personal bankruptcy provides a better model for insolvent governments than does corporate bankruptcy).

201. *See* CARMEN M. REINHART & KENNETH S. ROGOFF, THIS TIME IS DIFFERENT: EIGHT CENTURIES OF FINANCIAL FOLLY 81–83 (2009) (discussing Canada's annexation of the independent polity of Newfoundland in exchange for assuming Newfoundland's debts).

202. *See id.* (discussing Newfoundland); *see also* Eichengreen et al., *supra* note 10, at 15–16 (discussing the British takeover of Egypt ostensibly to protect the interests of European bondholders).

203. *See* RESTATEMENT (THIRD) OF FOREIGN RELS. L. § 209 (AM. L. INST. 1987) (discussing the effect of state succession on sovereign contracts).

204. *See generally* Weidemaier & Gelpern, *supra* note 176 (discussing the difficult issues that are raised when domestic courts seek to issue injunctions to sovereigns).

would be an in rem action that would reach only the property of the sovereign already subject to the jurisdiction of U.S. courts under the restrictive theory of sovereign immunity codified in the FSIA.[205] It thus seems to sidestep these thorny issues. Nevertheless, the U.S. court would remain free to reject a proposed reorganization on the grounds that it imposed unacceptable losses on New York law creditors while leaving domestic creditors untouched.

The equity receivership is a creditors' remedy, and limitations on the losses to be imposed on domestic creditors can be articulated in part in terms of the interests of private international creditors. Bondholders in New York will likely be poorly served by recession and plummeting tax revenues caused by a banking crisis in Ruritania and precipitated by domestic debt default. The same is true of rioting in the streets, at least if the rioting gets truly out of hand. These arguments, however, only delay the more fundamental question without answering it. At some point, the creditors' legitimate claims on the blood, sweat, and treasure of Ruritanian taxpayers ends. In the end, Ruritania and its future ought to belong to the Ruritanians, not the bondholders. In domestic law, an analogous concern manifests itself in the personal bankruptcy idea of a fresh start.[206] Another place where domestic law acknowledges this concern is in state homestead exemptions, which keep creditors from extracting every possible pound of flesh from individual debtors.[207] At some point, we impose losses on creditors not in the collective interests of the creditors but in the interests of the debtor.[208] This is because of the identity of the debtor, however, not the limitations of the procedure.

Ruritania's receivership would thus involve a balancing of a debtor's interests with creditors' interests in a way not seen in the railroad receiverships of yore. The balancing of such equities is not foreign to equitable remedies more

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205. *See supra* Part II.

206. *See* Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 599 U.S. 382, 390 (2023) ("Through various provisions, the Bankruptcy Code offers debtors a fresh start by discharging and restructuring their debts in an 'orderly and centralized' fashion." (citations omitted)); Loc. Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) ("One of the primary purposes of the Bankruptcy Act is to 'relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.' This purpose of the act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt." (citations omitted)).

207. *See, e.g.*, VA. CODE ANN. §§ 23.1-707(G)(1), 34-26, 34-27, 34-29, 34-4, 64.2-311 (granting an exemption from the claims of creditors of certain property of debtors); *see also* 11 U.S.C. § 522 (creating similar exemptions for individuals under federal bankruptcy law).

208. This is an ancient idea that can be found in the biblical idea of the Year of Jubilee when debts are wiped clean. *See generally Leviticus* 25:8–13. Not coincidentally, the Jubilee also involved freedom for those in debt slavery at least for members of the community, an early and important recognition on the limits of a creditor's remedies. *See id.* at 25:39. Despite its ancient pedigree, the fresh start, however, is an idea that is generally foreign to equity receiverships and corporate reorganization.

broadly. But it does mean that courts must make a nuanced judgment of a country's reasonable ability to pay as opposed to applying the much cleaner absolute priority rule developed in the equity receivership cases.[209] We should not make bondholders into the residual claimants on all of a nation's treasure.

CONCLUSION

This Article is no more than a sketch of a procedure for restructuring sovereign debt. Working out all of the details for such an equity receivership would require a daring and determined debtor with a small army of lawyers, bankers, and accountants. The inhabitants of finance ministries tend to be understandably timid creatures when it comes to springing unexpected events on financial markets. The procedure sketched here is sufficiently novel that a federal court might balk at implementing it, and no finance ministry may be desperate enough to attempt it. Considering the proposal, however, is still a useful exercise. As a doctrinal matter, it just doesn't seem to be true that there is no insolvency mechanism under current U.S. law that a sovereign debtor could use. Debt crises can lead to desperate gambits, and there is no reason to suppose that we've seen the end of sovereign default. Thinking through the options available to distressed countries, and especially to their struggling citizens, is worthwhile. Even if such a procedure is not used, demonstrating its plausibility may ease out-of-court negotiations by giving debtor countries a new threat against creditors. Finally, working through Ruritania's equity receivership raises difficult moral questions about the nature of sovereign debt, which are interesting and important in their own right.

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209. Under the absolute priority rule which is a descendant of the somewhat looser standard in *Northern Pacific Railway Co. v. Boyd*, 228 U.S. 482 (1913), equity holders—the owners of the debtor—are not allowed to participate in the reorganized entity until the creditors are paid in full. The effect of this rule is that a recognized entity in Chapter 11 will be owned by its junior, pre-petition creditors unless old equity in effect buys into the reorganization by contributing new capital. *See* Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434, 456 (1999) (holding that old equity may only participate in a reorganization if they provide new capital and the opportunity to participate is open to other potential investors). The interests of the pre-petition owners of the reorganized entity are not "balanced" against the interests of creditors. Rather, the interests of owners are supposed to be ruthlessly subordinated to the interests of creditors.