

2018

Jevic's Promise: Procedural Justice in Chapter 11

Pamela Foohey

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlro>



Part of the [Bankruptcy Law Commons](#)

Recommended Citation

Pamela Foohey, *Jevic's Promise: Procedural Justice in Chapter 11*, 93 WASH. L. REV. ONLINE 128 (2018).

Available at: <https://digitalcommons.law.uw.edu/wlro/vol93/iss1/16>

This Response is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review Online by an authorized editor of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.

JEVIC'S PROMISE: PROCEDURAL JUSTICE IN CHAPTER 11

Pamela Foohey*

The quality of adjudicative procedure is fundamental to how litigants and the general public view the justice system's integrity. Across criminal and civil proceedings, procedural justice research shows that people want to have a voice, be respected, and have their cases heard by neutral and even-handed adjudicators.¹ Taking part in a procedure with these hallmarks influences parties' evaluations of the integrity and neutrality of the justice system, including that of judges and other adjudicators, and of the ultimate outcome.² Likewise, the general public assesses the justice system's fairness and integrity based in part on its provision of procedural justice.³ Stated succinctly, process matters. Assessing a legal system solely on its outcomes devalues the crucial place of procedure in supporting parties' and the public's motivation to respect judicial decisions and the rule of law.⁴

In the context of corporate reorganization, scholars have given too little attention to the importance of the chapter 11 bankruptcy process.⁵ But in

* Associate Professor, Indiana University Maurer School of Law. My thanks to Jonathan Lipson for the opportunity to comment on his excellent Article. Thanks also to Laura Napoli Cordes, Andrew Dawson, Diane Lourdes Dick, Melissa Jacoby, and Jody Madeira for helpful comments and discussion.

1. See JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975) (establishing the foundations of procedural justice); Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127, 134–37 (2011) (canvassing procedural justice research).

2. See, e.g., TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 94–112 (1990) (discussing how people's experiences during legal proceedings influence their perceptions of outcomes' legitimacy); Hollander-Blumoff, *supra* note 1, at 129 (discussing how people assess the legitimacy of a legal system); Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, 2011 J. DISP. RESOL. 1, 3–4 (2011) (overviewing research about the effects of people's perceptions of procedural justice).

3. See Tom R. Tyler, *Procedural Justice and the Courts*, 44 CT. REV. 26, 28–29 (2007) (noting that process is the *primary* factor for parties and public in accepting decisions).

4. See Tom R. Tyler, *Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority*, 56 DEPAUL L. REV. 661, 666–68 (2007) [hereinafter Tyler, *Rule of Law*] (linking the rule of law to procedural justice).

5. Some scholars have focused on procedural issues in chapter 11, even if they did not explicitly

The Secret Life of Priority: Corporate Reorganization After Jevic, Jonathan Lipson explicitly links the chapter 11 process with the Bankruptcy Code's substantive rules about priority,⁶ crafting a forceful argument about what procedural values the U.S. Supreme Court sought to uphold when it penned *Czyzewski v. Jevic Holding Corp.*⁷ In doing so, Lipson expounds on a broader truth about the co-option of corporate reorganization's process in the name of value preservation. Procedural justice teaches that the process is as important as the final outcome. If chapter 11 is to remain respected, the lessons of *Jevic* that Lipson brings to light must be acknowledged and discussed fully. If they are not, corporate reorganization risks turning into a system that disregards the interests and voices of parties *en masse*, potentially subverting the very tenet of value maximization that currently animates corporate reorganization.

This Response expands upon Lipson's argument to add to the conversation about the place of procedural justice in corporate reorganization.⁸ It first discusses why Lipson correctly asserts that *Jevic* is as much about process as priority by focusing on two of the three process values that Lipson identifies—participation and procedural

characterize their scholarship in procedural terms. Notable recent works are: Diane Lourdes Dick, *The Bearish Bankruptcy*, 52 GA. L. REV. 437 (2018) (exploring the use of debtor-in-possession financing to gain control of restructuring and shut out other stakeholders); Diane Lourdes Dick, *Valuation in Chapter 11: The Dangers of an Implicit Market Test*, 2017 U. ILL. L. REV. 1487 (2017) (discussing the importance of financial disclosures in chapter 11 to process); Diane Lourdes Dick, *The Chapter 11 Efficiency Fallacy*, 2013 BYU L. REV. 759 (2013) (critiquing chapter 11's emphasis on speed and efficiency); Melissa B. Jacoby, *Corporate Bankruptcy Hybridity*, 166 U. PENN. L. REV. 1715 (2018) (linking the lessons of procedural justice with chapter 11); Melissa B. Jacoby & Edward J. Janger, *Tracing Equity: Realizing and Allocating Value in Chapter 11*, 96 TEX. L. REV. 673 (2018) (discussing value-allocation in bankruptcy); Melissa B. Jacoby & Edward J. Janger, *Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy*, 123 YALE L.J. 862, 870 (2014) [hereinafter Jacoby & Janger, *Ice Cube Bonds*] (discussing value and the reorganization process); Edward J. Janger & Adam J. Levitin, *One Dollar, One Vote: Mark-to-Market Governance in Bankruptcy*, 104 IOWA L. REV. (forthcoming 2019) (discussing how the market for bankruptcy claims affects the Code's procedural protections); Melissa B. Jacoby, *Congressional Testimony on H.R. 2533: "The Chapter 11 Bankruptcy Venue Reform Act of 2011"* 3 (UNC Legal Studies, Research Paper No. 1975868, 2011), <https://ssrn.com/abstract=1975868> [<https://perma.cc/45XN-MQ9S>] (discussing procedural fairness in bankruptcy). Scholars also have written more generally about the importance of process to maximizing value. See generally Lynn M. LoPucki & Joseph W. Doherty, *Bankruptcy Fire Sales*, 106 MICH. L. REV. 1 (2007); Stephen Lubben, *The "New and Improved" Chapter 11*, 93 KY. L.J. 839 (2004); Mark J. Roe & David A. Skeel, Jr., *Assessing the Chrysler Bankruptcy*, 108 MICH. L. REV. 828 (2010); David A. Skeel, Jr., *Creditors' Ball: The "New" New Corporate Governance in Chapter 11*, 152 U. PA. L. REV. 917 (2003).

6. Jonathan C. Lipson, *The Secret Life of Priority: Corporate Reorganization After Jevic*, 93 WASH. L. REV. 631 (2018).

7. 580 U.S. ___, 137 S. Ct. 973 (2017).

8. See *supra* note 5.

integrity. These values align almost seamlessly with procedural justice research. It then considers how *Jevic*'s emphasis on process should embolden bankruptcy courts to more rigorously assess chapter 11's procedures. The Response ends by identifying two points at the beginning of chapter 11 cases that are ripe for analysis under *Jevic*'s process lens, the assessment of which I argue will enhance parties' and the public's confidence in corporate reorganizations.

I. PRIORITY'S PROCESS VALUES

As is true across the legal system, bankruptcy's procedures are important. The claims process establishes the treatment of creditors in all bankruptcy cases.⁹ That treatment provides creditors with bargaining power based on their priority.¹⁰ Chapter 11 plan confirmation standards recognize and incorporate that treatment, with the important caveat that parties may consent to different treatment.¹¹

Increasingly, however, the chapter 11 cases of larger companies (based on measures of assets and debts) involve sales of all assets through bankruptcy court-approved auctions under § 363 of the Bankruptcy Code.¹² The rise of "363 sales" was facilitated by practitioners' adeptness at ushering cases that traditionally would have required plan confirmation through other Code provisions by arguing, for instance, that sales are necessary to preserve value in danger of "melting" away.¹³ And with the rise of these sales, questions about how parties' rights are to be preserved through quick sales and other processes have occupied courts and scholars of late.¹⁴

9. 11 U.S.C. § 501 *et seq.* (2012).

10. See Mark J. Roe & Frederick Tung, *Breaking Bankruptcy Priority: How Rent-Seeking Upends the Creditors' Bargain*, 99 VA. L. REV. 1235, 1236 (2013) (discussing priority).

11. 11 U.S.C. § 1121 *et seq.*

12. *Id.* at § 363(b). See also Stephen J. Lubben, *The Board's Duty to Keep Its Options Open*, 2015 U. ILL. L. REV. 817, 819–22 (2015) (overviewing the debate about the rise of 363 sales); Elizabeth Warren & Jay Lawrence Westbrook, *The Success of Chapter 11: A Challenge to the Critics*, 107 MICH. L. REV. 603, 609 (2009) (reporting on data from a sample of chapter 11 cases filed in 2002 that only 6% of cases involved more than \$100 million in assets); Jay Lawrence Westbrook, *Secured Creditor Control and Bankruptcy Sales: An Empirical View*, 2015 U. ILL. L. REV. 831, 837–38 (discussing the rise of 363 sales in very large cases).

13. See Jacoby & Janger, *Ice Cube Bonds*, *supra* note 5, at 865 (discussing the "melting ice cube" theory).

14. For example, the U.S. Supreme Court addressed secured creditors' rights to credit bid in *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639 (2012). Gifting also poses questions about parties' rights. See Ralph Brubaker, *Taking Chapter 11's Distribution Rules Seriously: "Inter-Class Gifting is Dead! Long Live Inter-Class Gifting!"*, BANKR. L. LETTER, Apr. 2011, at 1, 1–15 (discussing gifting); Anthony J. Casey, *The Creditors' Bargain and Option-*

The facts and procedure of *Jevic* pose a new use of the Code's provisions that implicates similar questions about parties' rights in the absence of a traditional plan confirmation.¹⁵ Structured dismissals, such as the one created by the settling parties in *Jevic*, threaten the integrity of the Code's priority scheme. Rather than engage in the plan process, through which all parties have the chance to negotiate under a set structure that includes disclosures, certain parties decide which other parties should receive what portions of a business's value upon dismissal.¹⁶

In *Jevic*, the parties of interest were private equity investors, their bankers, and a group of truck drivers who had worked for Jevic Transportation Company before being terminated without sufficient notice.¹⁷ The investors and bankers faced fraudulent conveyance actions related to their leveraged buyout (LBO) of Jevic.¹⁸ The drivers held Worker Adjustment and Retraining Notification (WARN) Act claims against Jevic, which in part were entitled to priority payment ahead of other unsecured claims.¹⁹ The structured dismissal of Jevic's chapter 11 case—negotiated by the investors, the bankers, Jevic, and the unsecured creditors' committee—provided that payout from the debtor's estate would bypass the drivers, despite their entitlement to priority payment under the Code. It also dismissed the LBO suit with prejudice.²⁰

As with most structured dismissals, the debtor and other parties championing this scheme argued that if the court did not approve their deal, the total value distributed to all creditors would decrease.²¹ As Lipson explains, making an end run around both plan confirmation and the chapter 7 liquidation procedure which accompanies conversion—all in the name of “some greater good”—usually benefits powerful parties

Preservation Priority in Chapter 11, 78 U. CHI. L. REV. 759, 760 (2011) (discussing quick sales and creditors' incentives); Sally McDonald Henry, *Chapter 11 Zombies*, 50 IND. L. REV. 579, 600–06 (2017) (connecting gifting to structured dismissals).

15. For a detailed overview of *Jevic*'s facts, see Lipson, *supra* note 6, at 640–46.

16. See *id.* at 666–67; Henry, *supra* note 14, at 580–81, 583–85 (2017) (calling structured dismissals “Zombie Plans”). Structured dismissals also can bypass the plan process after 363 sales. See Norman L. Pernick & G. David Dean, *Structured Chapter 11 Dismissals: A Viable and Growing Alternative After Asset Sales*, AM. BANKR. INST. J., June 2010, at 1, 56.

17. *Czyzewski v. Jevic Holding Corp.*, 580 U.S. ___, 137 S. Ct. 973, 980–81 (2017).

18. *Id.*

19. *Id.*

20. *Id.* at 981; see also Lipson, *supra* note 6, at 642–43 (noting that the structured dismissal “would have both stripped the drivers of their priority claims in bankruptcy and forbidden them from pursuing any other remedies against those who allegedly harmed them outside bankruptcy,” such as the potentially fraudulent transfer arising from the LBO).

21. See Lipson, *supra* note 6, at 643.

while cutting out weaker parties.²² Parties who are “powerful” most often draw their influence from monetary investment in the debtor business, such as from pre-petition loans or post-petition financing. With this investment, they can guide the timing, direction, and objectives of chapter 11 cases.²³

This held true in *Jevic*. The investors and bankers did not want to be embroiled in an LBO suit or see money paid to the truck drivers who were a thorn in both *Jevic*’s and the investors’ sides.²⁴ Through the structured dismissal, the investors and bankers ensured that the LBO would not come back to haunt them and that the drivers would not be paid anything on their claims.²⁵

In striking down *Jevic*’s structured dismissal, the U.S. Supreme Court focused on the lack of affirmative consent from the affected drivers to the priority skipping, combined with the significance of priority as “a basic underpinning of business bankruptcy law.”²⁶ Lipson aptly couches the issue of consent as Type I and II error—a false positive and negative, respectively.²⁷ Without clear consent, a court cannot know whether a party’s seeming assent is in error or whether a party’s silence does not indicate assent.²⁸ In comparison, the Code’s plan voting structure forces parties to manifest their consent.²⁹ As Lipson notes, in finding that structured dismissals must follow priority rules absent parties’ clear consent, even when a court predicts that only the clearly consenting parties will receive a “meaningful distribution,”³⁰ the Court held that “consent trumps closure.”³¹ And, importantly, that holding includes closure that ostensibly maximizes distribution to creditors.

Stated differently, *Jevic* elevates parties’ voices over value preservation and maximization. It was far from obvious that the Court would reach a holding and pen an opinion that is interpretable through a procedural justice lens. Value preservation and maximization have become the

22. *Id.* at 634–35.

23. *Id.* at 685–88 (discussing how senior creditors control the beginning and middle of chapter 11 cases through financing agreements).

24. *Jevic*, 137 S. Ct. at 981 (explaining that the drivers sued *Jevic* and the investors).

25. *See supra* note 20.

26. *Jevic*, 137 S. Ct. at 983.

27. *See* Amitav Banerjee et al., *Hypothesis Testing, Type I and II Errors*, 18 *IND. PSYCHIATRY J.* 127 (2009) (defining Type I and Type II error); Lipson, *supra* note 6, at 653 (discussing false positives and false negatives).

28. Lipson, *supra* note 6, at 653.

29. *Id.*

30. *Jevic*, 137 S. Ct. at 982.

31. Lipson, *supra* note 6, at 635.

leading calling cards of corporate reorganization. Process—and the participation that often comes with process—easily could have fallen to the wayside.

Lipson identifies three “process values” that he argues are incorporated into the Court’s elevation of consent: participation, predictability, and procedural integrity.³² Of these, participation and integrity together encompass the four components of how people assess if they received procedural justice: whether people (1) think that they had a voice and chance to be heard, (2) perceive that they were treated with dignity and respect, (3) believe that the decision-maker sincerely considered their case, and (4) observe the forum as neutral and even-handed.³³

First, procedural justice research describes participation as the ability to have a voice and thereby have the chance to be heard by a court.³⁴ The opportunity to be heard—that is, participation—is the most important factor in people’s assessments of procedural justice.³⁵ Believing that one has a voice affects people’s evaluations of whether they received the three other components of procedural justice.³⁶ These factors collectively imbue a legal proceeding with integrity, which is the second “process value” that Lipson identifies.

The final value that Lipson identifies, predictability, also connects to procedural justice. Lipson links predictability with the Court’s decision to uphold absolute priority and thus narrow the outcomes that parties can bargain around, which may make consent easier to reach and to demonstrate.³⁷ But research shows that procedural justice also is important to parties during negotiations, and that it can be fostered by private parties.³⁸ Requiring parties to explicitly demonstrate consent when asking a court to allow a deviation from absolute priority likewise should

32. *Id.* at 637.

33. See Hollander-Blumoff, *supra* note 1, at 135 (noting these four factors); Tyler, *Rule of Law*, *supra* note 4, at 665 (outlining four elements, “participation, neutrality, treatment with dignity and respect, and trust in authorities,” that “shape reactions to the courts”).

34. See Hollander-Blumoff, *supra* note 1, at 135 (noting voice); Tyler, *Rule of Law*, *supra* note 4, at 663 (discussing the importance of having a “day in court”).

35. See Hollander-Blumoff, *supra* note 1, at 135 (linking participation with control, noting that “perceptions about control over process are an important determinant of whether people feel that procedural justice has occurred”).

36. See *id.* (discussing these three elements); Hollander-Blumoff & Tyler, *supra* note 2, at 5 (linking trust with voice).

37. Lipson, *supra* note 6, at 637, 678–82. This reflects the Court’s concerns about bargaining powers and making settlements even more difficult to achieve. *Czyzewski v. Jevic Holding Corp.*, 580 U.S. ___, 137 S. Ct. 973, 987 (2017).

38. See generally Rebecca Holland-Blumoff, *Fairness Beyond the Legal System*, 85 *FORD. L. REV.* 2081 (2017).

encourage private parties to put into place negotiation processes that support procedural justice. Advancing procedurally rigorous negotiations is especially vital in the context of corporate reorganization because chapter 11 “is designed to produce negotiated settlements rather than litigated judgments.”³⁹

Regardless, Lipson’s focus on participation and procedural integrity as hallmarks of the process that the Court sought to facilitate when requiring consent to structured dismissals deviating from absolute priority exposes that *Jevic* is as much about procedural justice as it is about the Code’s priority rules. When the Court identified priority as “a basic underpinning of business bankruptcy law”⁴⁰ and discussed collusion among parties,⁴¹ it advanced a theory of procedural justice in corporate reorganization, even though it did not formulate its decision in those terms. Requiring affirmative consent to structured dismissals that alter parties’ standard rights confirms to parties that their voices will be heard. And, in terms of Lipson’s Type I and II errors, it shows that bankruptcy judges will not take parties’ ostensible silence as manifestation of their consent to a settlement in which they may not have had a voice.⁴² Collectively, the process will make parties feel that they were treated with respect and that an even-handed decision maker considered their interests—even if the parties recover nothing.

It is these procedural justice values that the plan process, complete with its required disclosures, ultimately affords all creditors. Although plan confirmation takes time and money, *Jevic* can be read to show that courts should not tolerate a weakening of the procedural justice that the plan process affords in the name of efficiency and value maximization, even in the resource-constrained context of chapter 11.⁴³ Research about procedural justice establishes why preserving process is essential.⁴⁴ Legal systems that provide procedural justice garner respect; legal systems that impair procedural justice open themselves up to criticism and to disregard for their orders.

One of the key insights of *Jevic* is the importance of affording parties a voice in a way that they believe they will be heard and sincerely

39. Jonathan C. Lipson, *The Shadow Bankruptcy System*, 90 B.U. L. REV. 1609, 1620 (2009); see also Melissa B. Jacoby, *What Should Judges Do In Chapter 11?*, 2015 U. ILL. L. REV. 572 (2015) (discussing the importance of negotiations in chapter 11).

40. *Jevic*, 137 S. Ct. at 983.

41. *Id.* at 987.

42. See *supra* note 27 and accompanying text.

43. Lipson, *supra* note 6, at 638, 671.

44. See *supra* note 2 and accompanying text.

considered. Lipson's focus on the process embedded in priority brings this truth to light. Indeed, that the Court was not sidelined by the argument that the particular facts of *Jevic*'s structural dismissal presented a "rare case" with "sufficient reasons" to disregard priority further shows its understanding of process's importance.⁴⁵ Instead of finding *Jevic*'s facts "rare," the Court noted that corporate reorganization is replete with "cases that turn on comparably dubious predictions."⁴⁶ The consequence of "similar claims being made in many, not just a few, cases" may be collusion among secured creditors, management, and favored creditors to squeeze out other parties.⁴⁷ Providing procedural justice to all parties through priority wards against such collusion, which is part of "the balance struck by the [Code]" and effectuated by priority's process, such as via plan confirmation standards.⁴⁸ It was this process—and its promise that parties' voices will be heard and considered—that the Court declined to sacrifice.

II. EXTENDING *JEVIC*'S PROCESS VALUES

In building his argument that *Jevic* is as much about process as priority, Lipson highlights two ongoing debates about corporate reorganization. The first focuses on how much control secured creditors should have over a business's chapter 11 case,⁴⁹ which may be characterized as simply reallocating a company's capital. The second, which historically has earned less attention, focuses on whether corporate reorganization "should be understood as involving more than simply economic adjustments."⁵⁰ In line with the balance that the U.S. Supreme Court faced in *Jevic* between process and value preservation, these debates focus principally on weighing the broader effects of the chapter 11 system against wealth maximization, particularly with respect to creditors with large economic stakes in reorganizing businesses.

45. *Jevic*, 137 S. Ct. at 986.

46. *Id.*

47. *Id.*

48. *Id.* at 987 (quoting *Law v. Siegel*, 571 U.S. 415, 427 (2014)).

49. Lipson, *supra* note 6, at 639. This includes debates about the creditors' bargain and contractualism. See Jacoby, *Corporate Bankruptcy Hybridity*, *supra* note 5, at 1721–23 (overviewing debate); Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 776–78 (1987).

50. Lipson, *supra* note 6, at 656; see also Jacoby, *Corporate Bankruptcy Hybridity*, *supra* note 5, at 1717–18 (discussing a model of "corporate bankruptcy as a public-private partnership"); Jay Lawrence Westbrook, *Commercial Law and the Public Interest*, 4 PENN ST. J.L. & INT'L AFF. 445, 450 (2015) (lamenting the lack of "public interest" concerns discussed in corporate reorganization scholarship).

As Melissa Jacoby recently discussed in depth, the chapter 11 system necessarily implicates interests beyond those of voluntary creditors and lenders.⁵¹ It affects non-consensual creditors, such as sexual assault victims and the WARN claimants in *Jevic*⁵²; it affects companies' workers, even if they hold no claims in cases; and it affects the ongoing finances of the towns and cities where large business are located. It also affects consensual creditors to the extent that the safeguards built into chapter 11, such as plan confirmation, are manipulated or bypassed in the name of value preservation.⁵³ As Lipson summarized, "Chapter 11 is a hybrid, public-private process. Because it occurs in and around courts, it is (or should be) more than simply a negotiated reallocation of wealth."⁵⁴

The Court's *Jevic* analysis—requiring that process be afforded to parties in structured dismissals—can and should be extended to other circumstances in which powerful parties seek to circumvent the Code's procedural protections.⁵⁵ Procedural justice research shows that it is worthwhile to give a voice to all parties involved in corporate reorganizations. Indeed, there are sound reasons to think that there is greater value in affording parties procedural justice in chapter 11 than in other legal contexts. As noted, procedural justice increases parties' confidence in outcomes, even when those outcomes run counter to their interests, and engenders trust in the legal institution as a whole.⁵⁶

Both of these benefits are particularly important to the bankruptcy system. Unlike many other parts of the legal system, which usually adjudicate disputes between two or a few parties, the business bankruptcy system oversees disputes that can involve tens of thousands of parties. The final outcomes of reorganization cases may profoundly affect the lives of those parties immediately involved, as well as other constituencies.⁵⁷

51. See generally Jacoby, *Corporate Bankruptcy Hybridity*, *supra* note 5.

52. Non-consensual creditors are parties that did not contract with the debtor. See *id.* at 1716 ("[S]cholarship insufficiently attends to claimants whose rights against a bankrupt company arise through pathways other than the fine print of a contract."). For a recent discussion of sexual assault victims' treatment in business bankruptcy, see Melissa Jacoby's series blog posts on *Credit Slips* about The Weinstein Company's chapter 11 case. Melissa Jacoby, *Postings by Melissa Jacoby*, CREDIT SLIPS, <https://www.creditslips.org/creditslips/JacobyAuthor.html> [<https://perma.cc/U5KF-6AGR>].

53. See generally Warren, *supra* note 49.

54. Lipson, *supra* note 6, at 657.

55. See *supra* notes 22 and 23 and accompanying text.

56. See *supra* note 2 and accompanying text.

57. See generally Edward J. Janger, *Towards a Jurisprudence of Public Law Bankruptcy Judging*, 12 BROOK. J. CORP. FIN. & COM. L. 39 (2017) (discussing public law judging in the context of municipal reorganization); Nathalie D. Martin, *Noneconomic Interests in Bankruptcy: Standing on the Outside Looking In*, 59 OHIO ST. L.J. 429 (1998) (discussing parties that have "nonpecuniary"

There are myriad opportunities for people to think that they were taken advantage of, to believe that they were ignored, or to deem the system rigged against particular parties. And each of these opportunities may end in disregard or contempt for individual case outcomes, which can taint perceptions of the entire chapter 11 system.

Billions of dollars in assets and debts move through the business bankruptcy system every year. And companies of immense importance to the American and world economy seek to reorganize every year.⁵⁸ Given this, those concerned about preserving positive perceptions of corporate reorganization and ensuring that chapter 11 remains an even-handed institution should pay serious attention to preventing the sort of process abuses addressed in *Jevic*.

The Court's reasoning in *Jevic* yields some general tenets that bankruptcy courts can call upon in the future when assessing requests that sidestep chapter 11's fundamental procedures. Lipson is correct that *Jevic* gives few straightforward guidelines for determining which (and the extent to which) parties' interests courts should prioritize going forward.⁵⁹ But there are general procedural justice values embedded in *Jevic* that courts should utilize in the future.

These values include affording representation such that all parties' voices truly are heard, especially those of non-consensual creditors. These creditors may be particularly at risk of being excluded from negotiations because other parties may view non-consensual creditors' claims as the primary contributor to the business's need to file bankruptcy.⁶⁰ General procedural justice values also include obtaining affirmative consent from affected parties to any deal that bypasses the Code's plan confirmation or

interests in bankruptcy cases in the context of providing these parties standing); Kathleen G. Noonan, Jonathan C. Lipson & William H. Simon, *Courts as Institutional Reformers: Bankruptcy and Public Law Litigation* (Colum. Law Sch. Pub. Law, Research Paper No. 14-572, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3082672 (last visited Nov. 5, 2018) (comparing reorganization and public law litigation).

58. The chapter 11 filings of Enron, General Motors, and Lehman Brothers are but a few examples. Enron was valued at \$65.5 billion when it filed. General Motors was valued at \$91 billion. And Lehman Brothers was valued at \$691 billion. See Alex Howe, *The 11 Largest Bankruptcies in American History*, BUS. INSIDER (Nov. 29, 2011, 12:33 PM), <https://www.businessinsider.com/largest-bankruptcies-in-american-history-2011-11> [<https://perma.cc/4YBC-RJC3>].

59. Lipson, *supra* note 6, at 657.

60. Examples include the chapter 11 filings of over a dozen Catholic dioceses and The Weinstein Company's recent chapter 11 case. See *Catholic Dioceses and Orders That Filed for Bankruptcy and Other Major Settlements*, NAT'L CATH. REP. (May 31, 2018), <https://www.nronline.org/news/accountability/catholic-dioceses-and-orders-filed-bankruptcy-and-other-major-settlements> [<https://perma.cc/X4TF-TUYK>]; *supra* note 52; *infra* Part III.

any other standard that would alter parties' economic interests, most notably priority. And they include giving sufficient time for all parties and system actors, such as bankruptcy judges, to consider the scope of the issues at stake.⁶¹

Effectuating these values likely will demand a lengthier process than presently afforded to larger businesses' chapter 11 cases. A trustworthy process almost necessarily requires time. Given the trend in corporate reorganization toward speeding up cases in the name of value preservation, that these values will require chapter 11 cases to last longer makes sense.⁶² But that time should be well spent given the importance of providing procedural justice to the legal system's integrity.

III. TWO EXAMPLES OF EXTENDING *JEVIC*'S PROCESS VALUES

At the end of his article, Lipson invites scholars and practitioners to think more about the relationship between process and priority in reorganization.⁶³ He includes a list of questions, most of which involve practices that remove corporate reorganization from the plan confirmation process or that concentrate power in the hands of secured creditors early on during a chapter 11 case.⁶⁴ To demonstrate how bankruptcy courts can extend *Jevic*'s process values to other parts of corporate reorganization, I consider two aspects of chapter 11 cases raised in these questions and cast them in *Jevic*'s process language.

Both examples occur toward the beginning of chapter 11 cases. I chose these two examples specifically because of their timing. The relevance of *Jevic*'s process framing is most evident in the context of 363 sales, gifting, and other end-of-case issues.⁶⁵ But the enhancement or impairment of parties' rights without their consent at a case's beginning are key because these changes can ripple through the case.

First, the Code provides for the formation of an official committee of unsecured creditors soon after a chapter 11 case's filing.⁶⁶ This committee conceptually represents the interests of all unsecured creditors, typically

61. See Melissa B. Jacoby, *Fast, Cheap, and Creditor-Controlled: Is Corporate Reorganization Failing?*, 54 BUFF. L. REV. 401, 427–33 (2006) (discussing creditor control).

62. See *supra* notes 12–14 and accompanying text.

63. Lipson, *supra* note 6, at 707–12.

64. *Id.* at 707–09.

65. *Id.* at 711–12 (discussing asset sales); see also Vincent S. J. Buccola, *The Janus Faces of Reorganization Law*, 44 J. CORP. L. (forthcoming 2018) (arguing that *Jevic*'s holding and logic is confined only to end-of-case issues); *supra* notes 12–14 and accompanying text.

66. 11 U.S.C. § 1102(a)(1) (2012).

by being comprised of seven to nine of the debtor's largest unsecured creditors based on the value of creditors' claims.⁶⁷ Even so, particularly in the reorganizations of larger companies, one committee may be insufficient. In cases with thousands of creditors, distinct creditor groups may be sufficiently dissimilar from others, but sufficiently large in number to merit their own representatives for these creditors to have a voice. Likewise, a committee comprised of nine representatives chosen based on unsecured creditors' claim amounts may not be sufficiently diverse to give all unsecured creditors the quality of voice required by procedural justice. And the unsecured creditors' committee necessarily does not represent the interests of equity holders, who also may deeply desire to have their voices heard.⁶⁸

Upon a motion by an interested party or the United States Trustee, the Code allows the court to appoint additional creditors' committees or committees of equity security holders "if necessary to assure adequate representation of creditors or of equity security holders."⁶⁹ For example, mass tort victims have asked for, though rarely received, dedicated committees.⁷⁰ Similarly, a court may appoint a representative to protect the interests of a group of claimants, such as tort victims or employees.⁷¹ Indeed, the reason why the issue presented by *Jevic* made it to the U.S. Supreme Court was that a group of former truck drivers banded together to assert their WARN claims.⁷²

The truck drivers were able to come together because they derived their priority from their collective WARN claims. In most other instances, similar claimants who would benefit from banding together to express

67. *Id.* at § 1102(b)(1); see generally Michelle M. Harner & Jamie Marincic, *Committee Capture? An Empirical Analysis of the Role of Creditors' Committees in Business Reorganization*, 64 VAND. L. REV. 749 (2011) (discussing the role of the official creditor's committee and empirically studying the impact of creditors' committees in chapter 11).

68. See generally Diane Lourdes Dick, *Grassroots Shareholder Activism in Large Commercial Bankruptcies*, 40 J. CORP. L. 1 (2014) (discussing how shareholders have come together to assert their rights in corporate reorganizations).

69. 11 U.S.C. § 1102(a)(2).

70. See generally Corinne McCarthy, Comment, *Creditors' Committees: Giving Tort Claimants a Voice in Chapter 11 Bankruptcy Cases*, 31 EMORY BANKR. DEV. J. 431 (2015) (detailing requests made by tort victims for separate committees to represent their interests).

71. These representatives often are appointed when all claimants may not be readily identified at the beginning of a chapter 11 case. For example, the bankruptcy judge approved the appointment of a future claims representative for sexual abuse victims in the Archdiocese of St. Paul and Minneapolis's chapter 11 case. See *Bankruptcy Judge Appoints Future Claims Representative*, CATH. SPIRIT (Feb. 10, 2017), <http://thecatholicspirit.com/news/local-news/bankruptcy-judge-appoints-future-claims-representative/> [<https://perma.cc/N59F-URAT>].

72. See *supra* note 19 and accompanying text.

their interests would not have the incentive or perhaps even the knowledge to do so. At present, case law sets a high burden for parties asking for additional committees to demonstrate that they are inadequately represented, partly because the Code provides judges with discretion to appoint additional committees.⁷³ This standard makes bankruptcy judges reluctant to appoint additional committees.⁷⁴ In the future, judges can call on the process values embedded in *Jevic* to justify the necessity of appointing additional committees. And other parties, such as the United States Trustee, can use *Jevic* to support requests for additional committees. Importantly, these committees will help ensure that the judge can assess whether affected parties actually consented to how they are treated across all the issues raised during cases.

Second, soon after the petition date, or at the same time as filing, the debtor-in-possession (DIP) typically files “first day motions.” These motions ask the court to approve details of the reorganizing company’s day-to-day operations, such as to pay employees and critical vendors, and to approve financing for those operations going forward.⁷⁵ Lipson identifies one of *Jevic*’s potential impacts as a change in the standards by which judges assess first day motions that disrupt priority in the name of efficiency and value preservation.⁷⁶ He is careful to note that “these concerns seem somewhat exaggerated” because “*Jevic* was careful to speak only about final distributions.”⁷⁷ Nonetheless, a handful of first day orders may result in certain parties’ rights being diminished or overshadowed by the powers and rights these orders grant to other parties.⁷⁸

Among these orders, DIP financing stands out.⁷⁹ Lipson spends several paragraphs discussing process problems with DIP financing—problems which arise in large part from the priority to payment and other rights that

73. See McCarthy, *supra* note 70, at 443 (discussing case law).

74. See *id.* at 443 n.84 (noting that bankruptcy courts view the appointment of additional creditors’ committees as “an extraordinary remedy”).

75. See ELIZABETH WARREN ET. AL, *THE LAW OF DEBTORS AND CREDITORS* 413–14 (7th ed. 2014) (discussing first day motions).

76. Lipson, *supra* note 6, at 709.

77. *Id.* (emphasis omitted).

78. See Henry, *supra* note 14, at 593–97 (discussing first day orders that often disrupt the Code’s priority rules).

79. See Jacoby, *Corporate Bankruptcy Hybridity*, *supra* note 5, at 1718, 1730–31 (identifying DIP financing as a “feature[] of modern Chapter 11 that distort[s] the balance in the public-private partnership”); David A. Skeel, Jr., *The Past, Present, and Future of Debtor-In-Possession Financing*, 25 *CARDOZO L. REV.* 1905, 1905 (2004) (discussing the creditor control inherent in DIP financing).

DIP financing agreements grant senior creditors.⁸⁰ This leads DIP financing to “seem to be the key mechanism by which senior creditors seize control” of the reorganization.⁸¹ Because of the timing of when courts approve both interim and final DIP financing agreements, parties often are afforded little choice in matters that may drastically reallocate their rights. Such reallocation of rights without explicit consent seems to violate the spirit of *Jevic*.

Lipson emphasizes that judges can preserve parties’ rights, such as through carve outs for professional fees and by prohibiting terms that have little to do with funding the business’s reorganization efforts.⁸² Carve outs, however, most often disrupt priority in favor of those parties, such as professionals, who support the DIP lenders’ and other secured creditors’ agendas.⁸³ Likewise, debtors and secured creditors often band together in support of DIP agreements, increasing the incentive “to bypass important safeguards” and to reallocate parties’ rights.⁸⁴ Plus, bankruptcy judges may not be willing to require that DIP agreements include terms that DIP lenders will view as unfavorable to them in situations in which only one lender ostensibly is willing to invest in the debtor post-petition.⁸⁵

Regardless, the initial (and likely linchpin) problem with DIP financing and certain other first day orders is their timing. When courts allow parties to augment and solidify rights through first day orders, they not only disrupt priority and other rights, but they also disrupt the Code’s procedural protections.⁸⁶ A core lesson of *Jevic* is that courts should not tolerate such process violations. In the future, if judges are reluctant to approve DIP financing and other first day motions that seem rushed or overbroad, they can call on *Jevic* to postpone final decisions.

Additionally, if courts are faithful to the process values embedded in *Jevic*, they will decelerate their approvals of these motions, particularly

80. Lipson, *supra* note 6, at 710–11.

81. *Id.* at 710; *see also* Dick, *The Bearish Bankruptcy*, *supra* note 5, at 476–87 (detailing how senior creditors can use DIP financing to seize “valuable upside rights”); Jacoby, *Corporate Bankruptcy Hybridity*, *supra* note 5, at 1730–31 (discussing how creditors use DIP financing agreements to insulate themselves from being sued and otherwise “direct the activities of the bankruptcy estate”).

82. Lipson, *supra* note 6, at 710–11; *see also* Dick, *The Bearish Bankruptcy*, *supra* note 5, at 477–87 (discussing the protections that DIP lenders typically receive).

83. *See* Dick, *The Bearish Bankruptcy*, *supra* note 5, at 481 (discussing carve outs); Henry, *supra* note 14, at 597–99 (noting how carve outs disrupt priority).

84. Dick, *The Bearish Bankruptcy*, *supra* note 5, at 479. *See also id.* at 479–87 (noting that the Code’s checks on lender overreach will not police DIP financing because the checks assume “that debtors are at odds with their creditors”).

85. *See id.* at 483 (discussing “unique aspects of the bankruptcy lending environment”).

86. *See id.* at 494 (“[P]ostpetition financing arrangements in all Chapter 11 cases are capable of shifting or reinforcing the balance of power among the parties and foreclosing other restructuring outcomes that may better advance the interests of stakeholders.”).

those regarding DIP financing, until committees or representatives have been appointed to speak for all affected parties. Judges can do so by declining to hand down any other rulings besides the interim decisions that are necessary to keep the business operating until committees are appointed. That is, *Jevic*'s reasoning speaks more broadly to the process that the Code's rules afford debtors, creditors, and other parties throughout chapter 11 cases, even though *Jevic* focused on the process due when parties attempt to bypass the Code's priority rules through structured dismissals. This extension of *Jevic*'s reasoning about process to other aspects of modern corporate reorganization indicates that *Jevic* is capable of halting chapter 11's current slide into becoming a system that powerful parties control by writing the rules as they see fit from case beginning to case end.

* * *

In the end, whether and the extent to which courts will consider extending *Jevic*'s reasoning depends on their views of the importance of preserving procedural protections for all parties, as well as the costs and benefits of doing so. Lipson tailors the questions he poses at the end of his article about *Jevic*'s legacy specifically for "empirically minded" scholars.⁸⁷ Lipson words some of the questions in terms of a cost-benefit or resource-allocation analysis. Given corporate reorganization's focus on value maximization to the exclusion of all other values, this makes sense. But as empirically minded scholars consider *Jevic*'s effects, it is crucial that they do not lose sight of the harder-to-quantify benefits that procedural justice affords to parties in individual cases and the business bankruptcy system generally. Protecting procedural justice is not unwarranted or foolhardy. Rather, failing to recognize and defend the robustness of the processes built into the Code will negatively affect corporate reorganization.

87. Lipson, *supra* note 6, at 707.